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Comment

# ***1605** LICENSING A CHOICE: "CHOOSE LIFE" SPECIALTY LICENSE PLATES AND THEIR CONSTITUTIONAL IMPLICATIONS

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While once considered simply a means of vehicle identification, [FN1] the use of license plates has evolved over time. License plates have become another means to display a state's motto, to recognize various organizations, or to support popular causes. As they have deviated further from their original use, license plates have become the center of controversies involving First [FN2] and Fourteenth Amendment [FN3] rights. Courts have confronted what role, if any, states may have in censoring requested vanity [FN4] license plate messages [FN5] as well as the creation of specialty plates [FN6] to acknowledge various groups or entities [FN7] who meet minimum requirements as defined by the states. [FN8] Those drivers ***1606** wishing to support a group represented on a specialty plate may do so by contributing to the group's cause directly through the increased price of the plate and indirectly by using their vehicle as a means of advertisement for a particular group or cause. [FN9]

Recently some states have passed legislation authorizing license plates [FN10] adorned with the pro-life message "Choose Life." [FN11] The revenue generated by the sale of these plates is primarily disbursed to adoption-counseling organizations, [FN12] often restricting any abortion-counseling group from receiving funds. [FN13] Currently six state legislatures have approved the "Choose Life" license plates, [FN14] but a number of other states have considered issuing similar plates. [FN15] Despite considerable support in state legislatures and among the ***1607** public, the plates have been challenged in court on First Amendment grounds. [FN16]

Parts I and II of this Comment trace the development of the "Choose Life" license plates and the court cases that ensued after the plates were issued. [FN17] As Part II illustrates, the outcomes of these cases have varied and no clear precedent exists. Part III explores the necessary standing requirements to challenge the "Choose Life" license plates, paying particular attention to the injury and redressability requirements. As this Part asserts, although it is arguable whether plaintiffs might be able to present actual injuries, courts are limited in any redress they may provide. Part IV provides an overview of free speech analysis and applies this framework to the license plates, concluding that the "Choose Life" license plates should be characterized as individual speech that occurs in designated public fora. This Part argues that states might have difficulty offering a compelling interest to limit such plates and must observe the viewpoint neutrality requirement. The viewpoint neutrality requirement may be in conflict with the redressability consideration for standing, as will be discussed further in Part IV. Finally, Part V of this Comment analyzes the "Choose Life" license plates under Establishment Clause jurisprudence and determines that the plates likely do not disturb the delicate balance between church and state.

## ***1608** I. Creation of "Choose Life" Plates

Although other states had previously offered specialty license plates, the plates' popularity did not surge until Florida issued a plate commemorating the Space Shuttle Challenger in 1987. [FN18] Since then, for example, the Florida legislature has approved over fifty options for specialty plates, [FN19] with the "Choose Life" plate causing the most controversy. [FN20] The "Choose Life" plate grew from a county commissioner's idea for a plate to encourage adoption, [FN21] and the idea caught on with supporters of the pro-life movement throughout Florida. To demonstrate the necessary level of support, the group raised $30,000 to cover the required application fee and obtained the signatures of over 10,000 residents interested in purchasing a plate. [FN22] Once the Florida legislature approved their creation, [FN23] the plates were issued in 1999. [FN24] Shortly thereafter, Louisiana approved its own version [FN25] of the pro-adoption license plate. [FN26] With legislation signed on September 2, 2001, South Carolina was the third state to endorse the "Choose Life" plate; [FN27] they were also the third state in which the

plates have been challenged in court.

***1609** II. “Choose Life” Plates Go to Court

Although the license plates withstood the tests of their respective state legislatures, the plates have received different treatment in the eight courts that have considered their constitutionality. [FN28] Soon after Florida began issuing the plates, residents challenged the plates' constitutionality, [FN29] basing their claim on both the unavailability of a pro-choice plate and the existence of a pro-life plate. [FN30] In Hildreth v. Dickinson [FN31] and Women's Emergency Network II, [FN32] the plaintiffs claimed the state was unlawfully engaging in viewpoint discrimination by not offering a pro-choice license plate as an alternative to the pro-life option, thereby limiting the selection of plates available. [FN33] Without deciding whether the state subscribed to a particular viewpoint in violation of the First Amendment, both courts dismissed the respective cases for lack of standing. [FN34] As a result, the courts did not address the substance of the plaintiff's claims. [FN35] In a separate case, a Florida state court dismissed a complaint challenging the constitutionality of the “Choose Life” plates and ruled the plaintiffs failed to state a claim. [FN36]

***1610** Opponents of Louisiana's “Choose Life” plate were initially more successful than their counterparts in Florida. In Henderson I, [FN37] residents contended that the plates violated the Establishment Clause of the First Amendment [FN38] and that Louisiana engaged in impermissible viewpoint discrimination. [FN39] The plaintiffs asserted that the groups receiving funds from the sale of plates were religious in nature, thereby upsetting a constitutionally acceptable division between church and state. [FN40] While the district court did not rule the Louisiana license plate program an “excessive entanglement with religion,” [FN41] the court did accept the argument that “the State fails in its responsibility to provide a viewpoint-neutral forum” by not offering a pro-choice license plate. [FN42] Recognizing the possible constitutional harms, and therefore lowering the standing requirement necessary to bring the claim, [FN43] the district court granted a preliminary injunction, thereby immediately halting production of the plates. [FN44] While the court did not explicitly decide what forum was at issue, [FN45] it did find that the State was not viewpoint neutral in issuing the plates. [FN46] When the district court subsequently revisited the issue, [FN47] it ruled that the State's request for a stay “would be tantamount to perpetuating a Constitutional violation,” and denied a stay of the preliminary injunction. [FN48]

On appeal, the United States Court of Appeals for the Fifth Circuit reversed the lower court and remanded the case with instructions to dismiss “for lack of ***1611** federal court jurisdiction.” [FN49] The court examined taxpayer, individual, and organizational standing and held the plaintiffs did not have proper standing to bring the case. The three-judge panel was split, with the court issuing a majority opinion, one concurrence and one dissent. [FN50]

Trying to capitalize on the initial success of pro-choice groups in Louisiana, and relying heavily on the district court's analysis in Henderson I, [FN51] Planned Parenthood of South Carolina and a South Carolina resident challenged that state's newly created “Choose Life” plate. [FN52] In seeking a preliminary injunction to halt production of the plates, the plaintiffs challenged the program on First and Fourteenth Amendment grounds. [FN53] Specifically, the plaintiffs alleged that South Carolina “impermissibly discriminates on the basis of viewpoint in a government forum” [FN54] by excluding a pro-choice license plate option, and that Planned Parenthood is prohibited from receiving any of the “crisis pregnancy” funds [FN55] generated by sales of the plate because the group “provides, promotes or refers for abortion.” [FN56] In their answer to Planned Parenthood's complaint, South Carolina officials [FN57] questioned the plaintiff's standing to bring the case, [FN58] a strategy that was successful for the States of Florida and Louisiana. [FN59] Before the court could give full consideration to the merits of the case, a preliminary injunction was granted thereby preventing South Carolina from producing the controversial license plates. [FN60]

***1612** III. Standing

Standing, “the question of . . . whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues,” [FN61] has played an important role in the cases challenging the “Choose Life” license plates. [FN62] The underlying principle of the standing doctrine is to ensure separation of powers by restricting judicial review of actions by the legislative and executive branches. [FN63] There are three requirements to satisfy Article

III standing: [FN64] injury in fact, causation, and redressability. [FN65] The standing inquiry ensures there is an actual injury [FN66] that is traceable to the defendant's actions and redressable by the court.

Although the Supreme Court has delineated the requirements for standing, [FN67] lower courts have had trouble applying standing requirements and have not done so consistently. [FN68] Such inconsistency is evident in the "Choose ***1613** Life" license plate cases [FN69] in which plaintiffs have failed to define their injuries clearly and courts have struggled to determine how to redress any injury. [FN70] Furthermore, the issue becomes murkier depending on the redressability courts may consider.

When considering standing for plaintiffs challenging the "Choose Life" plates, the courts have taken different paths in their decisions. [FN71] Courts have focused primarily on the requirements of an injury in fact and redressability. [FN72] The Hildreth court dismissed the plaintiffs' case because they failed to "articulate an actual or imminent injury." [FN73] The State of Florida argued, and the court held, that the citizens had not completed the statutory requirements necessary for the legislature to approve a pro-choice license plate and thus incurred no actual injury. [FN74] The plaintiffs countered that even if they were to meet the relevant statutory requirements necessary for the legislature to consider a license plate, there is no guarantee the state legislature would approve their preferred plate. [FN75] The court refused to "entertain a conjectural or hypothetical injury" [FN76] because the plaintiffs had not lobbied the state legislature. In other words, to determine if an injury existed, courts have emphasized whether plaintiffs undertook the process of obtaining approval for ***1614** a pro-choice plate (and whether their effort was successful) instead of simply asking whether the state offered the plate plaintiffs desired. [FN77]

When faced with the same question of standing, the Henderson I district court explicitly rebuked the Hildreth decision and took an entirely different approach. [FN78] Louisiana claimed the plaintiffs lacked standing because they did not gather the required signatures for the plate or attempt to have a pro-choice license plate enacted into law. [FN79] After sharply criticizing the Hildreth court's judgment, [FN80] the Henderson I court recognized the existence of a relaxed standing requirement for a case involving possible free speech and Establish-ment Clause violations. [FN81] Focusing on the result of the state legislature's action [FN82]--that is, whether the legislature approved a pro-life license plate, rather than requiring the process of lobbying for a pro-choice license plate [FN83]--the Henderson I court allowed the plaintiffs' claim to proceed through a lower standing threshold. [FN84]

***1615** Reversing the district court, the United States Court of Appeals for the Fifth Circuit dismissed the Henderson case for lack of standing. [FN85] The appellate court held there was no actual injury because any injury the plaintiffs claimed was speculative since Louisiana did not need to increase taxes to pay the administrative costs for issuing the plates. [FN86] Furthermore, even if the court did find an injury existed because the plaintiff did not have a pro-choice plate, the court recognized its limited ability to offer any redress that would "provide [the plaintiff] a forum in which to express her pro-choice viewpoint." [FN87] The dissent strongly disagreed with the majority and asserted that the plaintiffs did not need to seek a license plate, for which they might have been rejected, to provide an actual injury sufficient for standing. [FN88]

Courts will always evaluate the three prerequisites for standing to make certain the cases are justiciable, but this Comment will only consider injury in fact and redressability. The second requirement for standing, causation, has not been problematic because the alleged injuries are easily traceable to an action of the defendant: the state, the state department of motor vehicles, or a state officer. [FN89]

A. Injury in Fact

The first problem plaintiffs have had in establishing their standing to challenge the "Choose Life" plates is their difficulty articulating an actual injury. [FN90] Not all plaintiffs thus far have clearly explained the origin of the ***1616** particular injury sustained, [FN91] that is, whether the constitutional infringements are based on the authorization of a "Choose Life" plate or, alternatively, on the unavailability of a pro-choice license plate. Although plaintiffs could allege either of these injuries, if courts evaluate the standing inquiry properly, plaintiffs will have vastly different results depending on which injury they allege.

One possible injury for both an individual and an organization [FN92] opposed to the "Choose Life" plates is

based on the existence of the pro-life plates. Because the injury must be actual and specific to the plaintiffs, the claims thus far have been grounded in violations of the plaintiffs' constitutional rights, particularly First Amendment free speech and Establishment Clause harms. [FN93] Such alleged injuries become problematic for the courts because rather than examining a particularized injury to the specific plaintiffs, the court must also address the constitutional infringement for nonparties, the public, [FN94] and the likelihood of a future injury. [FN95] Without the probability of a future injury, the ***1617** court will not grant preliminary injunctive relief. [FN96] Furthermore, to fulfill an initial hurdle for standing, the existence of an injury in fact, the court is forced to delve "into the merits of the case to determine whether a constitutional right was violated." [FN97]

Depending on the alleged injuries in each case, the plaintiffs may claim taxpayer standing, organizational standing, or both. [FN98] Taxpayer standing is based on the notion that the plaintiff challenges how certain tax dollars are spent because of alleged constitutional harms. [FN99] Ordinarily courts will not grant standing based simply on a taxpayer's status alone; [FN100] however, courts have allowed taxpayer standing when the injury is based on constitutional violations. [FN101] To sue as a taxpayer, the plaintiff must establish two factors: (1) "a logical link between the status and the type of legislative enactment attacked" and (2) "a nexus between [the taxpayer's] status and the precise nature of the constitutional infringement alleged." [FN102] To receive standing, the taxpayer must allege the legislature is "violating a particular constitutional provision with the expenditure and not just that [it] is exceeding the scope of its powers under the Constitution." [FN103] Although the threshold to taxpayer standing is generally high, it may be granted based on violations of the Establishment Clause. [FN104] Taxpayer standing to challenge Establishment Clause ***1618** violations has been restricted somewhat, [FN105] yet "it remains relatively easy for tax-paying citizens to challenge government actions under the [Establishment] Clause." [FN106]

Courts examining the constitutionality of the "Choose Life" plates have split on whether taxpayer standing and the constitutional violations are sufficient to meet the injury requirement of standing. [FN107] Based on the United States Supreme Court rulings in Flast [FN108] and Valley Forge, [FN109] which establish a lower threshold for taxpayer standing, it seems the Henderson I court took the proper path of granting taxpayer standing based on Establishment Clause violations, thus providing the injury required to bring the suit. Even if individuals allege free speech or equal protection injuries due to the existence of the "Choose Life" plates, and the use of state administrative resources to produce the licenses, plaintiffs would be best served by including a claim for an Establishment Clause injury because the courts are more inclined to grant taxpayer standing based on Establishment Clause claims. [FN110] Therefore, future plaintiffs should challenge the possibility of their tax dollars being used to administer an arguably religiously affiliated license plate program.

