

Livingston County Planning Commission Lunch Series

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What Direction Is the Supreme Court Pointing With Sign Regulations

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I. Municipal Authority to Regulate Signs

- Local municipalities have the broad power to regulate for the general safety, public welfare, and health of local residents. “Public welfare” encompasses spiritual, physical, aesthetic, and monetary values. *Berman v Parker*, 348 U.S. 26, 32-33 (1954).
- Generally, the municipality's basis for such regulations must not be arbitrary and unreasonable with no relation to the public health, safety, and welfare. *Village Belle Terre v Boraas*, 416 U.S. 1, 8 (1974). In other words, the regulation should bear a “rational relationship” to a permissible objective of the municipality. *Reed v Town of Gilbert*, 404 U.S. 71 (2015).
- The courts have recognized the following legitimate purposes: public peace, health, and safety; eliminate distractions that are hazardous to motorists and pedestrians; protect the public’s ability to recognize establishments and premises; protect the natural beauty and distinctive character of a community; protect from visual chaos and clutter; and protect and enhance property values. *Metromedia, Inc. v San Diego*, 453 US 490, at 507-08 (1981).
- But when a municipality’s interest to regulate intersects with First Amendment rights, courts does not apply the rational basis test, but apply different analyses to determine whether the regulation impinges on First Amendment rights.

II. The First Amendment and “Free Speech”

- The First Amendment provides that a government may not restrict expression because of its messages, ideas, subject matter, or content—it protects “free speech.”
- The courts have wrestled with what qualifies as protected speech, that is, free speech, and unprotected speech. Even within protected speech, the courts have created separate categories, such as speech that is valuable in the “marketplace of ideas,” commercial speech, “adult” speech, and unprotected speech.
- Each category of speech regulated by an ordinance receives a different level of scrutiny from the courts.
- Courts review content-based regulations with “strict scrutiny.”
- Content-neutral regulations (time, place, and manner restrictions) are reviewed with intermediate scrutiny: the regulation must advance a significant or substantial government interest; must be narrowly tailored; and must leave available ample alternative channels for information to be communicated (cannot exclude message).
- Regulations of commercial speech have a specialized test that is a relaxed intermediate scrutiny: Speech must be lawful activity, not misleading, and there must be a substantial governmental interest being protected by the regulations, which directly advances the governmental interest asserted, and must not be more extensive than necessary to serve that interest.

III. **Strict Scrutiny of Content-Based Sign Regulations**

- Content-based regulations are those that target speech based on its communicative content.
- Regulation determined to be content-based by reference to:
 - Content based on its face.
 - Regulation that a municipality cannot justify without reference to the content of the regulated speech.
- If the regulation is deemed content-based, it is subject to strict scrutiny. The municipal ordinance will be **presumed unconstitutional** and only justified if the government proves that they are narrowly tailored to serve **compelling** state interests. *R.A.V. v St. Paul*, 505 U.S. 377, 395 (1992).
- Examples of content-based regulations: Political signs; Ideological signs; Garage Sale signs; Business Identification Banners during Street Construction; Interim Business Identification Banners; Bazaar signs; and Temporary Directional signs relating to a Qualifying Event.

IV. **Sign Regulations Before *Reed v Gilbert***

- The Supreme Court has held that governments may regulate signs. *City of Ladue v Gilleo*, 512 U.S. 43, 48 (U.S. 1994). The Court noted that “signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs.”
- In *Metromedia, Inc. v City of San Diego*, 453 U.S. 490, 507 (U.S. 1981), a majority of the Justices of the Supreme Court concluded that a government could distinguish between commercial and non-commercial speech when regulating signs.

V. **Supreme Court Applies Strict Scrutiny to Sign Ordinance in *Reed v Gilbert***

- March 2007, Pastor Clyde Reed and the Good News Presbyterian Church sued the Town of Gilbert, Arizona, in Federal District Court. Pastor Reed had been in the practice of setting up temporary directional signs for a Sunday church service. The signs were erected on Saturday mornings around town for a service the following day on Sunday morning.
- The Town of Gilbert allowed signs promoting “noncommercial” events, prayer in this case, to be displayed for no more than 12 hours before, and one hour after the event.
- The same ordinance also permitted “political” signs that support candidates or ballot measures for months before a campaign and a certain number of days after. “Ideological signs” were also permitted up to 20 square feet in size for any amount of time.

- The Federal District Court denied a motion for injunctive relief requested by Pastor Reed. This decision is appealed to the 9th Circuit Court of Appeals. The Court of Appeals upholds the denial as the ordinance was a content-neutral regulation and was a reasonable, time, place, and manner restriction. The 9th Circuit remanded the case to consider the First Amendment and equal protection claims that the Sign Code is unconstitutional for favoring some noncommercial speech over other noncommercial speech.
- The Federal District Court reviews the issues and grants summary judgment in favor of the Township. The case is appealed to the 9th Circuit again, upholding the ordinance as a content-neutral regulation.
- Pastor Reed seeks review in the U.S. Supreme Court where 1% of cases are granted for review. The Supreme Court grants review on October 21, 2013, receives briefing, and hears oral argument.
- 9 Justices agree on the judgment (i.e., the outcome that the Township's ordinance is unconstitutional). Three justices also write concurring opinions explaining their view of how the content-based analysis should apply. The majority opinion, agreed with by 6 Justices, is written by Justice Clarence Thomas.
- After 4 wins, the Town loses at the highest court on July 20, 2015 (more than seven years later).

