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I. INTRODUCTION

In states across the country, license plates have become a new constitutional battleground. For a small extra cost, many states sell specialty license tags displaying the emblems of colleges, universities, clubs, professional sports teams, and fraternal organizations ("specialty plates").[1] States also will customize the arrangement of letters and numbers to create a plate for a small fee ("vanity plates"). While the vast majority of specialty and vanity plates have raised no concerns, a few have caused significant disputes and raised First Amendment challenges to the controlling regulations.

The most substantial disagreements have been over the issuance of plates displaying the Confederate flag to members of organizations that use that flag as their logo. The latest controversy has erupted in Virginia, where challengers recently filed suit after the assembly refused to

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1. *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; *see generally* TENN.CODE ANN. § 55-4-202 (1998) (listing organizations with specialty plates in Tennessee); Diane Rado, *Chiles Vetoes "Choose Life" License Plates*, ST. PETERSBURG TIMES, May 21, 1998, at B1.

issue a specialty plate with a Confederate flag logo.[2]

There has also been recent debate, and potential litigation is pending, in Florida, Virginia, and Tennessee over requests for anti-abortion logo plates. Additionally, some states have faced challenges upon denying individual requests for obscene or vulgar plates.

Several decided cases concerning a state's right to regulate custom license plates turn on whether a viewpoint is being expressed through the custom plate. While the disparate rulings may be so accorded, the language of these cases contradicts itself. Specifically, these cases disagree on the constitutionality of license plate regulation and on whether license plates are forms of speech. They are also inconclusive as to whether license plates should be considered public fora.

This article first reviews the current public debate, particularly as reflected by legislative efforts regarding license plates. Next, the article reviews the existing case law surrounding First Amendment challenges to the regulations. It then will construct guiding principles for state regulation of license plates by resolving the apparent conflicts in the case law. Finally, it examines the related jurisprudence of bumper stickers.

II. THE CURRENT DEBATE

A. *Specialty Plates*

The first wave of specialty license plate debate centered on a group called the Sons of Confederate Veterans and its efforts to obtain plates with the organization's emblem, which incorporates the Confederate flag.

In May 1999, the Tennessee State Senate voted twenty-eight to two to create a "Sons of the Confederacy" plate.[3] The bill has been criticized as offensive to African Americans and "Americans of all colors, heritage and creeds who understand the need for healing rather than division."[4] This criticism stems from a belief that the Confederate flag serves as a symbol of "the effort by many Southerners to rip apart the Union in an attempt to preserve a way of life built on the evil subjugation of a race of people in slavery."[5] Supporters of the bill claim that the Confederate flag represents the principle that the states that voluntarily entered the Union had a right to voluntarily leave the Union, as well as

2. *See generally* Bowman, *supra* note 1, at B5.

3. *See* Theotis Robinson Jr., *Rebel Flag on License Plates Is Disservice*, KNOXVILLE NEWS-SENTINEL, May 24, 1999, at A10; *see also* 1999 TN S.B. 350 (SN), amending TENN. CODE ANN. §§ 55-4-202(c)(7), 210(c) (1998).

4. Robinson, *supra* note 3, at A10.

5. *Id.*

those who fought for that principle.[6]

One Tennessee state senator defended the vote as a protection of liberty, noting that other groups have been able to get speciality plates in the past.[7] He stated that in protection of liberty he would even approve a Ku Klux Klan plate.[8] An editorial critical of the bill's passage stated it is "not about the First Amendment guaranteeing freedom of speech" but rather comparable to a state's ability to prohibit vulgarities on custom plates.[9]

In 1999, the Virginia legislature also dealt with an application by the Sons of Confederate Veterans for a special license plate.[10] Virginia approved the application, but without the Confederate flag or the battle flag of the Army of Northern Virginia that is part of the organization's logo.[11] In response, the Virginia division of the Sons of Confederate Veterans sued the state on First Amendment grounds.[12] The suit, which was filed in a United States District Court, alleges that "[h]aving opened its 'special license plate' program as a public free speech forum in which motorists express their views or opinions, the defendants have discriminated against the plaintiffs on the basis of their speech, and have otherwise selected and censored protected speech with respect to content and/or viewpoint."[13]

As is discussed below, the Sons of Confederate Veterans disputes in Tennessee and Virginia follow those previously litigated and decided in other states. West Virginia also may join the debate; a bill to create a Sons of Confederate Veterans license plate with the Rebel flag logo awaits the Governor's signature.[14] Louisiana also has considered issuing a similar license plate.[15]

On a similar note, an Alabama State legislator proposed a bill that would require the state to offer two versions of its license tag, one with the "Heart of Dixie" motto that is currently in use, and one without it.[16] The representative who introduced the Alabama bill argued that "Dixie"

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6. *See* Bowman, *supra* note 1, at B5.

7. *See* Robinson, *supra* note 3, at A10.

8. *See id.*

9. *Id.* As this essay will discuss, despite the possibility of offense, viewpoint plates, as opposed to simple obscenities, are indeed a First Amendment free speech issue.

10. *See Let License Plates Be License Plates*, ROANOKE TIMES & WORLD NEWS, May 7, 1999, at A14.

11. *See id.*

12. *See id.*; *Group Sues State Over License-Plate Decision Legislature Violated Rights by Removing Confederate Flag Logo, Lawsuit Alleges*, VIRGINIAN-PILOT & LEDGER STAR, July 26, 1999, at B2.

13. Bowman, *supra* note 1, at B5.

14. *See id.*

15. *See* 1999 La. Sess. Law Serv. 1033 (West).

16. *See Across the USA*, USA TODAY, Aug. 11, 1999, at A12.

represents slavery and oppression.[17]

Another area of contention over license plate involves the issue of anti-abortion license plates. In 1998, Florida's then-governor, Lawton Chiles, vetoed a "Choose Life" license plate, stating that he was concerned that the plate would display a political and divisive message.[18] Governor Chiles wrote, "The creation of an official license plate with a clearly political message establishes a precedent that was not intended by the development of specialty plates bearing the name and sanction of the state of Florida."[19] He concluded that a license plate was not the appropriate forum for debates of political issues.[20]

Proponents of the plate stated that funds generated from sale of the plate would have been used for private, non-profit agencies that would counsel pregnant women to place their children up for adoption.[21] While some lawmakers worry that the plates might spark road rage or encourage violence against abortion providers, supporters of the plate plan to introduce the effort again during the administration of Florida's present Governor, Jeb Bush.[22]

Virginia also has entered the anti-abortion specialty plate debate. In February 1999, the Virginia House Transportation Committee endorsed legislation by a vote of ten to nine to create a specialty license plate with the slogan "Choose Life."[23] The plate would feature a crayon-drawn image of two smiling children.[24] The General Assembly refused to approve the plate, proposing instead a plate that read "Friends of Adoption."[25] One delegate stated, "I don't think our license plates should be used for political advocacy. . . . This is what you use bumper stickers for."[26] The supporters of the original "Choose Life" plate withdrew the legislation, promising to reintroduce the legislation again the next year.[27] The American Civil Liberties Union of Virginia has

17. *See id.*

18. *See* Rado, *supra* note 1, at B1.