Plaintiffs have also attempted to bring suit based on organizational standing in four cases thus far. [FN111] An association or organization may bring suit if its ***1619** members had standing to bring suit on their own, the claims are related to the organization's purpose, and "neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit." [FN112] The courts in Henderson III and the Women's Emergency Network II were the only courts thus far to distinguish organizational standing from individual standing. [FN113] In Henderson III, Planned Parenthood claimed it was "ineligible for grants through the Choose Life Fund because it makes referrals to abortion clinics and engages in pro-choice advertising." [FN114] While this may have been true, the circuit court did not grant standing because even if it found the Louisiana statute unconstitutional, "the injury complained of by [Planned Parenthood] would not be redressed because there would then be no fund from which [Planned Parenthood] could seek grants." [FN115] As a result, if the individual taxpayers do not have standing and there is no possibility of redress for the organization, it is doubtful the organization bringing the suit will have sufficient standing.

B. Redressability

The third requirement of standing, redressability, poses a thorny dilemma for courts regardless of the source of the constitutional injuries alleged. [FN116] This section analyzes both bases of the injuries and the possible options for redressability of each injury should the courts get beyond either dismissing a ***1620** case for lack of standing for failure to state an actual injury [FN117] or issuing an injunction [FN118] and adjudicate a case based on its merits.

If plaintiffs, regardless of whether they were individuals, organizations, or both, challenge the constitutionality

of the “Choose Life” plates based on the notion that a state does not provide a pro-choice alternative, [FN119] courts will not be able to redress the plaintiffs' injuries. If the origin of the injury in such a suit is the unavailability of a pro-choice license, the only sufficient remedy would be for the legislature to approve a pro-choice plate. [FN120] Courts in such circumstances would be of little help for two reasons. First, due to separation of powers, a court cannot redress the unavailability of a pro-choice plate because it does not have the capacity to force a state legislature to approve a certain license plate. Second, the question of whether there should be a pro-choice plate is reserved to the legislature, thus a political question courts may not address, [FN121] even though an alleged constitutional violation is at issue. [FN122] Therefore, even if plaintiffs demonstrate an injury in fact, courts are hampered by separation of powers and the political question doctrine, thereby eliminating any possibility of redress [FN123] based on the injury caused by the unavailability of a pro-choice plate. [FN124]

***1621** Redressability is less of an issue for constitutional injuries based on the existence of a pro-life plate. Courts, if they deemed it proper, simply could issue an injunction to halt the “Choose Life” license plate, thereby alleviating any future harm. [FN125] However, the existence of a pro-life plate becomes problematic for another reason. As will be discussed in the following Part, a court likely would rule that the state legislature in such a situation had undertaken impermissible viewpoint discrimination by approving one license plate without adopting an alternative. Therefore, because of the state's viewpoint discrimination, a court would halt entirely the “Choose Life” license plate program.

## IV. Free Speech Violations

If a court were to resolve the standing dilemma, it then would consider the plaintiffs' free speech claims. Free speech claims are often the foundation of these suits, with plaintiffs asserting they may not express their own views on a specialty license plate, and the government has impermissibly expressed its view in a forum, thus engaging in viewpoint discrimination. To receive full constitutional protection, the “Choose Life” license plates must be a form of First Amendment speech. Although no court has ruled on the merits of plaintiffs' free speech claims in the “Choose Life” license plate cases thus far, the issue will be an important one for the courts to consider when given the opportunity. As the Supreme Court explained in a previous license plate case, “The First Amendment protects the right of individuals to hold a point of view ***1622** different from the majority and to refuse to foster . . . an idea they find morally objectionable.” [FN126]

A court undertaking free speech analysis first must determine whether the “Choose Life” plate would constitute speech and, if so, whether the speech is that of the individual or the government. If the speech is the individual's, the court will apply a public forum analysis, first determining whether the speech occurred in a public forum and then scrutinizing any government limitation on the speech. If the speech is the government's, the court will not undertake this analysis because the government may restrict its own speech. Because there is no exact case law on point for the “Choose Life” plates, it will be helpful to examine decisions from cases involving other specialty and vanity license plates to provide a framework for analyzing the “Choose Life” plates.

### A. The License Plate as a Form of Speech

The first, and arguably the easiest, task for a court is to determine whether the license plate is classified as a form of speech. In Wooley v. Maynard, the United States Supreme Court determined that the language on a license plate, and an action involving that language, is speech. [FN127] Courts specifically have held specialty license plates are speech [FN128] for First Amendment purposes because they contain “the extra dimension of an organization name and a symbolic logo” [FN129] designed by the organization. The notion is that the license plates, particularly the specific markings of the organization's logo, are expres-sive conduct and not simply a functional tool for vehicle identification. [FN130] In most cases, a court will not have trouble determining whether the “Choose Life” license plate represents a form of speech, and it will be able to proceed to ***1623** the next step in the free speech examination, that of determining whose speech the plate constitutes.

### B. Whose Speech?

The decision of whose speech the license plate represents will have dramatic consequences on the

constitutionality of the license plates. If the court determines the plate is government speech, the plates undoubtedly will be held constitutional because the state can limit its own speech without any constitutional implications. [FN131] As the Holcomb court affirmed, "[T]he First Amendment protects only citizens' speech rights from government regulation, and does not apply to government speech itself." [FN132] If an individual were to display the standard state license plate, as opposed to either a specialty or vanity plate, the speech would likely be considered the government's because the plate is used solely for identification and registration purposes. [FN133] However, the mere fact that the government produces, and therefore owns, the license plates issued to drivers does not imply the actual message displayed on the specialty plate constitutes the government's speech, [FN134] even though the organization seeking the specialty plate must comply with specific design requirements established by the state. As the Holcomb court observed, "[M]ere ownership of the means of communication is not determinative in deciding who the speaker is." [FN135]

The more likely situation is that a court will find that the license plate represents the speech of an individual, the taxpaying car owner who chose to pay the additional money to display the "Choose Life" plate. Two distinct voluntary actions signify the speech is that of the driver. First, the driver must choose to apply for the specialty license plate and then pay a separate fee for it. [FN136] Second, after the state has issued the license plate, the driver must then ***1624** affix it to her car, demonstrating that the driver willingly adopts the plate, and thus the speech, as her own. Because people associate a car with its owner, [FN137] the speech of the license plate becomes the owner's once it is displayed to anyone who might see the car.

The very nature of the specialty license plates gives additional credence to the notion that the plate is the speech of the individual car owner. Because the specialty plate contains the logo or slogan of an organization the driver supports, such plates are different than the official state plate issued to the majority of drivers. The driver "speaks" by displaying the specialty plate's message. [FN138] The driver's actions and the unique characteristics of the license plate, rather than the government's ownership, likely would persuade a court that displaying the specialty license plate is the individual's speech. Following this reasoning, courts would likely find that the speech is the individual driver's and thus proceed with free speech forum and viewpoint discrimination analysis.

C. Forum Analysis

An essential part of a court's free speech inquiry is to determine the proper forum in which to classify where the speech occurs and then to apply the appropriate standard of scrutiny. The Supreme Court has recognized three distinct fora: the traditional public forum, the designated public forum, and the nonpublic forum. [FN139] The distinction between each fora is based on the limitations or designations the government may place on private speakers or subjects and the particular use of the government property where the speech occurs. [FN140] The categorization of the forum is crucial to free speech claims because the classification determines the amount of control the government ***1625** may assert in selecting the speakers and the subjects of their speech. [FN141] Courts reviewing the "Choose Life" plates have not needed to determine the forum of the plates, [FN142] but future courts should consider these plates as designated public fora.

1. Framework of Public Forum Analysis

The traditional public forum is the most basic forum and the one that most people likely associate with public speech. These fora are generally public streets and parks, which traditionally have been "used for purposes of assembly, communicating thoughts between citizens and discussing public questions." [FN143] "Traditional public fora are defined by the objective charac-teristics of the property," [FN144] characteristics that apply to areas that often are used for "assembly and debate." [FN145] Because traditional public fora are open for appropriate speech or conduct, the government must "accommodate [all] private speakers" in these fora. [FN146]

A designated public forum is one that the government has purposefully created for limited expressive conduct. The United States Supreme Court has explained that "the government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse." [FN147] A specific government action is required to transform the forum from a nontraditional forum to a designated public forum. The government's intent is central to creating a designated public

forum, and thus a court must "ascertain whether [the government] intended to designate a place not traditionally open . . . as a public forum." [FN148] Because of the limited nature of designated public fora, the ***1626** government does not need to permit all expressive activities [FN149] or retain the fora indefinitely. [FN150]

Both traditional public fora and designated public fora are subject to strict scrutiny review to determine whether government restrictions on speech are permissible. [FN151] To overcome the presumption of unconstitutionality under this standard, [FN152] the government must show that its regulations "serve a compelling state interest and that [they are] narrowly drawn to achieve that end." [FN153] The government, if it decides to regulate speech, "bears the burden of proving the constitutionality of its actions" [FN154] to meet the lofty strict scrutiny standard. [FN155] The court must examine the various regulations or prohibitions established by the government and ensure a compelling state interest is served.

Other governmental properties are classified as either "nonpublic fora or not fora at all." [FN156] A nonpublic forum is created when "selective access" [FN157] is granted to government property "which is not by tradition or designation a forum for public communication." [FN158] Examples of nonpublic fora would include: "mailboxes, street light posts . . . post office sidewalks, military bases . . . and airports." [FN159] These fora are subject to a lower reasonableness standard. [FN160] This standard is met if the government prohibition is "reasonable in light of the purpose of the forum . . . and reflects a legitimate government concern." [FN161] Access can be controlled based on the subject matter or the specific speaker "so long as the distinctions drawn are reasonable in light of the forum." [FN162] These distinctions do not need to be the only reasonable ones ***1627** available to the government, but, as long as they are reasonable, they will meet the standard. [FN163]

2. Application to "Choose Life" Cases

The particular forum at issue in the "Choose Life" cases is the license plate itself, which encompasses the design and wording proposed by the pro-life groups. Because courts have not determined in which forum to classify the "Choose Life" plates, other recent controversial specialty license plates serve as the most useful comparison for categorizing the forum of "Choose Life" plates. For example, plates honoring the Sons of Confederate Veterans (SCV), [FN164] which are controversial to some because of their design, [FN165] have been classified as designated public fora. [FN166] Because the groups were permitted to "place various slogans and designs on license plates," thus opening a "nontraditional public forum for public discourse," the plates were treated as designated public fora. [FN167] Designated public fora require an intentional government action opening the forum, which was present in this line of cases because the states allowed those interested in the SCV both to create and to apply for a state-issued license plate with the SCV logo. [FN168]

Similar to the SCV plates, the "Choose Life" plates involve an intentional effort by the states to open a nonpublic forum, the standard state license plate, to those groups who meet specific qualifications [FN169] and whose design the state ***1628** has approved. The qualifications include approval by the state legislature, a pre-determined application fee, and signatures of those who support creation of the plates. As with the plates honoring the SCV, states have taken distinct actions and have demonstrated the necessary intent to open this nonpublic forum to those interested in supporting the pro-life movement.

Specialty license plates, as opposed to vanity plates, serve as the best comparison to the "Choose Life" plates for forum classification. Vanity plates are those for which "the letter and number combinations are chosen by car owners to convey a message." [FN170] Courts have consistently ruled that vanity plates are nonpublic fora. [FN171] Even though vanity plates display the message selected by the car owner, the remaining design of the plate is exactly the same as ordinary license plates issued to most drivers in a state. [FN172] In contrast to vanity plates, specialty plates involve more private speech because of the organizational logo and message displayed on the plate, rather than simply a specific selection of letters and numbers on a vanity plate. [FN173] For specialty plates, such as the "Choose Life" plates, the government allows groups to alter the fundamental design of the usual license plate, thus indicating an intentional state effort to transform a nonpublic forum into a designated public forum. [FN174]

Because they should be classified as designated public fora, the strict scrutiny standard will be applied to the "Choose Life" plates. It is impossible for this Comment to predict whether future courts will uphold government

restrictions on such plates when applying the arduous strict scrutiny standard ***1629** because the compelling interest might vary from state to state. Nevertheless, the standard is a difficult one for states to meet. If states did not have a sufficiently compelling interest to prohibit the Sons of Confederate Veterans from receiving plates because of their controversial design [FN175] and the risk of offending some residents, [FN176] states may also have difficulty meeting this standard for the "Choose Life" plates. That is, if a group follows all of the necessary requirements for the creation of a specialty license plate, a state likely will not have a compelling interest to deny production of the plates. Looking only at forum analysis and not at viewpoint discrimination analysis, [FN177] there is a distinct possibility that future states will be unable to offer a compelling interest for excluding divisive specialty license plates, assuming the legislature approves the creation of the plates and the organizations are able to fulfill the steps necessary for their issuance.

