

Vanity Lawfare: Vanity License Plates and the First Amendment

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ABSTRACT: When Pennsylvania introduced the vanity license plate in the early 1930s, it represented the first time a state government added an expressive component to the otherwise solely identificatory license plate. Vanity-plate programs are now ubiquitous across the United States, and those programs are accompanied by sweeping and amorphous restrictions on categories of expression that the states will permit to appear on the plates. When these restrictions face constitutional challenge, both state and federal courts have disagreed as to whether those restrictions are constitutional, reaching wildly different conclusions at every stage of the First Amendment analysis. This Note suggests that the Supreme Court, in an appropriate case, should clarify the framework for analyzing the constitutionality of vanity-plate regulations. Based on this adjusted framework, this Note contends that, in many cases, states' broad restrictions cannot be squared with the First and Fourteenth Amendments' joint guarantee that state governments "shall make no law . . . abridging the freedom of speech." To reach this end, this Note first concludes that vanity plates' alphanumeric configurations are better understood as the expression of the private actors who request them, rather than of the state governments who approve the plates. Second, it turns to those categories of speech most commonly proscribed by vanity-plate regulations. It concludes that several of these categories—offensive speech, disparaging speech, and profane speech—cannot be wholly restricted without engaging in viewpoint discrimination, which is at the core of what is prohibited by the First Amendment.

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I. INTRODUCTION

In a 1995 episode of *Seinfeld*, Cosmo Kramer makes an initially mundane trip to the New York Department of Motor Vehicles to pick up new license plates for his Chevrolet Impala.¹ Upon arriving, he discovers that he has been issued the wrong plates. Rather than receiving plates featuring New York’s standard three-number and three-letter combination, Kramer is instead issued the vanity plate “ASSMAN.”² Assuming (correctly, as it turns out) the plate had been intended for a proctologist, Kramer uses the mistake to his advantage—swiping a convenient “doctors only” parking spot on a trip to the hospital.³

Such a story is only fit for television. In reality, the “ASSMAN” license plate likely never would have been issued. New York, like other states, has broad regulations governing the type of expression that may be featured on a vanity license plate. Vanity license plates may not be “obscene, profane, vulgar, repulsive, depraved, or lewd,” nor may they “refer to a sexual or intimate body part, area or function.”⁴ In all likelihood, “ASSMAN” would violate these criteria, regardless of the plate’s subjective meaning to its proctologist-requestor. If that were not enough, New York’s regulations reach even further, also restricting “derogatory, contemptuous, degrading, disrespectful or inflammatory” configurations.⁵ Undoubtedly, a government regulator would have little trouble stretching at least one of these adjectives to capture Kramer’s plate.

Kramer’s antics are played for laughs, but they offer a brief glimpse into the many complex First Amendment ramifications for vanity license plates. The introduction of vanity license plates transformed the standard license plate into a tool for expression. But exactly whose expression is it? Is the government speaking by physically producing the plate, or is a private

1. *Seinfeld: The Fusilli Jerry* (NBC television broadcast Apr. 27, 1995).

2. *Id.*

3. *Id.*

4. N.Y. COMP. CODES R. & REGS. tit. 15, § 16.5(a)(2)(i)–(ii) (2019).

5. *Id.* § 16.5(a)(2)(iv).

individual speaking by requesting the expressive configuration and displaying the plate on his or her vehicle? Assuming the vehicle-owner is speaking, is it permissible for a government agency constrained by the First Amendment to restrict the vehicle-owner's speech based on such broad and amorphous standards?

Before turning to these questions, this Note begins, in Part II, by setting the stage in two respects. First, it provides a brief historical overview of the license plate and explains the different functions of vanity and specialty plates. Second, it summarizes the broader First Amendment framework through which the constitutionality of vanity-plate regulations has been considered, focusing on the government-forum, government-speech, and offensive-speech doctrines. In Part III, this Note conducts a survey of states' vanity-plate regulations. It then turns to the difficulties state and federal courts have faced in applying First Amendment analysis to these regulations. Next, it addresses the inadequacy of current Supreme Court jurisprudence for resolving those difficulties and illustrates the consequences of these difficulties for individuals and state governments. Finally, in Part IV, this Note advocates for an adjusted approach, in which vanity plates are considered private expression on government property and are thus afforded some First Amendment protection.

II. THE LICENSE PLATE AND THE FIRST AMENDMENT FRAMEWORK

The legal significance of vanity plates is rooted in a series of shifts in the Supreme Court's approach to the Free Speech Clause of the First Amendment. The Free Speech Clause provides that "Congress shall make no law . . . abridging the freedom of speech."⁶ Through the Fourteenth Amendment, the First Amendment's speech protections have also been incorporated to apply against state governments, ensuring that they too may not abridge the speech of their citizens.⁷ On its face, the constitutional command is simple. But, despite its literal phrasing, the Supreme Court has never understood the First Amendment as prohibiting all government regulation of speech.⁸ Further, the collision of the First Amendment's text with a continually modernizing world has produced a winding and complex jurisprudence.⁹

6. U.S. CONST. amend. I.

7. See *Stromberg v. California*, 283 U.S. 359, 368 (1931) (considering it settled "that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech"); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (assuming the Free Speech Clause applies against the states).

8. Clay Calvert & Robert D. Richards, *Free Speech and the Right to Offend: Old Wars, New Battles, Different Media*, 18 GA. ST. U. L. REV. 671, 675-76 (2002). Excluded categories include, for example, obscenity, child pornography, incitement, and fighting words. *Id.*

9. See *id.* at 672, 675 n.24 (noting the complexity of First Amendment law, despite the amendment's straightforward language); see, e.g., *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (concluding a statute preventing registered sex offenders' access to social media

Courts have had particular trouble applying the First Amendment in circumstances where state governments have taken a more active role in their citizens' everyday lives. In addition to its traditional functions, the modern state government has assumed roles as "a creator of rights and programs, a manager of economic and social relationships, a vast employer and purchaser, an educator, investor, curator, librarian, historian, patron, and on and on."¹⁰ While this development poses novel challenges in all areas of law, it raises especially difficult questions in the realm of free speech. Rather than merely being at risk of trampling the marketplace of ideas,¹¹ state governments have now entered the market as active participants. Starting in the Rehnquist Court era, the Supreme Court began to shift its First Amendment jurisprudence to reflect this reality—finding governments had opened previously unforeseen forums for private speech¹² and, with increasing frequency, finding that a government was speaking for itself.¹³ This sea change was necessary to accommodate the practice of governments communicating messages to their citizens.¹⁴ However, as noted by judges and scholars alike, it also poses serious line-drawing difficulties¹⁵ and has the potential to erode private speech protections if incautiously applied.¹⁶

was "unprecedented in the scope of First Amendment speech it burden[ed]"); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (accepting "that video games qualify for First Amendment protection"); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 130–31 (1989) (overturning a ban on indecent telephone messages); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969) ("Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them." (citation omitted)).

10. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380 (2001).

11. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (first introducing the now-familiar metaphor into free speech jurisprudence); Rodney A. Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, in *FREEDOM AND TENURE IN THE ACADEMY* 195, 197 n.7 (William W. Van Alstyne ed., 1993) ("The 'marketplace of ideas' is perhaps the most powerful metaphor in the free speech tradition.").

12. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (construing the University of Virginia's Student Activities Fund as a "metaphysical" forum); see also *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019) (concluding President Trump created a government forum by using his Twitter "[a]ccount as an official vehicle for governance and ma[king] its interactive features accessible to the public without limitation").

13. Bezanson & Buss, *supra* note 10, at 1381.

14. *Id.* at 1380.

15. See *Mitchell v. Md. Motor Vehicle Admin.*, 148 A.3d 319, 328 n.8 (Md. 2016) (struggling "to divine the Supreme Court's intent" in applying the public-forum doctrine); Bezanson & Buss, *supra* note 10, at 1381 ("[T]he Court has become theoretically and analytically stuck in an endless circle, at the edge of a chasm between government speech and the public forum.").

16. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 221 (2015) (Alito, J., dissenting) (accusing the majority of "threaten[ing] private speech" by "pass[ing] off private speech as government speech"); Bezanson & Buss, *supra* note 10, at 1510.

In addition, throughout the Rehnquist and Roberts Court eras, the Court has reexamined the outer limits of *private* speech protected by the First Amendment.¹⁷ As a part of this examination, the Court has routinely encountered cases dealing with offensive or hateful expression.¹⁸ The result has been a more streamlined offensive-speech doctrine, centered on preventing government suppression of offensive ideas.¹⁹

On occasion, the government-speech, government-forum, and offensive-speech doctrines overlap. And at the center of that overlap sits what is otherwise a rather unassuming object: the license plate.

A. THE EVOLUTION OF THE LICENSE PLATE AS A MEDIUM OF EXPRESSION

Before proceeding to a more complete discussion of these evolving free-speech doctrines and evaluating vanity license plates' place in the First Amendment constellation, it is necessary to understand which aspects of the license plate invited constitutional scrutiny in the first place. Doing so requires briefly summarizing the changing physical form of the plate itself.

The history of the license plate can be traced to the turn of the twentieth century. In 1901, New York became the first state to require some form of license "plate."²⁰ Rather than issuing a unique combination of numbers and letters, New York required only that the owners' initials be placed on the back of the vehicle "in a conspicuous place, the letters forming such initials to be at least three inches in height."²¹ The owners themselves were responsible for providing the identifying mark, with "no restrictions on materials, style or color."²² In 1903, when faced with the predictable problem of people sharing the same initials, the New York legislature responded by assigning a unique number to each vehicle-owner instead.²³ The same year, Massachusetts introduced the first state-issued license plate, which also featured a designated

17. See, e.g., *United States v. Stevens*, 559 U.S. 460, 468–72 (2010) (rejecting a proposed balancing test for determining which categories of speech are unprotected); *Reno v. ACLU*, 521 U.S. 844, 874–79 (1997) (reaffirming "that '[s]exual expression which is indecent but not obscene is protected by the First Amendment'" (alteration in original) (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989))); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) (reexamining whether "fighting words," which had been long understood as unprotected by the First Amendment, can be regulated based on viewpoint).

18. See generally *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) ("immoral or scandalous" trademarks); *Matal v. Tam*, 137 S. Ct. 1744 (2017) ("disparaging" trademarks); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011) (violent video games); *Snyder v. Phelps*, 562 U.S. 443 (2011) (picketing funerals); *Stevens*, 559 U.S. 460 (depictions of animal cruelty); *Virginia v. Black*, 538 U.S. 343 (2003) (cross burning).

19. See *Iancu*, 139 S. Ct. at 2299 (asserting that if a restriction "is viewpoint-based, it is unconstitutional").

20. Merrill Fabry, *This Is Why Cars Have License Plates*, TIME (Apr. 25, 2016, 11:00 AM), <https://time.com/4301055/license-plate-history> [<https://perma.cc/V4AB-QS4X>].

21. *Id.*

22. *Id.*

23. *Id.*

registration number.²⁴ Despite states having realized the need for license plates as soon as the early 1900s, the uniform 6 by 12-inch plate design would not be adopted nationwide until 1956.²⁵

From this basic form, two variants of personalized license-plate programs have emerged. The first program involves what this Note refers to as “vanity” plates. The second program involves what this Note refers to as “specialty” plates. Vanity plates and specialty plates are easily confused in popular discourse,²⁶ and the precise nomenclature for each category varies.²⁷ Nonetheless, the two programs—and the categories of license plates produced therefrom—are distinct.

First, vanity-plate programs permit individual vehicle-owners, for an additional fee, to request a unique arrangement of letters and numbers to appear on their plate in place of the state’s default character sequence.²⁸ While typically subject to the same character limit as regular license plates,²⁹ within this constraint the vehicle-owner can assemble letters and numbers to form identifiable words, names, shorthand for phrases, acronyms, and the like. In 1931, Pennsylvania became the first state to adopt such a program.³⁰ By the 1960s, vanity-plate programs had become “a well-known cultural phenomenon,” as well as “a lucrative revenue-producing mechanism” for state governments.³¹

By contrast, specialty-plate programs permit vehicle-owners to select from a set of pre-approved designs, often containing graphics or slogans, that they

24. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 223–24 (2015) (Alito, J., dissenting).

25. Ronald Ahrens, *The Lost History of License Plates*, AUTOMOBILE (July 4, 2014), <https://www.automobilemag.com/news/the-lost-history-of-license-plates> [<https://perma.cc/W2NW-DTRW>].

26. See Editorial, *DMV Needs to Stop Censoring Your Vanity License Plate*, L.A. TIMES (Apr. 11, 2019, 3:15 AM), <https://www.latimes.com/opinion/editorials/la-ed-vanity-license-plate-lawsuit-20190411-story.html> [<https://perma.cc/8TBL-Y4LK>] (mistakenly describing a Supreme Court case about *specialty* plates as discussing *vanity* plates).

27. Compare ARIZ. REV. STAT. ANN. § 28-2406(A) (2012) (referring to vanity plates as “personalized special plates”), with GA. COMP. R. & REGS. 560-10-22.02 (2020) (referring to vanity plates as “special prestige license plates”), and MASS. GEN. LAWS ch. 90, § 2 (2018) (referring to vanity plates as “distinctive initial plates”), and N.H. CODE ADMIN. R. ANN. Saf-C 514.61 (a) (2018) (referring to vanity plates as “vanity registration plate[s]”).

28. Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 619 (2008).

29. See, e.g., IOWA ADMIN. CODE r. 761-401.6(2) (2020) (restricting vanity plates to “no fewer than two nor more than seven characters”); MASS. GEN. LAWS ch. 90, § 2 (requiring that vanity plates “shall not consist of more than six letters or numbers or combination thereof”); S.D. CODIFIED LAWS § 32-5-89.2 (2019) (limiting vanity plates for non-motorcycles to a maximum of seven characters).

30. *Mitchell v. Md. Motor Vehicle Admin.*, 126 A.3d 165, 181 (Md. Ct. Spec. App. 2015), *aff’d*, 148 A.3d 319 (Md. 2016).

31. *Id.* at 181.

wish to appear in place of the state's standard license-plate design.³² Depending on the state, available designs might include plates representing colleges and universities, sports teams, charitable causes, hobbies, private organizations, or consumer brands, as well as many other possibilities.³³ Some designs, such as those plates indicating the vehicle-owner is a veteran of a particular military branch, are reserved for specific classes of people.³⁴ In some cases, states donate the profits from the fees associated with purchasing a specialty plate to the cause with which the plate design is affiliated.³⁵ Specialty plates are also of a more recent vintage than vanity plates. Specialty plates first became popular after 1987, when "Florida issued a plate commemorating the space shuttle Challenger" disaster.³⁶ While almost every state now issues specialty plates, the number of available designs varies widely from state to state.³⁷

This Note principally concerns vanity plates, although some useful analogies will be drawn from the federal courts' decisions on specialty plates. The jurisprudence concerning specialty plates is more settled than that of vanity plates.³⁸ In the last three decades, both state and federal courts have struggled mightily to apply existing First Amendment law to the unique context of vanity plates, often reaching wholly contradictory conclusions.³⁹ This confusion is understandable, as courts face a process in which a private individual chooses an often-expressive combination of characters unique to the private individual, the private individual requests that the combination be

32. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 203 (2015); Corbin, *supra* note 28, at 619.

