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The Public Sensibilities Forum

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INTRODUCTION

The constitutional rule is clear: the government, and the public that it serves, must tolerate even "outrageous" and "offensive" speech to fulfill the First Amendment's guarantee of a robust and wide open marketplace of ideas. The quintessential Free Speech Clause evil is government action that suppresses some speech because others do not want to hear it. So, the government cannot police the private speech market to ensure that expression is in good taste, decent, or not upsetting. It cannot "forbid particular words" in public speech to "protect the sensitive" from a "distasteful mode of expression," or even prohibit hate-motivated speech that may cause listeners extreme emotional distress. Because such "public sensibility" stan-
dards would homogenize what should be a diverse offering of expression, the Constitution places the burden on those who dislike the speech to avoid it. That the government acts in response to the complaints of offended constituents—even a large number of them—does not justify restricting the unpopular speech. Rather, such a response constitutes an unconstitutional “heckler’s veto” of protected expression.

The exception to this rule is that the government itself can speak, and when it does so, it can choose what to say. It can cater to public sensibilities when crafting its own speech. It can deliberately favor some types of speech and disfavor others. If the government wants to speak homogeneously, it can do so. Specifically, pursuant to its responsibility to serve the interests of the public who elected it, it can discriminate in its own speech against unpopular ideas or modes of expression that are constitutionally protected when privately uttered.

Between the extremes of private speech and government speech lies the vast middle ground of government/private speech interaction. This type of interaction occurs in the many instances where the government subsidizes private speech by allocating funds or property access to support it. Some points within this middle ground are charted. Treated more like government speech are interactions where the government mingles its expression with the favored private expression, such as when it finances private speakers as its agents to pursue a legitimate public policy, acts as an editor if it falls into the “fighting words” category, i.e., words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace” (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

9 See Madsen, 512 U.S. at 773 (noting that a clinic can “pull its curtains” to protect patients from “images observable” outside); Erznoznik v. Jacksonville, 422 U.S. 205, 208-09 (1975) (stating that the government’s ability to “protect its citizens against unwilling exposure to materials that may be offensive” is limited to circumstances where “the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure”); Cohen, 403 U.S. at 2 (“Those [offended by vulgar word on a jacket] could effectively avoid further bombardment of their sensibilities simply by averting their eyes.”).

10 See, e.g., Edwards v. South Carolina, 372 U.S. 229, 237 (1963) (noting that the state cannot silence expression simply because it is “sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection”).

11 See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) (“[T]he government [may] regulate the content of what is or is not expressed when it is the speaker . . . .”); see also Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (noting that “when the government speaks, for instance to promote its own policies or to advance a particular idea,” the constitutional analysis is “altogether different” from the analysis that applies when the government regulates private speech).

12 See, e.g., Rust v. Sullivan, 500 U.S. 173, 194 (1991) (“When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.”).

13 See Rosenberger, 515 U.S. at 833 (“[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”); Rust, 500 U.S. at 194 (“[A prohibition against funded entities’ counseling about abortion] is not a case of the Government ‘suppressing a dan-
to compile private speech into a publication, or funds expression pursuant to a program designed to select and encourage "excellent" expression. Public sensibilities can be used to allocate access to these types of government subsidies. In particular, when deciding among art grant applicants the government may consider whether the art is "decent" and "respect[s] . . . [the] values of the American public," even though these criteria would be impermissible in speech regulations.

But the instances where government assistance to private speakers becomes government speech are limited to those where government expression is a primary purpose of the program.

Treated more like regulation of private speech are the many instances where the government maintains or creates a "forum" for private speech without itself "speaking." When the government creates a private speech forum, it has more discretion to discriminate among the types of speech that occur in it than it does when it restricts private speech generally. Still, limits to its discretion apply. The standards of access to any forum must...
at least be reasonable, meaning that the government can articulate some legitimate reason for excluding certain types of speech or speakers from the forum, and viewpoint neutral, meaning that the exclusion cannot be based on the viewpoint of the speaker. What constitutes viewpoint discrimination is far from clear. 24 The prohibition against it at least means, however, that the government may not exclude “speech discussing otherwise permissible subjects” from a forum because of its particular viewpoint. 25 It means that access to a forum cannot depend upon a majority vote. 27 It also means that access standards cannot be so vague or subjective as to create the risk that such viewpoint discrimination will occur in the forum’s administration. 28

Despite the fact that they pose these viewpoint discrimination dangers, the “public sensibilities forums” exist, and are thriving. In a wide range of situations that do not constitute government speech, governments have created opportunities for private speakers to gain access to public property or funds and have conditioned access on standards such as the speech being in good taste, 29 decent, 30 not controversial 31 or not offensive. 32 Often the stan-

23 See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45-46 (1983) (articulating three types of forum—traditional public, limited public, and nonpublic—and the rules that apply to each).

24 See Lee, 505 U.S. at 679 (holding that in a nonpublic forum, where access standards are subject to the most “limited review,” a “challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker’s activity due to disagreement with the speaker’s view”).

25 Rosenberg v. New Jersey, 515 U.S. at 831 (noting that the distinction between content and viewpoint discrimination “is not a precise one”).


27 See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 304 (2000) (“[S]tudent elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits . . . [do] nothing to protect minority views but rather place[] the students who hold such views at the mercy of the majority.”); Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (“The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent.”).

28 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975) (“The danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum’s use.”); United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg’l Transit Auth., 163 F.3d 341, 359 (6th Cir. 1998) (deciding that in administering a private speech forum, officials’ decision to limit access must be “constrained by objective criteria” and not rest on “ambiguous and subjective reasons” (quoting Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814, 818 (9th Cir. 1996))).

29 See United Food & Commercial Workers Union, 163 F.3d at 346 (6th Cir. 1998) (advertising on public transit vehicles must be “aesthetically pleasing”); Air Line Pilots Ass’n v. Dep’t of Aviation of Chicago, 45 F.3d 1144, 1148 (7th Cir. 1995) (advertising in display case must be “in good taste”); Claudia v. United States, 836 F. Supp. 1230, 1235 (E.D.N.C. 1993) (holding that government may insist that art displayed in federal courthouse be compatible “with the image and sense of decorum [of] the Federal Government”); Kahn v. Dep’t of Motor Vehicles, 20 Cal. Rptr. 2d 6, 9 (Cal. Ct. App. 1993) (noting that vanity plates may not “carry connotations offensive to good taste and decency” (quoting CAL. VEH. CODE § 5105(b) (West 1992))).

30 See AIDS Action Comm. of Mass. v. MTBA, 42 F.3d 1, 3 (1st Cir. 1994) (establishing guidelines
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standards forbid specific types of speech, such as those which pertains to sexual conduct, are derogatory toward particular groups, disparage a deity, or relate to an intoxicating substance. While the decision-making authorities operate under some type of written guidelines, they also frequently rely on citizen complaints as the basis for determining when particular speech offends public sensibilities and should be prohibited. Both these standards and the "heckler's veto" method of enforcement violate the rules of any type of "forum."

Examples of the de facto "public sensibilities forum" include "vanity" license plate programs, advertising in public spaces, and art displays in public places. Despite their prevalence, their constitutional status is re-of "good taste" and "decency"); Kahn, 20 Cal. Rptr. 2d at 9.

See United Food & Commercial Workers Union, 163 F.3d at 346 (excluding as a matter of policy "[advertising of controversial public issues" from all Metro Bus advertising space) (alteration in original).

Claudio v. United States, 836 F. Supp. 1230, 1232 (E.D.N.C. 1993) (holding that courthouse officials can refuse to place painting in lobby because it constitutes a "visual horror").

See, e.g., AIDS Action Comm. of Mass., 42 F.3d at 4 (forbidding advertisements that describe sexual conduct "in a patently offensive way").

See, e.g., Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099, 1100 (D. Md. 1997) (recounting how specialty license plates with confederate flag logo were recalled because of its "negative racial connotations").

See, e.g., Jean Godden, Foolin' State on Your Plate NOEZTSK, SEATTLE TIMES, Apr. 16, 1995, at B1 (noting that Washington state vanity plates cannot have letter combinations that are "blasphemous").

See id. (noting that Washington state vanity plates cannot have letter combinations that "relat[e] to illegal substances"); Frank J. Prial, WINE TALK, N.Y. TIMES, May 7, 1997, at C8 (noting that Oregon vanity plate rules forbid letter combinations that "refer to any intoxicating liquor or controlled substance or their use").

See, e.g., AIDS Action Comm. of Mass., 42 F.3d at 3 (noting that the record includes letters of complaint lodged by transit authority riders who were offended by the advertisements at issue); Confederate Veterans, 954 F. Supp. at 1100 (noting that the administrator explained his decision to recall specialty plates based on the "numerous, substantial complaints ... received in recent days"); Mike Royko, Profane Car Plates and All That Jazz, CHI. TRIB., Feb. 25, 1987, at 3 (describing an Arizona driver with "JAZZME" plate who received a letter beginning, "Since a complaint was filed with this office, I must recall the plates.").

See, e.g., CAL. CODE REGS. tit. 13, § 170.00(e)(3)(D) (2000). In California, drivers may apply for configurations on their license plates, except that they cannot be "offensive to good taste and decency, or ... misleading," which exclusions include a configuration that "has a sexual connotation or is a term of lust or depravity," "is a vulgar term; a term of contempt, prejudice, or hostility; an insulting or degrading term; a racially degrading term; or an ethnically degrading term," "is a swear word or term considered profane, obscene or repulsive," "has a negative connotation to a specific group," or "misrepresents a law enforcement entity." Id.

See, e.g., United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341, 346 (6th Cir. 1998) (prohibiting advertising on the exteriors of metropolitan buses and shelters "that adversely affect [the] ability to attract and maintain ridership"); Air Line Pilots Ass'n v. Dep't of Aviation of Chicago, 45 F.3d 1144, 1148 (7th Cir. 1995) (stating that advertising displays at O'Hare International Airport must be "in good taste," and not "political, immoral, or illegal").

See, e.g., Sefick v. Gardner, 164 F.3d 370, 373 (6th Cir. 1998) (finding that government can prefer "sedate and decorous exhibits ... while excluding the comic, the caustic, and the acerbic"); Claudio
markably uncertain. Disputes about application of the access rules are often resolved informally. These resolutions come to public attention only when a reporter takes interest or the aggrieved subsidy applicant has the tenacity to sue. In the former situation, the government’s censorship becomes the butt of joking journalist commentary and sometimes heated reader reaction. In the latter, confusion reigns as courts and individual judges struggle to reconcile their intuitions about the appropriate scope of the government’s discretion to discriminate among private speakers in the context at issue with the rule that forbids viewpoint discrimination in the administration of private speech forums.

The confusion reveals a crucial weakness in the current “forum” doctrine. As the Court has collapsed the distinctions between different types of government-created forums, the inquiry that has emerged as determinative to the constitutionality of them all is whether the access standards discrimi-
nate according to viewpoint. But a unitary concept of “viewpoint discrimination” fails to include the considerations of context that must bear on the government’s discretion to discriminate among private speakers. Its application leads to results that conflict with sound intuitions about the proper balance of constitutional interests.

For example, prohibiting references to religious practices or figures may constitute invidious viewpoint discrimination when allocating access to a civic center or funds for student publications. But is a state really required by the Constitution to issue vanity license plates that proclaim “GODZGUD” or “PRAY”? Similarly, that swear words, sex talk and ethnic epithets are lyrical to someone may justify protecting their use in city-owned theaters or in publications that receive discounted postage. But must a state be required to allow such words and imagery in its public transit advertising? Further, regulating violent speech or images may be fraught with constitutional danger in the context of a municipal auditorium. But must a federal courthouse, when it agrees to display private art,
devote the wall of its entrance to a larger-than-life depiction of a dead, bloody fetus? 57

Different conclusions about the scope of the government’s discretion to exclude private speakers from the speech opportunities according to their context may seem to make sense. The problem, however, is that it strains current doctrine to explain the different results according to a single concept of “viewpoint discrimination.” Rather, the proper inquiry is what risks of viewpoint discrimination are constitutionally tolerable in the context of the particular forum. 58 Although the particular access standards and their administration remain relevant to the constitutional inquiry, it is a combination of characteristics that defines the legitimate public sensibilities forum.

This Article spells out these characteristics that identify the legitimate public sensibilities forum. Part I discusses the spectrum of constitutional government speech promotion. This Part accepts the current boundaries as mapped by the Supreme Court and identifies the public sensibilities forums as operating within a middle ground the Court has not yet charted. Part II defines the legitimate public sensibilities forum. Subpart II.A. argues for its legitimate existence despite the risks of viewpoint discrimination that it poses. Subpart II.B. identifies the factors that characterize a legitimate public sensibilities forum. These factors are the government’s assumed responsibility for discriminating according to public sensibilities, its authority to employ public sensibilities standards in the particular context, the limited impact of its speech opportunity and the precision, content, and the administrative procedure of the standards. Finally, Part III applies this analysis to the public sensibilities forums that have generated such confusion.

I. THE SPECTRUM OF CONSTITUTIONAL GOVERNMENT SPEECH PROMOTION

The Supreme Court’s articulations as to the meaning of the First Amendment establish a range of discretion within which the government may operate to discriminate with respect to the content of expression. This discretion can be arranged conceptually on a spectrum. 59 The outer edges are defined. The murky middle ground is not well charted. It is within this area that the public sensibilities forum is operating.


A. The Established Points on the Government/Private Speech Interaction Spectrum

The First Amendment provides that "Congress shall make no law... abridging the freedom of speech." Although not absolute, this guarantee applies most strongly to limit government efforts to suppress private speech that seeks entry into the marketplace of ideas. The core value protected by the free speech guarantee is "the free flow of ideas and opinions on matters of public interest and concern." The prime threat to this value is government censorship or favoritism that skews public dialogue, presumably shaping it to endorse the majority's point of view. The government cannot regulate such speech in a message-sensitive way unless it can show that the restriction is narrowly tailored to serve a compelling government interest. Protecting the public from speech that is distasteful, offensive, controversial or contrary to public values is not generally a

60 U.S. CONST. amend. I.
61 See, e.g., Neb. Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976) ("This Court has frequently denied that First Amendment rights are absolute."); see also William J. Brennan, Jr., The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 HARV. L. REV. 1, 5 (1965) ("The absolute view [of the First Amendment] has not prevailed with the Court.").
62 The guarantee of free speech applies to the states through the due process clause of the Fourteenth Amendment. See Gitlow v. New York, 268 U.S. 652, 666 (1925).
63 See Hustler Magazine v. Falwell, 485 U.S. 46, 51 (1988) ("[The Court has been] vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions...[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market..." (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))).
64 Hustler, 485 U.S. at 50.
65 See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) ("The government may not regulate... based on hostility—or favoritism—towards the underlying message expressed."); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785-86 (1978) ("Especially where... the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is offended.").
66 See United States v. Playboy Entm't Group, 529 U.S. 803, 879 (2000) ("[A statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest."). (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989))).
67 See Hustler, 485 U.S. at 55 (finding that the Constitution forbids jurors from imposing liability on speech because it conflicts with their "tastes or views").
68 See, e.g., Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); FCC v. Pacifica Found., 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it."); Street v. New York, 394 U.S. 576, 592 (1969) ("It is firmly settled that... the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").
69 Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (deciding that the government cannot deny the use of a forum "to those wishing to express... more controversial views").
70 See id. (deciding that the government cannot deny use of a forum to "less favored" speech).
71 But see Lehman v. City of Shaker Heights, 418 U.S. 298, 303-305 (1974) (holding that a city can exclude political advertising from transit advertising space in part to protect a "captive audience" from
compelling government interest. Rather, the government must permit and even protect outrageous speech in order to preserve an uninhibited flow of ideas. Even when it regulates private speech without respect to the message, impacting only its time, place, or manner, the government must demonstrate that the regulation is narrowly tailored to serve a substantial government interest.

The permissible range of government action is different when it promotes speech, rather than restricts it. On one side of the spectrum, government itself can speak. When it does, it necessarily chooses to emphasize some topics and viewpoints over others. So, for example, the government can advocate democracy, attempt to persuade teenagers to “Just Say No” speech that is “controversial”); Rowan v. United States Post Office Dep’t, 397 U.S. 728, 740 (1970) (holding that Congress can authorize postmaster to withhold “offensive” mailings upon homeowner’s request).

72 See, e.g., Gregory v. City of Chicago, 394 U.S. 111, 112 (1969) (holding that the police cannot arrest protesters for disorderly conduct because onlookers become unruly).

73 Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) (“An ‘outrageousness’ standard [for excluding speech from First Amendment protection] runs afool of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.”).

74 Id. at 53 (“Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred . . . .” (quoting Garrison v. Louisiana, 379 U.S. 64, 73 (1964))); N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964) (“[D]ebate on public issues should be uninhibited, robust, and wide-open . . . .”).


76 See id. at 798 (“[A] regulation of time, place or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so.”).
to drugs and advise the American public to eat less fat, without being required by the Constitution to promote competing policies. This selectivity, while highly suspect and almost always unconstitutional when the government regulates private speech, fulfills the ideal of democratic self-determination in the government speech context.

By extension, the government has this same ability to favor certain subjects and viewpoints when it funds private parties to be its agents in pursuing its policies. Because the government can legitimately decide to promote childbirth over abortion it can, in distributing subsidies to family planning agencies, direct that their doctors not use the funds to talk to patients about abortion. This obvious favoritism of one viewpoint over another does not violate the Constitution because, rather than regulating private speech, the government is using its definition of the public interest to define the scope of its spending.

In many other ways, however, the government can promote private speech without designating the favored speakers as the government's agents. Because the government provides assistance to private speech as private speech, the constitutional values that allow the government great discretion in choosing the content of its own speech do not apply. Instead, the competing constitutional concern of governmental distortion of the private speech market comes into play. Because of the government's vast control over places and means for all communication—both governmental and

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80 See, e.g., Jennings Parrott, First Family Stresses Three Little Words: Just Say No, L.A. TIMES, May 21, 1986, at 2 ("During a White House ceremony after Congress proclaimed 'Just Say No Week,' [President] Reagan praised the first lady [for her campaign for young people to 'Just Say No' to drugs.").

81 See, e.g., Rosie Mestel, The Food Pyramid: Does It Miss the Point?, L.A. TIMES, Sept. 1, 2000, at A1 (reporting that the government published its "first dietary guidelines" in 1980 "which are the basis for government nutrition and education programs today," including the food pyramid).

82 See Rosenberger, 515 U.S. at 828 ("In the realm of private speech or expression, government regulation may not favor one speaker over another.").

83 See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.").

84 See Rosenberger, 515 U.S. at 833 ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."); Rust, 500 U.S. at 194 (deciding that where federal funding for family planning services forbids recipients from using the funds to speak about abortion it "is not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside the project's scope").

85 See Rust, 500 U.S. at 193; see also Regan v. Taxation with Representation of Washington, 461 U.S. 540, 551 (1983) (holding that Congress does not engage in impermissible viewpoint discrimination when it subsidizes lobbying by veterans' groups and no others). But see Legal Services Corp. v. Valasquez, 121 S. Ct. 1043, 1049 (2001) (stating that the government cannot discriminate among viewpoints in funding lawyers to represent welfare claimants because, unlike the funded doctors' speech in Rust, the attorney's speech "cannot be classified as government speech even under a generous understanding of the concept").

86 Rust, 500 U.S. at 194.
private—the “forum” doctrine limits the government’s ability to selectively advantage or disadvantage private speakers when it provides aid for private speech; this limit is analogous to the limits that apply to private speech restrictions. The “forum based” approach originated as a way to “assess[] restrictions that the government seeks to place on the use of its property.” It has now been extended to evaluate “metaphysical forums” where the government distributes money for speech rather than access to engage in it.

The traditional public forum is at the most speech-protective end of forum analysis. The public forum includes government property such as streets, parks, and sidewalks, which have by history and tradition been open to public access and expression. Despite government ownership, the objective characteristics of this property “require the government to accommodate private speakers.” Because the traditional public forum is a place vital for the free flow and exchange of private speech, the limits on government grants of access to a traditional public forum are as stringent as when it affirmatively restricts expression. Any sort of exclusion that de-

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89 Rosenberger, 515 U.S. at 830 (deciding that a student activity fund is “a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable”); see also Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 230 (2000) (finding principles of the public forum cases “controlling”); Gentala v. City of Tucson, 213 F.3d 1055, 1062 (9th Cir. 2000) (“Although the [Civic Events] Fund is not a forum for speech in the physical sense, as a government-created source of funding to cover costs associated with engaging in behavior deserving First Amendment protection, the Fund is a forum within the meaning of the First Amendment.”).
90 See Lee, 505 U.S. at 679 (stating that “streets and parks” are traditional public forums (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939))); Frisby v. Schultz, 487 U.S. 474, 481 (holding a residential street to be a traditional public forum); Perry, 460 U.S. at 45 (listing “streets and parks” as examples of traditional public forums).
93 See Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 677 (1998) (“Traditional public fora are defined by the objective characteristics of the property, such as whether, ‘by long tradition or by government fiat,’ the property has been ‘devoted to assembly and debate.’” (quoting Perry, 460 U.S. at 45)).
94 Id. at 678.
95 See Laurence H. Tribe, American Constitutional Law 987 (2d ed. 1988) (noting that public forums are “areas playing a vital role in communication”).
96 Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992) (“[R]egulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny.”).
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pends on the content of a speaker's expression is subject to strict scrutiny. So, government can make almost no subject matter exclusions from a public forum, and is even less likely to be able to exclude speech based upon its viewpoint. The determination of what constitutes a public forum depends crucially upon a history of its being open for public discourse. The category thus appears limited to the streets, parks, and sidewalks already declared to be such traditional public forums.

The next two types of forum are the "designated" public forum and the nonpublic forum. A designated public forum is property, such as meeting spaces or theaters, that the government intentionally opens for public expression. A nonpublic forum is government property on which the government permits some "selective access" for private expression, but which is not generally open for public discourse.