19. *Id.*

20. *See id.*

21. *See id.*

22. *See* Justin Blum, *Virginia License Plate Plan Runs into Abortion Fight*, WASH. POST, Dec. 19, 1998, at B1.

23. *See The General Assembly 1999 Session: Jan. 13 - Feb. 27*, VIRGINIA-PILOT & LEDGER-STAR, Feb. 7, 1999, at B4.

24. *See* Blum, *supra* note 22, at B1.

25. *See Car Tags One State, Many Plates*, VIRGINIA-PILOT & LEDGER-STAR, Mar. 15, 1999, at B10.

26. Blum, *supra* note 22, at B1.

27. *See Car Tags One State, Many Plates*, *supra* note 25, at B10; Ronald J. Hansen, *Democrat Calls Query a Plus*, WASH. TIMES, Aug. 18, 1999, at C4; *Legislature May Decide Specialty License Plates Aren't Worth Controversy Program Has Become Time-Consuming*, VIRGINIA-PILOT & LEDGER-STAR, Aug. 9, 1999, at B4.

demanded that a "Plan Parenthood" plate be approved if the "Choose Life" tag is issued.[28]

B. *Vanity Plates*

Vanity plates, like specialty plates, have generated dispute and offense. For example, one man in Chicago, who lost a friend in a drunk-driving incident, objected to an attorney's license plate which read, "I WIN DUI."[29] In response to applications for offensive and vulgar vanity plates, Florida has created a Highway Safety and Motor Vehicles' Bureau of Titles and Registrations, which insures that motorists are not granted license plates that could be construed as tasteless or offensive in either English or a foreign language.[30]

Likewise, the Ohio Bureau of Motor Vehicles "OBMV" prohibits personalized license plates that are vulgar, in poor taste, or convey hate — even hate of a rival football team.[31] The OBMV instituted the anti-hate plate prohibition in response to plates issued during a labor strike against General Motors. The OBMV approved "H8TWRK" (hate to work) as a vanity plate, but not "H8MICH" (hate Michigan, Ohio State University's traditional football rival).[32] A six-member committee of the OBMV reviews the approximately 275 personalized plates requests it receives each day, and a Registrar has final veto power.[33] The committee reads the proposed plates forwards and backwards, relies on a number of dictionaries, and reviews current slang.[34] Ohio has forty-eight three-letter combinations that are generally prohibited unless part of someone's name, including "BUT," "GAY," "NUN," "PEE," and "SEX." Ironically, a prisoner working on Ohio's jail license plate production line makes the final review of requested plates, checking a twenty-three page list of prohibited words and cryptic phrases.[35]

In Texas, the customer service clerk of the Department of Transportation checks requests for special license plates and rejects those that he or she deems inappropriate or offensive.[36] Department rules require

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28. *See* Todd Jackson, *Group Hoists Rebel Flag in New Fight Civil Rights Disputes Drive Debate About License Plates*, ROANOKE TIMES & WORLD NEWS, Jan. 21, 1999, at A1.

29. *See* Stan Rosenberg, *Offensive Vanity Plate*, CHI. DAILY HERALD, Jan. 21, 1999, at 10.

30. *See Considering an Offensive License Tag?*, MIAMI HERALD, Aug. 13, 1996, at A1.

31. *See No H8 on License Plates in Ohio*, PLAIN DEALER, May 27, 1999, at B5.

32. *See id.*

33. *See id.*

34. *See id.*

35. *See* Jill Riepenhoff, *A Lock on the Market: Prisoners Are Still Manufacturing Ohio's License Plates, and Saying Jobs with Old Equipment Are Best Ones Behind Bars*, PLAIN DEALER, Sept. 28, 1997, at B8.

36. *See No Profanity for Vanity Plates; Workers Become Linguistic Sleuths in Weeding Out Requests for Licentious License Plates*, AUSTIN AMERICAN-STATESMAN, Mar. 11, 1996, at B3.

rejection if a request is obscene or objectionable.[37] Aside from noting that ethnic slurs are "objectionable," the rules are open to interpretation although the bureau defers to the *New Dictionary of American Slang* by Robert L. Chapman as the definitive authority.[38]

Oregon also screens applications for vanity plates.[39] Its refusal to issue certain vanity plates has generated litigation. A wine enthusiast sued to be able to use "VINO" (the spanish word for wine) on his license plate.[40] Another Oregonian sued when the Department of Motor Vehicles refused to allow him to use his "69" plates, which he originally had on a 1969 car, on a 1976 car.[41] The DMV argued that "69," when used out of the context of a 1969 car, is a "euphemism for a sex act."[42] Another Oregonian sued and won the right to use a plate that said "PRAY."[43]

C. *Opposing Positions in the Debate*

To avoid allegations of discrimination against license plate applicants based on viewpoint, some suggest that states' motor vehicles departments should determine which groups should get speciality plates by passing a mandate that rejects all applications from groups that have even remotely political purposes.[44] The American Civil Liberties Union of Oregon, however, argues that a state has no right to restrict anything on a license plate unless it poses a traffic threat or is already on another plate.[45]

In response to the protection the First Amendment may lend to offensive viewpoint license plates, there has been a call by some to uniformly end all types of custom plates.[46] By making a blanket decision not aimed at, or in reaction to, any specific viewpoint, states avoid unconstitutional discrimination.[47] States, however, are very reluctant to

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37. *See id.*

38. *See id.*

39. *See ACLU Threatens Action on Oregon's Vanity License Plate Controls*, COLUMBIAN, Sept. 18, 1997, *available in* 1997 WL 13549266.

40. *See id.*

41. *See* Gordon Oliver, *DMV Says Vanity Plates Aren't License to Titillate*, PORTLAND OREGONIAN, Nov. 4, 1996, at B1.

42. *Id.*

43. *See id.*

44. *See License Plates Steer Clear of Silliness*, VIRGINIA-PILOT & LEDGER-STAR, Aug. 11, 1999, at B10.

