LD 1618 Resolve, To Place a Temporary Moratorium on the Approval of Any New Motor Vehicle Registration Plates and Initiate A Registration Working Group

Case for State Rights to Regulate Motor Vehicle Licensing

By Douglas Jones, resident of Ellsworth, Maine
January, 2019 and updated November, 2020

In 2015 the Legislature of the State of Maine eliminated most vanity registration plate restrictions that related to "obscene, contemptuous, profane or prejudicial" language. In doing so, there were a flood of requests for words that were widely reported in the media causing surprise to some, offense to others and, perhaps, glee to a limited audience. As one newspaper said, the new regulation encourages an effort to "see what they can get away with." In the *Sun Journal* Maine Secretary of State Matt Dunlap was quoted about the lack of restrictions and the resulting bad language saying, "… where is the state's compelling interest (in preventing that)?" Maybe Mr. Dunlap might reconsider if he were driving a car with F***CT plate in Connecticut or in Georgia where a different interpretation could land him in contempt of Georgia statutes. He might further consider the impact of a vanity plate on the reputation of our state.

Some of our most cherished rights involve the First and Second Amendments to the U.S. Constitution – the right to free speech and the right to bear arms. Just as Americans cannot legally possess certain kinds of arms (machine guns), citizens have seen the evolution of speech rights in ways that strengthen the rights and protections that we do have. The Supreme Court of the United States said in *Walker v. Texas Division, Sons of Confederate Veterans, Inc*. that license plates are "government property" and that such plates are closely identified with the issuing government. Further, it is reasonable that government might not wish to be identified with certain designs or messages developed by private parties. "Were the Free Speech Clause interpreted otherwise … 'It is not easy to imagine how government could function if it lacked th(e) freedom to select the messages it wishes to convey.' " For example, "How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization?" Given that there is ample opportunity to voice another perspective using alternative means, a state limitation on speech as *Walker* narrowly defines, is reasonable.

Reviewing District and Judicial Court rulings both before and after 2015 reveals a different picture about vanity plate restrictions than Secretary of State Dunlap expresses. While he claimed that *Walker* was a political decision by the US Supreme Court, it and similar rulings like *Roe v. Wade* remain the law of the land. He claimed that a number of states had their statutes

overturned and he mentioned New Hampshire as an example. The New Hampshire Supreme Court case cited by Dunlap in the *Press Herald*, *Montenegro v. New Hampshire Div. of Motor Vehicles*, said in its analysis in 2014 that "…because neither party has argued otherwise, we will assume, without deciding, that the speech at issue in this case is private speech and that the vanity registration plates are government property." This is important because the "speech" was characterized as "private speech." Even though the case was decided in 2014 before Maine's statute was revised, *Walker*, issued in 2015, confirmed a distinction that government speech (as opposed to private speech) is not bound by the First Amendment. Further, the New Hampshire case only found that the current statute is "unconstitutionally vague" and "encourages arbitrary and discriminatory enforcement" which leaves the door open to statute revision. New Hampshire continues to screen vanity license plates in 2019 with an extensive and clearly worded set of guidelines on what would be language that is restricted.

Mr. Dunlap might have taken the direction chosen by the State of New Hampshire and address the issues cited in *Montenegro*. Instead, he chose (according to information revealed in my Freedom of Information Request) to have had verbal conversations with the Maine Attorney General, Janet Mills, and the ACLU. Choosing to have a less than rigorous discussion about potential objections to any restrictions, he denied the Maine Legislature, based upon his recommendations, the option of new, narrowly defined limitations on vanity plate registration language!

Recently, at the request of Maine State Legislator Nicole Grohoski, the National Conference of State Legislatures queried five state web sites to determine vanity plate guidelines for Delaware, Massachusetts, New York, North Carolina and Pennsylvania. Each state has definitive guidelines used to screen vanity plate language. In my own survey of each of the 49 other states in the nation, the District of Columbia and New Brunswick and Nova Scotia, it was found that every entity has some form of screening beyond what Maine allows. While Canadian Provinces are not precedential for Maine, our neighbors must have some opinion about the only state in the nation to allow F*** on license plates.