97 See Forbes, 523 U.S. at 677.
98 See Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92, 94 (1972) (explaining that government cannot distinguish between labor and all other picketing in granting access to the sidewalk). But see Burson v. Freeman, 504 U.S. 191, 211 (1992) (holding that the government can exclude political speech from within 100 feet of entrance to polling places on election day).
100 See Lee, 505 U.S. at 680 ("[G]iven the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having 'immemorially... time out of mind' been held in the public trust and used for purposes of expressive activity."") (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

101 The two terms "designated" and "limited" public forum initially referred to different scopes of government action in creating a public forum. A "designated public forum" is a property which the government, through its explicit and intentional conduct, has designated as a forum generally open to the public for expressive activity. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983). The government can, however, limit a designated public forum to certain topics or classes of speakers. See id. at 46 n.7. This type of designated public forum is a limited public forum. See Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 789-90 (1985); Perry, 460 U.S. at 47. In practice, the government does not designate forums without limitation. See, e.g., Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 232 (2000) (explaining that even where university funds speech "distinguished not by discernable limits but by its vast, unexplored bounds," forum is limited because it funds only student speech). Most recently, the Court has merged the terms. See Lee, 505 U.S. at 678 ("The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public."); Forbes, 523 U.S. at 677 (same).

102 Lee, 505 U.S. at 678-79 (noting that the nonpublic forum category consists of "all remaining public property").

105 See Forbes, 523 U.S. at 677 ("Designated public fora... are created by purposeful governmental action."). "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." (quoting Cornelius, 473 U.S. at 800).
106 See id. at 679 ([T]he government creates a designated public forum when it makes its property
clude household mail boxes, open areas of a military base, a school’s internal mail system, the federal government’s annual charity drive, sidewalk areas around a post office, airport terminals, and a televised candidate debate.

The rules that limit the government’s discretion to exclude particular speakers from a designated and a nonpublic forum supposedly differ. In particular, although the government does not have to create a designated public forum, once it does so the strict rules of the traditional public forum are said to apply. By contrast, “[t]he government can restrict access to a nonpublic forum ‘as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker’s view.” This distinction’s limiting effect on government discretion is illusory, however, because the government’s definition of the forum’s scope determines its boundaries. In creating either a designated or nonpublic forum, the government can restrict access to a limited class of speakers or for limited topics. Because only the limits of reasonableness and viewpoint neutrality restrict the how the government can define the boundaries of either type of forum, there is no important analytical difference between them.

Instead, the “designated public forum” label is de-generally available to a certain class of speakers,” but “does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, ‘obtain permission . . . to use it.” (quoting Cornelius, 473 U.S. at 804)).

110 See Cornelius, 473 U.S. at 790.
114 See id. at 677 (“If the government excludes a speaker who falls within the class of speakers to which a designated public forum is made generally available, its action is subject to strict scrutiny.”); Lee, 505 U.S. at 678 (“Regulation of [a designated public forum] is subject to the same limitations as that governing a traditional public forum.”).
116 See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (“The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”).
117 See id. (characterizing funding mechanism as a limited public forum, but applying rules of the nonpublic forum—exclusions must be “reasonable in light of the purpose served by the forum” and may not “discriminate against speech on the basis of its viewpoint” (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 804-06 (1985))); Cornelius, 473 U.S. at 825-27 (Blackmun, J., dissenting) (explaining that rules of limited public forum and nonpublic forum are not meaningfully different); Gentala v. City of Tucson, 213 F.3d 1055, 1062 n.4 (9th Cir. 2000) (“[T]he distinction between a limited public forum and a nonpublic forum is a semantic distinction without an analytic difference.”); Warren v. Fairfax County, 196 F.3d 186, 194 n.8 (4th Cir. 1999) (en banc) (agreeing with Justice Blackmun’s observation in Cornelius that the “limited public forum [is] analytically indistinct from a nonpublic fo-
scriptive only, seeming to identify particular types of nonpublic forums that the government has chosen to make more generally available to private speakers than other government property or funds. In determining the government's discretion to make distinctions when aiding private speakers, the current forum doctrine thus looks most fundamentally to whether the government's action creates a traditional public or a permissibly more restrictive forum. While the traditional public forum rule recognizes that the government's vast power to control private expression by controlling access to public resources requires some degree of mandatory open access, the less speech-protective rules that guide administration of nonpublic forums recognize that most government property serves purposes other than free expression and that, to function properly, the government must be able to limit the use of its property to its intended purposes. 

As noted above, restrictions on speech in a nonpublic forum must be viewpoint neutral and reasonable "in light of the purpose of the forum and all the surrounding circumstances." The reasonableness inquiry occasionally seems to look to the compatibility of included and excluded types of speech with the property at issue, but more often accords wide deference to the government's judgment as to appropriate exclusions. Thus the requirement of viewpoint neutrality is left as the operational principle that limits the government's discretion to discriminate among

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118 See Forbes, 523 U.S. at 679 ("A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers.").

119 See Lee, 505 U.S. at 679-80 ("[T]he government—like other property owners—has power to preserve the property under its control for the use to which it is lawfully dedicated.") (quoting Greer v. Spock, 424 U.S. 828, 836 (1976)); Cornelius, 473 U.S. at 800 ("[T]he extent to which the Government can control access depends on the nature of the relevant forum.").

120 Cornelius, 473 U.S. at 809.

121 See Forbes, 523 U.S. at 681 (The format of the debate and the number of ballot-eligible candidates renders it reasonable to exclude some to avoid "cacophony" and promote "the educational value and quality of [the] debate." (quoting TWENTIETH CENTURY FUND TASK FORCE ON PRESIDENTIAL DEBATES, LET AMERICA DECIDE 148 (1995)); Lee, 505 U.S., at 683-84 (finding solicitation ban in airports reasonable because of "the disruptive effect that solicitation may have on business" and the "risks of duress" presented by the activity); id. at 689 (O'Connor, J., concurring) ("Face-to-face solicitation is incompatible with the airport's functioning in a way that the other, permitted activities are not.").

122 See, e.g., United States v. Kokinda, 497 U.S. 720, 732-33 (1990) (excluding solicitation from sidewalk between parking lot and post office is reasonable); Cornelius, 473 U.S. at 811 (excluding certain types of charities from fund drive is reasonable); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46-47 (1983) (excluding rival union from school mail system is reasonable). But see Lee, 505 U.S. at 692 (O'Connor, J., concurring) ("Because I cannot see how peaceful pamphleteering is incompatible with the multipurpose environment of the Port Authority airports, I cannot accept that a total ban on that activity is reasonable without an explanation as to why such a restriction 'preserv[es] the property' for the several uses to which it has been put." (quoting Perry, 460 U.S. at 50-51)) (alteration in original).
private speakers when distributing speech subsidies that create a forum. 123

Working inward from one end, the spectrum of government control over the content of the private expression it facilitates runs from very little when it regulates private speech that occurs without government subsidy or in the traditional public forum, to more control in a nonpublic forum. At the other end, the spectrum of control runs from almost absolute when the govern­ment speaks for itself, to great control when it enlists private people to speak as its agents. In the middle, between the nonpublic forum and the instance where government speaks through private agents, is the less charted realm of government/private speech interaction. 124 In this area, the gov­ernment subsidizes private speech as private speech. Its action thus falls outside the category of speech by government agents. At the same time, the government places access limits on its subsidies which, although perhaps not incontrovertibly aimed at suppressing a particular point of view, create a realistic danger of being applied in that way or having that effect. Govern­ment action in this area, then, does not clearly meet the viewpoint neutrality requirement of a legitimate nonpublic forum.

Two recent Supreme Court decisions touch certain aspects of this murky middle ground. In Arkansas Educational Television Commission v. Forbes, the Court clarified that the government can discriminate among private messages when it acts as an editor, compiling a range of private pieces into a unique act of expression. 125 It is “the nature of editorial discre­tion,” which requires “choos[ing] among speakers with different view­points,” that “counsels against subjecting [public] broadcasters to claims of viewpoint discrimination.” 126 Similarly, “like a university selecting a commence­ment speaker, a public institution selecting speakers for a lecture se­ries, or a public school prescribing its curriculum, a broadcaster [exercising its editorial discretion] . . . will facilitate the expression of some viewpoints instead of others.” 127 Although government editors “can and do abuse this power . . . [c]alculated risks of abuse are taken in order to preserve higher values.” 128 Because the exercise of journalistic discretion by a government

123 Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (noting that a university may use mandatory student fees to promote open discussion so long as “viewpoint neutrality” is the operational principle); see also Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (“[T]he State [may not] exercis[e] viewpoint discrimination, even when the limited public forum is one of its own creation.”).

124 See Forbes, 523 U.S. at 678 (“Where the property is not a traditional public forum and the govern­ment has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all.”).

125 Id. at 673.

126 Id.

127 Id. at 674.

128 Id. at 673-74 (quoting Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 124-25 (1973)).
The Public Sensibilities Forum

editor is "speech activity," the values that protect the government's discretion to choose the content of its own speech place the government editor's action on the government speech side of the spectrum.

The Forbes challenge, however, was to a candidate's exclusion from a broadcasted debate. The Court found this particular program a "narrow exception" to the rule that a public broadcaster has the discretion of a government speaker. Both because of the "design" and "implicit representation" as to the nature of the debate—as a forum for speech that was not the broadcaster's own—and because of the peculiarly important nature of political speech, the Court found the debate to be a nonpublic forum. In this context, viewpoint discrimination would not represent an acceptable '[c]alculated ris[k]," but rather would produce "an inevitability of skewing the electoral dialogue." The Court then went on to find Forbes's exclusion appropriately based on his status as a candidate with little public support, and thus not impermissibly viewpoint based.

In the other case, National Endowment for the Arts v. Finley, the Court addressed the government's discretion to set standards for arts funding. In response to controversy over federal government funding of several pieces of art, Congress amended the National Endowment for the Arts's authorization to state that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." The NEA distributes money to private organizations and individuals to further a "national policy of support for the . . . arts." The art produced, however, is neither government speech nor the speech of government agents in furtherance of an underlying substantive policy. Accordingly, in upholding the provision the Court did not immediately and

129 Id. at 674.
130 Id. at 675.
131 Id. ("[T]he debate was by design a forum for political speech by the candidates," and "[c]onsistent with the long tradition of candidate debates, the implicit representation of the broadcaster was that the views expressed were those of the candidates, not its own.").
132 Id. ("[I]n our tradition, candidate debates are of exceptional significance in the electoral process.").
133 See id. at 680.
134 Id. at 676. (quoting Columbia Broad. Sys., Inc., v. Democratic Nat'l Comm., 412 U.S. 94, 125 (1973) (alteration in original)).
135 The Court noted, "[t]here is no substance to Forbes' suggestion that he was excluded because his views were unpopular or out of the mainstream. His own objective lack of support, not his platform, was the criterion." Id. at 683.
138 Finley, 524 U.S. at 573 (citing 20 U.S.C. § 953(b) (1994)).
139 See id. at 611 (Souter, J., dissenting) ("The Government freely admits . . . that it neither speaks through the expression subsidized by the NEA, nor buys anything for itself with its NEA grants.").
exclusively rely on precedents in these areas. Nor did the Court hold that the provision was constitutional as a basis upon which to administer any type of private speech forum. The concurrence and dissent labeled the “decency and respect” criteria viewpoint discriminatory. The Court acknowledged that its subjectivity and vagueness might render it invalid in the criminal or regulatory context.

Instead, the Court distinguished the government funding at issue from government subsidies that create a forum. In contrast to government subsidies that “indiscriminately ‘encourage a diversity of views from private speakers’” or require “comparably objective decisions on allocating public benefits,” the NEA funding is “competitive,” “highly selective,” and allocated for the purpose of rewarding and encouraging “artistically excellent” projects. The “mandate to make aesthetic judgments” and “the inherently content-based ‘excellence’ threshold” are fundamentally incompatible with the “neutrality” required when the government administers a private speech forum. Consequently, the Court placed this arts funding more toward the government speech and government agent end than the forum end of the subsidy spectrum. It held the “decency and respect” provision facially consistent with substantive free speech principles. It also held that, “in the context of selective subsidies,” the standards were not unconstitutionally vague, noting that although “as a practical matter, . . . artists may conform their speech to what they believe to be the decision-making criteria in order to acquire funding,” “when the Government is acting as patron rather than as a sovereign, the consequences of imprecision are not constitutionally severe.”

140 See id. at 587-88 (referring to the government agent decisions as “final” considerations after upholding the constitutionality of the provision).
141 See id. at 590 (Scalia, J. concurring) (“By its terms, [the NEA authorization] establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated.”); id. at 600 (Souter, J., dissenting) (“The decency and respect proviso mandates viewpoint-based decisions in the disbursement of government subsidies . . . .”).
142 Id. at 587-87 (“[T]he government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.”); id. at 588 (“The terms of the provision . . . could raise substantial vagueness concerns [in the criminal or regulatory context].”).
143 Id. at 585-87.
144 Id. at 586.
145 See id. at 588 (“Congress may selectively fund a program to encourage certain activities it believes to be in the public interest [and] [i]n doing so, ‘the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.’” (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991))).
146 See id. at 586 (distinguishing the NEA’s mandate to make esthetic judgments from the fund subsidy in Rosenberger, which was nonselective, and from other access subsidies, which are “comparatively objective”).
147 See id. at 587 (“[W]e have no occasion here to address an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination.”).
148 Id. at 589. The Court also added, “[t]he 954(d)(1) merely adds some imprecise considera-
In both *Forbes* and *Finley*, the Court acknowledged the two ends of the spectrum of government speech promotion. On one hand, in *Forbes* and *Finley* the Court effectively excised two related types of government subsidies of private speech from the murky middle ground and placed them on the government speech end of the spectrum, where the government has broad discretion to discriminate among speakers. On the other hand, however, both cases emphasized the limits of the government speech-related categories. In both cases the Court confirmed that merely aiding private speech, by providing access or funding, does not give the government the same discretion it has with its own speech to discriminate according to message. Something more is required.

Both *Forbes* and *Finley* make clear that what distinguishes cases in which the government may employ viewpoint discrimination from cases in which it may not is a feature that infuses government's private speech promotion with the values that attach to government speech. These cases are best understood as instances where the Court examined the nature of the government action and found the government selection process itself to be a speech act that would be thwarted if the forum rule prohibiting viewpoint discrimination were applied. Public broadcasters communicate messages by "compil[ing] ... the speech of third parties." The NEA, as arts patron, "make[s] esthetic judgments" that communicate what meets its "‘excellence’ threshold for ... support." Not only is it appropriate to award discretion to the government to discriminate in these instances because the government intended to communicate in making its private speech selections, but it is also crucially important that the public understands this intention so that the government is politically accountable for its speech selections. These "editorial" and "competitive quality" judgments by the government in interacting with private speakers thus constitute the innermost points on the spectrum where the government retains discretion to discriminate among speakers in a way that creates a substantial risk of viewpoint discrimination.

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149 See Alan E. Bronstein, *Alternative Maps for Navigating the First Amendment Maze*, 16 Const. Comment. 101, 135 (1999) ("[W]hen the government property, program, or subsidy system at issue serves some expressive purpose, government selectivity in employing private speech to further that purpose should not be understood to create a forum for First Amendment purposes.").


151 *Finley*, 524 U.S. at 586; *Bezanson*, supra note 59, at 971 ("The government’s role was purposive and expressive, a status in which it must, to express its own preference, discriminate against competing viewpoints.").

152 See *Finley*, 524 U.S. at 586 ("The NEA’s mandate is to make esthetic judgments."); *Forbes*, 523 U.S. at 675 (explaining that public broadcast licensees are “accountable for broadcast performance;” debate is nonpublic forum because of the “implicit representation of the broadcaster ... that the views expressed were those of the candidates, not its own”).
B. The De Facto Public Sensibilities Forum

Although the boundaries of the “editorial discretion” and “competitive quality judgment” subsidies are not entirely clear,\(^{153}\) even at their broadest they do not include most of the realm of government/private speech interaction. Specifically, these cases do not address the constitutionality of the “public sensibilities forum.” A public sensibilities forum differs from the government/private speech interactions that occur when the government exercises editorial discretion or makes competitive quality judgments because, in a public sensibilities forum, the government opens a speech opportunity to applicants without intending to send a message of its own. Instead, the intent and appearance of the speech opportunity is as a “forum” where private speakers, not the government, are accountable for the content of the expression.

A public sensibilities forum resembles these other government/private speech interactions, however, because its access standards pose the same sort of “risk” of viewpoint discrimination as in these other contexts. In particular, the “decency and respect for public values” standard for arts funding is much like the access standards used in many of the de facto public sensibilities forums. On one hand, these standards are often not viewpoint discriminatory on their face and will not inevitably be applied to suppress disfavored viewpoints.\(^{154}\) On the other hand, their reference to majority sensibilities and their vagueness create a substantial danger that they will be applied in this way. The Court acknowledged this danger in reviewing the “decency and respect” standard for arts funding.\(^{155}\) Rather than label the public sensibilities standard viewpoint neutral, and therefore permissible even if the funding constituted a nonpublic forum, the Court took pains to distinguish the context of arts funding from forums where the prohibition against viewpoint discrimination would apply.\(^{156}\)

Public sensibilities standards, like the “decency and respect” standard applied to arts funding, condition access to a speech opportunity upon meeting standards that depend upon the public’s reaction to the private speech. Although constitutionally tolerable in the context of arts funding, these standards applied in nonpublic forums create the substantial possibility that they will act as a “heckler’s veto,” skewing speech in an unconstitutionally viewpoint-sensitive way. It is this tension between the two inconsistent

\(^{153}\) See, e.g., Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085 (2000). The Ku Klux Klan argued that underwriting of public television programs is like advertising and should be analyzed under forum doctrine. See id. at 1092. The Court disagreed, holding that such decisions fall under editorial discretion and so the station can reject the Ku Klux Klan as sponsor. See id. at 1094-95.

\(^{154}\) See Finley, 524 U.S. at 582 (noting that hortatory language and legislative history “undercut respondents’ argument that the provision inevitably will be utilized as a tool for invidious viewpoint discrimination”).

\(^{155}\) See id. at 588 (noting that public dislike of particular pieces of art by particular artists prompted adoption of the standards and that its terms were “undeniably opaque”).

\(^{156}\) See id. at 587-89.
concepts drawn from opposite sides of the government/private speech spectrum—(potentially viewpoint-based) public sensibilities— with (mandatorily viewpoint-neutral) forum—that creates the uncertain status of this type of government/private speech interaction. A sampling of these de facto “public sensibilities forums” follows.

1. Vanity License Plates.—Under personalized or vanity license plate programs, drivers, for an extra fee, can choose the configuration of numbers and letters on their plates. Typical standards forbid “[a]ny combination . . . that may carry connotations offensive to good taste and decency, or which could be misleading.” Often, the Department of Motor Vehicles (DMV) places the policy on the vanity plate application. Usually, the task of determining what combinations are unacceptable is delegated to an administrative employee, who can refer controversies to a several-person panel. The DMV may have a “no-no list” to aid it in its initial determinations of offensiveness. Once plates are issued, the DMV reacts to citizen complaints in deciding to recall plates. Plates recalled under this type of

1 See id. at 588 ("So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities."); Rust v. Sullivan, 500 U.S. 173, 194 (1991) ("Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.").

159 See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995) (deciding that viewpoint-based restrictions are not proper “when [a university does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers”); Rust, 500 U.S. at 199-200 ("[T]his Court has recognized that the existence of a Government 'subsidy,' in the form of Government-owned property, does not justify [certain types of] restrictions of speech.").

160 See, e.g., CAL. YEH. CODE § 5105 (West 1987).

161 See Royko, supra note 37, at 3 (noting standard on Arizona plate applications).


163 See Lewis, 89 F. Supp. 2d at 1085 (recognizing that clerk’s initial decision to issue plate is “forwarded to a review committee”); Pruitt, 840 F. Supp. at 416 ("[I]f a letter combination is not on the list [of unacceptable combinations] but appears questionable in light of the policy, the combination is referred to a ‘word committee’ for a determination of whether it violates DMV policy."); Godden, supra note 35, at 319 ("In Washington, the censor’s job falls to the Personalized Plate Review Committee, four employees at the Department of Licensing.").