33. *See Walker*, 576 U.S. at 221–22 (Alito, J., dissenting) (describing several types of specialty plate designs that may be spotted on the highway).

34. Corbin, *supra* note 28, at 619 n.70.

35. *See, e.g., Breast Cancer Awareness Plate*, IOWA DOT, <https://iowadot.gov/mvd/vehicleregistration/vehicleregistration/plates/breastcancer> [<https://perma.cc/AM3S-EPDT>] (donating associated fees to the Breast Cancer Awareness Fund); *Kansas DU License Plates*, DUCKS UNLIMITED, <https://www.ducks.org/kansas/kansas-du-license-plates/poe/recentadded> [<https://perma.cc/77LU-NEPJ>] (donating associated fees to Ducks Unlimited); *Autism Awareness*, UTAH DMV, <https://dmv.utah.gov/plates/autism> [<https://perma.cc/3RW4-GFT8>] ("This plate generates funds for research, public awareness and education programs, scholarship programs, and to provide support for caregivers for individuals with autism.").

36. Corbin, *supra* note 28, at 619.

37. *Id.* at 620. Over a dozen states each offer more than 100 unique designs. *Id.* at 619 n.72.

38. *See Walker*, 576 U.S. at 208–09 (concluding specialty license plates are government speech).

39. *Compare Perry v. McDonald*, 280 F.3d 159, 172–73 (2d Cir. 2001) (holding that New Hampshire's "policy of refusing to grant applications for vanity plates bearing scatological terms that may be deemed offensive by the general public" was constitutional), *with Lewis v. Wilson*, 253 F.3d 1077, 1081 (8th Cir. 2001) (concluding Missouri's denial of a proposed "ARYAN-1" vanity plate was unconstitutional); *compare also Mitchell v. Md. Motor Vehicle Admin.*, 148 A.3d 319, 326 (Md. 2016) (concluding vanity plates are private speech), *with Comm'r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1204 (Ind. 2015) (concluding vanity plates are government speech).

approved by the state, the state places that combination on a license plate the state manufactures, and the state requires the private individual to then place the vanity plate on his or her vehicle.

Given this convoluted process, the question of whether expression on a vanity plate is protected by the First Amendment will turn on two interrelated issues. First, a court must decide to whom the expression belongs—the vehicle-owner who requests the vanity plate or the state government that issues and creates it. Second, if the expression is the private vehicle-owner's, a court must decide whether the government may restrict the expression based on its content or viewpoint. However, before addressing these issues in detail, it is necessary to briefly summarize the unique free-speech doctrines underlying them.

*B. WHO IS SPEAKING?: WHEN A PRIVATE PERSON SPEAKS ON
GOVERNMENT PROPERTY*

If one assumes the expression on a vanity plate belongs to the vehicle-owner, the license plate itself operates as a forum for the vehicle-owner's speech. License plates are the property of state governments.⁴⁰ Thus, if the expression belongs to the vehicle-owner, rather than the government, the vehicle-owner is, by definition, speaking on a forum opened to him or her by the government. The Supreme Court has routinely indicated there are at least three types of fora a government entity may open in some capacity to the public: (1) the traditional public forum; (2) the designated public forum; and (3) the nonpublic forum.⁴¹ More recently, it has also acknowledged a fourth category: the limited public forum.⁴² Each of these fora have different characteristics and are subject to different constitutional requirements.⁴³

1. The Traditional Public Forum

First, as suggested by its title, the traditional public forum is limited to “places which by long tradition or by government fiat have been devoted to assembly and debate.”⁴⁴ Common examples of traditional public fora include

40. See *Mitchell*, 148 A.3d at 326–27 (treating license plates as government property); *Vawter*, 45 N.E.3d at 1208.

41. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44–46 (1983).

42. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995). The Supreme Court first hinted at the limited public forum's existence in a footnote. See *Perry Educ. Ass'n*, 460 U.S. at 46 n.7. Its inclusion has sometimes been the source of confusion. See *Mitchell*, 148 A.3d at 328 n.8 (noting that, at different times, “the Supreme Court seemed to believe that there was only one middle forum”).

43. *Perry Educ. Ass'n*, 460 U.S. at 44–46.

44. *Id.* at 45.

“streets, parks, and sidewalks.”⁴⁵ Given the importance of these traditional fora in advancing “the free exchange of ideas,” any government-imposed restrictions on speech within a traditional public forum must satisfy strict scrutiny.⁴⁶ That is, the restriction must “serve a compelling state interest” and be “narrowly drawn to achieve that end.”⁴⁷ However, the state may implement content-neutral time, place, and manner restrictions, which need only survive a relaxed form of intermediate scrutiny.⁴⁸

The Court has repeatedly refused to extend the reach of the traditional public forum “beyond its historic confines.”⁴⁹ Thus, it is reasonably well-settled that the traditional public forum cannot be stretched to include vanity plates.⁵⁰

2. The Designated Public Forum

Even if a traditional public forum does not exist, a government entity may open up other public property “for use by the public as a place for expressive activity.”⁵¹ A government may not open this “designated” public forum through inaction.⁵² Instead, the government must intend to open up the nontraditional forum to the public and take affirmative action to do so.⁵³ The designated public forum then operates in much the same manner as the traditional public forum.⁵⁴ Thus, although the government is free to close the forum at any time, so long as it remains open, any government restrictions on the content of speech are subjected to strict scrutiny.⁵⁵ But, as was the case for

45. Leslie Gielow Jacobs, *Government Identity Speech Programs: Understanding and Applying the New Walker Test*, 44 PEPP. L. REV. 305, 316 (2017).

46. *Cornelius*, 473 U.S. at 800.

47. *Perry Educ. Ass’n*, 460 U.S. at 45.

48. *Id.* Time, place, and manner restrictions “are valid provided [(1)] that they are justified without reference to the content of the regulated speech, [(2)] that they are narrowly tailored to serve a significant governmental interest, and [(3)] that they leave open ample alternative channels for communication of the information.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (citation omitted). The narrow-tailoring aspect of this test is far more relaxed than the standard for strict scrutiny. Rather than requiring a least-restrictive means, it requires only that the restriction not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Ward v. Rock Against Racism*, 491 U.S. 781, 798–800 (1989).

49. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998) (citing *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680–81 (1992)).

50. Marybeth Herald, *Licensed to Speak: The Case of Vanity Plates*, 72 U. COLO. L. REV. 595, 623–24 (2001).

51. *Perry Educ. Ass’n*, 460 U.S. at 45.

52. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

53. *Id.*

54. *Perry Educ. Ass’n*, 460 U.S. at 45–46.

55. *Id.*

traditional public fora, the government may implement reasonable time, place, and manner restrictions.⁵⁶

As noted, a government may only open a designated public forum through intentional actions. Courts will thus look to the government's intent to evaluate whether the government has created a designated public forum or some other, more limited forum.⁵⁷ Because "vanity plates are a highly limited and extremely constrained means of expression" and their use is limited to vehicle-owners, rather than the general public, it is unlikely a government intended them to serve as a designated public forum.⁵⁸

3. The Limited Public Forum

Rather than opening up a nontraditional forum to the public at large, a government may instead open a forum limited to "use by certain groups . . . or for the discussion of certain subjects."⁵⁹ Within this forum, government restrictions on speech need not satisfy strict scrutiny.⁶⁰ Instead, "the government may exclude speech . . . 'so long as the distinctions drawn are [(1)] viewpoint neutral and [(2)] reasonable in light of the purpose served by the forum."⁶¹

One manner of understanding the limited public forum is as a subset of the designated public forum, wherein the forum is "open only to those individuals who qualify under the class for whom the forum is opened," justifying a lower standard of judicial scrutiny.⁶² For example, in *Rosenberger v. Rector & Visitors of University of Virginia*, the Court classified the University of Virginia's Student Activities Fund as a limited public forum.⁶³ Eligible student organizations could submit bills from outside contractors to the fund for payment,⁶⁴ but the university prohibited religious student organizations from receiving this funding.⁶⁵ The Supreme Court held that this practice was

56. *Id.*

57. *Cornelius*, 473 U.S. at 802. Governmental intent has been described as "the 'touchstone' of forum analysis." *Gen. Media Commc'ns, Inc. v. Cohen*, 131 F.3d 273, 279 (2d Cir. 1997) (quoting *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991)).

58. *Perry v. McDonald*, 280 F.3d 159, 168 (2d Cir. 2001).

59. *Perry Educ. Ass'n*, 460 U.S. at 46 n.7 (citations omitted). Justice Blackmun criticized this aspect of the Court's forum analysis as being essentially circular: "The very fact that the Government denied access to the speaker indicates that the Government did not intend to provide an open forum for expressive activity, and under the Court's analysis that fact alone would demonstrate that the forum is not a limited public forum." *Cornelius*, 473 U.S. at 825 (Blackmun, J., dissenting).

60. *Jacobs*, *supra* note 45, at 319–20.

61. *Id.* at 319 (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 189 (2007)).

62. *Bezanson & Buss*, *supra* note 10, at 1403–04.

63. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

64. *Id.* at 823–24.

65. *Id.* at 825.

unconstitutional, as it discriminated based on viewpoint.⁶⁶ However, “no one in *Rosenberger* was arguing that a non-student organization—or a student organization from New York—had any right to share in the University of Virginia’s metaphysical funding forum.”⁶⁷ Rather, the University of Virginia, as a government entity, was free to confine the limited public “forum to the limited and legitimate purposes for which it was created,” so long as it did so in a (1) reasonable and (2) viewpoint-neutral manner.⁶⁸

One might argue that a vanity plate should be considered a limited public forum, which the government has intentionally opened for private communication but limited to use by vehicle-owners and only for those messages that can be conveyed in seven or eight characters. However, many courts have instead classified vanity plates as a version of the final category of government fora.

4. The Nonpublic Forum

In addition to the three varieties of public fora, the Supreme Court has also evaluated whether governments may exclude private speech in nonpublic fora. These are areas where the public has access to government property the government has not intentionally opened up as a forum for speech.⁶⁹ Nonpublic fora exist merely as an unintended consequence of “a government entity provid[ing] access to private speakers in the course of ‘acting as a proprietor, managing its internal operations.’”⁷⁰ Within a nonpublic forum, a government’s power to restrict speech is the same as it is in a limited public forum: It may restrict speech so long as those restrictions are (1) reasonable and (2) viewpoint-neutral.⁷¹

Thus, within any government forum, if the government opts to regulate speech, it must *at a minimum* do so in a viewpoint-neutral manner.⁷² Most of the courts to reach the question have concluded vanity plates are nonpublic fora, rather than limited public fora,⁷³ but the distinction is of minimal

66. *Id.* at 845–46.

67. *Bezanson & Buss*, *supra* note 10, at 1407.

68. *Rosenberger*, 515 U.S. at 829.

69. *See Herald*, *supra* note 50, at 628. Some examples of nonpublic fora include airports, mailboxes, and prisons. *Id.* (first citing *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992); then citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 116 (1981); and then citing *Adderly v. Florida*, 385 U.S. 39, 40 (1966)).

70. *Jacobs*, *supra* note 45, at 317–18 (quoting *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 216 (2015)).

71. *Id.* at 319–20.

72. *Herald*, *supra* note 50, at 622. Viewpoint neutrality will be discussed in more detail in Section II.D.1 *infra*.

73. *See, e.g., Byrne v. Rutledge*, 623 F.3d 46, 54 (2d Cir. 2010); *Mitchell v. Md. Motor Vehicle Admin.*, 148 A.3d 319, 335–36 (Md. 2016). *But see Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) (“We express some initial skepticism about characterizing a license plate as a

consequence.⁷⁴ In either case, the government may regulate speech based on its content, but not its viewpoint.

C. WHO IS SPEAKING?: WHEN THE GOVERNMENT SPEAKS

The government-forum doctrine remains a mainstay of First Amendment jurisprudence, but the doctrine accurately captures only part of the speech that takes place on government property. One consequence of state governments assuming a more active role in the everyday lives of their citizens is that the governments themselves must, with increasing frequency, engage in expression. Yet, until relatively recently, the Supreme Court had no mechanism by which it could account for this phenomenon.⁷⁵ The term “government speech” first emerged in the 1980s, and early judicial application centered on the Establishment Clause, rather than the Free Speech Clause.⁷⁶ It was not until the early 1990s that the Supreme Court began to first explore the implications of government speech on free speech more broadly.⁷⁷

1. Emergence of the Government-Speech Doctrine

The Supreme Court’s embrace of the government-speech doctrine began with *Rust v. Sullivan*. In *Rust*, a group of doctors and recipients of federal family-planning funds challenged a set of regulations adopted pursuant to Title X of the Public Health Service Act.⁷⁸ Section 1008 of the Act prevented family-planning funds from being granted to “programs where abortion [wa]s a method of family planning.”⁷⁹ Based on § 1008, the Secretary of Health and Human Services had promulgated regulations prohibiting Title X-funded projects from providing counseling on abortion or referring patients to abortion providers.⁸⁰ The challengers argued that the government had

nonpublic forum, because it occurs to us that a personalized plate is not so very different from a bumper sticker that expresses a social or political message.”).

74. Indeed, courts that determine the government has engaged in viewpoint discrimination by restricting a particular plate configuration often skip the forum analysis entirely. *E.g.*, *Lewis*, 253 F.3d at 1079 (“In any case, we need not determine precisely what kind of forum, if any, a personalized license plate is because the statute at issue is unconstitutional whatever kind of forum a license plate might be.”); *Montenegro v. N.H. Div. of Motor Vehicles*, 93 A.3d 290, 294 (N.H. 2014) (“We need not decide what type of forum a vanity registration plate is because we conclude that the challenged restriction . . . is facially unconstitutional regardless of the forum.”).

75. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009) (Stevens, J., concurring) (describing the government-speech doctrine as “recently minted”).

76. *Corbin*, *supra* note 28, at 611 (citing *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990)).

77. *Id.* at 612.

78. *Rust v. Sullivan*, 500 U.S. 173, 181 (1991).

79. *Id.* at 178.

80. *Id.* at 179–80.

restricted their free-speech rights by “impermissibly imposing ‘viewpoint-discriminatory conditions on government subsidies.’”⁸¹

In response, the *Rust* Court concluded that the government was entitled to selectively fund programs according to its policy objectives, as well as to decline to fund programs that would, in its view, undermine those objectives.⁸² By so doing, “the Government ha[d] not discriminated on the basis of viewpoint; it ha[d] merely chosen to fund one activity to the exclusion of the other.”⁸³ Notably, the term “government speech” never appears in the *Rust* opinion.⁸⁴ Nevertheless, *Rust* is now credited with first articulating the defining characteristic of government speech: When the government speaks for itself, it is free to favor one message to the exclusion of another.⁸⁵

Although the *Rust* Court denied that the government was discriminating based on viewpoint, in a sense this was precisely what the government was doing; the viewpoint just happened to be the government’s own. This distinction makes intuitive sense. After all, private speakers, in producing their own speech, routinely discriminate based on viewpoint. For example, it would be absurd to suggest a private speaker, upon declaring her view that smoking is bad, should be forced to remain neutral by also declaring that smoking is good. Governments, too, have viewpoints. It would be equally absurd to insist that a government undermine a policy objective by simultaneously advocating the opposite view.⁸⁶

2. *Summum* and *Walker*: The Modern Government-Speech Doctrine

The line between government speech and private speech hosted by a government is not always so clear. By refusing to apply viewpoint-discrimination analysis to government speech, the Supreme Court has ensured there will be “dramatic consequences” based on a given expression’s classification.⁸⁷ If a court determines expression is government speech, the government is free to promote or censor the expression as it sees fit.⁸⁸ If a court determines the expression is private speech, the government is required, at the very least, to remain viewpoint neutral in implementing any restrictions.⁸⁹ Thus, by the late 2000s, it became increasingly clear that the

81. *Id.* at 192.