So, what is it that courts are looking for to allow states to restrict license plate content? A search of the many cases that have been decided can be frustrating and, as in many situations, the researcher can find the results they want through affirmation bias. David Hudson, First Amendment Scholar for the Freedom Forum Institute wrote, "The Supreme Court's decision in *Walker* seems to have ended much of the First Amendment controversy surrounding license plates." And while that seems to be true given the continued screening of vanity plate requests in all but one state (Maine), he notes that Planned Parenthood and the Sons of Confederate Veterans are not likely to quit fighting restrictions.

An early case in the battle over license plates and First Amendment rights came from New Hampshire. The state motto "Live Free or Die" was the subject of *Wooley v. Maynard* where the Maynards, who are Jehovah's Witnesses, claimed that "or Die" was inconsistent with their religious beliefs. The US Supreme Court agreed. David Hudson pointed out that "… the case stands for the principle that the state cannot compel an individual to subscribe to a particular ideology." It is interesting to note, however, that passenger registration plates in New Hampshire all contain the unedited state motto today. To expand on the point of state censorship, in 1971 *Cohen v. California*, Justice John Marshall Harlan, II, cited *Whitney v. California* saying that the First Amendment operates to protect the "marketplace of ideas." Mr. Cohen had worn a jacket within a courthouse that was imprinted with "Fuck the Draft". Associate Justice Thurgood Marshall explained in the following year that "…the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

Much later in 2001, *Lewis v. Wilson* in the 8th Circuit Court of Appeals ruled that the Missouri Department of Motor Vehicles cannot restrict a plate (ARYAN-1) that "might make people angry." That same year, the 2nd Circuit ruled in *Perry v. McDonald* that Vermont officials could deny a plate reading "SHTHPNS". According to the Freedom Forum Institute's Hudson, Vermont had a policy "… that prohibited … offensive, scatological terms." The appeals panel determined that license plates are a nonpublic forum in which government officials can regulate speech as long as their restrictions are reasonable and do not discriminate based on viewpoint." The viewpoint was not held to be discriminatory because it was the word "shit" that violated the regulation, i.e., Perry's philosophical views were not what caused the restriction.

The *Perry* case documents that courts recognize "nonpublic forums" that may restrict language as long as the restriction is "viewpoint neutral." These concepts are worth exploring, albeit, a little difficult to understand. Viewpoint neutrality originates with the right to free speech. It should not be up to government officials to judge or censor a viewpoint or favor a positive or opposite position. Hence, SHTHPNS as a philosophy must not be censored if it were not for the espoused philosophy containing the word "shit." Had not Vermont established a narrowly defined regulation against scatological terms, even its nonpublic forum could not have denied the plate.

Interestingly, while Maine made the administrative decision to delete restriction on vanity plates, a Maryland ban on license plate profanity was upheld by the Court of Appeals in 2016. Hence, more than a dozen years after the seemingly conflicting decisions of *Lewis v. Wilson* and *Perry v. McDonald*, the opposite positions are once again in evidence.

In a more interesting difference of decisions relating to specialty license plates in four separate states with a "Choose Life" message request, decisions were issued for very different reasons. In Florida's 11th Circuit, *Women's Emergency Network v. Bush* challenged the issuance of a Choose Life specialty plate. The Court found that the Network lacked standing to challenge and could have requested an opposite viewpoint (Pro Choice) specialty plate. In a similar case, *Planned Parenthood v. Rose*, a federal district court determined that Planned Parenthood had standing and found that the state committed viewpoint discrimination by favoring the Choose Life message while excluding the Pro Choice message. The finding was upheld by the 4th Circuit.

A North Carolina case, *American Civil Liberties Union v. Tata,* involved free speech rights and unconstitutional viewpoint discrimination according to the 4th Circuit while, in Tennessee's 6th Circuit, *American Civil Liberties Union v. Bredesen* could issue "Choose Life" plates based upon the government-speech doctrine. The 6th Circuit recognized the conflict but said that "…following the Fourth Circuit's lead in this case would invalidate wide swaths of previously accepted exercises of government speech."

The viewpoint neutral argument does not apply when government speech is involved as the government-speech doctrine holds that government can speak for itself and propound certain viewpoints when advancing its own speech. The earlier example of promoting vaccinations against disease is a good example – especially in this time of global pandemic.