164 See, e.g., Lewis, 89 F. Supp. 2d at 1085 (“From time to time, the [Department of Revenue] receives complaints regarding particular vanity plates that have been issued. When the DOR receives such a complaint the General Counsel of the DOR reviews both the complaint and the configuration [and] makes a decision as to whether to recall the plate.”); McMahon v. Iowa Dep’t of Transp., 522 N.W.2d 51, 56 (Iowa 1994) ("Public complaints are . . . a gauge by which the [Office of Vehicle Registration] may determine how offensive a particular plate is to the public. Complaints serve to tip the scale in favor of revocation of a questionable plate."); Jack Cheevers, Vanity Plates: One Man’s Slur is Another Man’s Badge, L.A. TIMES, Aug. 21, 1990, at A3 ("The Department of Motor Vehicles’ recall of 333 vanity plates inscribed with the words wop or dago was initiated at the urging of the Sons of Italy, an
policy include "JAZZME" from a jazz historian because another driver understood it to have a sexual connotation, 165 "4 JIHAD" from Jihad Jaffer because it could be "misconstrued as a declaration of support for Iraqi President Saddam Hussein's call for jihad, or holy war, against the United States," 166 "GOVT SUX" because of "vulgar, obscene language," 167 and letter combinations understood as slurs by various groups. Recent recalls on this ground include plates with variations of "DAGO" or "WOP," at the instigation of the Sons of Italy, 168 and those with variations of "REDSKIN," at the instigation of Native American Groups. 169 Those who protest the censorship invoke an individual right to self-expression, 170 while state officials claim that vanity plates are a privilege to which the Constitution does not apply. 171

Courts have differed widely as to whether the free speech guarantee limits the government's discretion. According to California courts, the state's vanity plate program does not create "a forum for the free expression of ideas." 172 Rather, in this context, "First Amendment considerations are at best minimal, if present at all." 173 The letter combinations on a license plate are "at best expressive conduct, not speech per se," and so the appropriate constitutional analysis is the deferential one established in United States v. O'Brien. 174 The standard used to determine unacceptable letter
combinations—that they not "carry connotations offensive to good taste and decency"—is not unconstitutionally vague because it does not penalize the plate holder,\(^{175}\) but instead provides general directions to administrative employees charged with carrying out a legislative mandate.\(^{176}\) Thus, according to these decisions, the California Department of Motor Vehicles is virtually unrestricted in its ability to react to citizens' complaints and its own judgment in rejecting or recalling "offensive" vanity plate mottos.\(^{177}\)

By contrast, the United States District Court for the Northern District of California in an unpublished opinion required California's DMV to issue an "HIV POS" vanity plate.\(^{178}\) The court characterized California's vanity plate program as at least a nonpublic forum.\(^{179}\) Although the court implied that the DMV could enforce some public sensibilities standards by, for example, prohibiting "inherently offensive" racial, ethnic, and religious slurs, the plate at issue did not fit into this category.\(^{180}\) For this and other reasons,\(^{181}\) the DMV's denial of the plate constituted unconstitutional viewpoint discrimination.\(^{182}\)

Similarly, Virginia's vanity plate program, which is modeled on California's,\(^{183}\) constitutes at least a nonpublic forum.\(^{184}\) In this nonpublic forum, Virginia's ban on references to deities is unconstitutionally viewpoint based.\(^{185}\) Accordingly, Virginia must issue a "GODZGUD" license plate.\(^{186}\)

\(^{175}\) Katz, 108 Cal. Rptr. at 426 ("[Plate holder's] right to express the language of his choice remains totally unimpaired by the statute as Katz is free to put on his car or in the metal frame surrounding the license plate any combination of words and letters that he chooses.").

\(^{176}\) Id. at 427 ("[L]egislative standards for administrative acts may be expressed in general terms and need not precisely detail the factors that are to govern the administrative agency and its employees.").

\(^{177}\) See Kahn, 20 Cal. Rptr. 2d. at 13 (holding that DMV can reject plate with four-letter epithet written in stenographer's shorthand even though only a small portion of the population would understand it); Katz, 108 Cal. Rptr. at 429 (rejecting plate holder's argument that DMV's action is unconstitutionally arbitrary because it has "issued some personalized license plates that have combinations at least as offensive, if not more so, than the one he submitted").


\(^{179}\) Id., slip op. at 7 & n.1 (stating that the California Court of Appeals in Katz and Kahn did so as well).

\(^{180}\) Id., slip op. at 9.

\(^{181}\) The court also rejected the DMV's claim that it could reject the plate under a policy that prohibited the advertisement or disclosure of confidential medical information because the DMV did not have a consistent policy with respect either to medical conditions generally or to HIV. Id., slip op. at 7-8.

\(^{182}\) Id., slip op. at 7-9.

\(^{183}\) Pruitt v. Wilder, 840 F. Supp. 414, 416 (E.D. Va. 1994) ("In fashioning its CommuniPlate program, DMV relied in large part on the CommuniPlate system utilized in California.").

\(^{184}\) Id. at 417 n.2 (assuming that plates are nonpublic forum, as opposed to public forum, in deciding summary judgment motion).

\(^{185}\) Id. at 418 ("[B]y allowing one sub-set of religious speech—that not directly referring to a deity—to be placed on Communiplates, while denying another sub-set of religious speech—that referring to deities—the DMV policy discriminates on the basis of the speaker's viewpoint.").

\(^{186}\) In the Virginia case, the DMV voluntarily altered its policy to remove the ban on references to
Missouri’s vanity plate program is also a nonpublic forum. Language that permits state officials to reject letter combinations that are “contrary to public policy” is unconstitutionally vague and in fact “is designed to target particular viewpoints.” So, the state cannot recall an “ARYAN-I” plate on this basis.

In other states, courts have upheld state officials’ discretion to refuse or revoke vanity plates according to these same types of standards and procedures without considering Free Speech Clause objections. The Iowa Supreme Court has found its state’s vanity plate review procedure to be “reasonable and rational” as well as the Department of Transportation’s decision “to weigh a public complaint heavily in favor of revocation of particular plates.” Moreover, because vanity plates “do not involve a fundamental right or suspect classification, equal protection analysis affords governmental bodies broad discretion in pursuing legitimate governmental interests.” In this context, the government has a legitimate interest in “protecting the public from offensive messages.” Thus, the state can choose to reject letter combinations with messages that are “sexual in connotation or otherwise offensive.” In Utah, the State Tax Commission upheld the Motor Vehicle Division’s decision not to revoke “REDSKIN” plates. The Commission based its decision on the conclusion that only a small portion of the public found the term offensive. The Utah Supreme Court reversed and remanded, holding that the “offensiveness” provisions in the MVD’s rule require it to look to the perspective of the “objective,
reasoning person.” Applying this standard on remand, the Commission held that the plates should be recalled.

2. Advertising.—Government entities, particularly public transportation systems, often sell advertising space to private speakers to generate revenue. The Supreme Court has both recognized the free speech interests of the private speakers and validated some degree of public sensibilities regulation by the government. In *Lehman v. City of Shaker Heights*, the Court upheld a public transit authority’s rule that commercial, but not political, advertisers could gain access to advertising space in rapid transit vehicles. The Court distinguished advertising space from periodical or newspaper advertisements, noting that with the former the government had the legitimate purpose of protecting the interests of a captive audience. It also noted that the scope of the government’s discretion was broader when it was acting in a “proprietary capacity” than when it was merely the manager of a public forum. The Court then found the transit authority’s distinction between “the blare of political propaganda” and “less controversial commercial and service-oriented advertising” to be reasonable and thus not to constitute a First Amendment violation.

Public transit authorities have seized upon this decision as a green light for broad public sensibilities regulations. Thus, they solicit and accept private advertising, but retain broad discretion to modify or reject particular ads that violate norms of “good taste, decency and community standards,” are “objectionable for any reason,” or that discuss “controversial public issues.” Pursuant to these policies, the transit authorities may

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196 Id. at 470.
199 See Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (explaining that city can limit access to transit system advertising “to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience”).
200 Id.
201 Id. at 303 (“Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce.”).
202 Id. at 304.
203 Air Line Pilots Ass’n v. Dept’l of Aviation of Chicago, 45 F.3d 1144, 1148 (7th Cir. 1995) (stating that “[a]ll advertising shall be in good taste”); AIDS Action Comm. of Mass. v. MTBA, 42 F.3d 1, 3 (1st Cir. 1994).
205 United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg’l Transit, 163 F.3d 341, 352 (3d Cir. 1998) (noting that transit authority rejects such advertisements because they “may adversely affect [its] ridership”); Planned Parenthood v. Chicago Transit Auth., 767 F.2d 1225, 1227 (7th Cir. 1985) (noting that Chicago Transit Authority rejects “controversial public issue advertise-
require modifications or reject advertisements before they are placed. In addition, transit authorities may base their decisions to reject or remove particular advertisements on viewers’ complaints.

Lower courts confronted with particular controversies have limited the government’s discretion to condition advertising access on public sensibilities. These courts have rejected some public sensibilities standards as unacceptably vague. These include standards that forbid ads that are “not in good taste” or are “immoral,” that “pertain[] to sexual conduct,” or “controversial” in a way that “adversely affect[s] the transit authority’s image or ridership,” and that are not “aesthetically pleasing.” Such vagueness “invites abuse by enabling the official to administer the policy on the basis of impermissible factors.” In other instances, some courts have assumed the validity of particular sensibility standards, but have required that the government consistently enforce them. So, for example, a transit authority cannot reject condom

206 United Food & Commercial Workers Union, 163 F.3d at 347 (noting that wrap-around bus advertisement rejected before it was placed because photograph of labor protest showed “a mob of persons, many of whom are holding picket signs and certain of whose facial expressions, body positions and placement conveyed a solemn, if not angry, tone and an intimidating visual”); id. at 353 (noting that transit authority has rejected the following advertisements: “an advertisement stating that ‘Monday is a Bitch’;” “an advertisement for Rush Limbaugh’s radio talk show displaying a caricature of President Clinton with his pants down showing a tattoo stating ‘I Love Rush’;” “an advertisement containing an outline of a breast;” and “a clothing ad determined to be ‘in bad taste’ and ‘too controversial in content’”); AIDS Action Comm. of Mass., 42 F.3d at 4-5 (transit authority reviews proposed ads, rejecting some and agreeing to run others with editorial changes); id. at 9 (transit authority had previously rejected “certain Calvin Klein ads which somehow might have been misconstrued as endorsing the Ku Klux Klan, and an animal rights ad featuring a photograph of a maimed dog”).

207 AIDS Action Comm. of Mass., 42 F.3d at 12 (finding that AIDS awareness advertisements were rejected only after a number of public letters of protest”).

208 Air Line Pilots, 45 F.3d at 1153 n.5 (“The district court correctly determined that taste and morality were standards too vague to be enforced.”).

209 AIDS Action Comm. of Mass., 42 F.3d at 12 (“The purported exclusion of all messages or representations ‘pertaining to sexual conduct’ is so vague and broad that it could cover much of the clothing and movie advertising commonly seen on billboards and in magazines.”).

210 United Food & Commercial Workers Union, 163 F.3d at 359 (“We have no doubt that standing alone, the term ‘controversial’ vests the decision maker with an impermissible degree of discretion.”).

211 Id. at 359-60 (stating that the question becomes “whether in linking the term ‘controversial’ to [the transit authority’s] commercial interests, the term becomes sufficiently precise so as to constrain the decision-maker’s discretion” and, “[i]n the absence of requiring a demonstrable causality between an advertisement’s controversial nature and [the transit authority’s] interests,” it does not).

212 Id. at 360 (“The advertising policy’s ‘aesthetically pleasing’ requirement similarly invites arbitrary or discriminatory enforcement.”).

213 Id. at 359 (citing Leonardson v. City of East Lansing, 896 F.2d 190, 198 (6th Cir. 1990)).

214 See AIDS Action Comm. of Mass., 42 F.3d at 10 (“Even if we . . . assume arguendo . . . that the [transit authority] may constitutionally proscribe sexually explicit and/or patently offensive speech in its cars, we must decide whether the content discrimination inherent in [choosing between advertisements with sexual innuendo] is permissible.”).
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awareness advertisements pursuant to a policy that prohibits “sexually explicit” or “patently offensive” material when it has accepted a commercial film advertisement that contained the same degree of sexual innuendo.\textsuperscript{215} Nor can a transit authority reject an advertisement portraying a union protest as “too controversial” and “not aesthetically pleasing” when it otherwise accepts “a wide array of political and public-issue speech.”\textsuperscript{216} Such laissez-faire enforcement of potentially valid public sensibilities standards defeats the government’s ability to enforce its standards in particular instances.\textsuperscript{217} According to these courts, inconsistent enforcement of the standards, like vagueness in the standards themselves, creates an unacceptable risk of invidious viewpoint discrimination.\textsuperscript{218}

Despite these occasionally imposed limits, however, public transit authorities and other government entities continue to establish and enforce public sensibilities access standards when distributing advertising space to private speakers. Although some types of standards have been defined as impermissible by some courts in some contexts, the content of permissible public sensibilities standards, if any, remains uncertain, as does the status of public advertising space under the existing forum doctrine.\textsuperscript{219}

3. Displays.—Government efforts to select among private speakers have caused controversy when the government permits private speakers to create displays on public property. When the property constitutes a public forum, the government cannot exclude “offensive” speakers.\textsuperscript{220} Where the property is not a public forum, however, the government’s ability to be selective on these grounds is less certain.

The Supreme Court has addressed “display cases . . . in public facilities” in dicta, noting that “the Constitution does not require” that they “become Hyde Parks open to every would-be pamphleteer and politician.”\textsuperscript{221} Nevertheless, the Eighth Circuit en banc characterized a university history department display case as at least a nonpublic forum.\textsuperscript{222} It held that the

\textsuperscript{215} Id. at 10 (noting that film advertisements “are at least as sexually explicit and/or patently offensive as the [AIDS] ads”).

\textsuperscript{216} United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg’l Transit Auth., 163 F.3d 341, 354-55 (6th Cir. 1998).

\textsuperscript{217} See, e.g., Air Line Pilots Ass’n v. Dep’t of Aviation of Chicago, 45 F.3d 1144, 1153 (7th Cir. 1995) (quoting Planned Parenthood v. Chicago Transit Auth., 767 F.2d 1225, 1228 (7th Cir. 1985)).

\textsuperscript{218} See id., 45 F.3d at 1153 (“The government may not ‘create’ a policy to implement its newly-discovered desire to suppress a particular message.”).

\textsuperscript{219} See, e.g., AIDS Action Comm. of Mass., 42 F.3d at 9 (declining to reach “the public forum question” in part because of “the relatively murky status of the public forum doctrine” with respect to public transit advertising space).

\textsuperscript{220} Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) (stating that in a public forum, state “may regulate expressive content only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest”).

\textsuperscript{221} Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974).

\textsuperscript{222} See Burnham v. Ianni, 119 F.3d 668, 675 (8th Cir. 1997) (“In this case, the nature of the forum
chancellor did not have the discretion to remove photographs of gun-bearing military history professors from the display. The chancellor argued that the “disruption caused by the display,” and its “aggravation of the atmosphere of fear” stemming from death threats received by several female faculty members, justified removal of the photographs. The court characterized the removal as unconstitutional viewpoint discrimination.223

By contrast, several courts have been hospitable to claims by government building administrators that they can edit display submissions according to public sensibilities, even though they possess no legislative mandate to do so. In opening exhibit space to artists, governments have asserted the ability to select out art that is “controversial,” 224 that might offend “conservative voters,” 225 that is not “dignified,” 226 or that constitutes a “visual horror.” 227 Confronted with a painting of a giant nude woman holding a bloody, apparently self-aborted, fetus 228 and a satirical life-sized rendering of a federal district judge equipped with a viewer-activated tape recording mocking his reversal record, 229 courts have stated that building administrators must be able to consider “taste, decorum, sensitivity [and] respect” in rejecting the works at issue. 230 Despite the obvious attempts by both artists to convey political messages, one of these courts characterized the “preference for the somber over the sardonic” as neither viewpoint nor subject-matter discrimination, but instead merely “a standard time, place, and manner limitation.” 231

4. Other.—In other contexts as well, governments’ conditioning of the distribution of speech opportunities on meeting public sensibilities standards has generated controversy. Some of these other examples include state “specialty” license plate programs under which motorists can choose...
plates with a private group’s logo to support the group both expressively and financially,\textsuperscript{232} trademark certification rules requiring that marks not be disparaging,\textsuperscript{233} government signs that identify or commemorate particular individuals or groups,\textsuperscript{234} and programs to promote civic events by providing partial funding for them. In all of these instances, and certainly in others that have not yet come to judicial attention, governments and courts are uncertain as to the scope of the government’s discretion to consider public sensibilities when it creates a “forum” for private speakers.

II. DEFINING THE LEGITIMATE PUBLIC SENSIBILITIES FORUM

A. Acknowledging Its Legitimate Existence

The current confusion as to the status of the public sensibilities forum exists because the concept is internally inconsistent under existing free speech doctrine. On the one hand, responding to “public sensibilities” means protecting the public from “offensive” speech, which, in the context of speech restraints, creates an unacceptably high risk of invidious viewpoint discrimination.\textsuperscript{236} On the other hand, access decisions in any type of

\textsuperscript{232} See, e.g., Rex Bowman, Suit Seeks Rebel Flag License Plate; Free Speech Is Cited in Case Filed in Federal Court, RICHMOND TIMES-DISPATCH, July 24, 1999, at B5 (reporting that Rutherford Institute filed suit seeking to force Virginia to put the Rebel flag on the group’s state-approved special license plate arguing “that the Constitution prevents Virginia from barring speech just because some find it offensive”); Bonita M. de la Cruz, Senators OK Rebel License Tag: Opponents Call Plate Intensive to Blacks, TENNESSEE, May 18, 1999, at 1A (reporting that state senate approved Rebel flag plate in Tennessee); Marina Sarris, MVA to Revoke License Tags Bearing Confederate Flag: Complaints Led Agency to Act Against Plates, BALTIMORE SUN, Jan. 3, 1997, at 1A (“[S]pecialty” license plates, offered to raise money for particular groups, revoked Confederate flag logo because it “offends . . . citizens.” “The controversy has raised questions about the role of government in allowing clubs to sport their logos and names—for a price—on license plates.”).


\textsuperscript{234} See, e.g., East Timor Action Network, Inc. v. City of New York, 71 F. Supp. 2d 334, 337 (S.D.N.Y. 1999) (denying request for commemorative street sign because its proposed message was “very political” and would “inflame the diplomatic community”); Suzanne Stone Montgomery, Note, When the Klan Adopts a Highway: The Weaknesses of the Public Forum Doctrine Exposed, 77 WASH. U. L.Q. 557, 558 (1999) (describing mixed results in cases where courts have addressed states’ efforts to exclude the Ku Klux Klan from their Adopt-A-Highway programs, based on the anticipated adverse public reaction to its participation).

\textsuperscript{235} Compare Gentala v. City of Tucson, 213 F. 3d 1055, 1065 (9th Cir. 2000) (holding that city engaged in unconstitutional viewpoint discrimination in a limited public forum in refusing to fund National Day of Prayer under program to defray costs of civic events), with id. at 1075 (noting that fund is “not a forum at all” where city cosponsors events, so city can discriminate).

\textsuperscript{236} See Texas v. Johnson, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); Coates v. Cincinnati, 402 U.S. 611, 615 (1971)
free speech "forum" must be viewpoint neutral. Applying a unitary rule against "viewpoint discrimination" to the many types of public sensibilities forums would render many of them unconstitutional.

But invalidating public sensibilities forums under the rigid concept of "viewpoint discrimination" that applies to speech restraints seems to go too far. As the Court has recognized, tolerating different "risks of abuse" of government discretion is appropriate according to the context. In particular, tolerating a greater risk of abuse is appropriate when granting the government decision making discretion serves competing constitutional values. So, while the government may have little discretion to apply "risky" standards in the context of speech regulations, which might excise certain speech entirely from the marketplace of ideas, slightly more risk may be tolerable in the context of a forum that occupies a limited space in the marketplace of ideas, that the government need not create and can close at will. Competing constitutional values give the government greater discretion to control access to nonpublic forums than to regulate speech outside a forum. These competing constitutional values that support the quite wide latitude that the government already has to define access to nonpublic forums mean that it should have some ability to react to public sensibilities in granting access as well.

Acknowledging the potential legitimacy of a public sensibilities forum not only serves constitutional values by granting the government discretion in some circumstances, but also by opening discussion of the ways that a public sensibilities forum must be limited in order to be legitimate. Currently, the concept of "viewpoint discrimination" is being made to do all of
the work in determining the legitimacy of a nonpublic forum. Instead, the analysis must be multifactored. The appropriate task is to determine what factors can justify a broadening of the government’s ability to consider public sensibilities in the nonpublic forum context, and what particular standards pose an acceptably low risk of invidious discrimination that the government may employ them when the other factors are present.

B. The Factors That Determine the Legitimacy of a Public Sensibilities Forum

The factors that determine the legitimacy of a public sensibilities forum stem from the values emanating from either end of the government/private speech spectrum. First, at any point on the spectrum, the government’s discretion to make choices depends upon its public accountability for them. The scope of the government’s assumed responsibility for creating and administering a public sensibilities forum is thus a factor that defines its discretion to do so. Second, the government’s discretion to consider public sensibilities when dealing with private speech must stem from a legitimate responsibility it has toward the public. Otherwise, it is tampering with the speech market in a “risky” way without justification. The government’s responsibility to react to public sensibilities, then, is another factor that defines its discretion. Third, the government has discretion when it speaks because its voice is one among many. This background assumption means that the limited realm of a public sensibilities forum is important to its legitimacy. Finally, the substance of the government’s public sensibilities standards and the procedure for implementing them make a difference because some standards present greater First Amendment risk than others, and because clear standards limit decision makers’ discretion to engage in unaccountable viewpoint discrimination. This subpart will discuss these factors in turn.

1. Scope of Assumed Responsibility.—The legitimacy of a government speech action—be it speech, the funding of speech, or the compiling of speech—demands that the government assume responsibility for whatever viewpoint discrimination may occur as part of that speech action. For example, the government can discriminate among viewpoints in its own advocacy because it assumes responsibility for the positions it takes. Likewise, the government assumes responsibility for its public programs and for the speech of its agents, and thus these speech actions fall on the govern-

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244 See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000) (explaining that university funding of student speech is evaluated differently according to whether it is “responsible for its content” as opposed to “having disclaimed that the speech is its own.”).

245 See id. at 235 (stating that a government in its own speech may choose to advocate “a particular idea” because “[i]f the citizenry objects, newly elected officials later could espouse some different or contrary position”).
ment speech end of the spectrum. 246 Similarly, when a public broadcaster acts as an editor in compiling private speech, rather than a neutral forum-creator, its broadcasting decisions will be treated as legitimate government speech, because the public broadcaster assumes responsibility for the decisions it makes. 247 Finally, the government’s assumed responsibility for making selective, quality-based judgments from a range of applicants in distributing funds for expression distinguishes instances when the government can use subjective, and perhaps viewpoint-based criteria, from instances where it cannot. 248

On the private speech-protective side of the spectrum, however, the government’s assumed responsibility for discriminating among private speakers remains important, but limits on the government’s ability to define its own boundaries apply. Because the value that animates this end of the spectrum is protecting diverse private speech from government intervention, public property is a traditional public forum regardless of how effectively the government tries to assume responsibility for discriminating among private speakers. 249 The tradition of the place and the strong value of protecting minority speech from adverse majoritarian actions restrict governmental discretion to discriminate. 250 Moving inward on the spectrum, the government’s ability to assume responsibility for discriminating among private speakers becomes greater. It is the government’s assumed responsibility, or intent, to “open[] a nontraditional forum for public discourse” 251 that determines when it has created a nonpublic forum, and it is

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246 See Rust v. Sullivan, 500 U.S. 173, 198 (1991) (“The condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights.”); Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 610-11 (1998) (Souter, J., dissenting) (acknowledging the “government-as-buyer” category of government/private speech interaction but arguing that arts funding should be distinguished from the government-as-buyer category because the government’s assumed responsibility is to issue “an endorsement of the importance of the arts collectively, not an endorsement of the individual message espoused in a given work of art”).