82. *Id.* at 193.

83. *Id.*

84. Corbin, *supra* note 28, at 612.

85. Bezanson & Buss, *supra* note 10, at 1407. As reflected in *Rust*, this rule continues to apply even “when the government uses private speakers to promulgate its own speech.” Jacobs, *supra* note 45, at 308–09.

86. Corbin, *supra* note 28, at 615.

87. Note, *Three’s a Crowd—Defending the Binary Approach to Government Speech*, 124 HARV. L. REV. 805, 805 (2011) [hereinafter *Three’s a Crowd*].

88. See Corbin, *supra* note 28, at 610.

89. *Id.*

Court would need to develop a clear test for determining whether speech was governmental or private.⁹⁰ Some scholars went so far as to propose abolishing the sharp dichotomy altogether and embracing an intermediate doctrine of “mixed speech,” which would encompass all speech involving “the joint production of both government and private speakers.”⁹¹

Ultimately, this view would not prevail. In the 2009 case *Pleasant Grove City v. Summum*, the Court reaffirmed its commitment to a binary approach.⁹² Pioneer Park in Pleasant Grove City, Utah featured 15 permanent displays.⁹³ Of the 15 displays, at least 11 were donated by private parties, including a monument of the Ten Commandments.⁹⁴ In 2003, Summum, a religious organization based in Salt Lake City, contacted the city, “requesting permission to erect a ‘stone monument,’ which would contain ‘the Seven Aphorisms of SUMMUM’ and be similar in size and nature to the Ten Commandments monument.”⁹⁵ The city denied this request.⁹⁶ Summum brought suit under the Free Speech Clause, forcing the Court to decide whether the expressive element of the proposed monument was government speech, private speech housed in a government forum, or the mixed speech of private and public parties.⁹⁷

The Court concluded that the monument was government speech.⁹⁸ In deciding as much, the Court considered a variety of factors. First, the Court took note of the long history of governments using monuments as a form of speech to the public.⁹⁹ Second, it reasoned that “[p]ublic parks [we]re often closely identified in the public mind with the government unit that owns the land,”¹⁰⁰ leaving “little chance that observers w[ould] fail to appreciate the [governmental] identity of the speaker.”¹⁰¹ In his concurrence, Justice Souter suggested relying on a reasonable-person standard to evaluate “whether a

90. *See id.* at 612.

91. *Id.* at 608. First Amendment scholar Caroline Corbin’s test would classify speech as private, governmental, or mixed based on five factors: (1) the literal speaker; (2) control of the message; (3) funding of the message; (4) context of the speech; and (5) “[t]o whom a reasonable person would attribute the speech[.]” *Id.* at 627. If all five factors point in the same direction, the speech can be safely classified as either private or governmental. *Id.* at 628. But if any factor points in a different direction, the speech is classified as mixed. *Id.* Others continue to defend the binary model. *See generally Three’s a Crowd, supra* note 87 (defending the binary model and critiquing Corbin’s mixed-speech approach).

92. *See generally Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (determining expression in which a public and private actor both participated was government speech).

93. *Id.* at 464–65.

94. *Id.*

95. *Id.* at 465 (footnote omitted).

96. *Id.*

97. *See id.* at 466–67.

98. *Id.* at 481.

99. *Id.* at 470–71.

100. *Id.* at 472.

101. *Id.* at 471.

reasonable and fully informed observer would understand the expression to be government speech.”¹⁰² Finally, the Court observed that “the City . . . ‘effectively controlled’ the messages sent by the monuments . . . by exercising ‘final approval authority’ over their selection.”¹⁰³

The Court would later formally canonize these factors into a three-part test for determining whether speech was governmental or private.¹⁰⁴ Notably, in that case, *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Court applied the test to specialty plates, concluding they constituted government speech.¹⁰⁵ However, it specifically cabined its ruling to avoid reaching vanity plates.¹⁰⁶

3. *Tam*: Defining the “Outer Bounds” of the Doctrine

Not long after deciding *Walker*, in *Matal v. Tam*, the Supreme Court suggested that *Walker* “likely mark[ed] the outer bounds of the government-speech doctrine.”¹⁰⁷ At issue in *Tam* was whether trademarks, once registered with the federal Patent and Trademark Office (“PTO”), became government speech.¹⁰⁸ The Court’s answer was an emphatic no.¹⁰⁹ While the Court conceded the importance of the government-speech doctrine, it also took note of its potential for misuse: “If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.”¹¹⁰ For example, in this case, the PTO denied Simon Tam, an Asian-American and the founder of the rock band “The Slants,” a trademark for the band’s name because the name was “disparaging.”¹¹¹ The PTO refused

102. *Id.* at 487 (Souter, J., concurring).

103. *Id.* at 473 (majority opinion) (quoting *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560–61 (2005)).

104. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 209–10 (2015). Notably, Justice Alito, who wrote the majority opinion in *Summum*, objected to the *Walker* Court’s application of *Summum*’s test. Alito accused the majority of misconstruing some of *Summum*’s factors and neglecting others. *Id.* at 227–29 (Alito, J., dissenting).

105. *Id.* at 210–14 (majority opinion). *Walker* will be discussed in more detail in Sections III.C–D *infra*.

106. *Walker*, 576 U.S. at 204 (“Here we are concerned only with the second category of plates, namely specialty license plates, not with the personalization [vanity-plate] program.”).

107. *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017). Justice Alito, author of the majority opinion in *Summum* and the dissent in *Walker*, penned the opinion of the Court. *Id.* at 1751. While parts of Alito’s opinion did not receive majority support, Part III-A, which concerns the government-speech doctrine, is a part of the unanimous opinion. *Id.*

108. *Id.* at 1758.

109. *See id.* at 1759 (concluding unanimously that no prior cases “even remotely support[] the idea that registered trademarks are government speech”).

110. *Id.* at 1758.

111. *Id.* at 1754–55. The Court’s opinion mistakenly refers to Tam as the band’s “lead singer.” *Id.* at 1754. He was actually the band’s bassist. *About Me, SIMON TAM*, <https://www.simontam.org/about> [<https://perma.cc/36YE-672W>].

the mark even though Tam's apparent intent was to "reclaim" the slur for people of Asian ethnicity.¹¹²

In applying the three-factor test from *Sumnum* and *Walker*, the *Tam* Court rejected "a huge and dangerous extension of the government-speech doctrine."¹¹³ The Court noted trademarks were not historically used to convey government messages and found no evidence the public attributed trademarks to the federal government.¹¹⁴ While the Court did not explicitly dwell on governmental control, it asserted that if the government was speaking through trademarks, then it was "babbling prodigiously and incoherently," "saying many unseemly things," and "expressing contradictory views."¹¹⁵ Based on these factors, the Court concluded a governmental registration system did not convert private speech into government speech.¹¹⁶

D. CAN THEY SAY THAT?: VIEWPOINT NEUTRALITY AND OFFENSIVE SPEECH

With the government-speech and government-forum doctrines in mind, it is clear that viewpoint discrimination plays a defining role whenever the government acts to restrict speech on government property. The principal benefit of the government-speech doctrine is that it allows the government to elevate some viewpoints and reject others as a means of effectively conveying the government's message.¹¹⁷ Conversely, when the government restricts private speech, restrictions rooted in viewpoint discrimination are presumed to be unconstitutional.¹¹⁸

1. Viewpoint Discrimination Defined

Despite its importance, the precise contours of viewpoint discrimination are notoriously tricky to define. At its core, viewpoint discrimination involves restrictions based on "the specific motivating ideology or the opinion or perspective of the speaker."¹¹⁹ Viewpoint discrimination contrasts with content discrimination, which involves restrictions on a subject area of speech but not on the "particular views taken by speakers on [that] subject."¹²⁰ The Supreme Court has described viewpoint discrimination as "an egregious form of content discrimination."¹²¹ Admittedly, the distinction is irrelevant if the government is speaking, as it may engage in either viewpoint or content

112. *Tam*, 137 S. Ct. at 1754.

113. *Id.* at 1760.

114. *Id.*

115. *Id.* at 1758.

116. *Id.* at 1760.

117. *See supra* Section II.C.1.

118. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

119. *Id.* at 829.

120. *Id.*

121. *Id.*

discrimination.¹²² It is also irrelevant if the government has opened up a traditional or designated public forum, as either form of discrimination must survive strict scrutiny.¹²³ But within a limited or nonpublic forum—such as, potentially, a vanity plate—the government is free to engage in content discrimination but not viewpoint discrimination, making the distinction critically important.¹²⁴

Unfortunately, because of the imprecise natures of content and viewpoint discrimination,¹²⁵ it is often difficult to draw a line where one ends and the other begins.¹²⁶ For example, in *Rosenberger*, the University of Virginia argued it had not engaged in viewpoint discrimination by excluding *all* religious student organizations from funding.¹²⁷ Instead, by excluding what it saw as a broad subject area of speech, it argued it had only discriminated based on the speech's content.¹²⁸ The Court was unpersuaded. It concluded the university's discrimination was based on "[t]he prohibited perspective" unique to religion and "not the general subject matter."¹²⁹ The Court also rejected the "insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech," adding that the "exclusion of several views" on a particular subject was "just as offensive to the First Amendment as exclusion of only one."¹³⁰ In essence, by restricting all religious speech, the University of Virginia restricted a wide array of individual religious viewpoints. While the Supreme Court has not abandoned the general distinction between content and viewpoint discrimination, *Rosenberger* suggests prohibiting broad categories of speech content—particularly those categories intrinsically tied to the speaker's view of the world—may operate as *de facto* viewpoint discrimination and thus be presumptively impermissible.

2. The Offensive-Speech Doctrine

Another frequent point of discussion in the Supreme Court's First Amendment jurisprudence is offensive speech. Since the 1970s, the Court has

122. See *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) ("[I]mposing a requirement of viewpoint-neutrality on government speech would be paralyzing.").

123. See *supra* Sections II.B.1–.2.

124. See *supra* Sections II.B.3–.4.

125. *Rosenberger*, 515 U.S. at 831; see also *Iancu v. Brunetti*, 139 S. Ct. 2294, 2313 (2019) (Sotomayor, J., concurring in part and dissenting in part) (admitting the distinction between the two kinds of discrimination is "slippery").

126. See *Iancu*, 139 S. Ct. at 2305–06 (Breyer, J., concurring in part and dissenting in part) (acknowledging that the "boundaries between" viewpoint discrimination and content discrimination "may be difficult to discern").

127. *Rosenberger*, 515 U.S. at 830–31.

128. *Id.*

129. *Id.* at 831.

130. *Id.*

routinely acted to protect speech considered offensive by the listener.¹³¹ Even more firmly, the Court has asserted that beyond “not [being] a sufficient reason for suppressing” the speech, “if it is the speaker’s opinion that gives offense, that consequence is *a reason for* according it constitutional protection.”¹³² In *Texas v. Johnson*, the Court overturned Gregory Lee Johnson’s criminal conviction for burning the American flag in political protest.¹³³ In so doing, the Court identified as the First Amendment’s “bedrock principle” the notion “that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹³⁴ As Justice Holmes once observed, “[e]very idea is an incitement.”¹³⁵ If the First Amendment prohibits anything, it is a government acting as arbiter of truth by using its disproportionate power to squelch ideas it dislikes.¹³⁶

As illustration, it is useful to analyze one of the defining cases in the realm of offensive-speech jurisprudence: *Cohen v. California*. In that case, Paul

131. See, e.g., *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 798–99 (2011) (reasoning that “disgust is not a valid basis for restricting expression” while overturning a restriction on violent video games); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380–81 (1992) (overturning an ordinance that banned the placement of symbols designed to “arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”); *Texas v. Johnson*, 491 U.S. 397, 411 (1989) (overturning a flag-burning prohibition designed “to protect [the flag] only against impairments that would cause serious offense to others”); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (declining to adopt an “outrageousness” standard that would be based on words’ “adverse emotional impact on the audience”); *Nat’l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 44 (1977) (determining that the Illinois Supreme Court had failed to “provide strict procedural safeguards” to Nazis who wished to organize a march in the streets); *Cohen v. California*, 403 U.S. 15, 25 (1971) (refusing to permit the state “to cleanse public debate” to make it “palatable to the most squeamish among us”).

132. *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978) (emphasis added). This famous language from *Pacifica* did not keep the Court in that case from regulating a profanity-laced monologue as it appeared on broadcast media, a uniquely unprotected realm in First Amendment jurisprudence. *Id.* at 746–50. Nonetheless, the passage has been repeatedly cited as justification for affording First Amendment protection to offensive speech. E.g., *Johnson*, 491 U.S. at 409; *Hustler Mag.*, 485 U.S. at 55–56.

133. *Johnson*, 491 U.S. at 399.

134. *Id.* at 414.

135. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). Every idea, once expressed, “offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth.” *Id.*

136. See *Hustler Mag.*, 485 U.S. at 50–51 (“[T]he freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole. We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions.” (alteration in original) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503–04 (1984))); *Pacifica*, 438 U.S. at 745–46 (“[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) (“Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”).

Robert Cohen entered a courthouse corridor wearing a jacket displaying the words “Fuck the Draft.”¹³⁷ He was convicted of disturbing the peace through his “offensive conduct.”¹³⁸ The Court first dismissed California’s argument that Cohen’s profane display constituted obscenity or fighting words, two members of a narrow group of speech classifications that do not receive any First Amendment protection.¹³⁹ It then narrowed the question at issue to “whether California c[ould] excise, as ‘offensive conduct,’ one particular scurrilous epithet from the public discourse.”¹⁴⁰ The Court overturned Cohen’s conviction as violative of the First Amendment.¹⁴¹ Although it admitted profane words such as “fuck” might be considered distasteful, “it [wa]s nevertheless often true that one man’s vulgarity is another’s lyric.”¹⁴²

More importantly, the California state government could not be trusted to draw the line between tasteful and distasteful—between which words were offensive enough to draw censorship, and which were not.¹⁴³ On the contrary, by “forbid[ding] particular words,” a government “run[s] a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”¹⁴⁴ Framed differently, a government, if given free rein to target “offensive” words, can easily use that mechanism to squash “offensive” ideas—whatever the government might decide those to be. The Court has occasionally distinguished *Cohen* in the years since it was decided.¹⁴⁵ But this core principle still stands: Profanity, like other forms of offensive speech,¹⁴⁶ is situated firmly within the ambit of First Amendment protection¹⁴⁷—not in spite of its offensive character, but because of it.

137. *Cohen v. California*, 403 U.S. 15, 16 (1971).

138. *Id.*

139. *Id.* at 20. While profane words are sometimes colloquially referred to as “obscenities,” they are generally not implicated in the Supreme Court’s obscenity doctrine, which concerns erotic expression. *Id.* As the Court later clarified, even these traditionally “unprotected” categories of speech cannot “be made the vehicles for content discrimination unrelated to their distinctively proscribable content.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992).

