



Content-Neutral Sign Codes *After Reed and Austin*

Today's Speakers



Susan Trevarthen, Partner
Weiss Serota

As a Florida Bar Board Certified attorney in City, County and Local Government Law and Fellow of the American Institute of Certified Planners, Susan has an in-depth and specialized knowledge of the challenges faced by local government clients in the complex areas of land use, planning and zoning. She leads the Firm's Public Land Use and Zoning Practice, and also acts as lead municipal attorney for two small coastal communities in Miami-Dade and Broward Counties.



Mark White, Partner
White & Smith, LLC

Mark is an attorney and urban planner whose practice emphasizes zoning and code drafting, from conventional to form-based codes. He has completed over 150 development code updates, Zoning regulations and comprehensive plan/smart growth implementation projects for local governments in over 36 states. He has published over 35 books and articles on planning issues including the American Planning Association's Model development code.



David Hickey
International Sign Association

David is Vice President of Advocacy for the International Sign Association (ISA), where he oversees and coordinates ISA's legislative, grassroots and legal efforts – including ISA's two amicus briefs to the U.S. Supreme Court for the *Austin v. Reagan* case. Since 2011, Mr. Hickey and his ISA Advocacy team have educated nearly 8,000 local government officials, and they have helped hundreds of jurisdictions across the United States develop effective and enforceable sign regulations.

Today's Presentation

- I. Signs and the First Amendment
- II. Reed v. Town of Gilbert*
- II. Unresolved Issues
- IV. Limit Your Community's Legal Exposure

Signs and the First Amendment

Planning Challenges

“Sign Regulation is one of the more vexing tasks that a local government addresses on a routine basis.”*

The challenge when regulating signs is to balance:

- Traffic safety
- Aesthetics
- Economic development
- Business and institutional needs
- Neighborhood groups

Myriad of legal issues – esp. *Reed v. Town of Gilbert (2015)*



*PAS QuickNotes No. 18

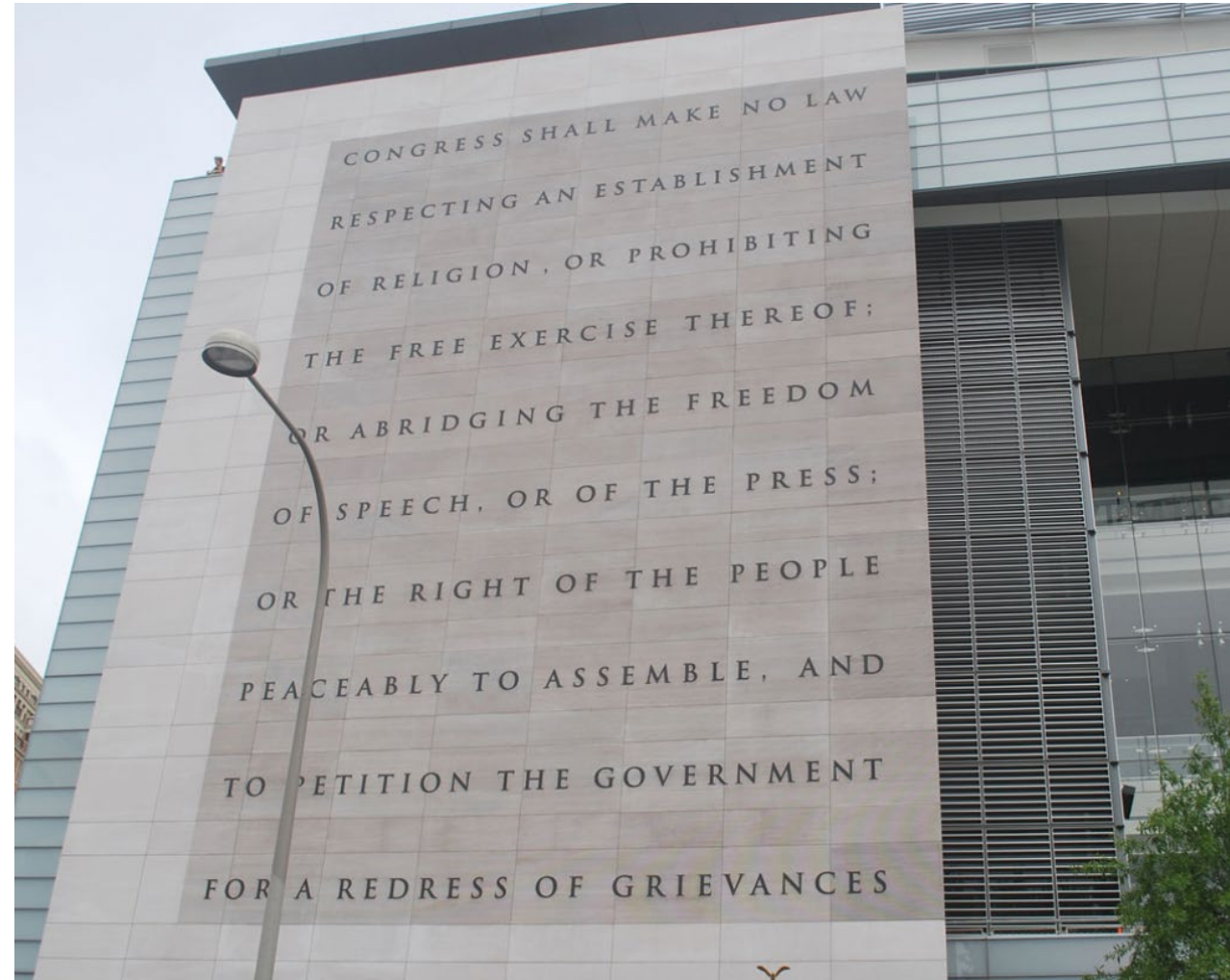
Sign Regulations and the First Amendment

