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NOTE

A License to Infringe: The Tenth Circuit's Reliance on the Reasonable Observer Test to Determine Symbolic Speech Protection of License Plates

Introduction

The First Amendment of the United States Constitution holds, “Congress shall make no law . . . abridging the freedom of speech”¹ While a plain reading of the First Amendment only seems to protect “speech,” courts “have long recognized that its protection does not end at the spoken or written word.”² Although the Supreme Court has rejected “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea,”³ it has “acknowledged that conduct may be ‘sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[.]’”⁴ While this broadening of speech protection is fitting, the absence of a concrete definition of what conduct deserves the protection of the First Amendment has divided courts and legal scholars for decades.⁵ Specifically, ambiguous Supreme Court decisions regarding symbolic speech have left lower courts in disarray, each either utilizing a different version of, or completely disregarding, the same test.⁶ Courts have,

1. U.S. CONST. amend. I.

2. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

3. *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

4. *Johnson*, 491 U.S. at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam)).

5. See R. George Wright, *What Counts as "Speech" in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217, 1225 (2010).

6. See, e.g., *Cressman v. Thompson*, 798 F.3d 938, 957-58 (10th Cir. 2015) (finding, at a minimum, that a claimant must articulate a message a viewer would perceive from a symbol to which he objects and that First Amendment protection is only afforded where the articulated message to which the claimant objects mirrors that of the “reasonable observer”); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388-89 (6th Cir. 2005) (finding the particularized message portion of the *Spence-Johnson* test must not be narrow or succinctly articulable); *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 n.6 (2d Cir. 2004) (finding the *Spence-Johnson* test to be the test for symbolic speech First Amendment protection); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (relaxing the *Spence-Johnson* test by only requiring that a reasonable person would interpret *any* message as opposed to a *specific* message for the test for symbolic speech First Amendment protection); *Tenaflly Eruv Ass'n v. Borough of Tenaflly*, 309 F.3d

however, consistently affirmed that one consideration has the potential to be a guidepost for categories of symbolic speech determinations: context. Adopting contextual considerations in every symbolic speech analysis is a much-needed stride towards uniformity in this area of law, which is becoming increasingly imperative as the way people convey messages continues to expand into new forums of abstract expression.⁷ As more and more types of symbolic speech forms come before courts, the utilization of context as a guiding factor in determining free speech protection can aid courts in promptly and uniformly adapting to these new forms.⁸

In *Cressman v. Thompson*,⁹ the Tenth Circuit determined whether the First Amendment accorded protection to symbolic speech in the context of license plates featuring Native American religious symbols. Although its analysis was not an unreasonable interpretation of Supreme Court precedent, the court's complete reliance on the "reasonable observer's" perception of the symbol at issue improperly limits the scope of reasonable objections that complainants may make regarding symbolic speech displayed on state-issued license plates. Under the Tenth Circuit's holding, citizens are essentially compelled to either display the words and symbols on a state-issued license plate—which is affixed on private property for numerous people to see—or suffer a penalty.¹⁰ Thus, in the specific context of license plates, where citizens are compelled to communicate a message of the government's choosing, the components of the symbolic speech test historically used by courts¹¹ should only be used as persuasive, not mandatory, factors in the determination of symbolic speech protection. Further, where the complainant's interpretation of the symbol is (1)

144, 160 (3d Cir. 2002) (finding the particularized message portion of the *Spence-Johnson* test to be unnecessary for the test for symbolic speech First Amendment protection).

7. See Caitlin Housley, *A Uniform Test Isn't Here Right Now, but Please Leave a Message: How Altering the Spence Symbolic Speech Test Can Better Meet the Needs of an Expressive Society*, 103 KY. L.J. 657, 658 (2015) ("[P]eople rely on technology, clothing, hairstyles, brands, and even tattoos to express their personalities and send messages about what they value in life.").

8. See *id.*

9. 798 F.3d 938.

10. Obscuring any part of a state-issued license plate is illegal under Oklahoma law, see 47 OKLA. STAT. § 1113(A)(2) (2011), so *Cressman*'s options were to either 1) obscure the Native American image and be subject to prosecution, or 2) pay an extra fee for a specialty license plate.

11. The symbolic speech test historically used by courts is the *Spence-Johnson* test, which requires (1) an intent to convey a particularized message and (2) a great likelihood that the message will be understood by viewers. See *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (*per curiam*).

reasonable and (2) ideological, his or her First Amendment claim should be successful and, at the very least, he or she should be allowed to display a specialty license plate for the same price as a state-issued license plate.

