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A TRICKY NEGOTIATION: FREE SPEECH VERSUS INSENSITIVITY

MELVIN DILANCHIAN

The central question presented in this paper is whether specialty license plates constitute government speech, and are thus subject to disapproval by the Board of the Texas Department of Motor Vehicles. The core concerns reviewed in this research, largely focus on defining whose speech specialty license plates are. The purpose is to investigate and analyze the precedent established as a result of a recent case, *Walker v. Texas Division, Sons of Confederate Veterans*. The paper thoroughly reviews the arguments made in the majority opinion, as well as those of the dissenting opinion, with an interdisciplinary approach. The argument presented is in favor of the defendants, Sons of Confederate Veterans, which is commonly referred to as SCV throughout the paper. Hence, the paper opposes the current stare decisis that renders specialty license plates government speech. The claim made is that the Court's decision to reverse the lower court's verdict falls short of success. This is primarily because it fails to identify specialty plates as hybrid speech. It is true these plates include the name of the state and are issued by the state, however, they are also personal messages requested and paid for by private entities. The alternative solutions presented to the current precedent include a return to previous specialty license plate programs, gathering of more relative data, and removal of such programs that blur the line of government and private speech.

INTRODUCTION

When taking into consideration the recent flooding of media with headlines involving the words “Confederate flag,” it becomes clear that this symbol of Southern pride and racial insensitivity remains a critical societal issue. It has even extended to acts of civil disobedience, like that of Bree Newsome, and both violent and non-violent events throughout communities. Being mindful of the escalation of racial tensions, it is critical that cases like *Walker v. Texas Division, Sons of Confederate Veterans* are properly decided. This case regards the approval and usage of specialty license plates in the state of Texas. It primarily involves the First and Fourteenth Amendments, and the central questions of whether specialty license plates constitute government speech or private speech, and if the Texas Department of Motor Vehicle Board’s rejection of the SCV design qualifies as unconstitutional viewpoint discrimination. The idea is that if these license plates are not government speech, then the government is required

to maintain a neutral viewpoint by approving even those designs seen as offensive. However, if this is government speech, then they may deny requests and designs on a reasonable basis. The U.S. Supreme Court ruled in favor of the Board, or Walker, and established the precedent that these license plates are government speech, and they may refuse a design with which they do not want the government to be associated. In a thorough analysis of both the majority and dissenting opinions, this paper opposes the precedent set by the Court and offers other possible solutions in maintaining both cultural sensitivity and constitutional rights.

TEXAS APPLICATION PROCESS

The State of Texas, much like other states in the U.S., has programs that allow its municipality to have personalized or specialty license plates upon application and an extra fee. Different states will have different methods of approving and publishing these license plates, and Texas provides three ways to do so. Interested citizens

must complete an application, have a design that meets the requirements, and submit a deposit. Once these demands are met, the proposed license plate design will move forward to a vote by the Board. The different ways that specialty license plates may be published in Texas include: the state legislature requesting a specific license plate, individuals and for-profit organizations creating a design through a state-approved private online vendor that is subject to approval by the DMV Board, or the Board may approve a license plate on its own merit or one from an application submitted by a non-profit organization. In this particular case, the focus is in the third method, because the Sons of Confederate Veterans is registered as a non-profit organization dedicated to the preservation of the history and traditions of the South and the Confederacy¹.

¹ *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. No. 14-144. Supreme Ct. of the US. (2015).

