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MIXED SPEECH: WHEN SPEECH IS BOTH PRIVATE AND GOVERNMENTAL

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Speech is generally considered to be either private or governmental, and this dichotomy is embedded in First Amendment jurisprudence. However, speech is often neither purely private nor purely governmental but rather a combination of the two. Nonetheless, the Supreme Court has not yet recognized mixed speech as a distinct category of speech. This Article suggests considerations for identifying mixed speech and exposes the shortcomings of the current approach of classifying all speech as either private or governmental when determining whether viewpoint restrictions pass First Amendment muster. Treating mixed speech as government speech gives short shrift to the free speech interests of speakers and audiences. According it private speech status overlooks compelling state interests, including the need to avoid establishment clause violations. This Article concludes that a better approach to mixed speech is to subject viewpoint restrictions to intermediate scrutiny. This will allow a more nuanced and transparent balancing of interests than the present either-or approach.

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INTRODUCTION

We generally characterize speech as either private or governmental, and this dichotomy is embedded in First Amendment jurisprudence. When a private person speaks, the establishment clause plays no role, but the free speech clause does. When the government speaks, it is just the reverse: The establishment clause, but not the free speech clause, applies. Thus, under the establishment clause, a private person can display a "Say Yes to Jesus" bumper sticker, but the government cannot print the same message on its currency. Under the free speech clause, the government cannot silence a private speaker from expressing particular viewpoints on abortion, race, or any other controversial topic but can, subject to establishment clause strictures,[1] choose sides in the debate and endorse one position over the other when it speaks for itself.

The trouble with this dichotomy is that not all speech is purely private or purely governmental. In fact, much speech is the joint production of both government and private speakers and exists somewhere along a continuum, with pure private speech and pure government speech at each end. In some cases, such as student speech at school events, private advertising on public transit systems, and privately purchased, government-issued specialty license plates, the mixed nature of the speech is apparent. Other times, either the private or the government component predominates so that the speech's mixed nature is less obvious. For example, although speech by private individuals subsidized by the government may seem private, it still has a government component. Otherwise, there would be no establishment clause questions about funding religious speech by private speakers.[2]

[1] *See infra* Part I.B (discussing establishment clause limitations on government speech).

[2] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (rejecting establishment clause challenge to federal voucher program that included private religious schools); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (Souter, J., dissenting) (arguing that state subsidies to religious student publication violate establishment clause).

Despite its pervasiveness, there has been little recognition of mixed speech.[3] This is, in part, because the doctrine of government speech is itself a recent development.[4] The Supreme Court has never explicitly acknowledged the existence of mixed speech, and few lower courts have addressed it.[5] Instead, the mixed nature of much speech is largely overlooked, and speech is normally categorized as either private or governmental. Commentators have focused on particular examples of mixed speech,[6] but have not grappled with the implications of recognizing mixed speech as a distinct category or examined mixed speech under the free speech and establishment clauses simultaneously.

Classifying mixed speech as purely private or purely governmental masks the competing interests at play. Once mixed speech is labeled government speech, the free speech interests of speakers and audiences are dismissed. Likewise, once mixed speech is labeled private, concerns about state endorsement of offensive, harmful, or religious speech are ignored. This is particularly problematic where the speech is roughly equal parts private speech and government speech.[7]

To illustrate the problems associated with the private/government dichotomy, this Article focuses on specialty license plates, which provide a paradigmatic example of mixed speech. Indeed, the first decisions acknowledging mixed speech address specialty license plates.[8] These plates are approved, manufactured, and owned by the govern-

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[3] Exceptions include Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1358 (2001) (describing government-subsidized speech as falling in middle ground between government speech and private speech), and Helen Norton, *Not for Attribution: Government's Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1319–20 (2004) (noting challenge posed by cases presenting elements of both government and private speech).

[4] *See infra* Part I.A (tracking development of government speech doctrine).

[5] Specialty license plates, discussed *infra* Part II.A, are the primary exception.

[6] *See, e.g.*, 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 (1984) (private speech on government property); Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 Nw. U. L. REV. 1007 (2005) (speech by public employees); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996) (government-funded speech).

[7] *See infra* Parts IV & V (discussing difficulties inherent in classifying mixed speech as either private or governmental). Conversely, this may be less true where the private or governmental component clearly predominates.

[8] *See, e.g.*, Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004) (noting that pro-life specialty plates "appear[ ] to be neither purely government speech nor purely private speech, but a mixture of the two"); Women's Res. Network v. Gourley, 305 F. Supp. 2d 1145, 1161 (E.D. Cal. 2004) ("It is pellucid that the speech on the [specialty] license plates . . . 'is neither exclusively that of the private individuals nor exclusively that of the government, but, rather, hybrid speech of both.'") (quoting Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't. of Motor Vehicles (*Sons of Confederate Veterans III*), 305 F.3d 241, 245 (4th Cir. 2002) (denial of rehearing en banc)).

ment but appear on private cars because private individuals select and pay for them. First surfacing in the late 1980s, specialty license plates are now available in most states. State programs with over a hundred plates, ranging from "God Bless America" to "Sons of Confederate Veterans" to "Choose Life," are not uncommon.

Lower courts resolving challenges to a state's decision to issue or not issue a particular plate have reached contrary conclusions about how to classify specialty license plates. When Virginia refused to allow a Confederate flag on its "Sons of Confederate Veterans" specialty license plates, the Fourth Circuit held that the plates were private speech and that the State's censorship amounted to unconstitutional viewpoint discrimination.[9] In contrast, when Tennessee was sued for providing pro-life but not pro-choice specialty license plates, the Sixth Circuit held that Tennessee was not obliged to issue pro-choice plates because specialty license plates represented government speech.[10] Though diametrically opposed, neither holding is entirely unreasonable because, in reality, these plates represent mixed speech, where both the government and private individuals are speaking.

Because of their obviously mixed nature, and because they are so popular,[11] specialty license plates provide an ideal vehicle for analyzing the problems of mixed speech. But the difficulties raised by the mixed nature of specialty license plates are by no means limited to that particular context. Indeed, as discussed in Part II, many of the Supreme Court's controversial free speech and establishment clause cases have involved mixed speech.

Part I of the Article outlines the development of the government speech doctrine, which has made recognition of mixed speech possible. It also examines the values animating free speech and establishment clause doctrine.

Part II discusses the pervasiveness of mixed speech. Recurring examples of mixed speech in First Amendment litigation include slogans on specialty license plates, religious messages in endorsement cases, speech by private individuals that is subsidized by the govern-

[9] Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles (*Sons of Confederate Veterans II*), 288 F.3d 610, 621 (4th Cir. 2002).

[10] ACLU of Tenn. v. Bredesen, 441 F.3d 370, 375 (6th Cir. 2006). I helped litigate this case while at the ACLU Reproductive Freedom Project.

[11] Specialty license plates have grown so popular that a for-profit website has built an extensive guide for would-be purchasers of the plates. *See* DMV.ORG, License Plates & Placards Information, http://www.dmv.org/license-plates.php (last visited Mar. 3, 2008) (providing state-by-state information on, among other things, specialty license plates).

ment, speech by private individuals on government property, and speech by government employees.

Part III suggests five considerations to help determine whether speech should be deemed private, governmental, or mixed: (1) who is the literal speaker; (2) who controls the message; (3) who pays for the speech; (4) what is the speech goal of the program in which the speech appears; and (5) to whom would a reasonable person attribute the speech. These factors are then applied to specialty license plates.

Part IV describes the problems associated with treating mixed speech as private speech. If mixed speech is categorized as private speech, the government cannot discriminate against any viewpoints. Consequently, discounting the government component of mixed speech may lead to government endorsement of undesirable messages (like offensive or hate speech) or government endorsement of religious messages in violation of the establishment clause.

Part V discusses the problems caused by treating mixed speech as government speech. If mixed speech is categorized as government speech, the government may censor viewpoints. Viewpoint discrimination, however, may undermine the free speech interests of both speakers and audiences and distort the marketplace of ideas. Furthermore, because the speech is actually mixed, the government's chosen viewpoint could be mistaken for private preferences. The resulting lack of transparency permits the government to advance its policy positions without being held accountable for its advocacy.

Part VI concludes that while there is no simple solution to the mixed speech problem, categorizing speech as either private or governmental diverts attention from the underlying values at stake. A better approach—which leads to more transparent and consistent balancing of interests—is to subject viewpoint-discriminatory regulations on mixed speech to intermediate scrutiny. Under such a regime, viewpoint discrimination would likely be allowed only if the government's interest were of constitutional magnitude, such as avoiding endorsement of religion or harmful speech.

I
GOVERNMENT SPEECH VERSUS PRIVATE SPEECH

Mixed speech is speech that contains both private and governmental components. Ignoring this duality, courts now generally hold that the threshold question in a mixed speech case is whether the speech is best classified as private speech or as government speech. The answer is usually dispositive under both free speech and establishment doctrine. Ten years ago, however, the question would have been

framed differently, as the doctrine of "government speech" had not yet been developed. This Part discusses the rise of the government speech doctrine and explains why the classification of speech as private or governmental impacts the values underlying the free speech and establishment clauses.

A. The Development of the Government Speech Doctrine

The problems created by mixed speech have received minimal attention in part because the concept of government speech is itself a recent development.[12] As Justice Souter observed in 2005, "The government-speech doctrine is relatively new, and correspondingly imprecise."[13] Its basic premise is that while the free speech clause protects private speakers, it does not apply when the government speaks.[14] However, the Supreme Court did not use the term "government speech" until the late 1980s, and even then, it was in the establishment clause context.[15] To the extent that free speech scholarship in the 1980s examined "government speech," the debate focused on the degree to which the government could or should be permitted to act as a speaker in the marketplace of ideas[16]—not whether speech should be considered governmental and therefore exempt from free speech clause protections.

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[12] *See, e.g.*, *The Supreme Court, 2004 Term—Leading Cases*, 119 HARV. L. REV. 277, 283 (2005) [hereinafter *Leading Cases*] ("Government speech doctrine is still in its early stages of evolution . . . .").

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

[14] However, commentators have suggested that government speech that monopolizes the market may be constrained by the First Amendment. *See, e.g.*, Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1488–91 (2001) (arguing that government monopoly on speech market can undermine First Amendment values); Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 27 (2000) ("[A]ctual monopolization [of the speech market] should be understood to violate the Constitution."); Post, *supra* note 6, at 192 ("[Government s]ubsidies that literally overwhelm public discourse . . . can and should be set aside.").

[15] In a frequently quoted passage, the Supreme Court observed that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

[16] *See* Richard Delgado, *The Language of the Arms Race: Should the People Limit Government Speech?*, 64 B.U. L. REV. 961, 961–62 (1984) ("A prominent theme in this 'government speech' debate is that the government's powerful voice can easily overwhelm weaker private voices, creating a monopoly of ideas and inhibiting the dialectic on which we rely to reach decisions." (internal citations omitted)); *see also* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 38–50 (1983) (examining whether government's participation in marketplace of ideas can undermine First Amendment goal of autonomous and informed citizenry exercising independent judgment).

Only in the 1990s did the "government speech doctrine" gain prominence. The 1991 *Rust v. Sullivan*[17] decision is now heralded as one of the first government speech cases. In *Rust*, doctors subsidized by family planning funds under Title X of the Public Health Service Act challenged a regulation barring them from discussing abortion with their patients.[18] The Supreme Court upheld the "gag rule" on the ground that the government had "merely chosen to fund one activity to the exclusion of the other."[19] On this view, the government was not suppressing a viewpoint but merely prohibiting subsidized doctors from engaging in activities outside the project's scope.[20] While the term "government speech" appeared nowhere in the decision, over time the notion gained grudging recognition. One 1997 Court decision, for example, referred to "so-called 'government speech.'"[21] By 2001, the Court explicitly characterized *Rust* as a government speech decision: In *Legal Services Corp. v. Velazquez*,[22] the Court explained that while *Rust* did not explicitly rely on a government speech rationale, "when interpreting the holding in later cases . . . we have explained *Rust* on this understanding. We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker . . . ."[23]

While the existence of the government speech doctrine is now firmly established,[24] its contours are not. "No clear standard has yet been enunciated . . . for determining when the government is

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17 500 U.S. 173 (1991).

18 *Id.* at 178–79, 181. Under the regulation, this restriction applies even if a patient asks for information about abortion. A recommended response to such a request is, "[T]he project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." *Id.* at 180.

19 *Id.* at 193 ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.").

20 *Id.* at 194.

21 Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 482 n.2 (1997).

22 531 U.S. 533 (2001).

23 *Id.* at 541.

24 In addition to its discussion in *Velazquez*, the Supreme Court invoked the government speech doctrine in *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 562 (2005) ("When . . . the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages."), *id.* at 574 (Souter, J., dissenting) ("The government-speech doctrine is relatively new, and correspondingly imprecise."), and in *Garcetti v. Ceballos*, 547 U.S. 410, 436–39 (2006) (Souter, J., dissenting) (arguing that Court majority should not have applied government speech doctrine).

'speaking' . . . ."[25] Nonetheless, the government speech doctrine clearly establishes a counterpart to private speech, which the free speech clause was designed to protect.[26] The government generally may not discriminate against private speakers' viewpoints by permitting some to speak while censoring others. A central idea behind the free speech clause is that democracy is best realized when there is a free-flowing marketplace of ideas.[27] This marketplace consists of both speakers and listeners, unhindered by government regulation. In this conception, speech can have inherent or instrumental value. Free speech is an end in itself because democracy should allow self-expression and self-actualization.[28] It is instrumental because self-governance requires a well-informed citizenry that both participates in debate and makes its own decisions after hearing all sides of an issue.[29] In addition, free speech can serve as a check on government abuse of power.[30]

All of these goals are impeded when the government tries to suppress speech because of the speaker's ideology, belief, or perspective.[31] Accordingly, while the government may regulate some aspects

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[25] *Sons of Confederate Veterans II*, 288 F.3d 610, 618 (4th Cir. 2002); *see also Sons of Confederate Veterans III*, 305 F.3d 241, 251 (4th Cir. 2002) (Gregory, J., dissenting from denial of rehearing en banc) ("What is, and what is not, 'government speech' is a nebulous concept, to say the least.").

[26] The free speech clause provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

[27] The "marketplace of ideas" concept was first articulated by Justice Holmes in his dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). While Justice Holmes envisioned the marketplace as a means of uncovering truth, scholars today focus less on the marketplace's truth-seeking function and more on how the exchange of ideas facilitates decisionmaking and participation in democratic processes. *See, e.g.*, Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2366–69 (2000) (arguing that protecting necessary communication process for voting and democracy requires similar elements as truth-seeking marketplace of ideas).

[28] *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 616–19 (1982) (arguing that individual self-realization is primary speech value of First Amendment).

[29] *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 75 (1960) ("The primary purpose of the First Amendment is . . . that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (stating that debate on public issues should be "uninhibited, robust, and wide-open"); MEIKLEJOHN, *supra* at 26 ("What is essential is not that everyone shall speak, but that everything worth saying shall be said."); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411 (1986) (arguing that ultimate purpose of First Amendment is to create rich public debate).

[30] Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 *passim* (1977).

[31] These goals can also be impeded if government speech monopolizes the marketplace. *See supra* note 16.

of private speech (such as its time, place, and manner),[32] the inviolable rule of the First Amendment is that viewpoint discrimination is prohibited.[33] This is true even if the government creates a forum for private speech on its own property.[34] Thus, while the government may limit the choice of subject matter or the class of speakers in a government-created forum,[35] it may not curb the range of viewpoints allowed: "Discrimination against [private] speech because of its message is presumed to be unconstitutional."[36]

Viewpoint discrimination can have pernicious consequences for both speaker and audience. The most severe is the potential death of an idea if a viewpoint is suppressed without having been expressed, considered, or debated.[37] The speaker is denied all opportunity for self-expression and the right to contribute to and influence debate. The listener's autonomy is also compromised because she must make decisions, be they about pregnancy or voting, without full and accurate information.[38] Even if an idea is not banned completely, its par-

[32] The government may impose content-neutral restrictions known as time, place, and manner regulations if "they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information." Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[33] *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). In fact, this rule is frequently broken, see *infra* notes 242–45 and accompanying text (listing exceptions to ban on viewpoint discrimination).

[34] As discussed in Part II.C, speech by private speakers on government property is actually a form of mixed speech. *See infra* notes 103–07 and accompanying text. The existence of a government component to this speech explains why content regulations are permitted in public fora when they would be unconstitutional on private property.

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

[36] *Id.* at 828. Under strict scrutiny, a viewpoint-based regulation is only acceptable if it is narrowly tailored to serve a compelling state interest. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991). Thus, in theory, viewpoint discriminatory regulations of private speakers may survive strict scrutiny. However, such regulations are in fact routinely invalidated. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 381, 395–96 (1992) (striking down as viewpoint discriminatory ban on bias-motivated—for example, racist, sexist, anti-Semitic—fighting words).

[37] *Simon & Schuster, Inc.*, 502 U.S. at 116; *see also* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198 (1983) (arguing that banning viewpoint excises specific message from public debate and mutilates thinking processes of community).

[38] *See* City of San Diego v. Roe, 543 U.S. 77, 82 (2004) ("The [free speech] interest at stake is as much the public's interest in receiving informed opinion as it is the [speaker's] own right to disseminate it."); *see also* Redish, *supra* note 28, at 618 (arguing that by ensuring free flow of information and opinions, free speech aids individuals in governing their own lives).

tial suppression can distort the marketplace of ideas in detrimental ways.[39]

The free speech clause's prohibition on viewpoint discrimination only makes sense, however, when the view to be protected is espoused by a private individual. Politicians are, after all, elected because they advocate particular viewpoints, and governments need to engage in viewpoint discrimination in order to act. "To govern, government has to say something . . . ."[40] It could not function otherwise.[41] Thus, the government may wage anti-smoking campaigns, make pro-war statements, and favor childbirth over abortion. Some commentators have even suggested that government speech is not just a necessary evil but a tool that can advance First Amendment values.[42] The government is allowed to discriminate based on viewpoint in its own speech in part because "it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."[43] As we shall see, one of the problems posed by mixed speech is the risk that the public will not spot government advocacy and will therefore fail to hold the government accountable for its viewpoint.[44]

B. Establishment Clause Values and Government Speech

The government's ability to say what it likes is not absolute. Although free speech commentators still debate the degree to which the government should be able to weigh in with its own viewpoint in the marketplace of ideas, especially on controversial topics like abortion,[45] the establishment clause of the U.S. Constitution unambiguously makes one controversial topic—religious truth—completely off-

[39] For example, critics of *Rust v. Sullivan*, 500 U.S. 173 (1991), argue that the Title X doctors' failure to inform women about abortion may lead these women to conclude it is not a legal option. *E.g.*, Dorothy E. Roberts, Rust v. Sullivan *and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 594, 600 (1993).

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

[41] *See* Bezanson & Buss, *supra* note 14, at 1380 ("Democratic governments must speak . . . . Speech is but one means that government must have at its disposal to conduct its affairs and to accomplish its ends."); Greene, *supra* note 14, at 8 ("It is hard to imagine government functioning without communicating.").

[42] As Greene points out, government can make distinctive contributions to public debate. Greene, *supra* note 14, at 8. For example, it can subsidize arts and science. *Id.* at 9. It can use its power of persuasion to alter social norms regarding race, smoking, and overeating. *Id.* at 10. Government can also check concentrations of private power. *Id.* at 11; *see also* John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1137 (2005) ("[G]overnment can and should make a positive difference in the world of ideas . . . .").

[43] Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000).

[44] *See infra* Part V.B.1.

[45] *Compare* Greene, *supra* note 14, at 4 (arguing that government should be able to fully participate in controversial debates provided that there are no concerns about

limits.[46] The establishment clause bars the government from endorsing religion and religious beliefs or otherwise commenting on religious truth.[47] Government may neither favor religion over nonreligion[48] nor favor one religion or sect over others.[49] Thus, the government may not declare Christianity, Judaism, Islam, or any other

monopoly, coercion, or ventriloquism), *with* Fee, *supra* note 42, at 1168 (arguing that government should remain neutral with respect to controversial issues).

[46] The establishment clause provides: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. Minor exceptions currently exist for ceremonial deism. According to the Supreme Court, certain religious pronouncements such as "In God We Trust," even if made by the government, do not violate the establishment clause because the religious content is de minimis and/or because the practice dates from the country's founding. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 30–31 (2004) (Rehnquist, J., concurring) (arguing that "under God" in Pledge of Allegiance is not prayer but merely public recognition of nation's religious history and character); Marsh v. Chambers, 463 U.S. 783, 791 (1983) ("[The nation's] unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of [legislative prayer similar to that now challenged].").

[47] Why does the treatment differ for government involvement in religious controversy versus other controversies? First, religious belief is not just another idea in the marketplace of ideas. It is also constitutive of individual identity, in the way that race and gender are. Consequently, government endorsement of one religion (or religion over nonreligion) arguably impacts people in a way that endorsing a political position will not. Second, while it does not automatically follow that government endorsement of one religious viewpoint will lead to suppression of other religious viewpoints or civil strife, history suggests that it often does. *See* Lee v. Weisman, 505 U.S. 577, 591–92 (1992) ("[T]he lesson of history that was and is the inspiration for the Establishment Clause . . . [is] that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.").

[48] A few justices have construed the establishment clause more narrowly. Justices Thomas, Scalia, and Kennedy (and previously Chief Justice Rehnquist) believe that the establishment clause does not always bar government preference for religion over nonreligion. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring) ("[T]here is nothing unconstitutional in a State's favoring religion generally . . . ."). In an opinion joined by Justices Thomas and Kennedy, Justice Scalia went even further, arguing that a state preference for monotheistic religions does not necessarily violate the establishment clause. *See* McCreary County v. ACLU of Ky., 545 U.S. 844, 893–94 (2005) (Scalia, J., dissenting) (arguing that state can favor one religion over another in its public acknowledgments of single Creator).

[49] *E.g.*, *McCreary County*, 545 U.S. at 860 ("Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the 'understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens . . . .'") (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting)); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.").

religion the true path to salvation or the official religion of the land.[50] Nor may the government preach, pray, or proselytize.[51]

These prohibitions "protect the integrity of individual conscience in religious matters"[52] and "guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate."[53] The endorsement ban also avoids "send[ing] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[54]

Because the establishment clause is meant to prevent harms flowing from government involvement with religion, the identity of the speaker is critical: "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[55] Government religious speech is prohibited, but private religious speech is protected.

How establishment clause strictures play out in practice depends on the type of case. In general, cases involving religious speech may be seen as falling into two categories. In the "government speech" category, there is no dispute that the government is speaking or acting. These cases involve government displays of the Ten Commandments[56] or nativity scenes[57] where no one contests, for example,

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[50] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("[T]he Establishment Clause forbids an established church or anything approaching it.").

[51] *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 425 (1962) (stating that establishment clause "must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government").

[52] *McCreary County*, 545 U.S. at 876. Justice O'Connor wrote in concurrence:

> Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices. . . . In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs. Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs.

Id. at 883.

[53] *Id.* at 876 (majority opinion).

[54] *Lynch*, 465 U.S. at 688.

[55] Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

[56] *E.g.*, *McCreary County*, 545 U.S. at 850 (Ten Commandments on walls of two Kentucky courthouses); Van Orden v. Perry, 545 U.S. 677, 681 (2005) (Ten Commandments monument on Texas State Capitol grounds); Stone v. Graham, 449 U.S. 39, 39 (1980) (Ten Commandments posted in each public classroom in Kentucky).

[57] County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 578 (1989); *Lynch*, 465 U.S. at 670–71.

that the government is responsible for hanging a Ten Commandments plaque on a courtroom wall[58] or for mounting a nativity scene together with Santa Claus, reindeer, and a Christmas tree in front of the town hall.[59] Rather, the dispute centers on whether the messages conveyed by these displays rise to the level of endorsement of religion.[60] These cases typically do not raise mixed speech issues, as the speaker is unquestionably the government.[61]

The "religious message" cases, on the other hand, do raise mixed speech issues. In this category, the question is not whether the message endorses religion—it does—but whether the government is a speaker of the religious message. This issue arises when the government provides financial assistance to private religious groups through grants, vouchers,[62] or access to government resources.[63] Cases involving state-approved prayer at public school events[64] also fall into this category, as would those involving religious specialty license plates, where the government approves religious messages paid for and displayed by private citizens. In these cases, speech will likely be mixed and should be analyzed as such.

II
EXAMPLES OF MIXED SPEECH

Examples of mixed speech[65] abound, the claimed dichotomy between private speech and government speech notwithstanding. In

[58] *McCreary County*, 545 U.S. at 850–52.

[59] *Lynch*, 465 U.S. at 670–71.

[60] Under current doctrine, endorsement occurs if the government's predominant purpose was religious, *see, e.g.*, *McCreary County*, 545 U.S. at 874 ("[P]urpose needs to be taken seriously under the Establishment Clause . . . ."), or if a reasonable observer "aware of the history and context of the community and forum in which the religious display appears" would conclude that the government was endorsing religion, *id.* at 866 (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring)). *See also McCreary County*, 545 U.S. at 866 (in endorsement inquiry, reasonable observer is one "familiar with the history of the government's actions and competent to learn what history has to show").

[61] Of course, some cases may raise both questions: Is the government a speaker, and if so, does its message amount to endorsement?

[62] Zelman v. Simmons-Harris, 536 U.S. 639, 643–48, 653 (2002) (holding that including parochial schools in Ohio school voucher program does not violate establishment clause).

[63] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 822–23, 837–46 (1995) (finding that university payments to contractors for printing costs of student newspaper with Christian editorial viewpoint do not violate establishment clause).

[64] *E.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000) (student-led prayer at school sporting events); Lee v. Weisman, 505 U.S. 577, 580–81 (1992) (clergy-led nonsectarian prayer at graduation); Wallace v. Jaffree, 472 U.S. 38, 40 (1985) (private moment of silence or prayer at start of school day).

[65] I use this term to describe messages with both private and government speakers. The term "mixed speech" has appeared before in other contexts. It has been used to

free speech jurisprudence, lower courts deciding specialty license plate cases have for the first time expressly identified and attempted to address mixed speech.[66] Moreover, the Supreme Court's establishment clause jurisprudence implicitly recognizes the possibility of simultaneous private and government speakers in certain endorsement cases.[67] Finally, although the Supreme Court has never explicitly recognized mixed speech, many of its most controversial free speech and endorsement cases have involved mixed speech.[68] This Part examines all these different types of mixed speech.