247 See Forbes, 523 U.S. at 675 (distinguishing a public broadcaster’s exercise of editorial discretion from the candidate debate at issue in part on the ground that “the debate was by design a forum for political speech by the candidates” and that the broadcaster made “the implicit representation . . . that the views expressed were those of the candidates, not its own”).

248 See Finley, 524 U.S. at 581 (distinguishing instances where the government “indiscriminately ‘encourage[s] a diversity of views from private speakers’” from those where the government attaches a “mandate . . . to make aesthetic judgments” to the speech opportunity).

249 See, e.g., Forbes, 523 U.S. at 677 (“[T]raditional public fora are open for expressive activity regardless of the government’s intent.”).

250 See id. at 667 (“Traditional public fora are defined by the objective characteristics of the property, such as whether, ‘by long tradition or by government fiat,’ the property has been ‘devoted to assembly and debate.’” (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983))); Int’l Soc’y for Krishna Consciousness v. Lee, 505 U.S. 672, 679 (1992) (explaining that individuals’ right to use ‘streets and parks for communication of views’ stems from the notion that these areas “have immemorially been held in trust for the use of the public”) quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515-16 (1939)).

251 Lee, 505 U.S. at 680 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 805
the government's intent to grant access "selectively" or by "permission" as opposed to "generally" that determines the boundaries of the forum that it has created.

Although the government's assumed responsibility, or intent, is a factor frequently mentioned by the Court to explain its decision to place a government/private speech interaction within a designated category on either side of the spectrum, it cannot alone be conclusive. In particular, the government's intent to be selective is a determining factor both for a nonpublic forum, and for government editorial and quality-based judgments, both of which are "not [forums] at all." Thus, selectivity among private speakers, in one form or another, is the hallmark of the middle ground of government/private speech interaction. What distinguishes selectivity on the government speech side of the spectrum from that on the other is that the standards in the former can to some extent be viewpoint based. Of course, examining selective government intents to determine whether it assumed responsibility for the risk of viewpoint discrimination could place the subsidies in either the private speech-protective or government speech area. But, as the Court has made clear, government assertions of selectivity in distributing speech subsidies are not self-justifying. Thus, more than

\[\text{(1985).}\]

252 Forbes, 523 U.S. at 679 ("A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers.").

253 Id. ("The government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it." (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 804 (1985))).

254 Id. at 678 ("To create a [designated public] forum . . . , the government must intend to make the property 'generally available.'" (quoting Widmar v. Vincent, 454 U.S. 263, 264 (1981))).

255 See supra note 117 and accompanying text (noting that there is little analytical difference between the designated public forum and the nonpublic forum).

256 See Forbes, 523 U.S. at 679 ("[S]elective access . . . indicates the property is a nonpublic forum." (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 805 (1985))).

257 See id. at 673 (noting that broadcasters may "choose among speakers expressing different viewpoints").

258 See Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 586 (1998) (showing how the "competitive process" by which "excellent[]" speakers are chosen distinguishes arts funding from other, "comparatively objective decisions on allocating public benefits").

259 Forbes, 523 U.S. at 679; see Finley, 524 U.S. at 586 (noting that "competitive process according to which . . . grants are allocated" distinguishes it from forum cases); Forbes, 523 U.S. at 680 (maintaining that candidate debate is a nonpublic forum because television commission "made candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate.").

260 See, e.g., Forbes, 523 U.S. at 674, 682 (explaining that a "broadcaster by its nature will facilitate the expression of some viewpoints instead of others," but access to a candidate debate, which is a nonpublic forum, "must not be based on the speaker's viewpoint").

261 See id. (stating that the television commission did not have "unfettered power to exclude any candidate it wished"); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 832-36 (1995) (rejecting university's intent to selectively fund all student publications except those that promote or manifest religious belief); Int’l Soc’y for Krishna Consciousness v. Lee, 505 U.S. 672, 689-90 (1992)
the government’s intent is necessary to determine the ultimate constitutionality of a government/private speech interaction. Specifically, an examination of the circumstances is required to determine whether the higher freedom of speech values served by the government speech action justifies the particular risk of viewpoint discrimination posed. This examination requires consideration of factors beyond the government’s intent to assume responsibility for its action.

The government’s assumed responsibility for discriminating when providing a speech opportunity is not dispositive as to its constitutionality; rather, its significance is on the other side of the inquiry, establishing conclusively when the government does not have the ability to discriminate among private speakers. That is, the search for government “intent” in the government/private speech interaction context is the search for the boundaries that the government has set for its own action. The government’s assumed responsibility sets the outer boundary of its discretion to discriminate because this assumed responsibility determines the extent of its political accountability. Political accountability is the element that lends legitimacy to government selectivity when speaking itself and when interacting with private speakers.

The government’s assumed responsibility to be discriminatory includes several aspects. These are the government’s articulated scope of discretion, the public’s perception of that scope, and the government’s actual practice in engaging in the private speech interaction.

(O'Connor, J., concurring) (rejecting as unreasonable airport’s intent to provide access to certain types of speech but not to leafleting); Rust v. Sullivan, 500 U.S. 173, 199 (1991) (“Funding by the Government is not invariably sufficient to justify Government control over the content of expression.”).

See, e.g., Rosenberger, 515 U.S. at 829 (“Once it has opened a limited forum, however, the State must respect the lawful boundaries it has set.”).

See, e.g., Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000) (explaining that where government “disclaim[s] that the speech is its own,” Court will not evaluate government/private interaction as government speech but if the government “were responsible for its content, the case might be evaluated on that premise”).

See, e.g., id. at 235 (maintaining that government has discretion as speaker because “it is, in the end, accountable to the electorate and the political process for its advocacy”).

See, e.g., Rust v. Sullivan, 500 U.S. 173, 196 (1991) (deciding that the government may “insist[] that public funds be spent for the purposes for which they were authorized”).


See Forbes, 523 U.S. at 677 (“[T]he Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.” (citing Cornelius, 473 U.S. at 802); AIDS Action Comm. of Mass. v. MTBA, 42 F.3d 1, 10 (1st Cir. 1994) (“[T]he Court also has stated that the government’s intent must be gleaned
The government’s articulated scope of discretion, set out in the politically visible—and presumably democratically enacted—government action, determines the outer possible boundary of its discretion. So, for example, if Congress establishes a program to place art in federal buildings on an open-access basis, the administrators of the program do not have the discretion to limit access according to public sensibilities. Even though Congress might well have the authority to set access limitations according to public sensibilities, administrators of individual buildings cannot later do so, because their decisions would exceed the responsibility that the government has publicly assumed.

The public’s perception can limit the government’s articulated scope of assumed responsibility when the two diverge. In particular, the political accountability that supports broad discretion in government speech does not exist where the government’s role in shaping the private speech is not visible. In addition, the First Amendment danger of skewing public perceptions about the public support for particular types of speech occurs if the government’s interaction with private speech is masked. If the “implicit representation” or common understanding of the scope of the government’s discretion when interacting with private speakers is narrower than the government’s asserted discretion, the public perception of the government’s intent should control until the government effectively disabuses the public of its perception. Because public perceptions are often difficult to discern, the burden should be on the government to make clear the extent to which it is assuming responsibility for the content of the speech it is subsidizing.

The government’s administration of the interaction may modify its intent if its program’s administrators do not enforce the outer bounds of the government’s articulated discretion. For example, a local transit authority

\[\text{from its policy and practice with respect to the property at issue.}\]

\[\text{See also Grace Bible Fellowship, Inc. v. Me. Sch. Admin. Dist. No. 5, 941 F.2d 45, 47 (1st Cir. 1991) (stating that in forum designation inquiry, “actual practice speaks louder than words”).}\]

\[\text{See Public Buildings Cooperative Use Act of 1976, 40 U.S.C. §§ 490, 601a, 606, 611, 612a (2000); Heins, supra note 40, at 141-42 (describing this statute as “explicitly designed to open appropriate federal property to expressive activities on a content-neutral, first come-first-served basis”).}\]

\[\text{See supra note 117 and accompanying text (explaining that the limited and nonpublic forum points on the spectrum are the same).}\]

\[\text{See Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 572 (1998) (holding that Congress can establish and fund a program that subsidizes only “excellent” art that reflects “general standards of decency and respect for the diverse beliefs and values of the American public”).}\]

\[\text{See, e.g., Cass R. Sunstein, THE PARTIAL CONSTITUTION 314 (1993).}\]

\[\text{See Forbes, 523 U.S. at 675 (reasoning behind treating candidate debate as a nonpublic forum rather than an exercise of editorial discretion is the “implicit representation” that the views expressed are those of the private speakers without the broadcaster’s input).}\]

\[\text{See Carole I. Chervin, The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?, 41 STAN. L. REV. 401, 428 (1989) (arguing that the government should have had this burden when it prohibited funded entities from discussing abortion).}\]
might state a policy that advertisements meet standards of “good taste [and] decency,”275 in particular forbidding ads that use “sexually explicit or patently offensive language to convey . . . substantive message[s].”276 When it then denies access to a particular advertisement and relies upon the policy, the first question is whether the government’s practice is consistent with its policy.277 If it is not, the government cannot rely upon the policy and is effectively left with no reason other than viewpoint to distinguish among speakers.278 Requiring that the government’s articulated policy match its actual practice is another critical baseline check of the accountability that supports the government’s discretion to discriminate among private speakers. An inconsistently enforced policy suggests ad hoc rather than principled decision making according to the democratically enacted standards.

Determining the government’s assumed responsibility by examining these three elements—articulated intent, public perception, and actual practice—is the first layer of analysis in determining the legitimacy of a public sensibilities forum. Only if the government has effectively assumed responsibility for discriminating according to public sensibilities can it constitutionally do so. By establishing the furthermost point along the speech subsidy spectrum where the government locates it action, the assumed responsibility determination limits the constitutional inquiry. So, for example, when the government does not assume responsibility for discriminating according to public sensibilities in allocating airport access to speakers, a court does not have to determine its ability to do so.279 By contrast, when the government asserts that the boundaries of its subsidy are and can be based on public sensibilities, the constitutional inquiry is expanded to consider whether the government can be so selective.280 In both of these inquiries, however, once the government’s asserted range of action has been established, the constitutional inquiry that occurs within this boundary must look to other factors.

275 AIDS Action Comm. of Mass. v. MTBA, 42 F.3d 1, 3 (1st Cir. 1994).
276 Id. at 8.
277 See id. at 11 (finding transit authority inconsistent in excluding advertisements with sexual innuendo and double entendre).
278 See id. at 11 (holding that inconsistent application of rule forbidding sexual innuendo and double entendre leaves the transit authority without “a neutral justification” for excluding one advertisement and not the other).
279 Compare Int’l Soc’y for Krishna Consciousness v. Lee, 505 U.S. 672, 683 (1992) (examining only reasonableness of no-solicitation rule), with Air Line Pilots Ass’n v. Dep’t of Aviation of Chicago, 45 F.3d 1144, 1157 (7th Cir. 1995) (examining claim by airport that it could reject display case advertising that is “critical of airlines”).
280 See Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 585 (1998) (looking beyond forum rules to rules that determine constitutionality of selective government funding); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) (examining and rejecting University’s argument that “content-based funding decisions are both inevitable and lawful.”).
2. Authority.—In addition to assumed responsibility, the government needs actual authority to exercise discretion when it interacts with private speech. This authority stems from the Constitution and is limited by it. That is, democratic authority animates the government speech side of the spectrum, while limits on that authority when circumstances pose a strong First Amendment danger emanate from the other side.

In the nonpublic forum context, the "reasonableness" standard embodies the authority requirement. This is not a demanding standard. It does, however, mean that the government must articulate some justification for its nonpublic forum access restrictions. Moreover, the reasonableness requirement exists in combination with the requirement that the access standards not discriminate according to viewpoint. So, the reason that justifies the access requirement cannot itself be viewpoint related.

These twin requirements complicate the reasonableness inquiry with respect to public sensibility access standards. Because public sensibilities standards pose the risk of viewpoint discrimination, it cannot be enough for the government to point to the possibility, or even probability, of public offense as the reason for restricting speakers. This would make viewpoint discrimination self-justifying. Something more than the bare democratic authority to respond to majority preferences that supports other government actions is required to justify one that threatens free speech values. In particular, the access restrictions must, at least to some extent, serve a "higher value" that balances and justifies the risk of viewpoint discrimination posed by them.

Judicial decisions reflect this intuition—that the government needs some degree of affirmative authority to employ standards that pose the risk of viewpoint discrimination when interacting with private speech—by offering a variety of justifications for the government’s action. Courts have said that the government acts as a "patron" or "proprietor" in distribut-

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281 See Lee, 505 U.S. at 683 (explaining that because an airport terminal is a nonpublic forum, the "restrictions . . . challenged . . . need only satisfy a requirement of reasonableness").
282 See id. ("The restriction 'need only be reasonable; it need not be the most reasonable or the only reasonable limitation.'" (quoting United States v. Kokinda, 497 U.S. 720, 730 (1990) (plurality opinion) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 808 (1985))).
283 Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 682 (1998) (O’Connor, J., concurring) ("[N]onpublic forum status 'does not mean that the government can restrict speech in whatever way it likes.'" (quoting Lee, 505 U.S. at 687)).
284 See Legal Services Corp. v. Velasquez, 531 U.S. 533 (2001) ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a mere semantic exercise."); Forbes, 523 U.S. at 682 ("To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property.").
285 Forbes, 523 U.S. at 674 (preserving "higher values" that attach to journalistic discretion justifies "risks of abuse").
ing speech opportunities rather than as a regulator restricting them, that the speech opportunities are scarce, that the government in distributing the speech opportunity lends its imprimatur of approval to the speech, that the government may restrict speech according to its compatibility with the place where it occurs, that the government has the didactic authority to set an example, and that the government has the authority to protect unwilling listeners. This section will examine each of these reasons in turn. Many of these reasons do not give the government the authority to impose public sensibilities standards in a private speech forum. Only the last two are potentially legitimate.

a. Illegitimate Reasons

(1) Spending Money.—The mere fact that the government "subsidizes" private speech, by providing property access or funds to support it, does not give the government the right to set access standards that depend upon public sensibilities. Forum doctrine makes this clear: where the resource distribution scheme constitutes any type of forum, the government's ability to condition access according to viewpoint discriminatory standards is strictly limited.

Although the Court has stated that different standards apply when the government spends its money to encourage private speech as opposed to when it regulates it, these observations must be understood in context.

287 See Lee, 505 U.S. at 678 (distinguishing between government acting as "proprietor" rather than as "lawmaker").
288 See Finley, 524 U.S. at 611 (Souter, J., dissenting) ("[T]he Government would have us liberate government-as-patron from First Amendment strictures.").
289 See id. at 586 (rejecting "scarcity of NEA funding," but accepting "the competitive process" as the ground for validating its discretion to discriminate).
290 See, e.g., Claudio v. United States, 836 F. Supp. 1230, 1235 (E.D.N.C. 1993) (finding that government has property owner's right to control content of art on its premises because the art affects its "image").
291 See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (noting that school can disallow speech that is inconsistent with its "basic educational mission").
292 See Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (holding that transit authority can limit advertising access to minimize "imposing upon a captive audience").
293 See Rust v. Sullivan, 500 U.S. 173, 200 (1991) ("[T]he existence of a Government 'subsidy,' in the form of Government-owned property, does not justify the restriction of speech in areas that have 'been traditionally open to the public for expressive activity,' or have been 'expressly dedicated to speech activity.'").
294 See Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587-88 (1998) ("[A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.").
The discretion that the government enjoys as “buyer” of private speech depends upon the government to some extent assuming responsibility, and thus accountability, for the content of the private expression.\textsuperscript{296} Property ownership alone is not enough.\textsuperscript{297} The government needs a democratic mandate to pursue a public policy that requires discriminating among private speakers.\textsuperscript{298}

The current outer boundary of this discretion to discriminate is a democratic mandate to fund “excellent” expression selectively.\textsuperscript{299} Thus, when the National Endowment for the Arts distributes grants pursuant to a democratically enacted subsidy program established for the purpose of promoting “quality” art,\textsuperscript{300} it is this articulated, publicly visible, and consistently practiced assumed responsibility—not merely the fact that the government is spending money—that places the subsidy on the government speech side of the spectrum.\textsuperscript{301}

That the government spends money may, when coupled with a government speech interest, support the government’s ability to set public sensibility access standards. In the context of a nonpublic forum, however, spending simply describes how the government often, but not always, creates the forum. Spending does not alone provide a constitutional “value” that counteracts the risk of viewpoint discrimination posed by public sensibility standards.

\textbf{(2) Engaging in Commerce.—} The Court has emphasized that different standards of review apply to government actions with respect to private speech when it “act[s] as a proprietor, managing its internal operations,”\textsuperscript{302} or otherwise “engage[s] in commerce.”\textsuperscript{303} In these instances, the government has greater discretion to limit the “forms of speech on property that it owns or controls” than when it “act[s] as lawmaker with the

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\item \textsuperscript{296} *Finley*, 524 U.S. at 586 (noting that the “NEA’s mandate . . . to make aesthetic judgments” sets it apart from other subsidies in which the government does not assume responsibility for the content of the subsidized speech).
\item \textsuperscript{297} *Rust*, 500 U.S. at 200 (noting that “funding by the government” is not “invariably sufficient to justify government control over the content of expression”).
\item \textsuperscript{298} See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833-34 (1995) (“[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes . . . . It does not follow, however, . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.”).
\item \textsuperscript{299} See *Rust*, 500 U.S. at 571 (“In the context of selective subsidies [that rely on ‘excellence’ as a criterion] it is not always feasible for Congress to legislate with clarity.”).
\item \textsuperscript{300} See *id.* at 569 (stating that “artistic excellence and artistic merit are the criteria by which [grant] applications are judged”).
\item \textsuperscript{301} See *id.* at 588 (“Congress modified the declaration of purpose in the NEA’s enabling act to provide that arts funding should ‘contribute to public support and confidence in the use of taxpayer funds.’”).
\item \textsuperscript{303} *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974).
\end{itemize}
power to regulate or license.” 304 What the Court means by this distinction is that when the government acts as a proprietor in promoting private speech, it runs a nonpublic, as opposed to traditional public, forum. The “much more limited” standard of review that applies when the government acts as a proprietor, then, is the nonpublic forum access standard. 305 Although this standard is less demanding than the “heightened review” that applies to traditional public forums, it still requires that the access standard be viewpoint neutral. 

Although the viewpoint neutrality requirement applies regardless of the government’s commercial purpose, this purpose is relevant in determining the scope of the government’s discretion to discriminate among private speakers. A commercial purpose may help determine the scope of the forum created. For example, the commercial purpose is evidence of an intent to exclude types of speakers or subject matters inconsistent with that purpose, 307 which would tend to increase the government’s discretion to exclude speakers. On the other hand, that the government acts to manage its property or to make money strongly suggests that its action in selecting private speakers is not imbued with government speech values. 308 That is, the commercial purpose suggests the forum is not something especially government speech-related.

These twin considerations suggest that the government’s role as proprietor does not alone provide it with authority to enforce public sensibilities standards. Additional considerations confirm this conclusion. Most important, the government’s involvement through a commercial purpose does not inject a competing government speech value that can balance the risk of viewpoint discrimination posed by public sensibilities standards. Instead, the government’s participation in commerce can heighten the danger that the risk of viewpoint discrimination from public sensibilities will be realized. In particular, limiting a speech opportunity’s access to “popular” speakers who will “generate favorable publicity” may be part of a rational government strategy to maximize profits from the management of its property. 309 At the same time, the result is viewpoint discrimination against un-

304 Lee, 505 U.S. at 678.
305 Id. at 679.
306 Id. (“The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker’s activity due to disagreement with the speaker’s view.”).
307 Air Line Pilots Ass’n v. Dept’ of Aviation of Chicago, 45 F.3d 1144, 1158 (7th Cir. 1995) (“[I]n both Lee and Kokinda, . . . the fact that proposed speech activities would have interfered with the designated use of the property suggested that the government never intended to dedicate the forum in question to the type of expression at issue.”).
308 See Lee, 505 U.S. at 682 (stating that because of its primary commercial purpose, “it cannot fairly be said that an airport terminal has as a principal purpose promoting “the free exchange of ideas.”” (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985))).
This motivation, and thus the danger of realized viewpoint discrimination, would seem to be present to some degree whenever the government’s purpose in opening a forum is to make money. The heightened risk of actual viewpoint discrimination means that the government’s commercial purpose alone should not support the legitimacy of a public sensibilities forum.

(3) Scarcity.—Often, government resources will be limited, and the government must set access standards when it interacts with private speakers. The Court has made clear, however, that scarcity alone does not justify viewpoint discrimination among private speakers. Rather, the additional factor of a “competitive process” under which the government assumes responsibility for making merit-based determinations is required. Absent some other authority to discriminate, then, the government must “ration or allocate the scarce resources on some acceptable neutral principle.”

