Florida A & M University Law Review

Volume 8
Number 1 *The Rule of Law in an Age of Constitutional Uncertainty*
Article 6

Fall 2012

Will Free Speech Get a License to Drive in Florida?: A Proposal for Distinguishing Free Speech from Government Speech in Florida Specialty Plate Cases

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WILL FREE SPEECH GET A LICENSE TO DRIVE IN FLORIDA?: A PROPOSAL FOR DISTINGUISHING FREE SPEECH FROM GOVERNMENT SPEECH IN FLORIDA SPECIALTY PLATE CASES

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Specialty license plates for automobiles, which publish individual and special interest Free Speech, present a quagmire for the courts when analyzed through the lens of the First Amendment's Free Speech Clause. While citizens and groups can obtain personalized license plates that publish both symbolic and written speech, state governments often exercise strict editorial control over their license plates. This regulatory scenario raises the dual questions of who is speaking – the government or the private party — and how much constitutional power the government has to engage in viewpoint restriction in regulating that speech in this traditional government forum. The United States Supreme Court has not heard any cases addressing this unique forum. State and federal courts have used several tests to decide this issue and have reached conflicting outcomes. This lack of a uniform analytical framework to guide courts in determining whether specialty license plates are private, government, or hybrid speech allows a State to engage in what is likely impermissible viewpoint restriction. Therefore, the courts must develop a clear test that determines who is speaking in this forum and how much editorial control the State has over the viewpoints that individuals and special interest groups wish to publish in this forum.

I. INTRODUCTION

In 1905, the State of Florida first required automobile owners to place license plates on their vehicles.[1] Taxpayers paid the state a two-dollar fee to register their vehicles and supplied the state with the vehicle's description, registration number, horsepower, and make. In return, the state provided the registrants with a paper registration containing the registrant's license plate number.[2] The registrants then made their own license plates out of paper, leather, wood, and other materials since there were no laws or regulations that dictated the material a registrant had to use to publish his vehicle's registration status.[3]

In 1918, Florida began issuing its own license plates.[4] In 1923, Florida added the state's outline to its tags and in 1949, Florida began adding slogans to its tags such as "The Sunshine State."[5] In 1987,

1. DIANE NELSON, CFC, PINELLAS COUNTY TAX COLLECTOR, http://www.taxcollect.com/Content.aspx?ContentID=422 (last visited Mar. 26, 2012).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

Florida authorized its first specialty license plate: The Challenger license plates. Over the decades, other specialty tags have followed, including so-called "vanity tags" that allow registrants to personalize their tags, whether a standard issue tag or a specialty tag, with words, numbers, and even organizational symbols.[6]

Since 1987, Florida has opened this traditionally government forum to specialty license plates for special interest groups, colleges and universities, sports teams, and other special interests. Florida currently has 123 specialty license plates.[7] These specialty license plates are revenue-generating symbols for the state. Exact figures are not available for the monies these tags generate since the amount can fluctuate from month-to-month according to a particular license plate's popularity and the overall amount of license plates sold in a given month, but these monies are split between the State and the license plates' sponsoring organizations.[8] Since 1986, Florida's specialty license plate program has raised over $500 million for the state. In 2011 alone, the organizations represented in Florida's 123 specialty plates raised over $31 million.[9]

Despite a registrant's ability to personalize her license plate or to purchase license plates to support various organizations, most people do not think much about the license plate on their vehicles until it comes time to pay the taxes due on them. Certainly, if one were to ask most vehicle owners about the implications of vehicle license plates and constitutionally protected speech, one might get more than a few puzzled looks. Yet specialty license plates encompass both written and symbolic speech.

When state governments allow individuals and organizations to publish their messages on license plate tags, those license plates may then become something other than a strict government forum. The question, though, is whether this a purely traditional government forum in which the State can lawfully exercise viewpoint discrimination, a public forum in which the State has but limited constitutional authority to engage in viewpoint discrimination, or a hybrid of the two.

The United States Supreme Court has not decided a case that addresses whether a State can engage in viewpoint restriction when it opens its license plates—a traditional government forum—to the pub-

6. *Id.*

7. *Id.*

8. *Id.*

9. Florida DHSMV, Florida Specialty License Plates, FLORIDA DEPARTMENT OF HIGHWAY SAFETY MOTOR VEHICLES, http://www.myfloridaspecialtyplate.com/ (last visited Apr. 29, 2012).

lic for free speech purposes. This emergent area of law has resulted in challenges from individuals and special interest groups such as the pro-life and pro-choice factions, and as discussed below, the Sons of the Confederate Veterans (SCV).

In 2008, the SCV applied for a Florida specialty tag—its proposed "Confederate Heritage" license plate.[10] The SCV satisfied the statutory application requirements set forth in Florida Statute section 320.08053 for the creation of its specialty license plate.[11] The proposed plate contained five flags and two coat buttons issued to Confederate troops from Florida, so the SCV's proposed license plate encompassed both written and symbolic speech.[12] The proposed license plate was submitted to the Florida Legislature as Florida House Bill 1159.[13]

The Florida Legislature denied the SCV its specialty license plate by not submitting the bill for legislative approval despite the SCV's satisfaction of the statutory criteria required for a vote.[14] Richard Glorioso, the then-Chairman of the House Infrastructure Committee, refused to bring the bill for a vote based on his concern that SCV's proposed license plate was "controversial."[15] One Florida Senator, Arthenia Joyner (D- Tampa), stated,

> The Florida Legislature is too sophisticated to permit such a specialty tag. I don't think they'd fall into the trap of passing legislation that raises the spectre (sic) of racism. It's a very sensitive issue in this state and this country. It's very polarizing and we don't need that today.[16]

This paper examines Florida's decision to deny the SCV its specialty license plate against the background of the First Amendment's Free Speech Clause and the court's decision in *Sons of Confederate Soldiers Veterans v. Atwater* (the "SCV court").[17] The SCV challenged the Florida Legislature's failure to enact Florida House Bill 1159 on several grounds; however, this paper will focus exclusively on the plaintiff's allegations of Free Speech Clause violations.[18]

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10. Pl. Br. Summ. J. Sons of Confederate Soldiers Veterans v. Atwater, 2011 WL 1233091, at *488 (M.D. Fla. 2009).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. HARDCORE CONFEDERATES, http://hardcoreconfederates.com/Specialty_plate.html (last visited Feb. 28, 2012).

