

Sign Regulations: The Implications of *Reed v. Town of Gilbert*

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About the Speaker



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- Has held AV-rating continuously since 1988 (28 years)
- Litigates, drafts, amends, writes and speaks extensively on sign regulation issues
- Admitted to practice before all thirteen of the U.S. Circuit Courts of Appeal as well as the U.S. Supreme Court
- Co-authored the amicus brief and served as counsel of record for the *amici curiae* in *Reed v. Town of Gilbert*
- Recipient in 2015 of Scenic America, Inc.'s Distinguished Advocacy Award – Scenic Beauty and the Law
- Recipient in 2015 of the International Municipal Lawyers Association's Amicus Service Award

- What are sign regulations and why do they matter to communities?
- First Amendment principles relevant to sign regulation before *Reed*
- *Reed v. Town of Gilbert* (2015)
- What should municipal attorneys be doing in response to *Reed*

Sign Regulation

What are sign regulations and why do they matter to communities?

- Categorical definitions of sign types, and definitions of other key terms
- Prohibited sign types
- Permitted sign types
- Time, place and manner limits that apply to the permitted sign types
 - Area, height, setbacks, number, lighting, spacing
 - Prohibitions or special rules for new billboards
- Sign types that are exempt from permitting, from regulation altogether
- Sign permit procedures – if and when a permit is required

- A purpose statement
- Location-specific sign regulations
 - Tighter controls in residential zoning districts
 - Differing regulations for entertainment or other high intensity zoning districts
 - Unique rules for areas of special character, such as corridors and planned developments
- Restrictions on digital or changing message signs
- Rules for temporary signs

Sign regulation is about:

- ◉ Place making and community building
- ◉ Economic development
- ◉ Aesthetics
- ◉ Safety for all modes of travel , including vehicular and pedestrian
- ◉ Property values
- ◉ Democracy

Before Sign Regulation



Clearwater, Florida, circa 1988

After Sign Regulation



Clearwater, Florida, circa 2002

Signs, signs, everywhere . . .



First Amendment Principles

Relevant to Sign
Regulation:

The World Before
Reed

First Amendment

Governments “shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, **and to petition the Government for a redress of grievances.”**

- Discretion
- Tailoring
- Practicality
- Prior Restraint

Content Neutral

- Some content is not protected – i.e., obscenity, defamation, fighting words
- Commercial speech has been protected since the 1970s, but only by a lesser level of scrutiny than core ideological speech
- If dealing with protected speech:
 - Regulations cannot discriminate based on sign content
 - Content-based *exceptions* to regulations or procedures (variations in treatment of signs), can invalidate the regulation or prohibition itself – if you really needed this regulation, it would need to apply uniformly
 - However, the Supreme Court and U.S. Courts of Appeals have not been consistent in their tests of what “content neutrality” means.

Intermediate Scrutiny

- This means the law need only be
 - Narrowly tailored to serve a *significant* content-neutral government interest that would be achieved less effectively without the regulation, and
 - Leave open ample alternative channels for communication of the information.
- Intermediate scrutiny is seldom fatal.
- Aesthetics is a *substantial/significant* governmental interest (but not a *compelling* government interest)

Strict Scrutiny

- If content based, to survive strict scrutiny, the law must:
 - Be necessary to further a *compelling* government interest; and
 - be narrowly tailored to achieve it
- The government usually loses, if the court gets to this point of the analysis
- Not always fatal: *Burson v. Freeman*, 504 US 191 (1992) (regulation of signs near polling places)

Literal Test

The rigid, “literal” test for content-neutrality: If you “need to read” the sign in order to apply the sign law, the sign law is content-based.

Pragmatic Test

The more pragmatic test for content-neutrality: so long as you can **justify** the sign law without reference to the sign’s content, and did not adopt the law **because of disagreement with the message** it conveys, it is content neutral.

