

License Plates and Public Signs: Government First Amendment Speech

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On June 18, 2015, the Supreme Court issued two First Amendment opinions, *Walker v. Texas Division, Sons of Confederate Veterans*, and *Reed v. Town of Gilbert*, which at first glance may seem contradictory. While the 9-0 *Reed* decision limits the state's power to regulate signs based on content, the 5-4 *Walker* decision allows the government to restrict content that appears on customized license plates. Understanding these two decisions becomes easier when looking at the decisions in the context of what questions each case brought before the Court. Although both cases appear to deal with the government's ability to regulate speech based on its content, the two differ greatly with regard to the question of whose speech is at issue. *Walker* presented the Court with [the question](#) of whether state-issued specialty license plates qualify as government speech immune from First Amendment scrutiny. *Reed*, on the other hand, presented the court with the [question](#) of whether the government may reasonably restrict speech based upon its content if the regulations are enacted for reasons other than content-discrimination.

Walker v. Texas Division, Sons of Confederate Veterans

The question of whether a license plate constitutes government speech was the dispositive question in *Walker*. Government speech is [not regulated](#) by the First Amendment. In his majority opinion, Justice Breyer noted, "as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and carries out its [duties on their behalf](#)." Although the government is constrained by the First Amendment in any attempts to [compel](#) private persons to espouse the government's message, there is no such restriction on the government using its own means to advocate its own programs. With this in mind, the *Walker* majority analyzed whether choosing to accept or reject a specialty license plate is a form of government speech.

The Court likened *Walker* to a previous case, [Pleasant Grove City v. Summum](#), in which a religious organization wanted to place a monument depicting the "Seven Aphorisms of Summum" in a public park. The Court in *Summum* found that when the government places monuments on public property, even when those monuments are donated by private parties, the government is engaging in its own speech, and need not include messages with which it disagrees. The *Walker* majority found three factors, highlighted in *Summum*, important when determining whether license plates should be considered government speech: whether the medium historically communicated the message of the state, whether the public closely associates the message with the State, and whether the government maintains direct control over the message.

Addressing the first factor, Justice Breyer discussed the history of license plates and noted that for as long as license plates have displayed more than state names, slogans such as "[Idaho Potatoes](#)," or "Virginia is for Lovers" have been included on the plates. This combination of vehicle identification and state-specification makes license plates de facto government IDs, according to the Court. Addressing the second factor, the Court found there is a [reasonable](#) assumption by observers that the messages on license plates are state-sponsored, given their history of displaying state specific messages and their association with state-owned space and property. Lastly, addressing the third factor, the Court pointed out that Texas maintained direct control over the messages on the plates because the state maintained the power to approve or disapprove of any proposed plate. Therefore, the Court found that license plates, even where the designs are provided by private parties, are government speech, and that states have the latitude to allow only the license plates that convey messages the state wishes to convey.

In his dissent, Justice Alito stated that observers do not associate license plates with government speech. Justice Alito would have held that, because the states allow private groups to create their own license plates, states are restricted in

their ability to prevent messages from being displayed based on the viewpoint that the message conveys.

Reed v. Town of Gilbert

In *Reed*, by contrast, the speech being regulated was entirely private. The town of Gilbert, Arizona strictly regulated the posting of signs within the boundaries of the town. “[Temporary Directional Signs](#),” defined by the town as signs conveying a message directing the public to a “church or some other qualifying event,” were restricted more than other types of signs, including political and ideological signs.

The First Amendment prohibits the government from restricting the expression of private actors because of [content, message, ideas, or subject matter](#). In his majority opinion, Justice Thomas noted that a restriction is content-based if it draws a distinction, on its face, based on the message that the speaker conveys.

In *Reed*, the Court found that the town’s code singles out signs that bear a particular message: the time and location of a specific event. The Court held that singling out a particular message for strict regulation is a restriction based on content, and only able to stand if those restrictions survive strict scrutiny. Regulations may survive strict scrutiny only when they advance a compelling government interest and are narrowly tailored to achieve that interest. If another, less restrictive, method of advancing that interest exists then the regulation cannot survive strict scrutiny. The Court’s strict scrutiny analysis focused on the [ineffective tailoring](#) of the sign regulation, finding that the regulation bore little relationship to the town’s goal of protecting safety. For that reason, the Court struck down the regulations.

While the decision in *Reed* was 9-0, only 6 Justices joined in Justice Thomas’ majority opinion. Justices Alito and Breyer filed opinions concurring in the judgment, and Justice Kagan filed an opinion, joined by Justices Breyer and Ginsburg, concurring in the judgment. The majority opinion holds that laws that make facial, content-based distinctions are always subject to strict scrutiny regardless of the government’s motivation for instituting the rules. Justice Kagan and Justice Breyer’s concurrences demonstrate a concern that the application of strict scrutiny, regardless of the government’s motivation, is perhaps unnecessarily restrictive.

For example, Justice Kagan noted in her concurrence that [entirely reasonable sign laws](#) may often be struck down under the majority’s standard, making it unnecessarily difficult for states to regulate sign placement, and therefore a more flexible standard for the application of strict scrutiny than the bright-line rule applied by the majority would be preferable. According to Justice Kagan, content-based speech is strongly protected for two reasons: to preserve an uninhibited marketplace of ideas and to ensure the government has not regulated speech “based on hostility – or favoritism – towards the underlying message expressed.” Justice Kagan observed that there are common sense reasons for content-based restrictions of signs that are not motivated by animus or favoritism towards the content of the signs, such as allowing illumination for “name and address” signs but not for any other signs. Justice Kagan further observed that there was no need for the majority to apply strict scrutiny analysis to the regulations at issue because the regulations would not survive at any level of scrutiny, including the “[laugh test](#).”

Conclusion

While *Walker* appears to grant states the authority to regulate what messages are conveyed on media that a reasonable observer would believe was state sponsored, *Reed* may create a more difficult precedent for municipal governments. The majority opinion in *Reed* applies strict scrutiny to all laws that facially distinguish between signs based on content. Creative drafting may be required in the future to ensure that regulations can withstand review.

For more information see CRS Report 95-815: [Freedom of Speech and Press: Exceptions to the First Amendment](#)