CASE INTRODUCTION

The Texas Division of Sons of Confederate Veterans applied to have the state publish a specialty license plate that included an image of a confederate flag and the inscription “Sons of Confederate Veterans” at the bottom. Prior to the approval meeting, the Board opened the design for public comment. The majority of the public opposed the design and elected officials addressed letters, urging the Board to reject the proposal. The Board unanimously rejected the design and refused to issue these personalized plates. Their basis for this decision was that the design, particularly the image of a confederate flag, was offensive to certain members of society, and they had the right to do so based on the Texas specialty license plates regulations. The Board also made the point that, in addition to being offensive, the specialty plates could result in dangerous situations for drivers. The Sons of Confederate Veterans took their case to the District Court, arguing that the Board’s decision violated their

constitutional rights to free speech, expression, and equal protection. According to the SCV, free speech was violated because they were being prevented from displaying this message, and equal protection was violated because other controversial designs had been approved. SCV believed these personalized license plates are not government speech and that the government and the Board engaged in viewpoint discrimination by only approving designs they favored. The Board argued that the free speech clause was not applicable to the case, because these license plates are government speech; therefore, they have the right to choose what this government platform expresses. The District Court ruled that this was private speech, but the Board's denial was reasonable given the contents of the design. The case was appealed to the United States Court of Appeals for the Fifth Circuit, which ruled in favor of the SCV, thus reversing the District Court's ruling. The Court of Appeals decided that the Board engaged in viewpoint discrimination, found these license plates to be private

speech, and said this violated the SCV's constitutional rights. The Board subsequently appealed the case to the United States Supreme Court, with the hopes of reversing the lower court's decision².

SUPREME COURT RULINGS

The United States Supreme Court granted the Board certiorari and reversed the lower court's verdict in favor of the Texas Board, or Walker, with a vote of 5-4. Justices Breyer, Sotomayor, Kagan, Ginsburg, and Thomas agreed with the petitioners. Justices Roberts, Scalia, Kennedy, and Alito dissented with the majority, in agreement with the position of the respondents. There were no concurring opinions for this case. In its ruling, the Supreme Court declared that specialty license plates ultimately amount to government speech; therefore, the Board has the right to refuse any proposals for publication. The precedent makes it clear that license plates are associated with the state and any phrase or

² *Walker* 576 U.S.

image that the plates include constitute government speech. The Court in its decision also ruled that the SCV's constitutional rights granted in the First and Fourteenth Amendments were not violated³.

MAJORITY OPINION

Justice Breyer delivered the majority opinion, in which he makes it clear that usually when the government speaks, it has the right to promote policies and positions it sees as representative of constituents. Also, the content of its speech is not regulated via the free speech clause. Essentially, the freedom that is provided to government speech stems from an accepted democratic electoral process that works as a check on government speech. Furthermore, given that government officials are elected, their speech and actions should be representative of the people. Justice Breyer makes the point that if the

³ Walker 576 U.S. "Walker v. Texas Division, Sons of Confederate Veterans, Inc." Oyez. Chicago Kent College of Law at Illinois Tech, n.d. Nov. 15, 2015. <<https://www.oyez.org/cases/2014/14-144>>

government was unable to select the messages it conveys, then society as we know it would fail to function⁴.

The majority opinion also made reference to a recent case that involved a similar question in identifying the disparity between government and non-government speech platforms. In *Pleasant Grove City v. Summum*, a religious organization sought to erect a monument in a park where the city allowed monuments donated by private entities to be erected. The city refused to allow the erection of this monument and the religious organization sued, arguing that by previously accepting other permanent exhibitions, the city had created a space for private speech represented in the form of monuments. In this case, the U.S. Supreme Court ruled against Summum for various reasons. For instance, they referenced history of governments using monuments to convey messages that they want to be seen as supporting. They also noted that observers were likely to attach the message of the

⁴ *Walker* 576 U.S.

monument to the owner of the park or the city. They even referred to “selective receptivity” as the city exercised control over the selection, especially since there is a limited space in a park⁵. Justice Breyer compares the similarities of this case to the license plates, with the exception that theoretically, the State of Texas can issue an unlimited number of license plates. In terms of the the cost of plates paid for by individuals, Justice Breyer alludes to the *Summum* decision, where private parties were the ones to bear the costs of the monument, even though the city still had to permit the erection. Similarly, in the *Walker* case, while those wishing to display the plate would have to pay extra, the state still had to approve of it. In other words, this is not a forum for the public to display any message they choose simply because they are paying for it⁶.