A. The Recognition of Mixed Speech in Specialty License Plate Cases

Messages on specialty license plates are a paradigmatic example of speech with both private and governmental speakers. Specialty license plate programs became popular after Florida issued a plate commemorating the space shuttle Challenger in 1987.[69] Unlike vanity license plates, where a single automobile owner personalizes the arrangement of letters and numbers on her plate, specialty license plates deviate from standard plates by including a specialized design and slogan that can generally be purchased by any driver.[70] For

describe activities that are considered a combination of conduct and speech, also known as expressive conduct. *E.g.*, Commonwealth v. Provost, 636 N.E.2d 1312, 1315 (Mass. 1994). Speech by public employees that raises both private concerns and matters of public interest has also been called "mixed speech." *E.g.*, Salge v. Edna Indep. Sch. Dist., 411 F.3d 178, 186 (5th Cir. 2005); Farhat v. Jopke, 370 F.3d 580, 590 (6th Cir. 2004). In the public employee cases, the term "mixed speech" generally denotes the private and public nature of the content as opposed to the existence of private and governmental speakers. But as will be discussed later, these cases may also involve mixed speech as I use this term, because a public employee can speak in both her capacity as a government representative and as a private citizen. *See infra* notes 108–12 and accompanying text (noting that public employee's speech may be mixed).

66 *See infra* Part II.A. Courts deciding specialty license plate cases have also used the term "hybrid" speech. *E.g.*, Women's Res. Network v. Gourley, 305 F. Supp. 2d 1145, 1161 (E.D. Cal. 2004) (quoting *Sons of Confederate Veterans III*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc)). This term has also been used to describe speech that has both commercial and noncommercial aspects. *E.g.*, Oxycal Labs., Inc. v. Jeffers, 909 F. Supp. 719, 724 (S.D. Cal. 1995).

67 *See infra* Part II.B.

68 *See infra* Part II.C.

69 Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 424 (2001).

70 A few plates, such as military plates, are not universally available. Virginia, for example, offers three dozen military plates, all of which are reserved for former or current military personnel and require some proof of service. *See* Va. Dep't of Motor Vehicles, License Plate Purchase, http://www.dmv.virginia.gov/dmvnet/plate_purchase/select_plate.asp (select "Military" link under "Select a plate type"; then select any military plate, such as "Army," in scroll-down window; then select "Plate Fees and Requirements" under image of selected military plate) (last visited Mar. 19, 2008).

example, instead of the standard plate featuring "Florida" on top, "Sunshine State" on the bottom,[71] and images of oranges and Florida in the background, the Challenger specialty plate has "Florida" on top, "Challenger Columbia" on the bottom, and an illustration of the space shuttle. Twenty years after the Challenger plates were issued, almost all states now issue some specialty license plates. Though the number of plates available depends on the state—Rhode Island offers only two while Maryland offers over five hundred—programs with at least one hundred choices are not uncommon.[72]

Though diverse, most programs require the state's legislature to approve each new plate. To ensure their financial feasibility, most states charge more for specialty license plates than for standard plates,[73] and new specialty plates are generally not issued without a commitment from a certain number of buyers.[74] Millions of drivers have proven willing to pay the extra fee.[75] Specialty license plate programs seem to be a win-win situation. They allow individuals to support a particular group or cause, and they help states raise millions of dollars.[76]

Their popularity is not without controversy; decisions regarding the issuance of plates have led to numerous First Amendment law-

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[71] Recent plates replace "Florida" with "myflorida.com," the state's official website. License Plates of Florida (United States), http://www.worldlicenceplates.com/usa/US_FLXX.html (last visited Mar. 19, 2008).

[72] States that offer at least one hundred specialty license plates include Alabama, Colorado, Florida, Georgia, Louisiana, Maryland, Missouri, Montana, New York, North Carolina, Oklahoma, Pennsylvania, Texas, and Virginia. States with at least fifty plates include Arkansas, Connecticut, Delaware, Indiana, Nevada, Ohio, South Carolina, and Tennessee.

[73] Florida's Challenger plate, for example, costs an extra $25 per year, plus fees. Fla. Dep't of Highway Safety & Motor Vehicles, Challenger/Columbia, http://www.flhsmv.gov/dmv/specialtytags/miscellaneous/challenger_columbia.html (last visited April 16, 2008).

[74] Florida requires a $60,000 application fee and survey evidence that at least 30,000 drivers would be interested in the new plate. FLA. DEP'T OF MOTOR VEHICLES, DIV. OF MOTOR VEHICLES, PROCEDURE RS-20, CREATION OF A NEW SPECIALTY LICENSE PLATE, at RS-20-02 to -03 (1996), *available at* http://casey.hsmv.state.fl.us/Intranet/dmv/Manuals/DMVProcedures/BTR/RS/RS-20.pdf (on file with the New York University Law Review); *see also infra* notes 195–97 and accompanying text (describing Tennessee specialty license plate program).

[75] In Florida alone, well over a million people had specialty license plates in 2005. *See* 2005 Specialty Plate Rankings, http://www.hsmv.state.fl.us/specialtytags/tagsales2005.pdf (last visited Feb. 28, 2007) (listing total number of individuals with different Florida specialty plates).

[76] According to the Florida Department of Highway Safety and Motor Vehicles Revenue Report for July 2006 through June 2007, Florida earned over $33.4 million from its specialty license plate program for that period. STATE OF FLA., DEP'T OF HIGHWAY SAFETY AND MOTOR VEHICLES REVENUE REPORT, JULY 2006–JUNE 2007, at 14 (2007), http://www.flhsmv.gov/html/revpub/revpub_july06_june07.pdf. The Challenger plate alone raised $947,025. *Id.* at 13.

suits. One of the earliest such cases was also the first to raise the possibility that some speech may have both private and government speakers. In this lawsuit, the Sons of Confederate Veterans (SCV) sued the Commissioner of the Virginia Department of Motor Vehicles[77] after the state legislature authorized a SCV specialty plate but without the SCV logo, the Confederate flag.[78] Though it did not provide its reasons, the Virginia Legislature probably did not want the divisive image of the Confederate flag linked to the State.[79] The SCV argued that the plates represented private speech and that the singling out of its logo for exclusion amounted to viewpoint discrimination.[80] Virginia countered that the plates represented government speech and, therefore, the free speech clause did not apply.[81] The Fourth Circuit agreed with the SCV and found Virginia's restrictions unconstitutional.[82] The decision proved contentious, and a motion for rehearing en banc, which failed by just one vote, produced a flurry of concurring and dissenting opinions.[83] At least two judges suggested that speech need not be wholly private or wholly governmental. Judge Luttig, who concurred in the denial, wrote that despite earlier Supreme Court precedent indicating otherwise, certain speech, like specialty license plates, might involve both a private individual and the government.[84] Judge Gregory, who voted for rehearing, observed that "license plate programs like the one implemented here really have elements of both private *and* government speech."[85]

Mixed speech was again recognized in a Fourth Circuit case about another controversial specialty plate practice: providing pro-life spe-

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[77] *Sons of Confederate Veterans II*, 288 F.3d 610 (4th Cir. 2002). This was the second case addressing the issue. In *Sons of Confederate Veterans, Inc. v. Glendening* (*Sons of Confederate Veterans I*), 954 F. Supp. 1099 (D. Md. 1997), Maryland had issued SCV plates with the Confederate flag but recalled them after receiving complaints. *Id.* at 1100. The district court, assuming that the plates represented private speech, held that the recall amounted to unconstitutional viewpoint discrimination. *Id.* at 1102–05.

[78] *Sons of Confederate Veterans II*, 288 F.3d at 613.

[79] As the Fourth Circuit acknowledged, for some the Confederate flag represents "pride in Southern heritage and ideals of independence," *id.* at 624, and for others it is "a symbol of racial separation and oppression," *id.* at 624 n.12 (citing United States v. Blanding, 250 F.3d 858, 861 (4th Cir. 2001)).

[80] *Id.* at 619, 622. The Legislature had not restricted logos on other plates it had authorized. *Id.* at 613. *See also Sons of Confederate Veterans III*, 305 F.3d 241, 242 (4th Cir. 2002) (denial of rehearing en banc) (reaffirming that logo restriction was violation of First Amendment).

[81] *Sons of Confederate Veterans II*, 288 F.3d at 615.

[82] *Id.* at 626–27 (holding that logo restriction was unconstitutional viewpoint discrimination).

[83] *See Sons of Confederate Veterans III*, 305 F.3d at 242 (Neimeyer, J., dissenting from denial of rehearing en banc) (noting 6-5 split in court's decision).

[84] *Id.* at 244–45 (Luttig, J., respecting denial).

[85] *Id.* at 252 (Gregory, J., dissenting).

cialty license plates but refusing to issue pro-choice ones.[86] In *Planned Parenthood of South Carolina, Inc. v. Rose*,[87] Planned Parenthood argued that this viewpoint discrimination violated the free speech clause, while South Carolina insisted that the pro-life plates were government speech. Consistent with its prior SCV decision, the Fourth Circuit held that South Carolina's actions were unconstitutional. Rather than categorizing South Carolina's specialty plates as pure government speech or pure private speech, Judge Michael concluded that the plates "embod[y] a mixture of private and government speech."[88] Nonetheless, he found that the free speech prohibition against viewpoint discrimination should apply.[89]

By contrast, the Sixth Circuit recently held that Tennessee could discriminate based on viewpoint because the pro-life plates embodied government speech[90] (citing the 2006 Supreme Court decision of *Johanns v. Livestock Marketing Ass'n*[91] for the proposition that "when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes"[92]). Given the mixed nature of the speech on specialty license plates, it is not surprising that this issue has triggered both a circuit split about whether the plates should be characterized as private or governmental and the first explicit acknowledgment that speech could be both. But even though mixed speech can be found in a variety of

[86] Several courts have avoided resolving this issue on the merits by holding that the plaintiffs lacked standing, *e.g.*, Women's Emergency Network v. Bush, 323 F.3d 937, 949 (11th Cir. 2003), or by concluding that the Tax Injunction Act bars federal court adjudication, *e.g.*, Hill v. Kemp, 478 F.3d 1236, 1239 (10th Cir. 2007); Henderson v. Stalder, 407 F.3d 351, 354–55 (5th Cir. 2005). Pro-life groups have also sued states that refused to issue "Choose Life" plates even though none of those states created pro-choice plates. *E.g.*, Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 971–73 (9th Cir. 2008); Children First Found., Inc. v. Martinez, 169 F. App'x 637, 639 (2d Cir. 2006); Choose Life Ill., Inc. v. White, No. 04 C 4316, 2007 WL 178455, at *3 (N.D. Ill. Jan. 19, 2007); *see also* sources cited *infra* note 218 (listing states with pro-life but no pro-choice plates).

[87] 361 F.3d 786 (4th Cir. 2004).

[88] *Id.* at 793. Although concurring only in the judgment announced by Judge Michael, the other two members of the panel, Judges Luttig and Gregory, did seem to approve of this position, consistent with their views from *Sons of Confederate Veterans III*, *supra* notes 84–85 and accompanying text. Judge Luttig wrote that "speech can indeed be hybrid in character," 361 F.3d at 800, and Judge Gregory noted that the license plate programs fall into the nebulous area between private and government speech because they have elements of both, *id.* at 801 (citing *Sons of Confederate Veterans III*, 305 F.3d at 251–52 (Gregory, J., dissenting)).

[89] *Id.* at 794.

[90] ACLU of Tenn. v. Bredesen, 441 F.3d 370, 375 (6th Cir. 2006).

[91] 544 U.S. 550 (2005).

[92] *Bredesen*, 441 F.3d at 375 (citing Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–67 (2005)).

contexts, its recognition has not yet extended much beyond the specialty license plate context.

B. "Religious Message" Endorsement Cases as Mixed Speech Cases

Despite the Supreme Court's claim that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect,"[93] the Court does not generally frame the issue in "religious message" endorsement cases[94] as whether to categorize speech as private or governmental, as is commonly done with free speech cases.[95] Instead, the question is usually presented as whether the incontrovertibly religious message should be attributed to the government. For example, in the Court's most recent "religious message" endorsement case,[96] involving a school's consent to student prayers at the start of school football games, the majority held that the student invocations violated the establishment clause because they were "stamped with [the] school's seal of approval" rather than because they were government speech.[97]

This formulation does not insist that speech be either wholly private or wholly governmental. Instead, by focusing on the question of attribution, it implicitly contemplates the possibility that more than one speaker may be involved. A religious message spoken by a private individual but endorsed by the government is speech that is both private and governmental. Thus, while it does not do so explicitly or consistently, the Court's establishment clause jurisprudence acknowledges that both private individuals and the government can speak simultaneously—something the current free speech jurisprudence, with its "either-or" approach, generally does not.

C. The Ubiquity of Mixed Speech

Whether recognized as such or not, mixed speech is everywhere. Speech by private individuals subsidized by the government is one

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[93] Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

[94] *See supra* notes 61–64 and accompanying text (describing "religious message" endorsement cases).

[95] *See, e.g.*, *Johanns*, 544 U.S. at 560–62 (holding that challenged advertisements were government speech); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 540–44 (2001) (holding that challenged law restricted private speech, as opposed to challenged law in Rust v. Sullivan, 500 U.S. 173, 194–99 (1991), which restricted government speech); *see also supra* Part II.A (discussing specialty license plate cases).

[96] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

[97] *Id.* at 308.

prominent example.[98] Who should be allowed to control content regularly becomes a contested issue when a private speaker accepts government money. Otherwise private speech by independent social services providers becomes mixed—and potentially subject to government limitations—when a government subsidy is added.[99] Mixed speech likewise results when the literal speaker is the artist but the government bestows a grant.[100] Similarly, religious speech in private schools, such as prayers led by parochial school teachers, becomes mixed speech when the schools accept government vouchers[101]—although the Supreme Court erased the government component by characterizing the funding as private.[102]

Speech by private individuals on government property is another common example of mixed speech. Cases involving this situation have included private advertisements on public transportation,[103] private solicitation in a government charity drive,[104] and student articles in public school newspapers.[105] The speech can be considered mixed because, although the literal speaker is a private entity, access to government property functions as a subsidy for that speaker. In addition, having the speech on government property raises attribution ques-

98 *See, e.g.*, *Velazquez*, 531 U.S. at 548–49 (striking down speech restriction attached to Legal Services Corporation funding); NEA v. Finley, 524 U.S. 569, 573–76, 590 (1998) (upholding decency regulation in public arts funding); *Rust*, 500 U.S. at 193–95, 203 (upholding restriction on abortion counseling attached to Title X funding).

99 In *Velazquez*, the government wanted to bar challenges to its welfare law brought by government-funded lawyers. 531 U.S. at 536–37. In *Rust*, the government wanted to forbid abortion counseling by government-funded doctors. 500 U.S. at 177–81.

100 In *Finley*, the question was whether the government could censor the indecent content of artists by refusing to fund it. 524 U.S. at 572–73. The Court dodged the question. *See infra* notes 459–65 and accompanying text (describing how *Finley* Court failed to resolve censorship question by describing decency regulations on arts grants as hortatory).

101 Under *Mitchell v. Helms*, religious institutions may use government subsidies for religious purposes: So long as the governmental aid is not itself "unsuitable for use in the public schools because of religious content," and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern. 530 U.S. 793, 820–25 (2000) (plurality opinion) (internal quotation marks omitted); *see infra* notes 143–44 and accompanying text (discussing *Zelman v. Simmons-Harris*).

102 *Mitchell*, 530 U.S. at 809–14, 829–35. The Court held that the funds really came from the private individuals who genuinely and independently chose to direct their government-issued vouchers to religious institutions. *Id.* at 830–31.

103 Lehman v. City of Shaker Heights, 418 U.S. 298, 298, 304 (1974) (rejecting First Amendment challenge to city's denial of political advertising on public transit system).

104 Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 790 (1985) (holding that government does not violate First Amendment when it limits participation in charity drive aimed at federal employees).

105 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73, 276 (1988) (holding that school's editorial control over student newspaper did not violate students' First Amendment rights).

tions.[106] While courts have not analyzed these cases as mixed speech, forum doctrine implicitly recognizes that speech in a government forum is actually mixed speech.[107] Due to the government component, forum doctrine allows the state to regulate subject matter according to more permissive standards than the strict scrutiny triggered by subject matter limits on private speech. At the same time, due to the private component of speech in a forum, forum doctrine prohibits viewpoint discrimination.

Finally, speech by government employees is often mixed. Where the state has disciplined a public employee for her speech, the threshold question in evaluating the constitutionality of the state's action is whether the speech concerned a personal matter or a matter of public interest.[108] In the former scenario, the employee is deemed to be speaking as a government worker and therefore receives no free speech protection.[109] In the latter, the employee is deemed to be speaking as a private citizen and is therefore eligible for free speech protection.[110] While the cases focus on the content of the speech, the content reflects the private or government role the speaker plays. Courts have recognized that a public employee's speech may be mixed—that is, it may concern matters of both private and public import, spoken by the employee in both her government-worker and private-citizen capacities.[111] Unfortunately, the Supreme Court's

106 For example, even if privately funded, a crèche on the main staircase of a county courthouse can violate the establishment clause. *See* County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 598–602 (1989) (holding that placement of crèche in courthouse had effect of patently endorsing Christianity).

107 *See infra* note 146 (describing forum doctrine).

108 Rankin v. McPherson, 483 U.S. 378, 384–85 (1987).

109 *See, e.g.*, City of San Diego v. Roe, 543 U.S. 77, 82–85 (2004) (holding that no free speech protection exists where employee was speaking on matters of personal interest); Connick v. Myers, 461 U.S. 138, 146 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.").

110 By definition, the public has an interest in hearing about "matters of public interest." For this reason, public employees have First Amendment protection when speaking on such subjects. *See, e.g.*, *Rankin*, 483 U.S. at 379–80, 384–87, 392 (holding that clerical worker cannot be fired for political remark criticizing current President); Pickering v. Bd. of Educ., 391 U.S. 563, 566, 573–75 (1968) (holding that teacher cannot be fired for letter to editor criticizing school's financial decisions). Once it is determined that an employee is speaking as a private citizen on a matter of public interest, the next step is to balance the free speech interest in disseminating that information against the state's interest as an employer in promoting the efficiency of the public services it performs through its employees. *Rankin*, 483 U.S. at 384, 388; *see also Pickering*, 391 U.S. at 568 (articulating need to balance such interests).

111 For example, in *Connick*, the Court held that the point of an employee's questionnaire was to gather ammunition for her employment dispute—a personal matter. Nevertheless, a question about pressure to work on political campaigns was held to touch upon

most recent decision retreats from that insight, holding that anything said by a government employee while fulfilling official duties is per se government speech.[112]

Given its pervasiveness, it is surprising that mixed speech is so rarely identified as such and so often shoehorned into the category of purely private speech or purely government speech.[113] Part of the reason may be that no clear understanding of mixed speech exists. The next Part helps define mixed speech by suggesting five specific factors to consider in identifying the speaker or speakers of a particular message.

III
IDENTIFYING MIXED SPEECH

While we may intuitively accept that the examples described in Part II have both private and government elements, the contours of mixed speech need to be specified. After all, in theory, almost all speech could be considered mixed if the government component is defined broadly enough.[114] But just as not every action influenced in some way by the government amounts to state action,[115] not every

matters of public concern. 461 U.S. at 148–49. Lower courts have shown more willingness to explicitly recognize the potentially mixed nature of employee speech. *See, e.g.*, Modica v. Taylor, 465 F.3d 174, 180 (5th Cir. 2006) (classifying employee's speech as "mixed").

[112] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."). In *Garcetti*, a Deputy District Attorney was disciplined for writing a memorandum pointing out that an affidavit used to obtain a critical search warrant contained material misrepresentations. *Id.* at 413–15. The dissents argued that government misconduct, even if raised pursuant to official duties, can be a matter of public concern. *E.g.*, *id.* at 433 (Souter, J., dissenting).

[113] Other examples of mixed speech are easy to find and include an invocation by a member of the clergy invited to a high school graduation, postage stamps on private letters, vanity license plates, and government ad campaigns that feature celebrity spokespeople.

[114] For example, while a private newspaper's rejection of a letter to the editor appears to be a private speech act, the paper's authority to decide what to print depends on laws regulating private property. In other words, the state has created the legal framework that makes possible the newspaper's decision, raising the question of whether the newspaper's speech act actually has a government component. Similar questions arise regarding state action. Indeed, many private acts are made possible by background conditions created by the state. In all such cases, the state invariably has some influence. *See generally* Cass R. Sunstein, *State Action Is Always Present*, 3 CHI. J. INT'L L. 465 (2002) (arguing that state always plays role, even in seemingly private interactions). Whether that influence is great enough such that the actions should be at least partially attributed to the state is a separate question.

[115] *See* Barbara Rook Synder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1057–63 (1990) (state action inquiry is not whether state has acted but whether harm should be attributed to state).

speech act influenced in some way by the government compels the conclusion that the government is a speaker. This Part suggests five factors that should be considered in deciding who is speaking and then applies those factors to the example of specialty license plates.

The Supreme Court has not developed a coherent theory of what qualifies as government or private speech in either the free speech or establishment clause context.[116] And it has not yet reviewed a case where the classification was relevant for both clauses.[117] Nor have commentators analyzed both clauses simultaneously. Some federal appellate courts have devised their own tests to determine whether speech is private or government speech for the purpose of the free speech clause.[118]

Determining who is a speaker of a message can be a challenge. Who is speaking when a principal approves a student's prayer at a school-sponsored event? Or when a letter is dictated by one person, paid for by another, and signed by a third? The reality is that speech is too complicated to be reduced to a single factor. In addition, a single message may have more than one speaker.

I propose five interrelated factors to help classify speech as private, governmental, or mixed for free speech and establishment clause purposes.

(1) Who is the literal speaker?

(2) Who controls the message?

(3) Who pays for the message?

(4) What is the context of the speech (particularly the speech goals of the program in which the speech appears)?

(5) To whom would a reasonable person attribute the speech?

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116 *See, e.g.*, *Sons of Confederate Veterans II*, 288 F.3d 610, 618 (4th Cir. 2002) ("No clear standard has yet been enunciated in our circuit or by the Supreme Court for determining when the government is 'speaking' and thus able to draw viewpoint-based distinctions, and when it is regulating private speech and thus unable to do so.").

117 While *Rosenberger v. Rector and Visitors of University of Virginia* implicated both clauses, 515 U.S. 819, 823, 838–40 (1995), its analysis of whether certain speech could be attributed to the government was relevant only for the establishment clause analysis. *Id.* at 841–42.

118 Most commonly, they ask who is the literal speaker, who exercises editorial control, what is the purpose of the program, and who bears ultimate responsibility. *See, e.g.*, Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 792–93 (4th Cir. 2004); Wells v. City & County of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001); Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093–94 (8th Cir. 2000). As noted above, *see supra* notes 90–92 and accompanying text, the Sixth Circuit has focused exclusively on editorial control. *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 375–76 (6th Cir. 2006) (focusing on government's ability to set overall message and approve every word disseminated).

Speech is easily categorized as purely private or purely governmental when all five factors point in one direction.[119] For example, a White House spokesperson's announcement of the administration's policy at a press conference is clearly government speech. The literal speaker is a government employee, and the government controls the message and pays for its dissemination at a government press conference. A reasonable observer will conclude that the government is speaking. At the other end of the spectrum, a reasonable person seeing a bumper sticker on someone's car will view it as private speech, since the literal speaker is the car owner, who chose and paid for the message and affixed the sticker on her private car.

Disputes arise when the five factors do not align. These are the "mixed speech" cases with which the Supreme Court has not yet fully come to terms. Speech may be mixed when (1) one factor points to a private speaker and another to a government speaker, such as when the literal speaker is private but the government funds the message; (2) a single factor suggests that both the government and private individuals should be considered speakers, such as when the government and a private individual share the costs of the speech or control over its content; or (3) some combination thereof. While the first four factors inform the last, there is not a hierarchy among the factors, nor is any one factor necessarily dispositive. In other words, unless all factors point exclusively to private speech or exclusively to government speech, the speech is mixed. This definition cuts a wide swath and will significantly change First Amendment jurisprudence. However, it is a much-needed change.

A. Five Factors to Consider in Deciding Who Is Speaking

The five factors explored below should help determine who is a speaker for First Amendment purposes: the individual, the government, or both. These factors adapt the test devised by the lower courts[120] and incorporate concerns raised by establishment clause jurisprudence. In particular, consideration of these factors will further the values underlying the free speech and establishment clauses.[121] Consequently, each factor has played a crucial role in Supreme Court decisions.

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[119] Because a message can have more than one speaker, the individual factors are no more binary than the overall determination. For example, it is not necessarily true that *either* the government *or* private individuals control a message; rather, both can.

[120] *See supra* note 118 (describing lower court tests).

[121] *See supra* Part I.A–B (describing free speech values and establishment clause values).

1. Who Is the Literal Speaker?

It seems fairly obvious that the identity of the literal speaker informs who is speaking for First Amendment purposes. Additionally, this factor is clearly central to the values underlying the First Amendment. In the establishment clause context, for example, if the government is the literal speaker of a religious message, the natural conclusion is that the government endorses the message, thus making those who share the belief feel like insiders and those who do not like outsiders.[122] For free speech, the right to self-expression would be substantially abridged without the right to be a literal speaker. By the same token, compelling someone to become the literal speaker of a message against her will also violates self-expressive autonomy, as it "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[123]

At first glance, identifying the literal speaker appears to be an easy task: The literal speaker is the person who said or wrote the speech in question. When a private individual speaks, she is the literal speaker. When the Department of Justice issues a report on agency letterhead, the government is the literal speaker. However, confusion can arise for at least two reasons. First, even where the literal speaker is readily identified, it may not be clear whether the speaker is acting as a representative (as when a government employee speaks on behalf of the government)[124] or on her own behalf.[125] The same uncertainty may arise, for example, when the government funds a private speaker.[126] Second, it may be difficult to identify a "literal speaker" when written speech is not obviously traceable to a speaker. For example, a sign may be difficult to assign to a particular speaker. In

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122 *See supra* Part I.B (discussing establishment clause's bar on government endorsement of religion).

123 W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

124 To be clear, the implication is that the government can qualify as the literal speaker when a private individual speaks, as long as the individual is acting as a government representative.

125 *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 572–75 (1968) (treating government employee's speech on matter of public policy as private citizen's speech entitled to First Amendment protection).

