Strategies and Tactics for Regulating Signs After *Reed v. Town of Gilbert*

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About the Speaker

- AV-rated Member, Weiss Serota Helfman Cole & Bierman, PL in Fort Lauderdale, Florida
- Chair, Municipal Land Use and Zoning Group; Board-certified in City County and Local Government Law by the Florida Bar; Town Attorney
- Drafter and defender of numerous local government sign ordinances, and of other regulations related to land uses protected by the First Amendment, such as religious uses and adult uses
- Former adjunct professor, and frequent author and lecturer on First Amendment and other land use and zoning matters
- Member, College of Fellows of American Institute of Certified Planners

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Overview

- Life Before *Reed*
  - What is sign regulation and why does it matter to communities?
  - First Amendment principles relevant to sign regulation before *Reed*
- *Reed v. Town of Gilbert:* the case and the opinions
- Decisions After *Reed*
- What Should Municipal Attorneys Be Doing In Response To *Reed*
  - Steps to Take
  - Strategies to Consider
  - Issues to Ponder and Sample Approaches

What is Sign Regulation and Why Does It Matter to Communities?

Elements of most sign codes

- 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 (or regulation altogether)
- Sign permit procedures

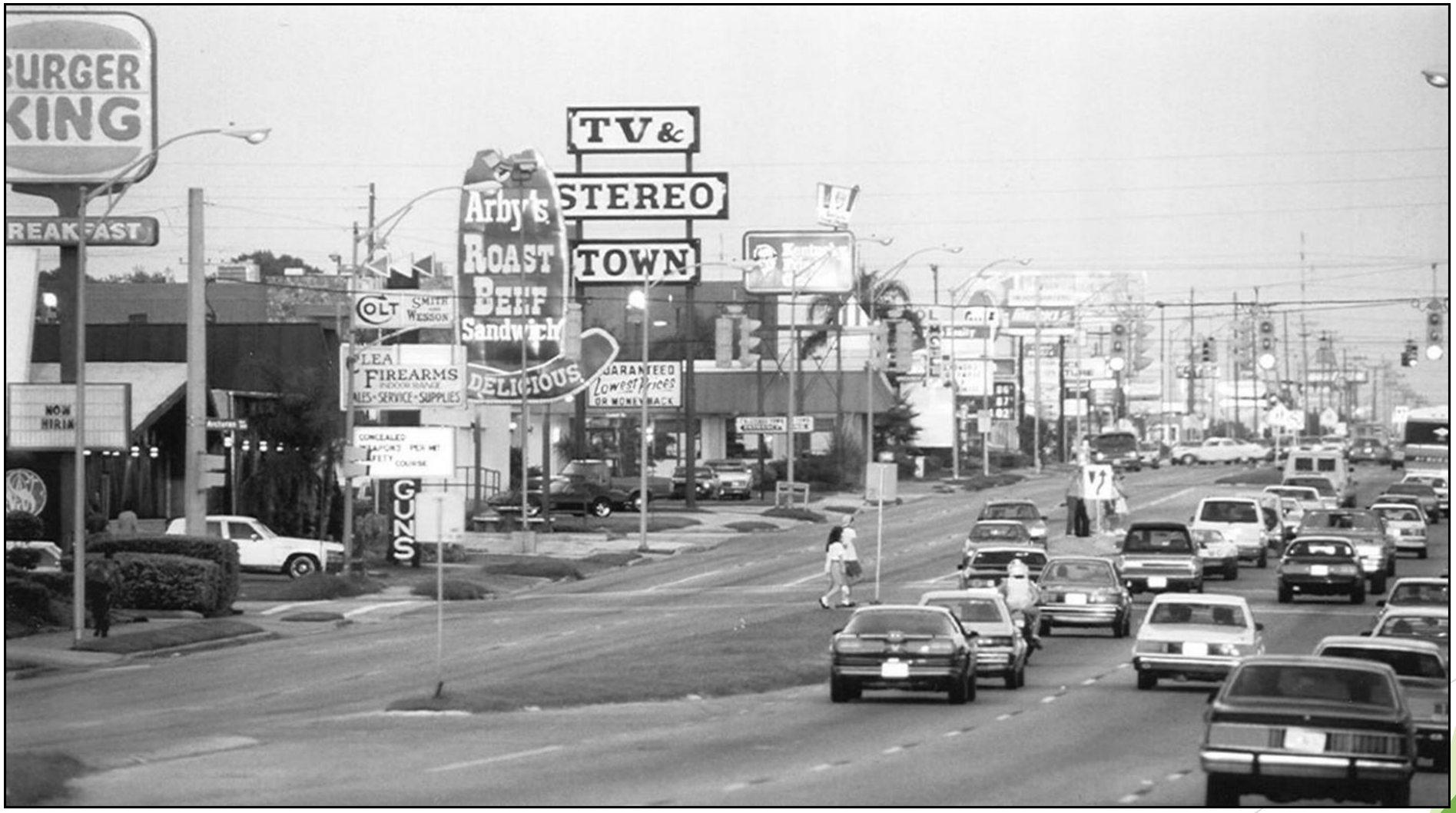
Additional elements of most sign codes

- A purpose statement
- Location-specific sign regulations
  - Tighter controls in residential zoning districts
  - Added exemptions 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 signs
- Rules for temporary signs

Sign regulation is not just a legal problem. It is about:

- Place making and community building
- Economic development
- Aesthetics
- Safety for all modes of travel
- Wayfinding
- Property values
- Democracy

Clearwater, Florida Before Sign Regulation



Clearwater, Florida After Sign Regulation



Signs Gone Wild



Signs Gone Wild



Examples of Signs













First Amendment Principles Relevant to Sign Regulation 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."**

The First Amendment Changes How We Approach Regulation: Discretion

- In typical police-power and land-use regulation, preserving discretion is good
  - You can't foresee everything
  - Rigid rules can have unforeseen consequences
  - Your judgment is generally presumed to be valid, and courts will defer to you
- With First Amendment-protected uses, preserving discretion creates problems
  - Because signs are expressive conduct, **courts distrust discretion** and do not defer to your judgment
  - Even if you never actually exercise discretion, an ordinance that *allows* you to exercise unbridled discretion over sign applications may be unconstitutional
  - Significant monetary damages and attorneys fees are possible, along with lengthy and controversial litigation

The First Amendment Changes How We Approach Regulation: Tailoring and the "Goldilocks" Principle