Literal Test

- *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)
- *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 515 (1981) (yet this case clearly endorses the on-site, off-site distinction as long as non-commercial speech is not banned)
- *City Council of Los Angeles v Taxpayers for Vincent*, 466 U.S. 789, 816 (1984)
- Eighth Circuit: *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011)
- Eleventh Circuit: *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005)

Pragmatic Test

- *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)
- *Hill v. Colorado*, 530 U.S. 703, 707 (2000)
- *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014)
- Third Circuit: *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380 (3d Cir. 2010), cert. denied, 131 S. Ct. 1008, 178 L. Ed. 2d 828 (2011); *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994)
- Fourth Circuit: *Brown v. Town of Cary*, 706 F.3d 294 (4th Cir. 2013); *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359 (4th Cir. 2012)
- Sixth Circuit: *H.D.V.-GREEKTOWN, LLC v. City of Detroit*, 568 F.3d 609 (6th Cir. 2009)
- Seventh Circuit: *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012)
- Ninth Circuit: *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006); *Desert Outdoor Adver., Inc. v. City of Oakland*, 506 F.3d 798, 803-04 (9th Cir. 2007)

The Law Before Reed

- Avoid “content-based regulation,” whatever that means
- Limit discretion, either explicitly or implicitly (through undue vagueness)
- “Just right” narrow tailoring of the regulation to substantially advance a significant interest
 - Not substantially **overbroad** (exceeding the scope of the governmental interest justifying regulation)
 - Not substantially **under inclusive** (so narrow or exception-ridden that the regulation fails to further the asserted governmental interest)
- Regulate noncommercial speech no more strictly than commercial speech
- Avoid prior restraints and viewpoint discrimination

Reed v. Town of Gilbert, 2015

The Background

- Plaintiffs are a small “homeless” church, Pastor Reed, and its members
 - The church lacks a building of its own, and meets in other available places such as schools and nursing homes
 - They use temporary directional signs to guide people to their weekly services
- Defendant is a large town, 75 square miles, with 208,000 residents as of 2010 census. It is southeast of Phoenix, AZ

Maximum Sign Sizes

Homeowners Association signs

Political signs (nonresidential zone)

Note: Gilbert was subject to a state law requiring that it allow larger political signs in ROW

Ideological signs

Note: often a permanent sign type, limited in number, and not allowed in ROW

Qualifying Event signs

Note: allowed in multiple numbers in ROW

Per Reed's Counsel

Temporary Sign Regulations:

Event Signs



- Nonpolitical, non-ideological, non-commercial event signs: 6 sq. ft.
- Maximum duration: 12 hours before, until 1 hour after the event



Election Signs

- Political temporary signs: 32 sq. ft. (in nonresidential zones)
- Maximum duration: 60 days before and 15 days after elections

Permanent “Ideological” Signs

(for non-commercial expression unrelated to an election)

- Ideological signs could be larger (i.e., 20 sq. ft.) than “qualifying event” signs, but not as big as political signs in a nonresidential zone
- They could be displayed for an unlimited period of time.
- However, they couldn’t be displayed in the right-of-way like event signs and election signs

Litigation History

- Reed was cited for a sign code violation in September 2005
- Reed sued in 2007, and was unsuccessful getting the federal district court to enjoin Gilbert
- Gilbert modified its code to be more defensible during litigation – which is harder than it looks
- Gilbert prevailed before four times before reaching the U.S. Supreme Court, including two Ninth Circuit decisions in its favor

Outcome

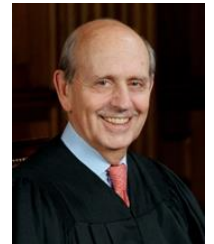
All nine justices agreed that the Ninth Circuit should not have ruled in the Town's favor, but they did not all agree on a rationale for that result.



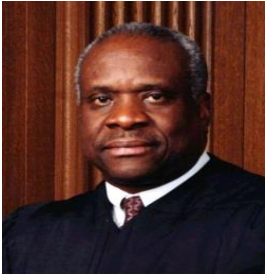
Four opinions were issued:



- Majority opinion (Justice Clarence Thomas, joined by five others)
- One Concurrence (Justice Samuel Alito, joined by two others, and comprising 3 of the 6 justices in the majority)
- Two Concurrences in the judgment (Justice Stephen Breyer for himself; Justice Elena Kagan, joined by Justice Breyer and Justice Ruth Ginsburg)

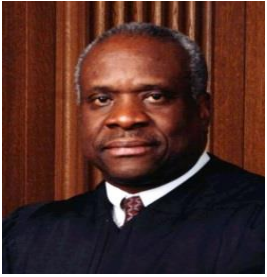


Majority Opinion: Thomas



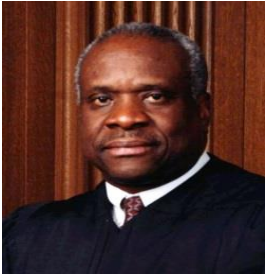
- Content-based regulation is **presumptively unconstitutional**, strict scrutiny applies, and **compelling governmental interest** is required.
- “Government regulation of speech is content based if a law **applies to particular speech because of the topic** discussed **or the idea or message** expressed.”
- Even a purely directional message, which merely gives “the time and location of a specific event,” is one that “conveys an idea about a specific event.” A category for directional signs is therefore content-based.
- Event-based regulations are also not content neutral. However, Gilbert’s regulation is not event based because its provision for added signs at election time was limited in content to election speech, and the event sign type was similarly limited in content.