If states act in a viewpoint-neutral manner and give equal consideration to license plates representing more than one perspective of the same issue, even more specialty license plates could be created because the state might have difficulty offering a compelling interest to prevent production of controversial plates. If preventing controversial plates is not a compelling state interest, [FN178] as in the SCV cases, [FN179] it is difficult to imagine an acceptable state interest [FN180] to ***1630** limit pro-life, pro-choice, or any other politically oriented license plate. [FN181] Therefore, it is conceivable that almost any group would be able to create a license plate with the legislature's approval because states will have a difficult time offering a compelling interest that meets the strict scrutiny standard as applied by the courts.

D. Viewpoint Neutrality Requirement

Once a court has categorized the speech in a forum and applied the requisite level of scrutiny to determine whether the government regulation is appropriate, the plates must then meet the fundamental constraint of viewpoint neutrality. As previously described, [FN182] the "Choose Life" plates should be classified as designated public fora; however, it is vital to note that even if a court were to determine the plates were a forum other than a designated public forum, the state's regulations still must be viewpoint neutral. Regardless of the forum created, the government has a duty to be viewpoint neutral in its regulations. [FN183] The underlying notion of viewpoint neutrality is based on free discourse within the "marketplace of ideas," [FN184] allowing Americans to "grow up and live in [a] relatively permissive, often disputatious, society." [FN185]

Because of this neutrality constraint, the government may not regulate speech supporting one viewpoint at the expense of another. [FN186] Neutrality is necessary due to the potential power of a government, whether state or federal, to limit certain views from being expressed thereby preventing an open forum for all participants.

***1631** Only one court in the "Choose Life" cases has considered the viewpoint neutrality requirement. [FN187] Despite the lack of attention the requirement has received thus far, courts confronting the "Choose Life" license plates may nevertheless find the viewpoint discrimination constraint to be problematic for four reasons. First, and most troubling, courts must determine which state action to assess: access to the legislature, design of the plate, or a combination of both. Before a state will issue a specialty license plate, the legislature must first approve the proposal. [FN188] The nature of a legislature in a representative democracy is such that it will consider those issues the representatives deem important. A court cannot require a legislature to give equal access to the pro-life and pro-choice plates, or to any other issue with diametrically opposed sides so that the state does not express a particular viewpoint by only considering one plate. [FN189] Furthermore, even if a court could require the legislature to consider the pro-choice plate once a pro-life plate was created, the specific issue would become whether the pro-choice plate had to come before the entire legislature for a vote or if it was sufficient for a legislative committee to consider the pro-choice plate. That is, a court would have to consider whether the two plates would have to go through the same stages in the legislative process so as not to constitute viewpoint discrimination. Because of separation of powers and political question concerns, a court would likely determine that to be viewpoint neutral does not mean the legislature has to give both license plates equal consideration in equal steps of the legislative process.

Second, courts would have to examine the design of the plate. Courts might consider whether it is appropriate for a state to incorporate any of its official designs or symbols into the license plate. For example, the design of Louisiana's "Choose Life" plate includes the brown pelican, the state bird, holding a baby. [FN190] Some might

perceive this design as the state tacitly approving adoption and therefore expressing its viewpoint.

A third consideration for courts will be the message of the "Choose Life" plates. Because the plates encourage adoption, a state might make the argument that it has the constitutional power to express a preference for ***1632** adoption rather than abortion. [FN191] Under this line of thought, the state is supporting adoption through the "Choose Life" plate, thus the plate becomes its speech. Such reasoning is flawed because, as detailed above, the speech of a specialty license plate is that of the private citizen and not the government's. [FN192] Therefore, the state's preference for adoption is immaterial.

A fourth issue that may be problematic for courts involves the relationship between standing and viewpoint discrimination. A court could find an injury in fact does not exist until the plaintiffs have actually gone before the legislature and sought a license plate espousing their views. [FN193] Assuming arguendo such efforts will fulfill the injury component of standing, the legislature will have to consider both license plates. If only one is selected, the legislature's selection could constitute viewpoint discrimination because the state has favored one plate at the expense of the other; however, if, by chance, both plates are approved or neither is approved, there is no injury in fact because both plates would have received equal treatment. In such a situation, the legislature would have acted in a viewpoint neutral manner by considering both plates. Short of this scenario, a Hobson's choice likely exists between either a plaintiff demonstrating an injury in fact or a state impermissibly engaging in viewpoint discrimination.

## V. Establishment Clause Violations

A final consideration for courts confronting the "Choose Life" license plates is a potential violation of the Establishment Clause [FN194] through improper entanglement with religion. Establishment Clause claims were raised in three of the cases brought thus far, [FN195] and future plaintiffs likely will make similar ***1633** claims based on the creation of the "Choose Life" license program, distribution of funds generated by sale of the plates, and the mechanism established by each state to distribute the funds.

The Establishment Clause ensures an appropriate division between church and state with the underlying premise that interaction between the two will degrade both. [FN196] The Establishment Clause prevents the government from defining a community's religious beliefs or practices and "foreclos[es] government from coercing citizens to participate in religious exercises . . . in violation of the principal of liberty of conscience." [FN197] The United States Supreme Court has recognized that some interaction between church and state is acceptable, and thus an absolute prohibition against the entities intermingling is unnecessary. [FN198] Under the Establishment Clause, a court must determine on a case-by-case basis where to draw the appropriate line [FN199] between church and state.

### A. The Lemon Test

The bedrock ideal of separation of church and state is firmly established, yet the guiding case law is not as clear. [FN200] Through this "unwieldy mass of ***1634** precedents," [FN201] the Supreme Court established a three-prong test, and subsequently modified it, to assist courts in analyzing Establishment Clause violations. Lemon v. Kurtzman [FN202] initially set forth a three-part inquiry to determine whether a government action "had the impermissible effect of advancing religion." [FN203] Under the Lemon test courts considered: (1) the purpose of the statute, (2) its primary effect, and (3) any "excessive government entanglement with religion." [FN204] The Lemon test guided a court's "general nature of . . . inquiry" [FN205] but was "not . . . viewed as setting the precise limits to the necessary constitutional inquiry." [FN206]

Courts followed the Lemon test for over twenty-five years [FN207] until it was revised in Agostini v. Felton, [FN208] which tried to provide more definite criteria for future courts adjudicating Establishment Clause challenges. While retaining the "purpose" inquiry, the Agostini Court recognized the similarity between the "effect" and "excessive entanglement" prongs of the Lemon test and therefore altered the test so that entanglement became "an aspect of the inquiry into a statute's effect." [FN209] To evaluate the revised "effect" prong, the modified Lemon test set out three primary criteria: whether a statute (1) "result[s] in governmental indoctrination," (2) "define[s] its recipients in reference to religion," or (3) "create[s] an excessive entanglement." [FN210] The revised Lemon ***1635**

test attempts to clarify an area of constitutional “jurisprudence [that] has changed significantly” [FN211] and created much confusion throughout its develop-ment. [FN212]

B. Application to “Choose Life” Cases

Establishment Clause claims have been raised in three of the “Choose Life” cases brought so far, [FN213] yet the only court to rule on the matter did not apply the proper test to determine whether a violation existed. [FN214] Future courts examining whether the “Choose Life” plates violate the separation of church and state should apply the modified Lemon test to three distinct stages of the license plate program: [FN215] the general “Choose Life” program [FN216] and license design, [FN217] the mechanism established to distribute funds generated by the sale of the plates, [FN218] and the actual distribution of funds. [FN219] When these three stages ***1636** are analyzed under the revised Lemon test, courts will likely determine the “Choose Life” license plates do not violate the Establishment Clause.

1. “Purpose” Analysis

The first prong a court should examine under the modified Lemon test is the purpose of the “Choose Life” specialty license plate program. A court should give leeway to a state if a program serves a “plausible secular purpose,” particularly when scrutinizing the statute's text. [FN220] Florida, Louisiana, and South Carolina have had secular purposes for creating the “Choose Life” license plates, namely promoting adoption and adoption counseling, which are evident based on the text of the statutes. [FN221] The mechanisms established for distributing funds generated by the sale of the plates [FN222] and the allocation of funds also have secular purposes in that they are means to achieving the end of adoption and adoption-counseling. [FN223] These statutes, [FN224] and any passed by states in the future that are similar in intention, would meet the first prong of ***1637** the revised Lemon test because their purpose, as given in the statutes, is to promote adoption rather than to support a religious cause. [FN225]

2. “Effects” Analysis

A court reviewing the “Choose Life” plates should then move to the “effects” prong of the modified Lemon test and the three criteria used to determine the consequences of a government program: government in-doctrination, religious reference, and excessive entanglement. [FN226] The first inquiry under the “government indoctrination” analysis [FN227] involves the manner by which funding flows from the government to a religious organization. While the test previously focused on whether the funds are distributed directly to religious organizations from the government, [FN228] the proper inquiry now is whether the allocation was based on private choice. [FN229] To determine whether the funding generated by sales of the “Choose Life” license plate could be ***1638** “attributed to governmental action,” [FN230] with funds possibly distributed to religious organizations, [FN231] the analysis depends on how the revenue flow [FN232] is characterized. [FN233]

The revenue flow from the annual fees for the “Choose Life” license plates should be characterized such that the individual car owner makes the decision how the fee will be spent and government's role is ministerial. [FN234] This situation is vastly different from other circumstances involving government aid to religious organizations in that revenue flow stemming from the sale of the “Choose Life” plates begins with the car owner paying the annual fee, [FN235] which is designated for a specific purpose. Ordinarily individual taxpayers do not choose how their taxes are spent by the government although public funds still ***1639** might be disbursed to religious organizations. [FN236] In the situation of annual use fees for the “Choose Life” license plate, the decision of how funds are spent is made by a private individual, the car owner, who may know religious groups could receive funds and not the government. Just as distinct actions taken by the car owner indicate the license plates are the individual's speech, [FN237] these same actions are relevant for the private choice analysis. Because religious organizations ultimately receive funding due to private choices--the car owners' decisions to buy the “Choose Life” license plates--the “government indoctrination” element would be met. [FN238]

The designs of the plate, [FN239] including the message of “Choose Life” [FN240] written on the plates, also would meet the “government indoctrination” criterion of the modified Lemon test. A claim may be raised regarding

a “symbolic union” between church and state [FN241] because of the possible religious undertones of the “Choose Life” license plate and because some religious groups actively support the license plates; however, the United States Supreme Court indicated that a “‘reasonable observer . . . must be deemed aware’ of the ***1640** ‘history and context”’ of a program, [FN242] so a court may assume the general public knows that the plates support adoption, not a particular religion or a religious message. The design of the “Choose Life” plates should also satisfy the “government indoctrination” element of the effects prong because the public likely will not confuse the message on the license plates with religious propaganda advanced by the government, particularly because the license plate is the speech of the car owner, not the government. [FN243]

The second element used under the effects prong is whether a program “define[s] its recipients by reference to religion.” [FN244] The criteria for distrib-uting funds must be neutral, [FN245] such that no religious organization is in a better position than any other group to receive funding. This element likely will be easily satisfied because the criteria used [FN246] for distributing funds is based on an organization's objective of “provid[ing] counseling and other services” [FN247] related to adoption. Any religious organization [FN248] that may receive funding does so under neutral criteria [FN249] delineated by the state statute. [FN250] Although a religious organization might receive funding for adoption counseling under the “Choose Life” program, the group would receive the funds based on neutral criteria that any other secular group might meet as long as it provides adoption counseling services.

The third element to be evaluated under the effects prong is “excessive entanglement,” a consideration of the relationship between church and state as ***1641** a result of a government program. [FN251] The excessive entanglement inquiry of the “Choose Life” license plate initiative likely is not based on quantifiable effects, [FN252] but rather on delegation of powers [FN253] and receipt of funds. The councils created [FN254] to distribute the revenue will be constitutional so long as their purpose remains secular, even if some of the council members include individuals from religiously affiliated organizations. [FN255] Furthermore, if neutral criteria are used to distribute the funds, [FN256] the “Choose Life” license plate programs will be constitutional even though some religious groups might ultimately receive funding. The secular purpose of promoting adoption, coupled with the neutral criteria for funding the same, do not constitute excessive entanglement between church and state, and therefore should be permitted under the Establishment Clause.

## ***1642** Conclusion

Specialty license plates generate a tremendous amount of revenue for states [FN257] and are an effective method for organizations wishing to display their particular cause. Although the license plates may achieve the goals of both the organizations and the states, politically oriented plates such as the “Choose Life” plates pose numerous problems for the parties involved.

Standing for plaintiffs challenging the “Choose Life” license plates is problematic in that the source of the injury has not been clearly defined. If a plaintiff claims an injury based on the lack of a pro-choice license plate, courts are limited in any redress they may provide because of separation of powers and the political question doctrine. Legislatures, not courts, are responsible for issuing license plates, so those seeking a pro-choice plate should pursue a legislative solution rather than a judicial one. Courts thus far have not been sympathetic to plaintiffs who have not sought a pro-choice license plate and have held the plaintiffs have not suffered an actual injury because the legislature did not deny them a plate they would support. Future plaintiffs claiming an injury based on the existence of a pro-life license plate likely have standing based on possible First Amendment free speech, viewpoint dis-crimination, and Establishment Clause violations.