1976: U.S. Supreme Court grants First Amendment protection to **commercial speech**

Commercial speech regulations are reviewed under *intermediate scrutiny*

Very important to have a **statement of purpose** establishing community's interests that justify the regulation (i.e., aesthetics or traffic safety)

Direct, content-based regulation of **political** or **ideological speech** is strictly scrutinized and rarely upheld.



Land Use vs. Sign Regulations

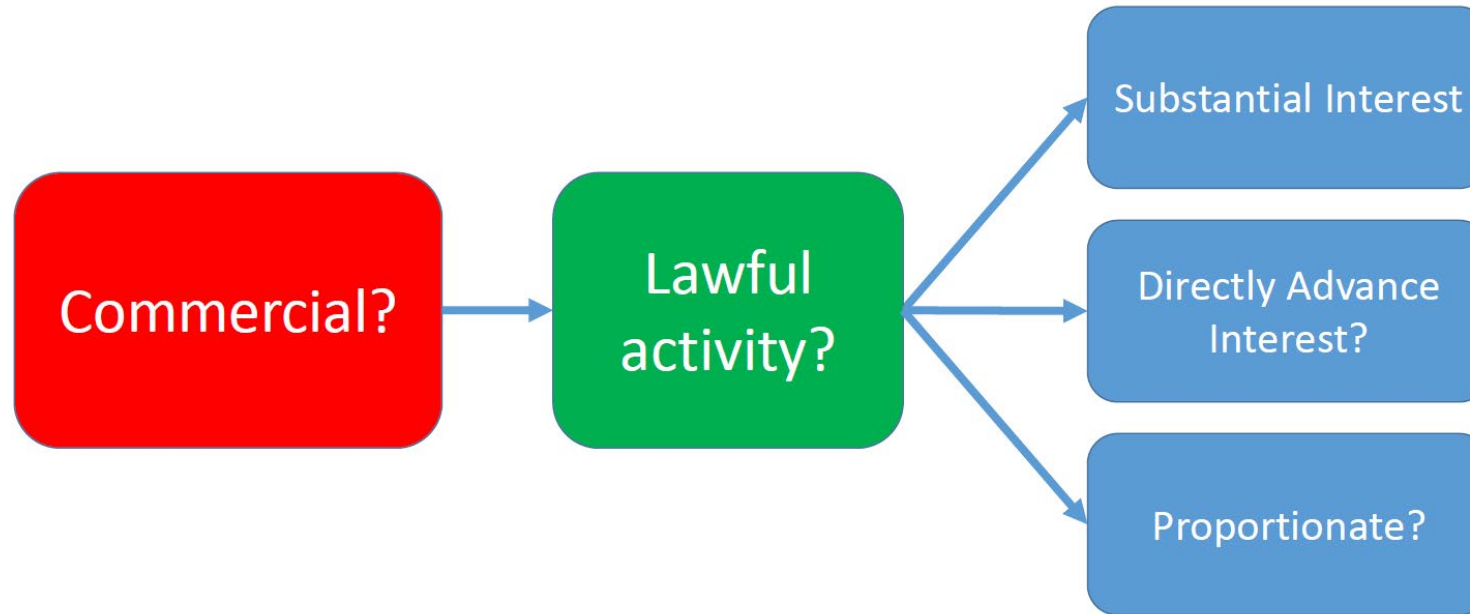