Part I of this Note examines how the jurisprudence of symbolic speech has evolved since its emergence in *Spence v. Washington*¹² and *Texas v. Johnson*.¹³ Part II discusses how the doctrines of compelled and governmental speech have impacted the courts' free speech analysis of state-issued license plates. Next, Part III provides an overview of the Tenth Circuit's *Cressman v. Thompson* decision involving speech protection of symbols found on Oklahoma's state-issued license plate.¹⁴ Finally, Part IV discusses how (1) the *Cressman* court improperly relied on the reasonable-observer test to reach its holding, and (2) implicit in the Supreme Court's decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*¹⁵ is a need for a flexible test for symbolic speech protection, requiring the consideration of context. Thus, in the specific context of license plates, a citizen's reasonable and ideological interpretation of the message on a license plate to which he or she objects should afford him or her the free speech protection of the First Amendment.

I. Symbolic Speech Jurisprudence

A. Spence v. Washington and Texas v. Johnson: The Emergence of the Test

The Supreme Court first articulated a test for assessing the First Amendment protection of symbolic speech in *Spence v. Washington*.¹⁶ In *Spence*, a college student hung an American flag out of his apartment window on private property.¹⁷ Contrary to custom, the American flag was positioned upside down and with peace signs made out of black tape attached to the front and back.¹⁸ The student explained that he "wanted people to know that [he] thought America stood for peace."¹⁹ The flag was noticeable to passersby, including police officers, who seized the flag and

12. 418 U.S. 405.

13. 491 U.S. 397 (1989).

14. 798 F.3d 938.

15. 515 U.S. 557 (1995).

16. 418 U.S. at 410-11.

17. *Id.* at 406.

18. *Id.*

19. *Id.* at 409.

arrested the student for violating a State of Washington improper-use statute.²⁰

The Court recognized that although the student's message was not conveyed via spoken word, he was still "engaged in a form of communication."²¹ Thus, the issue was "whether his activity was *sufficiently* imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."²² In its analysis, the Court recognized the communicative value of flags as symbols, as well as the context in which the student used the flag and peace sign as symbols.²³ Based on these considerations, the state's improper-use statute was held to be unconstitutional as applied to the expressions of the student—who was attempting to send a message about peace²⁴—as it would likely be understood by those who viewed it due to the then-current governmental domestic and foreign affairs.²⁵ According to this test, symbolic speech is protected by the First Amendment where there is "[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood [is] great that the message [will] be understood by those who view[] it."²⁶

The test articulated in *Spence* was reaffirmed in *Texas v. Johnson*,²⁷ where Johnson burned an American flag at the 1984 Republican National Convention to protest certain Reagan administration policies.²⁸ The Court held that because Johnson's conduct was both expressive and overtly political, it was "intentional and overwhelmingly apparent," and thus deserving of First Amendment protection.²⁹

The Court's analysis in these two cases has come to be known as the *Spence-Johnson* test, under which symbolic speech is protected by the First Amendment if there is (1) an intent to convey a particularized message and (2) a great likelihood that the message will be understood by viewers.³⁰

20. *Id.* at 406-07.

21. *Id.* at 409.

22. *Id.* (emphasis added).

23. *Id.* at 410.

24. The student testified that the upside-down peace signs on the flag were intended to protest the United States' invasion of Cambodia and the killings at Kent State University in 1970. *Id.* at 408.

25. *See id.* at 410.

26. *Id.* at 410-11.

27. 491 U.S. 397 (1989).

28. *Id.* at 399.

29. *See id.* at 406.

30. *See Spence*, 418 U.S. at 410-11.

Simple though this test may appear, lower courts have struggled to apply it uniformly due to their varying interpretations of the Supreme Court's use of the test in *Hurley*,³¹ resulting in confusion regarding the scope of protection afforded to various forms of symbolic speech.³²

B. Hurley v. GLIB: Source of Disarray

Undoubtedly seeing the problems with the application of the *Spence-Johnson* test, the Court once again addressed the issue of symbolic speech in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.³³ Although *Hurley* mainly dealt with the expressive content of parades protected by the First Amendment,³⁴ the Court also noted problems with the *Spence-Johnson* test.³⁵ According to the *Hurley* Court, “a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”³⁶ Although the Court attempted to provide clarity regarding the *Spence-Johnson* test by noting the requirement of a particularized message may not always reach apparent constitutionally protected symbolic speech,³⁷ the only thing that is clear after *Hurley* is that lower courts are even more confused as to when symbolic speech prompts First Amendment protection.³⁸ This uncertainty—and, consequently, the conflicting opinions of lower courts—is inconsistent with the values of justice and fairness that the judicial system strives to embody. The Supreme Court tried to alleviate the symbolic speech problem in *Hurley* by recognizing that the *Spence-Johnson* test may not always adequately recognize protected symbolic speech, but it ultimately enlarged the problem.³⁹ First Amendment protections are the cornerstone of America's free, democratic society, and accordingly the Court should articulate a clear test for symbolic speech that will allow for a uniform application and protect symbolic speech when appropriate.

31. 515 U.S. 557 (1995).

32. See cases cited *supra* note 6 and accompanying text.

33. 515 U.S. 557.