All of the plaintiffs in the “Choose Life” cases filed thus far have raised free speech and viewpoint discrimination claims. Their argument is that they too should be able to have license plates espousing their pro-choice views because license plates are individual speech, rather than government speech, that occurs in a designated public forum, the license plate. Because the designated public forum involves an intentional effort by the government to open the forum to those meeting certain qualifications, namely the signature and fee requirements for the plates, the government must offer a compelling interest for preventing the pro-choice movement from having its own plate once the necessary qualifications are met. Courts have not yet examined any state's interest in limiting the plates available to only pro-life plates, but a court would likely hold that a state cannot offer a compelling interest for issuing only a pro-life plate.

Regardless of which forum a court determines the plates constitutes, the government must be viewpoint neutral and not favor one view over another. It appears that the three states examined in this Comment are not viewpoint neutral because they did not give equal consideration to the pro-choice plates. Even though the pro-choice movement has not been successful in lobbying a ***1643** state legislature to consider a pro-choice license plate, the states have clearly expressed their viewpoint by approving the "Choose Life" plates and providing administrative support for their issuance. This becomes a circular problem because if states consider both plates, and select only one, a plaintiff will have an actual injury necessary for standing because her plate will not be available. Such a situation may become problematic because the state selected one plate at the expense of another, thus constituting viewpoint discrimination. A state could issue either both plates or neither plate, and thus remain viewpoint neutral, thereby eliminating any possible injury because the plates were given equal consideration.

The three states examined in this Comment that have issued "Choose Life" plates likely have not violated the delicate balance between church and state the Establishment Clause seeks to maintain. Although the "Choose Life" license plate does have religious undertones and seems to be supported by religious organizations, it is the private choice of car owners to pay for these plates, and thus revenue from the sales may flow to religious organizations involved in adoption services. The United States Supreme Court has placed tremendous emphasis in its Establishment Clause jurisprudence on private choice for religious organizations that receive public funds, such that courts examining the "Choose Life" plates will likely find the programs do not violate the delicate balance between church and state. The car owners ultimately choose that the funds from sale of the plates will be spent on adoption services, some of which may be administered by religious organizations, and the government is merely a conduit for the revenue flow. This model may be constitutional for three states so far, but the Establishment Clause could be violated if it becomes apparent the "Choose Life" initiative is merely a pretext for a religious cause, rather than a license plate program with the secular purpose of encouraging adoption.

States should continue issuing specialty license plates; however, politically oriented plates should be avoided because of the constitutional quandaries created, as the "Choose Life" license plates amply demonstrate.

[FN1]. See Kahn v. Dep't of Motor Vehicles, 20 Cal. Rptr. 2d 6, 10 (Ct. App. 1993) ("A vehicle license plate is a state-imposed display of registered vehicle identification."); Marybeth Herald, Licensed to Speak: The Case of Vanity Plates, 72 U. Colo. L. Rev. 595, 620 (2001) (stating that the government uses license plates for vehicle identification purposes).

[FN2]. U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion ... or abridging the freedom of speech.").

[FN3]. U.S. Const. amend. XIV, § 1 ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws.").

[FN4]. Vanity license plates are regular state-issued plates in which the "letter and number combinations are chosen by car owners to convey a message." Herald, supra note 1, at 608.

[FN5]. See Perry v. McDonald, 280 F.3d 159 (2d Cir. 2001) (upholding Vermont's decision to deny a request for a vanity license plate that included an obscenity); Lewis v. Wilson, 253 F.3d 1077 (8th Cir. 2001) (holding that language governing issuance of vanity plates in Missouri is unconstitutional), cert. denied, 122 S. Ct. 1536 (2002); Pruitt v. Wilder, 840 F. Supp. 414 (E.D. Va. 1994) (holding that Virginia DMV's policy banning the issuance of vanity plates with reference to "deities" was invalid and allowing the issuance of a license plate that said "GODZGUD"); Kahn, 20 Cal. Rptr. 2d at 12-13 (ruling that license plate sought by plaintiff was shorthand for an expletive despite plaintiff's claims otherwise and allowing the state to refuse issuance on that ground); Higgins v. Driver & Motor Vehicle Servs. Branch, 13 P.3d 531 (Or. Ct. App. 2000) (en banc) (allowing state to refuse numerous requests for a plate with wine references).

[FN6]. Specialty license plates recognize a "group or cause on the portion of the plate not devoted to the letter/number identifying configuration." Leslie Jacobs, Free Speech and the Limits of Legislative Discretion: The

Example of Specialty License Plates, 53 Fla. L. Rev. 419, 424 (2001).

[FN7]. See Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941 (W.D. Va. 2001), aff'd sub nom. Sons of Confederate Veterans, Inc. v. Comm'r of the Virginia DMV, 288 F.3d 610 (4th Cir. 2002) (holding that state must issue specialty license plates with the organization's logo, which resembles the Confederate flag); Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099 (D. Md. 1997) (same); N.C. Div. of Sons of Confederate Veterans v. Faulkner, 509 S.E.2d 207 (N.C. Ct. App. 1998) (same).

[FN8]. See, e.g., La. Rev. Stat. Ann. § 47:463.61 (West 2001) (providing for establishment of "Choose Life" license plate as long as there are a minimum of one hundred applicants willing to pay the annual fee of $25). See infra note 10 for complete listing of all the states' statutory requirements for "Choose Life" license plates.

[FN9]. See Jacobs, supra note 6, at 424 ("Groups that seek specialty plates are generally motivated both by their money-making potential and the recognition that they bring to the advertised cause."); see also Herald, supra note 1, at 596 n.6 (noting that Missouri, Massachusetts, and Michigan each receive over $1 million annually from the sale of specialty license plates).

[FN10]. See Fla. Stat. Ann. § 320.08058(30) (West 2001); La. Rev. Stat. Ann. § 47:463.61; Miss. Code Ann. § 27-19-56.70 (West 2002); S.C. Code Ann. § 56-3-8910 (Law. Co-op. 2001); S.B. 1248, 48th Leg., 2d Sess. (Okla. 2002). Alabama, which does not require legislative approval but rather relies on a legislative committee to approve proposed plates, authorized the "Choose Life" license plates pending commitments from 1,000 residents to purchase the plates. See Alabama Legislative Oversight Comm. for License Plates, Meeting Minutes, Oct. 23, 2001 (on file with author).

[FN11]. "'Choose Life' is a slogan which is generally associated with a social, religious, or political view which espouses the sanctity of human life and encourages adoption in lieu of abortion." Hildreth v. Dickinson, 1999 U.S. Dist. LEXIS 22503, at *7 (M.D. Fla. Dec. 22, 1999). See also Abortion Debate on License Plates, Tampa Trib., Dec. 30, 2001, at Commentary 2 (noting that the "Choose Life" slogan is based on "words ... found in the Old Testament book of Deuteronomy").

[FN12]. See Fla. Stat. Ann. § 320.08058(30)(b) (Funds from sale of plate are to be distributed to "not-for-profit agencies ... [whose] services are limited to counseling and meeting the physical needs of pregnant women who are committed to placing their children for adoption."); La. Rev. Stat. Ann. § 47:463.61(F)(2) ("An organization wishing to qualify for receipt of funds shall demonstrate it provides counseling and other services intended to meet the needs of expectant mothers considering adoption for their unborn child."); S.C. Code Ann. § 56-3-8910(B) ("The fees collected... [are] to be used to support local crisis pregnancy programs. Local private nonprofit tax exempt organizations offering crisis pregnancy services may apply for grants from this fund to further their tax exempt purposes.").

[FN13]. See Fla. Stat. Ann. § 320.08058(30)(b) ("Funds may not be distributed to any agency that is involved or associated with abortion activities, including counseling for or referrals to abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising ...."); La. Rev. Stat. Ann. § 47:463.61(F)(2) ("No monies ... shall be distributed to any organization involved in, or associated with counseling for, or referrals to, abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising ...."); S.C. Code Ann. § 56-3-8910(B) ("Grants may not be awarded to any agency, institution, or organization that provides, promotes, or refers for abortion.").

[FN14]. See supra note 10 for listing of all states.

[FN15]. See Jay Krall, Pro-Life License Plates Spark Controversy, Wall St. J., June 12, 2002, at B1 (stating that in addition to the states which offer the "Choose Life" license plate "[a]t least [thirteen] other states are considering legislation to offer plates with the same message"); see also Other States Adopting the Choose Life Tag, at http://www.choose-life.org/states.html (last visited July 21, 2002) (providing a list of states contemplating the "Choose Life" license plate). The most recent state to consider a "Choose Life" license plate is Alabama. See Not a

Problem: ‘Choose Life’ Tags Don't Mean State's Taking a Side, Birmingham News, Oct. 26, 2001, at 14A. The Legislative Oversight Committee of the Alabama Legislature approved the “Choose Life” license plate on October 23, 2001, and now residents of Alabama must demonstrate support for the plate by agreeing in advance to purchase it. The twelve-month period for “Commitment to Purchase” ends November 30, 2002. Alabama Legislative Oversight Comm., supra note 10. See http:// www.aplcef.org/cartag.htm (last visited August 30, 2002).

[FN16]. Although Equal Protection claims have been raised in two of the “Choose Life” cases so far, see Women's Emergency Network v. Bush, 191 F. Supp. 2d 1356 (S.D. Fla. 2002) (“Women's Emergency Network I”); Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, Planned Parenthood of S.C., Inc. v. Rose (D.S.C. 2001) (No. 2-01-3571-23), this Comment does not address potential Equal Protection violations.

[FN17]. Although six state legislatures have approved the creation of the “Choose Life” license plates, this Comment will only consider those programs that have been challenged in court as of the time this Comment was written (Florida, Louisiana, and South Carolina).

[FN18]. See Jacobs, supra note 6, at 424.

[FN19]. Fla. Stat. Ann. § 320.08058 (West 2001) (listing all specialty license plates offered in Florida); see also Krall, supra note 15 (“License plates supporting various causes and groups--conservation, for example, or an alma mater--are legion and generally excite little controversy.”).

[FN20]. The design of the plate is such that “the words ‘Choose Life’ appear in childish crayon scrawl across the top, between the month and year stickers. A similarly colorful crayon-like sketch of smiling boy and girl faces, bent affectionately together, appears in the right-hand third of the plate's surface, the same size vertically as the plate's identifying letter/number configuration.” Jacobs, supra note 6, at 428; see also Fla. Stat. Ann. § 320.08058(30)(a) (“The word ‘Florida’ must appear at the bottom of the plate, and the words ‘Choose Life’ must appear at the top of the plate.”).

[FN21]. See Jacobs, supra note 6, at 427; Krall, supra note 15.

[FN22]. See Jacobs, supra note 6, at 427-28.

[FN23]. See id. at 428. Although the Florida legislature first approved the license plate in 1998, Governor Lawton Chiles vetoed the bill and declared a license plate was not the “proper forum for debate on this--or any other--political issue.” Governor Jeb Bush signed legislation in 1999 authorizing the “Choose Life” plates in Florida. Id.

[FN24]. See Fla. Stat. Ann. § 320.08058(30) (delineating the requirements for creating the license plates and designating which groups may receive funds generated by the sale of the plates).

[FN25]. Louisiana issued a license plate with an entirely different design from that of Florida. The Louisiana plate “features a baby wrapped in a blanket dangling from the beak of the state bird, the brown pelican.” Jacobs, supra note 6, at 432.

[FN26]. See La. Rev. Stat. Ann. § 47:463.61 (West 2001) (codifying the “Choose Life” license plate, listing the specific representatives who may serve on the Choose Life Advisory Council, and limiting how generated funds may be disbursed). Although the Choose Life Advisory Council has input on groups receiving funds, the state treasurer makes the final distribution of money. See id. at § 47:463.61(G); see also Henderson v. Stalder, 112 F. Supp. 2d 589, 592 (E.D. La. 2000) (“Henderson I”), rev'd, 287 F.3d 372 (5th Cir. 2002).

[FN27]. See S.C. Code Ann. § 56-3-8910 (Law Co-op. 2001) (delineating the requirements for issuing the license plate and for spending the money from sales of the plate). The design of the South Carolina license plate is similar to that of Florida, although the wording on the sample yellow South Carolina plate avows, “I'm For It, Choose Life.” See All Things Considered: Louisiana's Pro-Life License Plate Raises Controversy (National Public Radio, Aug. 20,

2001), 2001 WL 9435996.

[FN28]. See Henderson v. Stalder, 287 F.3d 374 (5th Cir. 2002) ("Henderson III"); Women's Emergency Network v. Dickinson, 214 F. Supp. 2d 1308 (S.D. Fla. 2002) ("Women's Emergency Network II"); Women's Emergency Network I, 191 F. Supp. 2d 1356 (S.D. Fla. 2002); Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, Planned Parenthood of S.C., Inc. v. Rose (D.S.C. 2001) (No. 2-01-3571-23); Henderson v. Stalder, 2000 U.S. Dist. LEXIS 18805 (E.D. La. Dec. 22, 2000) ("Henderson II"); Henderson I, 112 F. Supp. 2d at 589; Hildreth v. Dickinson, 1999 U.S. Dist. LEXIS 22503 (M.D. Fla. Dec. 22, 1999), rev'd, 287 F.3d 374 (5th Cir. 2002); Order Dismissing Second Amended Complaint, Fla. Nat'l Org. for Women, Inc. v. Florida (Fla. 2d Cir. Ct. Nov. 21, 2001) (No. CV 00-1953).