17. Sons of Confederate Soldiers Veterans v. Atwater, 2011 WL 1233091 (M.D. Fla. Mar. 30, 2011).

18. *Id.*

Part I will discuss free speech case law regarding when a State can constitutionally restrict speech. Part II will discuss the SCV's and the State of Florida's positions and arguments in the SCV controversy. Part III analyzes the *SCV* court's decision and how it reached its decision using the two-pronged test in *Pleasant Grove City, Utah v. Summum* for determining whether monuments in public parks are private or governmental speech.[19] Part IV examines the four-prong test that other courts have used in specialty license plate cases and analyzes the SCV case under those prongs. This section proposes that the SCV court should have used a modification of the four-pronged test the court used in *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'n of Va. Dep't of Motor Vehicles* because the *Griffin* court's test is more relevant to specialty license plate cases.[20] Part V concludes by arguing that Florida must allow the SCV to have their own specialty license plate because specialty license tags are a hybrid of private speech and government speech. Therefore, whenever the State unilaterally and with unfettered discretion assigns its chosen meaning to free speech and engages in viewpoint discrimination in the realm of specialty license tags, it violates the First Amendment of the United States Constitution.[21]

II. Free Speech and its Limitations

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech,* or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[22] The SCV controversy concerns Florida's perception of the SCV organization superimposed on the SCV's First Amendment Free speech rights. The SCV's continuing legal controversies share a common thread; in every state in which they have litigated this issue, the case centers on the State's repression of unpopular ideas coupled with a lack of judicial guidance that states and the courts can use to decide the issue.

The Supreme Court has consistently supported states' ability to suppress unpopular and potentially dangerous ideas. For example, in *Schenck v. United States*, the Court ruled that the State could regulate

19. Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009).

20. Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'n of Va. Dep't of Motor Vehicles, 288 F.3d 610 (4th Cir. 2002).

21. U.S. Const. amend. I, cl. 3.

22. *Id.* (emphasis added).

speech when it presents a clear and present danger.[23] As Justice Holmes famously stated, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force."[24] Similarly, in *Abrams v. United States*, the Court concluded that the government could censor Free Speech when the defendants encouraged unlawful action against the United States during wartime. The defendants were convicted of sedition for their anti-government viewpoints because "the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war as is charged in the fourth count."[25] Justice Holmes stated in his dissent that the First Amendment left no room for the government suppression of dangerous ideas, except where a threat was imminent, and that even unpopular ideas should be heard.[26]

Likewise, in *Chaplinsky v. State of N.H.*, the Court ruled that the First Amendment does not protect lewd, obscene, or libelous speech, or "fighting words." The Court reasoned, "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[27] The question, of course, is who should decide which ideas have such limited social value, such that the state may censor them.

With freedom of speech comes a corresponding responsibility to exercise that freedom appropriately. If a person utters or publishes words that are dangerous in themselves, then the State can discriminate against those words. However, as Justice Brandeis famously noted in his concurrence in *Whitney v. California*,

> The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.[28]

23. Schenck v. United States, 249 U.S. 47, 249 (1919).
24. 249 U.S. 47 at 52 (citing Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 439).
25. Abrams v. United States, 250 U.S. 616, 622 (1919).
26. *Id.* at 630.
27. Chaplinsky v. State of N.H., 315 U.S. 568, 572 (1942).
28. Whitney v. California, 274 U.S. 357, 378 (1927).

The State's powers to proscribe speech, however, are limited, and mere fears of unpopular opinions cannot justify viewpoint restriction even if those opinions might result in societal controversy or the possibility of violence.[29] To justify a viewpoint restriction, there must be more than a tenuous nexus between the ideas the speaker is expressing and the harm that the State fears might result.[30] The Court has recognized this concept in the evolution of its opinions from *Schenck* to *Whitney*. Fear of controversy and public animus toward certain topics and subjects does not justify government censorship of private speech.[31] For example, *Tinker v. Des Moines Independent Community School District*, where a school imposed sanctions on the plaintiffs for wearing black armbands protesting the Vietnam War. The Court ruled that the plaintiffs' armbands were symbolic Free Speech and could only be reasonably regulated.[32] The public school feared that the black armbands and the students' symbolic opposition to the Vietnam War would incite violence; therefore, the school suspended any student it caught wearing a black armband if the student refused to remove the armband. The student could not return to school until he did so without the armband.[33] The Court stated, "In order for the State, in the person of school officials, to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.[34]

An example of how the Court has treated the suppression of unpopular ideas expressed through symbolic speech is the *Texas v. Johnson* case. In *Johnson*, the Court held that the State could not justify prosecuting Johnson when he burned an American flag. This holding was based on the State's stated interests in preventing breaches of peace or to preserve the flag as a symbol of nationhood and national unity.[35] The Court stated,

> Expression may not be prohibited on the basis that *an audience that takes serious offense to the expression may disturb the peace*, since the government cannot assume that every expression of a provocative idea will incite a riot but must look to the actual circumstances surrounding the expression.[36]

29. *Id.*
30. *Id.*
31. *Id.*
32. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).
33. *Id.*
34. *Id.*
35. Texas v. Johnson, 491 U.S. 397 (1989).
36. *Id.* at 398 (emphasis added).

The Johnson Court's decision mandates that the First Amendment's Free Speech Clause protects even the most unpopular of ideas, even those that may arouse strong emotions in those who observe the published speech - be it actual or symbolic Free Speech - when the government cannot prove that speech is not directed toward a specific individual or individuals.[37] In fact, the Court stated Johnson's actions did not rise to the level of "fighting words" in his speech and could not be curtailed under that doctrine.[38] The *Johnson* case further illustrates the Court's continued reluctance to allow states to proscribe unpopular and controversial private speech even if there is a danger it could elicit strong negative and emotions and even civil unrest.

In *Cohen v. California*, the Court stated that anyone offended by Cohen's jacket, which stated, "Fuck the Draft," had a duty to avert their eyes rather than take personal offense at an impersonal message.[39] The Court reached the same result in *Erznoznik v. City of Jacksonville* when it struck down a Jacksonville, Florida ordinance that prohibited nudity from being shown on drive-in movie screens when that nudity could be seen from the roadways — no matter how innocent or inadvertent that nudity might be.[40] Even when spoken words are combined with symbolic Free Speech to express abhorrent ideas in the presence of others, it does not allow the State to proscribe speech.[41] In *Street*, the defendant burned a flag and stated to a police officer and a gathering crowd, "We don't need no damned flag."[42]

In *Brandenburg v. Ohio*, the Court explicitly stated that even advocating violence is not enough to proscribe speech. There must be fear of imminent lawless action coupled with speech[43] – meaning that abstract language and symbolism alone will not suffice to allow a state to prohibit private speech. The danger must be concrete and brought about by the speaker.[44] It is highly unlikely the Court would accept arguments that a license tag sponsored by a disfavored group would present such prohibited speech.