- In typical police-power and land-use regulation, the best regulations are often the most precise and specific
- The substantive standard of review requires narrow tailoring of the regulation to the governmental interests that the regulation is intended to advance
- In sign law, the process of fine-tuning your ordinance (by treating different types of signs differently) can lead to **content discrimination**, which is a problem
- Yet reducing a sign ordinance to a simple set of generally applicable rules to achieve content-neutrality can cause those rules to be **overly broad**, creating different problems

The First Amendment Changes How We Approach Regulation: Practicality

- Most regulations are created in response to practical problems, using practical solutions.
  - Trying to anticipate and avoid hypothetical problems can be wasteful when the deferential standard of review allows you to just change the rules to adapt to new issues, with little chance of liability
- In sign cases, judges often lack understanding of the practical issues and may invalidate your ordinance based on abstract and unlikely hypothetical fact patterns that may never occur
  - Overly-broad rules can sometimes be attacked regardless of what people actually seek permission to do

The First Amendment Changes How We Approach Regulation: Prior Restraint

- Procedures and permitting must be clear and objective as possible, with only minimal delays, and guarantee access to prompt judicial review
- Typical application processing timelines will likely fail the standards for prior restraint. Should have special procedures and timelines.

Sign Codes Must be 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.

If The Regulation Or Its Application Is Content Neutral, Then Intermediate Scrutiny Applies

- 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.

If The Regulation Or Its Application Is Content Based, Then Strict Scrutiny Applies

- 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)

The Federal Courts' Inconsistent Tests for Content Neutrality: Circuit Split

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.

- *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 disadvantaged)
- *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)

The Federal Courts' Inconsistent Tests for Content Neutrality: Circuit Split

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's content neutral.

- *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)
- *Hill v. Colorado*, 530 U.S. 703, 707 (2000) (we have never suggested that the kind of "cursory examination" required to distinguish the regulated conduct would be problematic)
- *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)

The Federal Courts' Inconsistent Tests for Content Neutrality: Circuit Split

(cont'd)

- 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)

So, What Were Municipalities Required To Do 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 and its exceptions 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