VI. Majority Opinion in *Reed v Gilbert*

- The Majority of the Court held that the town's sign ordinance was “content based on its face” in light of the fact that the “restrictions in the Sign Code that apply to any given sign [depend] entirely on the communicative content of the sign.” Pastor Reed’s signs were “treated differently from signs conveying other types of ideas,” there was “no need to consider the government’s justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.”
- The Majority emphasized that “[a] law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech.”
- The Majority explained that “innocent motives” do not eliminate the danger of censorship, because governments may one day use content-based laws to regulate “disfavored speech.”
- Many sign ordinances are based on preserving aesthetic appeal and traffic safety. The Court assumed this as compelling interests, but found it undermined by the fact that the ordinance allowed for the proliferation of an unlimited number of larger, ideological signs that pose the same threats to aesthetics and traffic as directional signs.
- Justice Thomas even stated that a “sharply worded” ideological sign may be more likely to distract drivers than a directional sign.

- Justice Thomas provided an interest carve out, stating that some directional signs “may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety.”

VII. Concurring Opinion by Alito (joined by Kennedy and Sotomayor)

Justice Alito’s concurrence is crucial in providing some further explanation on the scope of the Court’s decision. Justice Alito explained that the majority’s opinion does not mean that municipalities are unable to enact and enforce reasonable sign regulations.

Justice Alito provides some examples of regulations that would not be content-based:

- Rules regulating the size of signs. Size limitations can vary among signs based on any content-neutral criteria.
- Rules regulating the locations in which signs may be placed. For instance, freestanding signs may be distinguished from those attached to buildings.
- Rules distinguishing between lighted and unlighted signs.
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
- Rules that distinguish between the placement of signs on private and public property.
- Rules distinguishing between the placement of signs on commercial and residential property.
- **Rules distinguishing between on-premises and off-premises signs.**
- Rules restricting the total number of signs allowed per mile of roadway.
- **Rules imposing time restrictions on signs advertising a one-time event.**
- In addition to regulation on private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. They may put up all manner of signs to promote safety, as well as direction signs and signs pointing out historic sites and scenic spots.

VIII. Signs (Michigan Precedent)

- The courts have recognized that billboards and other visual signs represent commercial speech and are afforded First Amendment protections. *Prime Media, Inc. v Brentwood*, 398 F3d 814, 818 (6th Cir 2005).
- A complete ban on digital billboards and signs is permissible. For example, the Michigan Supreme Court upheld an ordinance that banned all billboards and advertising signs, except those non-conforming uses already in existence. The court settled on the fact that the city allowed some commercial speech to remain, so there was no exclusionary zoning and

alternative channels of communication were available. *Adams Outdoor Advertising, Inc. v Holland*, 625 NW2d 377 (Mich 2001).

IX. Billboards

- Gaines Charter Township permitted billboards only on property that was adjacent to the M-6 highway, and further required that new billboards could not be located within 4,000 feet of existing billboards. A property owner that did not own property adjacent to the M-6 highway applied for a permit and was denied. The property owner claimed the ordinance violated the First Amendment and Fourteenth Amendment Equal Protection. The district court found in favor of the township, holding that the adjacency and spacing requirements were a valid time, place, and manner restriction because the content-neutral limits served to advance the traffic safety and aesthetics concerns of the township while leaving open ample alternative channels for commercial speech. The Sixth Circuit Court of Appeals agreed with the district court's findings. *Hucul Advertising v Gains Charter Tp*, 2012 WL 4052289 (ED Mich 2012).
- The City of Utica's ordinance initially provided that off-premise signs shall be limited to 250 square feet, and shall be at least 500 feet away from other signs. The city subsequently permitted a competitor of Lamar to place a larger sign on City property. Lamar sued for not being able to do the same on private property. On appeal to the federal district court, the court found in favor of Lamar, holding that the waiver violated Lamar's First Amendment rights because it was not narrowly tailored to serve the city's public health, safety, traffic, and aesthetic concerns. The Court found the amendment was too broad and infringed on Lamar's free speech rights. *Lamar Advertising v Utica*, 819 F Supp 2d 657 (ED Mich 2011).
- A company applied for and was denied a permit to erect a billboard in a commercial district, since a sign ordinance only permitted billboards in industrial districts. The company challenged the denial, pointing to where another billboard had been built in the commercial district. A Michigan federal court upheld the permit denial by a township. Evidence indicated that the other sign was in fact a pole sign, which were permitted in commercial districts. *M & S Signs, LLC v Au Sable*, Federal District Court of Michigan (2014).
- The Michigan Court of Appeals reviewed a challenge by a billboard company that the space requirement of 2,640 feet between billboards was an unconstitutional restriction on commercial speech. The court upheld the spacing requirement, finding the township's goals of enhancing aesthetic desirability and reducing hazards to life and property was a substantial government interest, and the restrictions directly advanced those interests and went no further than necessary to accomplish those objectives. *Blair Township v Grand Lamar OCI*, Michigan Court of Appeals (2011).

X. What Approach Should Municipalities Take With Sign Regulations?

- Approach regulations to pinpoint any content-based regulations.

- Apply the guidance provided by Justice Alito (but with caution).
 - Understand that content-based restrictions are not applicable to government speech.
 - Use public safety concerns as a basis to uphold content-based regulation, but do not undermine such a provision with other exemptions.
 - Determine whether simplifying the sign regulations and focusing on only physical characteristics will accomplish the municipality's concerns: size, height, width, location, fixed message, changeable copy, lightened signs, electronic signs, billboard placement, etc.
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