Majority Opinion: Thomas



- If a sign regulation, on its face, is content-based, **its purpose, its justification and its function does not matter**. If content neutral, then can consider these factors. Innocent motives do not eliminate the danger of content-based laws being used to censor.
 - Cites to *City of Cincinnati v. Discovery Network, Inc.*, 507 US 410, 429 (1993)
 - Note: Seems to reject or limit *Ward*
- Gilbert's sign code was not a speaker-based regulation – it applied regardless of who posted the sign. Speaker-based regulation **may** be subjected to strict scrutiny.
 - Note: Very unclear – discussions of speaker-based regulation in *Reed*; *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011) and *Turner Broad. Sys. v. FCC*, 512 US 622 (1994) fail to provide clear guidelines.

Majority Opinion: Thomas



- Even assuming arguendo that aesthetics and traffic safety are compelling governmental interests, the Gilbert regulation was under inclusive and thus not narrowly tailored enough to advance these interests and thereby satisfy strict scrutiny.
 - Strict size and durational limits on temporary directional signs to an event
 - Much less limited rules for political and ideological signs, resulting in significant sign clutter
- Certain signs that may be essential, for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety **might** well survive strict scrutiny.

Alito Concurrence

(Alito, Sotomayor and Kennedy)



- “I join the opinion of the Court but add a few words of further explanation.”
- “I will not attempt to provide anything like a comprehensive list, but **here are some rules that would not be content-based:**”
 - Rules distinguishing between –
 - “lighted and unlighted signs”
 - “signs with fixed messages and electronic signs with messages that change”
 - placement of signs on public and private property
 - placement of signs on commercial and residential property

Alito Concurrency

(Alito, Sotomayor and Kennedy)



(cont'd)

- Rules regulating size “based on any content-neutral criteria”
- Rules regulating the locations in which signs may be placed
- **“Rules distinguishing between on-premises and off-premises signs”**
 - Note: requires reading the sign, but regulates by location
- “Rules restricting the total number of signs per mile of roadway”
- Rules imposing time restrictions on “signs advertising a one-time event,” which are “akin to rules restricting times within which speech or music is allowed.”

Alito Concurrence

(Alito, Sotomayor and Kennedy)



- The government itself may “put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.”
 - Note: See *Walker v. Sons of Confederate Veterans*, 135 S. Ct. 2239, 576 US ___, released same day as *Reed*. Government speech doctrine is alive and well.
 - Alito on 3d Cir. thought directional signs might satisfy strict scrutiny: *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994)
- “**Properly understood**, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.”
- Not listed:
 - Commercial vs non-commercial
 - Temporary vs permanent
 - Private directional signs and identification signs

Kagan Opinion

(Kagan, Breyer and Ginsburg)



- On *Justice Alito*: “Even in trying (commendably) to limit today's decision, Justice Alito's concurrence highlights its far-reaching effects.” It also contradicts the Thomas opinion:
 - *Thomas*: Gilbert Code is content based because it singles out signs communicating the time and location of particular event
Note: The church events were recurring on a weekly basis.
 - *Alito*: strict scrutiny not required for regulations for sign advertising a “one-time event”
- The reasons for First Amendment protection are simply not present in most subject matter exemptions in sign codes – e.g., directional or identification signs.
 - “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail” and
 - “to ensure that the government has not regulated speech ‘based on hostility—or favoritism— towards the underlying message expressed.’”

Kagan Opinion

(Kagan, Breyer and Ginsburg)



- The majority approach will either lead to a watering down of strict scrutiny review, or lead to the Court acting as a “veritable Supreme Board of Sign Review” invalidating many perfectly reasonable, democratically adopted regulations.
- Dilemma: repeal useful exemptions or open the doors to sign clutter
- The Court has repeatedly upheld such content-based distinctions in cases not overruled—or even cited—by the *Reed* majority.

