

How the Supreme Court has Shaped First Amendment Issues for Local Governments: Reed v. Town of Gilbert

OTTENJOHNSON
ROBINSON NEFF + RAGONETTI PC

Brian J. Connolly, Esq.
Denver, Colorado

IMLA Annual Conference
Las Vegas, Nevada
October 6, 2015

©2015 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2015 Annual Conference, held October 3-7, 2015 in Las Vegas, NV. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

Program Outline

- Introduction to First Amendment and content neutrality
- Overview of *Reed v. Town of Gilbert*
  - Background
  - Outcome
- What was left unanswered?

The Legal Framework for Sign Regulation

- Signs implicate First Amendment concerns
- Government regulation of signs loses the normal presumption of constitutionality and is subject to heightened scrutiny
- Sign litigation is common, expensive, and risky
- Most sign ordinances contain at least a few provisions of questionable constitutionality, particularly following *Reed*

First Amendment Concepts

- Content (or message) neutrality
- Time, place or manner regulations
- Commercial vs. non-commercial speech
- Off-site vs. on-site signs
- Bans and exceptions
- Permits and prior restraints
- Vagueness and Overbreadth

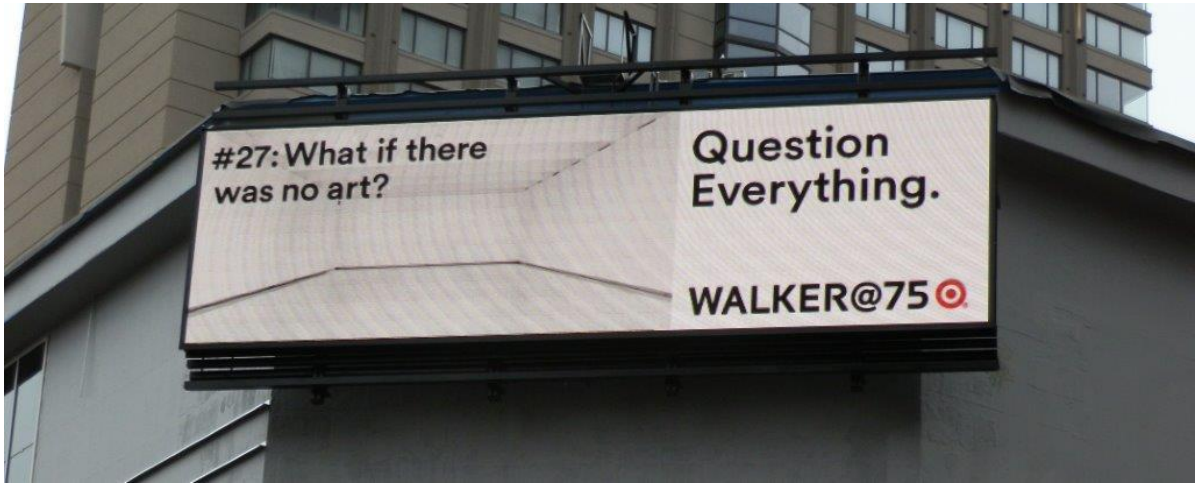
Content neutral vs. Viewpoint neutral

- Content neutrality looks at subject matter
- Viewpoint neutrality looks at point of view
  - a ban on all signs is content neutral *and* viewpoint neutral
  - a ban on all political signs is *not* content neutral but *is* viewpoint neutral
  - a ban on signs that criticize government is neither content neutral nor viewpoint neutral