45. *See ACLU Threatens Action on Oregon's Vanity License Plate Controls*, *supra* note 39. Approximately one out of every 100 custom plate requests is rejected in Oregon because the wording is deemed offensive. *See id.*

46. *See License to Offend*, BALTIMORE JEWISH TIMES, May 16, 1997, at 8.

47. *See Let License Plates Be License Plates*, *supra* note 10, at A14; *License to Offend*, *supra* note 46, at 8.

give up the easy revenue vanity and specialty plates generate.[48]

This article attempts to clarify the constitutional baselines so that the cost-benefit evaluation of revenues to unpopular plates, which survive regulation attempts, may be calculated. It also provides guidance to states on regulating custom plates. The analysis begins with a discussion of the cases already decided in this arena.

III. UNCONSTITUTIONAL LICENSE-PLATE RESTRICTION CASES

The cases that have found license plate regulations unconstitutional or their application unconstitutional seem to turn on whether the regulation was attempting to regulate a viewpoint. While the courts' reasoning is not always clear, and the cases do not define "viewpoint," the courts that have found such regulations unconstitutional seem to do so based on the view that a license plate is speech and that such speech presents a viewpoint when it is expressive of an idea that is more than a mere vulgarity or profanity. Notably, these cases do not reach the question of whether vanity plates and specialty plates are a public forum.

A. *Pruitt v. Wilder*

In *Pruitt v. Wilder*,[49] the United States District Court for the Eastern District of Virginia held that a state's ban on references to deities on vanity plates was a viewpoint-based regulation of speech which violated the plate-applicant's free speech rights.[50] The dispute in *Pruitt* arose out of the Virginia Division of Motor Vehicle's ("DMV") personalized automobile license plate policy. This policy is called "CommuniPlate." The statute announcing the policy provides in relevant part that "[t]he Commissioner [of the DMV] may, in his discretion, reserve license plates with certain registration numbers or letters or combinations thereof for issuance to persons requesting license plates so numbered and lettered."[51] When a CommuniPlate request was made, the DMV branch office personnel reviewed it to see if it ran afoul of a list of prohibited words and phrases.[52] If the request was not on the list but still seemed questionable it was referred to a "word committee" for a determination.[53] The DMV had not promulgated formal guidelines for

48. *See Legislature May Decide Specialty License Plates Aren't Worth Controversy Program Has Become Time-Consuming*, *supra* note 27, at B4. The response has been so positive that collector groups have emerged such as the Automobile License Plate Collectors Association. *See, e.g.*, http://www.alpca.org.

49. 840 F. Supp. 414 (E.D. Va. 1994).

50. *See id.* at 415.

51. VA. CODE ANN. § 46.2-726 (Michie 1998).

52. *See Pruitt*, 840 F. Supp. at 416.

53. *See id.*

the CommuniPlate program, but it relied upon the following policy statement to determine which plates to issue and which to prohibit: "Licenses are not to be issued with any reference to drug culture, lewd and obscene words, deities, or combinations which might otherwise be considered offensive."[54] The DMV added the prohibition against deity plates to avoid efforts to demean religion or to identify Virginia with a particular religion.[55]

In *Pruitt*, the plaintiff applied for a plate saying "GODZGUD."[56] After the Virginia DMV twice denied the application because it referred to a deity, Pruitt sought a declaratory judgment and injunctive relief on the grounds that Virginia had violated his right to free speech and discriminated against him on the basis of his viewpoint.[57] In response to the complaint, Virginia voluntarily altered its CommuniPlate policy to remove the ban on references to deities.[58] This did not render the case moot as, absent a contrary ruling, the state retained discretion to voluntarily revert to the policy.[59]

The court ruled for Pruitt, finding that the portion of the DMV policy which banned references to deities represented viewpoint-based regulation of speech and, as such, violated the Free Speech Clause of the First Amendment, which is applicable to the states through the Fourteenth Amendment.[60] Significantly, the court did not address whether the license plate was a public forum. Instead, it assumed the plate was a non-public forum for purposes of Pruitt's motion.[61]

The court found that although a non-public forum can be regulated based on subject matter, the regulation must be viewpoint neutral.[62] The court determined that the DMV's policy was not viewpoint neutral because "allowing one sub-set [sic] of religious speech — that not directly referring to a deity — to be placed on CommuniPlates, while denying another subset of religious speech — that referring to deities - . . . discriminates on the basis of the speaker's viewpoint."[63]

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54. *Id.* at 415-16.
55. *See id.* at 416.
56. *See id.*
57. *See id.*
58. *See id.*
59. *See id.*
60. *See id.* at 417.
61. *See id.* at 417 n.2.
62. *See id.* at 417 (quoting Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93 (1993)).
63. *Id.* at 418. Interestingly, the court implied that if indeed license plates were not a public forum, a complete ban of certain subjects, such as religion, might be appropriate. The ban of certain religious speech, however, was inappropriate. In fact, the court indicated that the defendant might need to institute a complete ban on religious plates if an Establishment Clause problem existed. *See id.*

B. *Sons of Confederate Veterans, Inc. v. Glendening*

In *Sons of Confederate Veterans, Inc. v. Glendening*,[64] an organization whose members were descendants of Confederate Civil War veterans brought an action against state officials challenging a Maryland Motor Vehicle Administration's decision to deny the group's request for specialty license plates displaying the Confederate flag.[65] The district court determined that the agency's denial constituted impermissible viewpoint discrimination in violation of the First Amendment.[66]

In Maryland, the Motor Vehicle Administration "MVA", registers motor vehicles and issues license plates, including specialty registration plates for non-profit organizations.[67] The organization plates may or may not display an organization's logo.[68] Because the MVA regulations do not specify any criteria for accepting or rejecting an organization's logo, the MVA relies on the criteria established by Maryland for issuance of vanity plates.[69] For vanity plates, MVA administrators may refuse an application if the plates's contents could be considered, among other things, a term of bigotry or hostility.[70]

The Sons of Confederate Veterans ("SCV") applied for plates with the organization's name and a logo containing the Confederate flag.[71] The MVA initially issued seventy-eight such plates without comment.[72] Subsequently, the MVA received numerous complaints about the plates and decided to withdraw its approval.[73] In response, SCV brought a complaint alleging that Maryland had violated its First Amendment right to free speech.[74] Among other things, SCV sought a declaratory judgment, a mandatory injunction that the MVA continue issuing SCV specialty plates, and a prohibitory injunction preventing the MVA from recalling the logo plates already issued.[75] Maryland conceded that the logo did constitute speech.[76] It argued, however, that it had not violated the group's First Amendment right because license plates do not constitute a public forum. It added that the MVA's actions were reasonable