34. See *id.* at 559.

35. See *id.* at 569.

36. *Id.* (citation omitted).

37. See *id.*

38. See cases cited *supra* note 6 and accompanying text.

39. See cases cited *supra* note 6.

II. License Plate Jurisprudence: Compelled and Government Speech

In the specific context of state-issued license plates, issues pertaining to symbolic speech have been further complicated by the need to consider the doctrines of compelled speech and government speech. The compelled speech doctrine provides that “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”⁴⁰ Government speech, on the other hand, “allows the government [as the speaker] to make content based choices when it comes to speech,” just like a private citizen.⁴¹ Although this appears to indicate that the government lacks any restraint in expressing government speech, “the Free Speech Clause itself may constrain the government’s speech if . . . the government seeks to compel private persons to convey the government’s speech.”⁴² Such an issue has arisen in every level of the courts in the context of state-issued license plates, where the plates contain words and symbols of the government’s choosing and are required to be affixed to the private property of all citizens driving automobiles, subsequently compelling them to display the government’s message.

A. *Walker v. Texas: License Plates Are Government Speech*

While there had been tension in lower courts relating to whether speech on state-issued license plates was government or private speech, *Cressman* recognized that *Walker v. Texas* explicitly settled the issue.⁴³ In *Walker*, the Court held that specialty license plates issued by the State of Texas were government speech because, just like state-issued non-specialty license plates, each plate serves a governmental purpose, the government approves of the contents of the plate, and states have long used license plates to

40. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); see *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943).

41. David Mangone, *Speech at a Crossroads: The Intersection of Symbolic Speech, Government Speech, and the State License Plate*, 8 FED. CTS. L. REV. 97, 108 (2014); see *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015) (“When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”).

42. *Walker*, 135 S. Ct. at 2246.

43. See *Cressman v. Thompson*, 798 F.3d 938, 965 (10th Cir. 2015) (McHugh, J., concurring).

convey governmental messages.⁴⁴ Therefore, state-issued license plates present compelled speech that may implicate the First Amendment, since speech on license plates is government speech and physical license plates must be affixed to private persons' vehicles.⁴⁵ With the issue of determining which category of speech license plates most appropriately fit being settled, the Court next grappled with license plate compelled speech in the form of an express message.

B. Wooley v. Maynard: A Successful Objection to a Morally Repugnant License Plate

Wooley v. Maynard involved license plates and compelled express government speech—not symbolic speech.⁴⁶ In *Wooley*, the issue surrounded New Hampshire's state-issued license plates, which contained the written phrase "Live Free or Die."⁴⁷ The Maynards, a married couple asserting membership in the Jehovah's Witnesses faith, found the phrase to be repugnant to their religious beliefs and subsequently covered that portion of the license plate affixed to their vehicle.⁴⁸ Covering any part of a license plate violates New Hampshire state law, and consequently the husband was arrested.⁴⁹ The Maynards then brought an action to enjoin enforcement of the statute where, upon appeal, the Court held that a citizen may not be required by the State to disseminate an ideological message "by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."⁵⁰ With this holding, the Court recognized that a state has no right to "require[] that [individuals] use their private property as a 'mobile billboard' for the State's ideological message—or suffer a penalty"⁵¹ Although this holding clearly addressed the constitutionality of express ideological messages on license plates, the outcome of a compelled-speech objection to displaying a license plate in

44. See *Walker*, 135 S. Ct. at 2249-50.

45. See *Cressman*, 798 F.3d at 949 (quoting *Walker*, 135 U.S. at 2252-53) ("[E]ven though license plate designs may be government speech, drivers 'convey the messages communicated through those designs,' and a State runs afoul of the First Amendment if it 'compel[s] a party to express a view with which the private party disagrees.'" (citations omitted)).

46. 430 U.S. 705 (1977).

47. *Id.* at 706-07.

48. *Id.* at 707-08.

49. *Id.*

50. *Id.* at 713.

51. *Id.* at 715.

instances where the government message is less clear, as with symbolic speech, remains unsettled.

C. *The Uncertainty of Symbolic Speech and License Plates*

While it is established that state-issued license plates are government speech, which only implicate First Amendment protections where the government seeks to compel private persons to convey a message that they find morally objectionable,⁵² determining the government's message is still unclear—particularly when the message is in the form of a symbol.⁵³ Although symbolic-speech jurisprudence may be characterized as a sea of uncertainty, as evidenced by the multitude of variations of the *Spence-Johnson* test utilized by lower courts, a common thread in nearly every symbolic-speech case is the consideration of context.⁵⁴ In the specific context of license plates, the Tenth Circuit's approach to determining symbolic-speech protections in *Cressman v. Thompson* improperly denied the First Amendment right to refrain from speaking.

