



The National Standard

BULLETIN OF THE VEXILLOLOGICAL ASSOCIATION OF THE STATE OF TEXAS

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CONTESTED SYMBOL: The proposed design of the Sons of Confederate Veterans license plate rejected by the agency. COURTESY TEX. DEPT. OF MOTOR VEHICLES

SUPREME COURT TO TEXAS: MESSAGE DETERMINES THE RIGHT AND YOU HAVE THE RIGHT TO SAY “NO”

Note: The U.S. Supreme Court decided Walker v. Texas Division, Sons of Confederate Veterans; The National Standard is pleased to reprint the following response to the decision by Professors Peter J. Smith and Robert W. Tuttle of The George Washington University Law School .

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* a closely divided Court upheld the decision of the Texas Department of Motor Vehicles Board to reject the respondents’ proposed license plate design featuring a Confederate flag. The respondents argued that, in light of the wide range of specialty license plate designs that the state had previously approved, the license plates constituted a public forum for private speech, and thus that the denial constituted impermissible viewpoint discrimination under the First and Fourteenth Amendments. The Court disagreed, reasoning that Texas’s specialty license plate program constituted government, rather than private, speech: “When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.” Justice Alito, joined by three others, dissented, agreeing with the respondents that the proposed design reflected private speech and thus that Texas impermissibly discriminated on the basis of viewpoint in rejecting their proposed design.

The Court relied heavily on a basic intuition that, without a category of speech that is immune from the content- and viewpoint-neutrality rules ordinarily required by the Free Speech Clause, “government would not work.” For example, in developing instructions for filing income tax returns, the government has no obligation to include the assertions of those who claim that the government lacks authority to impose an

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REPORT: 2015 BUSINESS MEETING, CORPUS CHRISTI

The Association held its annual business meeting on Saturday, March 7, 2015, at the Glass Pavilion, auxiliary to the 119th annual meeting of the Texas State Historical Association in Corpus Christi. Among other business, members re-elected James T. Liston, Hugh L. Brady, and Charles A. Spain as members of the Board and adopted the proposed amendment to the Bylaws to permit delivery of required notices by e-mail and to update outdated and incorrect references. The Board met after the annual meeting and re-elected Mr. Liston as President, Prof. Brady as Vice President, and Judge Spain as Secretary-Treasurer. The 2016 annual business meeting will be held Saturday, March 5, 2016, at the Omni Mandalay Hotel, auxiliary to the 120th annual meeting of the Texas State Historical Association in Irving.

REPORT: YEAR-END STATEMENTS FOR 2014

STATEMENT OF FINANCIAL POSITION			STATEMENT OF INCOME		
AS OF	12/31/13	12/31/14	FOR CALENDAR YEAR	2013	2014
Assets:			Income (revenue):		
Cash	\$3050.25	\$3170.25	Contributions	\$2350.00	\$ 50.00
Prepaid expenses	0.00	0.00	Membership dues	140.00	130.00
Total assets	<u>\$3050.25</u>	<u>\$3170.25</u>	Total income (revenue)....	<u>\$2490.00</u>	<u>\$180.00</u>
Liabilities:			Expenses:		
Accounts payable	\$ 0.00	\$ 0.00	Total expenses	\$ 998.52	\$ 60.00
Loan.....	0.00	0.00	Net income:.....	<u>\$1491.48</u>	<u>\$120.00</u>
Prepaid member dues .	0.00	0.00			
Total liabilities	<u>\$ 0.00</u>	<u>\$ 0.00</u>			
Net assets:					
Total net assets	<u>\$3050.25</u>	<u>\$3170.25</u>			
Total liabilities & net assets.	<u>\$3050.25</u>	<u>\$3170.25</u>			



REPORT: NAVA 49: OTTAWA, ONTARIO

The North American Vexillological Association-Association nord-américaine de vexillologie held its 49th Annual Meeting from October 16-18 at the Ottawa Marriott Hotel. The 3d annual George Preble Lecture was delivered by Dr. Claire Boudreau, Chief Herald of Canada, who spoke of “The Enduring Appeal of Heraldic Flags in Canada.”

The Association was represented by Vice President Hugh Brady, FF, and Secretary-Treasurer Charles A. Spain, WSF; and Dr. Scot Guenter, LF FF WSF FVAST. Prof. Brady received the Captain William Driver Award for his paper “‘But It Was Ours’: The Red Ensign, Dominion Day, and the Effects of Patriotic Memory on the Canadian Flag Debate.” Dr. Guenter, Prof. Brady, and H.P. (Pete) Van de Putte, Jr., FVAST, were re-elected as members of the NAVA nominating committee.

ABOVE: NAVA 49 Meeting Flag. COURTESY NAVA

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VEXILLOLOGICAL ASSOCIATION OF THE STATE OF TEXAS

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LAW PROFESSORS' RESPOND TO COURT'S OPINION IN WALKER

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come tax. But that common-sense intuition provides little help in addressing contexts in which the speech arises out of a collaboration between the government and one or more private entities. For example, the Court's analysis in *Walker* does not neatly resolve a claim that the government must permit the family of a deceased soldier to include a purely personalized display on his grave marker in a veterans' cemetery.

