

## Whose Call on Confederate Flag License Plates?

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Following the shooting deaths of nine black worshippers in June at a historically significant Charleston church and South Carolina's subsequent removal of the Confederate flag from the grounds of the State House, some have called upon North Carolina officials to stop issuing specialty license plates featuring the Confederate flag. N.C. Governor Pat McCrory [has said](#) that the General Assembly must pass legislation to halt issuance of the plates. One veteran legislator was quoted in [this News and Observer story](#) as saying that he never would have voted to authorize such a special plate and never recalls seeing such legislation. A spokesperson for another legislator was quoted as saying that the Governor was empowered to end issuance of the plates. Who's right?

As it turns out, the answer is not obvious.

**Where's the statute?** There's a reason legislators might not remember authorizing license plates featuring the Confederate flag. They never specifically did so. Indeed, [G.S. 20-79.4\(b\)](#) lists 250 types of special registration plates that DMV "shall issue." None of these plates feature the Confederate flag.

**So why were Confederate flag plates ever issued?** The General Assembly authorized issuance of license plates identifying civic clubs and displaying the emblem of the identified club in a provision currently codified as G.S. 20-79.4(b)(42). That statutory subdivision specifies that license plates are "[i]ssuable to a member of a nationally recognized civic organization whose member clubs in the State are exempt from State corporate income tax." It lists, as examples of these types of clubs, Jaycees, Kiwanis, Optimist, Rotary, Ruritan, and Shrine. The statute requires the plate to "bear a word or phrase identifying the civic club and the emblem of the civic club," and provides that DMV may not issue a civic club plate unless it receives at least 300 applications for that plate.

After receiving tax-exempt status from the North Carolina Department of Revenue, the North Carolina chapter of the Sons of Confederate Veterans (SCV) applied to DMV for issuance of a license plate bearing its emblem: the Confederate flag. DMV refused to issue the plates.

SCV sued in superior court and won. The trial court ordered DMV to issue SCV registration plates once it received the requisite 300 applications. DMV appealed, and a majority of the court of appeals affirmed in *North Carolina Division of Sons of Confederate Veterans v. Faulkner*, 131 N.C. App. 775 (1998). The appellate court determined that SCV was of a similar character as the qualifying civic clubs listed in the "civic club" subdivision of G.S. 20-79.4(b) and thus was a "nationally recognized civic organization" within the meaning of that statute. Thus, the court determined that SCV qualified for special registration plates. The court noted that "[w]hether the display of the confederate flag on state-issued license plates represents sound public policy is not an issue presented to the Court in this case. That is an issue for our General Assembly."

Significantly, however, the court did not rule in favor of SCV on constitutional grounds. While it noted that "allowing some organizations which fall within section [G.S. 20-79.4(b)(42)'s] criteria to obtain personalized plates while disallowing others equally within the criteria could implicate the First Amendment's restriction against content-based restraints on free speech," the court avoided the need for constitutional analysis when it determined that the statute

required issuance of the plates.

Judge (and subsequent Justice) Timmons-Goodson dissented on the basis that SCV did not satisfy the statutory definition of civic club. DMV evidently declined to exercise its right to appeal the divided decision to the state supreme court.

**What happened next?** DMV followed the court's directive. The News and Observer [reports](#) that more than 2,000 such plates have been issued.

**Wasn't there just a U.S. Supreme Court case involving this very issue?** Yes. The United States Supreme Court held last month in a 5-4 decision that the First Amendment did not require the State of Texas to issue license plates featuring the Sons of Confederate Veterans emblem. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015). The high court determined that specialized license plates were a form of public speech by the State government rather than private speech by the organizations whose logos were featured on license plates. Thus, the majority concluded that Texas could "choose how to present itself and its constituency."

Had the North Carolina court of appeals based its decision that DMV was required to issue SCV license plates on a determination that to do otherwise would constitute viewpoint discrimination in violation of the First Amendment, the United States Supreme Court's determination in *Sons of Confederate Veterans* would overrule that determination. But the North Carolina Court of Appeals did not rest its holding on that ground. Instead, as noted above, it determined that the statutory provision directing DMV to issue special license plates for civic clubs that met the statutory definition required issuance of the Confederate flag plates.

**So who is right?** If G.S. 20-79.4(b)(42) afforded DMV discretion in determining which civic organizations were entitled to special plates, there would be no question that the governor could direct DMV, an agency under his control, to stop issuing Confederate flag plates. But the court of appeals in *Sons of Confederate Veterans* did not construe G.S. 20-79.4(b) as allowing DMV to select which civic groups were eligible for special plates. That's presumably why the Governor has concluded that he cannot tell DMV to stop issuing the plates unless the General Assembly amends the statute.

On the other hand, considering the history behind the issuance of these plates, it isn't hard to understand why some legislators disagree. The legislature never approved the confederate plates, DMV issued them only after the state court of appeals said it had to, and the U.S. Supreme Court just held, in a similar case, that Texas was not required to issue Confederate flag plates. Taking a broad view of the matter and discounting the specific reasoning of the state court opinion, one might conclude that the Governor could act on his own to stop DMV from handing out Confederate plates.