Groups that the vast majority of society regards as being abhorrent cannot be prevented from exercising their Free Speech rights. For example, in *Forsyth County, Ga v. The Nationalist Movement*, the

37. *Id.*
38. *Id.* (citing United States v. O'Brien, 391 U.S. 367 (1968)).
39. Cohen v. California, 403 U.S. 15 (1971).
40. Erznoznik v City of Jacksonville, 422 U.S. 205 (1975).
41. Street v. New York, 394 U.S. 576 (1969).
42. *Id.* at 579.
43. Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).
44. *Id.*

Court ruled that charging variable rates for parade permits amounted to an unreasonable restriction of Free Speech, since the variable rates showed the State was exercising impermissible viewpoint restriction and favoring some groups' messages over the messages of disfavored groups.[45]

The SCV's continuing legal battles across the nation to obtain specialty license plates for its organization pit the SCV's controversial reputation against its desire to exercise its Free Speech rights in the forum of State-issued specialty license plates. As Judge Kiser aptly stated in *Sons of Confederate Veterans, Inc. v. Holcomb*, "The controversy regarding the Confederate flag has apparently invaded its newest terrain, automobile license plate designs," when referring to the SCV's litigation to get a specialty license plate with the SCV's Confederate flag symbol emblazoned on it.[46] Cases involving the First Amendment's Free Speech Clause involve situations in which the State believes that certain speech is so controversial that it is likely—in the State's opinion—to cause societal disorder or offend the public's sensibilities.

The Court has held the First Amendment protects even hate speech designed to embroil the public. Speech cannot be restricted simply because it is upsetting or arouses contempt, "because if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[47]

Even if the State owns the forum, the State cannot use unfettered discretion under the guise of protecting the public from controversy to curtail Free Speech. There must be a limiting process to guide the State in its decisions.[48] Government proscription of speech must be viewpoint neutral.[49]

45. Forsyth County, Ga. v. The Nationalist Movement, 505 U.S. 123 (1992).

46. Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941 (W.D. Va. 2001).

47. Snyder v. Phelps, 562 U.S. 1207 (2011) (citing Johnson, 491 U.S. at 414).

48. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

49. Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. (2010).

III. THE PARTIES' POSITIONS IN THE *SCV* CASE

A. The SCV's Position

The SCV's purpose is to celebrate ancestral pride in its members' collective military and familial history. Its website states,

> [T]he citizen-soldiers who fought for the Confederacy personified the best qualities of America. The preservation of liberty and freedom was the motivating factor in the South's decision to fight the Second American Revolution. The tenacity with which Confederate soldiers fought underscored their belief in the rights guaranteed by the Constitution. These attributes are the underpinning of our democratic society and represent the foundation on which this nation was built. Today, the Sons of Confederate Veterans is preserving the history and legacy of these heroes, so future generations can understand the motives that animated the Southern Cause.[50]

The SCV maintains that Florida was engaging in impermissible and "unfettered" viewpoint discrimination due to what Florida regarded as the SCV's "controversial" proposed license plate, thereby violating SCV's Free Speech rights in a public forum.[51]

The SCV contended that the Eleventh Circuit has already recognized specialty license plates as private speech that benefited the sponsoring organization. Therefore, the State's right to proscribe private speech and engage in viewpoint discrimination is highly restricted and limited to matters of great state importance. In *Women's Emerg. Network v. Bush*, the court held that Florida's "Choose Life" specialty license plate was created for the benefit of the sponsoring "Pro Life" organization, not Florida, and therefore, was not government speech.[52] Additionally, SCV argued there has been only one specialty license plate case that a court has held to be government speech. In that case, the State of Tennessee initiated legislation to create a "Choose Life" specialty tag and declined to sponsor an alternative viewpoint "Pro Choice" tag.[53]

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50. Sons Of Confederate Veterans, http://www.scv.org/ (last visited Feb. 4, 2012).

51. *Supra* note 9 (citing City of Lakewood v. Plain Dealer Publ'g, 486 U.S. 750, 764 (1988).

52. Women's Emerg. Network v. Bush, 323 F.3d 937 (11th Cir. 2003).

53. ACLU of Tenn. v. Bredeson, 441 F.3d 370 (6th Cir. 2005).

B. Florida's Position

Florida argued it is under no obligation and cannot be compelled to sponsor all speech in its forum of specialty license plates.[54] Furthermore, Florida contended that it "speaks to the public through its license plates" and exercises extreme editorial control over the messages it publishes with those license plates.[55] Therefore, no citizen would be misled into believing that specialty license plates are anything other than government speech in a government forum, and persons who observe specialty plates would reasonably interpret them as speaking for the State of Florida.[56] Florida further argued that not only does it have no duty to sponsor any viewpoint other than its own, but in terms of practicality, since the purpose of a license plate is to identify a vehicle, Florida cannot sponsor all viewpoints due to the inherent limitations of the alphanumeric system of identification.[57] If the court imposed on Florida a duty to sponsor all viewpoints, Florida argued that the primary purpose of its tags — identification of motor vehicles — would fail.[58] Florida also argued that it is common knowledge that the State issues the license plates on the back of vehicles, and by extension, no one could reasonably believe that regular or specialty license plates are anything other than State speech.[59]

Florida relied on two cases to support its position. In the first, *Johanns v. Livestock Mktg. Ass'n*, the Court found that although a cattle association paid monies to the government, and the government used those monies to promote a specific message, that message was still government speech — despite the mixed funding — and the government was under no constitutional compulsion to sponsor an alternative viewpoint.[60]

In the second case, *Pleasant Grove City, Utah v. Summum*, the Court ruled that although private organizations had donated religious monuments in a public park, States have traditionally spoken to the public through such forums.[61] Since the City exercised editorial control over the messages it sponsored, the resultant speech was

54. Def's. Br. Summ. 2010 WL 2750248. NO 43.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. Def's. Br. Summ. 2010 WL 2750248. NO 43.
60. Johanns v. Livestock Mktg. Ass'n, Annotiation, 544 U.S. 550, 565-66 (2005).
61. *Supra* note 19, at 481.

government, not private, speech, despite the fact that private funds were used to place those monuments.[62]

IV. THE *SCV* COURT'S RULING

This part of the paper addresses the SCV court's decision and analyze the factors that shaped its decision. The SCV court used a two-part analysis that first examined how easily the public could identify the government as the speaker, and then examined how much editorial control the government exercises over the messages in the forum in question.[63]

A. The Summum Analysis

The SCV court stated that the constitutionality of Florida's specialty license statutes turned on whether messages contained in the specialty license plates constitute private speech, to which First Amendment protections apply, or government speech, "which is exempt from First Amendment scrutiny."[64] The SCV court agreed with Florida and held the *Summum* decision and its two-prong test was outcome-determinative.