[FN29]. Hildreth, 1999 U.S. Dist. LEXIS 22503, at *7-8.

[FN30]. See id.

[FN31]. Id.

[FN32]. 214 F. Supp. 2d at 1308.

[FN33]. See Hildreth, 1999 U.S. Dist. LEXIS 22503, at *7; Women's Emergency Network II, 214 F. Supp. 2d at 1311.

[FN34]. See Hildreth, 1999 U.S. Dist. LEXIS 22503, at *18-21 (ruling the plaintiffs lacked standing because they "failed to even apply for the development of a specialty license plate which espouses their views under the Florida specialty plate statutory scheme" and therefore "failed to demonstrate an actual or imminent injury"); Women's Emergency Network II, 214 F. Supp. 2d. at 1315.

[FN35]. See Hildreth, 1999 U.S. Dist. LEXIS 22503, at *12-22 (ruling that because the plaintiffs had not suffered any injury and therefore did not have standing to file a claim, the court was not required to undertake any First Amendment forum and viewpoint discrimination analysis); Women's Emergency Network II, 214 F. Supp. 2d at 1315.

[FN36]. Order Dismissing Second Amended Complaint at 2-3, Fla. Nat'l Org. for Women, Inc. v. Florida (Fla. 2d Cir. Ct. Nov. 21, 2001) (No. CV 00-1953).

[FN37]. 112 F. Supp. 2d 589 (E.D. La. 2000), rev'd, 287 F.3d. 374 (5th Cir. 2002).

[FN38]. See id. at 591; see also infra Part V for a detailed discussion of the Establishment Clause and application to specialty license plates.

[FN39]. See 112 F. Supp. 2d at 591. See infra Part IV.D for a discussion of viewpoint neutrality requirement in government created or sponsored forum for speech.

[FN40]. See id. at 593 ("[P]laintiffs contend that the Act delegates governmental functions to Christian fundamentalist organizations," and that it "places the State's imprimatur on fundamentalist Christian beliefs.").

[FN41]. Id. at 595.

[FN42]. Id. at 599. "[T]he Act will probably be found to be an unconstitutional violation of the First Amendment right to free speech. The plain fact is that the plaintiffs are not legislatively authorized to use the forum (i.e. a license plate) to express their view(s), and that forum exists for only one point of view as adamantly declared by the State--its own." Id. at 599-600.

[FN43]. See id. at 601 (stating that the threshold for standing is lowered when free speech claims are brought).

[FN44]. Id. at 602.

[FN45]. See id. at 597 ("For purposes of this preliminary injunction, plaintiffs have assumed that the prestige license plates at issue herein constitute a non-public forum, and the Court will analyze the issue as such.").

[FN46]. Id. at 598 ("[O]nce the State creates a forum where viewpoints are expressed, it must be viewpoint neutral. The State has unequivocally taken the stand here that the message 'Choose Life' is its own message .... The State has chosen license plates as a forum for speech. Once it makes this choice it cannot discriminate against another viewpoint.").

[FN47]. See Henderson II, 2000 U.S. Dist. LEXIS 18805 (E.D. La. Dec. 22, 2000), rev'd, 287 F.3d 374 (5th Cir. 2002).

[FN48]. Id. at *4.

[FN49]. Henderson III, 287 F.3d 374, 382 (5th Cir. 2002).

[FN50]. Id. at 367; id. at 384 (Jones, J., concurring); id. at 387 (Davis, J., dissenting).

[FN51]. See Henderson I, 112 F. Supp. 2d 589.

[FN52]. Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, Planned Parenthood of S.C., Inc. v. Rose (D.S.C. 2001) (No. 2-01-3571-23). The resident, who owns a car registered in South Carolina, wanted to purchase a pro-choice license plate but could not because the legislature has not adopted such a plate. Furthermore, she objects to her state income tax being used for all facets of the Choose Life license plate program. See id. at 3.

[FN53]. See id. at 7-14.

[FN54]. Id. at 2, 7. See also infra Part IV.C. (listing three fora that exist and providing explanations of each).

[FN55]. S.C. Code Ann. § 56-3-8910(B) (Law Co-op. 2001).

[FN56]. See Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 6, Planned Parenthood of S.C., Inc. (No. 2-01-3571-23) (quoting S.C. Code Ann. § 56-3-8910(B)).

[FN57]. The defendants, in their official capacity for the State of South Carolina, are the Director of the Department of Public Safety, the Director of the Department of Corrections, and the Director of the Department of Social Services. See id. at 1.

[FN58]. See Answer to Amended Complaint at 1, Planned Parenthood of S.C., Inc.

[FN59]. See supra notes 34 and 49 and accompanying text.

[FN60]. See Order Granting Preliminary Injunction at 7, Planned Parenthood of S.C., Inc.

[FN61]. Warth v. Seldin, 422 U.S. 490, 498 (1975).

[FN62]. See supra notes 34 and 49 and accompanying text.

[FN63]. See Warth, 422 U.S. at 498 ("[Standing] is founded in concern about the proper--and properly limited--role

of courts in a democratic society."). The Supreme Court even stated that standing is "built on a single basic idea--the idea of separation of powers." Allen v. Wright, 468 U.S. 737, 752 (1984). "The notion is that by restricting who may sue in federal court, standing limits what matters the judiciary will address and minimizes judicial review of the actions of the other branches of government." Erwin Chemerinsky, Federal Jurisdiction 57 (3d ed. 1999).

[FN64]. "Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). See also Allen, 468 U.S. at 751 ("The requirement of standing ... has a core component derived directly from the Constitution. A plaintiff must allege a personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.").

[FN65]. To satisfy the standing requirements,

> [A] plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000).

[FN66]. Injury is defined to mean "an invasion of a legally protected interest which is ... concrete ... and 'actual or imminent, not conjectural or hypothetical."' Lujan, 504 U.S. at 560.

[FN67]. See generally Friends of the Earth, 528 U.S. 167 (2000); Lujan, 504 U.S. 555 (1992); Allen, 468 U.S. 737 (1984); Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464 (1982); Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26 (1976); Warth, 422 U.S. at 490. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies." E. Kentucky Welfare Rights Org., 426 U.S. at 37.

[FN68]. The United States Supreme Court went so far as to comment:

> We need not mince words when we say that the concept of "Art. III standing" has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it, nor when we say that this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition.

Valley Forge Christian Coll., 454 U.S. at 475.

[FN69]. Compare Henderson I, 112 F. Supp. 2d 589 (E.D. La. 2000) (finding plaintiffs had sufficient standing to bring suit), with Henderson III, 287 F.3d 374, 382 (5th Cir. 2002) (dismissing suit for lack of standing), Women's Emergency Network II, 214 F. Supp. 2d 1308, 1315 (S.D. Fla. 2002) (same), and Hildreth v. Dickinson, 1999 U.S. Dist. LEXIS 22503 (M.D. Fla. Dec. 22, 1999) (same).

[FN70]. See Henderson III, 287 F.3d at 380 (holding that plaintiffs "failed to allege 'an injury in fact' and, therefore, lack standing to challenge the facial constitutionality" of the "Choose Life" license program); see also Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 2-6, Planned Parenthood of S.C. Inc., v. Rose (D.S.C. 2001) (No. 2-01-3571-23) (providing no indication as to whether constitutional injuries are based on the existence of "Choose Life" plate or failure to pass a "Pro-Choice" plate).

[FN71]. Compare Henderson III, 287 F.3d at 382 (dismissing case for lack of standing), Women's Emergency Network II, 2002 WL 1787951, at *4-7 (dismissing case because plaintiffs did not seek a pro-choice plate in the legislature), and Hildreth, 1999 U.S. Dist. LEXIS 22503, at *2 (same), with Henderson I, 112 F. Supp. 2d at 602 (issuing preliminary injunction even though plaintiffs had not gone before the legislature).

[FN72]. See Henderson III, 287 F.3d at 378-82; Henderson I, 112 F. Supp. 2d at 601; Hildreth, 1999 U.S. Dist. LEXIS 22503, at *19-21.

[FN73]. Hildreth, 1999 U.S. Dist. LEXIS 22503, at *18-19.

[FN74]. Id. at *14-17.

[FN75]. Id. at *17-20.

[FN76]. Id. at *15.

[FN77]. See Women's Emergency Network II, 214 F. Supp. 2d 1308, 1309 (S.D. Fla. 2002) (focusing on whether the legislature approved a pro-life license plate); Henderson I, 112 F. Supp. 2d at 601 (same); Hildreth, 1999 U.S. Dist. LEXIS 22503, at *19 (same).

[FN78]. Henderson I, 112 F. Supp. 2d at 600-01.

[FN79]. Id. at 600.

[FN80]. Id.

[FN81]. See id. at 601 ("[W]hen the First Amendment is in play, however, the Court has relaxed the prudential limitations on standing to ameliorate the risk of washing away free speech protections." (quoting Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984))); see also Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 755-56 (1988) ("[W]hen a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license."); Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 6, Planned Parenthood of S.C., Inc. v. Rose (No. 2-01-3571-23) (D.S.C. 2001) ("It is well-established that the loss of constitutional 'freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."' (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976))).

[FN82]. See Henderson I, 112 F. Supp. 2d at 601 ("Once free speech has been abridged ... there is no case law supporting the proposition that those individuals whose speech has been restrained in this particular forum must wait a week, a month, or a year to have the opportunity to express an opposing viewpoint in that forum.").

[FN83]. See id. ("Those who want to express another point of view should not have to wait a year for the legislature to open the license plate forum particularly in light of the State's pointed espousal of the published opinion to 'Choose Life."'). It is worth noting the plaintiffs in South Carolina did go before the legislature both to seek a pro-choice license plate and to lobby against the "Choose Life" plate. See Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 3 n. 1, Planned Parenthood of S.C., Inc. (No. 2-01-3571-23).

[FN84]. See Henderson I, 112 F. Supp. 2d at 601.

[FN85]. Henderson III, 287 F.3d 374, 382 (5th Cir. 2002).

[FN86]. Id. at 379-80.

[FN87]. Id. at 381.

[FN88]. Id. at 388-89 (Davis, J., dissenting).

[FN89]. See id. at 376-77 (defendants were the Louisiana Secretary of the Department of Public Safety and Corrections and the Treasurer of the State of Louisiana); Women's Emergency Network II, 214 F. Supp. 2d 1308, 1311 (S.D. Fla. 2002) (defendants include Florida Executive Director of Department of Safety and Motor Vehicles, three counties, and two individuals); Women's Emergency Network I, 191 F. Supp. 2d 1356, 1359-60 (S.D. Fla. 2002) (defendants were the same as Women's Emergency Network II except the Florida governor was a party in this case); Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 1, Planned Parenthood of S.C., Inc. v. Rose (D.S.C. 2001) (No. 2-01-3571-23) (defendants include South Carolina Director of the Department of Public Safety, Director of the Department of Corrections, and Director of the Department of Social Services);

Hildreth v. Dickinson, 1999 U.S. Dist. LEXIS 22503, at *1 (M.D. Fla. Dec. 22, 1999) (defendants were the Florida Department of Highway Safety and Motor Vehicles and its director); Order Dismissing Second Amended Complaint at 1, Fla. Nat'l Org. for Women, Inc. v. Florida (Fla. 2d Cir. Ct. Nov. 21, 2001) (No. CV 00-1953) (defendants were the State of Florida and the Executive Director of the Florida Department of Highway Safety and Motor Vehicles).

[FN90]. See, e.g., Henderson III, 287 F.3d at 382 (dismissing case because plaintiffs suffered a speculative injury rather than an actual injury).

[FN91]. See supra note 69 and accompanying text. Plaintiffs in three cases have delineated clearly the foundation for their alleged injury. See Women's Emergency Network II, F. Supp. 2d at 1311 (alleging "[plaintiffs] are unable to purchase specialty plates expressing their pro-choice views"); Henderson I, 112 F. Supp. 2d at 589, 592 (E.D. La. 2000) ("Plaintiffs contend ... that no prestige license plate is available for 'pro-choice' citizens ...."); Hildreth, 1999 U.S. Dist. LEXIS 22503, at *14 ("[T]he injury alleged by the [p]laintiffs is the inability to obtain a license plate with the [p]laintiffs' desired message on it.").

[FN92]. See Henderson III, 287 F.3d at 376 (plaintiffs were three individuals and an organization); Women's Emergency Network I, 191 F. Supp. 2d at 1359 (plaintiffs were two organizations and an individual); Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 1, Planned Parenthood of S.C., Inc., (No. 2-01-3571-23) (plaintiffs were Planned Parenthood of S.C., Inc. and a resident); Hildreth, 1999 U.S. Dist. LEXIS 22503, at *5 (plaintiffs were two residents of Florida); Order Dismissing Second Amended Complaint at 1, Fla. Nat'l Org. for Women, Inc. (No. CV 00-1953) (plaintiffs included two Florida chapters of NOW, a synagogue, and two residents); see also infra note 112 and accompanying text regarding organizational standing.