⁵ *Pleasant Grove City v. Summum*. 555 U.S. No. 07-665. Supreme Ct. of the US. 25 February 2009.

⁶ *Walker* 576 U.S.

The opinion then explains the three primary reasons that result in the precedent that has been established. The first is the idea that states have been using license plates to promote their respective states. For instance, Texas has a license plate template that celebrates “150 Years of Statehood”⁷. The second reasoning refers to the assumption that, in general, the public will affiliate the state with the message transcribed on the license plate. They believe this happens because the word “Texas” is on every plate issued, the state requires all vehicles to display a license plate, and all of the license plates are issued by the state itself. In addition, the State of Texas owns all of the designs, including those proposed by private entities. In a sense, these license plates also double as a form of government identification. Justice Breyer points out that if someone wants a private message displayed via a specialty plate, they are likely doing so to show government agreement with their message. The third and final

⁷ *Walker* 576 U.S.

reasoning lies in the process to have a design approved and issued. Given that Texas law places final authority of approval in the control of the Board, the idea of this being a platform for private speech is demoted. This is because, by law, the Texas DMV Board may reject or approve a design that does not comply with the standards, and this allows Texas to have the power to select how it wants to be represented and how it will represent the constituency. The opinion provides an example of this as one where Texas may issue a license plate that praises the state's citrus industry, but by no means is it required to issue one that praises the citrus industry of another state. The majority of the justices concluded that these license plates belong to the government and they are government speech independent of the free speech clause, with the ability to reject submissions not meeting any of the set standards⁸.

⁸ *Walker* 576 U.S.

The arguments and decision of the majority opinion mainly interpret the case in the eyes of the law and policies established. They rely on past precedent and the state's policies to guide their decision and explain their reasoning for declaring licenses as government speech. However, there could be a concern about whether this ruling has an ideological dimension to it. All four liberal justices were included in the majority and they ruled in favor of the Board, which aligns with the Democratic ideology that usually supports centralized power and government intervention. The conservative justices, with the exception of one, all agreed in the dissent, which aligns with the Republican ideology that prefers less government intervention and power. The burden of the deciding vote fell on the shoulders of Justice Thomas, who voted in the majority despite being a conservative. There is no evidence to suggest that Justice Thomas's vote was largely based on his background as an African-American, even though all of his conservative colleagues dissented. The

article "Justice Thomas's Vote in Walker v. Sons of Confederate Veterans," references the *Capital Square Review Bd v. Pinette* case, in which Justice Thomas voted in support of Ku Klux Klan to display a cross in a public space. Therefore, while all of the justices' votes reflected their political ideology, Justice Thomas was the outlier and neither his African-American background nor his Republican ideology seem to have played a role in his vote.

DISSENTING OPINION

The dissenting opinion was delivered by Justice Alito. The opinion finds the precedent dangerous because it threatens the security and preservation of private speech, which they consider specialty license plates to be. The idea behind this argument is that the First Amendment prevents regulation of government speech, yet at the same time, it protects the speech of private parties by requiring government to exercise a neutral viewpoint. Justice Alito addresses the argument that

people naturally affiliate the design to the state by referring to arbitrary designs. For instance, Texas has license plates that promote certain academic institutions, drinks, and foods, and he makes the point that people would not consider that food to be Texas's favorite or preferred snack, but rather the person who has purchased and displayed the plate. The opinion agrees that license plates do have some government speech, such as the state's name and a license number, but the remaining is a limited public forum, because it is sold for people to display a private message of their choosing. In this case, the Board rejected the message they found displeasing or inappropriate. He also makes the point that while license plates originated to function as a form of government identification, their evolution has led them astray from that purpose. Through the decades, they came to include words and images that the states had chosen and designed, which rightfully constituted government speech. However, recently, when Texas opened this space for

private entities to place their own individual messages and designs, they created a space where private speech was promoted⁹.