The *Summum* case involved a religious organization that desired to place a religious monument in the Pleasant Grove City's public park. The Court used a two-prong test to determine if monuments in public parks are private or government speech.

In *Summum*, the respondents challenged the City's refusal to place a permanent monument donated by Summum, a religious organization, in a public park. The 2.5–acre park already contained fifteen such permanent displays, at least eleven of which were donated by private groups or individuals. The City rejected the respondents' monument because it did not comport with the City's policy of only accepting monuments that either "(1) directly relate[d] to the history of [the city], or (2) were donated by groups with longstanding ties to the community."[65]

The Court stated that in a public forum,

> government entities are strictly limited in their ability to regulate private speech in . . . 'traditional public fora.' Reasonable time,

62. *Id.*

63. Sons of Confederate Soldiers Veterans v. Atwater, 2011 WL 1233091 (M.D. Fla. Mar. 30, 2011).

64. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005).

65. *Supra* note 19, at 465.

> place, and manner restrictions are allowed, but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest.[66]

Restrictions based on viewpoint are strictly prohibited.[67]

In addition to traditional public fora, the Supreme Court has also recognized that a "government entity may create 'a designated public forum' if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose."[68] Government speech restrictions in a designated public forum are "subject to the same strict scrutiny as restrictions in a traditional public forum."[69]

The question in *Summum* mirrors that in the SCV case. By allowing the public to customize and publish messages in a traditional State forum (in the SCV's case, specialty license tags), did the State intentionally open that forum and create a designated public forum in which the State has less ability to engage in viewpoint discrimination?

The *Summum* court noted that "[p]ermanent monuments displayed on public property typically represent government speech," and noted two particularly relevant characteristics of permanent monuments: How easily is the government identified as the speaker, and how much editorial control does the government exercise over the message?[70] The Court used this two-prong test to determine whether the monuments in the City's park constituted private or government speech.[71]

B. The First Summum *Prong: How Easily is the Government Identified as the Speaker?*

The first *Summum* prong examines whether the government is clearly identifiable as the speaker. The Court held that public parks are traditional government forums and the government traditionally speaks to the public through monuments even though those monuments are often donated by private parties.[72] This argument tracks

66. *Id.* at 469 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).

67. *Id.*

68. *Id.* (citing *Cornelius*, 473 U.S. at 802).

69. *Id.*

70. *Id.* at 470.

71. *Id.*

72. *Supra* note 19, at 461.

closely with Florida's position that license tags are a traditional government forum.

In *Wooley v. Maynard*, the Court ruled that New Hampshire's statute forbidding drivers from obscuring its "Live Free or Die" motto on its vehicle license tags was unconstitutional forced speech that turned personal automobiles into mobile bulletin boards advertising the State's message.[73] Maynard and his wife were Jehovah Witnesses who disagreed with the State's motto on their vehicle's license tag and obscured it.[74] New Hampshire asserted that Maynard's covering of its motto on its license plates interfered the state's ability to identify vehicles, yet the Court disagreed and stated the motto was compelled State speech that interfered with Maynard's First Amendment rights, and that less-intrusive methods were available to accomplish the State's purpose.[75] The State "may not constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."[76]

By extension, the *Maynard* court's holding states that standard license tag mottos are clearly government speech and the public cannot be compelled to publish government speech with which it disagrees. Florida's argument would appear to be much stronger under *Summum's* first prong where its standard tags are concerned since registrants take what the State gives them, and the registrants have no input into the messages published upon those tags; however, Florida's argument weakens when vanity and specialty tags are implicated.

With vanity tags, the registrant speaks through alphanumeric symbols, and Florida is not the sole speaker in the plethora of personal speech published in vanity (or personalized) tags. Judicial notice can be taken of how often those tags consist of registrants' names or even cryptic messages with idiosyncratic meanings known only to the registrants. Florida's argument further weakens when it comes to specialty tags since Florida is allowing private speech of special interest groups into its forum, and Florida cannot reasonably argue it is the sole speaker through its NASCAR specialty tag, for example.[77]

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73. Wooley v. Maynard, 430 U.S. 705, 706 (1977).

74. *Id.*

75. *Id.*

76. *Id.*

77. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, NASCAR, http://www.flhsmv.gov/dmv/specialtytags/miscellaneous/NASCAR.html (last visited Apr. 5, 2012).

When vanity and specialty tags are analyzed as part of Florida's statutory licensing scheme, Florida's argument that the public would identify the State as the speaker is greatly weakened as the personalization of its license plates increases.[78] The SCV court noted on this matter, "With more than 110 specialty plates available to Florida vehicle owners, it is unlikely that the State of Florida would be identified as the speaker communicating each of the messages contained in the specialty plates."[79] The SCV court ruled free speech was implicated under this prong of the *Summum* analysis, and that a reasonable person would not believe Florida was speaking through each of its specialty tags.[80] The Court stated, "when specialty license plates are placed on private vehicles, there is little chance that observers will appreciate the identity of the speaker as the government.[81] The SCV court reasoned that the more specialty license plate viewpoints a State allows into its forum, the less likely it would be found to be government speech.

C. *The Second* Summum *Prong: How Much Editorial Control Does The Government Exercise?*

The second prong of the *Summum* test concerns the degree of editorial control the State exercises over the message. In *Summum*, the Court found the City exercised control over the messages its park expressed by selecting which monuments it published within its park, and by doing so, expressed its own viewpoints. States can say what they want and express the viewpoints they desire even though public funds are used to facilitate the expression of those viewpoints.[82] The State is always entitled to make "value judgments" in messages it supports so long as its conduct comports with the Constitution.[83]

The Court held in *Summum* that the placement of a permanent monument in a public park is government speech and is therefore not subject to scrutiny under the Free Speech Clause. The Court noted that cities take extreme care and exercise great selectivity when placing monuments in public parks because those parks represent the image those cities want to present to their residents, visitors, and the

78. When the author was a Florida police officer and specialty license plates emerged, the State issued booklets identifying the State's license plates because law enforcement officers were having difficulty determining if a vehicle's license plate was truly State-issued.