III. *Cressman v. Thompson*

Pursuant to title 47, section 1113.3 of the Oklahoma Statutes, the Oklahoma License Plate Design Task Force was created in 2007 to update the Oklahoma state-issued license plate.⁵⁵ Because one of the goals in the plate redesign was to specifically “market Oklahoma as a tourist destination,” the resulting design included the words “Native America” and an image of a Native American shooting an arrow into the sky (the “Native American image”).⁵⁶ The Native American image is based on an Allan Houser sculpture, *Sacred Rain Arrow*, “which depicts the story of a young Apache warrior who fired an arrow that was blessed by a medicine man into the heavens; as the tale goes, the arrow carried prayers for rain to the Spirit World.”⁵⁷

52. *See id.* at 715-17.

53. *See* cases cited *supra* note 6 and accompanying text.

54. *See, e.g.,* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 576-77 (1995); *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510 (1969); *Cressman v. Thompson*, 798 F.3d 938, 953 (10th Cir. 2015); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005).

55. *Cressman*, 798 F.3d at 943.

56. *Id.*

57. *Id.*

A. Cressman's Objection and Failed Remedial Attempts

Keith Cressman claimed to hold “historic Christian beliefs,” including monotheism, and consequently objected to the Native American image on the Oklahoma license plate because he believed it conveyed the same message as that behind the *Sacred Rain Arrow* sculpture, including teachings about “multiple gods” and “the arrow [as] an intermediary for prayer.”⁵⁸

Based on his contrary beliefs, Cressman made several attempts to avoid displaying the Native American image.⁵⁹ Cressman covered up the Native American image on his license plate, but was informed by the Oklahoma Tax Commission’s Tag Agency that doing so was illegal.⁶⁰ The Tax Commission then told him that he could buy a specialty license plate without the Native American image for an extra charge.⁶¹ While Cressman did buy specialty license plates at an increased price for a time, he later notified numerous state officials that he did not want to pay more for a specialty license plate and instead wished to either cover up the Native American image on a standard license plate or obtain a specialty license plate at no additional charge.⁶² Cressman received no response to his request and in November 2011 filed a civil-rights lawsuit pursuant to 42 U.S.C. § 1983, alleging that his First and Fourteenth Amendment rights were violated by being forced by the State of Oklahoma to display the Native American image carrying a pantheistic message in conflict with his personal beliefs.⁶³

After the district court ruled that Cressman’s First Amendment rights were not violated,⁶⁴ Cressman appealed to the United States Court of Appeals for the Tenth Circuit, which considered whether Cressman “ha[d] been unconstitutionally compelled to speak by Oklahoma’s requirement that he either display the Native American image on his vehicle license plate or pay an extra fee for a specialty plate.”⁶⁵ To make a valid compelled-speech claim, the court explained that “a party must establish (1) speech; (2) to which he objects; that is (3) compelled by some

58. *Id.*

59. *Id.*

60. *Id.*; 47 OKLA. STAT. §§ 1113(A)(2), 1151(A)(2) (2011 & Supp. 2012).

61. *Cressman*, 798 F.3d at 943-44.

62. *Id.* at 944.

63. *Id.*

64. *See id.*

65. *Id.* at 950.

governmental action.”⁶⁶ Thus, the court considered (1) whether the Native American image was pure or symbolic speech, and, if so, (2) whether Cressman objected to the message it conveys.⁶⁷

B. Not Pure, But Symbolic Speech

The Tenth Circuit found that the Native American image was not pure speech.⁶⁸ The court explained that pure-speech analysis is performed on a case-by-case basis, and the context of the message guides the court’s decision.⁶⁹ Because the image could be found on thousands of license plates throughout Oklahoma, and because such a plate “is not an exercise of self-expression entitled to pure-speech protection,” the Native American image is not pure speech.⁷⁰

The court next assessed whether the Native American image is symbolic speech that implicates the First Amendment.⁷¹ After discussing the historical jurisprudence of symbolic speech protection under *Spence* and *Johnson*, the court turned to *Hurley*, the source of lower court disarray.⁷² The Tenth Circuit asserted, “[T]he Court’s decision in *Hurley* ‘suggested the *Spence-Johnson* factors are not necessarily prerequisites for First Amendment protection for symbolic speech.’”⁷³ It then noted the “divergent approaches” courts have taken to reconcile *Hurley* with the *Spence-Johnson* test, and stated that the Tenth Circuit has “merely observe[d] that *Hurley* suggests that a *Spence-Johnson* particularized message standard may *at times* be *too high a bar* for First Amendment protection,” but that it has never articulated a specific test post-*Hurley*.⁷⁴

C. Avoiding the Problem of Hurley and Banking on the Reasonable Observer

The Tenth Circuit then asserted that, while it is difficult to find a common approach for assessing symbolic speech protection under the First Amendment across circuits, “at a minimum they require that the display be of such a character that a viewer could draw an identifiable inference from

66. *Id.* at 951.

67. *See id.* at 950.

68. *See id.* at 952-54.

69. *See id.* at 953.

70. *Id.* at 950.

