Regulating Signs after *Austin v. Reagan*

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Outline

A New Supreme Court
- Thomas loses control over signs
- Three new voices

Austin v. Reagan
- *Reed* reigned in
- Decades of sign law reaffirmed

Shurtleff v. City of Boston
- Government speech doctrine reaffirmed
- Importance for sign codes

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Reed v. Town of Gilbert (US 2015)

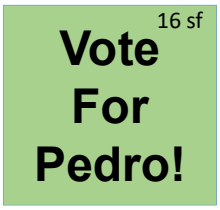
Ideological



20 sf

Where?	How long?
Anywhere	As long as you want

Political





Where?	How long?
Residential (16 sf) NR / public / ROW (32)	60 before primary 15 after general

Temporary Directional Sign Relating to a



6 sf

Where?	How long?
Private or public land 4 at a time	12 hours before 1 hour after

Mark White, White & Smith

A New US Supreme Court on *Reed*

The six-justice *Reed* majority included two members who are gone, Scalia and Kennedy. Of the majority, only Roberts and Thomas failed to join in the Alito concurrence which moderated the majority and blessed off-premise sign regulation.

So . . . What does this mean for local government land use regulation and activities with First Amendment implications?

April/May 2022: Two new cases, one on signs and other on government speech

- Traditional approaches that still work
- What is new

First Amendment Attacks on Sign Regulation

Typical attacks focus on the overall validity of the regulation and do not focus on exactly what affects the applicant

- Sign Code is content-based and favors commercial speech over noncommercial speech in violation of the Constitution, and favors certain types of noncommercial speech over others
- Regulation constitutes "prior restraint" because it gives city officials no deadline to decide, and gives officials unbridled discretion
- Flaws pervade the entire regulation, so that it is impossible to sever what is invalid and enforce the rest of it. Therefore, the entire sign code is invalid.

First Amendment Attacks on Sign Regulation

Defense considerations

- Do not waive any threshold defenses, such as ripeness and standing, as many cases were won without having to get into the merits of the constitutional challenge

Protecting your Code

- Severability: if one part is unconstitutional, the rest shall be unaffected by it. Explicit as to intent even if the result would be to allow less speech, and specifically preserving prohibited sign list
- Substitution clause: Non-commercial speech allowed without distinctions (political, religious, informational, etc.) and allowed to same extent as commercial speech

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The First Amendment and Sign Regulation

- Commercial speech is protected by intermediate scrutiny, requiring regulation to balance the speech rights against other substantial public interests. *Central Hudson Gas and Electric v. Public Service Commission*, 447 U.S. 557 (1980) (must seek to implement a substantial governmental interest, and directly advance that interest).
- To meet this standard, must have a statement of purpose establishing government's substantial interests that justify the regulation
  - aesthetics and traffic safety are substantial
  - *Reed* assumes without deciding that both are compelling

The First Amendment and Sign Regulation

- Where is ideological or non-commercial speech located? Should always be treated as on-premise, because either placed by owner or owner allows it to remain. Therefore, should never be affected by an off-premise sign ban. *Southlake Property Assocs. v. Morrow*, 112 F.3d 1114 (11th Cir. 1997). **Compare *Austin***.
- What is content-based regulation of speech? Do you have to look at the message to determine whether the rule applies? If so, may be content-based. *Reed v. Town of Gilbert, AZ* – "need to read"

  Examples: "for sale/for lease," "directional," "campaign," "election," "identification," "grand opening," or "stop" signs.

The First Amendment and Sign Regulation

Regulation of billboards/off-premise signs

- OK to ban, but watch out for exceptions that undermine the prohibition. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).
- Cannot require amortization or alteration, or city will be required to pay full compensation to the owner. See Section 70.20(2) and (9), F.S.
- State regulation along interstate and federal-aid primary highways, pursuant to Highway Beautification Act. See Section 479.111, F.S.

  "Allowed in commercial-zoned and industrial-zoned areas, or commercial-unzoned and industrial-unzoned areas and within 660 feet of the nearest edge of the right-of-way, subject to the requirements set forth in the agreement between the state and the United States Department of Transportation."

The Austin Perspective on Austin v. Reagan

Erika Lopez
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Austin's Prohibition of New Off-Premise Signs

- Austin prohibited new off-premise signs beginning in 1983.
  - Existing off-premise signs are non-conforming signs.
    - Blanket prohibition
    - Any "new" off-premise signs were existing prior to annexation
  - May not increase the degree of nonconformity, change the method of technology used to convey a message, or increase the sign's illumination.
- Austin's amendments since 1983.
  - Allowed to relocate some non-conforming signs. (2008)
  - *Reed*-focused amendments that did not impact the City's off-premise sign/non-conforming sign requirements. (Aug. 2017)

Austin vs City of Reagan: Legal Issue

Is the distinction between on- and off-premise signs a facially unconstitutional content-based regulation?

