LOS ANGELES
Daily Journal
www.dailyjournal.com

FRIDAY, SEPTEMBER 9, 2016

PERSPECTIVE

# When officials enforce laws in bizarre ways, taxpayers pay

By Kenneth White

The "butterfly effect," as used in chaos theory, is the idea that a butterfly flapping its wings in Brazil may help cause a tornado in Kansas. In law and politics, the butterfly effect is both more prosaic and more perverse. It shows us that a state legislator's mother becoming annoyed in a gift shop in Sacramento can prevent a civil war buff from displaying his painting at the art show at a state fair in Fresno. That is precisely what happened.

The state legislator is Isadore Hall, a California Assemblyman representing Compton. His mother was offended when she found replica Confederate money for sale at the gift shop at the state capitol in Sacramento. The novelty bills bore the Battle Flag of the Confederacy. Hall, like many Americans, reasonably views the Confederate flag as a symbol of slavery, bigotry and oppression. Perhaps inspired by Southern legislators who recently removed the Confederate flag from state property, he introduced Assembly Bill 2444, a bill to prohibit the state of California from selling or displaying the Confederate flag, except in media with an educational or historical purpose. The bill passed, and now California Government Code Section 8195 prohibits the state from displaying or selling the flag or items with its image.

Timothy Desmond, a resident of Fresno, had no reason to expect that an incident in a gift shop in the state capitol would limit his rights. Desmond, an artist and civil war enthusiast, has written about civil war reenactors and painted civil war scenes. Last year, he painted "The Attack," depicting the July 1864 Siege of Atlanta. It shows Confederate soldiers lined up under a Confederate flag in a doomed attempt to oppose Union General William T. Sherman. Mr. Desmond wanted to display "The Attack" at the Big Fresno Fair, a state fair run by a subdivision of the California Department of Food and Agriculture. The Big Fresno Fair's web site boasts "hundreds of artists and photographers display their paintings, sculptures, photos and illustrations with more 1,400 items exhibited each year!"

If state officials interpreted statutes reasonably or wisely, there would be no story here. Big Fresno Fair officials would have recognized that the state of California is not the one "displaying" a Confederate flag in a civil war painting submitted by a citizen to a public art show. Regrettably, state actors can be as capricious and unpredictable as butterfly wings. Big Fresno Fair officials and lawyers from the attorney general's office huddled together and agreed that the newly enacted Section 8195 prohibited Desmond from displaying his painting amongst the other local works at the fair because it includes a depiction of the Confederate flag.

In August, Desmond sued the California attorney general and various state agricultural officials in U.S. District Court for the Eastern District of California, arguing that Section 8195 — at least as applied here — violates his First Amendment right to free speech. He's represented by the Washington, D.C. center for Individual Rights and by Fresno firm Stammer, McKnight, Barnum & Bailey LLP, and he will very likely win.

The question isn't whether California's rather bizarre interpretation of Section 8195 will fall; the question is how fast and how hard. Desmond argues that by throwing the Big Fresno Fair art exhibit open to all applicants, the state has created a public forum. If he's right (and he is), California's interpretation of its Confederate flag statute will have to survive strict scrutiny. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) ("If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny."). In other words, California officials will have to demonstrate that the state has a compelling interest, that its policy is necessary to serve that interest, and that it is narrowly drawn to achieve that end. It cannot.

*"The Attack," by Timothy Desmond, as filed in court.*

The state has a compelling interest in refusing to endorse racism and slavery by flying the Confederate flag *itself*. But it cannot rationally argue that it's necessary to prohibit Confederate flags from citizens' civil war art displayed at public art forums, or that regulating art in public forums is narrowly drawn to avoid the appearance that the state is endorsing the flag. Courts have rejected far more reasonable arguments for censorship in public art forums. *See Hopper v. City of Pasco*, 241 F.3d 1067 (9th Cir. 2001) (fact that political, sexual, or controversial art might offend citizens visiting City Hall was not a compelling reason to exclude it from a city's public art forum there).

California will assert that the Big Fresno Fair is only a limited public forum. This is plausible, as many courts have recognized state fairs as limited public forums. *See, e.g., Heffron v. International Soc. for Krishna Consciousness, Inc.*,452 U.S. 640, 655 (1981) (recognizing Minnesota State Fair as a limited public forum). But it's not a winning argument. This isn't a reasonable time, place, or manner restriction like the Supreme Court endorsed at the Minnesota State Fair in Heffron. It's a content-based restriction on depictions of the Confederate flag based on disagreement with the ideas people associate with that flag. That doesn't satisfy even the relaxed standard applied to limited public forums. When the state seeks to limit speech in a limited public forum, it must do so in a way that's both reasonable and viewpoint- neutral. *See, e.g., Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 (2010). Here, the state's policy against Confederate flags in artistic depictions of Civil War scenes isn't just unreasonable, it's embarrassingly preposterous. No minimally rational person would mistake the flag's presence in the painting as state endorsement of its message.

Desmond should prevail on his argument that Section 8195, as the state is applying it, violates his First Amendment rights. Many of your tax dollars will be spent reaching that nearly inevitable result. The lesson is this: In crafting statutory language, the Legislature shouldn't only think about reasonable interpretations. Especially when free speech is at risk, the Legislature should also guard against the butterfly effect — the risk that state officials will attempt to enforce laws in unpredictably bizarre ways.

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