71. *See id.* at 954.

72. *See id.* at 955-56.

73. *Id.* at 955 (citing *Cressman v. Thompson* (*Cressman I*), 719 F.3d 1139, 1149 (10th Cir. 2013)).

74. *Id.* at 956 (alteration in original) (citing *Cressman I*, 719 F.3d at 1150).

it.”⁷⁵ Therefore, “the *Spence-Johnson* test—even if modified by *Hurley*—would oblige Mr. Cressman to articulate some inference drawn from the image that a viewer would perceive.”⁷⁶

Although Cressman alleged that a viewer of the Native American image would associate it with the Apache legend, pantheism, and prayer, the court disagreed.⁷⁷ In reaching that conclusion, the court used a method never explicitly utilized by other courts in this type of analysis. Because the district court and the parties discussed the Establishment Clause’s “reasonable observer test” in assessing what a viewer of the symbol would perceive, the Tenth Circuit decided to use this test, as it “appear[s] to be congruent with symbolic-speech jurisprudence[because] in that area [of symbolic speech], courts have focused on whether a display communicates a message that is identifiable by reasonable persons.”⁷⁸ As a result, the court referred back to *Spence*, asserting that:

[I]n the symbolic-speech context, the reasonable person focuses on “context [to] give meaning to [a] symbol” and is cognizant of the “then-current domestic and foreign affairs of his government,” “issue[s] of intense public concern,” the “environment” in which an expressive act occurs, and the reasons for the speaker’s expression.⁷⁹

In analyzing the Native American image within the bounds of the Establishment Clause’s reasonable observer test, the court discussed that while the reasonable observer would be aware of the Houser sculpture and the Apache legend, he would also be aware of other important contextual factors⁸⁰ including: the license plate designers’ aim to promote tourism with the selected image; Oklahoma’s Native American history; and the public, the Oklahoma Department of Tourism, and the Oklahoma Department of Public Safety’s opportunity to provide input to the license plate task force.⁸¹ The court determined that, based on his knowledge, the reasonable observer would not view the Oklahoma license plate as communicating the message of the *Sacred Rain Arrow* sculpture, but rather “that Oklahoma’s history

75. *Id.* at 957.

76. *Id.*

77. *See id.* at 957, 960.

78. *Id.* at 958.

79. *Id.* at 958 (quoting *Spence v. Washington*, 418 U.S. 405, 410 (1974) (per curiam)).

80. *Id.* at 959-60.

81. *Id.*

and culture has been strongly influenced by Native Americans.”⁸² Cressman did not object to this message.⁸³ In fact, Cressman repeatedly stated throughout litigation that he did not object to the message of Oklahoma’s Native American history and culture.⁸⁴ Instead, he objected to a message regarding the *Sacred Rain Arrow*, which the court believed he incorrectly asserted the Oklahoma license plate conveys based on his subjective misunderstanding of the Native American image’s message.⁸⁵ Thus, the court held that although the Native American image is symbolic speech, Cressman did not find the message it conveys to be unacceptable and was not compelled to speak by the State in violation of his First Amendment rights.⁸⁶

IV. While Technically Not Wrong, the Tenth Circuit Was Not Right

A. The Cressman Court Improperly Relied on the Reasonable-Observer Test to Determine First Amendment Protection of Symbolic Speech on License Plates

In reaching the determination that Cressman was not compelled to speak in violation of his First Amendment rights, the Tenth Circuit articulated a problematic approach to determining the message of symbolic speech by borrowing the Establishment Clause’s reasonable observer test, and, accordingly, did not reach the best decision.⁸⁷ This test was prompted by and contingent upon the court’s assertion that symbolic-speech jurisprudence, at a minimum, requires an inference to be drawn from the image which a reasonable viewer would perceive.⁸⁸ By wholly relying on the Establishment Clause’s reasonable observer test in determining whether Cressman had the right to refrain from displaying the Native American image on his license plate, the Tenth Circuit ignored and abandoned the fundamental principles of free speech. A citizen’s First Amendment right to free speech is a personal right, allowing him or her to speak or refuse to speak for any reason or absolutely no reason.⁸⁹ Utilizing the reasonable

82. *Id.* at 960.

83. *See id.* at 950-51, 963.

84. *See id.*

85. *See id.* at 963.

86. *See id.* at 963-64.

87. *See id.* at 958-60.

88. *See id.* at 958.

89. *See* *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”).

observer test in assessing symbolic speech confines free speech protection to the limited message that a group of judges determines a reasonable observer would perceive from an image on a license plate—an outcome that results in the deterioration of constitutional rights.

With its ruling in *Cressman*, the Tenth Circuit formulated a new standard for analyzing free speech claims involving symbolic and compelled speech. Not only is the symbolic-speech message of the debated image confined to what the court deems a reasonable observer would perceive, but the complainant must specifically articulate the reasonable observer's perception and object to it in order to make a successful claim.⁹⁰ Furthermore, if the complainant's objection is not identical to the specific perception of the reasonable observer, he or she has no valid claim and no choice but to display the image.⁹¹ This requirement is not consistent with the Supreme Court's treatment of compelled-speech cases, specifically in those involving license plates.

