

Legal Sidebar

Confederate License Plates are Government Speech, Rules Supreme Court

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The Supreme Court has spent much of the last decade broadening the First Amendment's free speech protections by [narrowing](#) the [exceptions](#) to the First Amendment. But in [Walker v. Sons of Confederate Veterans](#), the Supreme Court emphasized that government speech continues to be exempt from the First Amendment. When the government speaks, private citizens cannot object that the government's speech violates the citizen's free speech rights.

The First Amendment guarantees that "Congress shall make no law ... abridging the freedom of speech, or of the press." But this guarantee has always been read to merely prevent the government from compelling or forbidding private speech: it has never prevented the government itself from speaking. When the government speaks, the Supreme Court does not apply its First Amendment speech doctrines: rather, it approves the government speech as long as it does not violate a separate provision of the Constitution.

The State of Texas allows private organizations to propose novelty license plates. The Texas Department of Motor Vehicles Board (DMV) reviews any proposed novelty plate. If the DMV approves the plate, Texans may pay a fee to use the novelty plate instead of using a standard Texas license plate. In *Walker*, the Texas Division of the Sons of Confederate Veterans submitted for DMV approval a novelty plate that displayed a Confederate battle flag. The DMV rejected the proposed license plate for being too controversial and offensive. The Sons of Confederate Veterans sued, losing in the federal district court and winning in the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit held that the Texas license plates were private speech, and that the DMV denying the Confederate license plate was unlawful viewpoint discrimination.

The Supreme Court reversed the Fifth Circuit, holding 5-4 that the novelty license plates were government speech and therefore not subject to the First Amendment. The entire Court agreed that if the license plates were government speech they would not be subject to the First Amendment: the dispute between the majority and dissent was over whether the plates qualified as government speech. Writing for the majority, Justice Breyer noted that three factors from prior Supreme Court cases on government speech showed that the Texas license plates were government speech. Justice Breyer did not state whether all three factors must be found. However, it appears doubtful that satisfying only one factor would be sufficient. The three factors are:

1. License plates have historically been used to convey government speech.
2. License plates are the sort of items associated in the public mind with government speech.
3. Texas maintains direct control over the messages conveyed by the license plates.

Justice Alito's dissent for four Justices agreed with the majority that these factors were the correct factors to use in determining whether the license plates were government speech, although Justice Alito would have included the fact that the DMV could approve an unlimited number of license plates as an additional factor to consider. The principal disagreement between the majority and dissent was whether the license plates met the three factors outlined above. As for the first two factors, Justice Breyer compared the license plates to a 2009 case ([Pleasant Grove v. Summum](#)) where the Court declared that the government was speaking when it placed privately donated monuments in a public park. Just as the government has always used monuments to speak (e.g., the Vietnam War Memorial is how the government

expresses remembrance for American lives lost during the Vietnam War), the government has always used license plates to speak (e.g., “Live Free or Die” on New Hampshire [license plates](#) is how New Hampshire expresses dedication to certain ideals of liberty). As to the third factor, derived from a 2005 case ([Johanns v. Livestock Marketing Association](#)), Justice Breyer noted that the DMV had final authority to approve any proposed license plate design, and had actually rejected several previous designs.

Justice Alito distinguished *Summum* (which he had written), finding that the three factors pointed in the Confederate Veterans’ favor. Justice Alito agreed that license plates were traditionally government speech, but argued that when Texas started allowing a wide variety of license plates, the license plates became private speech. For example, the DMV had approved novelty license plates for fans of out-of-state universities like the University of Oklahoma: could a Texan therefore reasonably assume that the State of Texas officially supported the Oklahoma Sooners? And Justice Alito minimized the third factor, arguing that the DMV almost never rejected license plate designs and that an unlimited power to approve or reject a design would invite unfair and arbitrary decision making.

While license plate design appears to be a quintessential state function, *Walker* is instructive. The number of cases where the government uses private actors to perform government speech, but still satisfies the three *Walker* factors, would seem to be small: monuments and license plates are examples of government speech, but most cases will likely be much more difficult. After *Summum* and *Walker*, it appears that the government can no longer simply point to the *Johanns* test (Does the government have final authority to approve the challenged speech?) to show that challenged speech is government speech. Additionally, the 5-4 vote in *Walker* seems to show that the Court will not necessarily accept the government’s assertion that challenged speech is government speech. Finally, even though government speech can avoid a free speech challenge, it might conflict with other provisions in the Constitution (e.g., the [Establishment Clause](#)).

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