126 An example is speech by private social services providers subsidized by the government. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 540–44, 548–49 (2001) (describing speech by subsidized doctors providing Title X services in *Rust v. Sullivan*, 500 U.S. 173 (1991), as government speech but holding that speech by subsidized lawyers providing legal services is private speech). *See also* Post, *supra* note 6, at 152–58 (arguing that subsidizing speakers renders uncertain whether speaker is independent participant or instrument of government).

such cases, the literal speaker might be considered the one who owns the sign or the property on which the message is displayed.[127]

Because the values underlying the First Amendment cannot be disentangled from the identity of the literal speaker, this factor has often been dispositive in Supreme Court decisions. In cases involving compelled speech, once the court determines that the literal speaker is a private citizen, free speech protections attach, regardless of other considerations. Specifically, the Court has held that the government cannot force a private speaker to become the literal speaker of a government message. The government, therefore, cannot require school children to pledge allegiance to the American flag[128] or compel a couple to bear a standard license plate with the state's "Live Free or Die" motto.[129] By the same token, if the literal speaker in a "religious message" endorsement case is the government, an establishment clause violation has occurred.[130]

2. Who Controls the Message?

In *ACLU of Tennessee v. Bredesen*,[131] the Sixth Circuit held that control over the message, without more, determined the speaker for free speech purposes.[132] That view, although failing to capture the other relevant factors necessary to appropriately classify speech, is not entirely unreasonable and helps to further First Amendment values. The right to speak would hardly advance personal autonomy if one could not control the content of one's message, nor would it be likely to create a rich marketplace of ideas. Indeed, the paradigmatic free speech violation occurs when the government tries to control the acceptable content of speech. As a corollary, it is reasonable to conclude that the government endorses a religious message that it controls.

Who should be allowed to control the message is often the disputed issue in free speech cases.[133] Other times, the ability to control

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127 Of course, this factor may overlap significantly with the other four, making separate consideration difficult or redundant.

128 *Barnette*, 319 U.S. at 642.

129 Wooley v. Maynard, 430 U.S. 705, 715–17 (1977) (holding that New Hampshire could not require plaintiffs to "use their private property as a 'mobile billboard' for the State's ideological message").

130 *See, e.g.*, Sch. Dist. v. Schempp, 374 U.S. 203, 205 (1963) (holding that teacher-led Bible reading each morning violated establishment clause).

131 441 F.3d 370 (6th Cir. 2006).

132 *Id.* at 375–76.

133 *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 413 (2006) (considering whether state may discipline Deputy District Attorney for questioning warrant approved by his office); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 536–37 (2001) (considering whether Congress may limit claims brought by federally funded attorneys); NEA v. Finley, 524 U.S.

the message has proven dispositive, underscoring the importance of control to free speech and establishment clause values. For instance, in its most recent compelled-subsidy case, the Supreme Court held that the speech at issue was government speech because the government determined the content of the message and retained the power to approve every word disseminated at its behest.[134] Similarly, in two prominent establishment clause cases involving religion in public schools, the Court's findings that the schools were able to control the content of prayers led by clergy[135] and students,[136] respectively, influenced the conclusion that the religious speech in question was attributable to the government.[137]

3. Who Funds the Speech?

Who pays for a message is also a key factor in classifying speech; the willingness to spend money on a particular message signals commitment to and endorsement of that message. Certainly establishment clause jurisprudence has long recognized that financial support readily translates into endorsement.[138] At the very least, it is a logical default position that speech belongs to whoever pays for it.

This default position runs through Supreme Court decisions. First Amendment law would be much less complicated absent the modern regulatory state, where the government subsidizes all kinds of speech. Without a government subsidy to a private speaker, there

569, 572–73 (1998) (considering whether Congress may deny arts grant based on indecent content of artwork); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669 (1998) (considering whether federally funded TV station may exclude third-party candidate from televised debate); Rust v. Sullivan, 500 U.S. 173, 177–81 (1991) (considering whether government may ban abortion counseling by federally funded doctors).

134 Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–62 (2005) (finding privately subsidized beef advertisements to be government speech).

135 Lee v. Weisman, 505 U.S. 577, 588 (1992). The Court held that the school principal's power to authorize prayer at graduation, to choose the clergyman, and to insist on nonsectarian content "creat[ed] a state-sponsored and state-directed religious exercise." *Id.* at 587–88.

136 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305–10 (2000) (holding that student-led, student-initiated prayer before school football games was not private speech, in part because school officials were involved in choosing speaker and shaping religious message).

137 Both *Lee* and *Santa Fe Independent School District* divided the analysis into two questions. The first was whether the religious speech of the private individual was attributable to the State and thus subject to the establishment clause, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 305–09; *Lee*, 505 U.S. at 587–88, and the second was whether the speech in fact violated the establishment clause, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309–10; *Lee*, 505 U.S. at 590–93. In both cases, the Court held that the state effectively coerced students into participating in a religious exercise. *Santa Fe Indep. Sch. Dist*., 530 U.S. at 310–13; *Lee*, 505 U.S. at 598.

138 *See infra* notes 143–45 and accompanying text (discussing funding and establishment clause).

usually would be no question that the speech at issue is private. But for the government subsidy, restrictions on speech would constitute government regulation of private speech as opposed to government control over its own speech and programs. Thus, the funding of Title X doctors transformed their medical counsel into government speech, according to *Rust v. Sullivan*.[139] Similarly, the subsidization of legal aid lawyers raised the possibility that their speech was the government's in *Legal Services Corp. v. Velazquez*.[140] And while bankrolling artists' works in *National Endowment for the Arts v. Finley* did not convert these pieces into government speech, it did justify much greater control over them.[141] The Court has also recognized that private subsidization of speech implicates private speech rights in compelled-subsidy cases.[142] If paying for speech raised no free speech interests, there would be no free speech claim in these cases.

Who pays for speech has also been pivotal in endorsement cases. Even when the government was not the literal speaker, religious speech directly financed by the government has been treated like government speech subject to establishment clause restrictions. Thus, the government cannot give money directly to a parochial school for its morning prayers. It can, however, give a voucher to an individual who then steers it to a parochial school, even if the school uses it to fund morning prayers.[143] According to the Supreme Court, as long as the individual's choice to direct her voucher to a religious school is "genuine and independent," the private individual is actually the one who pays for the dissemination of the school's religious messages, and the

139 *See* 500 U.S. 173, 198–99 (1991) (holding that speech of doctors voluntarily employed for Title X project may be regulated and limited by government within context of project).

140 531 U.S. 533, 541–42 (2001) (considering whether legal services program was government speech).

141 524 U.S. 569, 589–90 (1998) (upholding decency restrictions on public arts funding).

142 *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562–67 (2005) (discussing role of private funding in respondents' compelled-subsidy claim); United States v. United Foods, Inc., 533 U.S. 405, 415–16 (2001) (barring government from compelling private subsidies for mushroom ad campaign); Keller v. State Bar, 496 U.S. 1, 15–16 (1990) (finding that attorney may not be compelled to subsidize ideological or political causes that fall outside bar association's professional activities); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977) (holding that school teacher may not be compelled to contribute to ideological cause not germane to union's duties as collective bargaining representative).

143 Zelman v. Simmons-Harris, 536 U.S. 639, 654–55 (2002); *see also id.* at 711 (Souter, J., dissenting) ("[T]he majority makes no pretense that substantial amounts of tax money are not systematically underwriting religious practice and indoctrination."); *id.* at 687 ("Public tax money [from vouchers] will pay . . . for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools . . . .").

speech is not attributable to the government.[144] As Justice O'Connor analogized, the voucher is "less like a direct subsidy" from the government and "more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution."[145] The accuracy of this comparison aside, the importance accorded to the question of who funds religious speech is evident throughout the Supreme Court's First Amendment jurisprudence.

4. What Is the Program's Speech Goal?

Another major factor in determining who should be considered speaking for First Amendment purposes is context. Context is obviously a rich and diverse category, but one variable comes up repeatedly: the speech goal of the government program (if any) in which the speech appears.

Different government programs have different speech goals. One speech goal may be to advance the government's viewpoint on an issue. Here, the government acts as a speaker of the particular message. A public advertising campaign against smoking or the promotion of childbirth over abortion are two examples. Another speech goal may be to create a forum for private viewpoints on a particular subject or assortment of subjects.[146] Here, the government acts less like a speaker and more like a host. A third possibility exists where the government's speech goal is not to promote one specific viewpoint or to encourage diverse private viewpoints but to allow a limited, government-approved range of viewpoints. Here, the government acts less like an author or host and more like an editor or moderator exercising control over the agenda. Frequently, the government wishes to exclude speech that is indecent, controversial, or derogatory. Perhaps the best known example is the National Endowment for the

144 *Id.* at 652–53 (majority opinion) ("The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.").

145 Mitchell v. Helms, 530 U.S. 793, 841 (2000) (O'Connor, J., concurring).

146 The Court generally presumes that the goal behind programs creating a forum open to the public is to promote diverse viewpoints. Under existing forum analysis, any content restriction in a traditional public or designated public forum must pass strict scrutiny. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983). By contrast, in a limited public or nonpublic forum, provided that the restriction is viewpoint neutral and reasonably related to the purpose of the forum, the government may limit speech to certain subjects, *see, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806–09 (1985) (direct services nonprofits), or to certain speakers, *see, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 842–43 (1995) (student groups).

Arts (NEA) patronage program, which approves funding for art that the NEA deems excellent and inoffensive.[147]

Under current free speech doctrine, speech made to advance a specific viewpoint (the first possibility) is generally treated as government speech, while speech made in the context of a government program to promote wide-ranging discussion (the second possibility) is generally treated as private speech.[148] It is the third possibility—speech made within the context of a government program to promote only certain views—that is the subject of considerable debate (and litigation).[149] So while the first type points to government speech and the second to private speech, the third, most contested, suggests mixed speech.

The Supreme Court has applied the same general guidelines to "religious message" endorsement cases.[150] If the government intends to advance a particular religious message, the resulting speech is

147 NEA guidelines direct the Chair to "ensure that 'artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.'" NEA v. Finley, 524 U.S. 569, 572 (1998) (quoting section 954(d)(1) of NEA's reauthorization bill, 20 U.S.C. § 954(d)(1) (2000)).

148 *See* Jacobs, *supra* note 3, at 1358–59 (noting that subsidized speech is treated more like government speech if government expression is primary purpose of program and is treated more like private speech if purpose is to create forum for private speech). The Court's determination of a government program's speech goals is not without controversy. The three most common criticisms are that the Court's characterizations of speech goals are (a) outcome-driven; (b) inconsistent; or (c) wrong. First, certain cases give the impression that the Court's decision about the speech goals follow from the Court's preference about the applicability of the First Amendment rather than from a fair description of the program. Second, the suspicion that decisions are outcome-driven is exacerbated when the Court concludes that highly comparable government programs have different speech goals. *See infra* note 411 and accompanying text (comparing *Rust*, which involved subsidized doctors, with *Velazquez*, which involved subsidized lawyers). Third, some commentators think that the speech goal of certain institutions, such as newspapers, libraries, and the arts, should always be deemed to be promoting a diversity of private viewpoints, regardless of what the government would like to do. *See, e.g.*, David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 717–47 (1992) (arguing for conception of public schools, the press, arts, and professional fiduciary counseling as "spheres of neutrality"); *see also* Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 295 (1992) (arguing that more places should be designated as traditional public fora).

149 *See* Jacobs, *supra* note 3, at 1360–63 (discussing "public sensibilities" fora). *Compare* Bezanson & Buss, *supra* note 14, at 1431 (advancing framework in which government speech doctrine only applies when government is expressing its own distinct message), *with* Norton, *supra* note 3, at 1338 (describing potential contexts in which government selection of messages is also speech act it is entitled to control).

150 Recall that in these cases, the speech clearly promotes religion, so the question is whether the religious speech is attributable to the government. *See supra* notes 61–64 and accompanying text.

treated as government speech subject to the establishment clause.[151] On the other hand, if the government speech goal is to establish a forum for diverse viewpoints, then facilitating private religious speakers does not make the speech governmental.[152] As a result, the speech generally does not implicate the establishment clause so long as nonreligious viewpoints are equally welcome and represented.[153] Indeed, a series of Supreme Court cases holds that once the government has created a forum for private speakers, it may not commit viewpoint discrimination by excluding religious speakers.[154] Arguably, if the government is constitutionally bound to allow all viewpoints in a forum, no viewpoint—be it an unpopular one the government would prefer to exclude or a religious one—should be attributable to the government.[155]

5. To Whom Would a Reasonable Person Attribute the Speech?

Who reasonably appears to be a speaker is the final relevant factor for First Amendment purposes. Indeed, the issue of whether a reasonable audience would attribute the contested speech to the government or to private individuals features prominently in endorsement cases. After all, certain harms the establishment clause seeks to prevent follow because people perceive the government as endorsing or favoring religion.[156]

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[151] Under the endorsement test, *see supra* note 47 and accompanying text, the government violates the establishment clause if its purpose is to advance religion. Accordingly, the government may not have the speech goal of advancing a religious message.

[152] *See* cases cited *infra* note 154. The Supreme Court has held that religious speech in a forum should be considered private even if subsidized by the government. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 842–43 (1995). In fact, under the five-factor analysis advanced in this Article, a state subsidy adds a governmental component, making the speech mixed.

[153] An additional caveat in the doctrine is that there must be no confusion about who is speaking—this wrinkle is addressed under the fifth factor, asking to whom a reasonable viewer would attribute the speech. *See infra* Part III.A.5.

[154] To subsidize all speech but religious speech would constitute viewpoint discrimination in violation of fundamental free speech principles. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 113–14, 120 (2001) (holding that school could not deny Christian club access to school facilities open to other student clubs); *Rosenberger*, 515 U.S. at 847–48 (holding that university could not deny subsidies to religious student publications when it subsidized secular student publications); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395–96 (1993) (holding that State could not grant after-hours access to school premises to secular groups but deny same to religious groups); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (same).

[155] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 762–63 (1995) (plurality opinion). The *Pinette* plurality would have adopted a per se rule that private speech in a public forum could never amount to endorsement, but the controlling concurrences did not go that far. *See infra* notes 161–62 and accompanying text.

[156] *See supra* notes 52–55 and accompanying text (discussing values underlying establishment clause).

In free speech cases, however, the Supreme Court has proved inconsistent. Although the Court has taken attribution into account when interests of speakers (be they private or government) are at stake,[157] it has unfortunately shown less concern where the audience's interests are implicated. In other words, the Court's free speech jurisprudence has protected the autonomy of speakers by ensuring that speech attributed to them is in fact their own but has disregarded the audience's need to properly identify speakers in order to best evaluate their arguments.[158]

The very framing of the endorsement test asks how a reasonable person would understand a particular message. In *Capitol Square Review and Advisory Board v. Pinette*,[159] for example, the contested speech was a Latin cross standing alone near the steps of the Ohio State Capitol. Had it applied the first four factors, the Court might well have concluded that there was no endorsement: The government was not the literal speaker, it provided no subsidy other than access to government property, it did not control the message, and the cross appeared in a traditional public forum. A plurality of Justices even argued for a per se rule holding that the message of a private speaker in a public forum always constitutes pure private speech[160] and that consequently the establishment clause has no role, since "[b]y its terms that Clause applies only to the words and acts of *government*."[161]

The controlling concurrences rejected this rule.[162] Instead, they emphasized that the cross would pass constitutional muster only if it

157 *See infra* notes 167–78 and accompanying text (providing examples of Court's recognition of attribution in protecting speaker from being associated with unwanted speech).

158 *See infra* notes 341–52 and accompanying text (discussing how identity of speaker can influence evaluation of her argument).

159 515 U.S. 753 (1995).

160 *See id.* at 770 (plurality opinion) ("Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum . . . .").

161 *Id.* at 767. On this view, it is irrelevant that the Latin cross might appear to be endorsed by the government based upon its proximity to an official government building or upon the lack of other displays indicating that the area is actually open to all. Interestingly, the plurality qualifies its own per se rule by suggesting that speech in a public forum would cease to be purely private speech—free of government endorsement—if the government intentionally fostered or encouraged the (mistaken) belief that it endorsed a religious message. *Id.* at 766. This concession implicitly acknowledges the importance of attribution to the classification of speech.

162 Justices Souter and O'Connor both wrote concurring opinions rejecting the per se rule. In his controlling concurrence, joined by Justices Breyer and O'Connor, Justice Souter noted that "[a]n observer need not be obtuse . . . to presume that an unattended display on government land in a place of prominence in front of a government building either belongs to the government, represents government speech, or enjoys its location because of government endorsement of its message." *Id.* at 785 (internal quotation marks

were plain to the reasonable observer that its presence in that particular context constituted private speech in a public forum.[163] The concurring Justices ultimately upheld the display because "the presence of a sign disclaiming government sponsorship or endorsement" would make clear that it represented private speech.[164] They therefore acknowledged that the audience's reasonable assumptions are a factor in defining who is speaking. Speech is not just about the speaker and the speaker's intentions; it is also about the audience and its interpretations.[165] The *Pinette* concurrences thus underscore that an audience's reasonable perception of the cross informs the determination of whether there is a government component to the speech.[166]

To the extent that the Supreme Court has recognized attribution as a concern in free speech cases, this recognition has been limited to protecting the speaker from being associated with unwanted speech. Compelled speech provides an apt example. The free speech clause protects both the right to express one's viewpoint and the right not to

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omitted). Justice O'Connor, in her separate concurrence, offered a related reason for rejecting the per se rule: "[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Id.* at 777. For example, "a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval." *Id.*; *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 303 n.13 (2000) ("[W]e have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause.").

163 According to Justice O'Connor, the reasonable observer is one "aware of the history and context of the community and forum in which the religious display appears." *Pinette*, 515 U.S. at 780.

164 *Id.* at 776 (O'Connor, J., concurring); *see also id.* at 784 (Souter, J., concurring) ("I vote to affirm in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it.").

165 This concept is well established in literary theory. *See generally* TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 64–76 (2d ed. 1996) (describing "reception theory" and role of readers in constructing text's meaning).

166 Reasonable perception is not frozen in time, and the law obviously plays a role in shaping expectations. For example, speech by private individuals made in public parks is generally not attributed to the government even though it occurs on government property, in part because of the long-standing and well-known practice of treating such speech as private speech. As the Supreme Court has said:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. C.I.O., 307 U.S. 496, 515–16 (1939). Of course, there are limits to the law's ability to shape expectations: No matter how long-lived or loudly decreed, a claim that the government does not endorse Christianity by adopting "Say Yes to Jesus" as its official motto will remain unpersuasive.

be forced to express someone else's viewpoint.[167] Compelled speech offends the speaker's individual autonomy in two ways: First, it forces individuals to say things that they do not actually believe (regardless of whether anyone hears it); second, it causes others to attribute beliefs to the speakers that they do not hold.[168] Reflecting this concern in a challenge involving official state license plates, the Court ruled that Jehovah's Witnesses could not be compelled to display to hundreds of people each day the state motto "Live Free or Die" on their car, a private vehicle "which is readily associated with its operator."[169] Likewise, the Court held that the government cannot force private parade organizers to include a gay and lesbian rights group in their St. Patrick's Day parade lest bystanders conclude that the organizers supported gay rights.[170] In contrast, the Court has held that shopping mall proprietors could not exclude political petitioners from their malls because "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition [would] not likely be identified with those of the [mall] owner."[171]

Unwanted attribution of private speech to the government—in essence making the government an unwilling co-speaker—has also triggered Supreme Court solicitude. In *Hazelwood School District v. Kuhlmeier*,[172] the Court held that a school district may delete articles from a student newspaper[173] because, among other reasons, the students' speech might be attributed to the school.[174] The Court distinguished purely private student speech—a "student's personal expression that happens to occur on the school premises"—from

167 *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34 (1943))).

168 As with most First Amendment protections, the right to be free from compelled speech benefits both speaker and audience. In addition to undermining the speaker's autonomy, compelling speech can distort the marketplace of ideas for the audience, leaving it with a false sense of the acceptance, popularity, or accuracy of an idea.

169 *Wooley*, 430 U.S. at 706–07, 717 & n.15.

170 Hurley v. Irish Am. Gay, Lesbian, & Bisexual Group of Boston, 515 U.S. 557, 574–75 (1995).

171 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980). Furthermore, the proprietors could "expressly disavow any connection with the message by simply posting signs." *Id.*

172 484 U.S. 260 (1988).

173 The principal of the school had deleted two articles from a student newspaper. One described students' experiences with pregnancy, and the other discussed the impact of divorce on students at the school. *Id.* at 263.

174 *Id.* at 271–73. The school's role as educator also entitled it to greater control in order to achieve its pedagogical mission, such as teaching students appropriate lessons and shielding them from inappropriate materials. *Id.* at 271.

speech with a government component—student expression appearing in a "school-sponsored publication[ ]."[175] The Court held that as a result of this sponsorship,[176] "students, parents, and members of the public might reasonably perceive [the school-sponsored publication] to bear the imprimatur of the school."[177] Consequently, "[e]ducators are entitled to exercise greater control over this second form of student expression to assure . . . that the views of the individual speaker are not erroneously attributed to the school."[178]

The Court has been less sympathetic, however, to concerns about how misattribution may harm the audience itself. In *Johanns v. Livestock Marketing Ass'n*,[179] for example, where the plaintiffs challenged a compelled subsidy, the Court held that the government need not be identified explicitly as the sponsor of its own speech.[180] While it noted in dicta that a claim might lie if the plaintiffs could prove that viewers incorrectly attributed the advertisements to them,[181] as long as viewers did not associate the advertisements with the plaintiffs, it did not matter if viewers missed the government's role. By rejecting the argument that government speech must be identified as such, the

175 *Hazelwood*, 484 U.S. at 270–71.

176 In *Hazelwood*, the student paper was produced as part of a journalism class, where the teacher closely supervised the students' work and the principal reviewed the newspaper's content before publication. *Id.* at 268–69. The Board of Education also subsidized the newspaper by paying for supplies, teachers' salaries, and most of its printing costs. *Id.* at 262–63.

177 *Id.* at 271. Similarly, in *Lehman v. City of Shaker Heights*, the Court allowed a city to reject political advertisements in its public transportation system (even though the city accepted public service and commercial advertising) in part because riders might believe that the government was favoring or endorsing the candidate advertised. 418 U.S. 298, 303–04 (1974).

178 *Hazelwood*, 484 U.S. at 260. Even the dissent acknowledged that "the majority is certainly correct that indicia of school sponsorship increase the likelihood of such attribution, and that state educators may therefore have a legitimate interest in dissociating themselves from student speech." *Id.* at 288–89 (Brennan, J., dissenting). However, Justice Brennan argued that this dissociation could be accomplished without suppressing student speech, for example, by providing a disclaimer. *Id.* at 289.

179 544 U.S. 550 (2005).

180 In *Johanns*, beef producers complained that they were being compelled to fund generic pro-beef advertisements. *Id.* at 553, 555. The generic message that "beef is good" implied that all beef was the same and failed to "distinguish, for example, the American ranchers' grain-fed beef from the grass-fed beef predominant in the imports, which the Americans consider inferior." *Id.* at 571 (Souter, J., dissenting). The Supreme Court rejected the compelled-subsidy claim on the grounds that the advertisements were government speech, and private individuals can be compelled to fund government speech. *Id.* at 562–67 (majority opinion).

181 *Id*. at 565.

Court expressed little concern that the audience might confuse government speech for private speech.[182]

It is a mistake to ignore attribution when deciding who should be considered a speaker of a particular message for First Amendment purposes. First, the disparate approaches set the stage for inconsistent determinations in free speech and endorsement cases. Second, and more fundamentally, ignoring this factor and thereby misclassifying speech can lead to troubling results, as Parts IV and V explore.[183]

B. The Five Factors Applied to Specialty License Plates

It is hardly surprising that courts first recognized mixed speech in the context of specialty license plates. As this Section demonstrates, under the five-factor analysis, these plates fall squarely in the middle of the private/government speech spectrum. The fact that both the government and private individuals can fairly be considered speakers of specialty license plate messages helps explain why the Sixth Circuit could conclude that the plates embody government speech and the Fourth Circuit that they represent private speech.[184]

Literal Speaker: The literal speaker of the message conveyed by specialty license plates can be reasonably identified as both the government and the private car owner.[185] The government can be consid-

[182] *Id.* at 564 n.7 (rejecting "requirement that government speech funded by a targeted assessment must identify government as the speaker" and holding that "respondents enjoy no right not to fund government speech . . . whether or not the reasonable viewer would identify the speech as the government's").

[183] Recognition of a similarly cavalier attitude toward audiences may undergird much of the criticism of some controversial Supreme Court cases. For example, in confronting *Rust v. Sullivan*, 500 U.S. 173, 177–78 (1991), where the federal government prohibited doctors receiving Title X funding from counseling their pregnant patients about abortion, critics rightly have focused on how censoring information could mislead poor women who rely on public clinics for their health care into believing abortion was not legally available or not medically appropriate for them. *See, e.g.*, Roberts, *supra* note 39, at 594, 600. Patients might reasonably assume the consultation involved private speech where the doctor, in accordance with medical ethics, would advise her of all her health options. While still problematic, such restricted speech would be less troubling if it were received in a government-funded "pro-childbirth clinic" that posted signs advertising its stance, such as "This government-funded health clinic advances the government's interest in childbirth over legal abortion by only providing information about childbirth." For an example of a similar hypothetical disclaimer, see Greene, *supra* note 14, at 50.

[184] ACLU of Tenn. v. Bredesen, 441 F.3d 370, 375–77 (6th Cir. 2006) (holding that specialty license plates represent government speech); *Sons of Confederate Veterans II*, 288 F.3d 610, 621 (4th Cir. 2002) (holding that specialty license plates represent private speech); *see also supra* notes 77–85, 90–92 and accompanying text (discussing cases).