Content and Viewpoint Neutrality

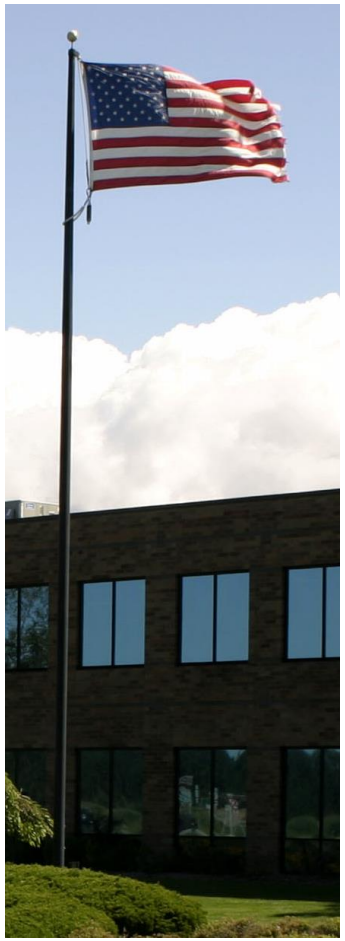
"The numerical limits on signs in this district do not apply to signs relating to a specific event *of a nonprofit organization,* so long as those signs contain *no commercial speech*."

If the law is enforced against this sign based on the "Target Corp." logo, would it make the law content-based?



Source: John Baker

Content and Viewpoint Neutrality



- Content: “No sign shall contain any political message.”
- Viewpoint: “No sign shall contain any message advocating the election of a Republican candidate.”

“Flags shall be prohibited, except that each property owner shall be permitted one pole-mounted governmental flag.”

--Content problem? Viewpoint problem? Both? Neither?

Content and Viewpoint Neutrality

Regulation of content vs. viewpoint vs. category…

- "No sign may advocate against abortion."
- "No sign may advocate a particular approach to contraception."
- "No sign may advocate a position relating to reproductive health."
- "Political signs may not exceed 20 square feet."
- "Political sign means any sign related to a campaign or referendum."
- "No sign may be posted within 30 feet of a reproductive health clinic."
- "Off-premises signage is prohibited."
- "'Sign' means any device used to convey a message using words or images."

Content Neutrality Summary

- A regulation that is "content-based" will be subject to strict scrutiny: compelling governmental interest, least restrictive means, and narrow tailoring
- A regulation that is "content-neutral" will be subject to intermediate scrutiny: significant/important governmental interest unrelated to suppression of speech, substantially related means, narrow tailoring, and ample alternative channels for communication
- Regulations of commercial speech are subject to the *Central Hudson* intermediate scrutiny test

Content Neutrality: Important Cases

- *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972)
- *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)
- *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981)
- *City of Ladue v. Gilleo*, 512 U.S. 43 (1994)
- *Hill v. Colorado*, 530 U.S. 703 (2000)
- *McCullen v. Coakley,* 134 S. Ct. 2518 (2014)



Source: buttonmuseum.org

The Views of Content-Neutrality

Absolute or literal approach

- Do you have to look at the message to determine if the rule applies?
- If so, it is content-based.
  - real estate signs
  - directional signs
  - identification signs
  - instructional signs
  - construction signs
  - nameplate signs
  - price signs
  - home occupation signs

No-censorship approach

- Is the government trying to regulate or censor content?
- If not, it is content-neutral because:
  - local government needs some leeway in navigating through First Amendment law
  - a limited number of content-based provisions that are not intended to censor or restrict speech is acceptable

Time, Place and Manner Regulations

- Maximum size/height
- Maximum number per lot/building/support structure
- Specific sign locations
  - corner lots
  - setbacks/spacing
  - zoning districts
  - uses
  - corridors
- Prohibited signs
- Regulations of materials, lighting and form
  - internal/external lighting
  - flashing/animation
  - neon
  - materials/colors*
  - monument/pole signs
  - design review and incentives
  - Cabinet/channel letter wall signs

*Note: Federal protection of color of federally-registered trademarks/logos.