The Background of *Reed v. Town of Gilbert*

- 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

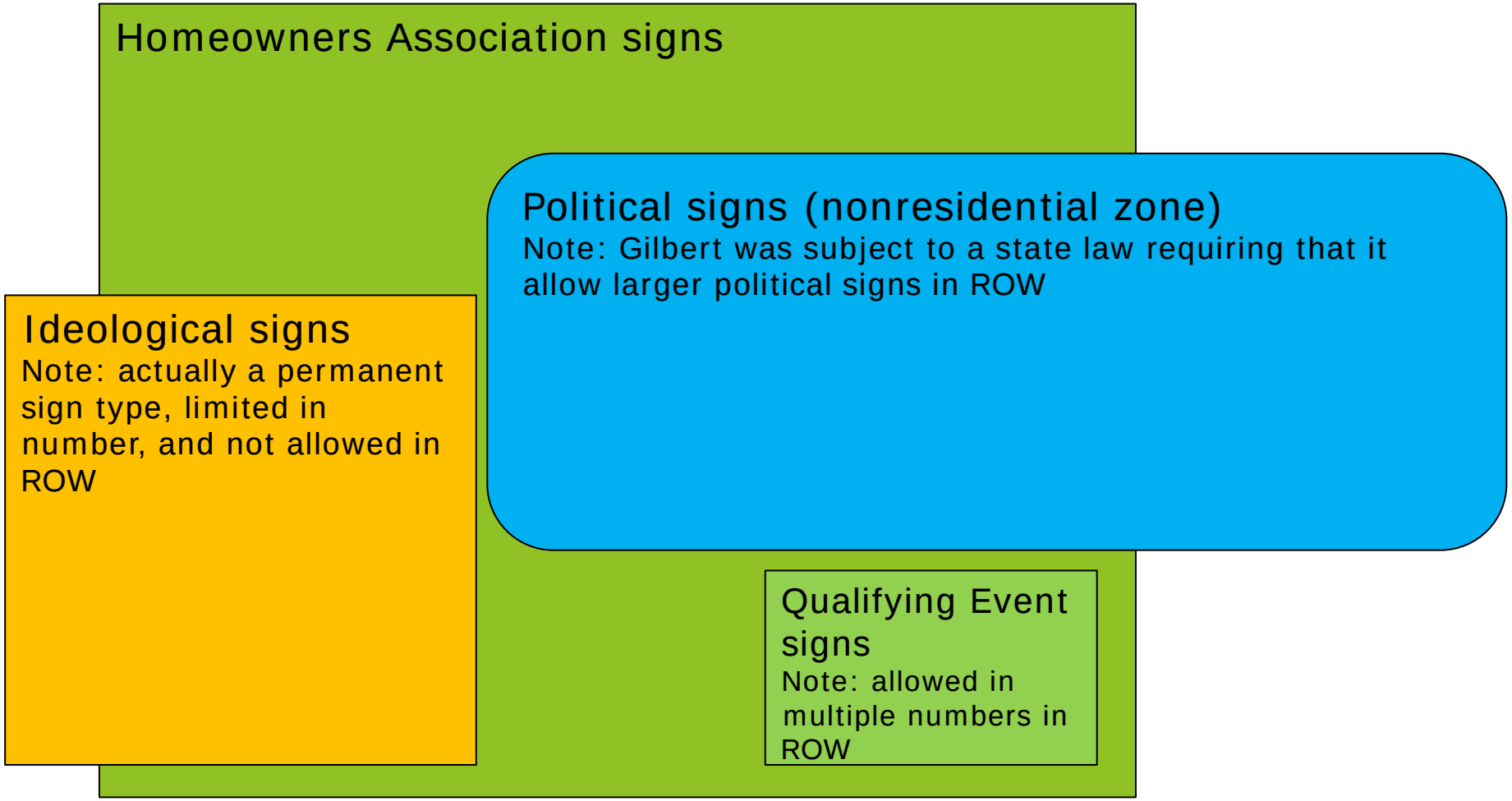
Plaintiffs' "qualifying event" signs



Candidates' "political" signs



Maximum Sign Sizes Per *Reed's* Counsel



Temporary Sign Regulations: Event Signs and Election Signs

- Nonpolitical, non-ideological, non-commercial event signs: 6 sq. ft.
- Maximum duration: 12 hours before, until 1 hour after the event
- 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 court to enjoin Gilbert
- Gilbert modified its code to be more defensible during litigation
- Gilbert prevailed **four times** before reaching the US Supreme Court, including two Ninth Circuit decisions in its favor

Brief of Amici Curiae Supporting Gilbert

- National League of Cities
- United States Conference of Mayors
- National Association of Counties
- International City County Management Association
- **International Municipal Lawyers Association**
- American Planning Association
- Scenic America, Inc.