79. Sons of Confederate Veterans Soldiers, 2011 WL 1233091, at 6 (M.D. Fla.).

80. *Id.* (emphasis in original).

81. *Id.*

82. *Johanns*, 544 U.S. at 562.

83. Maher v. Roe, 432 U.S. 464, 474 (1977).

rest of the world. This is the case even when private parties donate those monuments.[84]

Florida's position is much stronger under the second *Summum* prong. Florida regulates every aspect of design, editorial content, production, and distribution of its license plates. Florida license plates are owned by the State. Moreover, Florida exercises control over their issuance and distribution. Florida can also demand the return of any plates it issues but later finds obscene and/or offensive.[85] Florida regulates every aspect of its license plates, from the tags' size, shape, and even the amount of their nighttime reflectivity.[86]

The SCV court also found this second prong fatal to Florida's case: Florida exercised extensive control over the speech it was allowing into its specialty license plate forum, yet because it did not have any guidelines to control that discretion, the SCV court concluded that Florida had exercised unfettered discretion and viewpoint discrimination over private speech.

The SCV court declined to determine what type of forum specialty license plates present, noting, "Because section 320.08053 fails to prevent viewpoint discrimination, as discussed below, the statute is unconstitutional in any public forum."[87] The SCV court, by implication, found the forum to be either a public or limited public forum — a purely government forum would not have raised viewpoint discrimination issues. The SCV court's unwillingness to determine what type of forum specialty license plates represent is typical of such cases, and the *Summum* two-prong test does not sufficiently aid courts in making that decision.[88]

D. Where the Summum *Analysis Fails in the* SCV *Decision*

Despite its favorable finding for the SCV organization, the *SCV* court did not appear to take into consideration Florida's vehicle license

84. *Pleasant Grove City, Utah,* 555 U.S. at 461.

85. FLA. STAT. § 320.0805 (2009).

86. Florida requires by statute that its license plates have a ten-year lifespan due to decreased reflectivity, and customers must get new tags ten years after their initial issuance, demonstrating who owns the license plates and the extreme amount of control the State exercises over its license plates in general. *Sons of Confederate Soldiers Veterans*, 2011 WL 1233091 (citing §320.06, FLA. STAT.)

87. *Sons of Confederate Soldiers Veterans*, 2011 WL 1233091, at 7.

88. Jack Guggenheim & Jed Silversmith, *Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment*, 54 U. MIAMI L. REV. 563, 564 (2000).

plate scheme as a whole and account for how Florida has opened its license plate forum to the public. Its analysis would have benefited from reviewing Florida's statutory license plate scheme rather than focusing solely on specialty license plates.

For example, registrants can check the Florida Department of Highway Safety and Motor Vehicles ("DHSMV") website to determine if a particular alphanumeric combination is in use by another registrant. If not, then the registrant can print an application for the registrant's desired message, take it to a local DHSMV office, and purchase a tag with that message.[89] This registration scheme is analogous to a private citizen giving a speech in a section of a public park or a musical group performing in a public park. The State may charge non-discriminatory permit fees[90] — similar to vehicle licensing fees – and it can restrict free speech to a certain degree to avoid intimidation and the threat of imminent violence. In *Virginia v. Black*, the Court held that symbols — such as a burning cross — alone could not be prima facie evidence of an illicit intent, and there must be a true intent to cause imminent harm.[91] The State, then, must show a nexus between the prohibited symbol or speech and its fears of imminent violence. It is highly unlikely that Florida could show such a nexus between a specialty license plate for a disfavored group and its fears of controversy.

While the *Summum* two-prong test is easy to apply to monuments in public parks, the specialty license plate forum is arguably more complex since the messages are often very individual, diversified, and contain mixed speech far beyond traditional government viewpoints, Florida admitted in its trial brief that there are "obvious differences" between public monuments and its vehicle license plates. Florida, though, emphasized that government speaks to the public through license vehicle plates and detailed the statutory process with which special interest groups must comply in order to obtain legislative approval of their proposed specialty license plates.[92]

The courts in previous specialty license plate cases, beginning with *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles* ("*Griffin*"), used variations of a non-exhaustive four-prong test to determine whether the messages published on specialty

89. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, https://services.flhsmv.gov/MVCheckPersonalPlate/ (last visited Apr. 6, 2012).

90. *See generally* Forsyth Cnty., Ga. v. Nationalist Movement, 505 U.S. 123 (1992).

91. Virginia v. Black, 538 U.S. 343, 365 (2003).

92. Sons of Confederate Veterans, Fla. Div., Inc. v. Atwater, 2011 WL 123091 (M.D. Fla. 2011).

tags constituted government or private speech. Those prongs are (1) the central purpose of the program in which the speech in question occurs; (2) the degree of editorial control exercised by the government or private entities over the content of the speech; (3) the identity of the literal speaker; and (4) whether the government or the private entity bears the ultimate responsibility for the content of the speech.[93]

V. THE *GRIFFIN* COURT'S FOUR PRONGED TEST

The next section will compare the *SCV* decision to the *Griffin* case and argue why a hybrid *Griffin* test is superior to the *Summum* two-prong test for specialty license plate cases. The *Griffin* court analyzed the central purpose of specialty license tags, the amount of editorial control Virginia exercised over those tags, who the "literal speaker" was, and who had the "ultimate responsibility" for the speech. However, like the *SCV* court, the *Griffin* court did not include a forum analysis prong, which limit's a court's ability to effectively determine whether specialty license tags represent private or government speech.

