



Regulating Signs and Speech, 3 ½ Years After *Reed*

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General Reminders

- Every sign carries some form of First Amendment protection
- 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*

General Reminders

- Sign codes should reflect a careful balance of...
 - Community tolerance for legal risk
 - Community desire for aesthetic beautification





Legal Issues in Sign Regulation

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Sources of Sign Law

- First Amendment
- Other constitutional provisions
 - Fifth Amendment Takings Clause, Fourteenth Amendment Due Process and Equal Protection clauses
- State constitutions
- Federal Highway Beautification Act of 1965, state highway advertising acts
- State zoning enabling laws
- Local codes

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
- Public forum doctrine

Important Cases

- *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1975)
- *Linmark Associates v. Willingboro Twp.*, 431 U.S. 85 (1977)
- *Metromedia v. City of San Diego*, 453 U.S. 490 (1981)
- *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984)
- *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)
- *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)
- *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)

Content Neutrality

- 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

"Signs containing a political message are permitted in residential zoning districts."

As enforced against this sign,
is this provision viewpoint
neutral?

Content neutral?

What if another regulation
allowed *ideological* signs in
this setting?



Examples of 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

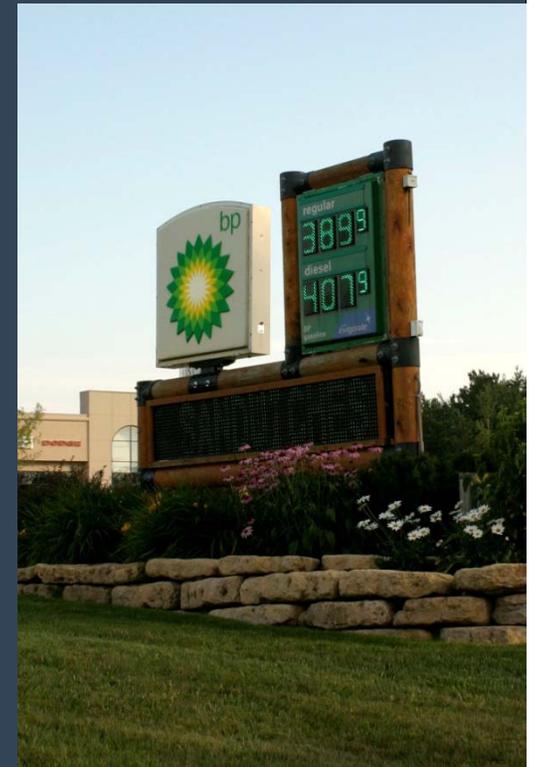
*Note: Federal protection of color of federally-registered trademarks/logos.

Content Neutrality: Implications

- 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

Commercial Speech Doctrine

- Commercial speech is reviewed differently from noncommercial speech
 - Commercial speech gained First Amendment protection in 1975
 - Content neutrality not required (but...)
- *Central Hudson* test: (1) lawful speech, (2) substantial governmental interest, (3) regulation must directly advance governmental interest, and (4) no more extensive than necessary



Prior Restraint

- Two ways sign regulations could be unconstitutional under the prior restraint doctrine:
 - Lacking procedural safeguards—sign regulations require a brief timeframe for permit application review
 - Unbridled discretion—sign regulations lack definite standards for review of permit applications

Public Forum Doctrine



- Classifications of public property
 - *Traditional public fora*: sidewalks and public parks, content neutrality required
 - *Designated public fora*: content neutrality required
 - *Limited public fora*: viewpoint neutrality required, reasonable in light of forum's purpose
 - *Nonpublic fora/nonforum*: no limitation on government regulation

Source: fairchangers.wordpress.com



Reed v. Town of Gilbert: The Case

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Reed v. Town of Gilbert: Background



Source: azcentral.com

- § 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



Reed v. Town of Gilbert: Outcome



- Distinctions between forms of noncommercial speech are content based
 - “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.”
 - “[C]ommonsense 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.”

Reed v. Town of Gilbert: Outcome



- Apply strict scrutiny
- Law was not narrowly tailored to Town's proffered interests
 - Town failed to show that limiting temporary event signs more than other temporary signs reduced visual clutter, etc.

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 on-premises and off-premises signs**”
- “Rules restricting the total **number of signs per mile** of roadway”
- 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.”
- 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.”