Use v. Sign Regulations

	Use Regulation	Sign Regulation
Constitutional issues	Due process, equal protection, takings (property rights)	First Amendment (free speech)
Government interest	Legitimate	Substantial / Compelling
Nexus	Rational basis	Intermediate “with bite” / strict
Scope	Reasonable (legislator’s choice)	Directly advance / no further than necessary Narrowly tailored
Scrutiny	Deferential	Intermediate / Strict



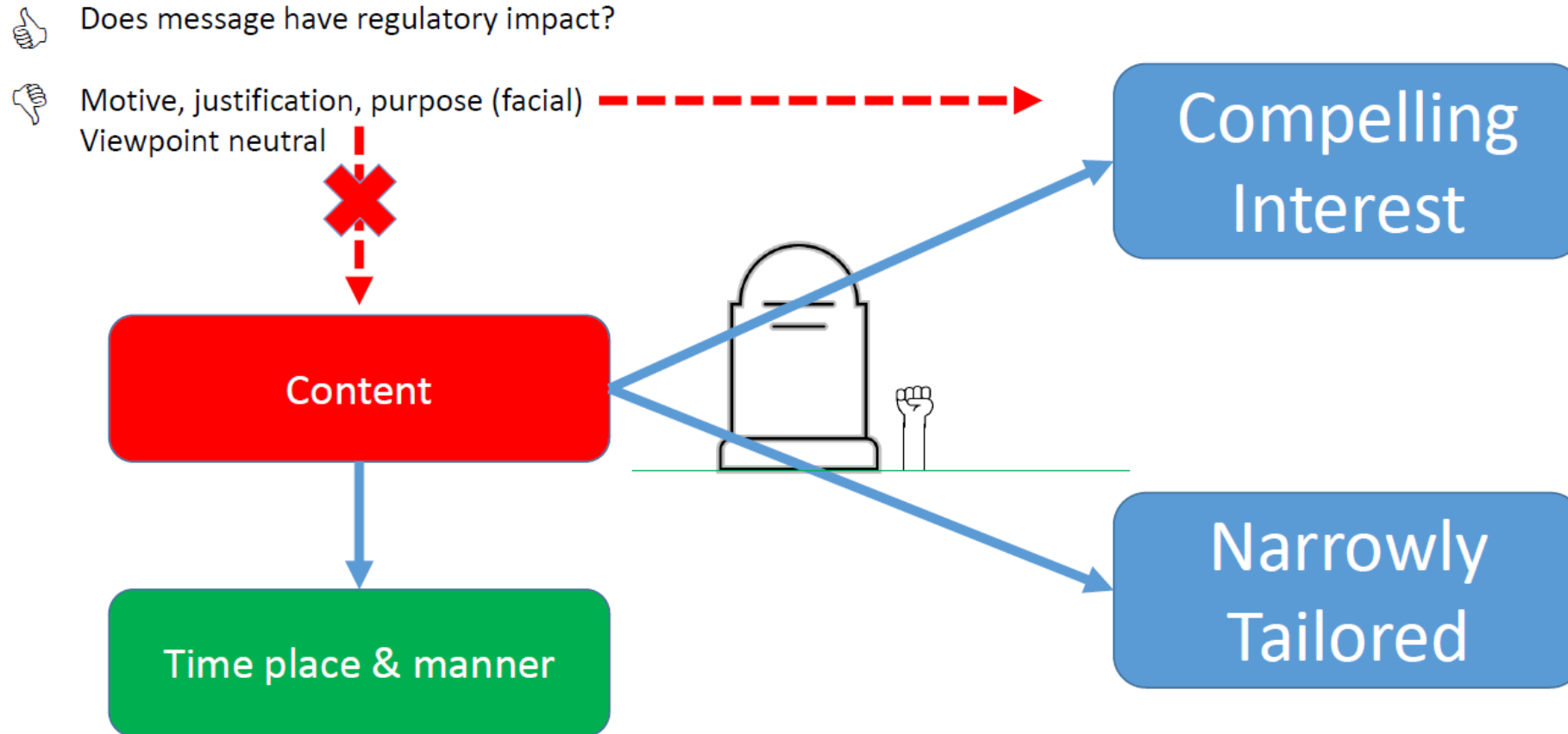
Mark White, White & Smith

What Is “Intermediate Scrutiny”?