Scarcity’s relevance to the legitimacy of the government’s use of public sensibilities standards that pose the risk of viewpoint discrimination should be no different than its relevance to standards that are more blatantly viewpoint discriminatory. In either situation, the mere fact that the speech opportunity is limited does not justify allocating access according to standards that threaten free speech values. Because the government’s legitimate interest can be served by employing standards that do not relate to public sensibilities, this reason does not help to authorize use of such standards.

(4) Imprimatur of Approval.—Another possible basis of government authority to discriminate in access to speech subsidies according to public sensibilities is the risk that, absent discrimination, the government will be perceived to approve of any message presented with its resources. Under this theory, the government can legitimately act to correct the public impression that it endorses the speech that occurs in the private speech opportunities it creates. Specifically, the government may impose public sensibilities access standards to prevent the public from acquiring the mistaken impression that the government approves of speech that offends it.

310 Id. at 701 (“Such a policy would be a form of the heckler’s veto.”).
312 See Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 586 (1998) (“Although the scarcity of NEA funding does not distinguish this case from Rosenberger, the competitive process according to which the grants are allocated does.”).
313 Rosenberger, 515 U.S. at 835.
314 See, e.g., McBride v. Motor Vehicile Div. of Utah State Tax Comm’n, 977 P.2d 467, 473 (Utah 1999) (Durham, J., dissenting) (“[P]ublic officials have the obligation to ensure that [racial epithets on license plates] are not used with the imprimatur of the state.”); Frank J. Phial, Wine Talk, N.Y. TIMES, May 7, 1997, at C8 (reporting that administrative law judge upheld rejection of wine-related vanity plate application in part because it “could convey the message that the state condones the use of alcoholic
While the government clearly has an interest in protecting the integrity of messages that are in some important way its own, the question with respect to the public sensibilities forum is whether the possibility of an imprimatur of approval legitimizes the standards when the government has not actually assumed responsibility for the private speech. A developed, although not completely unified, doctrine exists with respect to this possibility of perceived endorsement.315

In the context of the Establishment Clause,316 a plurality of justices held that an imprimatur of approval cannot justify discrimination against unwanted speakers where the forum at issue is open.317 This is true even where “hypothetical observers may—even reasonably—confuse an incidental benefit to [a speaker] with state endorsement.”318 It is the actual, announced contours of the speech opportunity—that is, the degree to which the government has assumed responsibility for the content of the private speech—that defines the government's discretion, not the possible assumptions of public viewers.

Other justices take a broader view of when an imprimatur of approval can justify government discrimination against private speakers. For these justices, the fact that a hypothetical observer may reasonably assume government approval of the private speaker may justify such governmental action.319 Still, for most of these justices, the relevant observer is one “aware of the history and context of the community and forum in which the [speech occurs].”320 Therefore, the government’s articulated boundaries for the forum and its practice in administering it will still be strong evidence countering the concern that a hypothetical observer will reasonably assume government endorsement, and will still limit the government’s ability to discriminate. In addition, most of these justices who look to a more liberal standard of endorsement acknowledge that the government can often counteract its possibility by means of an effective disclaimer.321 In the context of beverages by drivers”).

315 See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763-4 (1995) (Scalia, J., plurality opinion) (discussing endorsement test advocated by other justices in previous cases, but finding it inapplicable where property at issue is in fact open to all speakers); id. at 772 (O'Connor, J., concurring in part and concurring in the judgment) (finding endorsement test applicable to a public forum closely associated with the government).

316 U.S. CONST. amend I.

317 See Pinette, 515 U.S. at 770 (noting that imprimatur of approval does not lead to establishment clause violation if the property is in fact “a traditional or designated public forum, publicly announced and open to all on equal terms”).

318 Id. at 768.

319 See id. at 777 (O'Connor, J., concurring) (“[W]hen the reasonable observer would view a government practice as endorsing religion, . . . [the Establishment Clause] may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message.”).

320 Id. at 780 (O'Connor, J., concurring).

321 Id. at 776 (O'Connor, J., concurring) (“To the plurality’s consideration of the open nature of the
of compelled speech as well, the Court has found the ability of a speaker to disclaim association with unwanted speech relevant to the speaker's ability to discriminate against other speakers. 322

These perceived endorsement precedents lead to the conclusion that imprimatur of approval alone should not legitimize the government's use of public sensibilities standards in a nonpublic forum. The endorsement precedents exist under the Establishment Clause, which affirmatively prohibits the government from advancing religion. 323 No such affirmative constitutional provision supports the government's desire to disassociate itself from otherwise "offensive" private speech. 324 Rather, the free speech values are on the side of protecting "offensive" speech from government regulation. 325 Moreover, even applying the Establishment Clause endorsement precedents leads to the conclusion that the government almost always has the ability to structure its forum—either by initial design or disclaimer—to avoid reasonable misapprehensions of endorsement. 326 That it chooses not to do so should not provide authority for the government to discriminate among subsidized speakers.

The cases in which the Court has considered imprimatur of approval as relevant to the government's ability to take public sensibilities into account confirm that this possibility alone does not support the government's authority. These cases both involved public high schools' censoring of "inappropriate" student speech. 327 Although the Court noted in both the

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322 Compare Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 576 (1995) ("Disclaimers would be quite curious in a moving parade."); PruneYard Shopping Center v. Robins, 447 U.S. 74, 87 (1980) (holding that the owner of a shopping mall "can expressly disavow any connection with the [unwanted] message by simply posting signs in the area where the speakers or handbillers stand.").

323 U.S. CONST. amend. I ("Congress shall make no law . . . respecting an establishment of religion.").

324 See Shiffrin, supra note 77, at 606 ("[T]here can be no room for a non-religious establishment clause.").

325 See Texas v. Johnson, 491 U.S. 397, 414 (noting that the First Amendment's "bedrock principle" is that government cannot suppress "offensive" speech).

326 See Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 769 (1995) (noting the possibility that a government "concerned about misperceptions" could attach a disclaimer to private displays on public property); id. at 777 (stating that the establishment clause "imposes affirmative obligations that may required a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message.").

327 See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263 (1988) (noting that the principal's concerns were for students' and parents' privacy and that some references were "inappropriate for some of the younger students at the school"); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678-79 (1986) (describing how a student was punished for delivering a speech that was "indecent, lewd, and offensive..."
possibility that the schools would be perceived to endorse the private speaker’s message, it was not the imprimatur that gave the school authority to censor. Rather, the authority to censor stemmed from the legitimate didactic authority of the schools over their students in the context of the particular subsidy. So, a high school does not have the authority to “disassociate itself” from sexually explicit student speech simply because it occurs on school property and therefore listeners might believe the school endorses it. Its authority is, more specifically, in the context of a school-sponsored assembly, “to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education.” Similarly, while a high school newspaper is something that “members of the public might reasonably perceive to bear the imprimatur of the school,” this reasonable perception occurs when the newspaper is “sponsored by the school” and so is a “part of the school curriculum” over which the school has legitimate didactic control.

In sum, where the government’s authority to distribute speech subsidies according to public sensibilities is in question, imprimatur alone is not enough to support the government’s authority because the government can disclaim it.

(5) Compatibility.—Compatibility is an important element of analysis within the forum area. A traditional public forum has as “a principal purpose . . . the free exchange of ideas.” No other government purpose for the property can supercede the purpose of accommodating open communication. The property is, in other words, “inherently compatible with expressive conduct.” Property that is not a traditional public forum presumptively has uses other than promoting free interaction and expression. The government’s ability to set limits on the scope of a forum it created to the modesty and decency of many of the students and faculty who were in attendance at the assembly” (quoting hearing officer).

See Kuhlmeier, 484 U.S. at 271 (distinguishing the situation where “a student’s personal expression . . . happens to occur on the school premises” from “educators’ authority over school-sponsored publications”).

See id. See id. at 271. See id. at 271; see also id. at 271 n.3 (distinguishing “between speech that is sponsored by the school and speech that is not” in establishing the legitimate authority of the school over student expression).

See id. at 271.


Government purposes that relate to things other than competing functions of the property that constitutes the traditional public forum can justify content neutral restrictions on expression. See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989) (holding that the city can control noise levels at Bandshell in Central Park to prevent intrusion into other areas).

Warren v. Fairfax County, 196 F.3d 186, 191 (4th Cir. 1999).
ates stems from its ability to preserve its property for a primary purpose other than promoting free expression. At the same time, the requirements that access rules be viewpoint neutral and reasonable limit the government's discretion to grant access purely according to majority preferences. While it is not clear that the reasonableness requirement mandates a showing that excluded expression is incompatible with the purposes of the forum, a showing of incompatibility demonstrates the legitimacy of the government's access restriction.

The question is whether the government's claim that speech offensive to public sensibilities is incompatible with the primary purpose of a forum can legitimate the access standards. The problem with this claim is that in a nonpublic forum, access rules must not only be reasonable but also viewpoint neutral. It thus eviscerates the test to allow access standards in through the reasonableness requirement that do not necessarily meet the requirement of viewpoint neutrality. "Compatibility" could swallow any limits to the government's discretion to discriminate if it means an ability of the government to use public sensibilities standards whenever speech might be offensive. Where the government's incompatibility claim is with public sensibilities and values, then, factors other than the objective compatibility of the speech with the forum must determine the scope of the government's discretion.

b. Potentially Legitimate Reasons

(1) Didactic Authority.—Sometimes the government can set public sensibility standards on its distribution of speech subsidies for the purpose of educating by example. One circumstance is in special educational enclaves where it has legitimate didactic authority over a limited population. As noted above, the high school cases are properly understood as based upon the schools' legitimate didactic, or example-setting, authority. According to the Court, "[t]he inculcation of these values [of what manner of speech in the classroom or in school assembly is inappropriate] is truly the 'work of the schools.'" Similarly, the justification for selective speech

336 See Lee, 505 U.S. at 688 (O'Connor, J., concurring) ("We have said that a restriction on speech in a nonpublic forum is 'reasonable' when it is 'consistent with the [government's] legitimate interest in preserving the property . . . for the use to which it is lawfully dedicated.'" (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 50-51 (1983) (quoting Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129-30 (1981)))).
337 See Lee, 505 U.S. at 692 (noting that reasonableness looks to whether excluded speech "is inconsistent with the intended use of the forum").
338 See, e.g., Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682-83 (1998) (holding that exclusion of speaker from nonpublic forum "based on . . . status" is permissible, as opposed to based "on views" (quoting Perry, 460 U.S. at 49)).
339 See Air Line Pilots Ass'n v. Dep't of Aviation of Chicago, 45 F.3d 1144, 1158 (7th Cir. 1995) ("On some level, every government actor desiring to suppress a message views that message as 'incompatible' with one of its purposes (hence the desire to suppress.").
340 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (quoting Tinker v. Des Moines In-
restrictions on military bases rests in part on the government's unusual and legitimate didactic authority over a discrete population. Unlike the government toward the public generally, a military officer may “act[] to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.” Prisons are another area where the government has greater authority over a limited population. In each of these instances, the government's special authority to teach and control a limited population justifies selective speech restrictions that are not justified toward the public at large.

Whether and when the government has legitimate didactic authority toward the entire American public that justifies imposing public sensibilities standards is less certain. Certainly, this authority supports discriminating according to public sensibilities in government speech and government/private speech interactions on the government speech side of the spectrum. Particularly, when the government itself is speaking, or when it is speaking through agents, it can pursue a particular didactic policy or speak in such a way as to set an example. The question is whether this authority includes the ability to restrict speech according to public sensibilities when the government distributes speech resources to private parties without claiming the speech as its own.

Moving closer to the nonpublic forum, general didactic authority in part legitimates the “quality judgments” forum of arts funding. In making quality judgments, one legitimate goal of the government is to teach what is “excellent” by selecting and promoting it. Crucial to this authority, however, is a visible acknowledgment by the government that it is making quality judgments and will take responsibility for them. Under these conditions, the government is accountable for the speech of its own that it fuses with the private speech.

Absent such an open and visible acknowledgment that the government/private speech interaction is strongly shaped by government speech—

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343 JOSEPH TUSSMAN, GOVERNMENT AND THE MIND 85 (1977) (“[T]he teaching power” is “a fundamental power of the state.”).
either because the government has recognized didactic authority over a limited realm or because the government will stand accountable for shaping some of the content of the private expression—a general didactic authority is in tension with the values that emanate from the private speech protective side of the spectrum. Of course, the government has a general didactic interest whenever it promotes speech. By denying parade permits or student activities funding to offensive speakers, the government could teach what type of speech it views as unacceptable. But the constitutional limits on government discretion in administering these speech opportunities confirm that a generalized didactic interest cannot outweigh the free speech dangers of viewpoint discrimination. Similarly, a general didactic authority is simply too threatening to private speech values to support the government's use of public sensibilities access standards that pose this great danger. Only where the government acknowledges and stands accountable for exercising a significant didactic role in a special enclave should it potentially be able to employ public sensibilities access standards. A general didactic authority will not legitimate the use of public sensibilities standards in a nonpublic forum.

(2) Protective Authority.—A protective interest is the most frequent reason articulated by the government to justify public sensibilities access standards. As with a didactic interest, a general protective interest exists whenever the government speaks or interacts with private speakers. As also with the general didactic interest, the Constitution limits the government’s authority to respond to this interest in circumstances that do not fall on the government speech side of the spectrum. It is the very nature of public speech to be available to a wide and diverse audience. This audience will probably include both those willing to hear a wide range of speech and those who want to, or need to, be protected from it. The general rule is that the government may not regulate speech available to willing listeners to protect others. Neither may it regulate access to a traditional public forum on that basis. In addition, the requirement of viewpoint neutrality in administering nonpublic forums means that the government cannot act to protect unwilling listeners from unwanted viewpoints. Because public sensibilities standards either do this overtly, or present the danger that public "offense" is viewpoint based, a general protective interest, based upon the

348 Id. (deciding that university cannot discriminate according to viewpoint in student activities fees funding); Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123 (1992) (deciding that parade permit fee cannot be content based).
349 See, e.g., Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975) ("[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.").
inevitability that a diverse audience will encounter the expression, should not legitimate the use of such access standards.

In the realm of speech regulation, a more specific protective interest—based on audience captivity—can sometimes justify speech restrictions. The concept of audience captivity is narrowly defined when the government affirmatively restricts speech, so that the government’s protective interest exists only when an unwilling listener is in his or her home. Outside this “narrow circumstance,” “the burden . . . falls upon the viewer to . . . avert[] [his] eyes.” The government, however, has greater discretion to limit access to a nonpublic forum. This discretion includes a somewhat greater ability to justify access restrictions according to public sensibilities. In particular, the Court upheld a ban on political advertisements on public transit advertising space, based in part on the government’s interest in protecting the sensibilities of captive riders. On its face, the advertising ban was based upon subject matter and not viewpoint, and its application had been consistent rather than suspiciously viewpoint related. Nevertheless, the recognition of a greater governmental protective interest in this context provides a starting point for determining when it should justify other public sensibilities access standards that pose a risk of viewpoint discrimination.

Broadening somewhat the concept of captivity and the government’s ability to respond to it makes sense in the context of a nonpublic forum. One reason is that a captive audience strongly suggests that the forum has some primary, nonspeech purpose, which the government may legitimately seek to facilitate. Where disrupted public sensibilities would undermine that purpose, a competing value exists that can, to some extent, balance the danger of viewpoint discrimination posed by public sensibilities standards.

A second reason that supports a somewhat broader concept of audience captivity in a nonpublic forum is the free speech interest in encouraging the government to provide such public speech opportunities. The government can close a nonpublic forum entirely if it does not have the discretion to limit access according to what it perceives to be its legitimate interests.

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

351 See Rowan v. Post Office Dep’t, 397 U.S. 728, 736 (1970) (upholding statute allowing residents to request nondelivery of sex-related mailings, noting the right of every person “to be let alone” in the home).

352 Erznoznik, 422 U.S. at 210-11 (quoting Cohen, 403 U.S. at 21).


354 See id. at 304 (upholding a standard that prohibited “political” advertising because that political advertising was more “controversial”).

355 See Int‘l Soc’y for Krishna Consciousness v. Lee, 505 U.S. 672, 684 (1992) (upholding no-solicitation ban in airport terminal based on disruptive effects and risks of duress despite disproportionate impact that such a ban will likely have on marginal groups like the Krishnas who brought suit).
This does not mean the government should be able to limit access on whatever terms it wants.\footnote{Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 680 (1998) (recognizing that constitutional rules must respond to this “reality” that the government can choose to close a nonpublic forum, but also noting that this fact does not give the government “unfettered discretion” to discriminate).} It does, however, mean that constitutional doctrine must respond to this reality.

An appropriate compromise responds to the values on both sides of the free speech spectrum by protecting minority speech while encouraging the government to keep nonpublic forums open. To protect minority speech, courts limit the government’s ability to employ public sensibilities to instances where an audience is, in some demonstrable sense, captive. This means a significant number of people will, by legal compulsion or practical necessity, be forced to confront the expression in the nonpublic forum. On the other hand, to encourage the government to create and maintain private speech opportunities, courts must allow the use of limited public sensibilities standards when this type of audience captivity is present. A qualification of this ability, which again fulfills the minority speech protection interest, requires that the public sensibilities standards be narrow and specific to limit the danger of invidious viewpoint discrimination when they are employed.\footnote{See infra Part II.B.4.a.(1).}

Of course, the concept of audience captivity is imprecise. Certainly the degree of audience captivity varies according to the situation—both the extent to which the audience is compelled to confront the expression and the time during which it is required to do so—and the composition of the captive audience in any particular context, particularly whether children are likely to be included. These differences mean that the strength of the government’s protective interest will vary according to the situation. Still, with limits on the substance and procedure for administering the standards, it is possible to tolerate a fairly low captivity threshold. The government will likely be able to demonstrate reasonable audience captivity in many nonpublic forums.

Still, the concept of audience captivity retains a meaningful boundary. Even with a rather low threshold for demonstrating captivity, there will remain a significant number of government/private speech interactions that do not meet it. The requirement of demonstrating a reason for imposing public sensibilities standards thus may have its greatest importance in identifying nonpublic forums where the government obviously lacks the protective authority to do so. For example, the government has a legitimate protective interest in distributing advertising access in public transportation, space for art in public buildings, or access to license plates to display private mottos. In all of these instances, an audience, which will include children, is forced by government mandate or practical everyday necessity, to confront the subsidized expression beyond the brief time necessary to “avert one’s
eyes." By contrast, however, the government does not have such a protective interest in distributing theater or classroom access, or general funding for art of student publications, where the subsidized expression will occur largely in places where individuals can choose to confront the speech or avoid it after only a very brief confrontation with it. That the government lacks a protective interest in these instances means either that it must justify its public sensibilities standards by locating its action on the government speech side of the spectrum or that, if it is operating a nonpublic forum, it cannot impose them.

3. Limited Realm.—The primary danger that underpins the private speech-protective side of the spectrum is that an all-powerful government will impose its speech preferences to dominate the arenas for public expression. Accordingly, a crucial question that pervades First Amendment doctrine, and can support the government’s ability to exercise discretion when dealing with speech, is whether other avenues of communication remain open. Efforts to determine whether a government/private speech opportunity restriction is a "penalty" or is "coercive," meaning that the government is regulating rather than managing its own property or funds, have looked to its speech market impact. Because public sensibilities standards by the government threaten to distort the private speech market in a viewpoint-based way, they should be valid only in nonpublic forums that do not dominate the relevant portion of it.

358 These instances where the government lacks a protective interest substantially align with the forums the Court has labeled as "designated" or "limited" rather than "nonpublic." The Court has not, however, pointed to the government’s protective interest to make this determination.


360 See, e.g., Heffron v. Int’l Soc’y for Krishna Consciousness, 452 U.S. 640, 648 (1981) (explaining that time, place and manner restrictions are valid in a public forum "provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information").


362 See, e.g., Cole, supra note 78, at 679-80 (discussing unconstitutional conditions doctrine and noting that it "seeks to identify those conditions on funding that have a coercive effect on the recipient’s freedom to exercise her constitutional rights on her own time and with her own resources").

363 See, e.g., Post, supra note 54, at 164 (distinguishing between "public discourse" and "managerial domains").

364 See id. at 193 (noting that constitutional rules that apply to arts funding depend upon the NEA’s actual impact on the "world of art production"); Cole, supra note 78, at 680 (explaining that a danger of government-funded speech is "the indoctrinating effect of a monopolized marketplace of ideas").

365 SUNSTEIN, supra note 272, at 312 ("[Public sensibility] restrictions might be permissible if they are limited in time and space.").
Determining the impact of a government/private interaction requires consideration of several factors. Both the physical and temporal dimensions of the subsidy are relevant to this determination. The physical dimension is the percentage of space in the marketplace of ideas that it occupies at any particular moment. This determination requires the familiar comparison of the limited speech opportunity with the options. For example, advertising space in one sports arena occupies hardly any space because there are numerous alternate means for communication. A rule that applies to space in a large number of government buildings affects much more communication space. Still, such a rule probably does not dominate the relevant speech market, because other areas are available for public communication.

The time frame of the subsidy is relevant as well. A one-time grant of access or funds takes up much less of a portion of the speech market than one that is continuous. Even a continuous speech opportunity does not dominate the market if other, similar, opportunities remain available.

The impact of government/public interaction also depends on the ramifications to a potential recipient of conforming or refusing to conform to the government’s standards. Assessing these ramifications requires assessing the quantity and quality of alternate avenues through which the same type of speaker can engage in the same type of speech and reach the same type of audience. Where private or other governmental options are available, the forum at issue is not dominant.

Nonpublic forums will rarely dominate the speech market in ways that render the use of public sensibilities standards illegitimate. A nonpublic forum of government creation is usually similar to other available private speech opportunities; the government aid is helpful, but not necessary, for its recipients to communicate with the relevant audience. Nevertheless, the limited realm inquiry remains important because sometimes a government/private speech interaction will have a dominant influence in the relevant speech market. Certain types of arts or student activities funding

366 See, e.g., Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (noting that time, place, or manner restrictions must be "narrowly tailored to serve a significant government interest, and ... leave open ample alternative channels for communication of the information").