[185] At least one district court has held accordingly, although its decision was reversed on appeal. Ariz. Life Coal., Inc. v. Stanton, No. CV031691PHXPGR, 2005 WL 2412811, at *6 (D. Ariz. Sept. 26, 2005) (holding that literal speaker of specialty license plate implicates both government and private speech), *rev'd*, 515 F.3d 956, 966–67 (9th Cir. 2008) (noting that literal speaker inquiry shows "characteristics of both private and government speech"

ered the literal speaker because it "signed" the speech by emblazoning its name across the license plate, a plate it manufactures and owns.[186] At the same time, private vehicle owners "speak" the message broadcast by the specialty license plate by voluntarily placing the plate on their automobiles.[187]

Control over Message: Both the government and the private car owner help determine the message conveyed. A specialty license plate does not come into existence unless and until the government specifically authorizes it.[188] Moreover, a state almost always retains power to approve the final slogan and image.[189] Accordingly, the Sixth Circuit held that the "Choose Life" plates represented government speech in large part because Tennessee "sets the overall message to be communicated and approves every word that is disseminated."[190] Yet because specialty license plates are optional, private car owners have the power to decide which specialty plate (if any) to affix to their car. Therefore, they too control the message conveyed.[191] Accordingly, both the government and the individual car owner exercise substantial degrees of control over the message.[192]

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but finding that balance is toward private speech). A similar analysis also applies to postage stamps. The federal government signs the stamps with its "USA" imprint, while private individuals actually select and place the stamps on their letters.

186 *See, e.g.*, *Sons of Confederate Veterans II*, 288 F.3d at 621 ("The 'literal' speaker here might be said to be the [state-owned] license plate itself . . . .").

187 Because cars are identified closely with their owners, putting a message on one's car is the equivalent of holding a placard with a message. *See, e.g.*, *id.* at 621 (holding that analysis of literal speakers points toward car owners because (a) plates are mounted on vehicles owned by private persons, and (b) *Wooley v. Maynard*, 430 U.S. 705, 717 (1977), held that license plates implicate private speech interests); *see also* Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004) (holding that literal speaker of "Choose Life" specialty license plate was vehicle owner, "just as the literal speaker of a bumper sticker message is the vehicle owner, not the producer of the bumper sticker"). The Fourth Circuit's analogy is not quite apposite, since the state owns the license plates it makes, while a bumper sticker manufacturer does not.

188 As discussed in *Bredesen*, 441 F.3d at 372, for example, the Tennessee Legislature had passed a statute authorizing the Department of Motor Vehicles to issue a "Choose Life" plate. *See* TENN. CODE ANN. § 55-4-306 (2004).

189 Tennessee also retains veto power over the final design. § 55-4-306(b); *see also Bredesen*, 441 F.3d at 376 (noting that Tennessee has "the right to wield 'final approval authority over every word used' on the 'Choose Life' plate").

190 *Bredesen*, 441 F.3d at 376.

191 Further complicating matters, a private organization may help design the plate. *See, e.g.*, *id.* (noting that private pro-life group "New Life" works with state to make plate at issue).

192 As another example, joint control also characterizes speech by professionals subsidized by the government: The government sets parameters, while private individuals determine the exact content of the speech act. For instance, lawyers funded by the Legal Services Corporation are expected to use the money for legal advocacy rather than artistic endeavor, *see supra* note 140 and accompanying text, and NEA-funded artists are expected to make art and not bring lawsuits with their grants, *cf. supra* note 141 and accompanying

Funding: For specialty license plates, this factor weighs more in favor of private speech, though the government plays a funding role as well.[193] The government pays for the overhead relating to the manufacture, distribution, and administration of the plates, as it does for standard license plates. Private individuals pay a certain price over the cost of a standard plate, which allows the state to generate a profit.[194] In Tennessee, for example, vehicle owners must pay thirty-five dollars above the cost of a standard plate for a "Choose Life" license plate.[195] Most, if not all, states will not produce a specialty license plate without a guarantee that the extra expenses will be covered. Tennessee requires a commitment from 1000 customers before issuing a new specialty license plate;[196] Virginia requires 350 prepaid applications before it will manufacture a new plate.[197] The Fourth Circuit concluded that Virginia's specialty license plates represented private rather than government speech in part because, without private individuals willing to pay for a plate, the plate's message would not have been conveyed at all: "If the General Assembly intends to speak, it is curious that it requires the guaranteed collection of a designated amount of money from private persons before its 'speech' is triggered."[198]

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text. But while the government sets parameters, it does not create the exact legal arguments or final work of art. Similarly, both the government and private individuals exercise control over the content of speech in nonpublic fora: The government determines the acceptable subject matter, while private individuals decide what to say about that subject. *See supra* notes 103–07 and accompanying text (noting that private speech on government property is mixed speech for which government may determine subject matter but not viewpoints expressed).

193 There is no end of additional examples where funding for speech has both private and government sources. Speech subsidized by the government rarely is supported wholly by the government. For example, even under the program in *Rust v. Sullivan* the federal government had provided only about half of the family planning clinics' budget. *See* Commonwealth v. Sec'y of Health and Human Servs., 899 F.2d 53, 73 n.11 (1st Cir. 1990) ("[T]he government, at oral argument, said that the federal government provides only about 50% of the money supporting federally funded family planning projects."), *abrogated by* Rust v. Sullivan, 500 U.S. 173 (1991). Similarly, speech in nonpublic fora has both private and government financial support: The government subsidizes the speech by providing access to government property, while the private entities generally cover the remaining costs.

194 For example, Tennessee's authorizing statute specifically states that it authorizes the sale of specialty license plates in order to raise revenue for specific departments, agencies, charities, and programs. TENN. CODE ANN. § 55-4-201(j) (Supp. 2007).

195 *Id.* § 55-4-203(d).

196 *Id.* § 55-4-201(h)(1).

197 VA. CODE ANN. § 46.2-725(B)(1) (Supp. 2007).

198 *Sons of Confederate Veterans II*, 288 F.3d 610, 620 (4th Cir. 2002).

Speech Goal: For specialty license plates, this factor is inconclusive and difficult to evaluate.[199] For most specialty license plate programs, the government's speech goal seems neither to create a forum open to all viewpoints (which would point to private speech),[200] nor to promote only one particular viewpoint (which would point to government speech).[201] Indeed, the sheer number of specialty license plates offered makes it difficult to convincingly posit that any specific message is being promoted.[202] Even assuming that the government

[199] This is often the case for both government-subsidized speech and speech in a nonpublic forum. With government-funded speech, the government occasionally may have a particular message it wishes to propagate (e.g., pregnant women should carry to term rather than abort). *See* Rust v. Sullivan, 500 U.S. 173, 177–78, 203 (1991) (upholding ban on abortion counseling by Title X doctors). And sometimes it subsidizes speech with the goal of encouraging multiple points of view. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845 (1995) (granting printing subsidies for various newspapers). But often the goal is not to advance one particular policy, or to subsidize all viewpoints, but to encourage a limited range of acceptable viewpoints. *See* NEA v. Finley, 524 U.S. 569, 572–73 (1998) (upholding excellence and decency criteria for NEA grants). The same is true for government-created nonpublic fora, where the government may impose viewpoint restrictions by inaccurately describing them as subject-matter limits. *See infra* notes 246–57 and accompanying text (arguing that profanity restrictions may affect range of viewpoints that can be expressed). In these situations, it is debatable whether the speaker should be identified as the government, the private individual, or both. *See supra* notes 146–49 and accompanying text (describing circumstances, including NEA program, in which government limits, but does not choose, views to be expressed).

[200] The possible exception is Maryland, which offers over 500 plates, representing all kinds of messages, often conflicting, and not always ones the state would want to claim as its own. *See* DMV.ORG, License Plates & Placards, http://www.dmv.org/md-maryland/license-plates.php#organizational_plates (last visited April 16, 2008) (listing plates available). No state would adopt a political party as its official party, yet Maryland offers the "Libertarian Party of Maryland" plate and the "Maryland Republican Party" plate. No state would endorse a church, yet Maryland offers plates for dozens of specific churches including "Bishop Episcopal Diocese of Easton," "Bread of Life Tabernacle," and "Calvary Chapel Church of God." Finally Maryland cannot be said to endorse two conflicting viewpoints simultaneously, yet the pro-life "Choose Life of Maryland" and the pro-choice "National Organization of Women" are both available.

[201] On the other hand, some states have such a small selection of specialty license plates that it is at least arguable that the plates represent government speech and that individuals are volunteering to pay money to spread the government's message. For example, New Hampshire only offers specialty license plates for veterans and Purple Heart recipients, *see* DMV.ORG, New Hampshire License Plates and Placards Information, http://www.dmv.org/nh-new-hampshire/license-plates.php (last visited Feb. 27, 2008), as well as a "Moose" plate, used to raise money for New Hampshire conservation efforts and for support of its cultural heritage, *see* New Hampshire Moose Plate Program, http://www.mooseplate.com (last visited Feb. 27, 2008).

[202] Both Virginia and Tennessee, for example, claimed that their specialty license plates represented government speech, even though Virginia offers well over a hundred specialty license plates and Tennessee more than ninety. *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 375–76 (6th Cir. 2006) (holding that Tennessee could offer pro-life but not pro-choice plate because it was government speech, even given number of different plates that state issues); *Sons of Confederate Veterans II*, 288 F.3d at 614–15 (noting number of plates and Virginia's argument that these are government speech).

intends to convey its perspective on a hundred or more different subjects,[203] the actual phrases on the license plates often seem inapt as government messages. In some cases, the message is a controversial one from which states might prefer to dissociate themselves. One might expect a state to take, at most, an ambivalent stance toward homeschooling or Bob Jones University, yet plates for both exist.[204] On other plates, the message is entirely unrelated to any state concerns: What government interest is advanced by Virginia's "Bowler" plate[205] or New York's "Porsche Club of America" plate?[206] Some state programs offer plates espousing contrary views, belying any notion that the government is endorsing a particular viewpoint: Montana, for example, offers both a "Choose Life" plate and a "pro-family pro-choice" plate.[207] Finally, if a state wished to adopt a message as its own, it could convey this on one of its standard license plates, as Alabama did with "God Bless America."[208]

On the other hand, most specialty license plate programs do not permit all viewpoints. Instead, the state's speech goal often appears to be to allow expression of a range of state-approved subjects and viewpoints. Most programs allow positive plates about military and veteran groups;[209] cultural, health, and environmental groups;[210] civic

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203 *See Bredesen*, 441 F.3d at 376 ("[T]here is nothing implausible about the notion that Tennessee would use its license plate program to convey messages regarding over one hundred groups, ideologies, activities, and colleges. Government in this age is large and involved in practically every aspect of life.").

204 *See, e.g.*, South Carolina Department of Motor Vehicles, Plate Galleries, http://www.scdmvonline.com/DMVNew/PlateGallery.aspx?q=college (last visited Feb. 27, 2008) (listing "Bob Jones University" plate); Virginia Department of Motor Vehicles, Alphabetical Plate Search, http://www.dmv.virginia.gov/exec/vehicle/splates/alpha.asp?alpha=H (last visited Feb. 27, 2008) (listing "Home Education" plate).

205 Virginia Department of Motor Vehicles, Alphabetical Plate Search, http://www.dmv.virginia.gov/exec/vehicle/splates/alpha.asp?alpha=B (last visited Feb. 27, 2008).

206 *See* New York State Department of Motor Vehicles, Custom Plate Gallery, http://www.nysdmv.com/org.htm (last visited Feb. 27, 2008). The same might be asked of Connecticut's "Federated Garden Club" plate, *see* DMV.ORG, Connecticut License Plates and Placards Information, http://www.dmv.org/ct-connecticut/license-plates.php (last visited Feb. 27, 2008), or Oklahoma's "Ballooning" plate, *see* Oklahoma Tax Commission, Balloonist Special Plate, http://www.tax.ok.gov/plates/sp024.html (last visited Feb. 27, 2008).

207 *See* Montana Department of Justice, Service Organizations and Associations Plate Designs and Fees, http://doj.mt.gov/driving/platedesign/serviceorganizations.asp (last visited Feb. 27, 2008). The Montana plates are sponsored by the Montana Right to Life Association Educational Trust ("Choose Life") and Planned Parenthood of Montana ("pro-family pro-choice"). *Id.*

208 *See* Press Release, State of Ala. Office of the Governor, Governor Riley, Representative Hurst, and First Responders Unveil Design of "God Bless America" License Plate (Sept. 11, 2006), http://www.governorpress.state.al.us/pr/pr-2006-09-11-02-tag-photo.asp.

209 Tennessee, for example, has plates for veterans of particular wars, holders of various medals, former prisoners of war, Pearl Harbor survivors, and current members of the mili-

clubs, fraternities, and sororities;[211] professional organizations;[212] educational institutions;[213] sports teams;[214] and innocuous hobbies.[215]

tary. Tennessee.gov, Military/Veterans Specialty Plates, http://state.tn.us/revenue/vehicle/licenseplates/militaryveterans/military.htm (last visited Mar. 2, 2008). Virginia has military plates for specific branches of the military, as well as for veterans and medal-holders. Virginia Department of Motor Vehicles, Military Plates, http://www.dmv.virginia.gov/exec/vehicle/splates/category.asp?category=M (last visited Mar. 2, 2008).

210 In addition to the "Choose Life" plates, Tennessee has approved plates focused on children's welfare (e.g., "Helping Schools") and on the environment (e.g., "Animal Friendly," "Watchable Wildlife," "Radnor Lake," and the popular "Friends of the Smokies"). Tennessee.gov, Miscellaneous Specialty Plates, http://state.tn.us/revenue/vehicle/licenseplates/misc/misc.htm (last visited Mar. 2, 2008); Tennessee.gov, Most Popular Specialty Plates, http://state.tn.us/revenue/vehicle/licenseplates/mostpop.htm (last visited Mar. 19, 2008). Virginia has a "Kids First" plate and numerous environmental plates, ranging from "Shenandoah National Park" to "Wildlife Conservation" plates with different animals on them; in addition, Virginia offers health-related plates (e.g., "Educate, Eradicate, Advocate" from Breast Cancer Foundation of Virginia, and "Drive out Diabetes"), cultural plates (e.g., "Tobacco Heritage" and "Virginia for the Arts"), and other socially concerned plates (e.g., "Drive Smart," "Friends of Tibet," and "Supporter of Greyhound Adoption"). Virginia Department of Motor Vehicles, Special Interest Plates, http://www.dmv.virginia.gov/exec/vehicle/splates/category.asp?category=S (last visited Mar. 2, 2008).

211 Tennessee has plates for the Masons, the Police Benevolent Association, the Sons of Confederate Veterans, and for several sororities and fraternities. Tennessee.gov, Clubs / Groups Specialty Plates, http://state.tn.us/revenue/vehicle/licenseplates/clubs/clubs.htm (last visited Mar. 2, 2008); Tennessee.gov, Miscellaneous Specialty Plates, *supra* note 210. Virginia has fraternity and sorority plates, as well as plates for Freemasons, Knights of Columbus, Order of the Eastern Star, Rotary International, the Shriners, and the Sons of Confederate Veterans. *See* Virginia Department of Motor Vehicles, Special Interest Plates, *supra* note 210.

212 Tennessee has plates for emergency professions like firefighters, rescue squad members, and emergency trauma physicians. Tennessee.gov, Emergency Management Plates, http://state.tn.us/revenue/vehicle/licenseplates/emergency/emergency.htm (last visited Mar. 2, 2008). Virginia has plates for the Association of Realtors, AFL-CIO, Class J No. 611 Steam Locomotive, Credit Unions, and the Virginia Society of CPAs. Virginia Department of Motor Vehicles, Special Interest Plates, *supra* note 210.

213 Tennessee has plates for over forty different educational institutions, including several out-of-state ones. *See* Tennessee.gov, Collegiate Plates, http://state.tn.us/revenue/vehicle/licenseplates/college/college.htm (last visited Mar. 2, 2008). Virginia has plates for over eighty different educational institutions, many of them out of state. *See* Virginia Department of Motor Vehicles, College Plates, http://www.dmv.virginia.gov/exec/vehicle/splates/category.asp?category=C (last visited Mar. 2, 2008).

214 Tennessee has plates for the Tennessee Titans and plates celebrating the UT Lady Vols Championship and UT Football Championship. Tennessee.gov, Professional Sports Specialty Plates, http://state.tn.us/revenue/vehicle/licenseplates/sports/sports.htm (last visited Mar. 2, 2008); Tennessee.gov, Miscellaneous Specialty Plates, *supra* note 210. Virginia has a "Washington Redskins" plate. Virginia Department of Motor Vehicles, Special Interest Plates, *supra* note 210. Other states have more comprehensive sports plates. North Carolina, for example, offers over 20 different NASCAR plates, each with the name of a different racer. *See* North Carolina Division of Transportation, Department of Motor Vehicles, NASCAR Plates, https://edmv-sp.dot.state.nc.us/sp/SpecialPlatesList?category=Nascar (last visited Mar. 2, 2008).

215 Tennessee has plates for the "Sportsman" and "Antique Auto." Tennessee.gov, Miscellaneous Specialty Plates, *supra* note 210. Virginia has "Aviation Enthusiasts," "Bicycle

Also regularly endorsed are patriotic mottos.[216] But as the Sixth Circuit pointed out, while states are generally willing to produce plates for "respectable institutions," they do not tend to produce "plates for groups of wide disrepute such as the Ku Klux Klan or the American Nazi Party."[217] Nor does it seem likely that the many states with an "In God We Trust" or "United We Stand" plate will approve a "We Do Not Trust God" plate or an "America Out of Iraq" plate. And most obviously (and most litigated), the majority of states offering a "Choose Life" plate offer no pro-choice counterpart.[218] Whether this speech goal is constitutionally tenable is uncertain.

Attribution: A reasonable person is unlikely to attribute the message displayed on specialty license plates solely to private speakers or solely to the government. All the other factors—of which a reasonable person would have some (if imperfect) knowledge—point to the involvement of both entities.[219] On the one hand, private car owners choose among scores, if not hundreds, of messages and decide to pay for and display the message they have chosen. Under these circumstances, "no one who sees a specialty license plate imprinted with the phrase 'Choose Life' would doubt that the owner of that vehicle holds

Enthusiasts," "Horse Enthusiasts," "Bowler," and "Harley Davidson Owners Group" plates. Virginia Department of Motor Vehicles, Special Interest Plates, *supra* note 210.

216 Tennessee has an "In God We Trust" plate featuring a bald eagle. Tennessee.gov, Miscellaneous Specialty Plates, *supra* note 210. Virginia offers "Fight Terrorism" and "United We Stand." Virginia Department of Motor Vehicles, Special Interest Plates, *supra* note 210.

217 ACLU of Tenn. v. Bredesen, 441 F.3d 370, 376 (6th Cir. 2006).

218 States that have approved a "Choose Life" plate without offering a pro-choice counterpart include Alabama, Arkansas, Connecticut, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Ohio, Oklahoma, Pennsylvania, South Carolina (enjoined by the Fourth Circuit, *see supra* notes 86–89 and accompanying text), South Dakota, and Tennessee (upheld by the Sixth Circuit, *see supra* notes 90–92 and accompanying text). *See* Choose Life, Inc., Other States Adopting the Choose Life Tag, http://www.choose-life.org/states.htm (last visited Mar. 3, 2008) (listing states with Choose Life plates); Guttmacher Institute, *State Policies in Brief: "Choose Life" License Plates* (Apr. 1, 2008), *available at* http://www.guttmacher.org/statecenter/spibs/spib_CLLP.pdf (same); Illinois Choose Life, Links to Other Web Sites, http://www.ilchoose-life.org/links.htm (last visited Mar. 2, 2008) (listing all states with pro-life or pro-choice plates).

219 There are three possible relationships between this last factor and the previous four. One, awareness that the first four do not all point in one direction may lead an audience to reasonably conclude that the speech is mixed (or, conversely, to reasonably conclude that the speech is private or governmental if aware that the first four factors do all point in one and only one direction). Two, imperfect knowledge may lead audiences to reasonably conclude that speech is private or governmental when it is in fact mixed. For example, a reasonable audience might attribute a newspaper opinion solely to a columnist if it did not know the government paid the columnist to write it. Three, imperfect knowledge might lead an audience to reasonably conclude that the speech is governmental, even though the previous factors point to private speech (or vice versa). *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763–67 (1995). In that instance, the speech would be mixed, since attribution is the last factor.

a pro-life viewpoint."[220] On the other hand, the message appears on state property emblazoned with the state name[221] and was approved by the state legislature. Moreover, the state manufactures, advertises, and distributes the plates. And unlike the cross in *Pinette*, there is no disclaimer disavowing government involvement.[222]

In sum, these five factors can help identify instances of mixed speech, such as specialty license plates, which fall somewhere in the middle of the government/private speech spectrum. The next two Parts explain the problems encountered when speech that is properly identified as mixed is nonetheless categorized as either wholly private or wholly governmental.

IV
MIXED SPEECH AS PRIVATE SPEECH

This Part analyzes the consequences of categorizing mixed speech as purely private speech, using specialty license plates as the primary example. Most commentators writing about specialty license plates have argued for treating them as private speech to prevent states from engaging in viewpoint discrimination by, for example, issuing pro-life plates without providing pro-choice ones.[223] If speech is purely private, the government may not discriminate against any viewpoint, even one it finds distasteful. The trouble with this approach is that because of the undeniably strong government component, the government may be seen as approving views it does not condone or promoting religious views in violation of the establishment clause.

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220 Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004).

221 Louisiana lent not just its name but also its official bird: Its "Choose Life" plate shows the state bird (a brown pelican) holding a baby. Jeremy T. Berry, Comment, *Licensing a Choice: "Choose Life" Specialty License Plates and Their Constitutional Implications*, 51 EMORY L.J. 1605, 1631 (2002).

222 The controlling concurrences in *Pinette* insisted on an adequate disclaimer. *See Pinette*, 515 U.S. at 776 (O'Connor, J., concurring); *id.* at 784 (Souter, J., concurring). For a discussion of the concurrences, see *supra* notes 162–64 and accompanying text.

223 *See, e.g.*, Jack Achiezer Guggenheim & Jed M. Silversmith, *Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment*, 54 U. MIAMI L. REV. 563, 583 (2000) (arguing that specialty license plates are limited public forum and are subject to strict scrutiny); Sarah E. Hurst, *A One Way Street to Unconstitutionality: The "Choose Life" Specialty License Plate*, 64 OHIO ST. L.J. 957, 991–95 (2003) (arguing that issuing pro-life but not pro-choice plates amounts to impermissible viewpoint discrimination); Berry, *supra* note 221, at 1623–24 (arguing that courts will probably find plates to be private speech); *cf*. Marybeth Herald, *Licensed To Speak: The Case of Vanity Plates*, 72 U. COLO. L. REV. 595, 619–21 (2001) (arguing that vanity plates are private, not government, speech).

A. The Consequence of Classifying Mixed Speech as Private Speech: All Viewpoints Must Be Allowed

If specialty license plates are purely private speech, the free speech clause protects their messages by barring discrimination based on viewpoint, no matter how unpopular or controversial that viewpoint may be.[224] So strong is this prohibition that it applies even to speech normally considered outside the First Amendment's protection.[225] For example, the Supreme Court has held that the ban against viewpoint discrimination applies even to "fighting words," a category of speech that can be outlawed altogether.[226]

Does this mean a state has no choice but to issue a "Sons of Confederate Veterans" plate with a Confederate flag as well as a "Pro-Choice" plate? What about other plates with slogans that might be obscene, profane, derogatory, offensive, or contrary to public policy? Must the government allow an "Aryan Brotherhood" plate with a swastika? Or a "Swingers Sex Club" plate with some cartoon hanky-panky? Or a more hardcore version? An "America Out of Iraq" plate? And what about "Say Yes to Jesus" or "Jesus is a Myth" plates?

For the most part, the answer is yes. A state would probably be able to deny obscene plates, that is, ones with messages that appeal to the "prurient interest" and that are patently offensive "in light of community standards."[227] But a state would be hard-pressed to refuse any other messages.[228] While regulations aimed at indecent, offensive, and derogatory speech on vanity license plates[229] have been upheld for a variety of reasons,[230] they are not tenable under a rigorous free

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224 *Cf.* Fee, *supra* note 42, at 1116–22 (noting increased focus among Supreme Court Justices and scholars on prohibiting discriminatory restrictions on speech).

225 *See Leading Cases*, *supra* note 12, at 283 ("Viewpoint discrimination is so abhorrent that it has been deemed unconstitutional even when applied to speech otherwise outside the ambit of the First Amendment." (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992))).

226 *R.A.V.*, 505 U.S. at 386. In other words, although the government can ban all fighting words, it cannot ban a subset of fighting words based on viewpoint.

227 Ashcroft v. Free Speech Coal., 535 U.S. 234, 246 (2002) (citing obscenity standard from *Miller v. California*, 413 U.S. 15, 24 (1973)).

228 These plates do not fall into other established categories held to fall outside full First Amendment protection, such as incitement to violence or lawbreaking, defamation, commercial speech, or expressive conduct.

229 Vanity license plate owners can spell out an individualized message instead of accepting a random arrangement of letters and numbers. A typical policy might be "[n]o personalized license plates shall be issued . . . which are obscene, profane, inflammatory or contrary to public policy." Lewis v. Wilson, 253 F.3d 1077, 1078 (8th Cir. 2001) (emphasis and citations omitted).

230 *E.g.*, Perry v. McDonald, 280 F.3d 159, 163, 175 (2d Cir. 2001) ("SHTHPNS"—"Shit Happens"—barred as offensive); Kahn v. Dep't of Motor Vehicles, 20 Cal. Rptr. 2d 6,

speech analysis in which license plates are considered private speech. After all, a main goal of the First Amendment is to ensure that the government does not suppress unpopular private speech: "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."[231]

The Supreme Court has allowed states to restrict private speech foisted upon certain "captive audiences,"[232] but it is doubtful that the captive-audience doctrine applies to specialty license plate programs. A "captive" audience must satisfy two conditions. First, as a factual matter, the audience cannot readily avoid the speech.[233] Second, as a normative matter, the audience is exposed to the offensive messages in a place with a strong expectation of privacy,[234] like the home.[235] Specialty license plates do not meet these conditions. To start, the messages conveyed are written, and the Supreme Court has repeatedly emphasized that while one cannot readily close one's ears to oral speech, one may easily turn one's eyes away from written speech.[236] In addition, while one may expect to be spared offensive speech at

12–13 (Cal. Ct. App. 1993) ("TP U BG"—"FUCK" in court reporter shorthand—barred as offensive); Katz v. Dep't of Motor Vehicles, 108 Cal. Rptr. 424, 425 (Cal. Ct. App. 1973) ("EZ LAY" barred as indecent); McBride v. Motor Vehicle Div. of Utah State Tax Comm'n, 977 P.2d 467, 470–71 (Utah 1999) ("REDSKIN" revoked as derogatory). *But see Lewis*, 253 F.3d at 1078–81 (holding that government cannot bar "ARYAN-1" plate because viewpoint discriminatory).