Reed v. Town of Gilbert: Background



Source: azcentral.com

Gilbert Sign Code

- § 4.402.A requires all signs to be permitted, unless excepted by § 4.402.D
- § 4.402.D contained 23 exceptions to permitting requirement, including:
  - "Political signs"
  - "Ideological signs"
  - "Temporary directional signs relating to a qualifying event"

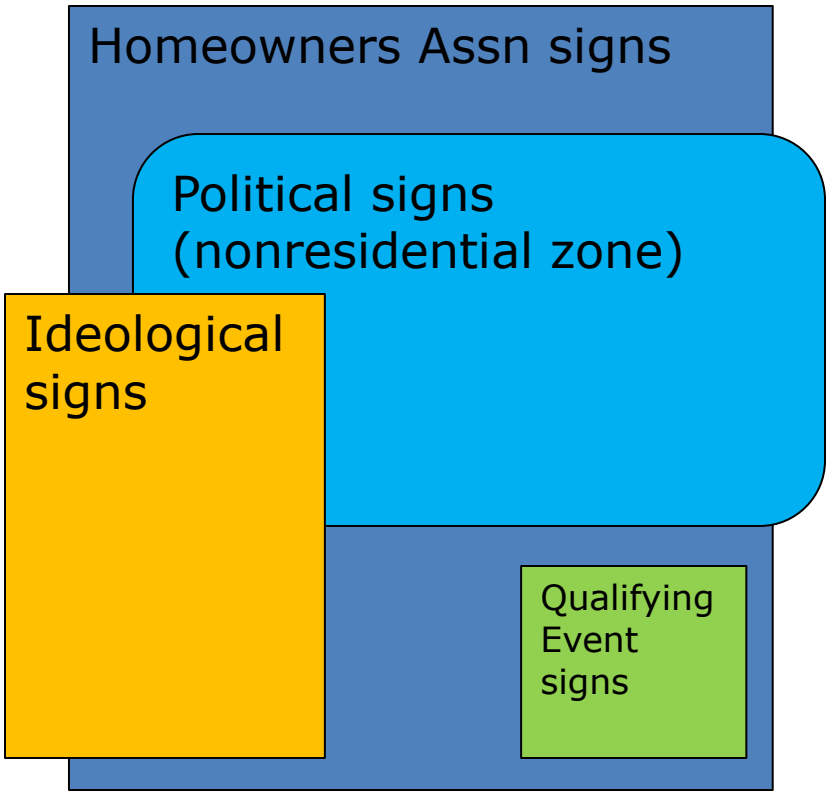
Gilbert Sign Code

- **Political signs**: "A temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general or special elections relating to any national, state or local election."
  - Up to 16 square feet on residential property, 32 square feet on nonresidential property, up to 6 feet in height
  - Must be removed 10 days after election
- **Ideological signs**: "Sign communicating a message or ideas for non-commercial purposes" (that is not also another sign type)
  - Up to 20 square feet, 6 feet in height

Gilbert Sign Code

- **Temporary directional signs**: Temporary sign "intended to direct pedestrians, motorists and other passersby to a 'qualifying event.'" Qualifying event is an event sponsored or hosted by religious, charitable, community service, educational, or other nonprofit organization.
  - 6 feet in height, 6 square feet in area, 4 signs per property
  - May be placed 12 hours before event, must be removed 1 hour after

Gilbert Sign Code



Factual Background

- Reed is pastor of Good News Presbyterian Church, which rents property at various community facilities in Gilbert
- Good News posts temporary signs around Gilbert to direct people to services, rather than identifying its presence on the signs available to the property and controlled by its landlords
- Gilbert code enforcement staff issued notice of violation in 2005, after church's signs were posted outside of display time provided by the temporary religious event sign provisions

Procedural History

- Reed and Good News Church filed suit against Town in 2007 in federal district court
- Facial and as-applied challenges to the Gilbert sign code under the Free Speech and Free Exercise clauses of the First Amendment to the Federal Constitution, the Equal Protection Clause of the Fourteenth Amendment, and related state-law provisions
- September 2008: Reed's motion for preliminary injunction denied
- Ninth Circuit affirmed denial of motion for preliminary injunction, remanded for further proceedings on the question of whether the code impermissibly distinguished between forms of noncommercial speech

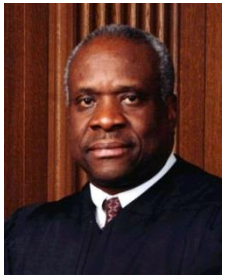
Procedural History

- February 2011: Town granted summary judgment on basis that Town's purpose in enacting sign regulations was unrelated to the content of the regulated speech
- Ninth Circuit affirmed
  - "[T]he fact that an enforcement official had to read a sign did not mean that an ordinance is content-based."
  - Distinctions were based on the purpose of the sign and not adopted out of the government's disagreement with the messages of any of the exempt signs
- Supreme Court granted cert