Use the code’s statement of purpose to establish community’s interests that justify the regulation, provide as much rationale as possible (studies, surveys, etc)

What is “Strict Scrutiny”?



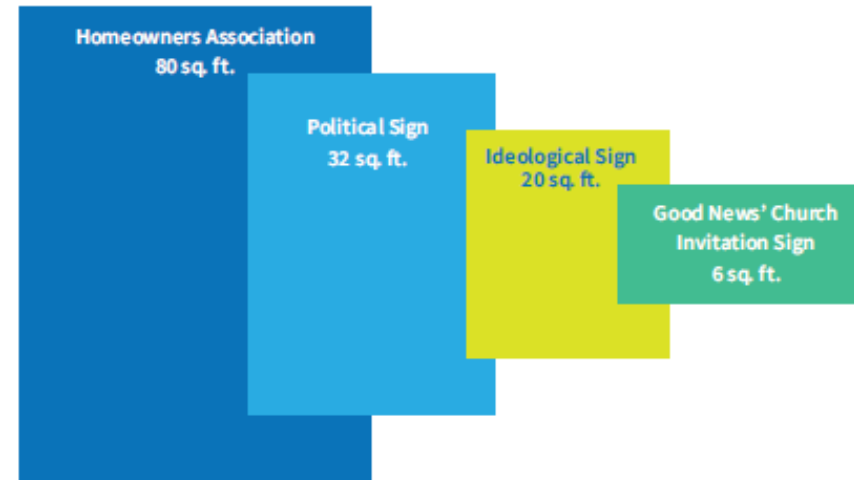
U.S. Supreme Court Decisions

- *Linmark Associates v. Township of Willingboro* (1977)
- *Metromedia v. City of San Diego* (1981)
- *City Council of Los Angeles v. Taxpayers for Vincent* (1984)
- *City of Ladue v. Gilleo* (1994)

***Reed v. Town of Gilbert* (2015)**

Reed v. Town of Gilbert

Reed v. Town of Gilbert (2015)



Display Time Before	Event	Display Time After
← UNLIMITED	Ideological Sign	UNLIMITED →
← 4 1/2 MONTHS	Election	→ 15 DAYS
← 30 DAYS	HOA Event	→ 48 HOURS
16 HOURS ←	Real Estate Sale	→ 36 HOURS
12 HOURS ←	Religious Event	→ 1 HOUR

Reed v. Town of Gilbert (2015)

- Town of Gilbert's sign regulation was content-based and did not survive *strict scrutiny* because the regulation was not narrowly-tailored to further a compelling government interest.
- Content-based "on its face" means it faces *strict scrutiny*
- If you need to "read the sign to know how to regulate it" then that's trouble

Administration and Enforcement After *Reed*

Business Sign



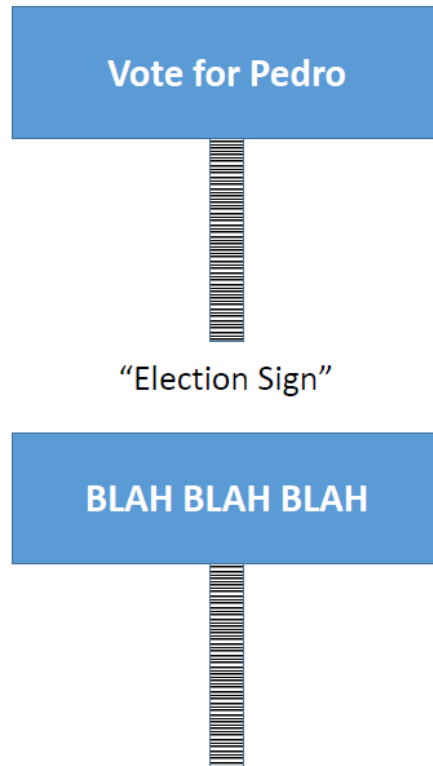
Read the Sign

Monument Sign



***Structure, location, size,
materials, design, etc***

What is “Content Based”?