140. *Cohen*, 403 U.S. at 22–23.

141. *Id.* at 26.

142. *Id.* at 25.

143. *Id.* But see William Cohen, *A Look Back at Cohen v. California*, 34 UCLA L. REV. 1595, 1614 (1987) (“*Cohen v. California* continues to stand for the proposition that a law is unconstitutional if it punishes the use of profanity in all public places at all times. It has not resolved the standards applicable to time, place, and manner control of the public use of profanity.”).

144. *Cohen*, 403 U.S. at 26.

145. *Cohen*, *supra* note 143, at 1607–09 (first citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); then citing *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)).

146. See *supra* notes 132–33 and accompanying text.

147. Alexandra Baruch Bachman, Note, *WTF? First Amendment Implications of Policing Profanity*, 17 FIRST AMEND. L. REV. 65, 71 (2018) (“Profanity for its own sake . . . occupies a place comfortably within the constitutional bubble . . .”); David L. Hudson, Jr., *Anti-Profanity Laws and*

3. “Giving Offense is a Viewpoint”

In addition to establishing an “outer bound” for the government-speech doctrine, the Supreme Court’s decision in *Tam* also represents an important step in both viewpoint-discrimination and offensive-speech jurisprudence. Although divided evenly among two non-majority opinions, all eight Justices¹⁴⁸ agreed that the Lanham Act’s restriction on registering “disparaging” trademarks “violated the First Amendment because it discriminated on the basis of viewpoint.”¹⁴⁹ Justice Alito, writing for four Justices, advocated for a broad understanding of viewpoint discrimination.¹⁵⁰ He acknowledged the statute, in some sense, was applied evenhandedly—“to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue.”¹⁵¹ But in a broader sense, it denied registration to a whole range of offensive speech.¹⁵² Doing so, Justice Alito reasoned, constituted viewpoint discrimination because “[g]iving offense is a viewpoint.”¹⁵³

Also writing for four Justices, Justice Kennedy applied a more conventional form of the viewpoint-discrimination test. He identified the relevant question as whether “the government ha[d] singled out a subset of messages for disfavor based on the views expressed.”¹⁵⁴ Because the statute in question restricted the registration of “disparaging” marks, it necessarily discriminated against those marks in favor of “positive or benign mark[s].”¹⁵⁵ Like Justice Alito, Justice Kennedy determined the statute was rooted in “the Government’s disapproval of a subset of messages it finds offensive,” which was “the essence of viewpoint discrimination.”¹⁵⁶ In Kennedy’s view, “[t]he danger of viewpoint discrimination” was the removal of “certain ideas or perspectives from a broader debate,” and “[t]hat danger [wa]s all the greater

the First Amendment, 42 T. MARSHALL L. REV. 203, 208 (2017) (“[I]ndividuals in general society have a free-speech right to utter profanity unless such speech crosses the line into a narrow unprotected category of speech, such as fighting words, true threats, incitement to imminent lawless action, or harassment.”).

148. Justice Gorsuch took no part in the *Tam* decision. *Matal v. Tam*, 137 S. Ct. 1744, 1750 (2017).

149. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019). This section of the Lanham Act provides that “[n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration” unless it falls into a proscribed category. 15 U.S.C. § 1052 (2018). At the time, one category encompassed marks that “[c]onsist[] of or comprise[] . . . matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” *Id.* § 1052(a), *invalidated in part by Tam*, 137 S. Ct. 1744.

150. *Tam*, 137 S. Ct. at 1751, 1763.

151. *Id.* at 1763.

152. *Id.*

153. *Id.*

154. *Id.* at 1766 (Kennedy, J., concurring).

155. *Id.*

156. *Id.*

if the ideas or perspectives [we]re ones a particular audience might think offensive.”¹⁵⁷

In *Iancu v. Brunetti*, another Lanham Act case—this time concerned with the registration of “immoral” or “scandalous” trademarks¹⁵⁸—a majority of the Court adopted the same proposition. Writing for the majority, Justice Kagan concluded succinctly, “as the Court made clear in *Tam*, a law disfavoring ‘ideas that offend’ discriminates based on viewpoint, in violation of the First Amendment.”¹⁵⁹ Thus, the opinions in *Tam* and *Iancu* join together two long-wandering strands of First Amendment thought: When a government censors speech solely because of the offensiveness of the ideas behind it, the government is engaging in viewpoint discrimination.

III. VANITY-PLATE REGULATIONS: UNLIMITED REGULATORY DISCRETION AND AN UNCERTAIN JUDICIAL STATUS

While this First Amendment framework has undergone substantial development in recent decades, it has proven especially difficult to apply to regulations on vanity-plate expression. Vanity-plate regulations vary from state to state, but a closer look at those regulations reveals extensive commonalities.¹⁶⁰ Despite these commonalities, both state and federal courts’ attempts to apply the existing First Amendment framework to those regulations have produced a string of contradictory results. After 2015, some pointed to the Supreme Court’s opinion in *Walker*, which resolved similar inconsistencies for specialty plates, as a potential answer to an analogous vanity-plate conundrum.¹⁶¹ But rather than resolving the split, *Walker* has proven unsatisfactory in application and deepened fissures between different courts.¹⁶²

A. A SURVEY OF VANITY-PLATE REGULATIONS

Before proceeding to the problems that state and federal courts have faced in applying the First Amendment to vanity-plate regulations, it is

157. *Id.* at 1767. This language echoes the Court’s earlier warning from *Cohen*. See *supra* notes 144–45 and accompanying text.

158. 15 U.S.C. § 1052 (a) (2018), *invalidated in part* by *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

159. See *Iancu*, 139 S. Ct. at 2301. But see generally Clay Calvert, *Merging Offensive-Speech Cases with Viewpoint-Discrimination Principles: The Immediate Impact of Matal v. Tam on Two Strands of First Amendment Jurisprudence*, 27 WM. & MARY BILL. RTS. J. 829 (2019) (criticizing the conflation of the two doctrines).

160. See *infra* Section III.A.

161. See generally Supplemental Brief of Appellant at 1, *Comm’r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200 (Ind. 2015) (No. 49Soo-1407-PL-494), 2015 WL 6108402, at *1 (devoting a supplemental brief to the argument that, in the wake of *Walker*, “[t]he only reasonable conclusion is that personalized plates are also government speech”).

162. Compare *Mitchell v. Md. Motor Vehicle Admin.*, 148 A.3d 319, 325–26 (Md. 2016) (applying *Walker* and concluding that vanity plates are private speech), with *Vawter*, 45 N.E.3d at 1204 (applying *Walker* and concluding vanity plates are government speech).

necessary to first turn to the root of the problem: the state regulations themselves. Before a vanity plate will be issued to a vehicle-owner, a state regulatory body must approve the vehicle-owner's proposed configuration of alphanumeric characters. Depending on the state, the approval process is either governed directly by statute¹⁶³ or, more commonly, by a department regulation promulgated under statutory authority.¹⁶⁴ In virtually all cases, the governing language is exceptionally broad.¹⁶⁵ Iowa, for example, prohibits "any combination of characters" deemed to be

[s]exual in connotation; (2) [a] term of vulgarity, contempt, prejudice, hostility, insult, or racial or ethnic degradation; (3) [r]ecognized as a swear word; (4) [a] reference to an illegal substance; (5) [a] reference to a criminal act; (6) [o]ffensive; or (7) [a] foreign word falling into any of these categories.¹⁶⁶

Some standards are even more amorphous. In Alabama, the Department of Revenue is prohibited from issuing a vanity plate it considers "offensive to the peace and dignity of the State of Alabama."¹⁶⁷

While most statutes and regulations are unique in some way, this Note identifies several common trends in the types of expression that a regulatory department may prohibit. As an initial matter, every state has some restrictions functionally necessary to the license-plate system itself. Vanity plates, like traditional license plates, continue to function as a form of individualized vehicle identification.¹⁶⁸ To this end, most states prohibit, for example, vanity plates that duplicate already-claimed character configurations.¹⁶⁹ They also prohibit configurations that give the false impression that the vehicle is owned by or the driver affiliated with the government.¹⁷⁰ These restrictions generally do not concern the substance of the speech beyond its tendency to mislead third persons about the owner of

163. *E.g.*, COLO. REV. STAT. § 42-3-211 (2019); S.D. CODIFIED LAWS § 32-5-89.2 (2019).

164. *E.g.*, GA. COMP. R. & REGS. 560-10-22-.02(3) (2020); NEV. ADMIN. CODE § 482.320 (2020); OKLA. ADMIN. CODE § 710:60-3-151(c) (2016).

165. *See, e.g.*, HAW. REV. STAT. § 249-9.1 (2017) (prohibiting configurations considered "publicly objectionable"); MISS. CODE ANN. § 27-19-48(1) (2017) (prohibiting "words or expressions that are considered obscene, slandering, insulting or vulgar in ordinary usage"); WASH. ADMIN. CODE § 308-96A-065(3)(a)(i), (iii), (vi)-(vii) (2019) (prohibiting, among other things, configurations considered "[o]ffensive to good taste and decency," "[v]ulgar, profane, or sexually suggestive in nature," "[d]erogatory," or "[s]landerous").

166. IOWA ADMIN. CODE r. 761-401.6(2)(d)(1)-(7) (2020).

167. ALA. ADMIN. CODE r. 810-5-1.234(2) (2018).

168. Jacobs, *supra* note 45, at 376-77 (noting that the primary function of license-plate configurations is "identifying vehicles").

169. *E.g.*, ARIZ. REV. STAT. ANN. § 28-2406(A) (2012); COLO. REV. STAT. § 42-3-211(3)(a) (2019); MICH. COMP. LAWS ANN. § 257.803b(1) (West 2019).

170. *E.g.*, N.H. CODE ADMIN. R. ANN. SaFC 514.61(c)(2) (2018); N.Y. COMP. CODES R. & REGS. tit. 15, § 16.5(a)(2)(viii) (2019); OR. ADMIN. R. 735-046-0010(6)(a)(C) (2020).

the vehicle. As such, any ancillary First Amendment implications are outside the scope of this Note.

However, as already indicated, vanity-plate statutes and regulations also routinely contain broad, substance-based prohibitions. The configurations prohibited can generally be sorted into five categories:¹⁷¹ (1) expression with obscene or sexual connotations;¹⁷² (2) language considered profane or vulgar;¹⁷³ (3) references to illegal acts, controlled substances, or alcohol;¹⁷⁴ (4) language considered derogatory, disparaging, or prejudicial;¹⁷⁵ and (5) language deemed “offensive.”¹⁷⁶ This last category is especially pervasive. Indeed, the most common statutory or regulatory formulation of any kind is a prohibition on any configuration deemed “offensive to good taste [and/or]

171. While these categories reflect common trends, they should not be considered exhaustive. In some cases, outlier restrictions may pose even more obvious free-speech problems than those restrictions that fall into the more common categories. Kentucky, for example, prohibits configurations that “promote a specific political belief,” as well as configurations that promote either religion or antireligion. KY. REV. STAT. ANN. § 186.174(5)(b)(2)–(3) (West 2019). In 2010, the Second Circuit declared a similar Vermont ban on references to religions or deities unconstitutional. *Byrne v. Rutledge*, 623 F.3d 46, 56–57 (2d Cir. 2010); *see also* *Hart v. Thomas*, 422 F. Supp. 3d 1227, 1233–35 (E.D. Ky. 2019) (declining to reach the facial constitutionality of Kentucky’s bans but concluding the ban on promotion of religion or antireligion was unconstitutional as applied to an atheist plaintiff who requested the vanity plate “IM GOD”).

172. *See, e.g.*, GA. COMP. R. & REGS. 560-10-22-02(3)(a) (2020) (prohibiting “any combination of letters or numbers which are obscene according to current community standards, or which includes any reference to sex, sexual acts or body parts, or any reference to excrement or to bodily fluids”); N.Y. COMP. CODES R. & REGS. tit. 15, § 16.5(a)(2)(ii)–(iii) (prohibiting references “to a sexual or intimate body part, area or function,” as well as “eliminary or other bodily functions”); OKLA. ADMIN. CODE § 710:60-3-151(c)(1) (2016) (prohibiting plates that “an objective, reasonable person would find” had “a sexual connotation”).

173. *See, e.g.*, KAN. STAT. ANN. § 8-132(c) (2019) (prohibiting configurations with “a profane, vulgar, lewd or indecent meaning or connotation”); N.H. CODE ADMIN. R. ANN. Saf-C 514.61(c)(3)(c) (prohibiting profanity and obscenity); N.Y. COMP. CODES R. & REGS. tit. 15, § 16.5(a)(2)(i) (prohibiting configurations that “are obscene, profane, vulgar, repulsive, depraved, or lewd”).

174. *See, e.g.*, GA. COMP. R. & REGS. 560-10-22-02(3)(f) (prohibiting “any combination of letters or numbers referring to a crime or criminal activity under state or federal law”); IOWA ADMIN. CODE r. 761-401.6(2)(d)(4) (2020) (prohibiting “reference[s] to an illegal substance”); N.H. CODE ADMIN. R. ANN. Saf-C 514.61(c)(3)(e) (prohibiting references to illegal activities).

175. *See, e.g.*, KY. REV. STAT. ANN. § 186.174(5)(b)(1) (prohibiting configurations that “discriminate against any race, color, religion, sex, or national origin” or “victimize or intimidate any person due to the person’s race, color, religion, sex, or national origin”); OKLA. ADMIN. CODE § 710:60-3-151(c)(2) (prohibiting configurations that “express[] contempt, ridicule or superiority based on race, gender, politics, ethnic heritage, or religion”); 43 TEX. ADMIN. CODE § 217.27(d)(2)(C) (2019) (prohibiting “expression that is demeaning to, belittles, or disparages any person, group, race, ethnicity, nationality, gender, sexual orientation”).

176. *See, e.g.*, IOWA ADMIN. CODE r. 761-401.6(2)(d)(6) (prohibiting “offensive” configurations); OKLA. ADMIN. CODE § 710:60-3-151(d) (permitting the Oklahoma Tax Commission to use “[d]ictionaries and compilation[s] of offensive words” as a guide in restricting configurations); 67 PA. CODE § 49.3(b)(1) (2020) (prohibiting configurations with “connotations offensive to good taste and decency”).

decency.”¹⁷⁷ As a practical matter, offense-based restrictions—or, in some cases, even more blatantly subjective language¹⁷⁸—function as a clear “catch-all” for any undesirable language not captured by the other categories.

In the First Amendment context, these restrictions pose serious problems. The regulations’ ambiguity and breadth vest regulatory bodies with near-limitless discretion in choosing which vanity plates to approve and which to reject. State governments are thus given wide latitude to cut off a considerable range of expression, potentially sweeping in traditionally protected speech under vast exclusory banners like “vulgar,” “disparaging,” and “offensive.” In particular, state legislatures have put their regulators at risk of both producing wildly inconsistent results and engaging in impermissible viewpoint discrimination.