231 Texas v. Johnson, 491 U.S. 397, 414 (1989) (citations omitted).

232 For instance, the Supreme Court has upheld Federal Communications Commission regulations banning "[p]atently offensive, indecent material presented over the airwaves." FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

233 *See* Frisby v. Schultz, 487 U.S. 474, 487–88 (1988) (upholding ban on "focused picketing" of particular residence because captive resident is "left with no ready means of avoiding the unwanted speech"); *see also infra* note 236 and accompanying text (further describing captive audience issue).

234 *See* Cohen v. California, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.").

235 *See Frisby*, 487 U.S. at 484 (1988) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." (quoting Carey v. Brown, 447 U.S. 455, 471 (1980))); *Pacifica Found.*, 438 U.S. at 748 ("[I]n the privacy of the home, . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.").

236 Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 772–73 (1994) (upholding restriction on sound but not on images around family planning clinics, as "it is much easier for the clinic to pull its curtains than for a patient to stop up her ears"); *Cohen*, 403 U.S. at 21 (asserting readers of "Fuck the Draft" jacket were not captive in part because they "could effectively avoid further bombardment of their sensibilities simply by averting their eyes"). As a result, even in one's home, one is not necessarily captive to unwanted written speech. *See* Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 542, 544 (1980) (invalidating prohibition against electric bill inserts addressing controversial issues because

home (the bastion of private spaces), one cannot expect the same cocoon in public spaces.[237] A court is not likely to equate the privacy expected in one's living room with the privacy expected when driving down a public street.[238] After all, public streets and sidewalks are deemed traditional public fora because they are the quintessential spaces for public speech and debate.[239]

Alternately, one might argue that a specialty license plate program amounts to a nonpublic forum for private speech. If so, the government may restrict the subjects—but not viewpoints—allowed within it.[240] Subject-matter limits, however, may be ineffective in prohibiting undesirable plates.

Because all private viewpoints on approved subjects must be allowed, even in nonpublic fora, subject-matter restrictions may be of little help in avoiding undesirable plates. If a state issues plates for some civic and fraternal organizations, then it must do so for all, from the Knights of Columbus, to the Sons of Confederate Veterans,[241] to the Aryan Nation. If drivers are allowed to express their patriotism, they must be able to do so with either "Support the Troops" or "America Out of Iraq" plates. Finally, and fairly obviously, a state cannot allow pro-life plates but deny pro-choice ones. In short, if specialty license plates are private speech, then even if they are construed as non-public fora, subject-matter restrictions cannot necessarily weed out undesirable plates.

One could argue that restrictions on certain offensive private speech amount to subject-matter, rather than viewpoint, regulation and are therefore not unconstitutional. For example, the Second Cir-

readers "may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket").

237 *See Pacifica Found*., 438 U.S. at 759 (Powell, J., concurring) ("Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, a different order of values obtains in the home." (internal citation omitted)).

238 Captive audiences have always been cabined to specific locations—at home, *see supra* note 235, inside a public bus, *see* Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974), by the entrance to a family planning clinic, *see Madsen*, 512 U.S. at 768, etc. By contrast, if a person driving on the road or walking on the street can be a captive audience, then just about anyone anywhere can be. To recognize a captive audience for specialty license plates would therefore transform a doctrine granting limited exceptions in specific locations with heightened expectations of privacy to an expansive prohibition requiring widespread balancing of speakers' and listeners' rights.

239 *See supra* note 166 (describing traditional use of streets and parks).

240 *See supra* note 146 and accompanying text (discussing standards for government content restrictions under forum analysis).

241 *See* N.C. Div. of Sons of Confederate Veterans v. Faulkner, 509 S.E.2d 207, 211 (N.C. Ct. App. 1998) (holding that Sons of Confederate Veterans is civic club entitled to specialty license plate).

cuit held that excluding scatological subjects was a viewpoint-neutral content regulation, so that Vermont could deny a "SHTHPNS" plate.[242] Similarly, the First Circuit upheld as viewpoint neutral the Massachusetts Bay Transportation Authority's policy of rejecting subway advertisements that were demeaning or derogatory[243] because "the state is not attempting to give one group an advantage over another in the marketplace of ideas."[244] In the court's view, all groups "are allowed to positively promote their own perspective and even to criticize other positions so long as they do not use demeaning speech in their attacks."[245] Even accepting the legitimacy of these holdings, they could not justify a state's refusal to issue Aryan Nation, pro-choice, or anti-war plates when it authorized messages relating to fraternal organizations, abortion, or patriotism.

The more fundamental problem is that the line between subject-matter discrimination and viewpoint discrimination is slippery and not always apparent.[246] Take the argument that profanity regulations are viewpoint neutral. On its face, this seems true: Neither "Fuck the Protesters" nor "Fuck the War" plates would be available under such a limitation.[247] But, as the Supreme Court wrote in defending a protester's right to wear a "Fuck the Draft" jacket, "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[248] After all, does "U.S. Out of Iraq" really express the same view as "Fuck the War"? Among those opposed to war, there may be those who believe it to be unsound foreign policy and those who believe that it is illegal and unconscionable, deserving of such contempt that only certain words can capture the sentiment.[249] In short, some viewpoints

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242 Perry v. McDonald, 280 F.3d 159, 170–71 (2d Cir. 2001); *see also* Kahn v. Dep't of Motor Vehicles, 20 Cal. Rptr. 2d 6, 11 (Cal. Ct. App. 1993) (finding no viewpoint discrimination in denying vanity plate reading "TP U BG" —"FUCK" in court reporter shorthand). Note that these cases involved vanity, not specialty, license plates. *See supra* text accompanying note 70 (distinguishing specialty license plates from vanity plates).

243 Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 90 (1st Cir. 2004).

244 *Id.* at 91; *see also* Katz v. Dep't of Motor Vehicles, 108 Cal. Rptr. 424, 428–29 (Cal. Ct. App. 1973) (upholding denial of "EZ LAY" vanity plate as viewpoint neutral because decency requirements of Department of Motor Vehicles were "not directed to the promotion of any particular point of view or the compelling of any given orthodoxy").

245 *Ridley*, 390 F.3d at 91.

246 *See* Greene, *supra* note 14, at 33 (describing notorious difficulty in identifying viewpoint discrimination); Herald, *supra* note 223, at 632–33 (arguing that most content restrictions discriminate based on viewpoint, even if not obviously so).

247 *Cf*. Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 140 (1981) (observing that content-neutral restriction would ban both "fuck the draft" and "fuck opponents of the draft").

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

249 As the *Cohen* Court noted:

cannot be expressed without strong, indecent, and perhaps even scatological or profane language.

Similarly, not all viewpoints can be expressed in a manner that is not in some respects demeaning or derogatory. The claim that barring derogatory speech is viewpoint neutral assumes that all viewpoints can be expressed in a positive way.[250] While the negative statement "don't vote for X" might also be expressed as the positive "vote for Y," (assuming X and Y are the only candidates in the election),[251] some viewpoints are inherently negative. "Impeach the President,"[252] for example, has no positive version.[253]

Finally, the determination of whether a message is indecent, demeaning, or degrading is an inherently subjective process. "[O]ne man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."[254] Perhaps most would agree that "Love to

> [W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Id.

250 In *Ridley*, the First Circuit allowed the Massachusetts Bay Transit Authority to reject a church's advertisement declaring that a number of religions were false and that their followers would go to hell. 390 F.3d at 74–75, 96. The court argued that the church could instead "use positive language to describe [its] own organizations, beliefs, and values." *Id.* at 91.

251 In a related vein, banning Aryan Nation plates but not NAACP plates could be construed as allowing speech by those with a positive view of African Americans but not speech by those with a negative view. *Cf*. Lewis v. Wilson, 253 F.3d 1077, 1082 (8th Cir. 2001) (holding that state with vanity plate program could not refuse to issue "ARYAN-1" vanity plate).

252 More than one "ITMFA" (Impeach the Motherfucker Already) vanity plate has been issued and then recalled. *See* ITMFA, http://www.impeachthemotherfuckeralready.com/ (last visited Mar. 3, 2008).

253 Similarly, in *Ridley*, central to the church's message of conversion was the warning that nonbelievers risk going to hell. 390 F.3d at 99 (Torruella, J., concurring in part, dissenting in part).

254 Cohen v. California, 403 U.S. 15, 25 (1971); *see also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 512 (1996) (arguing that it is improper to let government denigrate contemptible ideas, as government is likely to "err, as a result of self-interest or bias, in separating the true and noble ideas from the false, abhorrent ones"); Stone, *supra* note 37, at 228 (arguing that in democracy, "the people, not the government are entrusted with the responsibility for judging and evaluating the relative merits" of speech (internal quotation marks and citation omitted)); *cf*. Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1111 (2006) (arguing that courts should provide First Amendment protection for false factual statements because government cannot be trusted to separate truth from falsehood).

Fuck" is vulgar and indecent, but what about "EZ LAY" (which was banned as offensive to good taste and decency[255]), "Swingers Sex Club," or "Sex is Healthy"?[256] Because of the inescapable subjectivity, subject-matter prohibitions can too easily be used to suppress unpopular or distasteful viewpoints.[257]

The line between subject-matter and viewpoint discrimination, while never obvious, is especially blurry with religious speech because every subject is conceivably broad enough to have some religious perspective. As a result, the Supreme Court has repeatedly held that exclusion of religious speech amounts to viewpoint discrimination.[258] In *Lamb's Chapel v. Center Moriches Union Free School District*,[259] for example, a school district opened its school facilities after school hours to outside groups for social, civic, and recreational purposes.[260] It declined, however, to make the facilities available for religious purposes[261] and argued that this was a reasonable and viewpoint-neutral subject-matter restriction.[262] The Supreme Court disagreed, finding that barring an evangelical church from showing films about family values and childrearing from a religious point of view[263] constituted impermissible viewpoint discrimination.[264] The Court reasoned that

255 Katz v. Dep't of Motor Vehicles, 108 Cal. Rptr. 424, 425 (Cal. Ct. App. 1973).

256 Similarly, trying to limit specialty license plates to certain subjects can raise the specter of viewpoint discrimination. As just one example, allowing pro-life but not pro-choice plates obviously discriminates against a particular point of view. But an attempt to prohibit all plates on the subject of abortion could also lead to a viewpoint discrimination claim, since banning plates concerning abortion or childbirth while allowing plates supporting prostate cancer research arguably discriminates against plates about women's health issues. *Cf.* Dimmick v. Quigley, No. C 96-3987 SI, 1998 WL 34077216, at *1, *5 (N.D. Cal. July 13, 1998) (holding that denial of "HIV POS" vanity plate but allowance of "CANCER" plate constitutes viewpoint discrimination, as DMV is determining that "it is acceptable to announce one's medical condition with respect to cancer, but not with regard to HIV or AIDS"); Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 972 (9th Cir. 2008) (holding that barring controversial pro-life specialty license plate while allowing plates for other causes that serve community amounts to unconstitutional viewpoint discrimination).

257 *See* Herald, *supra* note 223, at 600 (making similar argument). In the vanity plate context, Virginia allowed a "WNTRSUX" (Winter Sucks) but not "GVT SUX" (Government Sucks) plate; Michigan revoked "RU486" (referring to abortion pill) but let stand an anti-abortion "PROLIFE" plate. *Id.* at 600–01.

258 *See supra* note 154 and accompanying text (discussing Supreme Court precedent regarding government exclusion of religious speech).

259 508 U.S. 384 (1993).

260 *Id.* at 387.

261 *Id.*

262 The Second Circuit had upheld the exclusion on these grounds. *Id.* at 389–90.

263 According to the church's brochure, "the film series would discuss . . . the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage." *Id.* at 388.

264 *Id.* at 393–94.

the school district's rules did not bar all films about family values and childrearing, just those with a religious point of view.[265]

Because specialty license plates often display social, civic, and recreational causes and organizations, it would follow that religious groups should have equal access. To allow specialty license plates for secular civic organizations, like the Rotary Club, but not religious ones, like churches, would discriminate against civic organizations based on their religious perspective. Likewise, to allow plates promoting secular childrearing advice like "Just Say No to Drugs" but not religious childrearing advice like "Just Say Yes to Jesus" might also be construed as viewpoint discriminatory.

In sum, classifying specialty license plates as purely private speech means that few controls over viewpoints expressed on the plates, even those couched as viewpoint-neutral subject-matter restrictions, would be constitutionally permissible.

B. Disadvantages of Treating Mixed Speech as Private Speech

Free speech values are arguably best advanced by treating mixed speech as private speech entitled to full protection from viewpoint discrimination.[266] Insisting on viewpoint neutrality prevents a distorted marketplace of ideas. It also facilitates a range of speech, and more speech is generally considered better than less speech. In the specialty license plate context, both pro-choice and pro-life license plates would be on the road, as well as diverse viewpoints on a multitude of other subjects. From the state's point of view, offering additional plates would likely lead to additional revenue. Granted, some undesirable plates might appear, but that is unavoidable in a free speech regime.[267]

But treating mixed speech as purely private speech does not erase its government component, and therein lies the problem. When the government component in mixed speech is undeniably strong, as it is with specialty license plates, the messages very likely will be linked to the government, regardless of how courts analyze them. Several pos-

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265 *Id.*

266 *See* Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 793, 795 (4th Cir. 2004) (describing specialty license plates as mixed speech but still protected against viewpoint discrimination); Perry v. McDonald, 280 F.3d 159, 169 (2d Cir. 2001) (describing vanity plates as nonpublic forum but still protected against viewpoint discrimination).

267 Perhaps the state might decide to shutter the specialty license plate program rather than tolerate plates carrying messages the government does not condone. *Cf.* Post, *supra* note 6, at 194 (warning that if government could not set limits on NEA grants, it might cease program). On the other hand, the government has more incentive to keep the specialty license plate programs, at least as compared to arts programs, as the plate programs generate revenue, while grant programs like the NEA do not.

sible interpretations of the government's involvement exist. One is that the state affirmatively approves and endorses the particular message.[268] Another is that the state tolerates the message; while it does not necessarily align itself with the message, the state does not feel the need to dissociate from it.[269] A third is that the state has no opinion on the message at all: It does not endorse, tolerate, approve, or disapprove of it. Because of the unmistakably strong government component,[270] the government will likely be viewed as endorsing or, at a minimum, tolerating those messages. Indeed, the mere fact that the government has the option of closing the forum rather than associating with undesirable messages suggests that the government at least tolerates the specialty license plates it issues.

Some might argue that since the government is not considered a speaker of speech by private individuals on government property under forum doctrine,[271] the same presumption ought to apply in the specialty license plate context. But the public forum analogy fails for several reasons. First, the government is usually not a literal speaker, as it is here, where it issues, owns, and essentially "signs" license plates by emblazoning its name across them. Second, the government also controls the message on the plate, as it authorizes and approves each specialty plate, which is not the case with private individuals speaking in a public forum.[272] Third, the speech goals of specialty license plate programs are opaque. Unlike public parks and sidewalks, specialty license plates are not traditionally viewed as a medium for unrestricted free speech.[273] Finally, in more than one case, a decision to accord private speech status to contested speech

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268 *See* Norton, *supra* note 3, at 1321–23 (describing government's affirmative expressive interests in promoting specific messages).

269 *See* Jacobs, *supra* note 3, at 1375 (arguing that setting parameters of nonpublic forum can convey message since government selection process itself can be speech act); Norton, *supra* note 3, at 1323–26 (describing government's negative or dissociative expressive interests in avoiding messages with which it disagrees); *see also* Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 91 (2004) (maintaining that government has broad expressive goals when it creates civic, cultural, or aesthetic forum).

270 *See supra* Part III.B (discussing government involvement in content, funding, and other aspects of specialty license plate programs).

271 This proposition is itself debatable. *See supra* notes 159–66 and accompanying text (discussing Justices' debate in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995)).

272 For the Sixth Circuit, this level of control was sufficient to find government speech. ACLU of Tenn. v. Bredesen, 441 F.3d 370, 375–77 (6th Cir. 2006).

273 While the long-time enforcement of a private speech regime could influence the public's perception of specialty license plates, such is not the current state of affairs.

depended on a disclaimer.[274] Here, no disclaimer dissociates the government from the license plate message. Indeed, there is no physical room for one.[275] In short, the indisputably strong government component means that the messages on specialty license plates will be imputed to the government in some fashion.

This inevitable attribution to the government creates both free speech and establishment complications. First, ratcheting up First Amendment protection for speech that is not entirely private deprives the government of its ability to control its own messages. Second, treating mixed speech as pure private speech ignores establishment clause concerns.

1. Government's Imprimatur on Undesirable Messages

If specialty license plates were treated as private speech so that viewpoint neutrality reigned, states would have to issue plates they would rather not, and those undesirable slogans would most likely be attributed to the government. From the government's perspective, a viewpoint neutrality regime would be objectionable because it would force the government to associate itself with messages that it would not voluntarily endorse or tolerate. If the state were a private entity, it would have a compelled speech claim, since it would be the literal speaker of an unwanted message.[276] But since the state is not a private entity, it has no First Amendment defense.[277] As a result, Tennessee would have to make and issue a pro-choice specialty license plate, and any state with a "Knights of Columbus" plate would have to allow a "Sons of Confederate Veterans" or "Aryan Nation" one.

The government's apparent endorsement or toleration of offensive, indecent, or religious messages would also be problematic from

274 Indeed, without the possibility of a disclaimer, *Pinette* might have been decided differently. *See Pinette*, 515 U.S. at 783 (O'Connor, J., concurring) (noting importance of disclaimer); *id.* at 784 (Souter, J., concurring) ("I vote to affirm in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it."). The Court also emphasized the disclaimers printed in the student publication at issue in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 823–24 (1995).

275 Disclaimers are thus not always feasible or effective. *Contra* Bezanson & Buss, *supra* note 14, at 1484 (arguing that government is perfectly capable of disclaiming speech it does not want attributed to it).

276 *See supra* notes 167–71 (discussing compelled speech doctrine); *cf.* James C. Colling, Casenote, *General Lee Speaking: Are License Plate Designs out of the State's Control? A Critical Analysis of the Fourth Circuit's Decision in* Sons of Confederate Veterans v. Commissioner of the Virginia Department of Motor Vehicles, 12 GEO. MASON L. REV. 441, 452, 478 (2003) (arguing that just as private speakers should not be compelled couriers of government message, government should not be compelled courier of private messages).

277 *See, e.g.*, Bezanson & Buss, *supra* note 14, at 1509–11 (maintaining that government is not First Amendment rights-holder).

the audience's perspective. First, license plates that bear messages contrary to government policy may confuse readers on the government's actual position. Second, the harm of certain messages[278] is exacerbated by the government's imprimatur.[279] The Confederate flag provides a real-life example. The SCV argue that the flag represents pride in their southern heritage.[280] However, "one motorist's proclamation of heritage is another's reminder of the unspeakable cruelties of human bondage."[281] States that hoped to keep the Confederate flag off their specialty license plates realized that for many, it represents a celebration of slavery and a not-so-subtly coded message of racial superiority.[282] For those who view the flag this way, it is bad enough that private individuals plaster it on their cars. Having the government put its stamp of approval on a message with racist subtexts compounds the injury. Such an imprimatur tends to make those who experience this subtext feel like outsiders to the political and civil community.[283] While such an endorsement may not be unconstitutional,[284] as a comparable endorsement of religion would be, it is hardly desirable for a conscientious government.

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[278] *See, e.g.*, Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 143–47 (1982) (describing psychological, sociological, and political effects of racial insults); Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 458–66 (same); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2335–41 (1989) (same).

[279] *See, e.g.*, Matsuda, *supra* note 278, at 2338 (arguing that government tolerance of racist speech exacerbates harms); *see also id*. at 2379 ("[T]he law's failure to provide recourse to persons who are demeaned by the hate messages is an effective second injury to that person.").

[280] *See, e.g.*, *Sons of Confederate Veterans II*, 288 F.3d 610, 624 (4th Cir. 2002) (discussing SCV view that Confederate flag is "symbolic acknowledgement of pride in Southern heritage and ideals of independence" (citation omitted)); *see also* Erickson v. City of Topeka, 209 F. Supp. 2d 1131, 1134–35 (D. Kan. 2002) (discussing SCV argument that flag represents "honor and chivalry in battle during the Civil War").

[281] *Sons of Confederate Veterans III*, 305 F.3d 241, 242 (4th Cir. 2002) (denial of rehearing en banc); *see also* Coleman v. Miller, 117 F.3d 527, 530 (11th Cir. 1997) ("We recognize that the Georgia flag conveys mixed meanings; to some it honors those who fought in the Civil War and to others it flies as a symbol of oppression.").

[282] *See, e.g.*, Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 801 (4th Cir. 2004) (Gregory, J., concurring) (describing Confederate flag as "symbol of racism and slavery").

[283] Mari Matsuda argues that when the government fails to respond to racist speech, "the victim becomes a stateless person. Target-group members can either identify with a community that promotes racist speech, or they can admit that the community does not include them." Matsuda, *supra* note 278, at 2338. Worse, the cause of this outsider status is an immutable characteristic central to identity.

[284] If the government component rises to the level of state action, Fourteenth Amendment equal protection could be implicated. *But see Coleman*, 117 F.3d at 529–30 (11th Cir. 1997) (holding that Georgia state flag containing Confederate flag did not violate equal protection rights of African American state citizens); NAACP v. Hunt, 891 F.2d 1555, 1562

A state with Confederate flag plates could try to compensate with NAACP plates or pro–African American plates.[285] But a state cannot completely negate endorsement of a racist message with simultaneous endorsement of an anti-racist message. Having both a state Nazi license plate and a state Anti-Defamation League plate does not convey the same message or create the same political atmosphere as having neither. Moreover, permitting a rebuttal plate does not ensure its issuance. Maryland, for all its hundreds and hundreds of plates, including a Sons of Confederate Veterans plate complete with Confederate flag, has no NAACP or similar plate.[286] Nor do the other states with Sons of Confederate Veterans specialty plates.[287] It may well be that no one has applied for one or that a group that applied failed to meet the content-neutral requirements, but it is a questionable proposition that the burden should fall on private citizens to counter a problematic government message.

The concern about government endorsement of harmful messages is not limited to specialty license plates. It regularly arises in other mixed speech contexts, including speech by private individuals that is funded by the government or that takes place on government property. The government is understandably reluctant to use taxpayer money to fund undesirable speech, such as awarding NEA grants to artists with racist messages.[288] But if government-subsidized speech is equated with private speech, then the government's refusal to fund racist artists because of their views would amount to unconsti-

(11th Cir. 1990) (rejecting equal protection challenge to State flying Confederate flag over state capitol).

285 For example, Oklahoma offers an NAACP specialty license plate. Oklahoma Specialty License Plates, http://www.oktax.state.ok.us/sp6.html (last visited Mar. 4, 2008).

286 *See* DMV.ORG, Maryland Organizational Plates, http://www.marylandmva.com/VehicleServ/SpecialtyPlates/OrgPlates_Entry1.asp (last visited Mar. 4, 2008); Maryland Motor Vehicle Administration, Sons of Confederate Veterans Plate Details, http://marylandmva.com/VehicleServ/SpecialtyPlates/displayPlateDetails.asp?PLATEID=468 (last visited Mar. 4, 2008) (displaying "Sons of Confederate Veterans Maryland" license plate).

287 States with Sons of Confederate Veterans specialty license plates include Alabama, Georgia, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. Information on each state's specialty license plate program is available by clicking on the individual state at DMV.ORG, License Plates & Placards Information, http://www.dmv.org/license-plates.php (last visited Mar. 4, 2008).

288 In fact, federal policy prohibits awarding grants and contracts to organizations that discriminate based on race. *See, e.g.*, Executive Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965) (mandating that all government contracts contain provisions prohibiting discrimination based on race, creed, color, or national origin). In addition, organizations that discriminate based on race are ineligible for tax-exempt status. Rev. Rul. 71-447, 1971-2 C.B. 230. This IRS ruling was upheld in *Bob Jones University v. United States*, 461 U.S. 574, 599 (1983). While these policies target discriminatory actions, rather than discriminatory speech, they illustrate government unwillingness to endorse and fund racism.

tutional viewpoint discrimination.[289] Likewise, if speech by private entities on government property is treated as wholly private, then the bar on viewpoint discrimination would allow harmful or degrading messages to find their way onto private advertisements on public transportation systems[290] or within historical displays on college campuses or in civic buildings. Even in public forum cases, where the government component is not as strong as in specialty license plate programs,[291] the lack of a disclaimer might signal government approval. One only has to imagine a lone Nazi display directly next to a state capitol building or a Ku Klux Klan Adopt-A-Highway sign on a public road to understand the government's dilemma.[292]

2. *Government's Imprimatur on Religious Messages in Violation of the Establishment Clause*

If specialty license plates are treated as purely private speech, then the establishment clause does not forbid, and the free speech clause may require, plates with religious messages.[293] But as discussed above, because the plates are actually mixed speech, the state may well be seen as endorsing these religious messages[294] and will thereby run afoul of the establishment clause. Consider a hypothetical specialty license plate with a state's name printed on top and "Say Yes to Jesus" below. If the state adopted the message as its own, it would clearly violate the establishment clause. Even if the government merely tolerates the message in the same way it tolerates pro-Porsche plates, if government endorsement of a pro-Jesus message is a plau-

[289] Some jurists have reconceptualized limits on racist or sexist messages as regulating discriminatory conduct rather than censoring a speech viewpoint. For example, Justice Thomas argued in one dissent that a law against cross-burning with the intent to intimidate "prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their points." Virginia v. Black, 538 U.S. 343, 394 (2003) (Thomas, J., dissenting). For the sake of argument, and so as not to duck the problem, this Article assumes that such government actions regulate speech content rather than conduct.

[290] Perhaps the captive audience doctrine would apply, though it seems doubtful that it would extend to advertisements visible on streets and sidewalks. *See supra* notes 232–39 and accompanying text (discussing captive audience doctrine).

[291] *See supra* notes 271–75 and accompanying text (arguing that public forum analogy does not apply in specialty license plate context).

[292] As described above, *see supra* notes 246–57 and accompanying text, courts have tried to circumvent these problematic results by describing limits on degrading, demeaning, obscene, and scatological messages as subject-matter limitations, rather than as viewpoint restrictions, but with mixed results.

[293] *See supra* note 55 and accompanying text.