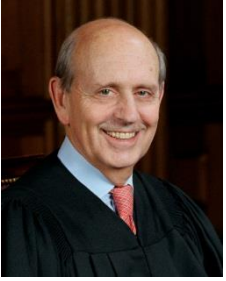
Kagan Opinion

(Kagan, Breyer and Ginsburg)



- As in *Ladue*, all justices agree that Gilbert's regulation fails intermediate scrutiny – and the “laugh test,” so the majority's whole discussion of strict scrutiny is unnecessary dicta.
- Compare Justice Scalia in *McCullen*: “The gratuitous portion of today's opinion is Part III, which concludes—in seven pages of the **purest dicta**—that subsection (b) of the Massachusetts Reproductive Health Care Facilities Act is not specifically directed at speech opposing (or even concerning) abortion and hence need not meet the strict-scrutiny standard applicable to content based speech regulations. **Inasmuch as Part IV holds that the Act is unconstitutional because it does not survive the lesser level of scrutiny associated with content-neutral “time, place, and manner” regulations, there is no principled reason for the majority to decide whether the statute is subject to strict scrutiny.**”

Breyer Opinion



- Content categories are not enough to solve this legal problem. They are analytical tools that should be used as rules of thumb rather than triggers for invalidation
- All kinds of government activities involve regulation of speech with content discrimination. If that triggers strict scrutiny, **the court has written “a recipe for judicial management of ordinary government regulatory activity.”**
 - Securities regulations
 - Airline safety announcements
 - Pharmaceutical and other consumer health and safety regulations

On site, offsite distinction remains valid

Commercial speech valid

- ◉ *Contest Promotions LLC v. City & Cnty. of San Francisco*, 2015 WL 4571564, at *4 (N.D. Cal. 2015) (concluding that “at least six Justices continue to believe that regulations that distinguish between on-site and offsite signs are not content-based, and therefore do not trigger strict scrutiny”) (Note: appeal being filed)
- ◉ *Citizens for Free Speech, LLC v. Cnty. Of Alameda*, ___ F. Supp. 3d ___, 2015 WL 4365439, at *13 (N.D. Cal. 2015) (*Reed* does not alter the analysis for laws regulating off-site commercial speech; “Plaintiffs have not identified any distinct temporal or geographic restrictions on different categories of permitted signs in Section 17.52.520 based on those signs' content. Consequently, *Reed* does not apply here”) (Note: No appeal filed)
- ◉ *Calif. Outdoor Equity Partners v. City of Corona*, 2015 WL 4163346, at *10 (C.D. Cal. 2015) (“*Reed* does not concern commercial speech, let alone bans on off-site billboards. The fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even cite *Central Hudson*, let alone apply it. *Metromedia*, 453 U.S. at 511-14, and its progeny remain good law; the City's sign ban is therefore not patently unconstitutional.”) (Note: No appeal filed)

On site, offsite distinction remains valid

Commercial speech valid

- *Lamar Central Outdoor, LLC v. City of Los Angeles*, 2016 WL 911406, at *8 (Cal. 2nd DCA March 10, 2016) (determining that *Reed* was of no help to the plaintiff inasmuch as *Reed* did not purport to eliminate the distinction between commercial and noncommercial speech, and did not involve commercial speech. The court pointed out that *Reed* did not even mention *Central Hudson* or cite *Metromedia II*, so *Reed* certainly did not overrule that precedent. The court further noted that three of the justices joining the court's opinion in *Reed* expressed the view that onsite-offsite distinctions and distinctions between placement of signs on private and public property are *not* content-based and do *not* require strict scrutiny.) (The court also rejected a challenge under the free speech clause of the California Constitution, and noted similar outcomes in the appellate courts in Texas and Indiana.) (Note: This is a significant decision)