A. The Central Purpose of Specialty License Tags

The *Griffin* case concerned the SCV's application to the State of Virginia for a specialty license plate. Virginia allowed the SCV to have a specialty license plate but did not allow the SCV to display a Confederate flag on the SCV's Virginia specialty license plate.[94]

Virginia argued that the central purpose of its specialty license plate program was government speech honoring the groups for whom Virginia authorizes special plates. The SCV argued that the central purpose of Virginia's specialty license plate program was to "allow individuals to display their association with and express their pride in the messages or goals of the group for which a special plate is authorized."[95]

The *Griffin* court disagreed with both Virginia and the SCV regarding the purpose of the program. It ruled that Virginia's specialty license plate program was designed to generate revenue, and the court noted that in the year 2000, the net revenue from special plates totaled

93. Griffin v. Comm'n of Va. Dep't of Motor Vehicles, 288 F.3d 610 (4th Cir. 2002), (citing Wells v. City and Cnty. of Denver, 257 F.3d 1132, 1141 (10th Cir.), *cert. denied*, 534 U.S. 997 (2001)).

94. *Id.* at 613.

95. *Id.* at 620.

nearly $4.5 million.[96] Additionally, the court noted since Virginia required registrants to prove they were members of certain groups before they could purchase some specialty license plates, Virginia was not honoring those groups. Rather, members of those groups who had specialty license plates were publishing individual free speech showing affiliation with those groups.[97]

Florida engages in a similar revenue-sharing scheme under §320.08053, Fla. Stat., that requires applicants for specialty license plates to pay a fee "not more than $60,000"[98] and submit a marketing plan estimating the number of specialty license plates the special interest group expects to sell. According to Carol Harwood, director of marketing of specialty license plates for the Harbor Branch Oceanographic Institute Foundation based in Fort Pierce, Florida's specialty license plates generated $33.5 million in revenue for special interest organizations in 2009 alone.[99]

The central purpose of license plates is to identify vehicles and their owners.[100]An analysis under the first *Griffin* prong shows Florida's central purpose in selling its specialty license plates is to generate revenue, not engage in government speech. Florida cannot reasonably argue that allowing more viewpoints into its specialty license plate forum would destroy the identifying properties of license plates, because the central purpose of specialty plates is to generate revenue.

Additionally, the method of identifying vehicles and their owners uses a combination of alphanumeric characters. The design of a specialty license plate has no impact on the identification of a vehicle's year, make, model, color or owner. The only apparent limitation is the finite number of alphanumeric combinations that will fit on any given plate design.

In *Summum*, the Court reasoned that opening the City's park to all viewpoints would destroy its essential purpose since the 2.5-acre park would be overrun with monuments.[101] The "central purpose" observation was *dicta* and not part of the two-part *Summum* test — unlike in *Griffin*. In the *SCV* case, though, analysis of the specialty plate program's essential purpose would have aided the court in deter-

96. *Id.* at 619.

97. *Id.*

98. FLA. STAT. §320.08053(1)(b).

99. Ed Killer, *Specialty license plates generate needed revenue*, TCPALM http://www.tcpalm.com/news/2009/sep/04/specialty-license-plates-generate-needed-revenue/ (last visited May 6, 2012).

100. *Griffin, supra* note 19, at 619.

101. *Pleasant City Grove, Utah, supra* note 77, at 479-480.

mining the type of forum at issue. As *Griffin* noted, payment for the right to speak in a forum tends to show that individuals, rather than the State, are speaking through specialty license plates.[102]Furthermore, the court found it curious that if the government was speaking through specialty license plates it would charge special interest groups for publishing government speech.[103]

B. Editorial Control

Griffin's editorial control prong mirrors the *Summum* editorial control prong used by the *SCV* court in deciding its case; however, the breadth of the analysis was different. While the *SCV* court focused on the Florida Legislature's unfettered discretion in approving or denying specialty license plate applications,[104] the *Griffin* court analyzed Virginia's entire specialty license plate process.[105]

In *Griffin*, Virginia claimed that it exercised strict editorial control over its specialty license plates.[106] However, the court determined that once an applicant for a specialty license plate submitted its design, Virginia exercised no editorial control over the proposed design beyond acceptance or rejection.[107] In fact, only one case was found in which Virginia declined to issue a specific design, and the applicants in that case did not challenge Virginia's decision.[108] Moreover, the court noted the following:

> [T]he 'Special Plate Design Criteria' sent to plate sponsors contains detailed instructions for ensuring that the design submitted by the sponsor will conform to size and space requirements, but it does not contain guidelines regarding the substantive content of the plates or any indication of reasons, other than failure to comply with size and space restrictions, that a special plate design might be rejected.[109]

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102. *Griffin, supra* note 73, at 620.

103. *Id.*

104. 2011 WL 1233091 at 8. Sons of Confederate Soldiers Veterans, Inc. v. Atwater, No. 6:09-cv-134-Orl-28KRS, 2011 WL 1233091, at *8 (M.D. Fla. Mar. 30, 2011).

105. *Id.* at 614.

106. *Id.* at 621 (arguing that its statutory discretion to approve or reject proposed designs undersection 46.2-725(B)(3), Virginia Statutes, demonstrated that the State "maintained control over the content of the specialty plates at all times."). *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

Thus, *Griffin* concluded that Virginia failed to exercise editorial control since the private applicants were the ones who made the substantive decisions concerning the contents of the specialty license plates.[110]

Conversely, the court in *American Civil Liberties Union of Tennessee v. Bredesen* ("*Bredesen*") determined that the State of Tennessee exercised ultimate editorial control over its "Choose Life" specialty license plate.[111] *Bredesen* reasoned that Tennessee had the right to veto all aspects of its design, exercised control over "every word" of their specialty license plates, and essentially "crafted the message".[112] Thus, contrary to *Griffin*, Tennessee's editorial control over the contents of its specialty license plates constituted government rather than private speech.[113]

Application of *Griffin's* "editorial control" prong to the SCV case reveals that Florida's control claim would not prevail. Similar to the Virginia statute at issue in Griffin, section 320.08053(1)(a), Florida Statutes,[114] details the application process for submitting a proposed specialty license plate as well as the measurement requirements, but leaves the design and wording of the license plate to the applicant.[115] Contrary to *Bresdesen*, Florida does not set the overall message communicated to the public. Moreover, while Florida exercises extensive editorial control over its standard license plates, once an applicant proposes to customize their prestige or specialty license plate Florida, like Virginia, merely approves or disapproves the proposed plate designs.[116] Therefore, because the *SCV* case is far more analogous to

110. *Id. See also* Wells v. Denver, 257 F.3d 1132 (10th Cir. 2001) (finding that the exercise of editorial control by private parties over government messages is more indicative of private speech than government speech).

111. 441 F.3d 370 (6th Cir. 2006).

112. *Id.* at 376.