Since vanity plates may seem to convey the car owner's sentiment, it may be easier to claim First Amendment relevance. On the other hand, one might argue that a bumper sticker provides an equal and more flexible method of conveying a message. Clearly however, vanity plates are a preferred method because of an implied state endorsement. It is the implied state endorsement that makes the government-speech doctrine persuasive.

The government-speech argument, when it is applied to specialty plates, is easier to understand in that the government's speech is on each of the specialty plates that are printed. However, the *Walker* case is important because government did not design the message for the Sons of Confederate Veterans which was clearly a private message! *Walker* was the case in 2015 that expressed that government speech is what appears on license plates. Secretary Dunlap may feel the case was political but that case was decided by the Supreme Court of the United States and, hence, is determined to be the law of the land.

In this 2015 case the Supreme Court expressed three pivotal points. First it said that historically license plates are the province of government and government has used plates to convey a message. Second, using the reasonable observer test, the Court said that the public identifies the message with government. Lastly, government has final approval of all license plates.

While the ruling had to do with specialty license plates, the points are just as binding. If government prints a word on its property then the word or message must belong to government. David Hudson of the Freedom Forum Institute points out that lower courts began to reverse themselves after *Walker* was decided. (*Berger v. ACLU of North Carolina* and *ACLU of North Carolina v. Tennyson)*

Whether there is a difference in First Amendment protection of Specialty vs. Vanity plates remains only a bit unclear. What is clear from all of the reviewed cases is that the content of license plates is identified with the issuing government. Further, what is also clear is that without a narrowly defined regulation (or any regulation) the ability of citizens to object to license plate content is prevented absolutely. As an example, I challenged F***CT, F***US and ICU2COP and NO SHIT in letters to Secretary Dunlap dated February 22 and March 4, 2019. I received a generic response to one letter (my only formal answer) indicating that the Legislature made changes to the regulation in 2015 and these license plates comported with the regulation!

While preparing this Case for State Rights, I passed a car with IT HPNS. I thought this might remind a person of the *Perry v. McDonald* case relating to SHTHPNS and thought this is creativity that has not crossed the line. It could be "information technology happens" or just the philosophy that "it" happens. I wondered, also, if the Maine Constitution might impact a defense of "anything goes." Article I, Section 4 of our state constitution says: "Every citizen may speak freely, write and publish sentiments on any subject, being responsible for the abuse of this liberty." Many words and abbreviations are not easily defined as speech, writings or publications on a Maine state-owned license plate. Further, such writings are not directly attributable to an individual but rather to the state's endorsement. Even if it occurs that the owner of the automobile is the sentiment author, one is "responsible for the abuse of this liberty…" and the Maine Legislature has the right to define what is an abuse of this liberty. Further, the state Constitution opens the door to the concept of abuse of liberty and, in addition, creates the question: does a single word or abbreviation always constitute a "sentiment"?

On October 4, 2020, the ACLU of Rhode Island challenged an administrative decision in early 2020 to revoke a vanity plate with FKGAS imprinted. The Rhode Island DMV regulation rejects plates "offensive to good taste" and, following a citizen's complaint, ordered the plate to be turned in. A federal judge issued a preliminary injunction stating that the rule likely violated the First Amendment. Rhode Island DMV maintains a list of prohibited license plate combinations and has rejected dozens of others while approving 41,000 others. The judge, siding with the ACLU, noted the "arbitrary nature" of DMV's process. It is important to note

that the judge did not say the decision was purely about free speech, but instead, found the regulation arbitrary and without sufficient guidance for rejecting a vanity plate. This is consistent with other findings across the United States that "offensive to good taste" is, in fact, an arbitrary regulatory directive. A state is therefore well advised to carefully craft clear and objective laws to which a motor vehicles department is bound.

Letters to the Governor (Mills), Attorney General Frey and Secretary of State Dunlap from me are routinely unanswered. Letters to candidates in the 2018 election process generated substantial interest. Since Dunlap, Frey and Mills were all involved in the 2015 regulation change, based upon one persons verbal discussions only with the Attorney General and the ACLU, it is quite clear that the current Legislature needs to and is entitled to make a decision about the kind of environment it wishes to endorse in a state where it proclaims: OPEN FOR BUSINESS, THE WAY LIFE SHOULD BE or WELCOME HOME. VACATIONLAND that says F***YOU is off limits to my family. I visit them elsewhere.