Source: fairchangeccs.wordpress.com



Reed v. Town of Gilbert: The Postscript

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Political Sign Regulations

- **Wagner v. City of Garfield Heights**, 675 Fed. App'x 599 (6th Cir. Jan. 13, 2017) (size restriction on political signs rejected)
- **Marin v. Town of Southeast**, 136 F. Supp. 3d 548 (S.D.N.Y. 2015) (special regulations of political signs rejected)
- **Vosse v. City of New York**, 144 F. Supp. 3d 627 (S.D.N.Y. 2015) (limitation on lighted signs more than 40 feet above sidewalk was content neutral, survived strict scrutiny)
- **Peterson v. Vill. of Downers Grove**, 150 F. Supp. 3d 910 (N.D. Ill. 2015) (restriction on painted wall signs was content neutral, survived strict scrutiny)
- **www.RicardoPacheco.com v. City of Baldwin Park**, No. 2:16-cv-09167-CAS(GJSx), 2017 WL 2962772 (C.D. Cal. Jul. 10, 2017) (finding, on motion for preliminary injunction, that allowance for additional temporary signs before election day was content based)

Time, Place, and Manner Regulations

- **Lone Star Security & Video, Inc. v. City of Los Angeles**, 827 F.3d 1192 (9th Cir. 2016) (ban on mobile advertising devices upheld against challenge that “advertising” was content based regulation of speech)
- **Luce v. Town of Campbell**, 872 F.3d 512 (7th Cir. 2017) (ban on overhead signs and banners upheld, remanded for further proceedings on restriction on signs within 100 feet of highway right-of-way)
- **Willson v. City of Bel-Nor**, 298 F. Supp. 3d 1213 (E.D. Mo. 2018) (denying a motion for preliminary injunction pertaining to one-sign limitation on yard signs)

Billboards and Off-Premises Signs

- **Contest Promotions LLC v. City & Cnty. of San Francisco**, 874 F.3d 597 (9th Cir. 2017) (upholding billboard ban, finding *Reed* does not apply to commercial speech)
- **Citizens for Free Speech, LLC v. Cnty. Of Alameda**, 114 F. Supp. 3d 952 (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.")

Billboards and Off-Premises Signs

- **Adams Outdoor Advertising Limited Partnership v. Penn. Dept. of Transp.**, No. 5:17-cv-01253, 2018 WL 822450 (E.D. Penn. Feb. 9, 2018) (denying motion to dismiss First Amendment challenge to constitutionality of Pennsylvania highway advertising act)
- **Thomas v. Schroer**, 248 F. Supp. 3d 868 (W.D. Tenn. 2017) (finding Tennessee highway advertising act content based and not the least restrictive means of achieving a compelling governmental interest)
- **Auspro Enterprises, LP v. Texas Dep't of Transp.**, 506 S.W.3d 688 (Tex. Ct. App. 2016) (Texas highway advertising law invalidated on basis of content discrimination)
- **E&J Equities, LLC v. Board of Adjustment**, 146 A.3d 623 (N.J. 2016) (challenge to New Jersey township's ban on digital billboards found content neutral, fails intermediate scrutiny because ban was not narrowly tailored)

Commercial Speech, cont'd

- **Strict Scrutiny Media, Co. v. City of Reno**, No. 3:16-CV-00734-MMD-WGC, slip op., 2017 WL 5505040 (D. Nev. Nov. 15, 2017) (denying motion to dismiss on claim that new billboard ban violates *Central Hudson*)
- **International Outdoor, Inc. v. City of Troy**, 2017 WL 2831702 (E.D. Mich. Jun. 30, 2017) (denial of variance to allow billboard upheld under *Central Hudson*)
- **Palmer v. City of Missoula**, CV-16-54-M-DLC, 2017 WL 1277460 (D. Mont. Apr. 4, 2017) (prohibition on wind signs, streamers, flags, etc. upheld against challenge under *Central Hudson*)

Commercial Speech Regulation

- **RCP Publications Inc. v. Chicago**, No. 1:2015cv11398 (N.D. Ill. Mar. 31, 2018) (ordinance banning commercial advertising material in public right-of-way was unconstitutionally vague because it lacked a definition of prohibited material)

Commercial Speech Regulation

- **Lamar Central Outdoor, LLC v. City of Los Angeles**, 199 Cal. Rptr. 3d 620 (Cal. App. 2016) (California constitution recognizes distinction between commercial and noncommercial speech, on-premises/off-premises signs)
- **GEFT Outdoor, LLC v. Consolidated City of Indianapolis and County of Marion**, 187 F. Supp. 3d 1002 (S.D. Ind. 2016) (substitution clause saved Indianapolis sign code)
- **Rzadkowolski v. Township of Metamora**, ___ F. Supp. ___, 2016 WL 2756518 (E.D. Mich. May 12, 2016) (upholding township billboard restrictions to particular districts, sizes, nonconformities BUT finding unconstitutional prior restraint due to unclear approval criteria)