Commercial speech doctrine remains valid

- *Dana's Railroad Supply v. Attorney General*, 807 F.3d 1235 (11th Cir 2015):
 - statute banning surcharges for the use of credit cards while allowing discounts for cash was speaker based, content based, and viewpoint based, and did not survive even intermediate scrutiny under *Central Hudson* if it were properly analyzed as a commercial speech regulation
 - treats *Reed* as though it is not a commercial speech case
 - greater leeway is given to regulations of commercial and professional speech "because of the robustness of the speech and the greater need for regulatory flexibility in those areas";
 - "Commercial speech is a narrow category of necessarily expressive communication that is "related solely to the economic interests of the speaker and its audience," or that "does `no more than propose a commercial transaction' and is protected "based on society's "strong interest in the free flow of commercial information," which is an "indispensable" prerequisite for creating the "intelligent and well informed" consumers needed to "preserve a predominantly free enterprise economy."
 - Carnes dissent criticizes majority for not applying the statutory definition of "surcharge" to save the regulation from challenge: "Under the constitutional-doubt canon, a federal court must construe a state statute to avoid a constitutional problem if the statute is "susceptible of [such] a construction." "

Commercial speech doctrine remains valid

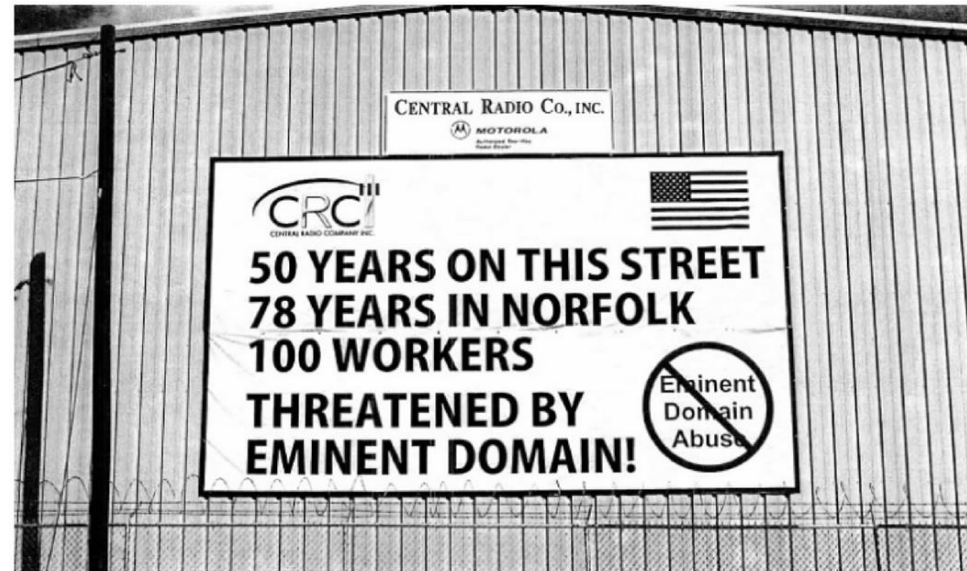
- *CTIA-the Wireless Association v. City of Berkeley*, ----- F.Supp.3d -----, 2015 WL 5569072 (ND Cal. 2015) (rejecting applicability of *Reed* to law requiring consumer disclosures re RF emissions from telecommunications devices because it related to commercial speech; “nothing in its recent opinions, including *Reed*, even comes close to suggesting that that well-established distinction is no longer valid Ironically, the classification of speech between commercial and noncommercial is itself a content-based distinction. Yet it cannot seriously be contended that such classification itself runs afoul of the First Amendment.”; compelled disclosure of commercial or governmental speech was not governed by *Central Hudson* and was only subject to rational basis review) (Note: appeal being filed)
- *San Francisco Apartment Association v. City and County of San Francisco*, --- F.Supp.3d -----, 2015 WL 6747489 (N.D. Cal. 2015) (*Reed* is not a commercial speech case; upholding regulation requiring landlords of rent controlled apartments to make certain disclosures under *Central Hudson*; rejecting applicability of *Sorrell*) (Note: appeal being filed)

Onsite/Offsite distinction questioned

- *Thomas v. Schroer*, ___ F. Supp. 3d ___, 2015 WL 4577084, at *4 (W.D. Tenn. 2015) (challenge to the Tennessee highway advertising act calls several of that law's distinctions into question, including the on-site/off-site distinction, after considering but rejecting the Alito concurrence, but finding driver safety to be a compelling interest)
- *State ex rel. Icon Groupe, LLC v. Washington County, Or.*, 272 Or. App. 688 (Or. Ct. App. 2015) (state law case; caselaw under Oregon state constitution rejects the distinction between on premise and off premise signs; Applicant sign company was entitled to issuance of its requested permits—i.e., permits for the specific "holiday signs" on a land use mandamus claim, because they met an exemption in the regulations, despite County's concerns that signs would be later converted to advertising signs; Oregon law provided for vested right in law at time of application; stating that "it is fairly clear that the "safety sign" exemption would render the county's code vulnerable to invalidation in a facial challenge under the First Amendment" under *Reed*)

Pending

- *Central Radio Company, et al., v. Norfolk, Va.*, 811 F.3d 625 (4th Cir. January 29, 2016) (dismissed in part, affirmed in part, reversed in part, and remanded for further consideration in light of *Reed*).