Distinguishes on basis of

- Idea Expressed / Viewpoint (“Vote for Sam”)
- Topic or Message (“Political Signs”)

Facially neutral but

- Cannot be justified without reference to content

Obvious	Subtle
Subject matter	Function or Purpose

Tips to Comply with *Reed*

Three (3) broad sign categories based on their *physical characteristics*. These typically include:



Freestanding signs



Attached signs



Incidental signs

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



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

- 1) *Reed's* “Need to Read” Test Does Not Apply to Off-Premise Sign Regulations.
- 2) Off-Premise Distinctions Should Never Regulate Non-Commercial Messages.
- 3) Limiting Off-Premise Regulations to Commercial Messages is Subject to Intermediate Scrutiny

7th and 5th U.S. Circuit Court decisions (2023)

Non-Commercial vs. Commercial Speech

There *was* a growing question about whether non-commercial/commercial speech distinction is content-based and entitled to strict scrutiny, but...

The *Austin* Court affirmed lower level of protection for commercial speech

After *Reed* and *Austin*

Reed and *Austin* confirmed **“Time, Place and Manner”** sign regulations, including:

- Locations
- Maximum Sign Size
- Materials
- Lighting
- Moving Parts
- Portability
- Banning Or Regulating Signs in the Public Right-Of-Way
- Distinguishing Freestanding and Attached Signs
- Distinguishing Fixed versus Changeable Electronic Signs
- Regulating Signs Differently by Zoning District
- Total Number of Signs Allowed Per Frontage or Area
- Time Restrictions on Advertising a One-Time Event
- Governmental Signs
- On-Premise Signs Distinguished from Off-Premise Signs (Billboards)

Unresolved Issues

Government Speech

High school athletic field booster banners

- *Mech v. Sch. Bd. of Palm Beach County* (2016) – Math tutoring
- Another Palm Beach School controversy, this time involving satanic banners (2019)

Flags

- *Shurtleff v. City of Boston* (2022) – religious flag

Cases also address license plates, monuments in parks, and visitor center pamphlets

Murals: Art, Signs...or Both?

- Art is **speech**
- Restrict text not the **message**
- Consider mural subcategories
- based on **physical design**
- Consider a **review process**



Murals: *Wag More Dogs v. Arlington County* (4th Circ. 2012)



Murals: *Kersten v. City of Mandan* (2019)



Murals: *Young, et al. Town of Conway*(2023)

Donut painting sparks free speech debate for bakery, town

By KATHY McCORMACK and ROBERT F. BUKATY April 18, 2023 GMT



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RELATED TOPICS

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CONWAY, N.H. (AP) — Bakery owner Sean Young was thrilled when high school art students covered the big blank wall over his doorway last spring with a painting of the sun shining over a mountain range made of sprinkle-covered chocolate and strawberry donuts, a blueberry muffin, a cinnamon roll and other pastries.

Exemptions: *Sweet Sage Café v. Town of N. Redington Beach* (M.D. Fla. 2017)

Exemption	Content?	Compelling?	Narrowly Tailored?
National flags (Adjutant General standards)			N
Warning signs	Y	N	
Murals, statues, paintings, designs, & decorative features if no names of occupants, drawings of the business' products, identification, trademark, logo, etc.	Y		N
Holiday, seasonal, commemorative or special event decorations or signs (11/15 – 1/10)	Y	N	
Political campaign signs	Y		N

Limit Your Community's Legal Exposure

Limit Legal Exposure

Procedures are Critical

- Ambiguity and vagueness in your sign code can leave your community open to legal challenges
- Have non-discretionary standards to avoid selective enforcement
- Tailor regulation to the problem you want addressed, stay away from overbroad regulation
- Tight deadlines for every step of the process
- Clear path to judicial appeal if sought

Limit Legal Exposure

Be Flexible

- Zoning strategies and desired outcomes need to be tailored to the circumstances
- Many (most?) sign codes don't meet current law, don't borrow

When in Doubt

- Act promptly
- Be as clear, unambiguous and non-discretionary as possible
- Avoid overbreadth and under-inclusiveness
- Always focus on the land use impact or other neutral justification for sign regulation, not the content or the speaker

Limit Legal Exposure

- Every sign code should have a *substitution* clause
- Every sign code should have a *severability* clause
- State purpose/rationale in detail at start of code
- Clearly define all critical words and phrases
- Minimize exemptions to the code

Questions?

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