B. COURTS’ STRUGGLES IN APPLYING THE FIRST AMENDMENT TO VANITY PLATES

Of course, none of these concerns are of any consequence if the government, rather than a private individual, is speaking through a vanity configuration. If this is the case, the state government is entitled to police its own speech as it sees fit.¹⁷⁹ Alternatively, even if vanity configurations are the expression of a private speaker, if by excluding the above categories of expression from appearing on its forum, the government is not engaging in viewpoint discrimination, there is no First Amendment violation.¹⁸⁰ Unfortunately, state and federal courts alike have struggled for decades to form even a rough consensus on the answers to either of these questions, leaving both state regulators and private citizens in the dark.

1. Vanity Plates in the State Courts: Disagreement on All Fronts

Despite the similarities among different states’ vanity-plate regulations, state courts have been inconsistent in concluding whether their regimes can withstand constitutional scrutiny. Even when courts have agreed on the ultimate conclusion, those courts have traveled wildly different routes to this result.

For example, the California Court of Appeals has twice decided California’s vanity-plate statute withstands constitutional challenge without proceeding through either a government-forum or government-speech

177. *E.g.*, MONT. CODE ANN. § 61-3-405 (2019); 67 PA. CODE § 49.3(b)(1); S.C. CODE ANN. § 56-3-2010(A) (2017); S.D. CODIFIED LAWS § 32-5-89.2 (2019); WASH. ADMIN. CODE § 308-96A-065(3)(a)(i) (2020); WIS. STAT. § 341.145(7) (2018).

178. *See, e.g.*, IND. CODE § 9-18.5-2-4(b)(3) (2019) (including a provision that reaches any configuration “the bureau otherwise considers improper for issuance”); MINN. R. 7403.0500 (2017) (tasking an administrative agency with determining whether a proposed configuration is “of an . . . immoral nature”); OKLA. ADMIN. CODE § 710:60-3-151(d) (providing that its list of specific prohibitions is “not exhaustive”).

179. *See supra* Section II.C.

180. *See supra* Section II.B.

analysis. The California Vehicle Code, in a familiar formulation, permitted the California DMV to refuse any vanity plate that “carr[ie]d connotations offensive to good taste and decency.”¹⁸¹ Aaron Katz challenged the denial of his proposed vanity plate “EZ LAY,” arguing California’s statute was vague, overbroad, invited arbitrary application, and violated his First Amendment rights.¹⁸² The California Court of Appeals did not dwell on whether the expression proposed was governmental or private speech, and it also declined to apply a forum analysis.¹⁸³ Nonetheless, it proceeded to assert that any restrictions imposed by the statute were viewpoint neutral.¹⁸⁴ To reach this conclusion, the court relied on analogous cases upholding statutes “prevent[ing] the degrading or dishonoring of” flags.¹⁸⁵ It theorized that vanity-plate statutes, like the “flag statutes d[id] not prohibit speech, the communication of ideas, or political dissent or protest, but merely prevent[ed] the degrading or dishonoring of the particular symbol subject to protection.”¹⁸⁶ Twenty years later, the court would reaffirm its *Katz* decision. This time, the court acknowledged a chosen vanity-plate configuration “may reflect an individual’s personal or professional identity, or possibly express a thought or idea.”¹⁸⁷ Even so, it concluded that permitting vehicle-owners to “vary minimally” a license-plate configuration did not somehow transform a license plate into a First Amendment forum.¹⁸⁸

Other state courts have also concluded governmental restrictions on vanity plates are constitutional but have rested their conclusions on entirely different premises. For example, in *Higgins v. Driver & Motor Vehicle Services Branch*, the Oregon Supreme Court dealt with a challenge to a state administrative rule, which prohibited vanity plates with references to alcoholic beverages or controlled substances.¹⁸⁹ The court determined the proposed plate was not government speech.¹⁹⁰ Although the government controlled the actual production of the plate itself, “the label ‘government speech’ . . . fail[ed] to describe accurately the vehicle owner’s conduct in

181. *Katz v. Dept. of Motor Vehicles*, 108 Cal. Rptr. 424, 425–26 (Ct. App. 1973) (emphasis omitted) (quoting CAL. VEH. CODE § 5105 (West 1973)).

182. *Id.* at 425.

183. *See id.* at 428 (reasoning only that the state had not transformed the license plate into an “open forum”).

184. *See id.* at 427–28 (“The statute is not directed toward the suppression of any specific idea or expression on the vehicle.”).

185. *Id.* at 428 (first citing *Joyce v. United States*, 454 F.2d 971, 983 (D.C. Cir. 1971); then citing *Halter v. Nebraska*, 205 U.S. 34 (1907)).

186. *Id.* Notably, these flag cases preceded the Supreme Court’s decision in *Texas v. Johnson*, in which the Court definitively held that at least some laws prohibiting flag desecration *can* unconstitutionally suppress messages or ideas. *Texas v. Johnson*, 491 U.S. 397, 416–17 (1989).

187. *Kahn v. Dep’t of Motor Vehicles*, 20 Cal. Rptr. 2d 6, 10 (Ct. App. 1993).

188. *Id.*

189. *Higgins v. Driver & Motor Vehicle Servs. Branch*, 72 P.3d 628, 630–31 (Or. 2003).

190. *Id.* at 632.

displaying the registration plate.”¹⁹¹ Instead, the court concluded the vanity plate was a nonpublic forum and Oregon’s restriction on references to alcohol was reasonable and viewpoint neutral.¹⁹² Conversely, in *Commissioner of Indiana Bureau of Motor Vehicles v. Vawter*, the Indiana Supreme Court concluded Indiana’s regulations governing vanity-plate issuance were constitutional because vanity-plate configurations *were* government speech.¹⁹³

Meanwhile, other state courts have struck down similar vanity-plate regulations as unconstitutional. In *Montenegro v. New Hampshire Division of Motor Vehicles*, the New Hampshire Supreme Court declared unconstitutional a state administrative rule prohibiting vanity plates “a reasonable person would find offensive to good taste.”¹⁹⁴ The court thought it unnecessary to define which type of forum the government had created, because the restriction was “facially unconstitutional regardless of the forum.”¹⁹⁵ Likewise, in *Bujno v. Virginia, Department of Motor Vehicles*, a Virginia circuit court concluded a vanity plate was a nonpublic forum and held the government had engaged in impermissible viewpoint discrimination by barring from the forum configurations that “could reasonably be interpreted as ‘socially, racially, or ethnically offensive or derogatory.’”¹⁹⁶ In particular, the court reasoned that by prohibiting only “offensive” or “derogatory” references, the Virginia DMV had explicitly prohibited only “disparaging” viewpoints while permitting “honorific” ones.¹⁹⁷ This regime was “unconstitutionally viewpoint discriminatory.”¹⁹⁸

2. An Enduring Federal Circuit Split

Federal courts, like state courts, have been unable to form a consensus as to whether state governments may restrict vanity-plate expression based on standards like offense or disparagement. While there is evidence of substantial disagreement among lower federal courts,¹⁹⁹ the split is especially well

191. *Id.*

192. *Id.* at 634 (quoting *Higgins v. Driver & Motor Vehicle Servs. Branch*, 13 P.3d 531, 553 (Or. Ct. App. 2000)).

193. *Comm’r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1204 (Ind. 2015).

194. *Montenegro v. N.H. Div. of Motor Vehicles*, 93 A.3d 290, 297–98 (N.H. 2014).

195. *Id.* at 294.

196. *Bujno v. Va., Dep’t of Motor Vehicles*, No. CL12-1119, 2012 WL 10638166, at *1, *5–6 (Va. Cir. Ct. Nov. 2, 2012).

197. *Id.* at *8.

198. *Id.*

199. *Compare Hart v. Thomas*, 422 F. Supp. 3d 1227, 1232–34 (E.D. Ky. 2019) (concluding a ban on religious references was both unreasonable and viewpoint-discriminatory as applied), *with Kotler v. Webb*, No. CV 19-2682-GW-SKx, 2019 WL 4635168, at *8 (C.D. Cal. Aug. 29, 2019) (concluding expression on a vanity plate is private speech but not reaching the forum analysis), *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 825 (W.D. Mich. 2014) (concluding Michigan’s vanity-plate “guidelines do not alleviate the potential for viewpoint discrimination”), *and Dimmick v. Quigley*, No. C 96-3987 SI., 1998 WL 34077216, at *5–6 (N.D. Cal. July 13, 1998) (upholding California’s regulation restricting offensive vanity plates but determining the plate “HIV POS”

illustrated by a pair of cases from the Second and Eighth Circuit Courts of Appeals.

In *Lewis v. Wilson*, the Eighth Circuit concluded that offensive speech on a vanity plate was protected by the Free Speech Clause. In 1983, Mary Lewis, a resident of Missouri, requested the vanity plate “ARYAN-1.”²⁰⁰ At the time, Missouri’s vanity-plate law prohibited only plates determined to be “obscene or profane.”²⁰¹ The Missouri Department of Revenue initially refused to issue the plate but, after Lewis was victorious in a court challenge, was eventually forced to issue it.²⁰² In direct response to the court decision, “the Missouri legislature amended the law to state that ‘[n]o personalized license plates shall be issued . . . which are obscene, profane, *inflammatory* or *contrary to public policy*.’”²⁰³ Lewis challenged the new statute after the state refused to reissue her vanity plates.²⁰⁴

Like the *Montenegro* court in New Hampshire, the Eighth Circuit did not fully proceed through a forum analysis, because it determined that “the statute at issue [wa]s unconstitutional whatever kind of forum a license plate might be.”²⁰⁵ The court pointed to a foundational principle that any restriction on speech must “be specific enough that it does not delegate unbridled discretion to the government officials entrusted to enforce the regulation.”²⁰⁶ As such, Lewis did not need to show Missouri *actually* declined to reissue her plates based on the viewpoint they expressed.²⁰⁷ Rather, she “need[ed to] show only that there was nothing in the ordinance to *prevent* the [Department of Revenue] from denying her the plate because of her viewpoint.”²⁰⁸ The court determined that language such as “contrary to public policy” and “inflammatory” vested virtually unlimited discretion in the regulatory decision-maker, creating an unconstitutional risk of viewpoint discrimination.²⁰⁹

The same year the Eighth Circuit decided *Lewis*, the Second Circuit reached the opposite conclusion in *Perry v. McDonald*.²¹⁰ Paula Perry, a

should be issued because “there is nothing inherently offensive about declaring that one is infected with HIV”).

200. *Lewis v. Wilson*, 253 F.3d 1077, 1078 (8th Cir. 2001).

201. *Id.*

202. *Id.* (citing Carr v. Dir. of Revenue, 799 S.W.2d 124 (Mo. Ct. App. 1990)).

203. *Id.* (quoting MO. REV. STAT. § 301.144.2 (1992)).

204. *Id.* at 1078–79.

205. *Id.* at 1079.

206. *Id.*

207. *Id.* at 1080.

208. *Id.* (emphasis added).

209. *Id.* at 1080–82 (“A public official with even marginal creative ability could frequently invent a ‘public policy’ basis for rejecting a plate containing a message with which he or she disagrees.”).

210. See *Perry v. McDonald*, 280 F.3d 159, 172–73 (2d Cir. 2001) (concluding Vermont’s policy did not violate the First Amendment).

Vermont resident, requested the vanity plate “SHTHPNS,” intended as a shorthand for the phrase “Shit Happens.”²¹¹ A Vermont statute permitted the DMV to refuse to issue any vanity plate it deemed “offensive.”²¹² While the DMV initially issued the plates, upon realizing its error, the DMV demanded they be returned.²¹³ Perry refused and filed suit.²¹⁴ Unlike the *Lewis* court, the *Perry* court decided it was necessary to conduct a forum analysis. The court noted that the primary purpose of license plates, including vanity plates, was to identify vehicles, and, from the state’s point of view, the secondary purpose of vanity plates was to boost state revenue.²¹⁵ Based on these government objectives, the court concluded vanity plates were nonpublic fora.²¹⁶

The Second Circuit next needed to determine whether the restrictions Vermont had imposed on speech in that nonpublic forum were reasonable and viewpoint neutral.²¹⁷ In short order, the court concluded Vermont had good reason to restrict “the public display of offensive scatological terms.”²¹⁸ Perry pointed to other “scatological” plates issued by the DMV, including “SHTZER,” “POOPER,” and “BM,” as evidence of viewpoint discrimination.²¹⁹ The court, however, determined Perry had “err[ed] in focusing solely on the ‘scatological’ aspect of the policy and ignoring its ‘offensiveness’ aspect.”²²⁰ In its view, while the word “poop” was scatological but not generally offensive, “shit” was profane and thus offensive.²²¹ According to the court, by restricting only those terms considered offensive, the DMV was not engaging in viewpoint discrimination.²²²

Curiously, the *McDonald* court did not interpret its decision as creating a circuit split with the Eighth Circuit. In fact, the court cited *Lewis*, in passing, as analogous support and summarized the case as “holding that a state statute authorizing the rejection of vanity plates deemed ‘contrary to public policy’ violated the First Amendment because it granted ‘unfettered discretion’ to state officials.”²²³ By implication, the *McDonald* court suggests Vermont’s statute, unlike Missouri’s, did not grant “unfettered discretion.”

However, this purported distinction quickly collapses under closer inspection. Like “inflammatory” language, it is impossible to define

211. *Id.* at 163.

212. *Id.*

213. *Id.* at 164.

214. *Id.* at 165.

215. *Id.* at 167.

216. *Id.* at 169.

217. *Id.* at 166–67 (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)).

218. *Id.* at 169.

219. *Id.* at 170.

220. *Id.*

221. *Id.* at 170–71.

222. *Id.* at 172–73.

223. *Id.* at 172 (citing *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001)).

“offensive” language without reference to the language’s impact on the listener. For language to be inflammatory, it must have an identifiable tendency to inflame the listener. Likewise, for language to be offensive, it must have an identifiable tendency to induce offense on the part of a listener. The *McDonald* court itself defined “offense” in relation to the beliefs of the general public.²²⁴ “Offense” is thus inherently subjective, with few articulatable standards to define its outer bounds.²²⁵ At the very least, *Lewis* stands for the proposition that the risk of viewpoint discrimination is unconstitutionally high when the language of a statute or regulation is so subjective that it fails to set standards that prevent a regulator from engaging in viewpoint discrimination.²²⁶ By preserving an ambiguous “offensiveness” standard, *McDonald* in effect embraces the opposite proposition.

C. WALKER: A TURNING POINT FOR LICENSE-PLATE JURISPRUDENCE?

1. The Specialty-Plate Circuit Split

At the same time both state and federal courts were reaching very different results regarding the treatment of vanity plates, the federal courts of appeals generated a parallel split regarding specialty plates. This split formed, in part, because specialty plates opened a new frontier for debate over two familiar public flashpoints: (1) abortion and (2) the Confederate flag.

During the late 1990s and through the 2000s, pro-life organizations and sympathetic state legislatures across the country proposed the adoption of specialty plates bearing the inscription “Choose Life.”²²⁷ Their initial efforts were met with varying success.²²⁸ In many states that rejected the plates, pro-

224. *See id.* at 172–73 (basing its holding on “the DMV’s policy of refusing to grant applications for vanity plates bearing scatological terms that may be *deemed offensive by the general public*” (emphasis added)).

225. Indeed, the *McDonald* court did not attempt to define these boundaries. Instead it focused on the fact that “shit” is profanity, without considering *why* a profane term is “offensive,” while other, referentially equivalent terms are not. *See id.* at 170–71 (drawing the distinction between “shit” and “pooper” based on the fact that one is profanity).