- *Wagner v. Garfield Heights*, 135 S.Ct. 2888. Vacated and remanded for further consideration in light of *Reed*.

Panhandling/solicitation ordinances at risk.

- *Norton v. City of Springfield*, 7th Cir. 2015 (anti-panhandling ordinance was content-based under *Reed* and failed strict scrutiny); *Cutting v. City of Portland, ME*, (1st Cir. 2015) (ordinance that prohibits standing, sitting, staying, driving, or parking on median strips was content neutral but violated 1st Am. because not narrowly tailored; allegedly official interpretation against applying ordinance to political signs was not properly at issue due to principle of constitutional avoidance); *Centro De La Comunidad Hispana De Locust Valley et al. v. Town of Oyster Bay, NY* (EDNY 2015) (ban on day labor solicitation was regulation of potentially lawful commercial speech advancing traffic safety that was governed by *Central Hudson*, despite being content based under *Reed*; however, ban was stricken because it was not narrowly tailored enough); *Watkins v. City of Arlington, TX* (ND Tex. 2015) (ban on roadside solicitation upheld; refusing to apply limiting construction involving application with state law creating an exemption for municipal solicitation, while noting that was very likely “speaker-based and therefore content-based” under *Reed*); *McLaughlin v. City of Lowell*, Dist. Court Mass. 2015 (ban on vocal panhandling and aggressive panhandling invalidated, citing *Norton* and *Cutting*, and suggesting a more narrowly tailored ban on aggressive panhandling might be sustained); *Browne v. City of Grand Junction, D. Col.* 2015 (striking panhandling ban based on *Reed* and failure to meet strict scrutiny); *Left Field Media LLC v. City of Chicago*, ND Ill. 2015 (upholding peddling ban near Wrigley Field with newspaper exception under *Ward* and Alito’s *Reed* concurrence as content neutral and narrowly tailored, rejecting *Reed* and *Norton* arguments)
- *Thayer v. Worcester*, 755 F.3d 60 (1st Cir. 2014) vacated and remanded for reconsideration in light of *Reed*, 1st Cir. remanded to district court, which concluded on Nov. 9 that the regulation of use of medians was content neutral but not narrowly tailored enough, and ban on aggressive panhandling failed strict scrutiny because it was not the least restrictive means. The plaintiff’s motion for summary judgment was granted and the city’s motion denied. *Thayer v. Worcester*, --- F.Supp.3d ---, 2015 WL 6872450 (D.Mass. 2015)

Other regulations of non-commercial speech at risk?

- *Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015) (receding from prior sign cases *Brown v. Town of Cary* and *Wag More Dogs* using functional approach to content neutrality, and applying *Reed* to strike an **anti-robocalling statute** as content based, because it only applied to consumer and political robocalls; less restrictive rules include time of day limits, do not call registries, and disclosure requirements)
- *Commonwealth v. Lucas*, 472 Mass. 387 34 N.E.3d 1242 (Mass. App. Ct. 2015) at note 10 (statute criminalized certain **false statements about political candidates or questions** submitted to voters; stricken as inconsistent with the fundamental right of free speech guaranteed by art. 16 of the Massachusetts Declaration of Rights, with reference to *Reed* as similar)
- *Rideout v. Gardner*, 123 F.Supp.3d 218 (D. N.H. 2015) (NH statute **banning ballot selfies** was content based under *Reed*, and stricken despite availability of alternative means of communication of one's vote; it was over inclusive; there was insufficient evidence in the record of actual threat to compelling governmental interest of avoiding vote buying; other statutes already banned vote buying; completed ballots were not government speech like license plates; less restrictive regulation was possible – ban only ballot selfies used to sell a vote)
- *Rosemond v. Markham*, --- F.Supp.3d ---, 2015 WL 5769091 (E.D. Ky. 2015) (**professional speech regulation** stricken for failing strict scrutiny)
- *Susan B. Anthony List v. Driehaus*, --- F.3d ----2016 WL 731971 (6th Cir. 2016)[Case upholding unconstitutionality of **Ohio's political false-statements laws** that prohibit persons from disseminating false information about a political candidate in campaign materials during the campaign season “knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.”]