[294] *See supra* notes 268–70 and accompanying text (describing possible interpretations of government's involvement with specialty license plates).

sible reading,[295] then the state has the burden of effectively disclaiming it.[296]

Notwithstanding the argument that since government cannot discriminate against religious viewpoints, it cannot be held accountable for them, speech in a forum is not (and ought not be) immune from establishment clause violations.[297] Accordingly, the controlling concurrences in *Pinette* rejected the plurality's proposed per se rule that private speech in a forum open to all viewpoints can never be attributed to the government.[298] One of the controlling concurrences noted that the establishment clause "is more than a negative prohibition against certain narrowly defined forms of government favoritism; it also imposes affirmative obligations."[299] The government's failure to act when, for example, a private religious group dominates a public forum, "*actually convey*[*s*] a message of endorsement."[300] (Recall that in *Pinette*, a lone, privately installed Latin cross on government property next to the Ohio State Capitol gave rise to the specter of endorsement.)[301] Implicitly recognized is that even in fora for private speech, the government has some power to control the message conveyed. Although the government cannot censor a viewpoint, it reserves the power to add a disclaimer to ensure that passersby under-

295 The plate might have a better chance at withstanding an establishment clause challenge if the state also issued "Say No to Jesus," "Jesus is a Myth," and "Say Yes to Satan" specialty license plates. Such a program, however, is not likely to ever exist. Maryland, which allows specialty license plates for churches, has dozens and dozens of Christian church plates but no plate for any other religion—and it is unclear what would happen to an application for an anti-Christian plate.

296 As explained below, *infra* notes 299–300 and accompanying text, Justice O'Connor's concurring opinion in *Pinette* imposed an affirmative duty on the government to make clear that it was not endorsing speech that might reasonably be associated with the state.

297 *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 303 n.13 (2000) ("[W]e have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause.").

298 Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring) ("[Cases are] not governed by [the plurality's] proposed *per se* rule where . . . preferential placement of a religious symbol in a public space or government manipulation of the forum is involved."). See also *supra* note 161 for the plurality's caveats to its own proposed per se rule.

299 *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring) (internal citation omitted).

300 *Id.*

301 *See supra* notes 159–60 and accompanying text.

stand that the cross is not government speech.[302] As a more extreme measure, the government could shut down the forum.[303]

Ultimately, with specialty license plates (to borrow from another establishment clause case), "the degree of [state] involvement makes it clear" that the plates "bear the imprint of the State."[304] Indeed, they physically bear the imprint of the state. The state's "signature" makes it a literal speaker. Having a private individual as a literal speaker of a license plate message created a strong enough link to the private individual to trigger free speech protection;[305] arguably, having the state as a literal speaker of a license plate message would create a strong enough link to the government to trigger establishment clause strictures. Moreover, the government retains some degree of control over the speech, as it can limit subject matter (e.g., to civic organizations) or eliminate the specialty license plate program altogether. In sum, if a state is willing to create and put its name alongside a "Say Yes to Jesus" religious message, a reasonable person could conclude that there is some degree of government endorsement.

The establishment clause concerns raised by specialty license plates cannot be cured by the possibility of a disclaimer, as the Latin cross was in *Pinette*.[306] It is difficult to conceive of a meaningful disclaimer that could be placed on a specialty license plate, given the small amount of space available. Given the need for the license plate number, the state's name, and the specialty message and/or graphic, there is little or no room left for any other text in a size that would be readable to a passerby.

Accordingly, a finding that a specialty license plate is purely private speech plots the free speech clause on a collision course with the establishment clause. Though the risk of endorsement is especially salient with specialty license plates, the danger is not unique to these programs. The risk of an establishment clause violation is present whenever mixed speech is classified as private speech, since the gov-

302 *See supra* notes 274–75 and accompanying text (discussing role of disclaimers). If the disclaimer is effective, and the other factors all point to private speech, then the speech may well be treated fairly as private speech. But if an effective disclaimer is not available, or the other factors suggest a government component, the speech may be associated with the government.

303 Scholars have suggested this measure in the context of endorsement of offensive or indecent speech. *See supra* note 267 (discussing "shutter[ing]" of specialty license plate programs). The same reasoning could also apply to religious speech.

304 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305 (2000) (internal quotation marks and citation omitted) (holding that student-led prayers at football games "bear the imprint of the State" and thus violate the establishment clause).

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

306 *See supra* note 274 and accompanying text (discussing role of disclaimer in *Pinette*).

ernment cannot censor a religious message despite its potential association with it.

V
MIXED SPEECH AS GOVERNMENT SPEECH

This Part analyzes the consequences of categorizing mixed speech as purely government speech, again using specialty license plates as the primary (but not exclusive) example. Treating mixed speech as government speech has two major drawbacks. First, government suppression of a viewpoint may be misread as private rejection of that viewpoint, allowing the government to promote controversial positions without being held accountable for its advocacy. Second, government suppression of viewpoints will distort the relevant marketplace of ideas, to the detriment of speakers and audiences.

A. The Consequence of Classifying Mixed Speech as Government Speech: All Viewpoints May Be Restricted

Given the often irreducible government component of mixed speech and the problems caused by classifying it as purely private speech, one might be tempted to conclude that mixed speech should be classified as purely government speech.[307] This regime would allow the government to control content and avoid any actual or perceived endorsement of a message contrary to the government's policy.[308] Thus, in the specialty license plate context, the government would be able to issue NAACP specialty license plates but not Sons of Confederate Veterans plates, pro-life but not pro-choice plates, and pro-troop but not anti-war plates. Moreover, the government could restrict indecent or offensive speech on license plates in the manner it saw fit. Those who wished to express a viewpoint contrary to the government's approved line would have to speak elsewhere. Finally, treating mixed speech as purely government speech also would eliminate any question about whether religious speech is attributable to the government. Under a specialty-plate-as-government-speech regime,

[307] *Cf., e.g.*, Norton, *supra* note 3, at 1344 (arguing that government should be able to control specialty license plates and issue pro-life but not pro-choice plates); Colling, *supra* note 276, at 466–67 (arguing that Fourth Circuit erred in holding that specialty license plates are private speech).

[308] *See* Dolan, *supra* note 269, at 123–27 (arguing that if it appears as though government is endorsing speech in forum, government speech doctrine should apply); Norton, *supra* note 3, at 1320–26 (arguing that government has legitimate interest in protecting integrity of its own expression).

the state could not issue any plates that endorsed religion[309] or that favored one religion over another.[310]

B. Disadvantages of Treating Mixed Speech as Government Speech

As with treating mixed speech as purely private speech, treating mixed speech as purely government speech has a substantial downside, flowing from audience confusion about the speaker. Specialty license plates, for example, are no more purely government speech than they are purely private speech. Because they are readily identified with the owners of the cars who choose them, it would not always be clear to the reasonable viewer that the plates have been accorded government speech status. Just as the risk that "private" messages will be attributed to the government leads to troubling results, so does the opposite problem—the risk that "government" messages will be attributed to private individuals. First, it lessens the likelihood that the government will be held accountable for its advocacy. Second, it distorts the marketplace of ideas by making some viewpoints seem more popular than they actually are. Even more problematic distortions arise in other mixed speech contexts.

1. Lack of Accountability

One problem with treating mixed speech as government speech is that the government may escape accountability for its advocacy. Under a government speech regime, the government has, subject to establishment clause restrictions, complete control over the content of its speech. The government may voice its opinion on controversial matters, assuming that its participation in the marketplace of ideas does not drown out opposing voices.[311] In other words, it may engage in viewpoint discrimination. There is, however, a trade-off. In exchange for its ability to discriminate, government speech is subject to democratic accountability.[312] If the electorate disapproves of the

[309] Of course, even in "government speech" endorsement cases, *see supra* notes 56–60 and accompanying text, questions may remain about whether the government speech in fact endorses religion.

[310] *See, e.g.*, Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

[311] *See supra* note 14 and accompanying text (noting limitation on government speech doctrine where government speech monopolizes market).

[312] *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 563 (2005); *see also* Jacobs, *supra* note 3, at 1387–88 (arguing that government's right to choose what speech to allow depends on its political accountability for those choices); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1018–19 (2005) (arguing that legitimacy of government speech depends on public's ability to identify what government says and to hold it accountable).

acts or messages of elected officials, it has a remedy: It can turn out the incumbents and elect new representatives.[313] However, this remedy is only effective so long as reasonable citizens know when the government speaks.[314]

Government advocacy can lack transparency in any number of ways.[315] The government can, intentionally or unintentionally, hide its role under any of the five speaker factors.[316] For example, the government can hide funding by secretly paying private papers to run favorable press,[317] or it can disguise the fact that it is the literal speaker by publishing materials that look privately printed but are actually governmental.[318] Of course, lack of transparency is not always the result of bad-faith obfuscation, and there are varying degrees of nontransparency.[319]

Specialty license plates fall somewhere in the middle on the continuum of transparency, where there is not deliberate and complete concealment but where a real risk of confusion remains. The government does not intentionally hide its role as speaker. On the contrary, there are plenty of guideposts indicating the government's role: Every plate has the state name on it, it is widely known that the state manufactures and distributes the plate, and anyone can read the legislation authorizing the program and plates.[320] But these factors do not

313 *See* Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000) (noting that government is accountable to electorate for its speech); *see also Johanns*, 544 U.S. at 575 (Souter, J., dissenting) ("Democracy, in other words, ensures that government is not untouchable . . . if enough voters disagree with what government says, the next election will cancel the message.").

314 *See* Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 798 (4th Cir. 2004) (noting that if public is misled, rationale of democratic accountability is thwarted); Saumya Manohar, Comment, *Look Who's Talking Now: "Choose Life" License Plates and Deceptive Government Speech*, 25 YALE L. & POL'Y REV. 229, 234 (2006) (observing that public cannot hold government accountable if it cannot tell who is speaking).

315 *See* Greene, *supra* note 14, at 49–52 (defining government speech that is not transparent as "ventriloquism" and discussing ways in which connection between government and speech can be masked).

316 *See supra* Part III.A (listing factors relevant to identifying speaker for First Amendment purposes).

317 *See* Lee, *supra* note 312, at 983–84 (describing how White House paid journalists and columnists to promote White House policies without disclosing ties to government); Manohar, *supra* note 314, at 230 (describing how from 1998 to 2003, White House Office of National Drug Control gave major television networks millions of dollars in public service broadcasting credit for airing primetime programming with anti-drug messages).

318 *See* Manohar, *supra* note 314, at 230–31 (describing news segments aired by local television stations that looked like regular news broadcasts but were federally created prepackaged segments).

319 At one end, the government completely (and probably intentionally) conceals its involvement. On the other end, the government claims the speech as its own.

320 These are the same components that make treating the speech as purely private speech problematic.

negate the impression of strong private interests at play, since private individuals select the specialty plates, pay for them, and affix them to their private property.

Adding to the confusion is the fact that the actual messages conveyed on specialty license plates in most programs do not, as a whole, suggest government advocacy.[321] Although there are some cases where the government is genuinely espousing certain messages to the exclusion of others—as with Tennessee's decision to issue "Choose Life" plates but not "Pro-Choice" plates[322]—it is difficult to discern the government's interest in most plates. As discussed above,[323] the sheer number of plates offered, the multitude of plates on subjects unrelated to any state concern (e.g., "Porsche Club" plates), and the existence of conflicting messages (e.g., states that offer "Choose Life" and "Planned Parenthood" plates)[324] make it difficult to divine any intended government policy stance. Consequently, a reasonable person can conclude that some (if not most) plates are tolerated rather than specifically endorsed by the government. Thus, a reasonable person might read the "Choose Life" plates the same way they do the "Porsche Club" plates—as an expression of a car owner's personal interests or opinions, rather than the government's position on that issue.[325] This conclusion would be reasonable and legitimate even for a highly educated observer aware of every legal enactment.

Despite the potential for confusion and resulting lack of accountability, the Supreme Court has rejected transparency as a condition for classifying speech as government speech immune from viewpoint neutrality requirements. In *Johanns v. Livestock Marketing Ass'n*,[326] the Court held that advertisements paid for by beef producers as part of a government program to promote beef products were government

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321 Exceptions to this general rule may exist for very small specialty license plate programs. *See supra* note 201 (discussing examples of states offering limited number of specialty license plates).

322 *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 372 (6th Cir. 2005) (describing Tennessee Legislature's rejection of pro-choice plate requested by Planned Parenthood); *see also* Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 794–95 (4th Cir. 2004) ("[T]he State's primary argument is that the license plate message, 'Choose Life,' is State speech because the Act is the most recent and apparently most visible expression in a long line of statements asserting the State's clear and oft-repeated preference for childbirth over abortion." (internal quotation marks and citation omitted)).

323 *See supra* notes 202–08 and accompanying text.

324 *See* Jacobs, *supra* note 69, at 454 (arguing that inconsistent messages on license plates belie claim of government speech).

325 "As the citizen becomes less likely to associate specialty plate messages with the State, the State's accountability for any message is correspondingly diminished." *Rose*, 361 F.3d at 799; *see also* Manohar, *supra* note 314, at 231 (stating that reasonable person will associate specialty license plates with driver of vehicle rather than with government).

326 544 U.S. 550 (2005).

speech because the government had complete control over the content of the advertisements.[327] However, the government's involvement was not clearly apparent: Because most advertisements bore the tag "Funded by America's Beef Producers,"[328] a reasonable person would probably conclude that private cattle ranchers were speaking. Nonetheless, the majority asserted that express disclosure of the government's involvement was unnecessary because there were internal mechanisms in place to check the government's role.[329]

The majority's view in *Johanns* shatters the bargain where the government may promote certain positions to the exclusion of others but only on the condition that the electorate can hold the government accountable for its advocacy.[330] Instead, the majority ignores this cornerstone of our democratic system.[331] As the dissent argued, "[i]t means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message."[332] In the words of the Fourth Circuit, "[t]he government speech doctrine was not intended to authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process."[333] Yet that is the result when the viewer misses or underestimates the government's role.[334]

Must all government speech be wholly transparent? Perhaps not. But at the very least, government messages aimed at the public should clearly identify the government as speaker, especially if the govern-

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[327] *Id.* at 560–62.

[328] *Id.* at 555.

[329] In particular, the majority noted that the advertisements were "subject to political safeguards more than adequate to set them apart from private messages," including federal regulations and oversight by the Secretary of Agriculture. *Id.* at 563.

[330] Under the *Johanns* majority's reasoning, regulations and internal operating procedures at a state's department of motor vehicles would suffice.

[331] *Cf.* Lee, *supra* note 312, at 1016 ("The commitment to political accountability stands as a bedrock principle of our Constitution."); Post, *supra* note 6, at 153 (arguing that democratic government derives its legitimacy from its responsiveness to its citizens).

[332] *Johanns*, 544 U.S. at 578 (Souter, J., dissenting).

[333] Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 795–96 (4th Cir. 2004); *see also* Lee, *supra* note 312, at 1041–42 (arguing that courts should take transparency into account when faced with government speech claims).

[334] *Rose*, 361 F.3d at 798–99 (noting that because of wide array of license plates available, accountability to citizens is diminished); *see also* Lee, *supra* note 312, at 1009 (noting that if government's communication lacks transparency, audiences may incorrectly attribute speech to identifiable speaker rather than to government); Manohar, *supra* note 314, at 230 ("By disguising its speech as private expression, the government can manipulate the 'marketplace of ideas' and the public's beliefs without being held democratically accountable.").

ment is taking a stance on a controversial issue like abortion.[335] To hold otherwise would mean a First Amendment pass even if the government secretly paid newspaper columnists to praise its policies or otherwise disguised advocacy of its own agenda.[336] In sum, if the government wants to promote a controversial policy, democratic accountability demands that it do so transparently rather than opaquely via mixed speech.

2. Distortion of the Marketplace

A second and independent problem caused by treating mixed speech as government speech is the possible distortion in the marketplace of ideas. "Distortion of the marketplace" can mean different things, depending on the particular marketplace, baselines, and distortions in play. A distortion, by definition, assumes a baseline. In free speech analysis, the ideal baseline for protected speech can be conceived as possessing the following three qualities: (1) no private speech is suppressed; (2) no private speech is compelled; and (3) there is no confusion about who is speaking.[337] Distortion is any deviation from one or more of these qualities.[338] As this subpart discusses, treating mixed speech as government speech can distort the first and third qualities in the specialty license plate context, and perhaps all three in other types of mixed speech.

Government censorship distorts the marketplace of ideas by not making all viewpoints available. For example, to the extent that "Pro-Choice" or "U.S. Out of Iraq" license plates are absent, speakers are denied the opportunity for self-expression, and readers are denied the opportunity to either hear about these views or know the extent to which other people support them.

The magnitude of this suppression depends on how the relevant marketplace of ideas is defined and demarcated. If the marketplace is the universe of all speech, the government's refusal to issue a particular license plate has little or no effect, and no one would argue that complete suppression has occurred.[339] Even if the marketplace is nar-

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335 This is particularly true if the government requires private entities to pay for the message, as in *Johanns*. *See* 544 U.S. at 553–54 (noting mandatory assessment used to fund beef-related promotional campaigns).

336 *See* Lee, *supra* note 312, at 1018–20 (arguing that when government participates in debate, it should make its participation transparent).

337 *See generally supra* Part I.A (discussing values underlying protection of free speech).

338 The First Amendment only addresses the ways in which the government distorts the ideal marketplace. It does not address the many ways in which private forces can also suppress speech, compel speech, or mask who is speaking.

339 *See* Greene, *supra* note 14, at 34 (arguing that distortion caused by government's suppression of viewpoint is problematic only when government monopolizes market). The

rowly defined as speech on motor vehicles, the government's actions may still have a de minimis effect on the overall availability of ideas, as drivers may post non-government-approved messages via bumper sticker or license plate holder.[340] While marketplace ambiguities may mitigate the constitutional harm, they do not eliminate it.

Treating specialty license plates as government speech can also distort the marketplace of ideas by clouding the third baseline quality, clarity about who is speaking. Intuitively, one can appreciate that evaluation of an argument may depend on the identity of the speaker.[341] A reader will treat an independent film critic's rave review of a movie differently than one written by the film's producer. Social science bears out this intuition. Studies have established that certain environmental cues, including the perceived credibility of the speaker,[342] can increase the persuasiveness of an argument.[343] People are more likely to credit the argument of someone perceived as trustworthy or expert on an issue.[344]

Confusing government endorsement with private support affects the persuasiveness of the license plate message but not because private speakers are more expert or trustworthy. Unlike the Title X doctors in *Rust v. Sullivan*,[345] automobile drivers do not have any particular expertise on subjects like abortion. Nor is the government passing off self-serving positions as critical evaluations by disinterested speakers.[346] Rather, selective government registration of specialty plates may make a particular policy position seem more popular than it actually is.[347] And as the famous Asch studies established, a

government's control of the specialty license plate forum hardly amounts to government monopoly of all speech markets. *See* Jacobs, *supra* note 3, at 1430–31 (arguing that censoring vanity plates does not threaten to monopolize speech market, due to availability of bumper stickers and other speech alternatives).

340 Arguably, the speaker's autonomy is not compromised because she is still able to express herself through alternate venues, and the audience's autonomy is not compromised because it is not denied exposure to a point of view. At the same time, people wanting to express a message unavailable on a specialty license plate might prefer not to mar the aesthetics of their car with a bumper sticker or license plate holder.

341 *See* Greene, *supra* note 14, at 50 ("By knowing the source of speech, one can more readily assess its value . . . .").

342 *See* Lee, *supra* note 312, at 1001–02 (discussing studies); Manohar, *supra* note 314, at 236 (same).

343 Lee, *supra* note 312, at 998–1005; Manohar, *supra* note 314, at 235–36.

344 Lee, *supra* note 312, at 999.

345 *See id.* at 1010 (discussing *Rust* and role of doctors' expertise).

346 *See supra* notes 317–18 and accompanying text (discussing examples). This might occur, however, if the plate directly concerns a controversial state policy.

347 *See* Lee, *supra* note 312, at 1011–13 (showing that individuals tend to adopt views perceived to be popular, and that government can make its views seem more popular than they actually are by communicating them in "non-transparent manner"); Manohar, *supra*

position perceived as popular is likely to wield greater influence.[348] "It is a 'social psychological truism that individuals tend to yield to a majority position even when that position is clearly incorrect.'"[349] In addition, "[t]he greater the number of independent sources that endorse a message, the more likely an individual will be persuaded by that message."[350] Bystanders, seeing traffic awash with pro-life specialty plates but not a single pro-choice plate, might conclude that the former position is more popular than the latter, when in fact the lack of pro-choice plates is a result of government suppression and not a dearth of support by private citizens.[351] Thus, if the existence of numerous pro-life plates and no pro-choice plates is attributed to the popularity of the pro-life position rather than to the government's promotion of that position, the government will have successfully distorted the marketplace of ideas on the issue of abortion.[352]

Beyond the license plate context, *Rust v. Sullivan*[353] illustrates a stark distortion of the marketplace of ideas caused by treating mixed speech as government speech. In *Rust*, the Supreme Court upheld the "gag rule" forbidding Title X doctors from counseling their patients about abortion, even when directly asked.[354] Again, the severity of the distortion depends upon how the relevant marketplace of ideas is defined. If the marketplace is defined as the communication between a patient and her doctor, then the government has in fact totally suppressed information about one of her options. Complete censorship of information, always anathema to free speech values,[355] has a partic-

note 314, at 236 ("If the government uses private speakers to make its message seem more popular than it actually is . . . it can increase the persuasiveness of that message.").

348 *See* Lee, *supra* note 312, at 1011 (describing Asch studies, in which subjects questioned alone correctly identified length of line 99% of time but when questioned in presence of others, all giving same incorrect answer, agreed with incorrect answer 33% of time).

349 Manohar, *supra* note 314, at 236 (quoting Anne Maass & Russell D. Clark, III, *Internationalization Versus Compliance: Differential Processes Underlying Minority Influence and Conformity*, 13 EUR. J. SOC. PSYCHOL. 197, 197 (1983)).

350 Manohar, *supra* note 314, at 236.

351 *See, e.g.*, Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 798 (4th Cir. 2004) ("Those who see the Choose Life plate displayed on vehicles, and fail to see a comparable pro-choice plate, are likely to assume that the presence of one plate and the absence of another are the result of popular choice.").

352 *See, e.g.*, *Rose*, 361 F.3d at 798 ("The State can thereby mislead the public into thinking that it has already won support for the position it is promoting.").

353 500 U.S. 173 (1991).

354 *See supra* notes 19–20 and accompanying text (discussing decision); *see also Rust*, 500 U.S. at 209 (Blackmun, J., dissenting) ("If a client asks directly about abortion, a Title X physician or counselor is required to say, in essence, that the project does not consider abortion to be an appropriate method of family planning.").

355 *See supra* notes 37–38 and accompanying text (discussing harms flowing from complete suppression of ideas).

ularly devastating effect here: The patient may conclude that abortion is not available.[356] Even if the marketplace is defined more widely, so that a patient may be aware from other sources of abortion's availability, confusion about whether the doctor's communication represents government policy (as claimed in *Rust*) or expert advice may lead the patient to believe that her doctor ruled out abortion as a medically viable option for her in particular.[357] Regardless of how the marketplace of ideas is defined, treating mixed speech as government speech means that Title X patients fail to receive all the medical information required for true informed consent and that Title X doctors fail to fulfill their professional responsibilities.[358]

A final example of problematic distortion flows from the Supreme Court's recent decision in *Garcetti v. Ceballos* to treat certain public employee speech as government speech.[359] In *Garcetti*, a Deputy District Attorney was disciplined after he wrote a memorandum questioning the legitimacy of a warrant and recommending dismissal of the case.[360] Prior doctrine recognized that a public employee can speak as both a private citizen about matters of public concern (such as government misconduct) and as a government employee, and it provided a degree of free speech protection for such mixed speech.[361] But rather than treating the prosecutor's memorandum as mixed speech, the Supreme Court held that when public employees make statements pursuant to their job duties, they do not speak as private citizens and are not protected by free speech, regardless of what they say.[362] In short, the Court eliminated the private component of such speech. As a result, the marketplace of ideas is denied information about potential government wrongdoing from those best positioned to uncover it.[363]

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356 Critics of *Rust* have made this argument forcefully. *See supra* note 39.

357 *See Rust*, 500 U.S. at 217 (Blackmun, J., dissenting) ("[T]he Title X client will reasonably construe [her physician's words] as professional advice to forgo her right to obtain an abortion.").

358 *See id.* at 211–12 n.3 (Blackmun, J., dissenting) ("That the doctor-patient relationship is substantially burdened by a rule prohibiting the dissemination by the physician of pertinent medical information is beyond serious dispute. . . . To suggest otherwise is to engage in uninformed fantasy."); Post, *supra* note 6, at 174 (discussing patients' reliance on doctors' independent judgment).

359 547 U.S. 410 (2006).

360 *Id.* at 413–15.

361 *See supra* notes 109–12 and accompanying text (describing *Pickering* balancing).

362 *Garcetti*, 547 U.S. at 421.

363 *See id.* at 429 (Souter, J., dissenting) (noting value of public disclosure and fact that government employees are uniquely situated to reveal government problems); *see also* City of San Diego v. Roe, 543 U.S. 77, 82 (2004) ("[P]ublic employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers . . . . Were they not able to speak on these matters, the community

In sum, treating mixed speech as government speech upsets free speech values by allowing the government to escape accountability for its speech and by distorting the marketplace of ideas.

VI
MIXED SPEECH AS MIXED SPEECH: A NEW CATEGORY

The disadvantages of treating mixed speech as either private or government speech raise the issue of whether mixed speech can or should be afforded distinctive treatment. Although mixed speech encompasses a wide swath of speech, not all mixed speech raises the problems identified above. For example, in compelled speech cases—which are, by definition, mixed speech situations—application of existing rules satisfactorily addresses private and government interests.[364] Similarly, when the private or government component clearly dominates, such that the risks of misattribution, confusion, and distortion are faint,[365] there is little harm in designating the speech as private or governmental.[366] In other cases, however, consideration of a third option is warranted. Indeed, any time there is a question about

would be deprived of informed opinions on important public issues."). Such suppression not only impoverishes the marketplace but also helps insulate the government from accountability.

364 Under the compelled speech doctrine, the government may control the messages, but individuals can refuse to become literal speakers of those messages. Thus, both individual and government interests are addressed.

365 Thus, speech by private individuals in city parks has a governmental component since it occurs on government property. Yet, it can be appropriately treated as purely private speech because few would believe that a private citizen speaking in the park is speaking on behalf of the government. *See supra* Part III.A.5 (discussing attribution as factor in determining whether speech is private, governmental, or mixed).