[FN93]. See Henderson III, 287 F.3d at 377 (free speech and Establishment Clause violations); Women's Emergency Network I, 191 F. Supp. 2d at 1361 (Establishment Clause and Due Process Clause violations); Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 2, Planned Parenthood of S.C., Inc., (No. 2-01-3571-23) (free speech infringement); Hildreth, 1999 U.S. Dist. LEXIS 22503, at *14 (free speech infringement); Order Dismissing Second Amended Complaint at 2, Fla. Nat'l Org. for Women, Inc. (No. CV 00-1953) (free speech and Establishment Clause violations).

[FN94]. In situations involving First Amendment claims, courts will allow plaintiffs to argue a constitutional violation on behalf of themselves and third parties not before the court. See, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.").

[FN95]. See, e.g., County of Riverside v. McLaughlin, 500 U.S. 44, 51 (1991) (acknowledging the plaintiffs "would continue to suffer [their] injury until they received the probable cause determination to which they were entitled."). But see Henderson III, 287 F.3d at 380 ("At best, the focus of the alleged injury complained of by these plaintiffs arises because of an appearance of future impropriety, which we have found insufficient to confer standing.").

[FN96]. See Order at 5, Planned Parenthood of S.C., Inc. (No. 2-01-3571-23) (granting a preliminary injunction because there is a substantial likelihood that plaintiffs will "suffer an irreparable injury ... [and] [d]efendants will suffer no injury if a preliminary injunction is granted"); Henderson I, 112 F. Supp. at 592 (plaintiffs sought, and were granted, an injunction to halt production of the license plates).

[FN97]. Chemerinsky, supra note 63, at 57, 70 (3d ed. 1999). See, e.g., Order at 4 n.1, Planned Parenthood of S.C., Inc. (No. 2-01-3571-23) ("If the Act affects a loss of a constitutional freedom, then there is irreparable harm per se.... Of course to determine that a constitutional freedom has been abrogated is in some part to decide the merits of the case.").

[FN98]. See supra note 92 for list of organizational and individual plaintiffs filing claims.

[FN99]. See Doremus v. Bd. of Educ. of Hawthorne, 342 U.S. 429, 434 (1952) (challenging the constitutionality of

a state statute requiring that the taxpayer "must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, not merely that he suffered in some indefinite way in common with the people generally"); see generally Chemerinsky, supra note 63, at 90-91 (discussing background and early cases involving taxpayer standing).

[FN100]. See, e.g., Frothingham v. Mellon, 262 U.S. 447, 487 (1923) (holding the plaintiff lacked standing because his "interest in the moneys of the treasury ... is comparatively minute and indeterminable"); see also Henderson III, 287 F.3d at 379-81 (finding taxpayers did not have sufficient standing to challenge statute); Women's Emergency Network II, 214 F. Supp. 2d 1308, 1315 (S.D. Fla. July 2002).

[FN101]. See, e.g., Flast v. Cohen, 392 U.S. 83, 106 (1968).

[FN102]. Id. at 102.

[FN103]. Chemerinsky, supra note 63, at 92.

[FN104]. See Flast, 392 U.S. at 102; see also Bowen v. Kendrick, 487 U.S. 589 (1988) (approving taxpayer standing based on alleged Establishment Clause injuries).

[FN105]. See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 487 (1982) ("[The plaintiff's] claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not constituted as an ombudsmen of the general welfare.").

[FN106]. John Witte, Jr., Religion and the American Constitutional Experiment: Essential Rights and Liberties 151 (2000). But see Henderson III, 287 F.3d 374, 379-80 (5th Cir. 2002) (holding the injury complained of was "insufficient to confer standing as the injury ... is, at best, speculative and, at most, constitutes a generalized grievance common to all tax payers in the state").

[FN107]. While taxpayer standing was granted initially in Henderson I, due to free speech and Establishment Clause violations alleged by the plaintiffs, see 112 F. Supp. 2d 589 (2000), the circuit court denied taxpayer standing, Henderson III, 287 F.3d at 381. In Hildreth v. Dickson, the court refused to grant standing for the plaintiffs, ruling that the constitutional violations were not sufficient injuries, thereby not presenting "a justiciable case or controversy." 1999 U.S. Dist. LEXIS 22503, at *21 (M.D. Fla. Dec. 22, 1999). The Women's Emergency Network II court also held the plaintiffs in Florida could not assert taxpayer standing because there was no "evidence to support the notion that any agency appointed to distribute the funds [from the sale of the "Choose Life" license plates] will advance any particular religious ideology." 214 F. Supp. 2d 1308, 1314 (S.D. Fla. 2002).

[FN108]. 392 U.S. at 83.

[FN109]. 454 U.S. at 464.

[FN110]. See supra note 81 regarding the possibility of a lower standing requirement for free speech violations. But see Henderson III, 287 F.3d at 379-80 (denying taxpayer standing to plaintiffs).

[FN111]. See Henderson III, 287 F.3d at 376 n.2 (Greater New Orleans Section of the National Council of Jewish Women and Planned Parenthood of S.C., Inc. were plaintiffs); Women's Emergency Network I, 191 F. Supp. 2d 1356, 1359 (S.D. Fla. 2002) (Women's Emergency Network and Emergency Medical Assistance, Inc. were two of the plaintiffs); Order, Planned Parenthood of S.C., Inc. v. Rose (D.S.C. 2001) (No. 2-01-3571-23) (Planned Parenthood was among the plaintiffs); Order Dismissing Second Amended Complaint at 2-3, Fla. Nat'l Org. for Women, Inc. v. Florida (No. CV 00-1953) (Fla. 2d Cir. Ct. Nov. 21, 2001) (plaintiffs included two Florida chapters of NOW).

[FN112]. Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). See also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000).

[FN113]. See Henderson III, 287 F.3d at 381-82 (discussing both organizational standing and individual standing); Women's Emergency Network II, 214 F. Supp. 2d 1308, 1313-15 (S.D. Fla. 2002) (same); Henderson I, 112 F. Supp. 2d at 600-02 (no distinction between individuals and taxpayers when discussing standing); Order Dismissing Second Amended Complaint at 2-3, Fla. Nat'l Org. for Women, Inc. (No. CV 00-1953) (same).

[FN114]. 287 F.3d at 381.

[FN115]. Id. The Women's Emergency Network II court also followed the Fifth Circuit's holding in Henderson III, 214 F. Supp. 2d at 1313.

[FN116]. See supra note 70 and accompanying text (indicating cases have not clearly articulated the source of the constitutional injuries, either the existence of the "Choose Life" plate or the unavailability of a pro-choice alternative).

[FN117]. See Henderson III, 287 F.3d at 382 (dismissing case for lack of standing); Women's Emergency Network II, 214 F. Supp. 2d at 1315 (same); Hildreth, 1999 U.S. Dist. LEXIS 22503, at *7 (same); Order Dismissing Second Amended Complaint at 2-3, Fla. Nat'l Org. for Women, Inc. (No. CV 00-1953) (same).

[FN118]. See Order at 5, Planned Parenthood of S.C. Inc., v. Rose (D.S.C. 2001) (No. 2-01-3571-23) (issuing preliminary injunction); Henderson I, 112 F. Supp. 2d at 589 (same).

[FN119]. For purposes of analysis within this section, it is assumed there is no contention of viewpoint discrimination. If the state approved only one license plate--the "Choose Life" plate--a plaintiff would have a strong argument that the state has improperly sanctioned viewpoint discrimination. Such a situation creates a circular problem to meet the standing requirement of an injury in fact: the legislature would have to consider both license plates and select only one, thus providing the injury of not having a pro-choice license plate. If this situation occurs, although the requisite injury is present based on the unavailability of a license plate, the state likely will have engaged in impermissible viewpoint discrimination by selecting one plate over another. For further discussion of viewpoint discrimination analysis, see infra Part IV.D.

[FN120]. As indicated in supra note 119, this remedy assumes there is not an issue of viewpoint discrimination. Therefore, it is assumed that the legislature did not consider both license plates and supported only the pro-life plate.

[FN121]. The Supreme Court described the political question doctrine as including "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or ... the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker v. Carr, 369 U.S. 186, 217 (1962).

[FN122]. See, e.g., Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (holding that the case posed a political question which could not be decided by the court even though a constitutional violation was at issue).

[FN123]. The argument can be made that there is no concrete injury based on the lack of a pro-choice plate because those interested in espousing such views could simply display a bumper sticker with the logo or message of their choice on their car. This argument is flawed for two reasons. First, the bumper sticker is not a government sponsored program and therefore such an option does not allow full access to government administrative efforts in producing and distributing the license plates. Second, the purposes of the specialty license plate are both to raise money for and to identify with a particular cause or group. While the bumper sticker would achieve the end of identifying with the group, displaying the sticker would not raise any money for the pro-choice movement, particularly without the assistance of the government. Additionally, in this situation, an injunction halting the "Choose Life" plate would be an improper remedy because the basis of the injury is the unavailability of a pro-choice plate, not the existence of the pro-life plate.

[FN124]. See Henderson III, 287 F.3d 374, 381 (5th Cir. 2002) ("[E]ven if the Choose Life statute is declared unconstitutional, [the plaintiff's] complained of injury would not be redressed as that remedy will not provide [the plaintiff] a forum in which to express her pro-choice viewpoint."); Women's Emergency Network II, 214 F. Supp. 2d 1308, 1313 (S.D. Fla. 2002) ("The Court also finds that [Women's Emergency Network] is unable to satisfy the redressability requirement of standing .... Notably, a favorable result for [Women's Emergency Network] would not present [them] with the opportunity to speak.").

[FN125]. See Order, Planned Parenthood of S.C., Inc., v. Rose (No. 2-01-3571-23) (D.S.C. 2001); Henderson I, 112 F. Supp. 2d 589 (E.D. La. 2000) (issuing a preliminary injunction which was later reversed by the circuit court).

[FN126]. Wooley v. Maynard, 430 U.S. 705, 715 (1977) (recognizing as a form of free speech Jehovah's Witnesses' practice of covering New Hampshire motto of "Live Free or Die" on their license plate because of religious objections).

[FN127]. Id.

[FN128]. See, e.g., Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941, 943-44 (W.D. Va. 2001) (finding that specialty license plates are a form of private speech), aff'd sub nom. Sons of Confederate Veterans, Inc., v. Comm'r of the Virginia DMV, 288 F.3d 610 (4th Cir. 2002); Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099, 1101-04 (D. Md. 1997) (same).

[FN129]. Jack Achiezer Guggenheim & Jed M. Silversmith, Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment, 54 U. Miami L. Rev. 563, 580 (2000). See also Holcomb, 129 F. Supp. 2d at 944 (noting that organizations are responsible for the design of the specialty license plates).

[FN130]. See Herald, supra note 1, at 615 ("When the space [on a specialty license plate] is sold for expressive purposes to car owners ... the government should not be able to deny that the expressive function exists or claim that its existence is somehow superseded by the identification function.").

[FN131]. Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 833 (1995) ("[W]hen the State is the speaker, it may make content-based choices.").

[FN132]. 129 F. Supp. 2d at 944.

[FN133]. See supra note 1 and accompanying text.

[FN134]. United States Postal Serv. v. Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981) ("The First Amendment does not guarantee access to property simply because it is owned or controlled by the government."); Holcomb, 129 F. Supp. 2d at 945 ("The fact that the government owns the medium for speech to which [p]laintiffs seek access does not change the character of that speech into the Commonwealth's message.").

[FN135]. Holcomb, 129 F. Supp. 2d at 945 (relying on Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000)).

[FN136]. See Fla. Stat. Ann. § 320.08056(4)(dd) (West 2001) (requiring individuals who want the "Choose Life" license plate to pay an annual use fee of $20 in addition to regular license plate fee); La. Rev. Stat. Ann. § 47:463.61(C) (West 2001) (requiring annual use fee of $25 in addition to regular license plate fee); S.C. Code Ann. § 56-3-8910(A) (Law. Co-op. 2001) (requiring use fee of $70 every two years in addition to regular license plate fee).

[FN137]. See Wooley v. Maynard, 430 U.S. 705, 717 n.15 (1977) (noting that a car is "readily associated with [its] operator").

[FN138]. See Holcomb, 129 F. Supp. 2d at 943 ("[P]lates honoring various occupational associations, civic and fraternal associations, industry associations, and so forth all represent the views of private actors, who are entitled to First Amendment protection."); see also Henderson II, 2000 U.S. Dist. LEXIS 18805, at *3 (E.D. La. Dec. 22, 2000) ("[T]he speech at issue is that of private citizens expressing it through a forum for private speech created by the State which is undoubtedly not viewpoint neutral.").

[FN139]. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

[FN140]. The Supreme Court has used four factors to determine which forum the government has created or intended to create. These factors are government policy, government practice, nature of the property, and the property's "compatibility with expressive activity." Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

[FN141]. See id. at 800 ("[T]he extent to which the [g]overnment can control access depends on the nature of the relevant forum.").

[FN142]. In Henderson I, the district court analyzed the plates as if they were nonpublic fora, but the court did not rule on the specific fora at issue. 112 F. Supp. 2d 589, 597 (E.D. La. 2000). See supra notes 117-18 and accompanying text for outcomes of the "Choose Life" cases decided thus far.

[FN143]. Perry Educ. Ass'n, 460 U.S. at 45 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

[FN144]. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

[FN145]. Perry Educ. Ass'n, 460 U.S. at 45.

[FN146]. Forbes, 523 U.S. at 678.

[FN147]. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985). See also Perry Educ. Ass'n, 460 U.S. at 47 ("[S]elective access does not transform government property into a public forum."). Examples of limited public fora include libraries and schools, for which the government could "allow some expressive activity without having to open it up to every group and every type of speech." Herald, supra note 1, at 625.