Brief of Amici Curiae

- If the mere categorization of signs by function renders them "content-based," few sign regulations will survive strict scrutiny.
- The adoption of the absolutist approach to defining "content-neutrality" will prevent local governments from legislating common sense classifications for temporary and permanent signage.
- To preserve the ability of local governments to advance important objectives such as aesthetics and safety, these temporary sign categories should be reviewed under intermediate scrutiny, which properly balances the interests involved.
- If Gilbert's code falls short, remand is needed to develop the record to determine severability.

Amicus Brief of the United States in Support of *Reed*

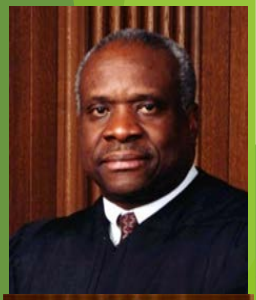
- Intermediate scrutiny applies, not strict scrutiny.
- A sign regulation based solely on safety and aesthetics, such as the Highway Beautification Act, should be subject to intermediate scrutiny.
- The Town's sign ordinance failed intermediate scrutiny.

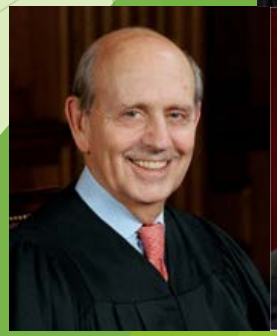
Outcome

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.

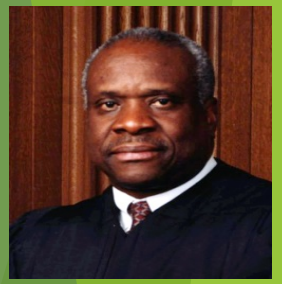
Four opinions were issued:

- Majority opinion (Justice Clarence Thomas, joined by five others)
- One Concurrence (Justice Samuel Alito, joined by two others 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 Ruth Ginsburg and by Breyer)



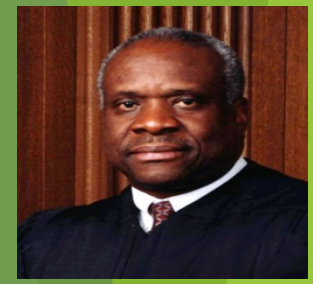



Majority Opinion: Thomas



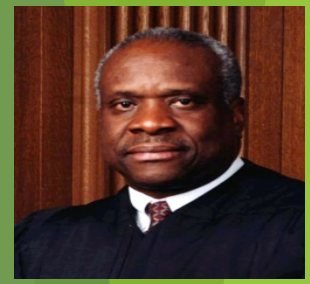
- Content-based regulation is **presumptively unconstitutional,** strict scrutiny applies, and **compelling governmental interest** is required.
- "Government regulation of speech is content based if a law **applies to particular speech because of the topic** discussed **or the idea or message** expressed."
- 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

The Alito Concurrence



(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"
  - Note: Sign rights are allocated per property – cannot deny rights to a small property
- 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."
  - Note: requires reading the sign

The Alito Concurrence



- 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, directory 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
  - *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)



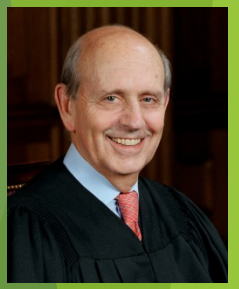
- The majority approach will either lead to a watering down of strict scrutiny review, or lead to the Court acting as a "veritable Supreme Board of Sign Review" invalidating many perfectly reasonable, democratically adopted regulations.
- Dilemma: repeal useful exemptions or open the doors to sign clutter
- 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

Decisions After *Reed v. Town of Gilbert*

Sample of Cases Post-*Reed*: Sign Regulations

On site, offsite distinction & commercial speech doctrine still 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")
- *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")
- *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.")

Sample of Cases Post-*Reed*: Sign Regulations

Onsite/Offsite distinction at risk

- *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*)

Sample of Cases Post-*Reed*: Sign Regulations

- Pending
  - *Central Radio Company, et al., v. Norfolk, Va*. Vacated and remanded for further consideration in light of *Reed*.
  - *Wagner v. Garfield Heights*. Vacated and remanded for further consideration in light of *Reed*.