371 Compare Donald W. Hawthorne, Subversive Subsidization: How NEA Art Funding Abridges Private Speech, 40 U. KAN. L. REV. 437, 438 (1992) (arguing that the NEA plays a "pervasive role ... in the art world"), with Post, supra note 54, at 193 n.207 ("Although the NEA is an important and influential player in the world of art production, the actual extent of this world’s practical dependence on the
might be examples, as might be the Combined Federal Campaign. The second-class mailing privilege certainly is one. In addition, the limited realm consideration keeps alive inquiry into creeping governmental domination of related speech markets. This concern should cause the government to act with caution in imposing access standards and allows courts to react to changing circumstances in assessing the constitutionality of public sensibility access standards.

In sum, the limited realm inquiry is contextual. Some indeterminacy is unavoidable, but not unmanageable, given that this inquiry is familiar to free speech doctrine. As with the inquiry into whether the government has a protective reason to impose public sensibilities standards, the inquiry into whether it acts in a limited realm can tolerate some imprecision that favors the government’s ability to impose the standards so long as the standards are narrow and precise when it does so. Moreover, because government-created nonpublic forums will sometimes dominate the relevant speech market, even under a lenient standard, the limited realm inquiry provides an important check on government action. Where the government/private speech opportunity dominates the relevant speech market, public sensibilities standards threaten to skew private discourse and so are illegitimate in the particular nonpublic forum.

4. The Standards.—While the ultimate determination of the constitutionality of a public sensibilities standard must depend upon the particular standard in the context of a particular forum, the balancing of the risks these standards create and the values they serve need not occur solely on a case-specific basis. It is possible to create a general outline of standards that may apply in a public sensibilities forum. This subsection relates both to the substance of the standards and to the procedures for implementing them.

a. Substance.—Public sensibilities standards are legitimate to the extent that they address public offense that occurs primarily because of the subject matter of the speech or the mode of communication. They are illegitimate to the extent pose a substantial threat of suppressing particular viewpoints unless the type of viewpoint discrimination is already embodied in a less protected speech category or the government otherwise has a com-

372 See Anne-Marie Cusac, Suing For Jesus: A New Legal Team Wants to Cleanse the Campuses for Christ, PROGRESSIVE, Apr. 1, 1997, at 31 (reporting that without student activity fee funding “most student expression will end”); Dave Newbart, College Student Fees Face First Amendment Test, CHI. TRIB., June 4, 1997, at 17 (noting that were student activity fee funding declared unconstitutional the hardest hit student groups would be the smallest and most controversial).


374 See YUDOF, supra note 77, at 234-5 (using second-class mailing privileges as an example of a government speech subsidy); Post, supra note 54, at 157 (arguing further that it falls within public discourse and so cannot be subject to content regulation).
pelling interest in reacting to the message. The goal in determining the substance of legitimate public sensibilities standards, then, is to identify particular standards that address the legitimate public interest with minimum risk of invidious viewpoint discrimination. Of course, assessing this risk for any particular standard is difficult, as viewpoint discrimination is most fundamentally in the eyes of the beholder, and every speech regulation poses some risk of it.Nevertheless, a practical approach premised on existing constitutional understandings can establish standards that meet the government's legitimate interests while confining to an acceptable level the risk that the standards will result in invidious discrimination.

(1) **Specificity.**—Generally phrased public sensibilities standards, such as those that require speech to be "in the public interest," "not controversial," "not offensive," or "in good taste," pose two related Free Speech Clause dangers. The first is that they are unconstitutionally vague. The second is that they may be unconstitutionally overbroad as well.

(a) **Vagueness.**—In the area of speech restraints, a law is unconstitutionally vague "if its prohibitions are not clearly defined." This rule applies because vague laws pose a number of Free Speech Clause dangers. One is that the government will violate the fundamental fairness principle, by "trap[ping] the innocent" who have no "reasonable opportunity to know what is prohibited." Beyond the threat of criminal punishment, a concern with government censorship underpins the "long line of precedent" that allows a facial challenge to licensing statutes that vest "unbridled discretion" in the hands of a government official or agency charged with permitting or denying private parties the right to engage in expression. The absence of express standards both poses the danger of use of illegitimate criteria by the government decision maker and of self-censorship by applicant speakers "even if the discretion and power are never actually abused." The prohibition against vague access standards applies when the government assists private speakers by granting them access to a public forum. In this context, "[i]f the permit scheme 'involves appraisal of facts,

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375 See, e.g., Abner S. Greene, Government of the Good, 53 VAND. L. REV. 1, 33 (2000) ("It is difficult to know whether a statute is viewpoint discriminatory in part because we see viewpoint discrimination depends on whether an issue is seen as disputed in the current legal culture.").
376 E.g., Kovacs v. Cooper, 336 U.S. 77, 102 (1999) (Black, J., dissenting) (propounding that ostensibly content-neutral ban on sound trucks favors wealthy over poor speakers).
378 Id.
380 Id.
381 Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 130-31 (1992) (deciding that precise standard requirement applies to parade permit fee); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 552 (1975) (applying requirement of "narrow, objective and definite standards" to city auditorium managing board's rejection of application to perform musical Hair); Shuttlesworth v. City of Bir-
the exercise of judgment, and the formation of an opinion,'... 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted.'

Toward the other end of the government/private speech interaction spectrum, however, such precision in standards is not constitutionally required. Specifically, "[i]n the context of selective subsidies [such as arts funding], it is not always feasible ... to legislate with clarity." While a "decency and respect for public values" access standard "could raise substantial vagueness concerns" in the context of private speech regulation, in the context of arts funding "the consequences of imprecision are not constitutionally severe." Rather, the standard "merely adds some imprecise considerations to an already subjective selection process."

These different tolerances for vagueness in the standards through which the government deals with private speech reflect the familiar balance between the benefits of government speech and the risks of abuse that direct the interaction's placement on the spectrum in the first place. Arts funding such as that done by the NEA is on the government speech side of the spectrum because the government acknowledges a quality arbiter role. In such a context, subjectivity in the access standard is necessary so that the government agents charged with making the "excellence" determination can do so in a way that reflects judgment rather than rote application of objective criteria. The exercise of judgment is a government speech act with a constitutional value that balances the risk of abuse posed by the subjective criteria. The government is politically, rather than judicially, accountable for any abuse that may occur because it has assumed responsibility for making the excellence determinations.

These considerations indicate that, although the public sensibilities forum is located between the open public forum and the competitively selective quality determinations program, for vagueness purposes the fact that it is a "forum" for private speech should be controlling. When the government speaks through its assistance to private speakers, requiring specific access standards undermines the government's legitimate speech interest. The same is not true when it administers a forum. In this context, the government does not have a legitimate interest in employing subjective criteria. Rather, one of the crucial elements that sets a forum apart from government/private speech interactions that constitute government speech is that

381 Forsyth, 505 U.S. at 131 (quoting Cantwell v. Connecticut, 310 U.S. 296, 305 (1940); Conrad, 420 U.S. at 553).
383 Id.
384 Id. at 586 (distinguishing "comparatively objective decisions").
the access criteria are “comparatively objective.” To be sure, the government has greater discretion to limit access to a nonpublic than to a public forum. But this greater discretion means only that more objective reasons for limiting access may be reasonable to protect other, legitimate uses of the property, not that the government can limit access for any reason at all.

Basing access decisions on the majority’s approval of the viewpoint expressed is strictly prohibited in any type of forum. Public sensibilities standards, if not precisely defined, present the great danger that they will be applied in this way. The legitimate grounds for denying access based upon public sensibilities can be spelled out with reasonable specificity. Because the government can be specific without undermining a legitimate interest of its own, the Constitution requires that it do so.

Clear standards support the constitutionality of a public sensibilities forum in several related ways. As in the context of speech restrictions, specific standards limit the discretion of forum administrators to engage in viewpoint discrimination. In addition, the specificity of public sensibilities standards heightens their legitimacy. The specificity makes the standards more publicly visible and so ensures accountability of the government’s decision to make the particular type of discriminations embodied in the standards. Finally, clear standards ensure that the decisions of forum administrators can be subject to meaningful judicial review, which is a crucial safeguard against unconstitutionally discriminatory action.

(b) Overbreadth.—A government action is unconstitutionally overbroad when it “creates an impermissible risk of suppression of ideas” either by “delegat[ing] overly broad discretion to the decisionmaker” or by “sweep[ing] too broadly, penalizing a substantial amount of speech that is constitutionally protected.” As with vagueness, the overbreadth doctrine

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2. See, e.g., Christ’s Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth., 148 F.3d 242, 250-51 (3d Cir. 1998) (considering policy prohibiting advertisements found “objectionable for any reason,” which applied to exclude some advertisements about abortion but not others); AIDS Action Comm. of Mass. v. MTBA, 42 F.3d 1, 9 (1st Cir. 1994) (deciding that policy prohibiting “sexually explicit” or “patently offensive” advertisements applies to create the appearance of viewpoint discrimination).
3. See United Food & Commercial Workers Union v. Southwest Ohio Reg’l Transit Auth., 163 F.3d 341, 359 (6th Cir. 1998) (explaining that official’s decision to limit speech must be “constrained by objective criteria” and not rest on “ambiguous and subjective reasons” (quoting Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814, 818 (9th Cir. 1996))).
4. See id. (deciding that vagueness doctrine “requires that the limits the [government] claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.” (quoting City of Lakewood v. Plain Dealer Publ’g Co., 486 U.S. 750, 770 (1988))).
embodies a concern beyond the parties before the court, specifically that an overbroad action will chill others’ speech by causing “those who desire to engage in legally protected expression . . . [to] refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.”\footnote{394} Courts require “substantial” overbreadth to find a government action facially invalid.\footnote{395}

For the same reasons that the vagueness doctrine should apply to access standards for nonpublic forums, the overbreadth doctrine should as well. When examined, the standards currently used in many public sensibilities forums are overbroad because they create the great danger that they will be used by government decision makers, or perceived by potential private speakers, to prohibit the expression of particular viewpoints.\footnote{396} These standards can be narrowed to limit their application to viewpoints without compromising legitimate government interests. Thus, as with vagueness concerns, overbreadth concerns indicate that public sensibilities standards must be narrowly and precisely articulated both to limit their constitutionally dangerous applications and to render the government accountable for the types of exclusions that will occur in the administration of the forum.

\textit{(2) Categories of Speech.}—The particular public sensibilities standards employed in a forum will depend upon the nature of both the forum and the members of the public who will come into contact with it. It is therefore not possible to delineate exactly which categories of speech can permissibly be governed by public sensibilities standards. It is, however, possible to generalize about the characteristics of an acceptable public sensibilities category, as well as to spell out some categories that have these characteristics.

One possibility implied by some articulations of the rule that governs nonpublic forums is that any access standard is valid so long as it does not explicitly target disfavored viewpoints.\footnote{397} Most public sensibilities forum exclusions would qualify as legitimate under this standard. But such a standard would remove almost all individual speech protections from administration of government-created private speech forums. Public sensibilities standards have, as their motivating rationale, public reaction to the excluded speech. This rationale carries with it the great danger of majoritarian viewpoint bias even if it is not articulated on the face of the exclu-

\begin{footnotesize}
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\item \footnote{395}{Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).}
\item \footnote{396}{See United Food & Commercial Workers Union, 163 F.3d at 361 ("We believe any prohibition against 'controversial' advertisements unquestionably allows for viewpoint discrimination.").}
\item \footnote{397}{Int’l Soc’y for Krishna Consciousness v. Lee, 505 U.S. 672, 679 (1992) ("Limitations on expressive activity conducted on [nonpublic forum] property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker’s activity due to disagreement with the speaker’s view.").}
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This great danger requires not only defining the instances when government assistance to private speakers constitutes a legitimate public sensibilities forum by reference to competing constitutional values, but identifying appropriate categories of exclusion in this way as well.

The Court has already identified categories of speech that the government can restrict entirely. These categories include obscenity and child pornography, defamation, fighting words, false or misleading commercial speech and speech that is directed to inciting or producing imminent lawless action. The justification for the exclusion of these categories from full Free Speech Clause protection is that the speech within them is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Thus a balance of constitutional values determines the composition of an excludable category, and the Court has defined each one precisely to limit applications where the balance does not obtain.

The existing categories of less protected expression and the balancing method of defining their boundaries provide a starting point for determining categories of speech that may be excluded from a public sensibilities forum. Their existing boundaries are a result of a balance of majoritarian interests against the very strong individual free speech interests that animate the doctrine of speech restraints. In the public sensibilities forum context, however, majoritarian interests are higher and individual free speech interests are lower. Consequently, a limited broadening of the category definitions may be appropriate for access exclusions to a public sensibilities forum. Additional categories of exclusion not recognized in speech restraint doc-

398 R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992) ("From 1791 to the present, . . . our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas" and, despite decisions that "have narrowed the scope of [some] traditional categorical exceptions," "a limited categorical approach has remained an important part of our First Amendment jurisprudence.").
406 Chaplinsky, 315 U.S. at 571-72 (classes of proscribable speech are "well-defined and narrowly limited").
407 See, e.g., Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988) ("Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently 'outrageous.' But in the world of debate about public affairs, . . . even when a speaker or writer is motivated by hatred or ill will his expression is protected by the First Amendment.").
trine may be appropriate for public sensibilities forum exclusion if the same balance of constitutional values applies.

But several limitations directed at limiting the possibility of invidious viewpoint discrimination must apply to public sensibilities forum exclusion categories as well. First, absent a link to a type of viewpoint discrimination inherent in the pre-existing less protected speech categories or compelling interest in suppressing a particular viewpoint, the offense at which the exclusion aims must refer primarily to the mode or subject matter of the expression. Second, an exclusion must be capable of reasonably specific articulation to limit its potentially viewpoint discriminatory applications. This subsection will discuss the requirements and categories of legitimate public sensibility forum exclusions.

(a) Vulgar Expression

(i) Sexually Explicit Speech.—Governments can prohibit obscenity entirely. This is true even though the reason for prohibiting obscenity is that it offends public values and sensibilities. Beyond the defined category of obscenity, the Court has already acknowledged a penumbra, distinguishing explicitly sexual speech that is not obscene from other types of speech. It has recently reaffirmed that although “the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interests in untrammled political debate.” This lesser protection for sexually explicit speech is apparent in cases upholding zoning and other restrictions of businesses that sell or display the material. Most recently, these cases have relied upon a determination that the restrictions are not content based because they target the speech’s secondary ef-

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409 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975) (explaining that in allocating access to municipal theater, “the danger of censorship and of abridgment of our precious first Amendment freedoms is too great where officials have unbridled discretion over a forum’s use”).


411 See Paris Adult Theatre I, 413 U.S. at 69 (deciding that State has a “right . . . to maintain a decent society”).


This second-class protection does not apply, however, to "blanket ban[s]" that "target[] the primary effects of protected speech." In particular, "[w]here the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists."

The public sensibilities forum does not fall neatly into either of these types of restrictions of sexually explicit speech. Nevertheless, the lesser scrutiny of some types of regulations suggests that broader restrictions of such speech may be appropriate in other contexts where the free speech dangers of a broad and direct speech restriction are not present. The public sensibilities forum is such a context.

Although the live adult entertainment zoning cases ostensibly depend upon a "secondary effects" rationale, underpinning them as well is the determination that, unlike invalid speech restrictions, the regulations do not significantly restrict communication of sexually explicit material to willing recipients. The same is true with respect to access limitations to a public sensibilities forum, which by definition operates in a limited realm. Moreover, in the area of speech restrictions even a significant one can be justified by a sufficiently compelling government interest. One such interest is that the government's legitimate responsibility to shield minors cannot be achieved through other means.

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415 City of Erie, 529 U.S. at 293 (plurality opinion) (deciding that ordinance prohibiting nude dancing is aimed at secondary effects and so intermediate scrutiny applies); id. at 310 (Souter, J., concurring in part and dissenting in part) ("I ... agree with the analytic approach that the plurality employs in deciding this case."); Renton, 475 U.S. at 47 (applying intermediate, rather than strict, scrutiny because secondary effects motivated zoning law); Young, 427 U.S. at 54 (explaining that secondary effects of theaters on neighborhoods of lower property values and crime justified burden of zoning ordinance).

416 United States v. Playboy Entm't Group, 529 U.S. 803, 815 (2000); City of Erie, 529 U.S. at 294 (explaining that nudity prohibition is not "a complete ban;" its "effect on the overall expression is de minimis"); id. at 322 (Stevens, J., dissenting) ("A dispersal that simply limits the places where speech may occur is a minimal imposition whereas a total ban is the most exacting of restrictions.").

417 Playboy, 529 U.S. at 813.

418 Public sensibilities forum access limitations directly based on the content of the expression and often its effect on the audience, rather than on nonspeech secondary effects. They are not, however, blanket bans as they apply only to the forum at issue.

419 Playboy, 529 U.S. at 812 (noting that the primary question is whether a speech regulation "is a significant restriction of communication between speakers and willing adult listeners").

420 City of Erie, 529 U.S. at 294 (finding effect of nudity prohibition on expression of erotic dance de minimis); Renton, 475 U.S. at 48 (finding that zoning ordinance merely "circumscribe[s] [theaters'] choice as to location"); Young, 427 U.S. at 81 n.4 ("[A] zoning ordinance that merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression."); id., at 78-79 (Powell, J., concurring) ("At most the impact of the [zoning] ordinance on [free speech] interest is incidental and minimal.").

421 Playboy, 529 U.S. at 813 ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.").

422 Id. at 814 ("E[ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.").
public sensibilities forum is broader than that which can support a speech restriction, both because it applies to the public generally\textsuperscript{423} and because the degree of captivity is less than required to justify speech restrictions. Nevertheless, achieving it generally cannot be accomplished by other means.\textsuperscript{424} If the broader protective interest is accepted as legitimate, it provides a countervailing constitutional value in the context of a public sensibilities forum that justifies some restrictions on sexually explicit speech.

Limitations on sexually explicit speech meet the feasibility requirements for access limitations to a public sensibilities forum. Although the category poses viewpoint discrimination dangers, it is primarily directed at the mode or subject matter of expression.\textsuperscript{425} In addition, the category is capable of reasonably specific articulation. The restricted category should be reducible to particular words or images, described in terms of body parts or actions. Although some gray areas will remain, the specificity will allow courts to review administrative decisions for uniformity, which may substantially reduce the viewpoint discriminatory potential remaining in the standards.\textsuperscript{426}

\textit{(ii) Swear Words.—}Early on, the Court identified “profanity” as a category of speech that the government can excise entirely.\textsuperscript{427} Later, it cast doubt on that conclusion, noting that to “forbid particular words” is to “run[] a substantial risk of suppressing ideas in the process.”\textsuperscript{428} Despite these comments in the context of a broad prohibition of “offensive” conduct, narrower prohibitions of swear words can perhaps be constitutional even in the context of speech restrictions.\textsuperscript{429}

At least, a swear words prohibition can constitute an appropriate access standard in an otherwise valid public sensibilities forum. Although swear words can be used to express a point of view that itself relates to swear

\textsuperscript{423}Although the protective interest in a public sensibilities forum extends to the public generally, in most instances children will be part of the audience that must confront expression in a public sensibilities forum. Consequently, the purpose of protecting them may often justify denying access to sexually explicit speech.

\textsuperscript{424}The captivity necessary to establish a public sensibilities forum means that the audience cannot easily “avert[] its eyes.” Cohen v. California, 403 U.S. 15, 21 (1971).

\textsuperscript{425}See Kent Greenawalt, \textit{Viewpoints from Olympus}, 96 COLUM. L. REV. 697, 700 (1996) (proposing that “sexually explicit speech differs from other presentations of similar ideas” according to its “form of presentation”).

\textsuperscript{426}See AIDS Action Comm. of Mass. v. MTBA, 42 F.3d 1, 12 (1st Cir. 1994) (finding unconstitutional the appearance of viewpoint discrimination where transit authority allowed depictions that “represent the conventional exploitation of women’s bodies for commercial advertising” but disallowed as too sexually explicit “sexual humor addressed to men’s bodies”).

\textsuperscript{427}See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

\textsuperscript{428}See Cohen, 403 U.S. at 26.

\textsuperscript{429}See Fed. Communications Comm’n v. Pacifica Found., 438 U.S. 726 (1978) (holding that the government may prohibit afternoon broadcast of \textit{Filthy Words}).
words, the category has a primary application to the mode of expression rather than the ideas expressed. It is also, perhaps more than any other category, capable of specific articulation, with the particular words prohibited reducible to a list.

(iii) Other Vulgar or Indecent Expression.—The categories of "vulgar" or "indecent" speech can capture words and images that offend public sensibilities in similar ways, but do not fall into the sexually explicit speech or swear words categories. While common sense and experience confirm that such speech may well exist, the catch-all nature of the category counsels caution as it opens the door to arbitrary enforcement. The fact that the vulgarity or indecency categories listed above can be described with both the breadth and specificity that limit their viewpoint impact suggests that other forms can be as well. Because of the danger of discretionary enforcement, a general "no vulgarity or indecency" access requirement is not a legitimate public sensibilities standard. Officials should be required to define vulgar or indecent types of speech with a breadth and specificity that largely confines their application to the manner of expression in order to enforce them.

(b) Controversial Expression

(i) Subject Matter Exclusions.—The Court's decision in Lehman v. City of Shaker Heights sets the precedent for the government's ability to exclude certain types of speech from a nonpublic forum on the ground that it is "controversial." In that case, the government excluded "political" speech, meaning candidate and public issue advertising, from its buses.

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430 This was, in fact, the point of the Filthy Words broadcast. Id. at 730 ("[George] Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.").

431 See SUNSTEIN, supra note 272, at 313 (suggesting that restrictions on profanity can be content neutral); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. REV. 189, 243 (1983) (noting that profanity restrictions are functionally equivalent to restrictions on the manner of communication).