Reed v. Gilbert: The Outcome

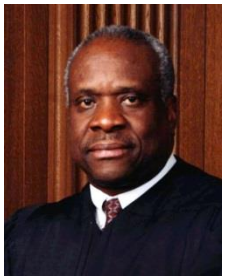
- Majority opinion (Justice Clarence Thomas)
- Concurrence (Justice Samuel Alito)
- Concurrences in the judgment (Justice Stephen Breyer, Justice Elena Kagan)

Majority Opinion



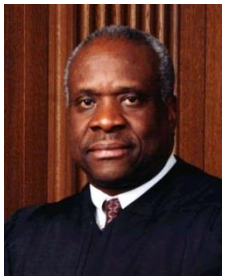
- Distinctions between forms of noncommercial speech are content based
- Apply strict scrutiny
- Gilbert's sign code is not narrowly tailored to aesthetic and traffic safety purposes

Majority Opinion



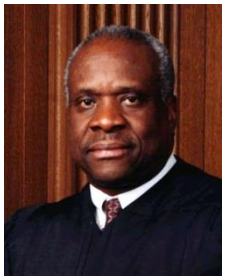
- "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."
- "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."

Majority Opinion



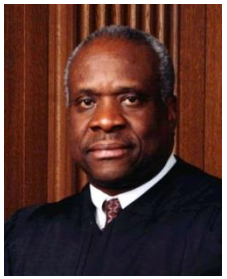
- "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose."
- Gilbert sign code definitions were content based on their face:
  - Temporary Directional Signs
  - Political Signs
  - Ideological Signs

Majority Opinion



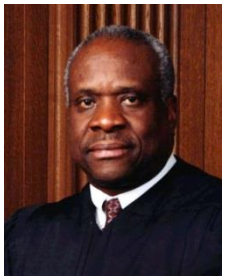
- Majority opinion sets up a mechanical approach:
  - Analyze a law for facial neutrality, then purposive neutrality
  - If content neutral, apply strict scrutiny
  - If content neutral, apply intermediate scrutiny

Majority Opinion



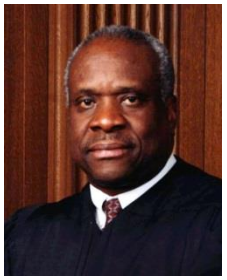
- Application of strict scrutiny
  - The Town “offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town's aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code's distinctions fail as hopelessly underinclusive.”

Majority Opinion



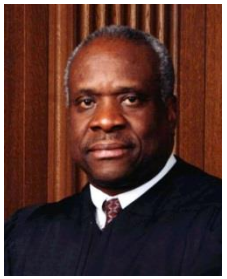
- Application of strict scrutiny
  - The Town “offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town's aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code's distinctions fail as hopelessly underinclusive.”
  - “The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.”

Majority Opinion



- “The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.”
- “The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability.”

Majority Opinion



- "[T]he presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—**well might survive strict scrutiny.**"

Justice Alito's concurrence (+2)



- "**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:**

Justice Alito's concurrence (+2)



- Rules regulating **size**
- Rules regulating **locations** in which signs may be placed
- 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**; **commercial** and **residential property**"

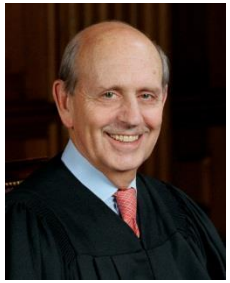
Justice Alito's concurrence (+2)



- "Rules **distinguishing between <u>on-premises and off-premises signs</u>**"
- "Rules restricting the total **number of signs per mile** of roadway"
- Rules imposing **<u>time restrictions on signs advertising a one-time event</u>**," which are "akin to rules restricting times within which speech or music is allowed."
- 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."