The dissenting opinion then goes on to review the main case referenced in the decision, *Pleasant Grove City v. Summum*. Justice Alito makes the argument that the characteristics of this case do not apply to the Walker case because of the stark contrasts in all three arguments made in the Summum case. While in the former a historical aspect shows the primary use of monuments throughout history by governments, this is absent in the Walker case. Specialty license plates are a new phenomenon of the late 20th and early 21st century. It also claims that there is no selective receptivity as the Board does not select by design and is mainly focused on “readability and reflectivity”¹⁰. In addition, the attempt by the Board to prove selective receptivity, by mentioning their rejection of a “Pro-Life”

⁹ *Id.*

¹⁰ *Id.*

license design fails, because it only proves other cases of viewpoint discrimination¹¹. Finally, the opinion argues Texas has created a limited public forum by selling this space to private entities. Justice Alito notes that Walker, who is the current Chairman of the Texas DMV Board, stated that they encourage these personalized license plates to ‘generate additional revenue for the state’¹². In conclusion, Justice Alito, and the remaining Justices who dissented, find the Court to be in error with its judgment by infringing upon speech that they deem private and unrelated to government ¹³.

APPLICATIONS AND IMPLICATIONS OF THE CASE

Upon research and review of the case and implications, it can be inferred that the precedent established by this case is endangering the fundamental idea of free speech. The majority opinion advances the argument that a government would fail to function if its

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

speech was limited, provided that they are elected to represent their constituency's voice and vision. While this holds true, it does not validate the denial of the SCV design, because it does not identify whose speech personalized plates are. It is true that government speech is not subject to regulation, but that applies to cases where the platform is clearly government speech. In this case, the very core question is whether this is private or government speech.

In the referenced *Sumnum* case, while the issues in question are similar, the contrasts are too blatant to base the decision largely from that precedent. Specialty licenses are not traditional and are unexplored. Also, in their evolution, license plates are commodities Texas is selling to express speech¹⁴. In terms of the public affiliating a license plate with the state, it does not hold true. In general, when observing a vehicle, one does not affiliate

¹⁴ Rowland, Lee. ACLU Senior Staff Attorney, author of ACLU amicus curiae. 13 Nov. 2015. E-mail Interview.

the items in it or placed on it with the state, but rather with the person driving the vehicle. In *Summum*, this differed because a park belongs to the city and it represents the entire municipality, not just one individual or group. The idea of a park clearly being a public space, paired with it being a limited space, justifies denying certain permanent exhibition requests. However, with specialty plates, this is not the case. The license plate is not for the entire public, but merely for the person willing to purchase and display it. Also, the idea of issuing any design provides people the option of availability, should they want to purchase it. In issuing the license, Texas is not forcing people to display the license or promoting it, but is rather allowing for the views of all of its citizens to be represented. The license plates also do not have the limited space issue, because as mentioned in the dissenting opinion, theoretically, the state can issue many. The State of Texas has approximately 350 specialty license plates issued already¹⁵.

¹⁵ *Walker* 576 U.S.

In addition, the Board stated repetitively that the purpose of these personalized plates is to attract additional revenue for the state. This fact shows that the state is not looking for a new way of promoting its speech, but is rather selling an additional space where citizens can display their personal messages for an extra cost. It is hard to believe that people would pay a large fee to display a government message rather than their own personal message. As Justice Alito mentions, if government is seeking to promote its message, then why must it sell to do so?