226. *Lewis*, 253 F.3d at 1080 (citing *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992)). In addition to viewpoint-discrimination concerns, the Supreme Court has suggested the absence of “objective, workable standards” for exercising regulatory discretion might call into question a regulation’s reasonableness. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018).

227. *See Choose Life Story*, CHOOSE LIFE AM., INC. (Feb. 27, 2019), <http://www.choose-life.org/choose-life-story.php> [<https://perma.cc/7GH9-3QY7>] (documenting Choose Life America’s efforts to encourage the adoption of “Choose Life” plates across the country).

228. Some states adopted the proposed plate designs and made them available to the general public. *E.g.*, *ACLU of N.C. v. Tata*, 742 F.3d 563, 566 (4th Cir. 2014), *vacated sub. nom.* *Berger v. ACLU of N.C.*, 135 S. Ct. 2886 (2015) (mem.) (North Carolina); *Hill v. Kemp*, 478 F.3d 1236, 1239–40 (10th Cir. 2007) (Oklahoma); *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 371–72 (6th Cir. 2006) (Tennessee); *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 788 (4th Cir. 2004) (South Carolina); *Women’s Emergency Network v. Bush*, 323 F.3d 937, 940–42 (11th Cir. 2003) (Florida). Others rejected them on account of political sensitivities or potential controversy. *E.g.*, *Children First Found., Inc. v. Fiala*, 790 F.3d 328, 335–36 (2d Cir. 2015),

life groups brought suit, arguing a refusal to adopt the pro-life plates “constituted impermissible viewpoint discrimination.”²²⁹ Conversely, in those states that adopted the plates, pro-choice groups brought suit, asserting that states were engaging in viewpoint discrimination by adopting pro-life plates but refusing to adopt pro-choice ones.²³⁰ During the same period, organizations like the Sons of Confederate Veterans proposed specialty plates bearing the symbol of the organization, which features an image of the Confederate flag.²³¹ When state legislatures declined to adopt the organization’s proposed plates, it also brought suit alleging free-speech violations.²³²

Waves of litigation eventually produced a particularly fractious split among the various federal circuit courts of appeals. The Sixth Circuit concluded specialty plates constituted government speech, permitting state governments to restrict or advocate for content as they saw fit.²³³ Meanwhile, multiple circuits concluded specialty plates were private speech, with the Fifth, Eighth, and Ninth Circuits concluding the state legislatures’ actions were viewpoint-discriminatory²³⁴ and the Second and Seventh Circuits concluding they were viewpoint-neutral.²³⁵ The Fourth Circuit shrugged off the binary approach entirely and concluded the speech in question was mixed, rather than purely governmental or private.²³⁶

abrogated by 611 F. App’x 741 (2d Cir. 2015) (New York); *Children First Found., Inc. v. Legreide*, 373 F. App’x 156, 158 (3d Cir. 2010) (New Jersey); *Roach v. Stouffer*, 560 F.3d 860, 861–63 (8th Cir. 2009) (Missouri); *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 960 (9th Cir. 2008) (Arizona); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 855 (7th Cir. 2008) (Illinois).

229. *E.g., Choose Life*, 547 F.3d at 855.

230. *E.g., Bredesen*, 441 F.3d at 371–73.

231. *Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 390–91 (5th Cir. 2014), *rev’d sub. nom. Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015); *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm’r of Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 613–14 (4th Cir. 2002).

232. *Vandergriff*, 759 F.3d at 391.

233. *See Bredesen*, 441 F.3d at 380.

234. *Vandergriff*, 759 F.3d at 396–99; *Roach v. Stouffer*, 560 F.3d 860, 868–70 (8th Cir. 2009); *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 968–72 (9th Cir. 2008); *see also Children First Found., Inc. v. Legreide*, 373 F. App’x 156, 160 (3d Cir. 2010) (concluding the plaintiffs made a plausible claim of viewpoint discrimination in a qualified-immunity case); *Hill v. Kemp*, 478 F.3d 1236, 1243 (10th Cir. 2007) (dismissing the case on jurisdictional grounds but recognizing “that a difference arguably preferring one competing viewpoint over another remains embedded in Oklahoma law”).

235. *Children First Found., Inc. v. Fiala*, 790 F.3d 328, 350 (2d Cir. 2015), *abrogated by* 611 F. App’x 741 (2d Cir. 2015) (joining the Seventh Circuit in concluding the rejection of a proposed specialty-plate design was “a permissible content-based restriction imposed in a nonpublic forum, rather than ‘an impermissible act of discrimination based on viewpoint’” (quoting *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 865 (7th Cir. 2008))).

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

Unlike the more subtle circuit split about vanity plates,²³⁷ it would not be long before the unsettled questions about specialty plates garnered the Supreme Court's attention.

2. *Walker's* Solution

The Supreme Court offered its answer to the specialty-plate conundrum in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* In *Walker*, the Texas DMV refused to adopt a specialty-plate design prominently featuring the Confederate flag.²³⁸ The DMV was authorized to issue new specialty-plate designs through several distinct processes, one of which was after the "receipt of an application from a nonprofit entity seeking to sponsor a specialty plate."²³⁹ Here, the Confederate flag design had been proposed by the Sons of Confederate Veterans, a nonprofit entity.²⁴⁰ The Texas Transportation Code permitted the DMV to refuse any design that "might be offensive to any member of the public . . . or for any other reason established by rule."²⁴¹ Based on that provision, the DMV board unanimously voted not to issue the proposed plate.²⁴² The Sons of Confederate Veterans filed suit, asserting that the board's decision violated its right to free speech.²⁴³ In response, Texas argued the plates were government speech.²⁴⁴

To determine whether specialty plates constituted private or governmental speech, the Supreme Court borrowed the multi-factor test from *Sumnum*, reformulating it as three distinct factors.²⁴⁵ First, the Court looked to whether states had traditionally used license plates to speak to the public.²⁴⁶ The Court concluded states had made frequent use of plates as message boards, pointing to the long-running, nationwide practice of using license plates to convey state slogans meant "to urge action, to promote tourism, and to tout local industries."²⁴⁷ Second, the Court asked whether "license plate designs '[we]re often closely identified in the public mind with the [State].'"²⁴⁸ According to the Court, the close relationship between a license plate and the state was evident from the uniform display of the state's name

237. See *supra* Section III.B.2.

238. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 203–04 (2015).

239. *Id.* at 206 (quoting TEX. TRANSP. CODE ANN. § 504.801 (a)–(b) (West 2015)).

240. *Id.*

241. *Id.* at 205 (quoting TEX. TRANSP. CODE ANN. § 504.801 (c)).

242. *Id.* at 206.

243. *Id.*

244. See *id.* at 206–07.

245. See *supra* Section II.C.2.

246. See *Walker*, 576 U.S. at 210–11 (citing *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 470 (2009)) (looking to "the history of license plates" in "communicat[ing] messages from the States").

247. *Id.* at 211.

248. *Id.* at 212 (second alteration in original) (quoting *Sumnum*, 555 U.S. at 472).

“in large letters at the top of every plate.”²⁴⁹ In addition, the state owned the plates, issued the plates, and required the plates to be displayed.²⁵⁰ As such, an observer was likely to “routinely—and reasonably—interpret” the plate design “as conveying some message on the [issuer’s] behalf.”²⁵¹ Third and finally, the Court looked to the control Texas maintained over the messages displayed on specialty plates. It concluded Texas “‘effectively controlled’ the messages [conveyed] by exercising ‘final approval authority’ over their selection.”²⁵² Based on these three factors, the Court held that the specialty plate’s message was government speech, over which the government was entitled to exercise total control.²⁵³

D. WALKER’S SHORTCOMINGS

In issuing its ruling, the *Walker* Court made it clear its decision concerned only specialty plates and not vanity plates.²⁵⁴ Even so, there is some intuitive appeal in drawing a straight line from *Walker*’s holding to vanity plates. Reasoning by analogy is a basic function of law, and, at least on a surface level, it is difficult to identify a more obvious analogy to vanity plates than specialty plates. But rather than producing a satisfactory result, applying the *Walker* test to vanity plates instead uncovers some serious shortcomings in the government-speech doctrine as presently constituted. In particular, *Walker*’s first two factors, if not properly constrained, can be pushed in any direction by simply adjusting the level of abstraction, and its final factor may incentivize government entities to engage in prior restraints of speech.

1. Tradition and Attribution: The Level-of-Abstraction Problem

In its simplest form, the *Walker* test is composed of three factors: “(1) whether the government has traditionally used the message or conduct at issue to speak to the public; (2) whether persons would interpret the speech as conveying some message on the government’s behalf; and (3) whether the government maintains control over the selection of the message.”²⁵⁵ The direction in which the former two factors will point is driven almost entirely by the level of abstraction employed in evaluating those factors.

When evaluating the tradition and attribution factors in *Walker* itself, the Court conflated government messaging via license plates generally with government messaging via specialty plates.²⁵⁶ While some scholars have

249. *Id.*

250. *Id.*

251. *Id.* (alteration in original) (quoting *Sumnum*, 555 U.S. at 471).

252. *Id.* at 213 (alteration in original) (quoting *Sumnum*, 555 U.S. at 473).

253. *Id.* at 208–09.

254. *Id.* at 204.

255. *Shurtleff v. City of Boston*, 928 F.3d 166, 172 (1st Cir. 2019) (summarizing the *Walker* test).

256. Mary-Rose Papandrea, *The Government Brand*, 110 NW. U.L. REV. 1195, 1211–12 (2016).

criticized the Court's approach,²⁵⁷ its conflation is not indefensible. Although specialty plates were introduced far more recently than standard license plates, a specialty plate's defining feature is the design of the plate itself. Governments' traditional use of the standard license-plate *design* as a mode of communication²⁵⁸ thus has direct bearing on whether specialty plates—which simply replace the standard plate's design—serve a similar function.

Likewise, because standard license-plate designs are “routinely . . . interpret[ed] . . . as conveying some message on the [government's] behalf,”²⁵⁹ a specialty design could understandably be interpreted by a reasonable observer²⁶⁰ as conveying government speech. Justice Alito is probably correct that a reasonable observer would not, upon seeing “Texas plates with the names of the University of Texas's out-of-state competitors in upcoming games”—such as Oklahoma State University—“assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents.”²⁶¹ However, a reasonable observer very well might have understood the Texas government as adopting an expressive “OSU Cowboys” design to offer a service for those Oklahoma State fans living in Texas. After all, the state government had approved the “OSU Cowboys” specialty plate, listed it publicly on its DMV website, and made it available for purchase by Texas's vehicle-owners.²⁶²

Yet, even assuming that the *Walker* Court's choice of a broader level of abstraction was appropriate for specialty plates, a similarly broad choice would not be appropriate in other circumstances. It would be a mistake, for example, to conclude a Pepsi advertisement on a public transit system constituted government speech based on a “certain[] understand[ing]” by observers “that the walls of a bus or a train are government property.”²⁶³ Even if the relevant

257. *See id.* (accusing the Court of failing to recognize the distinct history of the two plate forms).

258. *Walker*, 576 U.S. at 210–12.

259. *Id.* at 212 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 471 (2009)).

260. Precisely which potential observers are “reasonable” is a matter of some dispute. *See* Papandrea, *supra* note 256, at 1214–15 (contrasting the proposed approaches of Justices O'Connor and Stevens). In the Establishment Clause context, the Court appears to have settled on a “reasonable observer” who is “presumed to be familiar with the history of the government's actions and competent to learn what history has to show,” rather than one who is “absentminded” and “objective.” *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 866 (2005).

261. *Walker*, 576 U.S. at 222 (Alito, J., dissenting).

262. *See License Plate Personalization*, TEX. DEPT OF MOTOR VEHICLES, <https://www.txdmv.gov/motorists/license-plates/specialty-license-plates/itemlist/filter?category%5B%5D=66&moduleId=185&Itemid=145> [<https://perma.cc/2ZG-9C74>] (including an “OSU Cowboys” plate as an available design).

263. This illustration is adapted from one originally used by scholar Mary-Rose Papandrea. Papandrea, *supra* note 256, at 1229–30; *see also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992) (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)) (treating *Lehman*, a case concerning advertising on public transit, as implicating private speech in a nonpublic forum, rather than government speech); Jacobs, *supra* note 45, at 365 (“[T]he inherent attributes of types of government property do not alone condition viewers to attribute speech on it to the

government has also traditionally advertised in the transit system, the proper attribution inquiry must still be whether *the content* of the individual advertising space itself would reasonably be attributed to a government speaker. Here, an observer could not reasonably attribute a Pepsi ad to anyone other than PepsiCo.

Thus, while the level of abstraction for the traditional inquiry need only be tailored to the *medium* of expression in question, the level of abstraction for the attributional inquiry must be tailored to the *expression itself*. Otherwise, the Court risks “turn[ing] the public forum doctrine on its head” by concluding that any speech occurring on government property is government speech purely by virtue of the government’s ownership of the property.²⁶⁴ In so doing, it will inevitably allow states to seize whole swaths of private speech and subject it to government censorship.

2. Control: The Prior-Restraint Problem

Walker’s control factor creates an even more serious quandary. The Supreme Court tends to portray the prongs of the *Walker* test as “factors” rather than required elements.²⁶⁵ Yet, considered alone, no degree of governmental control should itself be able to justify a finding of government speech.²⁶⁶ To hold otherwise would produce a sinister circularity in which the government could censor any speech it chooses by pre-screening it and then claiming the censored speech as its own. This “scheme would be a prior restraint, and prior restraints are presumptively unconstitutional.”²⁶⁷

Even when considered alongside the other factors, the control factor can serve a perverse function. As indicated above, the interplay between the attribution and control factors, in particular, might lead courts to conclude private speech appearing in a government forum is government speech based on an observer’s association of *the forum* with the government.²⁶⁸ The *Walker* Court itself flirted with this reasoning, suggesting that because “[e]ach Texas license plate is a government article,” expression thereon could be attributed to the Texas government.²⁶⁹ This sort of analysis collapses the distinction between the forum and the speaker. It undermines any First Amendment protections owed to the latter in cases where the former is government-controlled. If the government-forum doctrine is to survive the advent of the

government. Instead, it is the combination of the obvious identity of the owner of the property and the apparent interrelationship of the property owner with the privately contributed expression that appears on it that causes viewers to perceive the owner to be a source of the expression.”).

264. Papandrea, *supra* note 256, at 1217.

265. See *Walker*, 576 U.S. at 209 (“We based our conclusion [in *Sumnum*] on several factors.”).

266. Jacobs, *supra* note 45, at 346; Papandrea, *supra* note 256, at 1221.

267. Papandrea, *supra* note 256, at 1221.

268. See *supra* Section III.D.1.

269. *Walker*, 576 U.S. at 212.

government-speech doctrine, it is thus essential to maintain a conscious separation between government control of the expression and government control of the forum in which the expression takes place.

3. The *Walker* Test and Vanity Plates: The State Court Response

The consequences of *Walker*'s shortcomings as applied to vanity plates are illustrated by the decisions of the state courts that have attempted to apply its test in that context. In evaluating whether vanity plates are private or governmental speech, the two state courts to apply the *Walker* test to vanity plates have reached directly contradictory conclusions.