433 Another category that could meet the breadth and specificity requirements would be words and images that relate to bodily excretions—urine, excrement, vomit, and the like. A government could exclude the "Piss Christ" or an image of a bloody fetus under a properly defined prohibition. See Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 574 (1998) (rewriting of NEA grant guidelines occasioned, in part, by a grant to assist Andres Serrano, who produced Piss Christ, a photograph of a crucifix immersed in urine); Claudio v. United States, 836 F. Supp 1230, 1232 (E.D.N.C. 1993) (considering proposed art display in federal building that included depiction of a bloody fetus).


435 Id. at 300 n.1 (noting that transit agency does not accept "political copy" that makes certain representations).

436 Id. at 301.
in order to protect riders from the “blare of political propaganda.” In this context, the Court held that the city could constitutionally choose to limit its forum “to innocuous and less controversial commercial and service-oriented advertising.”

Practical and theoretical considerations indicate that a government’s ability to restrict “controversial” speech’s access to a nonpublic forum should extend to the point indicated in *Lehman*, but no further. On one hand, the same considerations that allow the government to limit access to nonpublic forums on other grounds counsel in favor of allowing the government in certain circumstances to choose to limit access to some types of “controversial” speech. Where the requirements of a legitimate public sensibilities forum are met, as they were in *Lehman*, the government should have reasonable discretion to define the types of “controversial” speech from which the captive public needs to be protected. While it may seem unwise as a matter of free speech values and what should be the public’s interest in promoting it, the political visibility of the choice and the limited realm of its impact suggest that the government should in principle have the discretion to choose to create what amounts to an “insipid expression forum.”

The government cannot, however, have unlimited discretion to excise “controversy” from all of its voluntarily created forums. The government’s authority to limit controversial speech exists only in a legitimate public sensibilities forum. Specifically, outside limited didactic realms, the government must have a legitimate interest in protecting a captive audience before it can structure its forum to protect that audience from controversy. *Lehman* supports this qualification.

When the government otherwise has the ability to limit controversial speech, it must do so in a way that minimizes the possibility of viewpoint discrimination. *Lehman* also supports this qualification. The standard that the Court reviewed did not generally deny access to “controversial” speech, but only to the more limited category of “political” speech. Moreover,
the transit authority uniformly applied the standard to limit candidate and public issue speech. In the context of a specific standard, consistently applied, the Court held the city could limit forum access according to public distaste for controversial communication.

Specificity is required to limit the risk of viewpoint discrimination posed by more general standards. Specific standards must refer to subject matters, not generally to "controversial" speech. These categories should be defined in such a way that it is possible to identify, as a concrete reality, speakers with viewpoints on multiple sides of an issue who will be excluded according to the standard. Moreover, the categories should be ones that can plausibly pass as "controversial" in order to validate the government's protective interest.

Because the government should have reasonable discretion to assess the public interest in avoiding "controversy" and to address it in a legitimate public sensibilities forum, it will be able to exclude numerous topics from its forums. While it might seem troublesome, for example, for the government to forbid speech on the topics of abortion or foreign policy in a public sensibilities forum, the broader subject matter prohibition is acceptable in a way that more narrow viewpoint prohibitions are not. Political process and commercial interest checks beyond the free speech guarantee will dissuade the government from broadly enacting such standards. Further, because the access restrictions apply in limited realms, the subject matters will occur in public discourse. To the extent that the government assumes responsibility for limiting its otherwise legitimate public sensibilities forums to banal topics, then, it should be able to do so.

(ii) Religion.—Although it is a subject matter that can certainly be controversial, religion as an exclusion from a private speech forum requires its own discussion because the Court has discussed it most thoroughly. In numerous instances, the Court has invalidated government exclusion of religious groups from the benefits of a private speech forum on

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443 Id. at 300-01 ("There was uncontradicted testimony . . . that during the 26 years of public operation, the [transit system], pursuant to city council action, had not accepted or permitted any political or public issue advertising on its vehicles.").

444 E.g., Planned Parenthood Ass'n v. Chicago Transit Auth., 767 F.2d 1225, 1230 (7th Cir. 1985) ("We question whether a regulation of speech that has as its touchstone a government official's subjective view that the speech is 'controversial' could ever pass constitutional muster.").

445 See, e.g., Air Line Pilots Ass'n v. Dep't of Aviation of Chicago, 45 F.3d 1144, 1157 (7th Cir. 1995) ("Unlike a consistently enforced prohibition on political speech, a claimed policy that enabled the City to prohibit the narrower category of speech critical of airlines would virtually guarantee discrimination.").

446 See Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth., 148 F.3d 242 (3d Cir. 1998) (deciding that when transit authority accepts advertisements on topic of abortion, unconstitutional to forbid certain advertisements as "misleading"); East Timor Action Network, Inc. v. City of New York, 71 F. Supp. 2d 334, 347 (S.D.N.Y. 1999) (deciding that exclusion of "Free East Timor" street sign was unconstitutional when other "politically sensitive" signs were permitted).
the grounds that the exclusion was unconstitutionally viewpoint based.\footnote{Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093, 2101 (2001) (deciding that exclusion of religious group from forum where teaching of morals and character is permissible activity constitutes viewpoint discrimination); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995) (finding that university unconstitutionally "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints"); Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (deciding that because church’s films dealt with a subject otherwise permissible, its exclusion was viewpoint discrimination).}

The rule that emerges from these cases is that "speech discussing otherwise permissible subjects cannot be excluded from a [private speech] forum on the ground that the subject is discussed from a religious viewpoint."\footnote{Good News Club, 121 S. Ct. at 2102. In this case, the Court identified the rule as applying to a limited public forum, but as explained earlier, the categories of private speech forums have merged so that the "operative principle" that forbids viewpoint discrimination defines them all. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 233 (2000) (noting that viewpoint neutrality explains Rosenberger).}

Lower courts have sometimes applied this principle even more broadly, implying that almost any type of religious exclusion from a forum is invalid. For example, a federal district court found Virginia’s vanity license plate exclusion of “any reference to ... deities” invalid, reasoning that, because the state allowed other religious references, its exclusion of a “GODZGUD” plate was viewpoint discriminatory.\footnote{Pruitt v. Wilder, 840 F. Supp. 414, 418 (E.D. Va. 1994) ("[B]y allowing one subset of religious speech—that not directly referring to a deity—to be placed on CommuniPlates, while denying another sub-set of religious speech—that referring to deities—the DMV policy discriminates on the basis of the speaker’s viewpoint.").} In response to a similar lawsuit, by a woman whose “THNXGOD” or “IM4GOD” plates were rejected, the Utah Department of Motor Vehicles rewrote its rule outlawing any reference to religion to permit them, so long as they do not denigrate a faith.\footnote{Judy Fahys, State’s Tag Team Tries to Keep It Tasteful, SALT LAKE TRIB., Oct. 17, 1999, at A1. Rosenberger, 515 U.S. at 831.}

Even under the Court’s broad reading of viewpoint discrimination against religious groups, this reasoning goes too far. The crucial inquiry is whether the exclusion prohibits religious perspectives on an otherwise includable topic. The Court has implied that “exclusion of religion as a subject matter” is different than exclusion of religious viewpoints on other subject matters and may be permissible in a private speech forum.\footnote{None of the contexts in which the Court has articulated its broad standard of religious viewpoint discrimination were legitimate public sensibilities forums. Specifically, a legitimate protective interest because of audience captivity was lacking. Good News Club, 121 S. Ct. 2093 (forum is after hours use of school facilities); Rosenberger, 515 U.S. 819 (forum is funds for student publications); Lamb’s Chapel, 508 U.S. at 393 (1993) (forum is after hours use of public facilities).} Because of its confining definition, a public sensibilities forum is the location where such an exclusion is most likely appropriate.\footnote{Rosenberger, 515 U.S. at 831.} The government can reasonably decide that it wants to avoid controversy in a public sensibilities forum, and it can reasonably decide that the subject matter of religion is
controversial. The question then becomes whether the government can articulate the exclusion to limit its potentially viewpoint discriminatory applications.

The deity exclusion is one way to do so, at least in the context of the vanity license plate forum. The concern that motivates such an exclusion is often that both promoting or demeaning deities is inappropriate in the forum.\textsuperscript{453} Even without this motivation, the exclusion has this effect, which means that it is viewpoint neutral. In fact, it is the more targeted exclusions, prohibiting "blasphemy" or derogating deities that are more clearly viewpoint discriminatory.

A ban on the subject matter of religion is another way to exclude such controversy from a public sensibilities forum. It carries with it, however, substantial vagueness dangers and overbreadth dangers. The exclusion would need to be narrowed to include only discussions of the merits of particular religions or more general religious belief, or the use of religious symbols, figures, texts, or maxims for this purpose. Religious groups would have to remain free to discuss otherwise permissible subjects in the forum, to identify themselves as the source of the perspective and to use religious references to support their perspective.\textsuperscript{454} The line drawing that this requires is intricate, but with diligent and reasoned enforcement by government officials and judicial review for uniformity, in most cases it can be done.

Either the more broad subject matter exclusion or a more narrow subset of it, such as the deities exclusion, should be within the discretion of the government to employ when it structures a nonpublic forum. It must be noted, however, that often, the government will choose not to use the exclusions. A ban on the use of religious symbols in artwork placed in government buildings prohibits not only the "Piss Christ"\textsuperscript{455} but the whole body of art depicting and revering religion. Viewpoint neutrality requires the government to choose whether to ban all or none of, making exclusions less frequent.

\textit{(c) Harmful Speech}

\textit{(i) Hate Words.—}One category of speech that the government can prohibit completely is fighting words.\textsuperscript{456} In the speech restriction con-

\textsuperscript{453}\textit{Pruitt}, 840 F. Supp. at 416 ("The ban on references to deities was put in place by DMV, at least in part, to 'avoid demeaning deities' and because 'DMV did not wish to have Virginia license plates identified with any particular religion or deity.'").\textsuperscript{454}\textit{Good News Club}, 121 S. Ct. at 2102 (noting that "the invocation of Christianity" provides a "foundation" for the discussion of morals and character development).\textsuperscript{455} Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 574 (1998) (noting that Andres Serrano's Piss Christ is one work that prompted public controversy and reevaluation of the NEA's grant-making criteria).\textsuperscript{456} See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (stating that fighting words are those that "inflict injury or tend to incite a . . . breach of the peace").
text, however, this category is strictly limited for fear it will be used to suppress ideas. The line is drawn in the speech restriction area in favor of free speech, allowing a lot of hurtful group-based epithets and images and individual insults to go unpunished.

The government is not allowed to restrict hate speech more broadly—it cannot limit expression that more generally communicates condemnation of or disdain for certain groups. Such a restriction would at least be content-based, and perhaps viewpoint based as well. In addition, hate speech regulations in practice are inevitably vague and potentially overbroad, capturing the expression of ideas along with the hardcore epithets and insults at which they are primarily directed.

While both the government and the targets of hate speech must broadly tolerate it in general public discourse, the government’s protective interest confers authority to restrict access in the limited realm of a legitimate public sensibilities forum. This suggests a different balance of interests with respect to some types of hate speech in this context. Although all types of hate speech certainly embody the intolerance viewpoint, a subset within it can be defined as having a pedigree of being a particularly offensive mode of expressing it. In addition, because the types of speech that occur in a particular nonpublic forum are usually more limited than in public discourse, it is possible to craft hate speech access rules more specifically, limiting their potentially unconstitutional application.

A standard modeled around fighting words, currently employed in various forms in public sensibility forums, denies access to “terms” “of contempt, prejudice, or hostility” or that are “insulting or degrading.” This standard does not meet the specific requirements of the fighting words category and therefore would be probably be unacceptable as a private speech regulation. As a concept, however, it should be an acceptable ac-

457 See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1152 (3d ed. 1996) (noting that “[t]he Court has not upheld a conviction on the basis of the fighting words doctrine since Chaplinsky [and that it] has been argued that the Court’s post-Chaplinsky decisions have so narrowed the doctrine as to render it meaningless”).


460 Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (holding that a damage award for outrageous speech is unconstitutional when the subject is a public figure).

461 See R.A.V., 505 U.S. at 391 (stating that hate speech prohibition “goes even beyond mere content discrimination, to actual viewpoint discrimination”).

462 See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 827 (1997) (“[T]he Supreme Court’s decision in R.A.V. v. St. Paul makes it difficult for hate speech codes to survive judicial analysis; if they prohibit only some forms of hate, they will be invalidated as impermissible content-based discrimination. But if the codes are more expansive and general, they likely will fail on vagueness and overbreadth grounds.”).

463 CAL. CODE. REGS. tit. 13, § 170.00 (West 2001).

464 See Cohen v. California, 403 U.S. 15, 20 (1971) (deciding that epithet on jacket is not a fighting
cess standard in a public sensibilities forum. Although there is content, and probably viewpoint, discrimination inherent in prohibiting "degrading" as opposed to "complimentary" references, this is a distinction already embraced in the fighting words category. A broad public consensus supports tolerance over intolerance. In addition, explicit, democratically enacted public policies embody this content choice. In particular, the government’s interest in enforcing nondiscrimination norms can support prohibiting the use of such terms in limited realms similar to the public sensibilities forum. These considerations confirm that some types of “hate speech” access limitations, while unacceptable in speech restriction, should be acceptable in a public sensibilities forum.

Despite the general acceptability of prohibiting “degrading terms” in a public sensibilities forum, the term remains unacceptably vague and overbroad if left unmodified. Many current standards also distinguish among types of degrading terms, which also poses constitutional problems. In a nonpublic forum, however, it is possible to address these constitutional difficulties by narrowing the definition of “degrading” to limit the discretion available in enforcement. Most specifically, it is possible to define the unacceptable “derogatory references” in terms of a word list. While a word list might seem pointless in other contexts, as harmful ideas can be conveyed in other ways, nonpublic forums often offer more limited forms of communication, and therefore alternative modes of expressing insulting speech are less available. Even if other ways of communicating are available, excising the short, punchy epithets and insults most clearly addresses the government’s legitimate interest in protecting a captive audience from abuse while preserving the possibility of discussing viewpoints. A defined list makes the government accountable for the discrimination in which it chooses to engage, and makes the specific choices available for debate and for comparison for consistency with those not included. Because a list leads to consistency in enforcement, it also results in an important political process check on the forbidden words, as they must be forbidden in all contexts.

Controversy over California’s recall of “DAGO” and “WOP” plates il-
illustrates these points. While the recall was designed to protect Italian-Americans from harmful epithets, it was primarily Italian-Americans who owned the plates "as somewhat tongue-in-cheek tributes to their ethnic heritage." But vanity plates do not have the space to explain whether or not the speaker intended to deliver a message of ethnic hate, ethnic pride, or neither. So, the recall of a single term can affect multiple points of view. Moreover, the visible recall inspired a public debate between those who favored and opposed it, indicating that the ultimate decision whether to permit or disallow the term will be the result of a robust political process.

It may be possible to define the forbidden words more broadly than with a word list, in terms of an articulated standard of public perception. This allows for changes in public sensibilities while still cabining the opportunities for abuse. Unlike words, however, it will usually not be possible for the government to define "derogatory images" in an acceptably specific way. Thus, the broadened category of "fighting words" in the context of a public sensibilities forum should be limited to degrading "terms" defined by a specific list or clearly articulated and reviewable standard.

(ii) Specific References to or Depictions of Identifiable Individuals.—The government’s interest in protecting individuals from reputational injury permits it to allow subjects of defamatory speech to recovery damages from the speaker. But where the speech is of public interest or concerns public officials or figures, the constitutional value balance favors the speaker, allowing much harmful speech to go unpunished unless the harmed individual can meet onerous proof requirements. This balance in the context of speech restraints protects

470 Cheevers, supra note 164, at A3.
471 Id. ("The word wop came into common use during the 1920s as a derogatory terms for an illiterate Italian immigrant working as a day laborer, according to the Dictionary of American Slang. Some language experts believe the word may have originated as an acronym for ‘without papers’ to describe immigrants who entered the U.S. without passports.").
472 Id. (noting that recall initially included "DUWOP39," "held by a Fresno couple who are ‘50s music aficionados and drive a restored 1939 Ford coupe.").
473 Id. (quoting both plate holders and Sons of Italy spokesman).
474 See McBride v. Motor Vehicle Div. of Utah State Tax Comm’n, 977 P.2d 467, 470-71 (Utah 1999) (adopting standard of "objective reasonable person" when offensiveness of term "REDSKIN" was at issue).
476 Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) ("This [New York Times] standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price form the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the New York Times test.").
477 N.Y. Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (holding that to recover damages, public
the vigorous discussion of public issues from government censorship.\footnote{478}

The government's greater interest in controlling the content of discussion in a public sensibilities forum, and its lesser speech market impact, suggests that a slightly less speech protective rule may apply to its interest in protecting individuals from reputational harm. One possibility is to lower the proof requirements, allowing individuals to recover with a lesser showing of intent. Yet, for the reasons relied upon in speech restraint doctrine, this approach presents too great a danger of skewing public debate by protecting the government from critical commentary.

A better balance is to allow the government in a public sensibilities forum to prohibit the depiction of or reference to particular individuals. This is a subject matter restriction that limits potential viewpoint discriminatory applications. In fact, because of the breadth that viewpoint neutrality requires, the government will often choose not to employ the prohibition. For example, if, to prohibit unflattering references to Mayor Giuliani the New York Metropolitan Transit Authority would have to prohibit all references to specific individuals in the advertising it displays, both practical and economic consideration would almost certainly cause it not to do so\footnote{479}.

In some public sensibilities forum contexts, however, such a limitation may be feasible, and may serve legitimate government interests without compromising significant free speech interests. In an otherwise properly structured public sensibilities forum, for example, the government should be able to fulfill its interest in preventing satirical depictions of sitting judges in courthouse artwork by such a broad, viewpoint neutral rule. Similarly, were it a public sensibilities forum, New York City could deny access to the CowParade art exhibit to cow sculptures fashioned to look like identifiable individuals.\footnote{480} Vanity license plates are another example of a public sensibilities forum where the government could legitimately and feasibly

officials must prove "actual malice" according to clear and convincing proof standard); see also \citet{Gertz,418 U.S. at 343 (holding that New York Times standard applies to public figures and to presumed and punitive damages recoveries where speech concerns a public issue).} \footnote{478 New York Times, 376 U.S. at 270 ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").} \footnote{479 New York Magazine v. Metro. Transp. Auth., 136 F.3d 135, 125 (2d Cir. 1998). In New York Magazine, an advertisement for a magazine read, beneath the magazine's logo, "Possibly the only good thing in New York Rudy hasn't taken credit for." Id. Mayor Giuliani's office requested removal on grounds that it used his likeness to promote a commercial product, in violation of transit authority's access standards. Id.} \footnote{480 People for Ethical Treatment of Animals v. Giuliani, 105 F. Supp. 2d 294, 319 (S.D.N.Y. 2000) (characterizing "CowParade" as a private speech forum when organizers deny access to "Moni-Cow Lewinski" sculpture application); see Leslie Gielow Jacobs, \textit{Who's Talking?: Disentangling Government and Private Speech} (unpublished manuscript on file with author) (arguing that CowParade is properly characterized as government editorial speech).}
choose to prohibit references to specific individuals.\footnote{Or, since the use of the motorist’s initials is so popular in vanity plates, the prohibition could encompass references to individuals other than the motorist.}

This type of standard addresses the concern that underpins defamation law, in a way slightly broader than would be permissible in a public forum. It is capable of specific definition, however, in a way that limits its viewpoint discriminatory applications and allows for uniformity review. It is thus an appropriate access standard for a legitimate public sensibilities forum.

(iii) Violent Speech.—Efforts to restrict private speech based upon its violent content are fraught with constitutional danger.\footnote{See Eclipse Enters., Inc. v. Gulotta, 134 F.3d 63 (2d Cir. 1997) (invalidating law that prohibits sale of crime-depicting trading cards to minors); Video Software Dealers Ass’n v. Webster, 968 F.2d 684 (8th Cir. 1992) (invalidating statute restricting location of violent videos in stores and rental shops).} Unlike sexually explicit speech, which surrounds the category of obscenity, violent speech does not have a base recognized as “utterly without redeeming social importance”\footnote{Roth v. United States, 354 U.S. 477, 484 (1957).} in constitutional doctrine.\footnote{See Eclipse Enters., Inc., 134 F.3d at 67 (“The standards that apply to obscenity are different from those that apply to violence. Obscenity is not protected speech.”); Video Software Dealers Ass’n, 968 F.2d at 688 (“[V]iolence on television is protected speech.”). But see Jendi Reiter, Serial Killer Trading Cards and First Amendment Values: A Defense a/Content-Based Regulation a/Violent Expression, 62 ALB. L. REV. 183 (1998) (arguing that certain types of violence should be low value and thus prohibitable); Kevin W. Saunders, Media Violence and the Obscenity Exception to the First Amendment, 3 WM. & MARY BILLS RTS. J. 107 (1994) (arguing that graphic violence should fit within obscenity prohibition).} Nevertheless, violent words and images are widely perceived not only as violations of “good taste” but also as affirmatively socially harmful as well.\footnote{See, e.g., Susan Laccetti Meyers, Should Theaters Run Tighter Ship?, ATLANTA CONST., June 12, 1999, at 16A (reporting that rising tide of violence leads to pressure to enforce voluntary movie ratings system more strictly).} Although these social judgments may not be enough to support private speech restrictions,\footnote{Eclipse Enters., Inc., 134 F.3d 63; Video Software Dealers Ass’n, 968 F.2d 684; Meyers, supra note 485 (reporting that entertainment industry officials argue that strict enforcement of ratings system “might be an abridgement of First Amendment rights”).} they should support limited public sensibilities regulations in nonpublic forums.