64. 954 F. Supp. 1099 (D. Md. 1997).
65. *See id.*
66. *See id.*
67. *See id.*; MD. CODE ANN., TRANSP. II § 13-619 (1998 & Supp. 1999).
68. *See Glendening*, 954 F. Supp. at 1100.
69. *See id.*
70. *See id.*
71. *See id.*
72. *See id.*
73. *See id.*
74. *See id.* at 1101.
75. *See id.*
76. *See id.* at 1101-02. *See also* Texas v. Johnson, 491 U.S. 397, 404-06 (1989).

and viewpoint neutral.[77]

The court found that it did not need to decide what type of forum license plates constituted because the MVA's actions were viewpoint discrimination and impermissible in any forum.[78] The court rejected Maryland's view that the MVA's guidelines prohibit hostile or racially derogatory expressions from any and all points of view.[79] The court found, instead, that refusing an entire class of viewpoints is still viewpoint discrimination.[80]

As an addendum to the analysis in *Glendening*, it is worth noting a similar case that was decided on a different issue. In *North Carolina Division of Sons of Confederate Veterans v. Faulkner*,[81] the North Carolina Court of Appeals held that SCV was a "civic club" for purposes of a statute governing eligibility for special license plates.[82] As a result, it reversed a decision by the North Carolina DMV that had denied SCV a specialty plate reserved for civic clubs. In *Faulkner*, the decision turned solely on whether SCV had adequately demonstrated that it was a civic club as defined by the state statute. The court, however, also noted that "[a]llowing some organizations which fall within section 20-79.4(b)(5)'s criteria to obtain personalized plates while disallowing others equally within the criteria could implicate the First Amendment's restrictions against content-based restraints on free speech."[83]

C. *Dimmick v. Quigley*

In *Dimmick v. Quigley*,[84] the United States District Court for the Northern District of California granted injunctive relief to the plaintiff against the California Department of Motor Vehicles, which had refused to issue the plaintiff a vanity license plate reading "HIV POS."[85] The court ruled that the DMV's refusal to issue the requested license plates violated the plaintiff's First Amendment right to free speech.[86] The court distinguished between public discourse, which could not be pro-

77. *See Glendening*, 954 F. Supp. at 1101.

78. *See id.* at 1103.

79. *See id.*

80. *See id.* (citing Rosenberger v. Rector and Visitors of U. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Air Line Pilots Ass'n v. Department of Aviation, 45 F.3d 1144 (7th Cir. 1995); Pruitt v. Wilder, 840 F. Supp. 414 (E.D. Va. 1994)).

81. 509 S.E.2d 207 (N.C. Ct. App. 1998).

82. *See id.*

83. *Id.* at 209 n. 1.

84. *See* N.D. Cal. No. 96-3987, *discussed in* Dimmick v. Lungren, No. C98-4137SI, 1999 WL 111793 (N.D. Cal. Feb. 19, 1999), *and in* Bob Egelko, *AIDS Sufferer Entitled to 'HIV POS' License Plate, Calif. Judge Rules*, DAILY REC. BALTIMORE, July 23, 1998, at 2C.

85. *See Lungren*, 1999 WL 111793, at *1.

86. *Id.*

hibited from appearing on license plates, and racial, ethnic, and religious slurs, which are inherently offensive.[87] The court noted that the DMV could enforce decency standards in other cases, but its application to this plaintiff constituted viewpoint discrimination.[88]

IV. CONSTITUTIONAL LICENSE PLATE RESTRICTION CASES

In contrast to the above cases, which found license plate regulations unconstitutional as applied, the cases that have upheld such regulations explicitly find that license plates are not public forums, license plates are not speech, and license plates are not viewpoint expressive.

A. *Katz v. Department of Motor Vehicles*

In *Katz v. Department of Motor Vehicles*,[89] the California Court of Appeals held that a statute permitting the DMV to refuse to issue a vanity license plate that read "EZ LAY" did not abridge freedom of expression rights.[90] The plaintiff challenged California Vehicle Code section 5105 as unconstitutional on its face and as applied.[91] Section 5105 states in pertinent part, "There shall be no duplication of registration numbers, and the department may refuse to issue any combination of letters or numbers, or both, that may carry connotations offensive to good taste and decency or which would be misleading or a duplication of license plates."[92] Furthermore, the code provides, "[The DMV may] cancel and order the return of any [vanity] license plate . . . containing any combination of letters, or numbers, or both, which the department determines carries connotations offensive to good taste and decency or which would be misleading."[93]

The *Katz* court found that the statute did not curtail plaintiff's First Amendment rights because, "Katz' right to express the language of his choice remain[ed] totally unimpaired by the statute as Katz is free to put on his car or in the metal frame surrounding the license plate any combination of words and letters that he chooses."[94]

The court also held that the license plate was expressive conduct but not speech per se.[95] The court looked to the standard enunciated by

87. *See* Egelko, *supra* note 84, at C2.
88. *See id.*
89. 108 Cal. Rptr. 424 (Ct. App. 1973).
90. *See id.*
91. *See id.* at 425.
92. *Id.* at 425-26 (quoting CAL. VEH. CODE § 5105(a) (West 1970)).
93. Kahn v. Department of Motor Vehicles, 20 Cal. Rptr. 2d 6, 9 (Ct. App. 1993) (quoting CAL. VEH. CODE § 5105(b) (West 1970)).
94. *Katz*, 108 Cal. Rptr. at 426.
95. *See id.* at 427.

the United States Supreme Court in *United States v. O'Brien*:[96]

> [W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms . . . [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[97]

The *Katz* court found that the case before it was similar to *O'Brien* because "Vehicle Code section 5105 further[ed] a substantial governmental interest in vehicle identification consistent with community standards of good taste and decency, and impos[ed] at best a minimal and incidental restriction on Katz's alleged First Amendment freedom of expression."[98] The court noted that the impact on Katz's First Amendment rights, if any, was negligible and incidental, and that the statute was not directed towards suppression of idea or expression.[99] Rather, the statute excluded from the very limited parameters of a government mechanism a set of configurations of letters and numbers which were determined to be offensive to good taste and decency.[100]

The *Katz* court also found that license plates do not constitute an open forum.[101] The court based this determination on the fact that the state only permitted minor variations from the license plate form and shape, and the state had not strayed from the license plate's purpose as an identifying mechanism.[102] Furthermore, the court found that the state was neutrally protecting the legitimacy of its identification symbol, not promoting or compelling any particular point of view.[103]

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96. 391 U.S. 367 (1968).