366 As a policy matter, it is possible that the problems engendered by mixed speech could be avoided in the first place by attenuating either the private or government component. For specialty license plates, perhaps the government component could be reduced by delegating to an agency the power to authorize new plates based on neutral criteria and by eliminating any viewpoint limitations. *See* Jacobs, *supra* note 69, at 469–71 (suggesting this policy solution). But even assuming that the government would issue "In God We Do Not Trust" and "Fuck the War" plates rather than eliminate the program entirely, the government component would probably not be sufficiently attenuated to treat specialty license plates as purely private speech since the state would still make, distribute, own, administer, and use the plates in its vehicle identification program, with the state's name prominently displayed—all without a disclaimer.

The government might have more success taking the opposite approach: attempting to reduce traces of private speech. If, for example, the government severely restricted the number and content of specialty plates, it might be able to argue that the plates essentially represent purely government speech and that private individuals were simply choosing amongst government messages. Apart from curtailing the fundraising potential of the plates, this approach presents the challenge of determining when the government has sufficiently reduced the private component. At what number of plates would the claim of government speech seem forced? How tightly edited must the selection of plates be? Of course, the easiest policy solution would be to eliminate specialty license plate programs

whether challenged speech can be fairly treated as purely private or purely governmental, it should be treated as problematic mixed speech.[367]

The Supreme Court has not adopted a uniform strategy for dealing with cases presenting this issue. In recent years, it has tended to characterize mixed speech as either purely private or purely government speech.[368] In other cases, it has balanced the government interests against private interests by using public forum analysis.[369] In still other cases, the Court has sidestepped the issue entirely. For example, in *National Endowment for the Arts v. Finley*,[370] the Court avoided the difficult question of whether the government could discriminate based on viewpoint in mixed speech by concluding that the NEA's viewpoint-based decency regulations were not mandatory requirements.[371]

Lower courts are also inconsistent in their treatment of mixed speech. In the specialty license plate cases, courts have tended to categorize the plates as either private or government speech.[372] By contrast, courts have analyzed other forms of mixed speech, including Adopt-A-Highway signs,[373] private advertisements on public trans-

entirely. However, this policy solution is not feasible for other types of mixed speech, such as speech by individuals subsidized by the government.

367 In other words, the challenge is to identify problematic mixed speech.

368 *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that anything said by public employee pursuant to his job duties is government speech outside purview of First Amendment protection); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–65 (2005) (holding that advertisements paid by private cattle ranchers and credited to "America's Beef Producers" were government speech); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542, 548–49 (2001) (holding subsidized speech of lawyers to be private speech); *id.* at 540–41 (describing *Rust v. Sullivan*, 500 U.S. 173 (1991), as holding subsidized speech of doctors to be government speech).

369 *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678–80 (1998) (finding that challenged speech decision occurred in nonpublic forum); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995) (describing government's power to control speech in limited public forum).

370 524 U.S. 569 (1998).

371 *Id.* at 581.

372 *See, e.g.*, ACLU of Tenn. v. Bredesen, 441 F.3d 370, 375–77 (6th Cir. 2006) (holding that specialty license plates constitute government speech); *Sons of Confederate Veterans II*, 288 F.3d 610, 619–21 (4th Cir. 2002) (holding that specialty plates constitute private speech).

373 *See, e.g.*, Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075, 1080 (5th Cir. 1995) (holding that though Adopt-A-Highway Program is nonpublic forum, State's refusal to allow Ku Klux Klan to participate near desegregated housing project was permissible because viewpoint neutral); Knights of Ku Klux Klan v. Ark. State Highway & Transp. Dep't, 807 F. Supp. 1427, 1435 (W.D. Ark. 1992) (holding that since Adopt-A-Highway Program is designated public forum, State could not exclude Ku Klux Klan from participation).

portation,[374] and participation in government civic or cultural programs,[375] under the public forum rubric. Public forum analysis, under which most fora are judged nonpublic,[376] represents a compromise: The existence of government interests allows greater governmental control over speech in the forum (in terms of subject matter and identity of speakers) than if the speech were deemed purely private. On the other hand, the existence of private interests precludes the complete government control (since regulations must be viewpoint neutral) usually afforded speech deemed purely governmental.[377] In theory, no suppression of ideas occurs, so long as the forum does not monopolize the speech market on a particular subject,[378] and no distortion of speech occurs because the audience either hears all viewpoints on a subject or none. Whether this proves to be the case in reality is the subject of much debate, as discussed in Part IV.[379]

In any case, subjecting mixed speech to forum analysis fails to address crucial government and free speech interests. Not all government interests can be accommodated by subject-matter restrictions. The government's desire to avoid association with undesirable speech, be it artwork entitled "Piss Christ"[380] or an Adopt-A-Highway sign

374 *See, e.g.*, Children of the Rosary v. City of Phoenix, 154 F.3d 972, 978, 980–81 (9th Cir. 1998) (holding that public bus advertising program was nonpublic forum from which anti-abortion posters could be excluded because restrictions on noncommercial speech were viewpoint neutral); Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth., 148 F.3d 242, 252 (3d Cir. 1998) (holding that public transportation system's advertising program was designated public forum that could not exclude anti-abortion poster).

375 *See, e.g.*, Hopper v. City of Pasco, 241 F.3d 1067, 1081 (9th Cir. 2001) (holding that city could not exclude controversial art because city hall art exhibit was designated public forum); Gentala v. City of Tucson, 325 F. Supp. 2d 1012, 1017, 1020 (D. Ariz. 2003) (holding that city could not refuse to subsidize Day of Prayer because City Civic Events Fund created speech forum).

376 Irene Segal Ayers, *What Rudy Hasn't Taken Credit For: First Amendment Limits on Regulation of Advertising on Government Property*, 42 ARIZ. L. REV. 607, 642 (2000).

377 *See supra* note 146 (discussing forum doctrine).

378 In other words, if a particular forum is the sole or main source of information on a subject, then suppression of a viewpoint within that forum equates to general suppression of that viewpoint.

379 The Fourth Circuit's decision in *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004), appears to adopt the public forum compromise with respect to specialty license plates. The court found that because the plates contained a private speech component, South Carolina could not issue pro-life plates without also offering pro-choice ones. *Id.* at 794, 799. Otherwise, the government could "distort[ ] the forum in favor of its own viewpoint" and "insulate[ ] itself from electoral accountability by disguising its own pro-life advocacy." *Id.* at 799. At the same time, the court also noted (in dicta) that because the plates contained a government component, the government should be permitted to restrict certain content, such as patently offensive speech, *id.*, presumably to avoid any misconception of state approval of offensive speech.

380 *See* NEA v. Finley, 524 U.S. 569, 574 (1998) (describing government denunciation of work of art entitled "Piss Christ").

thanking the Ku Klux Klan,[381] cannot readily be accomplished without committing viewpoint discrimination.[382] Also jeopardized is the government's constitutional duty to obey the establishment clause, as public forum analysis tends to mask the government component of the contested speech. So long as a court finds a public forum, any exclusion of religious speech is likely to be deemed unconstitutional viewpoint discrimination.[383] This has proven true even when the government helps fund the speech[384] or when it selects and subsidizes the speech,[385] factors which ought to raise serious establishment clause questions.

At the same time, private speech interests can receive short shrift under forum analysis, as the vindication of free speech rights is tied to the presence of a forum. In other words, the private component in mixed speech only garners protection if a court finds some kind of forum.[386] As Daniel Farber and John Nowak have argued, the public forum doctrine may be a useful method of balancing interests, but

381 *See, e.g.*, Cuffley v. Mickes, 208 F.3d 702, 705 (8th Cir. 2000) (describing Ku Klux Klan's application to participate in Adopt-A-Highway program); Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075, 1077 (5th Cir. 1995) (same); Knights of Ku Klux Klan v. Ark. State Highway & Transp. Dep't, 807 F. Supp. 1427, 1431 (W.D. Ark. 1992) (same).

382 Recall too that subject-matter limitations for license plates will not guarantee the purging of offensive plates, as all plates within each category must be allowed. *See supra* notes 241–45 and accompanying text; *see also supra* notes 246–57 and accompanying text (explaining difficulty of drawing line between subject-matter and viewpoint-based limitations); *cf. Finley*, 524 U.S. at 603 (Souter, J., dissenting) ("[The NEA] decency and respect provision on its face is quintessentially viewpoint based . . . .").

383 *See supra* notes 155, 259–66 and accompanying text (describing Supreme Court decisions prohibiting exclusion of religious speakers from government-created fora).

384 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845–46 (1995) (holding that funding student religious publication in limited public forum did not violate establishment clause, while not funding it would violate free speech clause).

385 Gentala v. City of Tucson, 325 F. Supp. 2d 1012, 1025 (D. Ariz. 2003) (selecting and funding National Day of Prayer did not violate establishment clause, while excluding it would violate free speech clause). The Court held that even though Tucson's civic events program was "*meant* to endorse some events as . . . worthy of the City's imprimatur," it did not follow that the city endorsed religion by funding the National Day of Prayer event. *Id*. at 1021.

386 Tellingly, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court did not find that there was a speech forum and gave little, if any, consideration to the doctors' and patients' free speech rights. *See id.* at 192–200 (rejecting petitioners' First Amendment claims). Furthermore, even if the court finds a forum, the government must only provide a rational explanation for subject-matter restrictions. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677–78 (1998) (holding that government can restrict access to nonpublic forum as long as subject-matter restrictions are reasonable and viewpoint neutral).

"when the heuristic device becomes the exclusive method of analysis, only confusion and mistakes can result."[387]

A. A New Approach to Mixed Speech: Intermediate Scrutiny

As the case of specialty license plates illustrates, an either/or approach to mixed speech fails on many levels. Public forum analysis allows some compromises but does not provide an entirely satisfactory substitute. A better approach applies some intermediate level of scrutiny to measures that constitute viewpoint discrimination on mixed speech. Under this approach, the government may restrict viewpoints if (1) it has a closely tailored, substantial interest that is clearly and publicly articulated;[388] (2) it has no alternate means of accomplishing the same goal;[389] and (3) private speakers have alternate means of communicating to the same audience.[390] This three-part test is a rigorous intermediate scrutiny. Its "intermediate scrutiny" counterpart is the heightened scrutiny given to sex classifications under equal protection[391] rather than the cursory scrutiny given to content-neutral restrictions on expressive conduct.[392] I avoid the term "strict scrutiny" since "strict in scrutiny" is usually thought to be "fatal in fact," and I believe that some viewpoint restrictions can be justified. After

387 Farber & Nowak, *supra* note 6, at 1235; *cf.* Post, *supra* note 6, at 152 (arguing that unconstitutional condition and viewpoint discrimination doctrines "have become formalistic labels for conclusions, rather than useful tools for understanding").

388 *See* Farber & Nowak, *supra* note 6, at 1240 (arguing that government goals in restricting speech "should be clearly articulated by lawmaker and not by an after-the-fact rationalization"); Jacobs, *supra* note 3, at 1390–92 (arguing that any discretion to restrict speech should be set out in politically visible manner).

389 To put it another way, the restriction is not greater than necessary to achieve particular government aims. For example, viewpoint discrimination would not be allowed if the government's interest were avoiding association with an undesirable message and if an effective disclaimer were available.

390 *See* Dolan, *supra* note 269, at 91–92, 113–15 (arguing that in "special purpose public forums"—fora created for civic, cultural, and aesthetic purposes—government should be allowed to discriminate based on viewpoint if discrimination is related to publicly stated government goals and if restrictions do not completely suppress particular viewpoints); Redish, *supra* note 247, at 143 (arguing that speech restrictions should be subject to heightened scrutiny, focusing on strength of government interest, closeness of fit, less restrictive alternatives, and availability of adequate alternate channels of communication for reaching roughly the same audience).

391 *See* United States v. Virginia, 518 U.S. 515, 531 (1996) (government must demonstrate an "exceedingly persuasive justification" for sex-based classifications); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996) ("[T]he Court [in *Virginia*] did not merely restate the intermediate scrutiny test but pressed it closer to strict scrutiny.").

392 *See, e.g.*, Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1202–04 (1996) (describing scrutiny applied to expressive conduct as "toothless").

all, like most constitutional rights, free speech rights are not absolute.[393]

The advantages of intermediate scrutiny for mixed speech cases are threefold: Intermediate scrutiny shifts the inquiry from categorizing speech to examining the underlying values; it makes transparent the inevitable balancing of interests; and, as a consequence, it may improve the consistency of outcomes.[394]

Applying intermediate scrutiny to mixed speech changes the focus from categorizing speech to weighing its underlying values.[395] For example, imagine two proposed specialty license plates: "Say Yes to Choice" and "Say Yes to Jesus." Under the current either/or approach, specialty license plates must be classified as either private speech or government speech. If they are labeled private speech, the government cannot commit viewpoint discrimination and must therefore issue both plates. However, a "Say Yes to Jesus" plate would most likely violate the establishment clause.[396] On the other hand, if the plates are labeled government speech, the government can exclude the "Say Yes to Choice" plate, allowing it to distort the marketplace of ideas and advocate without accountability.[397] In reality, these two specialty license plates highlight different competing interests and should not necessarily be treated in the same way.[398] Instead of deciding whether speech is more like private or government speech (or whether the forum is designated, nonpublic, or nonexistent), inter-

393 *See, e.g.*, Fee, *supra* note 42, at 1108 (suggesting that other legitimate social values may outweigh free speech); Redish, *supra* note 28, at 623 (arguing that free speech rights are not absolute). Even pure private speech may be restricted. *See, e.g.*, Fee, *supra* note 42, at 1106 (listing exceptions to viewpoint neutrality rule, including government-employee speech, student speech, commercial speech, and workplace speech that amounts to harassment); *see also infra* note 477.

394 Subjecting hybrid types of speech to intermediate scrutiny is not a new idea. Expressive conduct, another type of "mixed speech," is evaluated under an intermediate level of scrutiny. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968). Under the *O'Brien* test, the government interest cannot be related to the suppression of speech; rather, it must target the conduct aspect of the expressive conduct. *Id.* at 377. In fact, intermediate scrutiny pervades free speech jurisprudence. For example, content-neutral time, place, and manner restrictions, as well as commercial speech regulations, are subject to an intermediate level of scrutiny. *See generally* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (profiling development and application of intermediate scrutiny in First Amendment jurisprudence).

395 *See* Farber & Nowak, *supra* note 6, at 1234 (arguing that constitutional protection should not depend on labels but on values involved).

396 *See supra* notes 294–95 and accompanying text.

397 *See supra* Part V.B.2 (discussing potential distortion in marketplace of ideas when mixed speech is treated as government speech).

398 *See infra* Part VI.B (discussing intermediate scrutiny applied to license plates).

mediate scrutiny expressly balances the government's interests against the free speech interests at stake.[399]

A common complaint leveled against intermediate scrutiny balancing is that it opens the door to ad hoc decisionmaking.[400] According to detractors, balancing invites outcome-driven judgments; instead of categorizing speech as private or governmental and accepting the consequences, judges can designate speech as mixed and then allow their own values to prevail.[401]

However, the current categorization approach is already ad hoc, just not transparently so. It is true that heuristic devices can serve as useful proxies for more direct analysis[402] and can be more objective compared to direct assessments, which are vulnerable to judicial

399 *See, e.g.*, Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992) (describing intermediate scrutiny as overt balancing).

400 *See, e.g.*, Redish, *supra* note 247, at 119 n.44 (arguing that balancing tests "inevitably become intertwined with the ideological predispositions of those doing the balancing" (quoting John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975))); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 398 (1985) (detailing argument that balancing is unlikely to yield uniform, predictable, and impartial results).

401 A related worry that free speech advocates might voice is that recognizing mixed speech as a category will result in less free speech protection because courts will be able to label as "mixed" speech that otherwise would have been treated as "private." Speech by individuals in a public forum would be an example: The fear is that viewpoint restrictions that would have been struck down as unconstitutional under forum analysis might instead be subject to intermediate scrutiny and be upheld. This fear is unwarranted, as it makes two assumptions that are not necessarily true. First, it assumes that it is better that mixed speech be treated as private speech. Part IV refutes this assumption. Second, it assumes that courts would view the speech in question as private and protected against viewpoint discriminatory regulations. But courts' forum judgments may well be outcome-driven—after all, courts can uphold a regulation by finding no forum or by describing the regulation as viewpoint neutral. *See supra* notes 242–45 and accompanying text. *Compare* Hopper v. City of Pasco, 241 F.3d 1067, 1073, 1081–82 (9th Cir. 2001) (holding that city cannot exclude controversial art, described as "offensive and disgusting" in complaints, from city hall lobby open to art exhibits), *with* Claudio v. United States, 836 F. Supp. 1230, 1232, 1236–37 (E.D.N.C. 1993) (holding that government can exclude controversial artwork, described by judge as "a visual horror," from lobby of federal courthouse open to art exhibits), *and* Sefick v. Gardner, 164 F.3d 370, 372–73 (7th Cir. 1998) (holding that government can exclude satirical sculpture of federal district judge from lobby of federal courthouse open to art exhibits). *See also* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 555, 562–67 (2005) (finding that beef advertisements represent government speech, even though advertisements were privately funded and bore tagline "Funded by America's Beef Producers," because government agency determined ad slogans).

402 For example, Elena Kagan argues that an examination of legislative motives, measured by various objective First Amendment tests, serves as a proxy for measuring distortion in the marketplace of ideas. Kagan, *supra* note 254, at 507–09, 507 n.260. Geoffrey Stone argues that the ban on viewpoint discrimination serves as a proxy for a ban on distorting effects. Stone, *supra* note 37, at 223–24.

bias.[403] Nonetheless, categorizing mixed speech as private or governmental cannot serve this function for a very simple reason: Using categories only restrains judicial discretion if it is obvious what category applies.[404] This is usually not true with mixed speech. Since mixed speech has private and government components, it does not obviously fall into the government speech category, as opposed to the private speech category (or vice versa). Consequently, the judge must still make a value-informed decision; it is just played out at the earlier categorization stage.[405] In other words, instead of articulating why government interests should prevail over free speech interests, the court reaches its determination without explanation by labeling the contested speech as government speech (or vice versa). In lieu of subrosa balancing, mixed speech should be acknowledged as such, and competing interests should be weighed in the open.[406]

Greater judicial transparency is a benefit in and of itself. Courts should provide reasons for their decisions; "[c]andor and demystification are independent goods."[407] As Kathleen Sullivan observes, reasons promote trust in the legitimacy of the courts and help reconcile losers to their loss:[408] "Classifications into a pre-existing taxonomy, in contrast, risk seeming arbitrary, costing courts the appearance of legitimacy."[409]

Judicial transparency may also lead to more consistent outcomes. While greater predictability is a claimed virtue of categorization,[410] a single court deciding two separate cases with the same clash between government interest *X* and free speech interest *Y* can reach diametrically opposite outcomes if it finds government speech in one case and

403 Kagan, for example, argues that focusing on the motives behind a regulation rather than the constitutionality of their effects will better forestall biased decisionmaking. Kagan, *supra* note 254, at 507–09.

404 The claimed benefits of categorization over balancing, such as predictability and conservation of judicial resources, *see, e.g.*, Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 3 SUP. CT. REV. 79, 107 (1992), likewise assume that the categorization process is simple and straightforward.

405 *See, e.g.*, Sullivan, *supra* note 399, at 301–02 (suggesting that in categorical approach, all important work is done before reaching justification stage); *see also id.* at 308 ("[T]he choice of boxes plays out the same substantive value conflict as balancing, it just drives it back one step earlier in the analysis.").

406 *See* Farber & Nowak, *supra* note 6, at 1244 (arguing that since judges' values always inform their decisions, it is preferable to require judges to articulate values at stake and explain their relevance in particular cases).

407 Sullivan, *supra* note 399, at 309.

408 *Id.*

409 *Id.*

410 *But see* Schlag, *supra* note 400, at 412–13 (arguing that rules may also entail uncertainty because "rules do not determine their own fields of application").

private speech in the other.[411] If that court openly balanced the private and government interests, then its conclusion that *Y* trumped *X* would mean that *Y* should prevail in both cases.[412]

In any event, balancing need not be completely case-by-case.[413] Rules can evolve for balancing particular government and free speech interests.[414] While this may entail developing new subcategories, these would be much more nuanced than the simple private/government speech divide, and the underlying interests and values could still be addressed transparently.[415] A good existing example is the well-established *Pickering* test for mixed speech cases involving public employees. Under the *Pickering* test, the government may discipline public employees for their speech unless it concerns a matter of public interest and does not upset the efficiency of public services the government performs through its employees.[416] The underlying values are in the forefront: The government has a management interest in effectively running its workplace,[417] and the public has a free speech interest in hearing about matters of public import—especially information that it might not otherwise learn if the public employee is silenced.[418] While the Court's determination that efficiency generally

411 For example, *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), and *Rust v. Sullivan*, 500 U.S. 173 (1991), appear to present parallel conflicts with opposite results. In both cases, the literal speakers were private professionals (lawyers in *Velazquez*, 531 U.S. at 537, and doctors in *Rust*, 500 U.S. at 181); the message conveyed was professional advice (legal claims in *Velazquez*, 531 U.S. at 537–39, and health care options in *Rust*, 500 U.S. at 178–81); and the context seemed to be the same (government support of social services to poor persons where the government wanted to avoid a particular message, *Velazquez*, 531 U.S. at 537–39; *Rust*, 500 U.S. at 178–81). Yet, by categorizing the speech in the two cases differently, the Court struck down the restriction on lawyers' speech, *Velazquez*, 531 U.S. at 537, but upheld restrictions on doctors' speech, *Rust*, 500 U.S. at 203.

412 The court would at least have to explain why the interests differed, as they arguably did in *Rust* and *Velazquez*. *See infra* note 444 (noting that *Velazquez* involved especially weighty speech interests because courts' ability to assess constitutionality of laws was at stake).

413 *See* Bhagwat, *supra* note 394, at 825 (arguing that balancing need not be unguided and unfettered, given more detailed jurisprudence regarding how courts should balance interests).

414 Redish, *supra* note 247, at 144 (arguing that when courts apply heightened scrutiny, definitional balancing—as opposed to ad hoc balancing—may develop).

415 As the test in *Pickering v. Board of Education*, 391 U.S. 563, 569–72 (1968), suggests, judicial methodology is not necessarily purely categorical or purely balancing any more than speech is necessarily purely private or purely governmental. There, the Court first engaged in categorical analysis, determining that the public employee was speaking as a private citizen on a matter of public interest, *id.* at 569–71, then balanced the free speech interests against the State's interest as an employer, *id.* at 574.

416 Connick v. Myers, 461 U.S. 138, 142 (1983) (citing *Pickering*, 391 U.S. at 568).

417 *See Pickering*, 391 U.S. at 568 (noting that State has interest as employer in regulating speech of its employees to promote efficiency of service).

418 *See, e.g.*, *id.* at 572 (noting that teachers have unique insight on questions about public funding for schools).

wins[419] is subject to debate, the values promoted are plain. Unfortunately, in *Garcetti v. Ceballos*, the Supreme Court seems to be moving toward a categorical approach for public employee speech challenges.[420]

In sum, the switch from treating mixed speech as private or government speech to treating it as its own unique category, subject to intermediate scrutiny, allows for a more nuanced analysis of the competing interests—all without increasing judicial discretion. As mentioned, the current approach is already ad hoc, since speech with both private and government components can readily be labeled as either private or governmental. In addition, intermediate scrutiny imposes its own constraints on judicial discretion. First, forcing judges to articulate and balance the private and government interests and explain why one should triumph might rein in outcome-driven rulings. In contrast, under the dichotomy approach, once the contested speech is designated private or governmental, a judge does not even have to acknowledge the competing interests, let alone explain how they should be balanced. Second, once balancing of competing interests becomes more transparent, future judges addressing the same set of interests will be faced with relevant precedent that they will have to follow or distinguish, further reducing unwarranted discretion.

B. Intermediate Scrutiny Applied to Specialty License Plates

Balancing government and private interests need not be completely ad hoc, as certain government interests crop up regularly. They include the need to (1) perform a nonsovereign role efficiently; (2) dissociate from undesirable speech; and (3) avoid establishment clause violations. These interests must be balanced against free speech interests, such as preventing censorship and distortion in speech marketplaces. This Section conducts a preliminary assessment of these interests in the specialty license plate context and highlights how nuanced intermediate scrutiny is an improvement over the current approach. In particular, this Section considers government exclusion of pro-choice plates, offensive plates, and religious plates. It

419 Efficiency generally wins since the government may punish its employees unless the speech concerns a matter of public interest and is not disruptive. *Connick*, 461 U.S. at 154 (holding that public employer may discharge employee whose speech has become disruptive).

420 *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (establishing categorical rule that when public employees make statements pursuant to their official duties, First Amendment does not protect against employer discipline); *see also supra* notes 359–63 and accompanying text (discussing case).

concludes that state interests with a constitutional dimension present the strongest case for allowing viewpoint discrimination.

1. Discretion To Perform Nonsovereign Roles

A frequently recognized government interest is the need for government to perform its function effectively when acting in a capacity other than that of sovereign.[421] Thus, the government-as-employer may discipline its public employees in a way the government-as-sovereign could not treat private citizens. Courts have also balanced this nonsovereign efficiency interest against free speech interests in cases where the government is acting as broadcaster,[422] arts patron,[423] and educator[424]—all functions with private sector counterparts.

In specialty license plate programs, the government has a nonsovereign interest in acting as an effective business manager. This role was recognized in *Lehman v. City of Shaker Heights*,[425] where the Supreme Court described the city's sale of advertising space on its public transit system as a "commercial venture."[426] In *Lehman*, the Court held that, as could private newspapers, a city could exclude

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421 *Cf*. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1775, 1782 (1987) (arguing that state should have more control over speech when acting as manager of its own institutions, as opposed to when governing general public).

422 Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 683 (1998) (allowing government-as-broadcaster to exercise editorial judgment in selecting which speakers to air).

423 NEA v. Finley, 524 U.S. 569, 589–90 (1998) (upholding decency regulations in part because government-as-patron must exercise discretion in awarding grants). While the government-as-patron may need discretion to reward excellence in art, it is less clear why it needs to discriminate against excellent but offensive art.