Justices Kagan and Breyer: Concurring in the Judgment





- Was strict scrutiny really necessary?!
  - Justice Kagan thinks Gilbert's code failed the "laugh test"
- 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."

What the Case Left Unanswered

- How can local governments continue to regulate signs by category and function?
  - Temporary/event signs
  - Political signs
  - Real estate, construction, directional signs
  - Grand opening signs, coming soon signs, etc.



Source: www.princetonmn.org

What the Case Left Unanswered

- Is it possible to define "sign" in a content neutral manner?
- Is there any effect on *commercial* sign regulation?
  - Preliminary answers seem to be "no"
  - Law disfavors implicitly overruling prior Supreme Court precedent
- What is speaker-based regulation and what's the problem with it?
  - Maybe it's okay after *Reed*, but content discrimination can't hide behind it…

What the Case Left Unanswered

Can we still regulate signs on the basis of land use?

- Multi-tenant shopping centers
- Gas stations
- Theaters
- Places of worship
- Construction sites
- Residential subdivisions

What about zoning and licensing regulations of adult businesses?

- Regulating secondary effects of uses that area defined based on reference to expressive activity:
  - Nude dancing/strip club
  - Adult video/book store

What the Case Left Unanswered

Questions for lawyers:

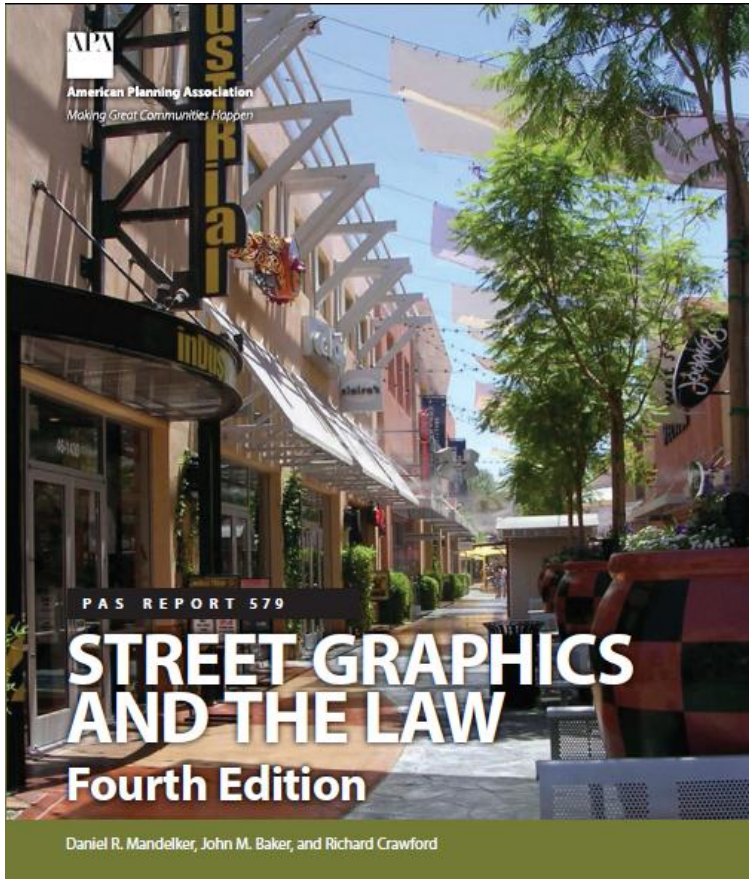
- What governmental interests are *compelling*?
- What *is* narrow tailoring?
- How *strict* is strict scrutiny?
- Does *Reed* even apply outside of sign regulation?



Source: hotelchatter.com

Additional Resources

- Daniel Mandelker, John Baker and Richard Crawford, *Street Graphics and the Law*, revised edition (American Planning Association, forthcoming 2015)
- *Local Government, Land Use and the First Amendment*, Brian Connolly, ed. (ABA, forthcoming 2016)



Questions and Answers

Brian Connolly
(303) 575-7589 / bconnolly@ottenjohnson.com

OTTENJOHNSON
ROBINSON NEFF + RAGONETTI PC