Walker involved speech conveying a secular message—the message, that is, conveyed by the Confederate flag—and concerned only the question whether the government's refusal to permit that speech violated the Free Speech Clause. Many cases arising in this context, however, involve religious speech, and thus implicate both the Free Speech Clause and the Establishment Clause. In his opinion for the Court, Justice Breyer noted that “[c]onstitutional and statutory provisions outside of the Free Speech Clause may limit government speech,” but he did not explicitly mention the Establishment Clause. Nonetheless, it is difficult not to view the dispute between the majority and the dissent in *Walker* as a proxy for the controversy over government responsibility for the content of religious messages.

In a prior decision, for example, the Board approved a specialty license plate design that depicts three Christian crosses on a hill and the motto “One State Under God.” If indeed the messages conveyed by specialty license plate designs in Texas constitute government speech, as the Court held in *Walker*, then this design and message give rise to a colorable claim under the Establishment Clause. Under current doctrine, an official embrace of a particular faith group's religious message violates the Clause.

Consider the case of the “I Believe” specialty license plate in South Carolina. In 2008, the state legislature enacted a law authorizing the issuance of plates depicting a cross superimposed over a stained-glass window and the phrase “I Believe.” In 2009, a federal district court held that the Act violated the Establishment Clause. South Carolina responded by approving an application from a private organization for a substantially similar—and even more overtly Christian—specialty license plate design, based upon an opinion by the state Attorney General concluding that such an action would merely facilitate private speech, rather than constitute government speech. After *Walker*, however, the mere fact that a private organization proposed the plate does not convert the message into private speech. According to the Court, the messages on the license plates are government speech because license plates “have long communicated messages from the States”; license plate designs are “often identified in the public mind with the State”; and the state “retains direct control over the messages” expressed on the plates. As a consequence, the religious themes on the South Carolina “I Believe” plate raise the same questions under the Establishment Clause as those confronted by the district court in 2009.

The Court's conclusion in *Walker* that the specialty license plates at issue constitute government speech is not wholly satisfying as a matter of free speech doctrine. But one unmistakable consequence of the decision is to make clear that such cases involving religious speech will now be subject to scrutiny under the Establishment Clause, a consequence that would not follow from the dissent's view that the plates communicated the speech of private parties.

Under the majority's approach in *Walker*, many of the religiously themed specialty license plates that have been approved are constitutionally vulnerable. The “I Believe” plate, for example, promotes Christianity and thus almost certainly offends the most commonly applied standards for Establishment Clause review. Similarly, the “Jesus is Lord” plate proposed in Tennessee presumably offends the Establishment Clause.

For those who are concerned about the proliferation of government sponsored religious messages, however, the Court's implicit decision in *Walker* to leave constitutional scrutiny to the Es-

Establishment Clause will ultimately offer little relief. The widely noted disagreements among the Justices about the application of the Establishment Clause will at best render uncertain the constitutional status of many religious messages that have appeared on, or been proposed for, specialty license plates. In many cases, those messages will easily survive scrutiny under the Establishment Clause.

For example, Kentucky (among a significant number of states) has adopted a plate with the message “In God We Trust.” Few would believe that this message—which appears on United States currency—offends the Establishment Clause. Because that message constitutes government speech when it appears on a state-issued license plate, moreover, the state is under no obligation to approve a plate that advances a contrary message—such as, say, a design proposed by atheists declaring “In Humanity We Trust.”

Indeed, the most controversial specialty license plate designs have involved the message “Choose Life.” Such plates have given rise to three types of disputes: first, the claim (typically in liberal-leaning states) that the state impermissibly denied a proposal for such a plate featuring that message; second, the claim (typically in conservative states) that the state impermissibly issued a plate with that message; and third, the claim (again, typically in conservative states) that the state, having approved a “Choose Life” design, must also approve a plate with a competing message, such as “Pro-Choice.” Under *Walker*, the first and third claims are no longer colorable, even though most of the lower courts that previously addressed the issue concluded that the denials constituted impermissible viewpoint discrimination. And because the Establishment Clause is now the only effective limit on the state’s discretion to include messages on specialty license plates, the second claim will fail because, although the phrase “Choose Life” has, for many, religious undertones, it is not an expressly religious statement.

At a time of renewed attention to the divisive character of the Confederate flag, the majority in *Walker* succeeded in permitting Texas to block its display on state-issued plates. But to the extent that the liberal Justices in the majority are concerned about the proliferation of state-sponsored religious messages, their approach in *Walker* will offer only slight assistance in that project.

Geo. Wash. L. Rev. Docket (June 23, 2015)

Peter J. Smith is Professor of Law at The George Washington Law School and is an expert in constitutional law. His articles have appeared in the Yale Law Journal, the Columbia Law Review, the Virginia Law Review, the Georgetown Law Journal, and the Duke Law Journal, among others. Professor Smith has co-authored of a casebook on constitutional law with Professor Gregory Maggs.

*Robert W. Tuttle is the David R. and Sherry Kirschner Berz Research Professor of Law and Religion. Professor Tuttle is an expert in Law & Religion and instructs courses in property, trusts and estates, and professional responsibility. Professor Tuttle’s recently published book on the religion clauses of the constitution with Professor Ira C. Lupu is *Secular Government, Religious People* (Eerdmans, 2014).*