In terms of the Board's arguments, there are additional shortcomings. Chiefly, their reasoning that displaying such images or symbols would be dangerous to the safety of drivers is dubious. People who display this symbol are aware of the implications of doing so and that most disagree with the symbol. Therefore, the risk they run of displaying it is a personal choice and, while it is reasonable to be concerned for the safety of people, it does not validate their argument. People can still display

the image in ways other than a personalized plate. A vehicle may have a sticker of the confederate flag. People can even put an actual flag of it on their car, and if one was to follow the Board's safety argument, then the state would have to ban such displays as well, because they may enrage drivers. Parade permits offer another example, because the ruling allows the government to reject a parade it finds displeasing since governments approve parade permits¹⁶. It becomes evident how this can quickly lead to the fallacy of a slippery slope that misinterprets the many nuances of free speech. Later on in *Pro-Football Inc. v. Amanda Blackhorse*, the Court referenced the Walker case and allowed government to deny a displeasing registered trademark¹⁷. Furthermore, Texas has license plates like "Choose Life," which advocates a pro-life approach to

¹⁶ Rowland, Lee. ACLU Senior Staff Attorney, author of ACLU amicus curiae. 13 Nov. 2015. E-mail Interview.

¹⁷ Knutsson, Maurine L. "Federal District Court Affirms Cancellation of Redskins Marks on Summary Judgment." *Lexology*. Globe Business Publishing Ltd, 15 July 2015. Web. 23 Nov. 2015.

abortion¹⁸. This design takes a side on a controversial issue and it can be said that it may cause anger and reckless behavior among drivers. Hence, there comes forth the idea that the Board in that reasoning should not have issued such a controversial specialty design either. In addition, the Board made these safety arguments without providing any form of statistical data supporting the theory that this can be dangerous. In fact, the article “A Test of Free Speech and Bias, Served on a Plate from Texas,” provides images of nine other Southern states that have issued licenses with the Confederate flag. Justice Alito points out that in the years since the Confederate specialty plates have been in use in those states, there have been no reports of violence resulting from the displaying of this symbol¹⁹.

Furthermore, the Board is not consistent in its issuing of specialty plate designs. For instance, in the same

¹⁸ *Walker* 576 U.S.

¹⁹ *Walker* 576 U.S.

meeting that the Board unanimously rejected the SCV proposal, they approved a proposal that celebrated the Buffalo Soldiers. The Buffalo Soldiers represent the African-American soldiers that served in the Indian Wars²⁰. This design is offensive to the Native Americans who suffered and lost their lands as a result of the U.S. quest of Westward expansion. A representative of the Native American community stated that this was offensive to them given the historical context²¹. This creates confusion and casts doubt on the reliability of the process, because if the Board's primary motive for rejecting the proposal was to refrain from being offensive, then they should not have approved the Buffalo Soldiers design either. This inconsistency also addresses the issue that the SCV's right to equal protection has been violated, provided that the Confederacy flag is to African-

²⁰ *Walker* 576 U.S.

²¹ Scharrer, Gary. "Indian Group Objects to Buffalo Soldier Plates." *Houston Chronicle*. Hearst Newspapers LLC, 26 Nov. 2011. Web. 20 Nov. 2015.

Americans as the Buffalo Soldiers symbol is to Native Americans. Yet, the former was rejected and the latter approved²². The duplicity in this case is also evident in that the Texas's State Capitol building gift shop includes items for sale that have the Confederate flag on them. This is an issue because this is a government establishment that is selling and displaying items with the very symbol the state is denying. Naturally, there is a rebuttal that the government can overturn the Board's decision to allow the Buffalo Soldiers plates, and stop the sale of items that include the Confederate flag from the State Capitol gift shops. While those are potential possibilities, the reality is that they have not been enacted, therefore, resulting in inconsistencies in how the case has been handled.