113. *Id.* The *Bredesen* court declined to use the *Griffin* test and instead relied upon *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005). The *Bredesen* court stated that mixing of private and public funds to promote a government message does not affect the fact that a message is government speech. However, it is important to note that *Bredesen* was decided pre-*Summum*, and it is not possible to determine if the court would have reached the same conclusion post-*Summum*.

114. FLA. STAT. § 320.08053(1)(a) (2009), (requiring an organization seeking authorization to establish a new license plate to submit "a request for the particular specialty license plate being sought, describing the proposed specialty license plate in specific terms, including a sample plate that conforms to the specifications set by the department and this chapter, and that is in substantially final form.").

115. *See id. See also* FLORIDA HIGHWAY SAFETY MOTOR VEHICLES BASIC SPECIFICATIONS FOR SPECIALTY LICENSE PLATES, http://www3.flhsmv.gov/DMV/Proc/RS/RS-20.pdf (last visited Apr. 7, 2013).

116. Sons of Confederate Soldiers Veterans, Inc. v. Atwater, 2011 WL 1233091, at 7 (M.D. Fla.)(March 30, 2011).

Griffin than *Bredesen*, the *Griffin* court would find that speaker is the private registrant rather than Florida who is exercising editorial control over the specialty license plates.

C. *The Literal Speaker and Ultimate Responsibility for Speech Prongs*

The *Griffin* court next analyzed who the "literal speaker" was and who bore the "ultimate responsibility" for the speech.[117] The court posited that discerning the literal speaker of license plates, and in particular specialty license plates, is a difficult task.[118]One reason for this difficulty, the court stated, is that in license plate cases the license plate itself is the literal speaker.[119]

In determining whether the government is the literal speaker in a specialty license place cases, the *Griffin* court noted that "ownership of the means of communication [is] a valid consideration."[120] In *Wells v. Denver*, for example, in holding that a government sign constituted government speech, the court found it significant that the State of Denver owned every part of the holiday display.[121] Although private corporate sponsors had contributed money towards the display, the court ruled it was the government speaking through the government sign.[122] Conversely, unlike the holiday display in *Wells*, a license plate is attached to private property — a motor vehicle — and *Griffin* noted that the Supreme Court has ruled that forcing the public to broadcast a State's messages via vehicle license plates is a violation of an individual's free speech rights.[123] The *Griffin* court reasoned that although there is no disputing the State is the owner of its vehicle license plates, when a person attaches a license plate to his vehicle, this triggers free speech concerns.[124] Since the license plate is the literal speaker, the registrant can reject or adopt that speech as his own, but cannot constitutionally be forced to publish it.[125]

117. Sons of Confederate Veterans, Inc. *ex rel.* Griffin v. Comm'n of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 621 (4th Cir. 2002).

118. *Id.*

119. *Id.*

120. *Id.* (citing Wells v. Denver, 257 F.3d 1132(10th Cir. 2001).

121. 257 F.3d 1132, 1150 (10th Cir. 2001).

122. *Griffin*, at 621.

123. *Id.* at 621 (citing Wooley v. Maynard, 430 U.S. 705, 717 (1977) (holding that New Hampshire violated the First Amendment rights of objecting drivers when it required them to display the state motto "Live Free or Die" on their license plates).

124. *Id.*

125. *Id.*

Conversely, *Griffin's* line of reasoning is conflicting in cases concerning vanity plates with personalized messages created by the registrant. For instance, in *Perry v. McDonald*,[126] after Perry ordered a personalized license plate that read "SHTHPNS," the State recalled it, citing its offensive nature.[127] The court considered whether a restriction on vanity plates that might be "offensive or confusing to the general public" was a "government regulation concerning private individuals' speech on government-owned property."[128] The court ruled that the State could regulate vanity license plates since they are not free speech, free speech, or government fora. Further, it reasoned that the State had an interest in avoiding "scatological" and offensive references, and there were no indications the State had opened its license plate forum to the public.[129] Interestingly, the *Perry* court did not mention *Wooley* anywhere in its opinion.[130]

A variety of factors explains the distinction between *Griffin's* protection of specialty license plates and *Perry's* failure to protect vanity plates. With vanity plates, nominal monies are spent by a registrant compared to the higher amount of money specialty license plates cost to procure, the amounts of revenue they generate, and the costs related to their customization. Thus, the sheer amount of money an applicant expends and receives for publishing speech on a specialty license plate and the amount of editorial control an applicant exercises over the design of a specialty license plate is far more indicative of private free speech.

In *Sons of Confederate Veterans, Inc. v. Holcomb*,[131] the court examined these factors and held that while the State does speak through vehicle plates, it does so only about official government matters.[132] *Holcomb* was dismissive of attempts to separate speech in vanity plates from that of specialty plates, and stated, "It makes no difference to the analysis whether this expression is conveyed via the letters and numbers of CommuniPlates or the logos and emblems of specialty plates."[133] Other courts have reached similar conclusions.[134]

126. Paula v. Perry, 280 F.3d 159, 166 (2d Cir. 2001).

127. *Id.*

128. *Id.*

129. *Id.* at 170.

130. *But see* Pruitt v. Wilder, 840 F. Supp. 414, 418 (E.D. Vir. 1994) (holding State's prohibition against the publishing of deities' names on State-issued personalized license plates constitutes impermissible viewpoint restriction of motorists' free speech rights).

131. 129 F. Supp. 2d 941 (W.D. Va. 2001).

132. *Id.* at 943.

133. *Id.* at 945 (discussing *Pruitt*, 840 F. Supp. 414).

If the "literal speaker" is the license plate, and the State owns the license plate, then one must look to the messages the license plate is publishing. This analysis indicates the State name, seal, motto and other standard government identifiers are State speech, but when individuals and private organizations speak through vanity and specialty plates, then the result is a mixture of State and private free speech.

Florida's argument in the *SCV case* that specialty license plates are purely government speech is unpersuasive and would fail this prong of the *Griffin* analysis when coupled with the *Holcomb* holding. The more customization and influence the public has over such a government forum, the more likely the forum will tilt away from being a purely government forum, and the more likely it is to implicate Free Speech rights.

The *Griffin* court did not explicitly address the ultimate responsibility for speech prong; rather, it combined its literal speaker and ultimate responsibility analyses.[135] However, the court stated the SCV spoke through its specialty license plate, and the State merely provided the literal forum for that free .speech. Therefore, when the State allows the public to express free speech within its forums, the State cannot engage in viewpoint discrimination.[136] A better explanation of this principle would be to determine who controls the speech. In the case of specialty license plates, this would almost always be the special interest group who designs, funds, and markets the specialty license plates.