Event Signs

- Act Now to Stop War and End Racism Coal. v. Dist. of Columbia, 846 F.3d 391 (D.C. Cir. 2017) (regulation requiring signs related to a specific event to be removed within 30 days of the event upheld)

Artwork

- **Cent. Radio, Inc. v. City of Norfolk**, 811 F.3d 625 (4th Cir. 2016)
 - Exemption for “works of art which in no way identify or specifically relate to a product or service.”
 - Challenge to ordinance related to anti- eminent domain mural



Source: ij.org

Architectural Review

- **Burns v. Town of Palm Beach**, No. 17-CV-81152, 2018 WL 4868710 (S.D. Fla. Jul. 13, 2018)
 - Beachfront home found not to constitute expressive conduct
 - No First Amendment analysis

Resources

Rocky Mountain Sign Law

(www.rockymountainlaw.com)

Rocky Mountain Sign Law Blog
Regulatory, Best Practices and Other First Amendment News from Colorado's Leading Land Use Law Firm

HOME ABOUT RESOURCES CONTACT Search...

Another Anti-Panhandling Ordinance Bites the Dust

By Brian J. Connolly on March 21, 2016
POSTED IN PANHANDLING & SOLICITATION

The post-Reed assault on panhandling bans continued when a federal court in Massachusetts held that the City of Worcester's ordinance prohibiting aggressive panhandling was content based and unconstitutional. In 2014, in an

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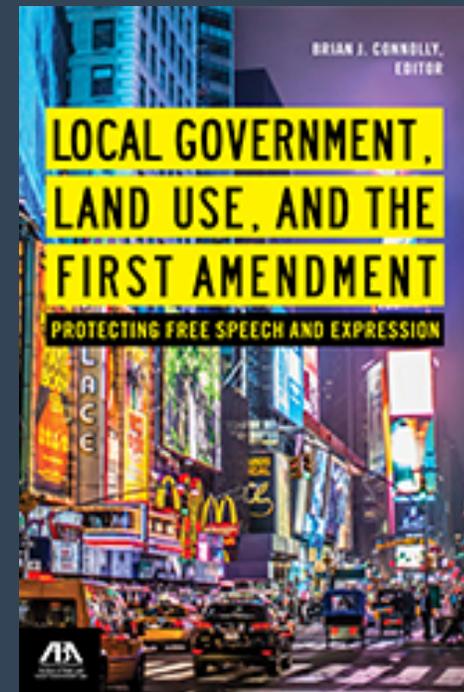
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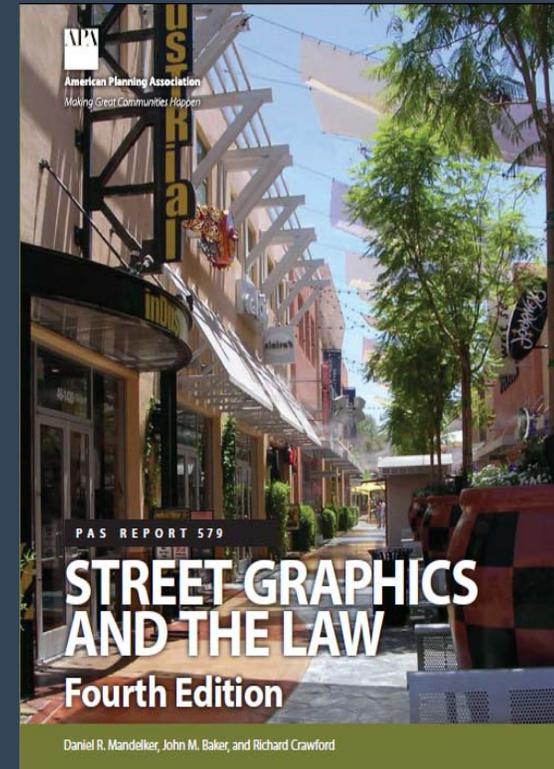
Resources

Local Government, Land Use, and the First Amendment: Protecting Free Speech and Expression (ABA 2017)



Additional Resources

- Daniel Mandelker, John Baker and Richard Crawford, *Street Graphics and the Law*, revised edition (American Planning Association, forthcoming 2015)
- Brian J. Connolly & Alan C. Weinstein, *Sign Regulation after Reed: Suggestions for Coping with Legal Uncertainty*, 47 Urb. Law. 569 (2015)



Questions and Answers



Source: Rory Bolger

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