The Indiana Supreme Court in *Commissioner of Indiana Bureau of Motor Vehicles v. Vawter* applied the *Walker* test and concluded vanity plates were government speech.²⁷⁰ First, in considering the tradition factor, the *Vawter* court mirrored the *Walker* Court's broad level of abstraction.²⁷¹ It blurred any distinction between government communication through vanity configurations and government communication through license plates generally.²⁷² Likewise, in considering the attribution factor, the *Vawter* court noted vanity plates "belong[ed] to the [Indiana Bureau of Motor Vehicles] and display[ed] 'Indiana' prominently at the top of every plate, indicating that Indiana owns and issues them."²⁷³ Finally, it noted that Indiana exercised "broad authority" in rejecting plates, including those in "poor taste" or containing profanity.²⁷⁴

The year after *Vawter* was decided, the Maryland Court of Appeals, in *Mitchell v. Maryland Motor Vehicle Administration*, specifically rejected every aspect of *Vawter*'s application of the *Walker* test.²⁷⁵ It concluded vanity plates were private speech in a government forum.²⁷⁶ The *Mitchell* court first addressed the tradition and attribution factors. Rather than conflating the text appearing on a vanity plate with the license plate itself, the court drew a

270. *Comm'r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1204 (Ind. 2015).

271. *See id.*

272. *See id.* (quoting *Walker*, 576 U.S. at 211) (noting that license plates "long have communicated messages from the States"). The *Vawter* court also pointed out that a license plate's "alphanumeric combinations provide identifiers for public, law enforcement, and administrative purposes." *Id.* But it is dubious to suggest that the randomized number sequences that appear on a standard license plate convey a message in any real sense.

273. *Id.* at 1205.

274. *Id.* at 1206. Indiana's governing statute gave the BMV the authority to reject plates "that (1) carri[e]d a connotation offensive to good taste and decency; (2) would be misleading; or (3) the bureau otherwise consider[ed] improper for issuance." *Id.* at 1202 (quoting IND. CODE § 9-18-15-4(b) (2015)). It is again worth noting the circularity of the court's conclusion: In essence, Indiana may restrict speech in "poor taste" because it has already restricted speech in "poor taste."

275. *Mitchell v. Md. Motor Vehicle Admin.*, 148 A.3d 319, 326-27 (Md. 2016).

276. *Id.* at 326. However, the *Mitchell* court ultimately concluded Maryland's refusal to reissue a plate bearing the configuration "MIERDA"—a Spanish term roughly translating to "shit"—was constitutional, because the restriction was reasonable and viewpoint neutral. *Id.* at 336-37.

careful distinction. Historically, vanity plates' personalized messages were sourced exclusively from individual vehicle-owners, rather than from state governments.²⁷⁷ Thus, “[u]nlike the license plate slogans that States use ‘to urge action, to promote tourism, and to tout local industries[,]’ vanity plates are personal to the vehicle owner, and are perceived as such.”²⁷⁸ For that reason, vanity plates’ “unique, personalized, user-created messages” could not “be attributed reasonably to the government” in the same way as could specialty plates.²⁷⁹ Finally, turning to the issue of governmental control, the *Mitchell* court concluded the degree of control exercised by the Maryland government “d[id] not rise to the rigorous level required to transmogrify its regulatory approach into government speech.”²⁸⁰

E. THE CURRENT STATE OF THE LAW: BETWEEN A ROCK AND A HARD PLACE

Taken together, the enduring splits among both state and federal courts and the questionable reach of the Supreme Court’s decision in *Walker* leave the constitutionality of states’ vanity-plate regulations in a rut of confusion. This confusion, in turn, leads to substantial uncertainty for vehicle-owners and state governments alike. A vehicle-owner can never be confident a government official will not conclude his or her proposed plates will fall into an abstract and endlessly malleable category like “vulgar,” “offensive,” or “against public policy.” Admittedly, it is easy to suggest vehicle-owners can avoid this problem by choosing less controversial or risqué formulations. Yet, as is the case with most speech restrictions, unpredictable standards are just as likely to censor the breast cancer survivor with a sense of humor (“BQQBS”)²⁸¹ or the person with mildly unpopular political opinions (“55-SUKZ”),²⁸² as they are the virulent racist (“ARYAN-1”).²⁸³ More fundamentally, if anything is anathema to the Free Speech Clause, it is the

^{277.} *Id.* at 326 (quoting *Mitchell v. Md. Motor Vehicle Admin.*, 126 A.3d 165, 185 (Md. Ct. Spec. App. 2015), *aff’d*, 148 A.3d 319 (Md. 2016)).

^{278.} *Id.* (second alteration in original) (quoting *Mitchell*, 126 A.3d at 185).

^{279.} *Id.* at 326–27.

^{280.} *Id.* at 327.

^{281.} Scott Thistle, *Law Change Could Make Maine Vanity Plates More Risque*, BANGOR DAILY NEWS (Mar. 28, 2016, 1:58 PM), <https://bangordailynews.com/2016/03/27/news/state/law-change-could-make-maine-vanity-plates-more-risque> [<https://perma.cc/4FGN-EKG2>] (noting that Maine rejected a breast cancer survivor’s request for the vanity configuration “BQQBS,” which she intended to display on a breast cancer awareness specialty plate).

^{282.} *Hunt v. PennDOT*, 47 Pa. D. & C.3d 132, 132–33 (Ct. Com. Pl. 1987). *Hunt* was a longstanding opponent of the 55 mile-per-hour speed limit. *Id.*

^{283.} *Lewis v. Wilson*, 253 F.3d 1077, 1078 (8th Cir. 2001). Mary Lewis, the plaintiff in this case, was a former member of the Ku Klux Klan and requested the plate “because she consider[ed] herself and her ancestors to possess superior qualities.” Mede Nix, *Former Klan Member Fighting to Keep License Plate*, UNITED PRESS INT’L (July 13, 1989), <https://www.upi.com/Archives/1989/07/13/Former-Klan-member-fighting-to-keep-license-plate/4762616305600> [<https://perma.cc/9SU3-DYHH>].

idea of blockading controversial stances or viewpoints based on the whims of a government official.

While the effects of the current regime on private speakers should be at the forefront, often unappreciated is the toll the current regime places on state regulators attempting to maintain a popular program amid uncertainty. Some jurisdictions have attempted—quite haphazardly—to immunize their regimes against constitutional attack by amending the governing statutes, regulations, or administrative guidance.²⁸⁴ But without a clear constitutional framework, the effectiveness of these changes remains an open question—the answers to which are subject to change from regulation to regulation and from jurisdiction to jurisdiction.

IV. BUILDING A LEGAL FRAMEWORK FOR VANITY PLATES

The law of vanity license plates is thus in desperate need of clarification from the Supreme Court. In an appropriate case, the Court should address whether vanity-plate regulations survive constitutional scrutiny. It should first determine who is speaking on a vanity plate by clarifying some aspects of its established *Walker* test. Once the contours of the *Walker* test have been clarified, it should be clear that the speaker on a vanity plate is the private vehicle-owner and not the government. Second, having determined a private individual is speaking, the Court should provide a framework for evaluating whether the state government is engaging in viewpoint discrimination by prohibiting certain classes of speech. To do so, it should draw on its recent opinions in *Tam* and *Iancu*, as well as its classic opinion in *Cohen*. Based on the resulting framework, the Court should conclude that restricting vanity-plate expression because it is offensive or disparaging is viewpoint-discriminatory and unconstitutional, while restricting profanity unconstitutionally risks the same result. By contrast, restrictions on speech with sexual connotations or references to illegality would not pose the same constitutional problems.

A. WHO IS SPEAKING?

The Supreme Court thus ought to begin its analysis by determining whether vanity-plate configurations are private or government speech. Although its existing *Walker* test purports to determine whether a government or a private individual is speaking, without further clarification it is not clear how *Walker*'s three factors—tradition, attribution, and control—should apply to vanity plates.

²⁸⁴ See *Martin v. State, Agency of Transp. Dep't of Motor Vehicles*, 819 A.2d 742, 745 ¶ 2 (Vt. 2003) (describing the Vermont DMV's unsuccessful attempts "to insulate the vanity plate program from constitutional attack by removing the Commissioner's statutory obligation to determine a requested plate's potential to offend the general public"); Thistle, *supra* note 281 (explaining how Maine amended its law "to reject only messages that are considered a racial slur or are clearly discriminatory, as well as language that demonstrates hate or encourages violence or other illegal activities" based on fears the previous version would not survive a court challenge).

1. Tradition and Attribution: Defining the Level of Abstraction

In looking at the tradition of government messaging through vanity plates, the Court should begin by defining the level of abstraction. In that regard, the Maryland Court of Appeals' opinion in *Mitchell* serves as an appropriate model. Whereas governments have historically used license-plate designs to communicate—traditionally by displaying government slogans, but more recently through specialty designs—the plates' alphanumeric sequences have not been used to convey government messages.²⁸⁵ The design and alphanumeric sequence of the license plate should not be conflated; each feature serves a separate function and emerged at a different point in history. For this reason, *Walker's* holding should not be directly extended to encompass vanity plates. In *Walker*, the design on the plate was all that was at issue; a specialty design merely replaced the standard design.²⁸⁶ Vanity plates, by contrast, convey two entirely distinct messages.

Likewise, in gauging to whom a reasonable person would attribute the expression conveyed by a vanity plate's alphanumeric configuration, the Court should focus on the message conveyed by the configuration itself, rather than the license plate as a whole. This message is by definition personal to the individual vehicle-owner. Although the relevant state agency approves the proposed expression, the agency plays no role in inventing it. If a hypothetical reasonable observer knows of the government's role in approving the speech, that observer also surely recognizes that a private speaker originally proposed the speech.²⁸⁷ Even putting these processes aside, the proliferation of individualized vanity-plate messages, as well as their place in the popular culture,²⁸⁸ makes it increasingly unlikely an observer would attribute each plate's message to the government. Indeed, as the *Mitchell* court observed, it is more likely that an observer's thoughts would be "rooted in an understanding that the vehicle owner, not the government, is the speaker, and that the speaker implicated the State in a private message that . . . the government permitted, but certainly did not endorse."²⁸⁹ And, in any case, even if a given message were reasonably attributable to either the government

285. *Mitchell*, 148 A.3d at 326–27.

286. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 214–18 (2015).

287. See *supra* notes 260–61; see also Bezanson & Buss, *supra* note 10, at 1482–83 ("Attribution, in short, is a difficult, subtle, fact-intensive, and circumstance-specific question.").

288. See Taura Šitkauskaitė, *30 of the Best License Plates That People Have Spotted on Cars*, BORED PANDA, https://www.boredpanda.com/funny-license-plates/?utm_source=google&utm_medium=organic&utm_campaign=organic [<https://perma.cc/VCT8-CYBC>] (compiling a list of humorous vanity-plate configurations spotted on the roads and noting that "[t]here's something about vanity license plates that can cause a severe case of eye-roll" because it suggests "[t]his person refuses to make do with a random assortment of letters and numbers like the rest of us and insists on making a statement" (emphasis added)).

289. *Mitchell*, 148 A.3d at 327.

or a private speaker, the tradition factor continues to counsel against classifying the speech as government speech.

2. Control: Approval Versus Adoption

Having now reevaluated *Walker's* tradition and attribution factors, all that remains is the control factor, which, as discussed earlier, cannot by itself convert private speech into government speech.²⁹⁰ By exercising a prior restraint—admittedly a form of control—a government cannot transform the restrained speech into the government's own and bestow on the government a right to continue restraining the expression as it sees fit. Standing alone, this sort of “control test” for government speech “could incentivize the government to increase its control over speech, thereby deem the speech its own, and then use its freedom from First Amendment constraints to discriminate against disfavored speakers and messages at will.”²⁹¹

Nonetheless, the question remains as to how the control factor ought to be properly understood. After all, it is settled law that a government can recruit private speakers to aid it in speaking.²⁹² At the same time, Justice Alito, dissenting in *Walker*, correctly observed that there must be a “difference between government speech . . . and governmental blessing (or condemnation) of private speech.”²⁹³ Otherwise, any private expression registered through an approval process with a government agency—including trademarks, copyrights, patents, and the like—would mutate into government speech upon registration and lose all First Amendment protection.²⁹⁴

Out of respect for this distinction, the Court ought to adopt a modified, binary approach to *Walker's* control factor. When a government entity claims it has recruited private speakers to aid in producing government speech, the focus should not be on *whether* the government has asserted control, but rather on *how* it has asserted it. That is, the proper “control” inquiry should be whether the government has, by exercising control, (1) adopted the speech for itself or (2) merely approved it for use by the private speaker. The former suggests government speech. The latter suggests private speech, in which case the government's exercise of control must be judged according to First Amendment limitations. This binary approach reflects the distinction

290. See *supra* Section III.D.2.

291. Papandrea, *supra* note 256, at 1221 (quoting *ACLU of N.C. v. Tennyson*, 815 F.3d 183, 188 (4th Cir. 2016) (Wynn, J., dissenting)).

292. See Jacobs, *supra* note 45, at 308–09 (“[W]hen the government uses private speakers to promulgate its own speech, it may choose among privately proposed messages according to the viewpoints they present on controversial public issues.”).

293. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 232 (2015) (Alito, J., dissenting).

294. *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017).

between a government's role as regulator and its role as an expressive actor in the marketplace of ideas.²⁹⁵

In evaluating whether a government has adopted or approved a given expression, the Court should look to the expression's purpose. To have adopted speech as its own, the procedural control exercised "must demonstrate the government's intent to review and evaluate private submissions for the purpose of tailoring them and accepting them into the government's broadcast of identity."²⁹⁶ If a government is speaking for itself by adopting the expression of private speakers, the message should be targeted toward a clear purpose. By contrast, if, by marking a class of expression as government speech, the government would begin "babbling prodigiously and incoherently," it is more likely a government is merely approving or registering the speech of dissonant private speakers.²⁹⁷

Under this modified control test, at one extreme, a registered trademark would be understood as private speech subjected to government registration.²⁹⁸ On the other extreme, were a government entity to hire a private contractor to design a marketing campaign, the campaign's expressive elements would be understood as having been adopted by the government entity. In both cases, in a technical sense, a private party is responsible for producing the message at issue. But only in the latter case has the government directed this messaging toward a particular purpose and, in so doing, adopted the privately sourced expression as its own.

On the margins, the line between adoption and approval is more difficult to draw. But, once again, the distinction between specialty plates and vanity plates is instructive. Both a specialty-plate design and a vanity-plate configuration may trace their origin to a private party.²⁹⁹ However, once a specialty-plate design is approved, the state makes the design publicly available to other vehicle-owners in the state—often by posting it at agency

295. See Bezanson & Buss, *supra* note 10, at 1510 (drawing a distinction between judging a government's action "as a form of expression" or as a form of regulation).

296. Jacobs, *supra* note 45, at 351; see also Bezanson & Buss, *supra* note 10, at 1510 ("[G]overnment should be able to act as a speaker only when it does so purposefully, with an identified message, which is reasonably understood by those receiving it to be the government's message."). The Court has dismissed the idea that a government should be required to formally document its adoption of a particular message. *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009). However, even absent formal procedures, the distinction between adoption and approval serves as a useful metric for evaluating whether speech is governmental or private. Indeed, the *Summum* Court dismissed the need for formal procedures because "[t]he City's actions provided a more dramatic form of adoption than [a] . . . formal endorsement." *Id.* at 474.