Other regulations of non-commercial speech at risk? Or maybe not?

- *Defense Distributed v. US Dep't of State*, 121 F.Supp.3d 680 (W.D. Tex. 2015) (noting *Reed*, but upholding **regulation of weapons export**, including ban on internet posting of technical data regarding guns, under intermediate scrutiny, by relying on analogy to adult use secondary effects cases, open meetings act, licenses for tour guides, and the abortion protest case *McCullen*)
- *State v. Packingham, N.C.*, 368 N.C. 380, 777 S.E.2d 738 (2015) (upholding statute which **bars any registered sex offender from accessing any commercial social networking site** on which he knows a minor can create or maintain a profile under *Reed* and *Ward*) (where analyzing North Carolina Constitution's Free Speech Clause, great weight has been given to First Amendment jurisprudence of the U.S. Supreme Court)
- *RAEF v. Superior Court of Los Angeles County, Calif.*, 240 Cal.App.4th 1112, 193 Cal. Rptr. 159 (2015) (**paparazzi chase law** upheld against *Reed* attack on commercial purpose element of act, applying intermediate scrutiny)
- *Ex Parte Flores, Tex.*, --- S.W.2d ---, 2015 WL 6948828 (Ct App, 14th Dist.) (**ban on gang members having guns in vehicles** challenged for attaching criminal sanctions to the otherwise-lawful behavior of displaying a sign or symbol was upheld under *Ward* by analogy to adult use regulations)

Responses to *Reed*

Steps to Take
Strategies to
Consider
Questions and
Issues to Ponder

- Content neutral need not mean more signage
- Content neutral need not mean you have to allow it on public property; **important to protect public property from any signs other than government signs**
- No reason to think properly drafted commercial sign regulation and billboard regulation is affected
- Planning and human factors studies to establish safety and aesthetic interests
- Problem: To accommodate signage that is relevant only at certain times, such as election signs, without content based regulation, will overall signage allotments need to increase? Can additional signs be allotted in relation to time or activity, resulting in fewer potential signs? How you answer this question may have major impact on aesthetics, increased consideration of spacing requirements likely for temporary signs; Solution: Treat all temporary noncommercial signs the same
- Enhanced risk of litigation, which could lead to court orders invalidating all (or a portion) of a sign code, if *Reed* is not addresses

What Should Governments Do?

- ◉ Review your sign code NOW for potential areas of content bias. If fixing your sign code will take a while, meet with permit and enforcement staff to avoid enforcing content-based distinctions, or suspending enforcement of same through official action.
- ◉ Make sure your sign code has a strong purpose statement. Make clear the tie to the purpose statement and regulatory approach to data, wherever possible. Reference a comprehensive plan, and any other relevant laws supporting governmental purposes (check state constitution). Include references to the case law, and an explanation for the regulatory approach in some detail in the preambles or even in the adopted text. Make explicit the legislative findings in the preambles.
- ◉ Consider carefully the number of sign categories.
- ◉ Simplify temporary sign regulation, and consider setting them apart from permanent sign regulations.
- ◉ Remember threshold defenses: standing, ripeness, mootness

What Should Governments Do?

- Fix the older problems.
 - Add a severability clause now if you don't have one, and consider improvements to existing severability provisions if you do have one to state that you intend severability to be utilized even if less speech occurs.
 - Be sure your code contains a substitution clause that allows noncommercial speech substitution.
 - Ensure viewpoint neutrality – e.g., American flags.
 - Reduce exceptions to permitting and exceptions to prohibitions as much as possible.
 - Avoid prior restraint scenarios on the face of the ordinance.
 - Don't *favor* commercial speech over noncommercial speech, e.g. location, size, height, etc. This may require special attention when drafting a replacement code.
- Evaluate other regulations that may be based on content, e.g., solicitation ordinances.
- Figure out how to deal with the open issues.
- Strongly consider a replacement sign code with extensive preambles to explain the substance of the sign regulations in context.

Issues to Ponder:

How to deal with address signs, identification signs, and directional signs?