B. Compelled Speech and License Plates: At Odds With the Tenth's Circuit's Exclusive Use of the "Reasonable Observer"

The Supreme Court explained that license plates are essentially "mobile billboard[s]" on display to hundreds of people daily, as driving an automobile is "a virtual necessity for most Americans."⁹² Once words or images have been classified as speech, a citizen should not be forced to say or display the message, regardless of his reason for doing or not doing so. Thus, by forcing a citizen to either display an image he or she finds objectionable that may be classified as symbolic speech on a license plate or suffer a penalty, the citizen is compelled to speak by the government in violation of his or her First Amendment rights.⁹³ Furthermore, the approach of limiting successful symbolic-speech claims to those where the claimant articulates an objection identical to what the court deems a reasonable observer would perceive improperly disregards established jurisprudence involving symbolic speech.⁹⁴

In *Wooley*, the Court found that a citizen's First Amendment rights were violated when he was compelled to display the state-issued license plate

90. *Cressman*, 798 F.3d at 956-57.

91. *See id.*

92. *Wooley*, 430 U.S. at 715.

93. *See id.* at 714-15.

94. *See generally* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995); *Wooley*, 430 U.S. 705.

including the words “Live Free or Die.”⁹⁵ While most of the citizens in the state had no issue with the phrase being displayed on their license plates, what most citizens feel about something “is not the test.”⁹⁶ The Maynards’ personal objection to the motto determined whether their right to free speech was violated because “[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.”⁹⁷ As members of the Jehovah’s Witnesses faith, the Maynards personally found the phrase morally, politically, and religiously repugnant, since they believed that “life is more precious than freedom.”⁹⁸ Thus, even if every other citizen of New Hampshire had no objection to the license plate motto, the Maynards’ First Amendment rights were abridged when they were forced to display the plate even though they found the speech objectionable.⁹⁹ The Court did not consider what a reasonable observer would perceive the motto communicated, nor did it consider that the State sought to convey a message of “appreciation of history, state pride, and individualism.”¹⁰⁰ The Court only considered what the Maynards *personally* perceived to determine whether their *personal* constitutional rights had been violated.¹⁰¹

Although *Wooley* involved speech in the form of words, the personal nature of the right to free speech applies with equal force to speech in the form of images. In *Walker*, the Court found that the State of Texas could not be forced to include a Confederate flag on one of its specialty license plates because the license plates constituted government speech and the government, just like private parties, cannot be forced to convey a particular message.¹⁰² In reaching this holding, the Court did not require the State to articulate the message that a reasonable observer would perceive in viewing the image of the Confederate flag, nor was the State required to object to that specific perception to have a successful claim.¹⁰³ The State merely objected to the image, and the Court held that forcing the State to display the image would violate the First Amendment.¹⁰⁴

95. *See* 430 U.S. at 715, 717.

96. *Id.* at 715.

97. *Id.*

98. *Id.* at 707 n.2.

99. *See id.* at 717.

100. *Id.*

101. *See id.* at 715.

102. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015).

103. *See id.* at 2252-53.

104. *See id.*

Additionally, in *Hurley* the Court evaluated symbolic speech in the form of a parade, never pondering the reasonable observer's perception of the respondent's float or requiring that Hurley specifically object to that perception.¹⁰⁵ The Court found that Hurley had the right to refuse to allow the respondent's participation in the parade because, "whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."¹⁰⁶

Wooley, *Hurley*, and *Walker* highlight a fundamental principle—free speech is a personal right that allows a citizen to speak or refrain from speaking for any reason or no reason at all. Thus, contrary to the approach of the Tenth Circuit in *Cressman*, the reasonable observer has no business being used *exclusively* in the analysis.

C. One Symbol, Numerous Interpretations

Speech in any form is subject to multiple interpretations.¹⁰⁷ Not only do words have different meanings in different contexts, but so do symbols, making symbolic speech and its protection under the First Amendment an area of significant confusion and controversy. Although allowing First Amendment protection to encompass any interpretation of a symbol would be overbroad, simply confining that protection to what a court deems a reasonable observer would perceive from a symbol is too narrow to sufficiently protect the rights of citizens to speak or refrain from speaking in *every* context. When a citizen *voluntarily* waves an upside-down flag displaying a peace sign on his private property,¹⁰⁸ utilizing the perception of the reasonable observer to determine the message of the symbolic speech may be appropriate and useful.¹⁰⁹ However, when a court determines the

105. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995).

106. *Id.* at 575.