- On-premise
- Off-premise

City of Austin v. Reagan Nat'l Advertising (U.S. 2022)



Mark White, White & Smith

Introduction – The litigation

- Reagan wanted to digitize some of its off-premise signs.
- Alleged that the distinction between on- and off-premise signs is an unconstitutional content-based restriction of speech (facially and as applied).
- Reagan sought a declaration that City's regulations are unconstitutional, and Reagan may convert its off-premise signs to digital.

Keeping Austin Weird- Factual Circumstances to Consider

- Definition of off-premise signs is not limited to commercial speech
- Decision was based on older sign code (pre-August 2017 amendments)
- Austin's sign code has limited code regulations regarding electronic signs
  - Other regulations apply to on-premise signs such as height and number

The Fifth Circuit's Decision In *Reagan*: Reversed the Trial Court

- Held that the City's on-premise/off-premise distinction is content-based under *Reed v. Town of Gilbert*.
- Reasoned that if one must read the sign to determine whether the sign is "off-premises" then it is a content-based inquiry and subject to strict scrutiny.
- Held that since on-premise/off-premise distinction applied to both commercial and noncommercial messages, strict scrutiny applies.
- Ruled that traffic safety and aesthetics are not compelling interests.
- Relied on *Thomas v. Bright* and rejected DC case.

Law During *Reagan* litigation

- Conflict between the Circuits on whether the distinction between off-premise and on-premise is considered content-based.
  - Yes: Fifth and Sixth Circuit
  - No: Third, Ninth and DC Circuit

City of Austin v. Reagan Majority Opinion

- Written by Sotomayer (Breyer and Alito concur in result)
  - Rejected the "Need to Read" Test would automatically render a sign regulation as content-based
    - Reasoned that "too extreme" an interpretation
  - Long history of state and federal jurisprudence upholding off-premise sign regulations
  - Austin's regulations only require reading the message to determine whether it directs readers to the property or other location– "agnostic as to content"
    - Does not single out topic or subject manner for differential treatment
    - Regulations are based on sign's location
    - Similar to ordinary time, place, or manner restrictions

City of Austin v. Reagan Majority Opinion

- Distinction between on-premise and off-premise signs are facially content neutral therefore intermediate scrutiny applies
- However, additional scrutiny will be required if regulation has impermissible content-based purpose or justification
  - Using a "function or purpose" proxy that achieves the same result will be considered facially content-based
- Court remanded the to the Fifth Circuit
  - To determine if there is evidence of impermissible purpose or justification; and
  - Whether the regulation is narrowly tailored.

City of Austin v. Reagan: Breyer Concurrence

- Rejects formalistic First Amendment framework approach in *Reed*
  - Expresses concerns about the consequence of rigidly applying strict scrutiny on content-based regulations
  - Harm that may be caused
    - Substitute judicial judgment instead of democratic decision making
    - Weaken future strict scrutiny analysis
    - Creation of a patchwork of exceptions to distinguish between reasonable and unreasonable content-based regulations that may become overly complex or unworkable
- Raises the possibility that strict scrutiny may not be appropriate for some content-based regulations that do no suppress ideas

City of Austin v. Reagan: Breyer Concurrence

- Proposes an alternative framework of evaluating content-based regulations
  - Instead of using a formalistic approach suggests that courts weigh the First Amendment harms of regulation against the regulatory objective the regulation serves
  - Factors to consider in this analysis include:
    - Seriousness of harm to speech,
    - Importance of countervailing objectives,
    - Extent law will achieve objectives, and
    - Whether less restrictive ways to achieve objective.

City of Austin v. Reagan: Alito Concurrence

- Austin's regulation is facially constitutional under "overbreadth" doctrine where a law restricting speech is unconstitutional if "a substantial number of its application are unconstitutional, judged in relation to the statue's plainly legitimate sweep"
- Distinction between digitized and non-digitized sign not based on content topic or subject matter
- Raised concerns about impact of the challenged regulation on non-commercial speech
  - Substitution clause

City of Austin v. Reagan: Thomas/Gorsuch/Barret dissent

- Defends the standard set in *Reed*
  - Majority misinterprets *Reed*'s clear and firm rule for content-based restrictions and replaces with it incoherent and malleable standard
    - Characterizes majority's reasoning as holding that a regulation based on a sufficiently general or broad category of communicative content is not actually content based
  - If restriction depends on sign's communicative intent, then restriction is content-based
  - Defends the "need to read" test as being a strong indicator that regulation is content based
    - Rejected majority's interpretation of Court's precedent and reliance on historical support