97. *Id.* at 376-77.

98. Katz v. Dept. of Motor Vehicles, 108 Cal. Rptr. 424, 427 (Ct. App. 1973).

99. *See id.*

100. *See id.*

101. *See id.* at 428.

102. *See id.*

103. *See id.* Katz also argued that the DMV acted arbitrarily in denying his request since it issued the following other plates: BALL, BALLS, BFD, BIPPY, BJ, BOOBS, BS, DIK, EAT OUT, EZ HOOK, FCK, FERN, FUCHS, HOOKER, HOT BOD, HOT BOX HORNEE, HORNY, KILLER, PUSSY, 4 PLAY, SCREW 2, SLEEZ, SLEEZY, STUD, and VIRGIN. *See id.* at 429 n.4. The court found that this only meant the DMV needed a better control system, not that the statute was arbitrarily applied. *See id.* at 429.

B. *Kahn v. Department of Motor Vehicles*

In *Kahn v. Department of Motor Vehicles*,[104] the California Court of Appeals addressed an extremely interesting set of facts.[105] Kahn, a certified court reporter employed by the Culver City Municipal Court, obtained a vanity plate in 1972.[106] The plate read "TP U BG," which in stenographic court reporting symbols can be understood as "if you can."[107] "If you can" was a motivating phrase Kahn adopted based on the story of "The Little Engine That Could."[108] Seventeen years later, another court reporter complained to the California Department of Motor Vehicles that in stenography "TP U BG" could read as the expletive "fuck."[109] In fact, it would naturally be read as the expletive and read as "if you can" only in the proper context. While the plaintiff had not intended to display the expletive form, the DMV nonetheless asked that she surrender her license plates.[110]

In reviewing the case, the court heard a sociology professor who testified that the expletive is the "preeminent" curse word and is insulting if used in reference to someone and that the word can deeply offend and even cause a violent reaction.[111] The court reasoned that a license plate with the expletive could create a problem "in that it would be seen by those who would be offended" and that "additionally, the state is actually producing the word and that in itself could be seen as offensive."[112]

Kahn, like Katz before her, challenged California Vehicle Code section 5105 as unconstitutional on its face and as applied.[113] The court disagreed with the plaintiff, finding first that there was no censor of a forum for the free expression of ideas. The court determined that a license plate was not a First Amendment forum as it was not comparable to an open space, meeting hall, park, street corner, or other public thoroughfare.[114] The court stated:

> That the state permits license holders, for an additional fee, to vary minimally their vehicle identification from the prescribed form by selecting letter and/or number combinations which may reflect an individual's personal or professional identity, or possibly express a

104. 20 Cal. Rptr. 2d 6 (1993).
105. *See id.*
106. *Id.* at 7.
107. *See id.*
108. *See id.* at 8.
109. *See id.*
110. *See id.*
111. *See id.*
112. *Id.*
113. *See id.* at 9.
114. *See id.* at 10 (citing Lehman v. City of Shaker Heights, 418 U.S. 298, 303-304 (1974)).

> thought or idea, is purely incidental to the primary function of vehicle identification.[115]

As a result, the court found that the state was not regulating an "open forum."[116]

As in *Katz*, the *Kahn* court found that the license plate was expressive conduct, not speech per se.[117] Therefore, the court once again applied the United States Supreme Court *O'Brien* standard, which is discussed above.[118]

The *Kahn* court next found that the state has a substantial interest in protecting its license plates from degradation.[119] "That is, the DMV reasonably is concerned with avoiding the abusive use of its vehicle identification system and preserving the legitimacy, credibility and reliability of its official emblem."[120] The court also found that Vehicle Code section 5105 did not suppress free expression in that it did not prohibit conduct intended to communicate an idea, viewpoint or opinion.[121] Rather, it limited "to a slight degree the combinations of letters and numbers one may choose as a vehicle identification symbol."[122]

Based on the above analysis, the *Kahn* court concluded that Vehicle Code section 5105 was not facially unconstitutional.[123] The court also concluded that section 5105 was not unconstitutional as applied to plaintiff because "[s]he remains free to express the same sentiment on her vehicle by using a bumper sticker, license plate holder or similar medium; she simply cannot continue to do so via the license plate itself."[124]

V. LICENSE-PLATE GUIDELINES

The cases discussed above all depend on the same principle: where the license plate expressed a viewpoint, restrictive regulation was unconstitutional; where the license plate did not express a viewpoint, but only an obscenity or vulgarity, the restrictive regulation was constitutional. This distinction does play a role in the analysis, but the assessment must be more detailed. The decisions upholding the license plate regulations stated that the plates do not constitute speech. These holdings, however,

115. *Id.*
116. *See id.*
117. *See id.*
118. *See id.*
119. *See id.* at 11 (quoting Katz v. Dept. of Motor Vehicles, 108 Cal. Rptr. 424, 428 (Ct. App. 1973)).
120. *Id.*
121. *See id.*
122. *Id.*
123. *See id.*
124. *Id.* at 11-12 (citing *Katz*, 108 Cal. Rptr. at 426).

do not comport with the language in the decisions that held such regulations to be unconstitutional. Furthermore, the decisions upholding the regulations stated that a license plate is not a public forum. This contrasts with the cases that found the regulations unconstitutional and expressed a likelihood that the plates were a public forum.

A logical explanation of these differences distinguishes specialty plates from vanity plates. This distinction is buttressed by *Wooley v. Maynard*.[125] In *Wooley*, the Supreme Court held that New Hampshire could not constitutionally require individuals to disseminate an ideological point of view by requiring residents to have a license plate with the motto, "Live Free or Die."[126] The Court specifically distinguished passenger license plates, which "consist of a specific configuration of letters and numbers," from license plates with mottos.[127] The next section of the article explains justifications for such a distinction and when the distinction is relevant.

A. *Type of Forum Created*

Specialty plates should be considered a limited public forum, whereas vanity plates should be considered a nonpublic forum.

The First Amendment does not protect all speech in all places and under all circumstances.[128] The government "has [the] power to preserve the property under its control for the use to which it is lawfully dedicated."[129] To determine whether the government's interest in restricting the use of its property outweighs the interest of those who desire to use the property, the Supreme Court has prescribed a "forum" analysis.[130] The extent to which government can lawfully regulate speech under this analysis depends upon the nature of the forum at issue.[131]

The United States Supreme Court has recognized "three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum."[132] Traditional public fora are places, such as public streets and parks, which "by long tradition or by government fiat have been devoted to assembly and debate."[133] A

125. 430 U.S. 705 (1977).