107. See *Wright*, *supra* note 5, at 1245 ("[A]udience members may perceive a fairly wide range of intended messages, and in some cases, only a fraction of the audience will perceive any intended message, let alone the actual intended message. But then, the speaker may intend different messages for different audience members, for various, legitimate reasons. Different messages intended for different audience members should hardly deprive the speech of its character as speech for First Amendment purposes.").

108. See *Spence v. Washington*, 418 U.S. 405, 406 (1974) (per curiam).

109. The reasonable observer test is appropriate in this circumstance because the claimant is seeking to invoke his First Amendment right to free speech to protect expressive conduct he created (hanging a flag with an upside down peace sign out of a window) and was not compelled to display, as opposed to a situation like *Keith Cressman's*, where the

constitutional protection of symbolic speech where a citizen is *compelled* to display a symbol, such as an image or phrase on a license plate, exclusive use of the reasonable observer test does not adequately protect citizens' constitutional rights because the citizens did not choose the license plate design—unlike the boy who chose to display the upside-down flag exhibiting a peace sign—but instead were compelled to display the license plate or suffer a penalty. In this situation, what a reasonable observer perceives a symbol to communicate wholly disregards other logical interpretations and perceptions of the symbol, as the meaning behind a symbol is rarely limited to one logical interpretation.¹¹⁰ Thus, because symbolic speech in the compelled-speech context is unique, *Hurley* should not be interpreted as making the *Spence-Johnson* test either wholly necessary or unnecessary for First Amendment protection of symbolic speech; rather, the test should be viewed as providing optional factors for consideration of symbolic speech protection.

D. Hurley: Dispensing With the Rigid Spence-Johnson Test In Favor of Flexibility

Recognizing the difficulties that the *Spence-Johnson* test presented for citizens bringing symbolic-speech claims, a reasonable interpretation of the Court's opinion in *Hurley* is that it dispensed with the factors as prerequisites.¹¹¹ The Court's statement that "a narrow, succinctly articulable message is not a condition of constitutional protection"¹¹² may fairly lead to the conclusion that the first factor of the *Spence-Johnson* test, a particularized message, is not required in assessing the constitutional protection accorded to symbolic speech. Further, the Court's failure to address the second factor of the *Spence-Johnson* test, the likelihood that the message would be understood by viewers,¹¹³ also may reasonably lead to the conclusion that it is not a requirement. The Tenth Circuit in *Cressman*

government created the speech (the Native American image on a license plate) which he is compelled to display, contrary to his personal objections. Where a party is compelled to speak, the reasonable observer may not encompass his perception of the symbol to which he objects. The differing motives of the creators of symbolic speech under scrutiny should dictate the appropriateness of the "reasonable observer" test.

110. For example, an image of a covered wagon may be interpreted by some to represent the pioneer days in the United States or the migration of settlers to the west in colonial times, and may represent to others the University of Oklahoma mascot, the Sooner Schooner.

111. See cases cited *supra* note 6.

112. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

113. See *Spence*, 418 U.S. at 410-11.

even noted that “the Court’s decision in *Hurley* ‘suggested the *Spence-Johnson* factors are not necessarily prerequisites for First Amendment protection for symbolic speech.’”¹¹⁴ The Tenth Circuit nonetheless incorrectly relied entirely on the second element of the *Spence-Johnson* test by analyzing whether a reasonable observer would perceive the Native American image to communicate the same message to which Cressman objected.¹¹⁵

E. The Common Thread of Context

Although the Tenth Circuit’s analysis and holding can fit within an interpretation of symbolic-speech jurisprudence, the same can be said for virtually any symbolic-speech analysis due to the Court’s lack of apparent direction in *Hurley* and beyond. The Court has already explicitly ruled that a citizen may refrain from communicating the ideological messages on state-issued license plates if that citizen disagrees with those messages, and that forcing a citizen to display those messages is compelled speech.¹¹⁶ While First Amendment protection is dependent upon whether the words or symbols are classified as speech, one common thread in nearly every free speech case is the Court’s consideration of *context*.¹¹⁷

1. The Context of License Plates

In the context of license plates, where citizens are forced to display on their private property the state-issued license plate containing the state’s chosen words or symbols, a citizen should be able to object to being forced to display his or her reasonable interpretation of the message. This is not to say that a citizen may object to a license plate image like the Native American image because it offends him in *any* way imaginable, such as offending his anti-war beliefs by including a bow and arrow. Conversely, when a citizen has a free-speech objection to a message on a license plate, courts should consider his or her specific objection and determine whether such an interpretation of the message is (1) reasonable and (2) ideological.¹¹⁸

114. *Cressman v. Thompson*, 798 F.3d 938, 955 (10th Cir. 2015) (quoting *Cressman I*, 719 F.3d 1139, 1149 (10th Cir. 2013)).

115. *See id.* at 958.

116. *See Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

117. *See cases cited supra* note 54 and accompanying text; *see also Spence*, 418 U.S. at 410 (“[T]he context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol.”).