Court cases applying Supreme Court *City of Austin v. Reagan* decision

- *GEFT Outdoor, LLC v. City of Westfield*, 39 F.4th 821, 822 (7th Cir. 2022)
  - District court relied on precedent set by the Fifth Circuit *Reagan* opinion (2020) and concluded that majority of city's ordinance regulated based on content and therefore
  - Remanded the case so the ordinance can be reviewed under the intermediate scrutiny standard
- *Norton Outdoor Advert., Inc. v. Vill. of St. Bernard*, No. 1:20-CV-350, 2022 WL 2176339, at *1 (S.D. Ohio June 16, 2022)
  - Challenged ordinance banned off-premise variable messages
  - Court recognized that there was there a different esthetic and safety "harm" caused by variable message signs than static signs

Reagan's Supplemental Fifth Circuit Briefing

- Reframes the scope of the issue to ban on *digitization* of off-premise signs
- Argues Austin's ban on digitization of off-premise signs does not survive intermediate scrutiny
  - Cited justification does not support differential treatment
    - Prohibiting digitization of off-premise sign does not advance safety or aesthetics since on-premise signs are allowed to digitize
    - *City of Cincinnati v. Discovery Network*
  - Distinguishes from *Metromedia*
    - Argues this is not factually similar since Austin's ban is on digitizing *existing* off-premise signs and not adding any new off-premise signs

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Reagan's Supplemental Fifth Circuit Briefing

- *City of Cincinnati v. Discovery Network* 507 U.S. 410 (1993)
  - Challenged ordinance prohibited newsracks for "commercial handbills" on public property but allowed newsracks that had newspapers
  - City had the burden to establish a "reasonable fit" between its legitimate interests in safety and esthetics and the regulation
    - The number of newsracks dispensing commercial handbills was substantially less than the number of newsracks allowed
- Argues that City of Austin failed to provide evidence as to why digitized off-premise signs presents a greater harm than digitized on-premise signs

City of Austin's Supplemental Briefing

- Reagan waived the argument the district court erred by holding that on and off-premise distinction satisfied intermediate scrutiny
- Reagan is now raising a different legal issue by emphasizing the prohibition on digitizing off-premise signs
  - Practical result of a nonconforming use
  - Only code provision challenged was the "off-premise" definition
  - New issue should not be raised in supplemental briefing

City of Austin's Supplemental Briefing

- Argues the challenged regulation of prohibiting new off-premise signs satisfies intermediate scrutiny
  - Government interests are traffic safety and aesthetics
  - Prohibition on new off-premise signs is not substantially broader then necessary
    - Regulation targets the harm of off-premise signs
  - Leaves ample alternative channels of communication
    - Does not eliminate existing off-premise signs

Fifth Circuit Oral Argument

- Oral arguments occurred on September 12th
- Argument focused on "digitization" of signs
  - First instance of this issue being discussed before the Court
  - Court had concerns that the record did not reflect any evidence regarding digital signs
  - Weighed whether it would be appropriate to remand the case back to the district court

Lessons from Fifth Circuit

- Intermediate scrutiny analysis is intact
- Question raised about potential government interest in reducing visual clutter and minimizing existing signs
- Importance of *City of Cincinnati v. Discovery Network*
  - Concern about the proliferation of on-premise digital signs
  - Questions about the number of on-premise digital signs vs. the number of off-premise signs that would be converted
  - Raises question about whether regulation is narrowly tailored to address stated justification

Does the Traditional Approach to Sign Regulation Still Work?

Yes!

Austin v. Reagan

Austin's lessons

- Off-premise sign regulation remains valid, if you avoid sweeping noncommercial speech into it. *Southlake* already handles that issue in the Eleventh Circuit.
- Regulation of technology and location do not require enhanced scrutiny. Commercial speech continues to be subject only to intermediate scrutiny.
- Some classifications using function/purpose ok? Revival of solicitation regulations?
- Not addressed but still key: **Distinctions among different kinds of noncommercial speech will always be high risk**. Limitation of discretion in administration and tight procedures remain vital. Use substitution and severability clauses. Draft carefully, because a classification that is otherwise acceptable can be used in a way that will trigger content-based scrutiny.

Austin v. Reagan

- Notably missing from all opinions – any reference to a substitution clause. Having one would solve the concerns of Alito and Thomas for mistreatment of noncommercial speech.
- Drafting, drafting, drafting
  - Majority attempts to break away from *Reed* formalism.
  - But four justices are still gunning for your drafting missteps
    - Alito recognizes Austin revised its off-premise definition to make it apply to commercial speech. He offered an interpretation of how the wording might be unsuccessful in limiting the scope of off-premise signs to commercial signs.
    - Thomas emphasized that categories that normally might not turn on the communicative content of signs cannot be excluded from the content-based analysis, because they could be drafted to turn on content.