424 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (stating that school need not tolerate school-sponsored speech that is inconsistent with its basic educational mission); Bethel Sch. Dist. No. 43 v. Fraser, 478 U.S. 675, 681 (1986) (holding that students' First Amendment rights must be balanced against school's educational mission of inculcating values); Bd. of Educ. v. Pico, 457 U.S. 853, 910 (1982) (Rehnquist, J., dissenting) ("[A]ctions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign."). The government's considerable leeway is probably due to both its capacity as educator and the lesser constitutional protection afforded to minors. However, the Supreme Court has emphasized that only restrictions necessary to meet certain pedagogical ends outweigh students' free speech interests. *See, e.g.*, *Hazelwood*, 484 U.S. at 273 (holding that educators may exercise editorial control over school-sponsored student speech as long as their actions are reasonably related to legitimate pedagogical concerns).

425 418 U.S. 298, 303–04 (1974) (holding that city-as-business-manager may exclude all noncommercial advertising in city buses in order to maximize profits).

426 *Id.* at 303; *cf.* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512–14 (1981) (finding that when state acts as sovereign, it cannot restrict privately owned billboards to noncommercial advertising).

political advertisements that might jeopardize its income stream.[427] The majority did not explain why allowing political advertisements would undermine its revenue, but lower courts grappling with similar issues have suggested that advertisers may not want to share the same space with controversial advertisements.[428] Also, "as a vendor, [the government transit authority] has a legitimate interest in not offending riders so that they stop their patronage."[429] Like advertising programs, specialty license plate programs are used to raise money—often quite successfully.[430] To the extent that a state benefits from the sale of specialty license plates,[431] it acts as a business manager trying to maximize profits.[432] Arguably, the government's need to perform this role effectively satisfies the substantial government interest requirement under intermediate scrutiny.

But if limiting viewpoints does not help the state to fulfill its role as effective business manager, then the close fit between means and ends required by intermediate scrutiny is missing. In fact, the justifications for viewpoint regulations offered in advertising programs do not translate well to the specialty license plate context. Unlike the public bus system in *Lehman*, there are no riders who can withhold their patronage. Furthermore, the license plates do not all appear together, so the existence of one plate would not impact the message of the others in the same way. Finally, by refusing to issue any new plates without a guaranteed preorder, states have already taken measures to ensure that they will not lose money.[433] The only possible argument is that all specialty license plates will become less desirable if certain unpopular, offensive, or derogatory plates are allowed.

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427 *Lehman*, 418 U.S. at 304.

428 *E.g.*, Children of the Rosary v. City of Phoenix, 154 F.3d 972, 979 (9th Cir. 1998).

429 Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 85 (1st Cir. 2004). The *Ridley* court noted that MBTA's decision to exclude demeaning advertisements was "not inconsistent with . . . [its] role as a market actor." *Id.* at 82.

430 In the six months between July 2006 and January 2007, revenue from the Florida specialty license plate program exceeded $19.6 million dollars. STATE OF FLA., DEP'T OF HIGHWAY SAFETY AND MOTOR VEHICLES REVENUE REPORT, JULY 2006–JANUARY 2007, at 13–14 (2007), http://flhsmv.gov/html/revpub/revpub_july06_jan07.pdf. Its "Choose Life" plate alone raised $477,240. *Id.* at 13.

431 While all the profit does not necessarily accrue to the state, much of it does. In Tennessee, for example, all monies from "cultural" plates go to the State, TENN. CODE ANN. § 55-4-216(a)(1)–(2) (2004), while monies from "specialty earmarked" plates, like the "Choose Life" plate, are divided equally between the State and the cause advocated by the plate, *id.* § 55-4-215(a)(1)–(3).

432 *See Lehman*, 418 U.S. at 304 (finding that given revenue at stake, "managerial decision" to display only commercial advertisements was "little different from deciding to impose a 10-, 25-, or 35-cent fare").

433 *See supra* notes 73–74 and accompanying text (discussing state restrictions on issuance of new plates).

Without state selectivity, the plates will lose their aura of state approval, which may well be a major attraction of the plates in the first place. But even assuming that viewpoint limits would increase the profitability of specialty license plate programs (and that a speculative loss of profits would implicate a substantial government interest), the government has numerous alternate means of raising revenue. Consequently, these viewpoint restrictions fail intermediate scrutiny, and fundraising effectiveness should not trump free speech in the specialty license plate context.

As discussed above,[434] no such balancing of interests occurred in *Garcetti v. Ceballos*,[435] the Supreme Court's most recent mixed speech decision involving a clash between the government's interest in the effective fulfillment of a nonsovereign role (government-as-employer) and free speech rights. Instead, the Court adopted an all-or-nothing approach, holding that a public employee's speech within the scope of his work responsibilities was essentially government speech, entitled to no free speech protection regardless of its content.[436] While efficiency matters, the *Garcetti* Court ignored the importance of speech on matters of public interest. The Court's approach also invites arbitrary results: While Ceballos's exposure of corruption was unprotected because it was reported pursuant to his job duties, exposure of the same corruption by someone with very different job responsibilities (such as a secretary) might well be protected.[437] In sum, compared to intermediate scrutiny, the *Garcetti* analysis overlooks any countervailing interests and may lead to inconsistent decisions.

2. Dissociating from Undesirable Speech

The government may also wish to regulate mixed speech to avoid supporting, condoning, or associating with speech it finds undesirable. In balancing this government interest against free speech interests, it helps to examine why the government might find speech undesirable. Reasons may include: The speech contravenes a government policy (as the requested pro-choice plates allegedly did in Tennessee); it is harmful (e.g., racist specialty license plates); or the government simply finds it distasteful.

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434 *See supra* notes 359–63 and accompanying text.

435 547 U.S. 410 (2006).

436 *Id.* at 421.

437 *Cf. id.* at 430 (Souter, J., dissenting) (noting that it would be very odd if schoolteacher could complain to principal about discriminatory hiring but school personnel officer could not).

a. Advancing a Policy Goal

Advancing a particular policy—for example, allowing pro-life plates but not pro-choice ones—is a recurring government interest. Nonetheless, in the license plate context, the balance arguably tips in favor of free speech interests. First, the government's claim to a substantial interest is questionable. Granted, the notion that the government has a significant interest in promoting its selected policies is intuitive and superficially reasonable. However, the proliferation of plates unrelated to government policies (such as "Bowling Enthusiast" or "Porsche Club" plates) dilutes the strength of assertions about the importance of the government's interest.[438] Second, while requiring the government to lend its imprimatur to a position it disagrees with is clearly not ideal, this does not necessarily affect the implementation of its policy.[439] In other words, the government has alternate means of achieving the same goals. After all, the government presumably has enough resources to clarify its own position through other, and indeed more effective, channels.[440] Third, while the censored speakers have alternate means of reaching the same audience, excluding a pro-choice or pro-life plate amounts to the hostile targeting of a particular viewpoint. These viewpoints are silenced for no reason other than that the government disagrees with them. (Exclusion of these plates also raises the accountability and distortion issues discussed above.)[441] In sum, the viewpoint restrictions fail intermediate scrutiny.

The same government interest—promoting the government's pro-life policies—animated the mixed speech decision in *Rust v. Sullivan*.[442] But by treating the doctors' speech as government speech,[443] the *Rust* Court ignored the competing private speech interests of both the subsidized doctors and the patients. In particular, as discussed in Part V.B.2, *Rust* overlooks the fact that the doctors did not have alter-

438 *See supra* notes 205–06 and accompanying text.

439 There are possible exceptions; a policy against race discrimination might be undermined by racist plates. This is because discrimination can be accomplished by verbal acts, so that a government-approved racist plate is itself a form of racial discrimination. In contrast, a pro-choice plate is not the equivalent of an abortion. Consequently, a policy against abortion is not undermined by allowing private individuals to buy pro-choice plates.

440 If the government is truly bothered, it can end or severely curtail its specialty plate program. *See supra* note 267 and text accompanying note 305.

441 *See supra* Part V.B.

442 500 U.S. 173 (1991).

443 *Rust*, 500 U.S. at 192–93 ("[T]he government 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))); *see supra* Part I.A (discussing *Rust* and development of government speech doctrine).

nate channels for providing their Title X patients with all the information necessary for true informed consent. The restriction thus fails the intermediate scrutiny requirement that the censored speaker have alternate means of reaching the same audience. *Rust* also failed to consider less restrictive alternatives for the government to achieve its policy goals, such as allowing Title X doctors to speak about abortion but withholding funding for abortions.[444] Both facts would have to be considered in an intermediate scrutiny regime.[445]

b. Harmful Messages

The government may also wish to withhold its imprimatur on harmful speech. Harmful speech is speech whose very utterance causes harm—as opposed to speech that urges harmful action[446]—and

444 In contrast, the Court more successfully addressed the underlying interests in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). Congress sought to advance its welfare policy by barring attorneys subsidized by Legal Services Corporation from challenging the validity of its welfare laws—a clear viewpoint restriction. Ultimately, the Court found that free speech interests won because having a judiciary that did not hear all arguments about Congress's laws would undermine the balance of power among the three branches of government. *Id.* at 546, 549. One could argue that in *Velazquez*, the free speech and government interests actually aligned—the private individuals' in speaking and the government's in maintaining a proper balance among its coordinate branches (even if upsetting one branch's aims). While the Supreme Court discussed the case in terms of whether the state intended to facilitate private speech, *id.* at 542–43, it essentially balanced competing interests.

445 Nor is the unconstitutional condition doctrine, which the government speech doctrine supplants, a better alternative. The unconstitutional condition doctrine holds that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989). Apart from questions about whether any coherent doctrine actually existed, *see, e.g.*, Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 469 (2000) ("[T]he contours of the unconstitutional conditions doctrine are a notoriously murky and contested area of law."); Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 1003–04 (1995) (arguing that doctrine is incoherent), the doctrine tends to be overly deferential to the government. For example, *Rust* itself rejected an unconstitutional condition claim on the grounds that the gag rule restrictions applied to the program, not to the speakers. 500 U.S. at 196–98. In other words, while the gag rule restricted Title X doctors' speech within the Title X program, it did not control their speech outside the Title X program. *Id*. at 198–99. As long as the speakers have access to some hypothetical alternate venue for their speech—for example, as long as the *Rust* doctors could talk about abortion outside the Title X program—then the challenged condition will probably be upheld as constitutional. Unlike intermediate scrutiny, the unconstitutional condition doctrine does not ask if the censored speaker has an alternate way to reach the same audience, nor does it ask if the government actually has a substantial interest or less restrictive means of accomplishing that interest.

446 It is the difference, for example, between a racial or sexual slur, which can cause harm to readers of the message by the message itself, and a pro-choice or pro-life message, which urges action that if adopted can cause harm (at least, according to detractors). Fur-

includes racist and hate speech. The exact contours of harmful speech are hotly contested,[447] but whatever the threshold, it should be lower when the government is a speaker since a demeaning message has greater, more harmful impact when uttered by the government than when said privately.[448]

Avoiding harmful government speech should be recognized as a substantial government interest.[449] As with promoting policy positions, the government does not want to advance, or even be seen as tolerating, these messages. But while government articulation of its policy positions is not directly harmful, government endorsement of hate messages is.[450] Government association with a pro-gun or pro-choice platform may be annoying for a reader with contrary views, but the government placing its imprimatur on a Nazi flag or a racial slur hurts.[451] Hate speech, for example, has been described as more like a slap in the face than a meaningful contribution to debate.[452] In other words, the government is not just approving an undesirable position—

thermore, the harm is traced to the message, not to secondary effects. *See* Kagan, *supra* note 254, at 436 (describing distinction between laws based on communicative effect of speech and laws based on aspects of speech independent of and extraneous to its message).

447 *See, e.g.*, Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes that Prohibit Racial Insults*, 3 WM. & MARY BILL RTS. J. 179, 179, 184–89 (1994) ("Determining the constitutionality of campus regulations that restrict the expression of hate speech is a particularly difficult undertaking because the form and content of what may be reasonably regarded as hate speech . . . vary significantly."); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L. REV. 343, 345–48 (1991) (discussing competing characterizations of harmful speech); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 490–92 (discussing disagreement among scholars about contours of regulable hate speech).

448 *See supra* notes 278–79 and accompanying text (discussing special harm of government-sponsored speech).

449 The lack of less restrictive alternatives, required by the second prong of intermediate scrutiny, also establishes the close fit between means and ends required by the first prong.

450 *See* Delgado, *supra* note 278, at 173 (arguing that government has interest in regulating words that are "harmful in themselves"); Kagan, *supra* note 254, at 431 (arguing that regulation of speech to prevent material harm is legitimate goal, while regulation of speech because government dislikes it is not); Stone, *supra* note 37, at 229 (contrasting suppression of speech because of disagreement with it and suppression of speech because of fear of its consequences).

451 *See supra* notes 278–84 and accompanying text (discussing distinct harm caused by government adoption of racist speech).

452 Lawrence, *supra* note 278, at 452; *see also id.* ("[T]he perpetrator's intention is not to discover truth or initiate dialogue but to injure the victim."). Some argue that the speech value of hate speech is so low that in certain circumstances the government ought to be able to restrict it even when it is purely private. *See* Delgado, *supra* note 278, at 134, 179–81 (proposing independent tort action for racial insults); Matsuda, *supra* note 278, at 2321, 2357–60 (proposing legal sanctions for certain racist speech).

it is inflicting a distinct harm.[453] In addition, in at least some cases, the harm has a constitutional dimension.[454] Although issuing state-sponsored racist license plates is not likely to be deemed state action[455] implicating the equal protection clause, it is still of constitutional significance in a way that issuing other controversial plates is not. Not only is avoiding this material harm a substantial if not compelling government interest, there is no less restrictive means of achieving it since there is no effective way to counteract or disclaim the pernicious plate.[456] Finally, as with the other withheld license plates, there is no outright quashing of ideas; since private speakers may convey these messages on their own, the restriction satisfies the third prong of intermediate scrutiny.[457]

Because few would dispute that government-approved hate speech plates inflict material harm, because the restriction on hate speech plates is not greater than necessary to prevent the harm, and because automobile-driving speakers can still reach the same audience, the restriction survives intermediate scrutiny. That is, the government should be allowed to refuse to issue, for example, Nazi specialty license plates.[458]

c. Distasteful Speech

Refusing to fund or associate with undesirable (but not harmful) speech is another government interest recognized by the Supreme Court. *NEA v. Finley*,[459] which upheld decency regulations on arts grants, illustrates this interest. There, the government's interest was in

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453 There is a First Amendment risk in trusting the government to decide whether speech is harmful, as it may define "harm" to exclude disfavored views rather than truly harmful ones. Presumably, in evaluating whether the government has a substantial interest, the court could determine whether the government was in fact restricting harmful viewpoints.

454 *See, e.g.*, Greene, *supra* note 14, at 37 (arguing that viewpoint-based government speech denigrating race, sex, or religion "violates cardinal constitutional norms"); Lawrence, *supra* note 278, at 446, 449, 473–76 (arguing that hate-speech injuries have constitutional dimension as violations of victims' rights to liberty and equal protection).

455 Mari Matsuda, however, argues that the government's tolerance of hate speech is a form of state action. Matsuda, *supra* note 278, at 2378. In fact, the specter of active state participation in hate speech (as may be presented by issuing racist license plate) presents an even stronger case for state action.

456 *See supra* notes 285–87 and accompanying text (discussing problems with alternate means).

457 Note, though, that limits on harmful speech are not entirely viewpoint neutral and may lead to some distortion in the perceived popularity of these views within the specialty license plate forum.

458 The Confederate flag raises the additional question of whether it is in fact racist. *See supra* notes 280–82 and accompanying text (discussing different views of flag).

459 524 U.S. 569 (1998).

avoiding patronage of artworks deemed inconsistent with "general standards of decency and respect for the diverse beliefs and values of the American public."[460] Applied to specialty license plates, this category might cover sexually provocative messages and other distasteful or offensive speech.[461]

The intermediate scrutiny analysis of restrictions on plates with undesirable messages parallels that of restrictions on plates with harmful messages, with two important distinctions. First, the government interest is weaker, since it wishes to avoid association with speech that offends but does not harm.[462] Second, the free speech risk of targeting unpopular viewpoints is greater since "offensive" is defined in terms of mainstream values. *Finley* proves the point: The art that triggered the NEA restrictions questioned Christianity (Andres Serrano's "Piss Christ") and celebrated homosexuality (photographs by Robert Mapplethorpe).[463]

Rather than recognizing the competing values at stake, the *Finley* Court pretended that the decency limits were merely hortatory and that the state needed to exercise discretion in its role as patron anyway.[464] Although the NEA might need discretion to select excellent art in order to fulfill its mandate, effective patronage does not require that the NEA have the unfettered ability to reject controversial or offensive art.[465] It is really another government interest—the interest in not funding or associating with the disreputable—at work

460 *Id.* at 572.

461 Again, the line between harmful and offensive is not self-evident.

462 *See* Lawrence, *supra* note 278, at 461 ("There is a great difference between the offensiveness of words that you would rather not hear . . . and the *injury* inflicted by words that remind the world that you are fair game for physical attack, [and] evoke in you all of the millions of cultural lessons regarding your inferiority . . . .").

463 *Finley*, 524 U.S. at 574; *see also id*. at 606 (Souter, J., dissenting) ("[T]he whole point of the proviso was to make sure that works like Serrano's ostensibly blasphemous portrayal of Jesus would not be funded, while a reverent treatment, conventionally respectful of Christian sensibilities, would not run afoul of the law. Nothing could be more viewpoint based than that." (internal citation omitted)).

464 *Id.* at 583–84 (finding that given "vague exhortation" to consider decency, it was "unlikely that this provision [would] introduce any greater element of selectivity than the determination of 'artistic excellence' itself"). The Court has more than once shied away from explicitly holding that certain government roles justify viewpoint discrimination, even when that is essentially the result. For example, in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the Court seemed to assume that the ban on commercial speech was viewpoint neutral, as the plurality and concurrence did not even raise the issue. *See also* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682 (1998) (finding that exclusion of fringe candidate from debate was not because of viewpoint "but because he had generated no appreciable public interest").

465 On the contrary, the plaintiffs in *Finley* included artists who had been approved for grants based on excellence before the restrictions went into effect but who were subsequently denied funding. *Finley*, 524 U.S. at 577.

in *Finley*. But this was not candidly acknowledged. Intermediate scrutiny would have chased these interests into the open.

3. Avoiding Government Endorsement of Religion

Avoiding endorsement of religion is a constitutional mandate and therefore a compelling interest.[466] Overtly religious license plates raise the possibility of a clash between the free speech and establishment clauses—a clash that the Supreme Court has thus far managed to duck. It came close in *Rosenberger v. Rector and Visitors of University of Virginia*,[467] where a state university refused to subsidize the printing costs of a student religious publication even though it subsidized the costs of secular student publications.[468] Direct funding of religious speech would seem to violate the establishment clause, just as state endorsement of religious messages like "Say Yes to Jesus" would. On the other hand, creating a forum for all viewpoints except religious ones would seem to undermine free speech.

The *Rosenberger* Court did not hold that the establishment clause should give way to free speech. Rather, it found no establishment clause violation on the ground that the religious speech should not be attributed to the government.[469] Pivotal to that decision was the Court's insistence on three points. First, the students' speech was private speech: "The program respects the critical difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[470] Second, the university took pains to dissociate itself from that private speech by requiring disclaimers on all student publications.[471] Third, the state aid was dis-

466 Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112–13 (2001) (citing Widmar v. Vincent, 454 U.S. 263, 271 (1981)).

467 515 U.S. 819 (1995).

468 *Id.* at 822–23. The same tension existed in *Locke v. Davey*, where the State of Washington provided scholarships to qualifying students for all areas of study except devotional theology. 540 U.S. 712, 716 (2004). Washington argued that the establishment clause of its state constitution barred such funding, *id.*, while the plaintiff argued that the denial of funding violated his free speech rights, *id.* at 718. The Court found that neither argument had any traction under the U.S. Constitution. According to the Court, Washington could fund the theology studies because "the link between government funds and religious training is broken by the independent and private choice of recipients." *Id*. at 719. At the same time, the First Amendment was not implicated because Washington's Promise Scholarship Program did not create a forum for speech. *Id*. at 720 n.3.

469 *Rosenberger*, 515 U.S. at 841–42.

470 *Id.* at 841 (internal quotation marks and citation omitted).

471 *See id*. at 823, 841 ("[T]he government has not fostered or encouraged any mistaken impression that the student newspapers speak for the University." (internal quotation marks and citation omitted)).

tributed neutrally.[472] Consequently, the fear that the publication's "religious orientation would be attributed to the University" was not plausible, as there was "no real likelihood that the speech in question [was] being either endorsed or coerced by the State."[473]

The collision between establishment and free speech cannot be so easily skirted with specialty license plates. The government component is much stronger: Unlike the student publication in *Rosenberger*, the license plates cannot be fairly categorized as purely private speech.[474] In addition, effective disclaimers are impossible.[475] Finally, if the government opts for some kind of content restriction, such as a prohibition on denigrating plates like "Jesus is a Myth," then it is not making the license plates available to all speech on a neutral basis. In short, specialty license plates present a much starker clash.

In this clash, restrictions on mixed speech religious plates would probably survive intermediate scrutiny. The government's interest—complying with the establishment clause—is compelling, not just substantial. And there is no alternative, such as adding disclaimers,[476] less restrictive than excluding the religious plates.[477] On the other hand, there are plenty of alternate channels of communication open to religious speakers; specialty license plates do not monopolize the relevant speech market, whether one defines the relevant market as all speech fora where religious views might be discussed, or just speech on private cars.[478] Consequently, there is little risk of suppression of religious ideas. While speakers may feel frustrated that they cannot voice a religious opinion with the government's imprimatur, they at

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[472] *Id*. at 840 ("The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion . . . .").

[473] *Id.* at 841–42.

[474] The *Rosenberger* Court's characterization of the student publication as purely private speech is itself debatable.

[475] *See supra* notes 274–75 and accompanying text (discussing this problem).

[476] *Cf*. Norton, *supra* note 3, at 1339 ("If government can adequately protect the integrity of its expression by disclaiming private speech, then it should do so.").

[477] Furthermore, as a structural restraint on the government, establishment clause limitations are absolute. *See generally* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 IOWA L. REV. 1 (1998) (arguing that establishment clause is properly understood as structural restraint on government power that cannot be waived). In contrast, free speech rights are regularly balanced against competing interests. Thus, free speech doctrine tolerates content restrictions on private speech when countervailing interests are strong enough. *See, e.g.*, Delgado, *supra* note 447, at 377 (enumerating fifteen distinct "exceptions" to free speech protection); *see also* Matsuda, *supra* note 278, at 2353–55 (discussing how government's interests have justified limiting private speech in various situations); *supra* note 393.

[478] *See supra* notes 339–40 and accompanying text (discussing relationship between breadth of definition of relevant marketplace and degree of government suppression of ideas).

least have the consolation that the government is simply not allowed to grant that imprimatur. In other words, the government has not targeted their speech because of its perspective—instead, the Constitution has precluded it. This is a significant difference from restricting offensive speech or policy positions that the government opposes, both of which are targeted precisely because of their viewpoints.[479]

In sum, compared to applying intermediate scrutiny to viewpoint restrictions, categorizing mixed speech as private or governmental is too blunt an instrument to take competing interests into account. It leads to the government restricting all viewpoints or none. Applying intermediate scrutiny, on the other hand, highlights all the interests, private and governmental. In an evaluation of these interests, the government's arguments for restricting certain viewpoints are strongest when they implicate constitutional concerns, like equal protection or establishment of religion. In contrast, the scales tip in favor of free speech when the government interests lie in maximizing income or advancing its policies. In the specialty license plate context, the government should be able to disallow racist and religious plates, but not pro-choice ones. Of course, subjecting mixed speech restrictions to intermediate scrutiny does not guarantee this outcome. My recommendation only ensures a certain process of reaching decisions, not the decisions themselves. Subjecting mixed speech to intermediate scrutiny simply makes possible a nuanced and transparent analysis. Even if courts do not ultimately agree with the specific conclusions briefly sketched out above, application of intermediate scrutiny renders transparent the inevitable balancing that courts perform.

CONCLUSION

Speech that has both private and government components is a distinct type of speech, deserving of recognition. Because both private individuals and the government "speak," both have strong interests in mixed speech. Consequently, mixed speech foregrounds two lurking conflicts. First, there is the clash between free speech's goal of protecting private speech, including unpopular and offensive speech,

479 That religious restrictions pass intermediate scrutiny should not be a startling conclusion. The Supreme Court has already approved viewpoint restrictions on mixed speech for interests that are arguably far less compelling. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 421–23 (2006) (upholding viewpoint restriction in part to ensure efficient workplace); NEA v. Finley, 524 U.S. 569, 572–73 (1998) (upholding decency regulation); Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (upholding restriction on political advertisement in part to secure revenue from sale of advertising space).

and the government's goal of withholding its imprimatur on unpopular or offensive speech. Also on a collision course in religious mixed speech cases is the free speech clause's protection against viewpoint discrimination and the establishment clause's bar on state religious speech.

The current solution is usually to avoid these clashes by pretending that mixed speech is actually private or government speech. But classifying mixed speech as either private or governmental masks the competing interests involved. Once mixed speech is labeled government speech, the free speech interests of speakers and the audience are dismissed. Likewise, once it is labeled private, concerns about state endorsement of offensive, harmful, or religious speech are ignored. Intermediate scrutiny of mixed speech allows a more nuanced analysis than does the present either-or approach.[480] In addition, intermediate scrutiny also makes transparent the inevitable balancing of interests by forcing the courts to articulate reasons for restricting speech rather than letting them hide behind nomenclature.[481]

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[480] The categories would not be completely retired. As discussed above in the introduction to Part VI, where the private or government components are sufficiently attenuated, courts may fairly categorize the speech as purely private or purely governmental. Intermediate scrutiny would apply in cases where this classification cannot be made.

[481] All things being equal, the government's constitutional duty to avoid violating the establishment clause is a stronger interest than advocacy of a particular policy on abortion. Yet, the actual decisions seem to indicate the opposite priorities: Private interests seem to prevail when the mixed speech is of a religious nature, while the government seems to prevail when the mixed speech concerns abortion. This may just be happenstance; it may well be that the Sixth Circuit would have held that the specialty license plates were government speech if the contested message were pro-choice instead of pro-life and that the Fourth Circuit would have held that the specialty license plates were private speech if the contested image were of two men kissing rather than a Confederate flag. But perhaps not. Regardless, it would be more reassuring if these results were reached after an aboveboard balancing of the competing interests at stake.