The approval of the Buffalo Soldiers proposal and the rejection of the Sons of Confederate Veterans proposals also highlight the dichotomies present in symbolism. It is clear that symbolism is subject to

²² *Walker* 576 U.S.

interpretation and what it may mean to one may not be the same for another. In his book, *Cultural Anthropology: A Toolkit for A Global Age*, Guest defines symbols as “anything that signifies something else”²³. This definition is testament that symbols are misleading in interpretation and are subject to constant change over time and through different cultures. Anthropologist Clifford Geertz invented the interpretivist approach, where one studies a system of symbols. He points out that to us, a cockfight may symbolize violence and backward thought, but to the communities in Asia, a cockfight symbolizes the centuries of competition among villagers for prestige²⁴. In a sense, the Confederate symbol works in similar terms. It is part of the culture of the South, which contributes to the culture of the U.S. as a whole. To many, it is a symbol of

²³ Guest, Kenneth J. *Cultural Anthropology: A Toolkit for a Global Age*. New York: W. W. Norton & Company, 2014. Print.

²⁴ Guest, Kenneth J. *Cultural Anthropology: A Toolkit for a Global Age*. New York: W. W. Norton & Company, 2014. Print.

racism and white supremacist agenda and ideology, but to others, it is a symbol of their forefathers' heritage and courage. Similarly, the Buffalo Soldiers symbolize pride for African Americans as a sign of equality in the U.S. military, but to Native Americans, it is a symbolic reminder of atrocities committed against them. A symbol's vulnerability to interpretation makes it difficult to pinpoint exactly how it is perceived, because often times it is both seen as negative and positive.

A critical rebuttal to the arguments in this paper is that if this design was approved, then other groups would have the right to ask the publication of designs that included other controversial symbols like swastikas and obscenities. In his article published in June of 2015, Mauro explains that when the justices brought forth this concern during the court proceedings, the SCV attorney, Mr. George, replied that the state indeed would have to permit

those symbols²⁵. While this is disheartening, the reality is that people can put swastikas and images and symbols affiliated with other controversial groups on their cars, in other ways, if not through license plates. The program that Texas has currently instilled makes specialty plates private speech, and that allows people to place on them what they desire.

CONCLUSION

It is certainly difficult to identify the speaker of the message in the issue of personalized license plates. The majority opinion fails to acknowledge that specialty plates are hybrid speech. They include the government as the publisher of the plate, and the private entity that designs and requests it. The word “personalized” is, in its very name, emphasizing that these messages belong to the

²⁵ Mauro, Tony. "A Big Fuss Over the First Amendment." *The National Law Journal*. N.p., 22 June 2015. Web. 15 Nov. 2015.
<<http://www.nationallawjournal.com/id=1202730075499/A-Big-Fuss-Over-the-First-Amendment?mcode=0&curindex=0&curpage=1>>.

driver. In its attempt to raise revenues, Texas blurred the line distinguishing government and private speech. The dissenting justices believe private speech is violated when allowing government to engage in viewpoint discrimination by removing speech they disagree with. This belief is dangerous because the First Amendment exists to protect unpopular speech²⁶. The American Civil Liberties Union, or ACLU, states that in order to preserve constitutional rights for all, even the most repulsive speech must be protected because, often it is this unorthodox speech that governments are likely to suppress²⁷. Emphatically, many will disagree with the symbol in question, but its denial is not justified in the given circumstances. Frankly, there are solutions far better than the stare decisis of the Court. Justice Roberts made the suggestion to simply remove the program of

²⁶ George Jr., R. James. Partner at George Brothers Kincaid and Horton LLP, represented Texas Division, Sons of Confederate Veterans. Personal Interview. 18 Nov. 2015.

²⁷ Rowland, Lee. ACLU Senior Staff Attorney, author of ACLU amicus curiae. 13 Nov. 2015. E-mail Interview.

personalizing plates. Another solution can be to simply revert to previous methods that allowed the state to issue certain specialty plates available, but none that were proposed by private entities. This allows the state to maintain the specialty license program and generate revenue while avoiding the complicated nature of private entity proposals. In their submitted amicus curiae, the ACLU suggested placing a phrase that indicated that messages on the plates were not endorsed by the state. In an attempt to shine light on the implications, one can even conduct a study to collect data indicating if people attribute messages on licenses to the owner or the state. Regardless of one's views, this issue requires further research and discussion, but the current precedent falls short of success.

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