Does the Traditional Approach to Government Speech and the Public Forum Still Work?

Yes!

New Decision:

Shurtloff v. City of Boston - May 2, 2022



Implications of Government Speech for Sign Regulation

- Signs at government properties and facilities
- Traffic control signs
- Address signs
- Warning signs
- Posted No Trespassing
- Notice of hearings
- Notice of legal process

Government Speech and the Public Forum

Post *Reed* Government Speech Doctrine

- **The government does not have First Amendment rights. Free speech clause does not regulate government speech.**

Direct government speech	Speech mandated by government
Private speech in a government speech program	

- **BUT: if the government creates a public forum for private speech, it cannot control content.** Time, place and manner only. (Limited forum – neutral controls within the limits)

Government Speech and the Public Forum

Post *Reed* Government Speech Doctrine

- *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U. S. 200 (2015) (same day as *Reed*): Personalized license plate program is a government speech program and therefore the state could control content of the plate. While the personalized message is private, it is only possible as part of a government-issued ID.
- *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009): Government can decide what to say – and what not to say, so it could reject a proposed private monument to be placed in a public park. Only those directly related to the City's history or donated by groups with longstanding community ties.
- *Mech v. Sch. Bd. of Palm Beach Cnty.*, 806 F.3d 1070, 1074 (11th Cir. 2015), rev. den.: School Board can control the content of the banner **signs** for boosters on a football field.

Shurtleff v. City of Boston







Shurtleff v. City of Boston

So – is it a government speech program where the City can control content? Or has the City created a public forum on its flagpole, and is it therefore limited to TPM regulations?

District Court and First Circuit: It is a government speech program

- Breyer: The Constitution therefore relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks.

US: Nope – the City created a public forum. Must allow, but can disavow the message. And it can remove the public forum if it wants, by exercising control over the flags.

Shurtleff v. City of Boston

Analysis

- Boundary between government speech and private expression can blur when City invites people to participate in a program.
- How to tell? "Holistic inquiry" to determine whether the government intends to speak for itself or, rather, to regulate private expression
  - the history of the expression at issue;
  - the public's likely perception as to who (the government or a private person) is speaking;
  - and the extent to which the government has actively shaped or controlled the expression.
- In *Summum* (monument) and *Walker* (license plate) (and *Mech* in 11th Cir.), the S. Ct. analysis found a government speech program.

Shurtleff v. City of Boston

Analysis

- City flag program is more like trademark registration – a public forum
  - *Matal v. Tam* - trademarking words or symbols generated by private registrants did not amount to government speech because the Patent and Trademark Office did not exercise sufficient control over the nature and content of those marks to convey a governmental message. Therefore, could not refuse to register a racial slur (Asian band called the Slants).
- History of flag flying as government speech and the public perception of these flags in relation to the ceremonies favor the City.
- But the City's lack of meaningful involvement in selection of the flags, beyond the bare minimum TPM, and failure to shape the message, is fatal. Once it is private speech, the rejection of this flag **clearly** was unconstitutional:
  - When the government does not speak for itself, it may not exclude private speech based on "religious viewpoint"; doing so "constitutes impermissible viewpoint discrimination."
- Breyer for the majority – **all** concurred in the result.

Shurtleff v. City of Boston

Alito, Thomas, Gorsuch

- Should be a fact-bound totality-of-the-circumstances inquiry that relies on any factors helpful in evaluating whether the speech was government or private speech.
- Real test – identity of the speaker. Is the government speaking? Or is it regulating private speech?
  - "courts must be very careful when a government claims that speech by one or more private speakers is actually government speech. When that occurs, it can be difficult to tell whether the government is using the doctrine "as a subterfuge for favoring certain private speakers over others based on viewpoint" and the government-speech doctrine becomes "susceptible to dangerous misuse."

Shurtleff v. City of Boston

Alito's test

- Government speech occurs if—but only if—a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech.
- It must literally be the purposeful communication of a governmentally determined message by a person acting within the scope of their power to speak for a government.
  - Can deputize private persons who volunteer to speak on its behalf
  - Can adopt a medium of expression created by a private party (e.g. a monument) and use it to express a government message
- Government must not rely on a means that abridges the speech of persons acting in a private capacity. A financial subsidy or other governmental facilitation of private speech (e.g., trademark registration) is not enough.

Questions?

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