The court in Planned *Parenthood of South Carolina Inc. v. Rose* applied the *Griffin* four-factor test and determined South Carolina's specialty license plates are both government and private speech, and viewpoint discrimination is prohibited in this context. The court analogized specialty license plates to bumper stickers, reasoning a bumper sticker expresses a vehicle owner's free speech no matter who manufactures the bumper sticker.[137]

134. *See, e.g.*, Henderson *v.* Stalder, 112 F. Supp. 2d 589, 595 (E.D. La. 2000) (referring to the premise that specialty license plates represent State speech as "an oxymoron" in ruling that specialty license plates implicate private speech).

135. Sons of Confederate Veterans, Inc. *ex rel.* Griffin v. Comm'n of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 621 (4th Cir. 2002).

136. *Id.* at 622 (*citing* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998)); Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788, 805 (1985).

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

D. The Forum Analysis Prong

To ensure full consideration of constitutionally protected private speech versus state speech in the specialty license plate forum, the *Griffin* court's test must be modified to include a forum analysis. The *Holcomb* court used an additional two-prong test to determine the character of Virginia's specialty license plate program. The first prong concerned government practice, and the second prong involved the compatibility of the forum with the expressive activity sought to be conducted there.[138] Borrowing from another case unrelated to specialty license plates provides the final prong, that of the reasonable person.[139]

Regarding the first prong, the court noted that Virginia had authorized hundreds of specialty license plates for special interest groups, including scores of fraternal, civic, and professional organizations. In addition, many of those special interest groups had taken sensitive or controversial positions in the past.[140]

On the second prong, the court noted that Virginia residents had paid additional fees for many years to purchase unique combinations of alphanumeric characters to express ideas and personal messages. The court concluded that both vanity and specialty license plates were well suited to the expression of private speech. The court reasoned the government's practice had opened a nontraditional forum for the public's messages by allowing the public to publish its speech in Virginia's vanity and specialty license plates — a forum especially well-suited to this type of private speech.[141]

Yet another useful prong that courts should use in specialty license plate cases is the reasonable person standard the Court used in *Capitol Square Review and Advisory Bd. v. Pinette* ("*Pinette*"). In *Pinette*, the Ku Klux Klan wanted to erect a Latin cross on public property, and the State denied the Ku Klux Klan's petition on the grounds that the cross would cause entanglement issues with the Establishment Clause of the First Amendment. The Court stated that no reasonable person would believe the state was endorsing religion based upon the unattended Latin cross.[142]

138. *Sons of Confederate Veterans*, 129 F. Supp. 2d at 948.
139. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 755 (1995).
140. *Sons of Confederate Veterans*, 129 F. Supp. 2d at 948.
141. *Id.*
142. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. at 755.

VI. PROPOSED MODIFIED *GRIFFIN* TEST

The *Griffin* court, like the *SCV* court, did not include a forum analysis prong, yet forum analysis is necessary to determine when the State can engage in content or even viewpoint discrimination, since the forum dictates the State's rights.[143] The additional two-prong test the court used in *Holcomb* should be incorporated into the *Griffin* test.[144] Additionally, the "reasonable person" standard the Court used *Pinette* would add a final determinative prong in the specialty license plate forum.[145]

The *Summum* two-prong test that the *SCV* court used is not well suited to the specialty license plate forum; however, the analogy of a public park is eminently useful when determining whether free speech exists within a State's specialty license plate program. Parks are traditionally public property owned and maintained by the State. When a visitor enters a public park, that visitor is generally aware of the park's governmental nature. Most visitors would believe that any monuments they encounter within the park are State-owned — even if there is a plaque denoting the fact that a monument was donated by a special interest group or an individual. However, when a visitor to a park observes a speaker standing on a soapbox within that State park, it is logical to assume that visitor would believe the speaker is exercising his First Amendment rights to free speech, despite the fact this publication is occurring in a State-owned forum. Very few reasonable people would assume that the State agrees with every speech published within its park.

Florida has created a limited public forum with its specialty license plate program, and, by opening this traditional forum to the public, Florida cannot engage in viewpoint discrimination no matter how controversial Florida regards the SCV's reputation. Even despised groups have free speech rights, and Florida must treat all special interest groups the same.[146] Florida cannot stand on its claims that the SCV is too controversial to be granted admission into Florida's specialty license plate forum, since controversy is not a permissible limiting factor under the First Amendment's Free Speech Clause.[147] There is no conceivable nexus between the harm or controversy Florida

143. Perry Educ. . Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46-47 (1983).

144. *Sons of Confederate Veterans*, 129 F. Supp. 2d at 948.

145. *Capitol Square Review & Advisory Bd.*, 515 U.S. at 755.

146. Knights of Ku Klux Klan v. Ark. State Highway & Transp. Dep't, 807 F. Supp. 1427, 1438 (W.D. Ark 1992).

147. Tinker v. Des Moines Indep. Cmty. Sch. Dist.,393 U.S. 503, 504 (1969).

envisions by allowing the SCV a specialty license plate and the symbolic speech the SCV's proposed license plate represents. Florida has engaged in unfettered viewpoint discrimination by giving meaning to the SCV's symbolic speech and the SCV organization itself. By doing so, Florida has impermissibly assigned a meaning to the SCV without justification. There is no evidence that the SCV is a racist organization or that granting the SCV a specialty tag would result in imminent harm. The evolution of the Court's opinions in free speech cases confirms that the State cannot proscribe such speech because the public regards it as controversial.

Florida has declared a moratorium on creating new specialty license plates until 2014. Florida has two choices at this point: the first is not to create any new specialty license plates, and if Florida desires to avoid controversy in this limited public forum, this would be the safest choice. However, if Florida enacts a statute with clear legislative guidelines for the approval of specialty license plates, then Florida must allow the SCV and any other specialty group — no matter how controversial — entry into Florida's specialty license plate forum.

Florida simply cannot engage in impermissible viewpoint discrimination under the guise of avoiding controversy. Florida may believe that avoiding controversial subjects is for the public good, but as Justice Holmes stated, "The ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[148] In the end, it is "the thought that we hate" that deserves the constitutional protection.[149]

148. Abrams v. United States, 250 U.S. 616, 629 (1919).

149. United States v. Schwimmer, 279 U.S. 644, 655, (1929) (Holmes, J., dissenting).

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