[FN148]. Cornelius, 473 U.S. at 802.

[FN149]. Id. (noting that designated public fora may be limited to "use by certain speakers, or for the discussion of certain subjects").

[FN150]. Perry Educ. Ass'n, 460 U.S. at 46.

[FN151]. United States v. Kokinda, 497 U.S. 720, 726-27 (1990) (citing Perry Educ. Ass'n, 460 U.S. 37 at 45-46).

[FN152]. See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995) ("Discrimination against speech ... is presumed to be unconstitutional.").

[FN153]. Perry Educ. Ass'n, 460 U.S. at 45.

[FN154]. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 816 (2000).

[FN155]. "Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." City of Boerne v. Flores,

521 U.S. 507, 534 (1997).

[FN156]. Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

[FN157]. Id. at 679 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985)).

[FN158]. Perry Educ. Ass'n, 460 U.S. at 46.

[FN159]. Herald, supra note 1, at 628.

[FN160]. See Perry Educ. Ass'n, 460 U.S. at 46 (stating that regulation of nonpublic fora must meet reasonableness standard).

[FN161]. Gen. Media Communications, Inc. v. Cohen, 131 F.3d 273, 282 (2d. Cir. 1997).

[FN162]. Cornelius, 473 U.S. at 806 (1985); see also Perry Educ. Ass'n, 460 U.S. at 46 ("In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes ... as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.").

[FN163]. See Cornelius, 473 U.S. at 806.

[FN164]. "The SCV is a non-profit, historical, educational, and benevolent organization whose membership consists of men who can demonstrate genealogically that one of their ancestors served honorably in the Confederate armed forces in ... the Civil War ...." Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099, 1100 (D. Md. 1997).

[FN165]. The SCV plates display the organization's name and logo, which depicts the Confederate battle flag. Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941, 943 (W.D. Va. 2001), aff'd sub nom. Sons of Confederate Veterans, Inc. v. Comm'r of the Virginia DMV, 288 F.3d 610 (4th Cir. 2002); Glendening, 954 F. Supp. at 1100; N.C. Div. of Sons of Confederate Veterans v. Faulkner, 509 S.E.2d 207, 209 n.1 (N.C. Ct. App. 1998).

[FN166]. See Holcomb, 129 F. Supp. 2d at 948 (holding that specialty plate is a designated public forum). But see Glendening, 954 F. Supp. at 1102 (declining to address the forum by deciding the case on viewpoint discrimination); Faulkner, 509 S.E. 2d at 211 (failing to undertake forum analysis because SCV met all factors the state legislature established to receive a specialty license plate).

[FN167]. Holcomb, 129 F. Supp. 2d at 948.

[FN168]. See id.

[FN169]. See Jacobs, supra note 6, at 447 (noting that state legislatures establish guidelines for specialty plates, thus "evinc[ing] an intent to open a particular piece of government property for private speech").

[FN170]. Herald, supra note 1, at 608.

[FN171]. See Perry v. McDonald, 280 F.3d 159, 169 (2d Cir. 2001) (concluding a vanity plate is a nonpublic forum); Pruitt v. Wilder, 840 F. Supp. 414, 417 n.2 (E.D. Va. 1994) (assuming, but not deciding, that a vanity plate is a nonpublic forum); Kahn v. Dep't of Motor Vehicles, 20 Cal. Rptr. 6, 10 (Ct. App. 1993) (holding that a vanity plate is a nonpublic forum); Higgins v. Driver & Motor Vehicle Serv. Branch, 13 P.3d 531, 537 (Or. Ct. App. 2000) (en banc) (same). But see Lewis v. Wilson, 253 F.3d 1077, 1079 (8th Cir. 2001) (expressing skepticism about categorizing a vanity license plate as a nonpublic forum because of its similarity to a bumper sticker with a political message).

[FN172]. See Perry, 280 F.3d at 168 (“Because vanity plates are physically restricted by size and shape and by the state's interests, including that of vehicle identification, vanity plates are a highly limited and extremely constrained means of expression.”); see also Guggenheim & Silversmith, supra note 129, at 582 (“The purpose of the vanity plate is ... to identify to the state the owner of a vehicle. There is no added element such as a logo. The vanity plate merely allows the owner to select which letters and numbers ... are to be used ....”).

[FN173]. See Guggenheim & Silversmith, supra note 129, at 582 (“Specialty plates should be presumed viewpoint expressive because their purpose is to identify vehicle owners with a specific organization and show that owners endorse such organizations' purpose and objectives.”).

[FN174]. See Perry, 280 F.3d at 168 (concluding that government did not intend to create a designated public forum on vanity plates).

[FN175]. See e.g., Sons of Confederate Veterans, Inc v. Holcomb, 129 F. Supp. 2d 941, 949 (W.D. Va. 2001) (holding that restrictions on plates did not meet the strict scrutiny standard), aff'd sub nom. Sons of Confederate Veterans Inc., v. Comm'r of the Virginia DMV, 288 F.3d 610 (4th Cir. 2002); Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp 1099, 1102 (D. Md. 1997) (applying no forum analysis because court decided the case on viewpoint discrimination); N.C. Div. of Sons of Confederate Veterans v. Faulkner, 509 S.E.2d 207, 211 (N.C. Ct. App. 1998) (holding that state had met all of the requirements for a specialty plate thus negating the court's obligation to undertake forum analysis).

[FN176]. The Supreme Court has held that fear of controversy or unrest is not sufficient justification for limiting speech in a government-sponsored forum. See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969). (“[A]pprehension of disturbance is not enough to overcome the right to freedom of expression.”).

[FN177]. The Supreme Court has not ruled whether states may claim avoidance of an Establishment Clause violation as a compelling interest for forum analysis. See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 113 (2001) (“[I]t is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination.”).

[FN178]. See supra note 176.

[FN179]. See supra note 175 for the outcomes of SCV cases.

[FN180]. A state issuing the “Choose Life” license plates might claim a compelling interest of promoting adoption rather than abortion. However, a court could find that limiting pro-choice plates is not a narrowly drawn alternative because states may promote their ideologies in a certain way without limiting the voices of the pro-choice movement. Other possible compelling state interests have also been discussed and disputed. See Herald, supra note 1, at 641-57 (discussing and rejecting four possible compelling government interests for limiting license plates: “(1) protection of a captive audience; (2) prevention of the appearance of state endorsement; (3) protection of children; and (4) prevention of road rage”).

[FN181]. During the Virginia General Assembly's 1998 debate over the “Choose Life” plates, one representative observed, “I don't think our license plates should be used for political advocacy.... This is what you use bumper stickers for.” Guggenheim & Silversmith, supra note 129, at 566 (quoting Justin Blum, Virginia License Plate Plan Runs into Abortion Fight, Wash. Post, Dec. 19, 1998, at B1). A Louisiana representative remarked during that state legislature's debate, “[W]hat [the legislature] should be debating is whether license plates should be that specialized.... If the Legislature lets people put their views on their license plates, then the Legislature ought not be in the business of saying some views are better than others.” Steve Ritea, Anti-Abortion License Plate Drawing Fire, Times-Picayune (New Orleans), July 19, 2000, at A1.

[FN182]. See supra notes 169-74 and accompanying text.

[FN183]. See Sons of Confederate Veterans, Inc., v. Glendening, 964 F. Supp. 1099, 1102 (D. Md. 1997).

[FN184]. Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941, 945 (W.D. Va. 2001), aff'd sub nom. Sons of Confederate Veterans, Inc., v. Comm'r of the Virginia DMV, 288 F.3d 610 (4th Cir. 2002).

[FN185]. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508-09 (1969).

[FN186]. See Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

[FN187]. See Henderson I, 112 F. Supp. 2d 589, 599 (E.D. La. 2000) (basing decision for preliminary injunction on "appearance" of viewpoint discrimination).

[FN188]. See supra note 10 for statutes passed by state legislatures.

[FN189]. See supra notes 121-22 and accompanying text for discussion of separation of powers and application of the political question doctrine.

[FN190]. See supra note 25.

[FN191]. See generally Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 878 (1992) (holding that a state may enact regulations regarding the health and safety of women); see also Henderson I, 112 F. Supp. 2d at 595 (explaining that state of Louisiana claimed it could express its preference for adoption, and opposition to abortion, because of ruling in Casey); Krall, supra note 15 (quoting the assistant deputy attorney general of South Carolina as stating, "'Choose Life' is a universal message, not a political message .... Obviously, choosing life is relevant beyond the abortion debate.").

[FN192]. See supra Part IV.B explaining that the speech of a specialty license plate belongs to the individual.

[FN193]. See supra notes 119-24 and accompanying text for discussion of injury in fact and requirement of seeking the legislature's approval for a pro-choice license plate.

[FN194]. See supra note 2 for text of Establishment Clause; see also Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (expressly applying the Establishment Clause to the states through the Fourteenth Amendment).

[FN195]. See Henderson III, 287 F.3d 374, 380 (5th Cir. 2002) (claiming violation of Establishment Clause for state's delegation of authority to a religious organization); Women's Emergency Network II, 214 F. Supp. 2d 1308, 1314 (S.D. Fla. 2002) (same); Henderson I, 112 F. Supp. 2d 589, 593 (E.D. La. 2000).

[FN196]. See, e.g., Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 398 (1985) ("[T]he Establishment Clause 'rest[s] on the belief that a union of government and religion tends to destroy government and to degrade religion."' (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962))); Lemon v. Kurtzman, 403 U.S. 602, 623 (1971) ("The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government."); Torcaso v. Watkins, 367 U.S. 488, 493 (1961) ("In the words of [Thomas] Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and State." (internal quotation marks omitted)); s ee generally Witte, supra note 106, at 149-84 (providing thorough history and explanation of Establishment Clause jurisprudence).

[FN197]. Witte, supra note 106, at 163.

[FN198]. See Agostini v. Felton, 521 U.S. 203, 233 (1997) ("Interaction between church and state is inevitable and

we have always tolerated some level of involvement between the two." (citation omitted)); Witters v. Wash. Dep't of Serv. for the Blind, 474 U.S. 481, 486 (1986) ("[T]he Establishment Clause is not violated every time money previously in possession of a State is conveyed to a religious institution."); Lemon, 403 U.S. at 614 ("Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.").

[FN199]. Lemon, 403 U.S. at 625 ("The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.").

[FN200]. See Witters, 474 U.S. at 485 ("The Establishment Clause of the First Amendment has consistently presented this Court with difficult questions of interpretation and application."); Ball, 473 U.S. at 385 ("Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."); Mueller v. Allen, 463 U.S. 388, 393 (1983) ("[I]t is not at all easy ... to apply this Court's various decisions construing the [Establishment] Clause to governmental programs of financial assistance ...."); Lemon, 403 U.S. at 612 ("[The Court] can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law. The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment."); see also Witte, supra note 106, at 163 ("The Court has been struggling mightily for more than a decade to bring this unwieldy mass of precedents to some semblance of order and predictability. But for the moment, an integrated law of disestablishment remains only a distant ideal.").

[FN201]. Witte, supra note 106, at 163.

[FN202]. 403 U.S. at 602.

[FN203]. Agostini, 521 U.S. at 219 (internal quotation marks omitted).

[FN204]. The Lemon court outlined the test as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement with religion." 403 U.S. at 612-13.

[FN205]. Mueller, 463 U.S. at 394.

[FN206]. Meek v. Pittenger, 421 U.S. 349, 359 (1975); see also Hunt v. McNair, 413 U.S. 734, 741 (1973) (stating that the Lemon test provides "no more than [a] helpful signpost" in dealing with Establishment Clause challenges).

[FN207]. See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819 (1995); Bowen v. Kendrick, 487 U.S. 589 (1988); Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481 (1986); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Mueller v. Allen, 463 U.S. 388 (1983); Meek, 421 U.S. at 349; Hunt v. McNair, 413 U.S. 734 (1973).

[FN208]. 521 U.S. at 203.

[FN209]. Id. at 233.

[FN210]. Id. at 234.

[FN211]. Id. at 236.

[FN212]. See generally Witte, supra note 106, at 149-84 (providing thorough history and explanation of current law of Establishment Clause).

[FN213]. See Henderson III, 287 F.3d 374, 380 (5th Cir. 2002) (claiming violation of Establishment Clause for state's delegation of authority to a religious organization); Women's Emergency Network II, 214 F. Supp. 2d 1308, 1314 (S.D. Fla. July 12, 2002) (same); Henderson I, 112 F. Supp. 2d 589, 593 (E.D. La. 2000) (same).

[FN214]. See Henderson I, 112 F. Supp. 2d at 593-95 (following original Lemon test rather than the revised test, even though the Supreme Court developed the latter three years prior to the instant case).

[FN215]. The "Choose Life" license plates should undergo the modified Lemon analysis because religious organizations are involved in the distribution of funding and could receive such funds for adoption-related services.

[FN216]. See Fla. Stat. Ann. § 320.08058(30)(b) (West 2001) (purpose of the program is to "counsel[] and meet[] the physical needs of pregnant women who are committed to placing their children for adoption" and funds are not to be used for "abortion activities"); La. Rev. Stat. Ann. § 47:463.61(F)(2) (West 2001) (similar purpose); S.C. Code Ann. § 56-3-8910(B) (Law. Co-op. 2001) (similar purpose); see also Choose Life Inc., Benefits Derived From the Choose Life License Plate, at http://www.choose-life.org/benefits.html (last visited July 21, 2002) (describing specific purposes and benefits of "Choose Life" license plate).