126. *See id.* at 717.

127. *Id.* at 716.

128. *See* Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 799 (1985); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981).

129. *Cornelius*, 473 U.S. at 800 (quoting Greer v. Spock, 424 U.S. 828, 836 (1976)).

130. *See id.*

131. *See id.*

132. *Id.* at 802 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

133. *Id.* (quoting *Perry*, 460 U.S. at 45).

limited or designated public forum is "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[134] A nonpublic forum is "[p]ublic property which is not by tradition or designation a forum for public communication."[135] It consists of property whose function usually is incompatible with expressive activity.[136]

Government regulation of speech in both the traditional and limited, or designated, public fora is subject to strict scrutiny.[137] Thus, a content-based regulation in either of these fora is presumed unconstitutional and will be permitted only if it is narrowly tailored to serve a compelling government interest.[138] The government also may enforce narrowly tailored and content-neutral time, place, and manner restrictions if the restrictions serve a significant government interest and leave open ample alternate channels of communication.[139]

In the nonpublic forum, however, government regulation of speech is subject only to a reasonableness test with a requirement of viewpoint neutrality.[140] Thus, "[c]ontrol over . . . a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."[141] The government may restrict access based on content if "the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[142]

The purpose of specialty plates and their value to organizations using them is as a "place or channel of communication for use . . . for . . . speech . . . by certain speakers . . . for the discussion of certain subjects."[143] The specialty plate allows an organization to promote its recognition through its members' display of its logo. As the Supreme Court held in *Wooley*, adding a motto to a license plate turns it into a "mobile billboard."[144] This specialty plate, however, is not a traditional

134. *Id.* (citing *Perry*, 460 U.S. at 45-46 & n.7).

135. *Perry*, 460 U.S. at 46.

136. *See Cornelius*, 473 U.S. at 804.

137. *See* United States v. Kokinda, 497 U.S. 720, 726-27 (1990) (citing *Perry* 460 U.S. at 45).

138. *See Perry*, 460 U.S. at 45 (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

139. *See id.* (citing United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535-36 (1980); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939)).

140. *See Kokinda*, 497 U.S. at 727 (citing *Perry*, 460 U.S. at 46).

141. *Cornelius*, 473 U.S. at 806 (citing *Perry*, 460 U.S. at 49).

142. *Perry*, 460 U.S. at 46 (citing *United States Postal Serv.*, 453 U.S. at 131 n.7).

143. *Cornelius*, 473 U.S. at 802 (citing *Perry*, 460 U.S. at 45, 46 n.7).

144. Wooley v. Maynard, 430 U.S. 705, 715 (1977).

public forum such as a public street or park, which "by long tradition or by government fiat ha[s] been devoted to assembly and debate."[145] Under the guidance of the Supreme Court, therefore, courts should characterize a specialty license plate as a limited public forum subject to strict scrutiny.[146] A content-based regulation of specialty plates should be presumed unconstitutional and only permitted if narrowly tailored to serve a compelling government interest.[147]

Because the specialty license plate is a limited public forum, the statements of some legal scholars become clear that "when state officials began granting special license plates to groups with a political identification, such as the National Rifle Association and the AFL-CIO, they . . . took an irreversible step toward making the plates a mode of protected speech."[148] These off-the-cuff remarks can be understood to apply to specialty plates, which, unlike vanity plates, are associated with organizations.

Vanity plates, in contrast, constitute a nonpublic forum as they are "[p]ublic property which is not by tradition or designation a forum for public communication."[149] Vanity plates are distinct from specialty plates because the latter significantly change the appearance of the plate, giving the plate a substantial secondary purpose. The purpose of the vanity plate is still to identify to the state the owner of a vehicle. There is no added element such as a logo. The vanity plate merely allows the owner to select which letters and numbers, from the general pool of letters and numbers used for all license plates, are to be used for the owner. As the court noted in *Katz*, the vanity plate permits only minor variations from the standard license plate and has not strayed from the license plate's purpose as an identifying mechanism.[150] The court in *Kahn* likewise noted that the vanity plate only minimally varies the "vehicle identification from the prescribed form by selecting letter and/or number combinations" and any reflection of an individual's personal or professional identity "is purely incidental to the primary function of vehicle identification."[151]

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145. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

146. *See* United States v. Kokinda, 497 U.S. 720, 726-27 (1990) (citing *Perry*, 460 U.S. at 45).

147. *Perry*, 460 U.S. at 45 (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

148. *Legislature May Decide Specialty Plates Aren't Worth Controversy Program Has Become Time Consuming*, *supra* note 27, at B4. Professor Vincent Blasi of Columbia Law School said "The state [of Virginia] is in trouble. The legal test is usually whether a state has created a public forum for political speech. . . . The state has probably gone too far in allowing this sort of thing to say it can restrict it for one group now." *Id.*

149. *Perry*, 460 U.S. at 46.

150. *See* Katz v. Department of Motor Vehicles, 108 Cal. Rptr. 424, 428 (Ct. App. 1973).

151. Kahn v. Department of Motor Vehicles, 20 Cal. Rptr. 2d 6, 10 (Ct. App. 1993).

B. *Speech or Expressive Conduct*

The discrepancies between the cases as to whether license plates constitute speech or merely expressive conduct are hard to clarify but they can be reconciled by distinguishing between specialty plates and vanity plates. Specialty plates constitute speech because the plate contains the extra dimension of an organization name and a symbolic logo. In short, they overtly articulate speech. Vanity plates, on the other hand, are only a simple and limited manipulation of letters and numbers. As such, they convey speech only implicitly. Indeed, customized vanity plates may be so difficult to understand as to be indistinguishable from randomly issued plates. Conversely, it is possible that randomly issued plates may by chance comprise a word or phrase. Vanity plates are therefore not automatically speech, but should be deemed speech only when they are clear articulations. This distinction could arguably explain the difference between *Pruitt* and *Dimmick* which, although dealing with vanity plates and not specialty plates, were more apparent articulations of speech, and *Katz* and *Kahn*, which dealt with more covert articulations of speech.

While specialty plates should automatically be afforded the protections given to speech, vanity plates should be protected only when they are clearly articulations of speech. This is a very serious distinction because speech is more likely than expressive conduct to be found viewpoint indicative. As such, specialty plates will enjoy the protections of viewpoint indicative speech.