Issues to Ponder



Issues to Ponder:



Problems: “Sign”

- Scope. How to define “Sign” in a way that is not content based. Typical exclusions in many sign codes:
 - Murals or art; noncommercial artwork.
 - No text.
 - No more than certain square footage or height of letters as text.
 - Logos.
 - “Holiday” decorations; noncommercial decorations.
 - Cemetery markers, drop-off boxes, vending machines: Signs?
 - Governmental signs (government speech).
 - Traffic Control Devices (MUTCD).
 - Merchandise visible through a shop window.
 - Flags; flagpoles and flag stanchions
- Can you sever the definition of sign? No.
- Can you sever an exception from it?

- Allotments for temporary signs that make sense year round, while allowing for additional noncommercial signage at election time without being content based, and respecting the Supreme Court cases requiring governments to allow certain sign types even on residential lots. But potential pitfalls in this approach for allowing additional noncommercial signage at various time periods.
- Non-commercial – *Ladue* certainly requires allowance of free expression signs (protest signs) on residential lots; perhaps elsewhere as well-when considering utilization of signage as a form of speech and free expression.

- Every property has a particular amount of square feet of signage that they can use for any temporary signs on their property, year round.
- For example-in accordance with a zoning districts: ["__"] square feet per parcel, ["__"] square feet for any one individual sign, ["__"] height for any one individual signs, ["__"] feet of set back from property line, ["__"] feet of spacing from any other sign. No temporary signs shall be lighted, contain florescent paint, [or be wind-activated, etc].

Regulating commercial signs differently from noncommercial signs.

- Commercial speech – *Central Hudson Gas & Elec. Co. v. Pub. Svc. Comm'n of NY*, 447 US 557 (1980) intermediate scrutiny
- Real estate signs – *Linmark Assoc., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 96 (1977) requires allowance of real estate signs on residential lots
- *Metromedia* requires that commercial not be treated more favorably than noncommercial

- Noncommercial speech should always be considered as the onsite speech of the property owner, so that offsite sign bans do not ban noncommercial speech – *Metromedia; Southlake Prop. Associates v. City of Morrow, Ga.*, 112 F.3d 1114 (**11th Cir. 1997**) (noncommercial speech is always onsite because "[a]n idea, unlike a product, may be viewed as located wherever the idea is expressed, i.e., wherever the speaker is located . . . [or] wherever the speaker places it)
- *Reed* is not a commercial speech case. In prior cases, clear majorities of justices endorsed less than strict scrutiny.
- *Reed* did not overrule any case. Implicit overruling is disfavored:
 - "[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997)

Sample approaches

- Limiting the number of temporary commercial signs within the overall allotment of temporary signs?
- Allow an extra sign of appropriate dimensions for a lot that includes one or more drive-through windows, or land uses such as a gas station, or a theater?
- Allowing additional sign when special event permit is active for property (special event signs)?

Problems:

- What about the appearance of rights of way and public realm?

Sample approaches

- Protect the public right-of-way and public property by prohibiting privately placed signs. Under government speech doctrine, you have broad discretion over use of public property.
- Remove all regulations of traffic control devices from the sign regulations, such as references to them being exempt from permitting or prohibitions. Add findings that traffic control devices serve the interest in safety, and do not hamper the interest in aesthetics.
- No banners over roadways unless the government is a sponsor for the event on the banner
- Allow, but limit proliferation with size, location and spacing criteria. Realize that you cannot control the content. Could be hate speech. Is it really worth it when you open up government property to non-government signs?

Additional Resources

- Daniel Mandelker, John Baker and Richard Crawford, *Street Graphics and the Law*, revised edition (American Planning Association, 2015)
- *Local Government, Land Use and the First Amendment*, Brian Connolly, ed. (ABA, forthcoming 2016)
- Alan C. Weinstein and Brian J. Connolly, "Sign Regulation after Reed: Suggestions for Coping with Legal Uncertainty," *The Urban Lawyer*, Quarterly Journal of the ABA Section of State & Local Government Law, 2015
- Randal Morrison's *SIGNLAW.COM*, an informational website on the American law of signs, billboards, outdoor advertising, public forum, government speech, and related First Amendment / free speech / zoning topics.

Additional Resources

- Trade industry and scenic conservation websites:
- Outdoor Advertising Association of America: oaaa.org
- Scenic America, Inc.: scenic.org
- Scenic North Carolina, Inc.: scenicnc.org

Questions?

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