297. *Tam*, 137 S. Ct. at 1758.

298. The Court has already concluded as much in *Tam*. *Id.* at 1758–60.

299. A specialty-plate design, of course, need not necessarily have a private origin. In Texas, for example, plates can be proposed by private parties, but they can also be created as a result of a legislative mandate or at the DMV's own initiative. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 205 (2015). A vanity-plate proposal, by definition, always stems from a private party. See *supra* notes 28–31 and accompanying text.

offices or by making it available for purchase on its website.³⁰⁰ By making the design publicly available, the state indicates that it has adopted the specialty plate as its own expression. While the content of different specialty plates may express contrary opinions, by holding them all out together a state government promulgates a unified message meant to accommodate the different views of its citizens.

By contrast, the expression on a vanity plate is not adopted by the government or made publicly available. Its individualized character is its defining characteristic; the person who requests the vanity configuration will be the only one to ever have that plate appear on his or her vehicle. Put differently, although the government ultimately manufactures the physical plate, the expression thereon will only ever be associated with its original expressor. Under a contrary understanding, the state government would adopt as its own not only every configuration identifying an individual driver but also every cleverly disguised curse word and double entendre it lets slip past a DMV censor. Such an argument stretches the government-speech doctrine beyond what it can bear. Rather than adopting a vanity plate's configuration as its own speech, the government's role is instead limited to an approbatory function.

Despite the obvious similarities between vanity plates and specialty plates, the different processes by which they are created and the different functions they serve suggest that the two plates should be treated differently under the First Amendment. While specialty plates are adopted by the government as its own speech, vanity plates remain the speech of the private actors who originally proposed them—even as the speech is housed in a government forum.

B. CAN THEY SAY THAT?

Even after establishing that vanity plates are private expression in a government forum, the Supreme Court would still need to address whether state restrictions on the expression can withstand constitutional challenge. Because a license plate bearing a vanity configuration is likely to be classified as either a limited public or nonpublic forum, a state government is free to regulate the content of those configurations, but any restrictions on viewpoint will be unconstitutional.³⁰¹ While it would be impracticable for the Court to assess each state's unique vanity-plate statutes and regulations, the Court can provide a workable framework by focusing on the five most commonly proscribed types of expression and determining whether those proscriptions discriminate based on viewpoint.³⁰² On this basis, it should conclude that

300. *E.g., Personalized and Specialty Plates*, IOWADOT, <https://iowadot.gov/mvd/vehicleregistration/plates> [<https://perma.cc/G25T-VMUF>] (displaying specialty-plate designs available for order).

301. *See supra* Sections II.B.3–4.

302. *See supra* Section III.A.

restrictions on disparaging, offensive, and profane speech violate the Free Speech Clause, whereas restrictions on references to sexual acts or illegality are likely viewpoint neutral and thus at least facially constitutional.

1. Disparaging Speech

Of the five categories of proscribed expression, the most straightforward analysis concerns restrictions on derogatory, disparaging, or prejudicial language.³⁰³ Here, the Court's opinions in *Tam* serve as a direct guide. In *Tam*, the PTO permitted applicants to "register a positive or benign mark but not a derogatory one," which "is the essence of viewpoint discrimination."³⁰⁴ In the same manner, many states exclude only vanity-plate configurations that, for example, "demean[] . . . , belittle[], or disparage[] any person, group, race, ethnicity, nationality, gender, [or] sexual orientation."³⁰⁵ By so doing, the state legislature or regulatory body is barring the display of negative or disparaging viewpoints while permitting positive or uplifting ones. Excluding expression because its message is derogatory, disparaging, or prejudicial is quintessential viewpoint discrimination, and the statute or regulation that commands it must be facially unconstitutional.³⁰⁶

To be sure, this conclusion has consequences. Should disparaging-speech regulations fall (and assuming states opt to otherwise continue their vanity-plate programs in those programs' current forms),³⁰⁷ state governments will find themselves obligated to approve a great deal of contemptible speech. It is safe to assume legislatures meant well by barring configurations that "express[] contempt, ridicule or superiority based on race, gender, politics, ethnic heritage, or religion"³⁰⁸ or communicate "prejudice, hostility, insult, or racial or ethnic degradation."³⁰⁹ But good intentions are not a license to elevate one viewpoint at the expense of another. When it comes to the expression of private parties, state governments are without authority to distort the marketplace of ideas by deciding which

303. See *supra* note 175 and accompanying text.

304. *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring).

305. 43 TEX. ADMIN. CODE § 217.27(d)(2)(C) (2019).

306. See *supra* notes 149–57 and accompanying text.

307. In theory, states could choose to narrow their vanity-plate programs in ways that avoid featuring contemptible speech without engaging in viewpoint discrimination. For example, there would be nothing viewpoint-discriminatory about limiting the availability of vanity-plate configurations to, say, a vehicle-owner's last name or an abbreviation thereof. See Herald, *supra* note 50, at 659. However, even with a limitation of this sort in place, if the real David Assman were to request a vanity plate with his last name, presumably the state government would have to grant the request. See Mack Lamoureux, *No One Can Stop Assman from Turning His Truck into a Giant Vanity Plate*, VICE (Feb. 13, 2019, 1:30 PM), https://www.vice.com/en_us/article/vbw79x/no-one-can-stop-assman-from-turning-his-truck-into-a-giant-vanity-plate [https://perma.cc/NC58-9WPN].

308. OKLA. ADMIN. CODE § 710:60-3-151(c)(2) (2016).

309. IOWA ADMIN. CODE r. 761-401.6(2)(d)(2) (2020).

viewpoints are hateful enough to draw censorship.³¹⁰ Instead, the First Amendment entrusts *the people* with the power to discern between that which is hateful and that which is laudable. As Justice Alito remarked in *Tam*, “[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”³¹¹

2. Offensive Speech

A similar framework applies to states’ sweeping restrictions on offensive speech.³¹² In this circumstance, the Court should again look to the opinions in *Tam*, as well as its opinion in *Iancu*, for guidance. In *Iancu*, the Lanham Act’s restriction on “immoral” trademarks “permit[ted] registration of marks that champion[ed] society’s sense of rectitude and morality, but not marks that denigrate[d] those concepts.”³¹³ In the same way, a restriction on plate configurations “offensive to good taste and decency”³¹⁴ permits configurations in line with society’s standards but rejects configurations out-of-step with those standards. Before *Tam* and *Iancu*, the PTO “rejected marks express[ing] opinions that [we]re, at the least, offensive to many Americans.”³¹⁵ The Court’s response was clear: “[A] law disfavoring ‘ideas that offend’ discriminates based on viewpoint, in violation of the First Amendment.”³¹⁶ The same principle should apply to vanity plates, and states’ statutes and regulations prohibiting offensive expression should be deemed facially unconstitutional.

310. See *supra* notes 143–44 and accompanying text. As illustrated by the enforcement of vanity-plate regulations, when governments do draw these lines, they often do so poorly. See *supra* Section III.E; see also Herald, *supra* note 50, at 600 (“The rejections often appear arbitrary. In Alaska, for example, ‘POOPOO’ is fine, but ‘WEEWEE’ is not, unless you spell it ‘OUI OUI.’ The plates ‘JERK,’ ‘GOON,’ and ‘CREEP,’ seem acceptable as well, but do not try to get a ‘DORK’ plate—the computer found that it had an unacceptable meaning.” (footnote omitted)); Erin Alberty, *License Plate Complaints Receive Different State Responses, According to Records*, SALT LAKE TRIB. (Feb. 15, 2020), <https://www.sltrib.com/news/2020/02/15/license-plate-complaints> [<https://perma.cc/FHL9-gURW>] (noting that “drivers have taken to Utah roads with license plate messages such as ‘NEGROS’ ‘J3WBRNR’ and ‘FÜHRER,’ while state officials rejected such license plates as ‘COFFEE’ and ‘MERLOT’”).

311. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

312. See *supra* notes 176–77 and accompanying text.

313. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019).

314. E.g., S.D. CODIFIED LAWS § 32-5-89.2 (2019).

315. *Iancu*, 139 S. Ct. at 2301.

316. *Id.*

3. Profane Speech

In contrast to restrictions on disparaging or offensive speech, restrictions on profane speech³¹⁷ pose a more complex problem. The *Iancu* Court overturned restrictions on “immoral or scandalous” trademarks, not profanity.³¹⁸ However, “immoral” and “scandalous” phrases, like profanity, are typically restricted because they implicate “society’s sense of decency or propriety.”³¹⁹ In fact, the particular trademark at issue in *Iancu* was suggestive of profanity.³²⁰ Nonetheless, several concurring Justices in that case suggested that if “scandalous” had been interpreted more narrowly—to include only “marks that [we]re obscene, vulgar, or profane”—the statute would have been viewpoint neutral.³²¹ Justice Alito, for example, reasoned that profane terms do not “express any idea and . . . generally signif[y] nothing except emotion and a severely limited vocabulary.”³²² Based only on *Iancu*, then, regulations targeted at profanity might perhaps be upheld as facially viewpoint neutral. However, even accepting this standard, the Court would necessarily need to leave open the door for as-applied or overbreadth challenges.

Furthermore, the reasoning of the concurring Justices in *Iancu* is in tension with the Court’s holding in *Cohen*. The *Cohen* Court preserved on First Amendment grounds Paul Robert Cohen’s right to wear his “Fuck the Draft” jacket³²³—even, notably, in what would now be called a nonpublic forum.³²⁴ The Court refused to “indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”³²⁵ While the word “fuck” may not express an idea in itself,³²⁶

317. See *supra* note 173 and accompanying text.

318. *Iancu*, 139 S. Ct. at 2302.

319. *Id.* at 2299–300.

320. The trademark at issue belonged to the apparel company FUCT. *Id.* at 2297.

321. *Id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part); see also *id.* at 2308 (Sotomayor, J., concurring in part and dissenting in part) (“[I]t is equally possible to read that provision’s bar on the registration of ‘scandalous’ marks to address only obscenity, vulgarity, and profanity. Such a narrowing construction would save that duly enacted legislative text by rendering it a reasonable, viewpoint-neutral restriction on speech that is permissible in the context of a beneficial governmental initiative like the trademark-registration system.”).

322. *Id.* at 2303 (Alito, J., concurring).

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

324. At the time *Cohen* was decided, the government-forum verbiage was not yet fully formed, and there is no explicit discussion of government fora in the opinion. See David L. Hudson, Jr., *Public Forum Doctrine*, FIRST AMEND. ENCYCLOPEDIA (Jan. 8, 2020), <https://www.mtsu.edu/first-amendment/article/824/public-forum-doctrine> [<https://perma.cc/S3KM-7PYF>] (tracing the origin of the doctrine to 1939 but noting that “[t]he term *public forum* . . . did not appear in First Amendment cases until the 1970s, and *public forum doctrine* did not appear until the 1980s”). However, a courthouse corridor would almost certainly fit the definition of a nonpublic forum. See *supra* notes 69–71 and accompanying text.

325. *Cohen*, 403 U.S. at 26.

326. See Christopher M. Fairman, *FUCK*, 28 CARDOZO L. REV. 1711, 1719–20 (2007) (asserting that the term lacks any intrinsic meaning).

Cohen’s “Fuck the Draft” message certainly did.³²⁷ So too would a “FKDRAFT” vanity plate. In the same vein, Justice Alito’s assertion that profane terms suggest nothing beyond “a severely limited vocabulary”³²⁸ is slightly exaggerated. While profane terms may lack intrinsic meaning in a vacuum,³²⁹ in context they often contribute to a message conveying a forceful viewpoint. It would be odd to suggest, for example, declaring “fuck the draft” carries an identical meaning as “I’d like to express my disdain for the draft.”³³⁰ Even in a constrained forum like a vanity plate, allowance must be made for clever individuals to express forceful ideas or viewpoints by use of profane language.

4. Sexually Connotative Speech and References to Illegality

Finally, unlike their peers, restrictions on configurations containing obscene or sexual connotations³³¹ or references to illegal acts or substances³³² are likely viewpoint-neutral. It is more difficult to imagine scenarios in which a viewpoint is suppressed by restrictions on sexual connotations or references to illegality than is the case with profane speech. For the most part, a license plate’s uniquely cramped forum hinders vehicle-owners from expressing viewpoints through references to sex or illegality.³³³ More importantly, unlike restrictions on derogatory or offensive speech, these restrictions prevent *all* references to a particular substance or act, whether framed in the positive or negative. As a facial matter, at least, proscriptions on sexual language or references to illegal acts or substances are likely viewpoint neutral and thus would withstand First Amendment scrutiny.³³⁴

V. CONCLUSION

State governments have long regulated expression on vanity plates by equipping sweeping and amorphous terms like “disparaging,” “vulgar,” and, most commonly, “offensive.” As a result, they have vested government officials with boundless discretion and prohibited vast categories of speech from appearing in a government forum. Some of these proscriptions—like those

327. See *Cohen*, 403 U.S. at 25 (noting “that one man’s vulgarity is another’s lyric”).

328. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2303 (Alito, J., concurring).

329. Fairman, *supra* note 326, at 1719–20.

330. See *Corbin*, *supra* note 28, at 651–52 (“[S]ome viewpoints cannot be expressed without strong, indecent, and perhaps even scatological or profane language.”).

331. See *supra* note 172 and accompanying text.

332. See *supra* note 174 and accompanying text.

333. Admittedly, it is not impossible. An obvious exception might be a configuration such as “LUVWEED” (or its alternative, “H8WEED”).

334. Even this rule would not foreclose as-applied challenges if states inconsistently enforce these restrictions to favor certain viewpoints at the expense of others. See *AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 12 (1st Cir. 1994) (concluding the Transportation Authority had engaged in impermissible viewpoint discrimination by accepting advertisements depicting sexually explicit images of women but rejecting condom advertisements, which referred to male anatomy).

barring obscene speech or references to illegal acts—can be squared with the Supreme Court’s most recent jurisprudence about viewpoint discrimination and First Amendment-protected speech. Others—like those proscribing offensive or disparaging speech—cannot.

The current scheme leaves state and lower federal courts to fend for themselves, forcing those courts to evaluate individual regulations on an *ad hoc* basis, with minimal guidance from higher courts. As a result, the constitutionality of state vanity-plate programs is mired in a perpetual state of uncertainty—both among individual vehicle-owners uncertain how they might satisfy the demands of state regulations, and among state governments uncertain how to maintain the constitutionality of a popular and profitable program.

The Supreme Court should adopt this Note’s general framework, by which state legislatures, administrative departments, and courts can more consistently evaluate the constitutionality of their vanity-plate regulations. That is, in an appropriate case or series of cases, the Court should clarify its existing *Walker* test for distinguishing private and government speech and hold that vanity plates are private speech. It should then look to the most commonly proscribed categories of vanity-plate configurations and evaluate each of them according to the viewpoint-discrimination standard outlined in *Tam*, *Iancu*, and *Cohen*. Within this framework, restrictions on disparaging, offensive, and profane speech should be deemed viewpoint-discriminatory and unconstitutional, whereas restrictions on references to sexual acts or illegality should be deemed viewpoint-neutral and facially constitutional. By so doing, the Court can deliver some much-needed certainty to this area of the law.