C. *Viewpoint Discrimination*

Regardless of the type of forum, any governmental regulation of speech must be viewpoint-neutral. That is, the government may not target the "particular views taken by speakers on a subject,"[152] in an effort "to discourage one viewpoint and advance another."[153] Nor may the government restrict speech based on "the specific motivating ideology or the opinion or perspective of the speaker."[154] When the government denies access to a speaker solely to suppress his or her point of view, "the violation of the First Amendment is all the more blatant."[155] The rationale for prohibiting the government from engaging in viewpoint discrimination is that such actions raise "the specter that the government may effectively drive certain ideas or viewpoints from the market-

152. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829, (1995).

153. Monterey County Democratic Cent. Comm. v. United States Postal Serv., 812 F.2d 1194, 1198 (9th Cir. 1987), *cited with approval in* United States v. Kokinda, 497 U.S. 720, 736 (1990).

154. *Rosenberger*, 515 U.S. at 829 (citing *Perry*, 460 U.S. at 46).

155. *Id.* (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992)).

place."[156] As Justice Kennedy wrote on behalf of the Supreme Court in *Turner Broadcasting System, Inc. v. Federal Communications Commission*:[157]

> At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. . . . Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right.[158]

The Supreme Court has declared that "[c]ontent-based regulations are presumptively invalid."[159] The general rule is that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulations need meet only intermediate scrutiny.[160] Because the government must be content-neutral in its regulation of speech, it must be both viewpoint neutral and subject matter neutral.[161] As one legal scholar succinctly characterized, "Viewpoint neutral means that the government cannot regulate speech based on the ideology of the message,"[162] while subject matter neutral means that "the government cannot regulate speech based on the topic of the speech."[163]

Although the Supreme Court occasionally has upheld subject matter speech restrictions, it never has upheld viewpoint-based restrictions.[164] The Supreme Court, however, has failed to actually define what constitutes viewpoint discrimination.[165] In assessing license plates,

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156. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (citing Leathers v. Medlock, 499 U.S. 439, 448-49 (1991)).

157. 515 U.S. 622 (1994).

158. *Id.* at 641.

159. *R.A.V.*, 505 U.S. at 382 (citing *Simon & Schuster*, 502 U.S. at 115).

160. *See* Turner Broad. Sys., Inc. v. Federal Comms. Comm'n, 512 U.S. at 662, 661-62 (1994).

161. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

162. Erwin Chemerinsky, *Court Takes Narrow View of Viewpoint Discrimination*, TRIAL, Mar. 1999, 90, 90. *See also* Boos v. Barry, 485 U.S. 312 (1988) (declaring unconstitutional a District of Columbia ordinance prohibiting display of signs critical of foreign government within 500 feet of government's embassy because law, by its very terms, limited certain speech based on viewpoint); Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1227-28 (1993).

163. Chemerinsky, *supra* note 162, at 90. *See also* Carey v. Brown, 447 U.S. 455 (1980) (holding Illinois statute prohibiting all picketing in residential neighborhoods unless it was labor picketing connected to a place of employment unconstitutional because when the government attempts to regulate speech in public places, it must be subject matter neutral); Sabrin, *supra* note 162, at 1227-28.

164. *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (allowing ordinance permitting commercial advertisement on buses but prohibiting political advertisements); Chemerinsky, *supra* note 162, at 90 & 91 n.10 (citing Burson v. Freeman, 504 U.S. 191 (1992) (upholding restrictions on campaign activity proximate to polling stations)).

165. *See* Chemerinsky, *supra* note 162.

this article therefore recommends that a distinction be drawn between specialty plates and vanity plates. Specialty plates should be presumed viewpoint expressive because their purpose is to identify vehicle owners with a specific organization and show that owners endorse such organizations' purpose and objectives. For example, in *Wooley* the Supreme Court found that New Hampshire, by insisting that plates bear the state motto, was "seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism."[166]

In contrast, a vanity plate is merely an ordering of letters and numbers that might otherwise be used for a plate in the ordinary course of issuance. Therefore, the applicant of a vanity plate must meet a burden of affirmatively showing that the plate is viewpoint expressive. Only if it clearly articulates a position should it be considered a viewpoint.

This rubric resolves the apparent conflict between the decided cases. In *Pruitt, Glendening*, and *Dimmick*, the courts found that the license plates communicated a viewpoint. *Glendening* addressed specialty plates, which, under the proposal of this article, enjoy a presumption of being a viewpoint. *Pruitt* and *Dimmick* meet the vanity plate viewpoint burden because the plates at issue express societal ideas: divine benevolence and the prevalence of AIDS. The courts found these plates expressed viewpoints and thus were entitled to constitutional protection. In contrast, the vanity plates in *Katz* and *Kahn* merely transmitted vulgarity and obscenity, specifically, sexual promiscuity and an expletive term. These plates failed to meet the vanity plate burden. For this reason, the courts found no expression of a viewpoint, and no Constitutional protection.

The decisions in *Katz* and *Kahn* are also consistent with the generally relaxed constitutional protection of obscenity and vulgarity.[167] Expression which is offensive to the local community, appeals to the prurient interest, and lacks serious value, receives almost no First Amendment protection.[168]

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166. Wooley v. Maynard, 430 U.S. 705, 717 (1977).

167. *See generally* Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99 (1996).

168. *See* Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957). *See also* Barnes v. Theater, Inc., 501 U.S. 560, 567 (1991) (allowing regulation of nude entertainment); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (permitting students to be punished for delivering speeches with sexual innuendo at assemblies); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (upholding regulation of adult book and video stores); Federal Comms. Comm'n v. Pacifica Found., 438 U.S. 726 (1978) (allowing FCC to regulate indecent radio and television programming); Virgil v. School Bd., 862 F.2d 1517 (11th Cir. 1989) (allowing removal of indecent literary works from school curriculum).

D. *The Guidelines*

The above analysis leads to two guidelines, one for specialty plates and one for vanity plates. Specialty plates should be considered a limited public forum, expressing speech which is presumptively a viewpoint. Vanity plates, on the other hand, should be considered nonpublic forums, which may possibly be speech and viewpoint expressive. This distinction creates a burden shift. For specialty plates, the state must show either that the plate is not speech and not viewpoint expressive or that the plate regulation is narrowly tailored to serve a compelling government interest.[169] For vanity plates, however, the plate-applicant must affirmatively show, and overcome the contrary presumption, that the plate is speech and viewpoint expressive.

If a vanity plate can affirmatively be shown to be speech, but cannot be shown to be viewpoint expressive, it is only entitled to intermediate scrutiny. Only where it can be demonstrated affirmatively that a vanity plate is also viewpoint expressive is it entitled to strict scrutiny. If it is not viewpoint expressive and not even speech per se, but merely expressive, the government can justify restrictive regulations by merely showing a sufficiently important interest. In contrast, specialty plates should be presumed to be expressing speech and viewpoints. They therefore should be presumptively entitled to strict scrutiny constitutional protection.

