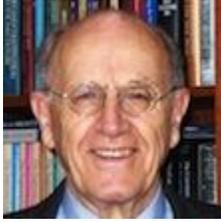


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Argument analysis: Assuming the answer, up front

Analysis

From the moment that a state lawyer stood up in the Supreme Court to argue that messages on license plates are government speech, it seemed that the Justices went forward for the rest of the hour assuming that it was not — at least not always. A strange hearing thus unfolded on when the First Amendment puts curbs on government regulation of expression, and how tight those curbs can be.

The Court previously had made it absolutely clear that, if it is the government that speaks out on any issue, the First Amendment does not apply at all: it can say what it likes, and it can refuse to say what it opposes or even simply what it finds a bit unpleasant. In other words, as speaker, it can act as total censor.

That is the simple approach that Texas was seeking to have the Court embrace in *Walker v. Sons of Confederate Veterans*, a case that gives the Court its first chance in nearly four decades to address the nature of license plate messages, beyond simply numbers and state names.

The state’s solicitor general, Scott A. Keller, opened by arguing that, because the state exercises “total control” over the making and display of auto and truck license plates, it has absolute authority to refuse to place its “imprimatur” on any message that a tourist might want to put on a vanity, or specialty, plate.

But he had hardly finished his opening sentences when members of the Court began acting as if the First Amendment did apply to that system. Justice Ruth Bader Ginsburg said the state used a “nebulous standard” for disapproving plate designs — which, of course, would be beside the point if the state had absolute freedom to choose; it would not need any standard at all, and could act on whimsy.

Justice Samuel A. Alito, Jr., quickly offered a hypothetical about government billboards that contained the state’s message, but left room at the bottom for people to put up a message of their choice. He was, of course, hinting at a hybrid display: some government, some private. Keller

responded that, if the government had final approval authority, it still would be government speech.

Justice Sonia Sotomayor suggested that, “almost anything that the government does, it has final authority over,” but that would not be true if the government had not created the words — in other words, if some of the speech was privately initiated. She, too, was talking about a hybrid situation and that, again, would seem to bring the First Amendment at least partly into play.

When Justice Elena Kagan took a turn at suggesting a hypothetical, with a state allowing a license plate that said “Vote Republican” but turned down one that would say “Vote Democratic,” the state’s lawyer said that might run into other constitutional provisions — but not the First Amendment.

It was perhaps inevitable that, sooner or later, someone would start pondering whether a license plate program was, in fact, a kind of “public forum” — one, to be sure, that would have to conform to the First Amendment. Justice Anthony M. Kennedy was the first to do so, wondering if a specialty license plate program did amount to “a new kind of public forum.” Again, though, that begged the question whether it was, as Texas insisted, a program of government speech.

And Chief Justice John G. Roberts may have come close to casting aside entirely the question whether it was government speech at all, commenting: “I’m not sure why it’s government speech [to have a specialty plate program]. It is only doing it to get the money.”

That was the way it would go throughout the rest of Keller’s time at the lectern, and it would continue in that vein when a free-speech-for-license-plate advocate, R. James George, Jr., of Austin argued in favor of the Sons of Confederate Veterans and for a right for them to display a license plate with a Confederate flag as part of the design.

It was no surprise at all that George would open with an argument about license plates as a “public forum.” The state, he said at the outset, has “issued an open invitation” for motorists to submit plate designs.

His first adversary would be Justice Antonin Scalia, who sought to resurrect Texas’s argument that what was on the license plates was, indeed, what Texas government wanted said in those displays. “If it is Texas’s speech,” Scalia commented, “all things can be said.”

George, of course, did not agree, insisting that the government had invited the public to join in a forum of public expression, with plates saying what the public wanted. And George did not shy away from arguing, in response to Justices’ questions, that Texas could not refuse a plate bearing a swastika, or one that said “Jihad,” or “Make Pot Legal,” or “Bong Hits for Jesus.”

That put off some of the Justices, or at least disturbed their sensibilities a bit, but it did have the positive value of being a way to stress that the First Amendment did have a role to play in protecting a public right of free expression on their cars and trucks.

George's entire time at the lectern, like Keller's, was taken up with explorations of where free expression stopped and state regulation could begin — a line-drawing problem that would not even arise if the First Amendment did not apply at all.

What was evident, by the close of the argument, that Texas had made no significant impression with its core argument, but the Court was left with a very challenging task of deciding what constitutional regime should be put in place to monitor the potential censorship of the messages that roll down Texas's highways.

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