[FN217]. See Fla. Stat. Ann. § 320.08058(30)(a) (providing that license plate is designed by the Department of Motor Vehicles and must include "'Choose Life' at the top of the plate"); La. Rev. Stat. Ann. § 47:463.61(A) (providing that license plate is designed by Choose Life Advisory Council and must include the words "Choose Life"); S.C. Code Ann. § 56-3-8910(A) (providing that Department of Public Safety designs license plates).

[FN218]. See Fla. Stat. Ann. § 320.08058(30)(b) (providing that annual use fees are distributed to each county based on the sales in each county and then distributed by the county to a nongovernmental agency involved in adoption); La. Rev. Stat. Ann. § 47:463.61(E)(1) (creating Choose Life Advisory Council to "review grant applications for qualifying organizations"); S.C. Code Ann. § 56-3-8910(B) (providing that Department of Social Services is to distribute funds). The "Choose Life Advisory Council" created in Louisiana specifically included "[t]he president, or his designee" from the American Family Association, the Louisiana Family Forum, and the Concerned Women for America, all of which are nonprofit organizations that are based on religious principles and involved in numerous public policy issues. See La. Rev. Stat. Ann. § 47:463.61(E)(1)(a)-(c); see also http://www.afa.net/ (last visited July 21, 2002) (containing information on the American Family Association); http://www.lafamilyforum.org/ (last visited July 21, 2002) (containing information on the Louisiana Family Forum); http://cwfa.org/ (last visited July 21, 2002) (containing information on the Concerned Women for America).

[FN219]. See Fla. Stat. Ann. § 320.08056(4)(dd) (providing that individuals who want the "Choose Life" license plate must pay an annual use fee of $20 in addition to regular license plate fee); La. Rev. Stat. Ann. § 47:463.61(C) (providing that annual use fee is $25 in addition to regular license plate fee); S.C. Code Ann. § 56-3-8910(A) (providing that use fee is $70 every two years in addition to regular license plate fee). The Florida "Choose Life" license plate has generated over $1 million since they were first sold. Choose Life Newsletter, at http://www.choose-life.org/newsletter.html (last visited July 21, 2002) (providing a total for all "Choose Life" license plates sold).

[FN220]. See Mueller v. Allen, 463 U.S. 388, 394-95 (1983) ("[The United States Supreme Court is] reluctan[t] to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute.").

[FN221]. The texts of the statutes refer to counseling and other adoption-related services, specific functions that could not be a pretext for a religious purpose. See Fla. Stat. Ann. § 320.08058(30)(b); La. Rev. Stat. Ann. § 47:463.61(F)(2); S.C. Code Ann. § 56-3-8910(B).

[FN222]. A court should recognize if the council departs from its stated mission based on its membership. Simply because a council established to administer the program might include members of religious organizations, the purpose does not necessarily become religious, and therefore fatal, under Establishment Clause analysis. See Agostini v. Felton, 521 U.S. 203, 226 (1997) (stating there is "no reason to presume" that because a public school teacher taught in a parochial school classroom she "will depart from her assigned duties ... and embark on religious

indoctrination").

[FN223]. See supra notes 218-19 and accompanying text for description of mechanisms used to distribute funds and the annual use fees for the plates. Courts should consider whether the funds are given to religious organization because of private choice. See infra Part V.B.2 for discussion on funding of religious organizations based on private choice.

[FN224]. Upon reviewing the Louisiana "Choose Life" license plate statute, the district court in Henderson I unequivocally stated, "[O]n the face of the statute, it is impossible to say that the primary effect would be to promote religion." 112 F. Supp. 2d 589, 594 (E.D. La. 2000).

[FN225]. See supra note 216. It is worth noting that although the license plate program has a secular purpose, the initiative is not free of religious ties as some in the religious community support the endeavor. In one documented instance, a religious organization, the Parishioners of Sacred Heart Parish, sponsored a billboard in Punta Gorda, Florida, encouraging residents to "Take a Stand for Life!" The billboard includes the parishioners' message next to a sample of the Florida "Choose Life" license plate. See Choose Life Newsletter, at http://www.choose-life.org/newsletter.html (last visited July 21, 2002) (containing a picture of the billboard). However, incidental affiliations with religious entities are permissible, provided the statute has a secular purpose. See Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2465 (2002) (stating that school voucher program, which ultimately provided public funds to religious schools, was permissible because "the program challenged ... was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system").

[FN226]. See supra note 210 and accompanying text.

[FN227]. The "governmental indoctrination" inquiry is "ultimately a question whether any religious indoctrination that occurs ... could reasonably be attributed to governmental action." Mitchell v. Helms, 530 U.S. 793, 809 (2000).

[FN228]. See Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 842 (1995) (The Supreme Court has "recognized special Establishment Clause dangers where the government makes direct money payment to sectarian institutions."); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 394 (1985) ("The question in each case must be whether the effect of the proffered aid is 'direct and substantial' or indirect and incidental." (quoting Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 784-85 n.39 (1973))).

[FN229]. See Zelman, 122 S. Ct. at 2467 (holding that a government program that "provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice ... is not readily subject to challenge under the Establishment Clause"); Agostini v. Felton, 521 U.S. 203, 226 (1997) (explaining that the correct rule is whether "any money that ultimately went to religious institutions did so only as a result of the genuinely independent and private choices of individuals" (quoting Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481, 487 (1986))). The Witters Court noted that a religious institution receiving money from the government because of a private citizen's decision was analogous to the state paying an employee and knowing she would donate her paycheck to a religious institution. The Court observed that either situation was acceptable because it was the private individual who directed how the money was spent. Witters, 474 U.S. at 486-87.

[FN230]. See Mitchell, 530 U.S. at 809 .

[FN231]. Id. ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Supreme Court has] consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups ... without regard to their religion.").

[FN232]. This Comment uses "revenue flow" to refer to the annual fee that is paid initially by a car owner who decides to purchase a "Choose Life" license plate, the total funds collected by the proper state government entity, and the revenue distributed to the adoption groups as defined by the state statute.

[FN233]. One way to characterize the revenue flow is based on an individual's decision to purchase the plate with knowledge that the funds will be given to adoption organizations, possibly religious in nature, and the government serving as a medium for the collection and distribution of funds. A second way to classify the revenue flow is that an individual decides to purchase a "Choose Life" license plate without the knowledge the funds may go to a religious organization, and the government decides which groups are to receive funding. The difference between the two categorizations is defining whether the taxpayer or the government decides ultimately where the money is spent and the role the government plays in either scenario: "decisionmaker" or conduit for the funds.

[FN234]. The individual, knowing funds might go to religious organizations, recognizes the fee will be spent on adoption causes when she purchases the "Choose Life" license plate design and the government merely provides a ministerial function by ensuring the specific groups will receive funding. The United States Supreme Court asserted that "'the reasonable observer in the endorsement inquiry must be deemed aware' of the 'history and context' underlying a challenged program." Zelman, 122 S. Ct. at 2460-69 (quoting Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001)). Therefore, a court can assume the car owner knows the funds might go to religious organizations.

[FN235]. The revenue flows can be illustrated as such:

[FN236]. See, e.g., Zelman, 122 S. Ct. at 2463 (allowing public funds to be spent on school vouchers, some of which were used for religious schooling); Good News Club, 533 U.S. at 103 (allowing a private Christian organization to use school building paid for with tax dollars); Mitchell v. Helms, 530 U.S. 793, 1803 (2000) (allowing some federal tax dollars to be used for materials and equipment loaned to Catholic schools); Agostini v. Felton, 521 U.S. 203, 208 (1997) (allowing public school teachers, paid by tax revenue, to teach remedial education to students in parochial schools); Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 822-23 (1995) (allowing student activity fund from a state university to be used for printing a religious organization's publication).

[FN237]. See supra notes 136-38 and accompanying text for relevant analysis of actions involved with ordering and displaying the "Choose Life" license plate that indicate the speech is that of the individual car owner.

[FN238]. See Zelman, 122 S. Ct. at 2468 ("[W]e have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the imprimatur of government endorsement."); Mitchell, 530 U.S. at 810 ("For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot ... grant special favors that might lead to a religious establishment.").

[FN239]. See supra notes 20, 25, and 27 for descriptions of the Florida, Louisiana, and South Carolina license plates respectively.

[FN240]. See supra note 11 for religious basis of "Choose Life" slogan.

[FN241]. The Supreme Court has observed the "symbolic union" of church and state in various government programs and has factored this union into the "effects" inquiry. See Agostini, 521 U.S. at 220 (discussing "graphic symbol of the 'concert or union or dependency' of church and state" (quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952))); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985) ("[A]n important concern of the effects test is whether the symbolic union of church and State effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement ... of their individual religious choices."). The plaintiffs in Louisiana raised the "symbolic union" claim but the district court did not specifically comment on this point. See Henderson I, 112 F. Supp. 2d 589, 592 (E.D. La. 2000).

[FN242]. Zelman, 122 S. Ct. at 2468-69 (quoting Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001)).

[FN243]. See supra notes 134-38 and accompanying text.

[FN244]. Agostini, 521 U.S. at 234.

[FN245]. See Zelman, 122 S. Ct. at 2468 (permitting school voucher program for which "benefits are available to participating families on neutral terms, with no reference to religion"); Mitchell v. Helms, 530 U.S. 793, 816 (2000) (concluding that neutral distribution of government aid is constitutional); Agostini, 521 U.S. at 231 (allowing program "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis"); Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 839 (1995) ("[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."); Mueller v. Allen, 463 U.S. 388, 398-99 (1983) ("[A] program ... that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.").

[FN246]. See supra notes 12 and 216 for criteria and purposes of "Choose Life" license plate program.

[FN247]. La. Rev. Stat. Ann. § 47:463.61(F)(2) (West 2001).

[FN248]. See Mitchell, 530 U.S. at 827 ("[T]he religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose.").

[FN249]. See Agostini, 521 U.S. at 231 ("[A] financial incentive to undertake religious indoctrination ... is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.").

[FN250]. See supra notes 12 and 216 for criteria and purposes of "Choose Life" license plate program.

[FN251]. To evaluate excessive entanglement, the Supreme Court has examined, among other factors, "the resulting relationship between the government and religious authority." Agostini, 521 U.S. at 232 (quoting Lemon v. Kurtzman, 403 U.S. 602, 615 (1971)).

[FN252]. The Supreme Court seems to be moving away from analyzing the constitutionality of a statute based on the quantifiable effects of a government program. Compare Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2470 (2002) ("The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."), Agostini, 521 U.S. at 229 ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid."), Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481, 491 n.3 (1986) (White, J., concurring) (concluding a statute's constitutionality should not depend on number of students who "use [federal] assistance to pursue religious training"), and Mueller v. Allen, 463 U.S. 388, 401 (1983) ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."), with Mitchell, 530 U.S. at 803 (noting that, while constitutional, 41 of 46 private schools to receive funding as part of a government program were religiously affiliated), and Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985) ("Given that [40] out of the [41] schools ... are thus 'pervasively sectarian,' the challenged public school programs operating in the religious schools may impermissibly advance religion ....").

[FN253]. See Women's Emergency Network I, 191 F. Supp. 2d 1356, 1359 (S.D. Fla. 2002) (plaintiffs claimed that ten counties designated a Roman Catholic organization to allocate funds to adoption agencies); Henderson I, 112 F. Supp. 2d 589, 592 (2000) (plaintiffs claim that Louisiana statute "delegates government functions to Christian fundamentalist organizations"); see also supra note 218 and accompanying text for description of mechanisms established to distribute annual use fees.

[FN254]. This analysis would also apply to schemes such as Florida's that allow individual counties to distribute the

funds. See supra note 218 and accompanying text (describing Florida's system of dispensing funds).

[FN255]. See supra notes 218 and 222; see also Witte, supra note 106, at 183 (“It is one thing to prevent government officials from delegating their core police powers to religious bodies, quite another thing to prevent them from facilitating the charitable services of voluntary religious and nonreligious associations alike.”).

[FN256]. See supra notes 245-49 and accompanying text. The Women's Emergency Network II court stated “[T]he evidence shows that even Catholic Charities, the proverbial basket in which [the p]laintiffs place the mass of their eggs, distributed a [Florida] [c]ounty's funds equally among all qualified agencies. There is simply no showing that any regard has been given to religious affiliation.” 214 F. Supp. 2d 1308, 1314 (S.D. Fla. 2002).

[FN257]. See supra notes 9 and 219 for discussion of money raised by sale of specialty license plates.

[FNa1]. J.D., Emory University School of Law, Atlanta, Georgia (2003); B.A., Emory University, Atlanta, Georgia (1997). I would like to thank my family for their unwavering support during my law school career and the writing of this Comment. I especially want to thank my wife, Rashelle, for tolerating my numerous long days in the library and late nights in front of the computer and for her encouragement in all stages of law school. I also wish to thank my brother, Michael, for his invaluable insight and assistance in editing nearly every draft throughout the process, and for his inspiration along the way. Special thanks to Professor Charles Shanor, Professor John Witte, Jr., and Anne Marie Herron for their guidance and advice throughout the course of this Comment.

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