Like restrictions on sexually explicit speech, profanity, or insulting epithets, violent speech restrictions can be crafted so they primarily address the mode of communication. Most important is defining the specificity required to ensure that an access standard primarily addresses the manner of communication, rather than the ideas. In some forums, a word list can do this. In other forums, a list of particular images or substances can do this as well. The specificity limits the potential viewpoint discriminatory impact of the standards. And, because the standards must be uniformly applied, the number of items that will be on the forbidden list will be limited as well.
(iv) Advocacy of Illegal Action.—In the context of speech restraints, the government can prohibit advocacy of illegal action only in narrowly defined circumstances.\textsuperscript{487} The narrow definition protects the discussion of antigovernment viewpoints unless it poses a substantial threat that only immediate suppression of the speech can address. This formulation strikes a balance that strongly favors free speech rights against the government’s interest in maintaining social order.\textsuperscript{488}

The different balance in the public sensibilities forum calls for a slight broadening of the government’s ability to exclude expression that may lead to illegal action. One such broadening would address the advocacy definition. But any such broadening poses substantial vagueness and overbreadth concerns, as a determination of whether speech “promotes” illegal action requires subjectivity that leads to Free Speech Clause danger.\textsuperscript{489}

The extension that can be more easily cabined addresses the extent of the illegality. Specifically, that minors are part of the captive audience that must receive the speech in a public sensibilities forum should broaden the government’s ability to prohibit speech that advocates conduct illegal for them. That the conduct must be illegal as to minors substantially limits the exclusion’s potential application to valuable ideas.\textsuperscript{490} The meaning of “advocacy” can be limited by explanation and consistent application. For these reasons, the government’s interest should justify restricting speech advocating the use of illegal drugs, alcohol and tobacco in a public sensibilities forum even though it may not justify such restrictions more generally.\textsuperscript{491}

The category of controlled substances, then, presents an extension of the illegal advocacy category that can be narrowly defined to limit its application only to those instances of expression where the government has a strong protective interest. The limited nature of the public sensibilities forum and the ability of the government to close it entirely if it cannot address

\textsuperscript{487} Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (explaining that the State may only proscribe advocacy that is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

\textsuperscript{488} See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982) (“This Court has made clear . . . that mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment.”).

\textsuperscript{489} Brandenburg, 395 U.S. at 449 (noting that Constitution forbids punishment of “mere advocacy” of illegal action).

\textsuperscript{490} See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg’l Transit Auth., 163 F.3d 341, 352 n.5 (6th Cir. 1998) (noting that transit authority prohibits more broadly “[a]dvertising that is harmful to children or is of a nature to frighten children, either emotionally or physically,” and then listing specific examples which include depictions of sexual activity, nudity, foul language, violence and “glorified” criminal activity).

\textsuperscript{491} Lorillard Tobacco Co. v. Reilly, 121 S. Ct. 2404, 2426 (2001) (deciding that a state’s interest in preventing underage tobacco use is substantial, and even compelling, but outdoor advertising restrictions that prohibit advertisements within 1,000 feet of a school or playground “unduly impinge on [a] speaker’s ability to propose a commercial transaction and [an] adult listener’s opportunity to obtain information about (the) product”).
its legitimate concerns make the extension appropriate in this context.

b. Procedure.—In addition to clear standards, procedural safeguards are required to render a licensing scheme constitutional in the speech restraint context. These safeguards require the government to determine promptly whether to issue a license and to make judicial review available for license denials. The procedural safeguards should not be as stringent in nonpublic forums because the government has more discretion to limit access in this context. The requirement of viewpoint neutrality in the government’s exercise of discretion, however, suggests that some procedural requirements are necessary to ensure that this standard is met.

Because the standards in a legitimate public sensibilities forum may create a somewhat greater risk of viewpoint discrimination than is acceptable in speech restriction, the procedures should limit this risk to what is inherent in the standards. A number of procedural safeguards can ensure that this occurs. First, the government should be required to provide a reason for denying access that is tied to one of the clear standards necessary to legitimate a public sensibilities forum. Second, this reason must be subject to review beyond the initial decision maker, so the speaker can challenge the basis of the decision.

Third, and perhaps most important, the “heckler’s veto” method of enforcement common in the current public sensibilities forums—that is, the practice of justifying speech restrictions according to public complaints—cannot be constitutional. Specifically, the existence of widespread public “offense” cannot itself justify an access denial or revocation. Public complaints can be relevant in two ways. One is to alert the forum administrator that it misapplied an existing public sensibilities standard. If the government argues this, then the speaker can look to see if the administrator has consistently applied the standard in other instances. If not, the ad hoc denial would not be legitimate. Public complaints may also alert the government entity responsible for creating the forum access standards that it has failed to limit access on a basis that can be legitimate. The government entity could then revise the access standards.

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492 See Freedman v. Maryland, 380 U.S. 51, 58 (1965) (stating that procedural safeguards are required to avoid dangers of censorship).
494 In Southeastern Promotions, Ltd. v. Conrad, the Court implied that the same level of procedural protections as applied to speech restraints applied to a city’s management of access to its theater. 420 U.S. 546, 553 (1975). The censoring effect of official action is “indistinguishable” from “official actions consistently identified as prior restraints.” Id. At this time the Court had not, however, articulated its current forum doctrine. See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983) (articulating the three types of forums). Under current doctrine, the theater would be classified as a limited public forum. Conrad, 420 U.S. at 552 (referring to theater as a “public forum”). Because the government lacks a protective interest, the theater would not meet the definition of a legitimate public sensibilities forum.
III. APPLICATION

The above discussion spells out how the four factors of the government’s assumed responsibility for discriminating, the extent of the government’s authority to be selective, the magnitude of the impact on the marketplace of ideas, and the nature of the standards, define the boundaries of a legitimate public sensibilities forum. This Part will apply this analysis to a sampling of the public sensibilities forums that are currently operating in various contexts.

A. Vanity License Plates

The first factor for determining the legitimacy of a public sensibilities forum is the extent of the government’s assumed responsibility for discriminating according to viewpoint. The extent of any state’s assumed authority will vary according to its standards. Many states assume a wide authority to discriminate through broadly worded standards.

The next factor is the government’s authority to react to public sensibilities. License plates create no special, restricted didactic enclave, so the government only has the weak authority to set an example that applies to any of its actions. It does, however, have significant protective authority. While license plates are seen, not heard, and therefore can be avoided by averting one’s eyes, they are still pervasive in a way that supports the government’s ability to protect the general public and, more particular, children, from unwilling exposure. License plates appear anywhere that motor vehicles can go. People of all ages ride in motor vehicles and view license plates. Moreover, it is not necessary to be riding in a motor vehicle to view license plates. Pedestrians and other bystanders are exposed to license plates. While the exposure may be brief with a moving vehicle, it may be quite long as cars may stay parked on streets or in lots or residential driveways. The frequent and unavoidable appearance of motor vehicles very close to homes, where homeowners have a heightened interest in avoiding offensive communications, supports the government’s protective authority. Thus, when the factors of assumed responsibility and actual authority are combined, states may have the broadest possible ability to consider public sensibilities in operating their vanity plate programs.

At first blush, the marketplace of ideas impact of vanity license plates appears minimal. After all, under such programs the state permits only “minor variations from the precisely prescribed form and shape of the li-

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495 See supra Part I.B.
496 See, e.g., CAL. VEH. CODE § 5105 (West 1987) (vanity plates cannot “carry connotations offensive to good taste and decency”); MO. REV. STAT. § 301.144.2 (2000) (vanity plates shall not contain “any letters, numbers or combination of letters and numbers which are obscene, profane, inflammatory, or contrary to public policy”); Prial, supra note 36, at C8 (reporting that administrative law judge rejects appeal to have wine-related vanity plate on grounds that it “would cause public offense or embarrassment to the state”).

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license plate.  

The message that anyone can send with the six to eight characters available is obviously limited. Furthermore, many of the configurations that individuals have sought to maintain hardly seem to rank at the highest rung of First Amendment protection. These reasons might lead to the conclusion that government censorship of license plate configurations can work no great free speech damage.

This conclusion that license plate expression is of little value, however, conflicts with the great personal attachment many individuals feel toward their license plates and the messages that appear on them. Certainly, the Supreme Court viewed the impact of messages on license plates as of First Amendment significance when it held that a state cannot require an individual to display the state’s motto. Moreover, the Court has recognized the special importance of residential signs to conveying an individual message. Apparently, many people attach the same significance to messages on their cars. The limited space undoubtedly curtails the possible complexity of any “philosophical” message, but, at the same time, the brevity and immediate visibility of a license plate message gives it a “punch” that lengthy dissertations lack. The Court has recognized the expressive potential of short words and symbols. In a way, license plates have the expressive potential of a work of art. The message is brief and visual, and often comes without an explanatory context. Not everyone will understand messages in the same way. Many people will not understand the messages at all. But like artists, plate holders can work within a limited medium to make people see things differently. That not all, or even most, plate holders use the opportunity this way does not undercut the expressive potential of the speech opportunity.

The significance of the speech opportunity means that government manipulations of it will have an impact on the marketplace of ideas. It does

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498 See, e.g., McMahon v. Iowa Dep’t of Transp., 522 N.W.2d 51 (Iowa 1994) (“3MTA3,” which when viewed in a mirror reads “EATME”); Kahn v. Dep’t of Motor Vehicles, 20 Cal. Rptr. 2d 6, 10 (Cal. Ct. App. 1993) (“TP U BG,” which translates to the F-word in court reporting shorthand); Katz, 108 Cal. Rptr. at 428 (“EZ LAY”).
499 See, e.g., Kahn, 20 Cal. Rptr. 2d at 11 (considering plate holder who claims that because she “has made her philosophical statement in the language of her profession for [17] years[,] [h]er license plate has become part of her identity, her persona, her statement of being and purpose”); Cheevers, supra note 164, at A3 (reporting that a DMV official noted, in response to protests by Italian-Americans with recalled “DAGO” and “WOP” plates, “[i]t’s amazing that there’s such attachment to a license plate”).
502 Kahn, 108 Cal. Rptr. at 12 (considering license plate holder’s claim that license plate message “If you can” is a philosophical one of great personal import).
not, however, mean that the impact of vanity license plate programs in any way threatens to monopolize the relevant speech market. Bumper stickers and other sorts of signs on cars are available as speech alternatives, as is the possibility of communicating through nonvehicular means such as hand bills, placards, or residential signs. The impact of these means does not have the same "punch" as a license plate motto, but it is nevertheless adequate to dispel the concern that the impact of vanity plate programs is so substantial that governments should not be able to engage in some form of public sensibilities discrimination.

The factor of marketplace impact thus both confirms and limits the extent of a government's discretion to cater to public sensibilities in administering its vanity license plate program. The government does have discretion but, because the private speech opportunity is significant, standards that channel the government's ability to engage in viewpoint discrimination must apply.

As explained above, the best way to limit the government's discretion to engage in viewpoint discrimination while acknowledging its ability to protect public sensibilities is to require the government to justify any particular denial or revocation with reference to categories of speech that primarily address the mode of communication and can be stated with specificity. Most such denials and recalls can be so justified. But some cannot. For example, denial of plates such as "4JIHAD" and "GOVT SUX" must be justified on some ground other than that the government, or the public that it serves, is offended by the political message. In addition, the "hate speech" extension around the fighting word category can justify denials only so long as it is limited by a word list or narrow, objective standard and is consistently applied to all groups.⁵⁰⁴

Clarity in the standards for denying access to vanity plates is particularly important because administrative officials so often make the decisions. Standards that permit denial of license plates with connotations "offensive to good taste and decency" alone are too vague to protect against the risk of invidious viewpoint discrimination. Not only particular denials, but the standards themselves must clearly trace to acceptable categories of regulation. Most states list examples of "offensive" configurations after the general prohibition.⁵⁰⁵ These examples must trace to acceptable categories of regulation as well.

Clear standards both protect against invalid exercises of administrative discretion and prevent potential applicants from being "chilled" because of the possibility of denial.⁵⁰⁶ While it is acceptable in the context of quality-

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⁵⁰⁵ See, e.g., CAL. CODE. REGS. tit. 13, §170.00 (West 2001).
⁵⁰⁶ Obviously, license plate applicants are less likely to be chilled than speakers facing the threat of a criminal sanction. Standards and no-no lists, however, likely have some deterrent effect on applicants who don't want to waste their time on an effort that appears fruitless.
based grants that applicants would conform their speech to meet the government’s vaguely expressed expectations, it is not acceptable where the government has not assumed responsibility for making quality-based judgments.

In addition to clear standards that trace to category penumbras, states must follow procedures that ensure the accountability of particular denial decisions. Particularly suspect is the practice of recalling plates based upon citizen complaints. Citizen complaints can be a valid basis for prompting review of particular configurations as well as evidence of how the public interprets configurations. They cannot, however, be dispositive. An established and visible review procedure must link the complaint to a valid ground for denying a configuration, essentially establishing that the issuance was an oversight, or must use the complaint as the basis for determining that an unlisted standard for denial is appropriate and then enact it according to an accountable procedure. Absent one of these links to a constitutionally acceptable ground for denying access, citizen complaints based on “offensiveness” alone present the heckler’s veto danger that is anathema to the First Amendment.

B. Advertising

As set out below, the government’s assumed responsibility to discriminate in its access standards is usually quite broad. When the government’s practice has been added to its articulated policy, its actual responsibility it assumes has contracted in a number of cases. The less discriminatory of the two, either the articulated policy or the consistently enforced policy, should establish the outer limit of the government’s assumed responsibility for discriminating in any instance.

Once this point is established, the question becomes whether the government’s legitimate authority to discriminate extends to the point of assumed responsibility. Because the decided cases have largely focused on the mismatch between the government’s articulated and assumed responsibilities to discriminate, they have not addressed the authority issue. The

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507 See Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 571 (1998) (“[A]rtists may conform their speech to what they believe to be the decision-making criteria in order to acquire funding. But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.”).

508 See supra Part I.B.2. (discussing advertising access standards, which forbid advertisements that are not “in good taste,” that are “offensive,” and that are “controversial”).

509 See, e.g., AIDS Action Comm. of Mass. v. MBTA, 42 F.3d 1, 11 (1st Cir. 1994) (stating that inconsistent application of articulated policy creates “the impression of discrimination”).

510 See Air Line Pilots Ass’n v. Dep’t of Aviation of Chicago, 45 F.3d 1144, 1152 (7th Cir. 1995) (stating that the focus in free speech inquiry is on “the government’s consistent policy and practice”).

511 See, e.g., AIDS Action Comm. of Mass., 42 F.3d at 10 (explaining that, assuming transit authority can proscribe sexually explicit or patently offensive speech, the application is invalid because it is inconsistent with past practice).
government has no special didactic authority toward public transit riders. It can, however, have a significant protective interest.

One important factor that determines the government’s protective authority is where the advertising at issue is placed.\textsuperscript{512} At least with respect to advertising inside public transportation vehicles placed within view of riders, the government has a strong protective authority. Riders of public transit are all ages, practical necessity at least requires them to witness the advertisements, and the duration of exposure can be substantial. The Court has contrasted public transit advertising with other forms of advertising which are more avoidable, and to which unwilling exposure can be less lengthy.\textsuperscript{513} This strong protective interest means that the government’s authority to discriminate according to public sensibilities can extend to the furthest permissible point, and thus overlap, but not extend, the government’s assumed responsibility for discriminating.

Gauging the marketplace impact of regulating public transit advertising requires comparing other possibilities for obtaining comparable types of exposure. Similar types of advertising areas include billboards and advertisements on nonpublic vehicles, such as taxis. These alternative options demonstrate that other means of advertising communication exist and that the public transit advertising opportunity is not a monopoly. Nevertheless, examining the options also reveals that they are usually not fully comparable to the public transit arena. The very fact that supports the “captivity” of the public transit ridership (many people cannot afford alternatives to government created and subsidized transportation) also demonstrates its value as a speech opportunity (it is uniquely visible). Its value as a speech opportunity means that limits on the standards of access must apply.

Courts have already rejected a number of public transit advertising access standards as too vague.\textsuperscript{514} To ensure accountability, the burden should be on public transit authorities to articulate clear, specific standards of access. If they do so, their authority to discriminate according to public sensibilities should extend to the acceptable categories, but not beyond them. So, for example, public transit authorities could forbid “sexually explicit” or “violent” advertisements, so long as they further specified the content and enforced the exclusions consistently. They could not, however, forbid some advertisements within those categories because riders do not like the

\textsuperscript{512} The government’s protective interest will usually be less when the advertising is placed on a billboard in a transit station or outside it, rather than in the transportation vehicle, because of the greater ability of unwilling viewers to avoid prolonged exposure. Of course, other variables, such as the size and location of the billboard, will affect the analysis as well. See Lebron v. Nat’l R.R. Passenger Corp., 69 F.3d 650, 653 (1993) (considering controversy concerning “the Spectacular, a curved back-lit display space approximately 103 feet wide by ten feet high . . . [which] dominates the west wall of the rotunda on the upper level of Penn Station where thousands of passengers pass each day”).


\textsuperscript{514} See supra Part I.B.2.
message. In addition, a public transit authority’s ability to react to viewer complaints should be limited in the same way as a motor vehicle authority’s ability: complaints can point out that the transit authority failed to consistently apply an existing policy to the advertisement in question but they cannot, alone, provide the basis for excluding an advertisement.

C. Displays

The government’s assumed responsibility to discriminate is crucial in determining its ability to consider public sensibilities in administering access to display space. If the government assumes responsibility for the content of a particular display, it can transform a forum into government speech. For example, when the government purchases art work and holds it out as its own, the artist does not have a First Amendment right to dictate its use or location. Quite simply, when the government purchases art it may “control[] its own expression.” 516 Similarly, the government may assume control of other displays or display cases. If it publicly assumes responsibility for the content of a particular display area, government speech principles rather than public sensibility forum principles should determine the scope of its discretion.

Public sensibility forum questions arise when the government does not assume responsibility for the content of the display. In these instances, the government’s ability to discriminate according to public sensibilities should extend only to the extent that its policy and practice assume responsibility for it. So, Congress’s open access policy in the Public Buildings Cooperative Use Act should limit the discretion of individual building administrators to take public sensibilities into account in rejecting particular applications. Only a publicly visible policy has the accountability necessary to justify the risk of viewpoint discrimination. The stretch by courts to validate decisions based on “taste” and “decorum” represent exactly the ad hoc decision making that this factor protects against. 517 The judges’ intuitions are correct—if properly assumed, the government can take public sensibilities into account in placing art in federal buildings—but the government must do it in the right way. This means Congress must react to “visual horrors” and properly enact standards that authorize building managers to forbid access to them.

Unless display cases are in areas of special governmental didactic authority, such as public schools, the question is the extent to which a protec-

515 See AIDS Action Comm. of Mass., 42 F.3d at 11 (stating that the transit authority’s decision not to run condom awareness advertisements while running film advertisements with the same degree of sexual innuendo “constitutes content discrimination which gives rise to an appearance of viewpoint discrimination”).


tive interest gives the government the authority to enforce public sensibility standards. The nature of the area will determine the extent of this authority. In an area of purely voluntary access, such as a museum or theater, the government will not have a protective interest. In areas where public business is conducted, however, such as courthouses and government office buildings, the protective interest will exist. Other public places, where people pass by through practical necessity or convenience, such as hospitals and libraries, will generate a protective interest as well.

The determination of the marketplace impact of display opportunities must also be made depending on the context. Like most government/private speech interactions, display opportunities will almost certainly fall between the situations of government monopoly and no speech impact at all. Displaying a message on any government property is a valuable enough speech opportunity so that some limits on the government’s ability to select according to public sensibilities must apply.

Finally, as with the other examples, the substance of the public sensibilities exclusions must be specific and must trace to acceptable public sensibilities exclusions. This means that exclusions to maintain “dignity,” “decorum,” and “taste” are too broad. Proper standards could forbid depictions of sex acts, of genitalia, or of nudity, so long as they were articulated and consistently enforced. Other standards could forbid depictions of graphic violence or words that disparage individuals or groups. Still other types of standards directed at protecting public sensibilities might be permissible. What are not permissible in a public sensibilities forum, however, are standards crafted to project a certain “image” of the government to display viewers. Indeed, the government is “entitled to project” a chosen image, but it cannot do so through a forum for which it assumes no responsibility for the communication’s content.

CONCLUSION

In a wide range of contexts, governments are operating “public sensibilities forums.” That is, governments are granting speech opportunities to private citizens and groups, but are limiting access to speech that is, in one way or another, consistent with, rather than offensive to, public sensibilities. This type of standard creates the possibility that the people who ad-

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518 See, e.g., Claudio, 836 F. Supp. at 1235 (noting that persons who would view the “offensive” art work “were in the courthouse involuntarily” and were “required” when placing items on the x-ray machine belt to “face the wall upon which the painting was displayed”).

519 See id. (stating that the offensive art work at issue is “incompatible with the image and sense of decorum which the Federal Government, like any other property owner, is entitled to project”); Sefick, 164 F.3d at 373 (noting that the government may edit art submissions to prevent “[a]n implication in the lobby that judges do not take their oaths seriously, deal honestly with the facts, or respect the allocation of authority within the judiciary” to promote “the seriousness with which other participants take their own oaths and tasks”).

520 Claudio, 836 F. Supp. at 1235.
minister the forum will engage in unconstitutional viewpoint discrimination. At the same time, these government/private speech interactions are acts of largesse, not regulation, and are often highly publicly visible. These considerations suggest that the government, and the public it serves, should not have to tolerate the same range of “outrageous” speech that they must when the government does not provide the speech opportunity.

The resolution of these competing intuitions is a properly limited public sensibilities forum. This exists when the government: assumes responsibility for limiting access according to public sensibilities; has authority to do so, usually because an unwilling audience will likely view the speech created; does not monopolize the speech market by creating the speech opportunity; and articulates clear standards that primarily relate to the manner, rather than the viewpoint, of expression.