Sample of Cases Post-*Reed*: Other Regulations

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)*
  - Pending: *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

Sample of Cases Post-*Reed*: Other Regulations

Commercial speech doctrine remains valid

Compelled commercial speech subject only to rational basis review

- *CTIA-the Wireless Association v. City of Berkeley*, 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*)*

Sample of Cases Post-*Reed*: Other Regulations

Other regulations of non-commercial speech at risk

- *Cahaly v. LaRosa*, 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 alternatives include time of day limits, do not call registries, and disclosure requirements)
- *Commonwealth v. Lucas,* 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,* D. NH 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)
- *Defense Distributed v. US Dep't of State*, (WD 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)*

Responses to *Reed*

Steps to Take
Strategies to Consider
Questions and Issues to Ponder

What Governments Should Do

- Review your sign code NOW for potential areas of content bias. If fixing your sign code will take a while, coach permit and enforcement staff to *avoid enforcing content-based distinctions*.
- Make sure your sign code has a strong *purpose statement*. Tie the purpose statement and regulatory approach to data, wherever possible. Reference your comprehensive plan, and any other relevant laws supporting governmental purposes (check state constitution). Include references to the caselaw, and an explanation for the regulatory approach in some detail in the preambles or even in the adopted text. Make explicit legislative findings.
- Reduce the number of sign categories.
- Simplify the temporary sign regulations.

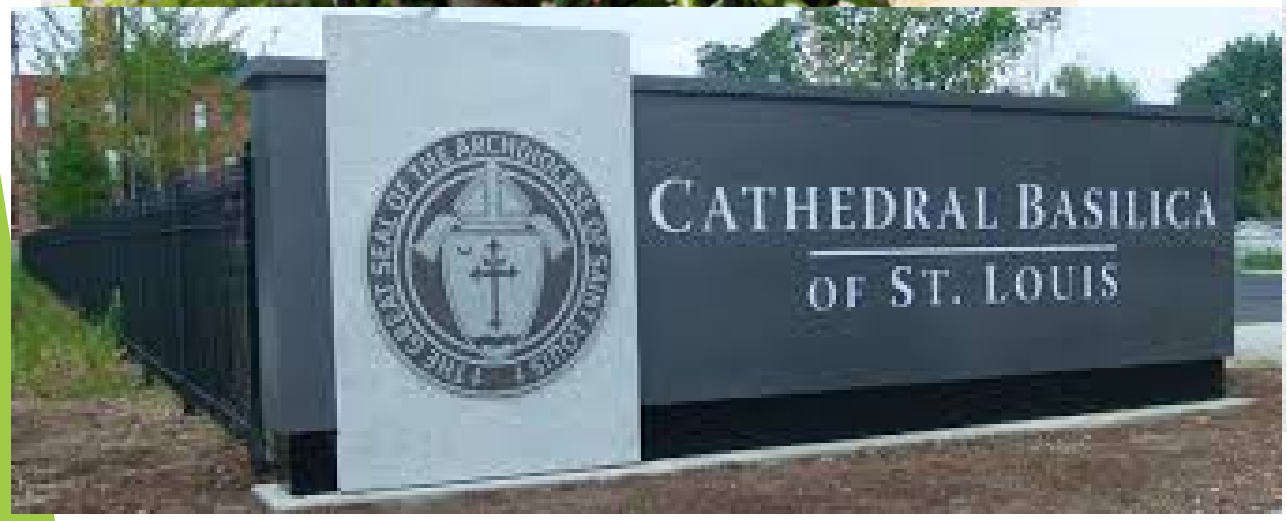
What Governments Should Do

- Fix the older problems.
  - Add a severability clause now if you don't have one.
  - Be sure your code contains a substitution clause that allows noncommercial substitution.
  - Ensure viewpoint neutrality – e.g., flags.
  - Reduce exceptions to permitting and exceptions to prohibitions as much as possible.
  - Meet prior restraint
  - Don't favor commercial speech over noncommercial speech, e.g. location, size, height, etc.
- Evaluate other regulations that may be based on content, e.g., solicitation ordinances
- Figure out how to deal with the open issues after *Reed*
- Remember threshold defenses if challenged: standing, ripeness, mootness, severability, substitution

Issues to Ponder: How to deal with address signs, identification signs, and directional signs?









Issues to Ponder: Are these commercial signs?













Issues to Ponder: What is *Reed*'s impact on commercial signs?