VI. BUMPER STICKERS

The *Kahn* court based its holding, in part, on the belief that an individual may freely display any bumper sticker. The effect of its decision to restrict what a car owner may display on his license plate would be de minimis.[170] Given the reasoning in *Kahn*, this article will review the caselaw on bumper stickers. An analyses of the jurisprudence of bumper stickers suggests that the *Kahn* court correctly found that, with the exception of obscenities, a state generally may not prevent an individual from displaying whatever he desires on the bumper of his car.[171]

Most courts have found state restrictions on bumper stickers unconstitutional. Nonetheless, several states have statutes prohibiting the display of obscene bumper stickers.[172] The legality of these statutes is questionable. Several courts have found that laws prohibiting bumper

169. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (citing Carey v. Brown, 477 U.S. 455, 461 (1980)).

170. *See* Kahn v. Department of Motor Vehicles, 20 Cal. Rptr. 2d 6 (Ct. App. 1993).

171. *See id.* at 11-12. Public organizations may, however, prohibit certain bumper stickers.

172. *See, e.g.*, ALA. CODE § 13A-12-131 (1994); 18 PA. CONS. STAT. ANN. § 5903(a) (West 1983); TENN. CODE ANN. § 55-8-187 (1998).

stickers, even those that contain offensive language such as "fuck" and "shit," are unconstitutional.[173]

The standard for states wishing to regulate bumper stickers is quite high. The federal district court in the District of Columbia has held that the state must overcome an onerous burden before it can demonstrate that a bumper sticker may be prohibited.[174] In *Fire Fighters Association*, fire fighters protested against the city by displaying bumper stickers that read, "D.C. Fire Department—It's Not Just A Job, It's A Joke, Too!"[175] The district court held that the city's concern with its residents respect for the fire department was outweighed by the fire fighters' First Amendment rights.[176]

Courts will, however, generally allow public organizations to restrict what bumper stickers their employees display. For example, in *Ethredge v. Hail*,[177] a civilian Air Force employee challenged an Air Force administration order that prohibited the plaintiff from displaying, while on military property, a bumper sticker that disparaged the Commander-in-Chief.[178] The court found that the parking lot was a non-public forum, so the order would be upheld as long as its application was reasonable.[179] The court concluded that the administrative order was reasonable because it did not prohibit "robust criticism of the President; instead it bar[red] only those messages that embarrass or disparage the Commander-in-Chief."[180] Similarly, in *Connealy v. Walsh*,[181] a state social services agency fired a social worker because

173. *Compare* Baker v. Glover, 776 F. Supp. 1551 (M.D. Ala. 1991), *with* ALA. CODE § 13A-12-131 (1994). *See, e.g.*, Cunningham v. State, 400 S.E.2d 916, 917 (Ga. 1991); State v. Meyers, 462 So. 2d 227, 227 (La. Ct. App. 1984) (citing Cohen v. California, 403 U.S. 15 (1971); City of New Orleans v. Lyons, 342 So. 2d 196, 198-99 (La. 1977)).

174. *See* Fire Fighters Ass'n., D.C. v. Barry, 742 F. Supp. 1182, 1189 (D.D.C. 1990). *See also* Hobbs v. Thompson, 448 F.2d 456, 475 (5th Cir. 1971).

175. *Fire Fighters*, 742 F. Supp. at 1185.

176. *See id.* at 1191.

177. 56 F.3d 1324 (11th Cir. 1995).

178. *See id.* at 1325.

179. *See id.* at 1328 (citing Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985)).

180. *Id.* The court hesitantly addressed this issue. Initially, the court found that the issue was moot. The plaintiff had first displayed a bumper sticker deriding President Bush. Before the court rendered the decision, but after the plaintiff filed his suit, President Bush lost the 1992 election. *See* Ethredge v. Hail, 996 F.2d 1173 (11th Cir. 1993). The second case arose only after the plaintiff displayed a bumper sticker criticizing President Clinton. *See Ethredge*, 56 F.3d at 1326.

Similarly, in *Speed v. Moffat*, 477 S.W.2d 391 (Tex. Ct. App. 1972), the court dealt with a statute prohibiting city employees from displaying a bumper sticker which would convey that employee's preference in a municipal election. The appellate court held that plaintiff, city employee, did not have standing because his "pleading has stated his case in hypothetical form, and no violation, reprimand or disciplinary action against him has been alleged or proven." *Id.* at 395.

181. 412 F. Supp. 146, 152 (W.D. Mo. 1976).

she had a political bumper sticker endorsing Presidential candidate George McGovern.[182] The employer maintained that it terminated the plaintiff because she displayed the bumper sticker on her car in violation of the employer's policy.[183] The policy limited what social workers could display on their vehicles.[184] The court found for the employer, holding that the state policy did not violate the plaintiff's First Amendment rights.[185] The court reasoned that "although the effect of a partisan political bumper sticker cannot be generalized, under some circumstances depending on the nature of the bumper sticker and the person receiving the counseling, a partisan political bumper sticker could have an adverse impact on the efficiency of the social worker."[186]

VII. CONCLUSION

This article has proposed guidelines for evaluating license plate regulations based upon a distinction between specialty plates and vanity plates, as well as the limited case law addressing license plate regulation. States may regulate license plates to prohibit obscenities and vulgarities, but states generally may not restrict specialty plates. For vanity plates, states may likewise not restrict viewpoint plates beyond prohibiting obscenity and vulgarity. The state must in fact overcome serious constitutional hurdles just to regulate vanity plates which have affirmatively been shown to constitute speech per se and must even meet essential constitutional concerns to regulate vanity plates that have affirmatively been shown to be expressive. States must balance this onus against the increased revenue generated by the sale of specialty plates and vanity plates.[187] They also must consider that these custom plates may be used as constitutionally-protected mini-billboards that can broadcast hate, offense, and disparagement across the highways of America.

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182. *See id.* at 148.

183. *See id.* at 150.

184. *See id.*

185. *See id.* at 158.

186. *Id.* at 152.

187. States which already have specialty plate and vanity plate programs can constitutionally end these programs. The government may close a limited nonpublic forum entirely. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); Robert L. Waring, Comment, *Talk Is Not Cheap: Funded Student Speech at Public Universities on Trial*, 29 U.S.F. L. REV. 541, 555 (1995) (quoting Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1220-21 (1984)).