118. Ideological considerations could include those ideals protected by the United States Constitution, i.e., freedom of religion or the right to bear arms.

Confining the message of symbolic speech merely to what a reasonable observer would attribute to the symbol offends the underlying premise of free speech in the First Amendment—the right of citizens “to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable”¹¹⁹—a premise the Tenth Circuit failed to stay true to in its *Cressman* decision.

2. *The Tenth Circuit’s Narrow Contextual Analysis*

In *Cressman*, the Tenth Circuit noted that the reasonable observer would have knowledge of the *Sacred Rain Arrow* sculpture and the legend behind it.¹²⁰ But it also stated that the reasonable observer would know about the tourism-based motivation of the legislators who designed the plate.¹²¹ Instead of acknowledging that some Oklahomans, like Cressman, would possess knowledge of the legend behind the Native American image, and lack knowledge about the legislative intent behind the license plate design, the Tenth Circuit confined the only viable free-speech objection to the intent of the Oklahoma legislators by asserting that to be the reasonable observer’s perception of the Native American image.¹²² While relying on an almost omniscient reasonable observer’s interpretation of speech in some circumstances may be appropriate, it is *not* appropriate in the context of license plates. As a result, an objector’s reasonable and ideological interpretation of the speech on a license plate should invoke First Amendment protection when he or she is being compelled to speak by displaying a state-issued license plate. Although most Oklahomans presumably do not have an objection to the Native American image, Keith Cressman does.¹²³ Regardless of what his objection is, he should not be compelled to display the message on a “mobile billboard” where his objection is both reasonable and ideological. Under the Tenth Circuit’s reasoning, if Cressman had found the Native American history of Oklahoma to be offensive, this would be enough for his claim to be successful because it is what the reasonable observer would perceive from the Native American image.¹²⁴ However, Cressman’s much more understandable claim of a religious nature is not enough because it does not

119. *Wooley*, 430 U.S. at 715.

120. *Cressman*, 798 F.3d at 959.

121. *Id.*

122. *Id.* at 960.

123. *Id.* at 943.

124. *See id.* at 965 (McHugh, J., concurring).

line up with a few judges' views of the reasonable observer.¹²⁵ Consequently, Cressman is forced to display the image on a daily basis to hundreds of people—an injustice which the First Amendment aims to prevent.

F. A Symbolic Speech Solution Implicit in Hurley: A Flexible Test Going Forward

Treating the *Spence-Johnson* factors as optional, rather than as prerequisites to First Amendment protection of symbolic speech, is the most appropriate approach when symbolic and compelled speech collide—specifically in the realm of license plates. As illustrated by the various forms of symbolic expression that have come before courts, the outcome of symbolic speech cases is largely dictated not only by the historical and cultural context of the expression, but also the specific form the expression takes.¹²⁶ Such a notion was explicitly highlighted by the Supreme Court in *Hurley* when it explained that requiring a particularized message for First Amendment free-speech protection would fail to include some clear forms of expression that require protection.¹²⁷ Thus, while in some situations the *Spence-Johnson* test sufficiently determines symbolic speech, in others, the context is of greater relevance and the test factors are better utilized as persuasive support.

The law of symbolic speech is in disarray, and although *Hurley* seemed to cause more confusion amongst lower courts, its lack of explicit direction can actually be interpreted as guidance by the Supreme Court.¹²⁸ By minimizing the importance of strict adherence to the *Spence-Johnson* test, the Court recognized the need for flexibility in this context-specific area of law.¹²⁹ The approach of allowing a citizen to object to a reasonable and ideological message he or she perceives is communicated by a symbol on a state-issued license plate complies with this recognized need for flexibility—a rule appropriate in the specific context of license plates.

125. *See id.*

126. *See, e.g.,* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (involving a petitioner seeking free-speech protection for a parade); *Wooley v. Maynard*, 430 U.S. 705 (1977) (involving a petitioner seeking free-speech protection to refrain from displaying a license plate); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (involving a petitioner seeking free-speech protection for wearing arm bands at school).

127. *See Hurley*, 515 U.S. at 569 (for example, a “painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll”).

128. *See* cases cited *supra* note 6.

129. *See Hurley*, 515 U.S. at 557.

Although *Cressman* relied too heavily on the second part of the *Spence-Johnson* test by focusing on the narrow view of the reasonable observer, the Tenth Circuit's recognition that a particularized message is not necessary for symbolic-speech protection was a partial adherence to the Supreme Court's teachings in *Hurley*. But in the specific context of license plates—"mobile billboards" which citizens are compelled by the government to display on a daily basis to countless people—a court's determination of the narrow message perceived by the reasonable observer should not be the only viable First Amendment objection a citizen may make. Instead, a citizen's reasonable and ideological interpretation of the message on a license plate to which he or she objects should allow him or her to, at the very least, display a specialty license plate for the same price as the state-issued license plate.

Hayley Ray Scott