Implications for Aesthetics and Safety

- Content neutral need not mean more signage
- Content neutral need not mean you have to allow it on public property
- No reason to think properly drafted commercial sign regulation and billboard regulation is affected
- Does the Florida Constitution's guarantee of scenic beauty amount to a compelling governmental interest? Does compliance with the comprehensive plan represent a compelling governmental interest?
- Planning and human factors studies to establish safety and aesthetic interests
- Enhanced risk of litigation, which could lead to court orders invalidating all (or a portion) of a sign code

Problems:

- How do cities accommodate signage relevant only at certain times, such as election signs, without content based regulation? Can additional signs be allotted in relation to time or activity, resulting in fewer potential signs?

Answer involves both policy and law – the approach affects community aesthetics

- Increase the overall allotment of temporary signs to accommodate the maximum demand for such signage at any one time, and allow that amount of temporary signs
  - Year round, more sign clutter
  - Safer legally? Not if the regulation so loose that the governmental purpose is no longer advanced
- Provide a base allotment of signs, and additional signs in relation to activities or events
  - Less year round sign clutter
  - More narrowly tailored, but the distinctions in the code could be seen as a proxy for content-based regulation, making it more vulnerable to challenge?

Problems:

- Scope—How to define “Sign” in a way that is not content based? Typical exclusions in many sign codes:
  - Murals or art
    - No text
    - No more than certain square footage or height of letters as text
    - Logos
  - Holiday decorations
  - Governmental signs
  - Traffic Control Devices
  - Merchandise visible through a shop window
  - Flags
  - Signs not visible from a public place
- Can you sever the definition of sign? Unlikely. Can you sever an exception from it?

Sample Approach:

- Retain exclusions from the definition of sign
- Define government signs and Traffic Control Devices as signs, but specifically authorize them in all districts
  - Potential implications for city's proprietary rights to develop its own property under state law
  - Allows sign abuse by other governments with activities in your jurisdiction
- Allow art as a sign, with size and district limits
  - The sizes may not make sense in all situations
  - By regulating, implicating core ideological speech
- Each exception from regulation may undermine the justification to regulate

Problems:

- 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
  - Non-commercial – *Ladue* requires allowance of protest signs on residential lots
  - Commercial – *Linmark* requires allowance of real estate signs on residential lots

Sample approach – additional signs based on time, without specifying that they must be used for the event triggering the timing

- 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: [x] square feet per parcel, in a residentially-zoned area, with a limit on the size of signs and perhaps with spacing of signs from one another
- All properties get additional noncommercial signs at certain times, such as before an election or tied to issuance of special event permit

Sample approach – suspend enforcement based on timing

- 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: [x] square feet per parcel, in a residentially-zoned area, with a limit on the size of signs, and perhaps the spacing of signs from one another
- For particular periods of times (such as before an election), all size and number restrictions on noncommercial temporary signs are suspended

Problems:

Regulating commercial signs differently from noncommercial signs defines the appearance of the community. Still allowed after *Reed*? Not required to meet strict scrutiny?

- 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

Sample approach – commercial can be regulated to meet intermediate scrutiny if noncommercial always treated as onsite

- Noncommercial speech should always be considered as the onsite speech of the property owner, so that offsite sign bans do not inadvertantly 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 of billboard regulations. Likely, 6 of the *Reed* justices continue to support.
- *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)

Problems:

- Allowing extra signage for certain land uses or activities without having to increase the overall allotment of signs year-round. A type of speaker-based regulation?
- Separate from zoning district regulations, which are clearly permissible

Sample approaches – additional signs based on activity or use on the site, without specifying how the additional signs are used for content

- Allow an extra sign on property that is currently for sale or rent, or within the two weeks following issuance of a new occupational license (real estate or grand opening signs)
- Allow an extra sign of the proper dimensions for a lot that includes a drive-through window, or a gas station, or a theater (drive thru, gas station price, and theater signs)
- Allowing additional sign when special event permit is active for property (special event signs)
- **Key:** not requiring that the additional signage be used for the purpose the sign opportunity is designed for, or to communicate only the content related to that opportunity. Or can you do that if it is a commercial message?

Problems:

- What about the appearance of our rights of way and public realm? Is there an enhanced role for spacing between signs to address clutter?

Sample approaches – protect public property with a ban or with limits

- 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. Get a public safety affidavit? National studies.
  - 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 you cannot control the content. Could be hate speech. Is it really worth it?

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)
- IMLA working group on a model sign code
- Alan C. Weinstein and Brian J. Connolly, "Sign Regulation after *Reed*: Suggestions for Coping with Legal Uncertainty," to be published in *The Urban Lawyer*, Quarterly Journal of the ABA Section of State & Local Government Law, 2015

Questions?

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