Sign Regulations Post *Austin v. Reagan National*

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After several years of uncertainty, a recent U.S. Supreme Court decision provides municipalities greater clarity on the limits of lawful speech regulation.

Legal Principles

Municipalities regulate signs through their police power, which is shorthand for the government's authority to pass and enforce laws that promote the general welfare. This authority originates in the United States and Wisconsin Constitutions.[1] In the context of sign regulation, the police power is limited by the First Amendment, which declares in part, "Congress shall make no law … abridging the freedom of speech …." Wisconsin's version is a bit more robust and reads, "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press…."[2] The U.S. Supreme Court has understood the First Amendment to mean that a government "has no power to restrict expression because of its message, its ideas, its subject matter or its content"[3] unless the law is narrowly tailored to serve a compelling government interest.[4] This is known as "the strict scrutiny test." However, a government may regulate content-neutral aspects of speech such as time, place, and manner if the regulations support a significant government interest and "leave open ample alternative channels for communication of the information."[5]

Reed v. Town of Gilbert, a Major Setback

In 2015, the U.S. Supreme Court dealt a significant blow to municipal sign regulation authority in *Reed v. Town of Gilbert*. The town of Gilbert had adopted a comprehensive sign code prohibiting the display of outdoor signs without a permit.[6] Twenty-three categories of signs were exempt from permitting.[7] These categories were based on the signs' subject matter or installation method and included categories such as political signs, ideological signs and temporary event directional signs.[8] Beyond exempting these signs from permitting, the town code regulated these categories differently from one another – for example, ideological signs were allowed more total square footage and longer duration of placement than temporary event directional signs.[9]

Good News Community Church held services at various locations throughout and near the town and would advertise the locations to parishioners via temporary signs usually placed in the rights-of-way abutting the street.[10] The town twice cited the church for violating the sign code.[11] Clyde Reed, pastor of the church, sued the town after he wasn't able to reach an accommodation.[12] Based on earlier U.S. Supreme Court precedent, the Court of Appeals viewed the town's sign code as acceptable content-neutral regulation for three reasons. Ultimately, the Supreme Court disagreed.

The Court of Appeals first determined that the sign code was content-neutral because the code was adopted to promote content-neutral interests like aesthetics and traffic safety.[13] The Supreme Court explained however, that neutral justifications will not save a content-based regulation because "innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, [as] future government officials may one day wield such statutes to suppress disfavored speech."[14] Second, the Court of Appeals reasoned that the regulations were content-neutral because they were viewpoint neutral,[15] but the Supreme Court dismissed this rationale noting, "it is well established that the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."[16] Finally, the Supreme Court dismissed the Court of Appeals' third justification – that the code was content-neutral because it was speaker-based – as factually and legally incorrect.[17]

1. U.S. Const. pmbl. (We the People of the United States, in Order to form a more perfect Union, … [and] promote the general welfare, … do ordain and establish this Constitution for the United States of America."); WI Const. Art I, § 3 ("We, the people of Wisconsin, … in order to … promote the general welfare, do establish this Constitution ….").
2. WI Const. Art. I, § 3.
3. *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218 (2015) citing *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286 (1972).
4. *Id.* at 163 citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395, 112 S. Ct. 2538 (1992).
5. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516, 101 S. Ct. 2882 (1981).
6. *Reed* at 159.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 161.
11. *Id.*
12. *Id.*
13. *Id.* at 171.
14. *Id.* at 167.
15. *Id.* at 168.
16. *Id.*
17. *Id.* at 169.

In its conclusion, the Supreme Court reassured municipalities that not all was lost because municipalities could regulate content-neutral aspects of signs such as size, construction materials, lighting, moving parts, and portability.[18] Justice Alito, joined by Justices Kennedy and Sotomayor, suggested in his concurrence (which is not binding law) that sign codes could lawfully distinguish by location, such as public property vs. private property and commercial property vs. residential property.[19] Confusingly, Justice Alito included time restrictions on signs advertising a one-time event and regulations distinguishing between on- and off-premise placement as permissible content-neutral regulations.[20] But, if you have to read a sign to know that it relates to a one-time event or to activity occurring on-site, isn't the regulation content-based?

That very question split the federal circuit courts. The Third, Fourth and Ninth Circuits viewed on- and off-premise distinctions as lawful while the Fifth and Sixth saw them as problematic.[21] No clear guidance was afforded to those states located in the other circuits,[22] including Wisconsin, although at least one case was pending on appeal to the Seventh Circuit Court of Appeals at the time this article was written.[23]

City of Austin v. Reagan National Advertising, a Course Correction

Like tens of thousands of cities around the country, the City of Austin, Texas, enforced a sign code that distinguished between on-premises and off-premises signs, defining an "off-premises sign" as one that "advertis[es] a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site."[24] Austin prohibited construction of new off-premises signs and, while existing off-premises signs were allowed to remain, they could not be enlarged, digitized, or made brighter.[25] Reagan National owned several billboards around the city that it wanted to digitize but the city denied their permit applications.[26] Frustrated by this, Reagan National sued arguing that the city's ordinance violated Reagan National's constitutional right to free speech because it was a content-based regulation that couldn't survive a strict scrutiny analysis.[27] The Supreme Court disagreed.

According to the Court, Austin's on- and off-premise distinction was "agnostic to content"[28] because "[u]nlike the regulations at issue in Reed, [Austin's] off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines."[29] "A sign's substantive message … is irrelevant to the application of the provisions … [and] a given sign is treated differently solely based on whether it is located on the same premises as the thing being discussed or not."[30] The Austin regulations, again unlike those in *Reed*, did not treat on- and off-premise signs differently based on their subject matter. The sign's message mattered only to determine the sign's relative location. The Court noted that these regulations were, therefore, similar to an ordinary time, place or manner restriction. However, the Court did note that a content-based purpose or justification for Austin's regulations would have been problematic. The Court then remanded the matter to the lower court to determine whether Austin's sign code passes intermediate scrutiny analysis.

Conclusion

Off-premises advertising has been part of the American landscape for over 150 years.[31] However, between 2015 and 2021, municipalities were discouraged from treating billboards any differently than murals or large, on-premises signs. In light of *Austin v. Reagan National*, municipalities may once again honor the positive impact some large signs have on community identity while minimizing the harms of others. As you review your city's sign code, carefully consider any distinctions it contains. Content-based distinctions targeting particular subjects or viewpoints remain problematic. But distinctions based on physical characteristics (size, materials, digitization, brightness) or location (lot line setbacks, distance between signs, vacant or occupied property, commercial or residential property, on- and off-premise) will likely be upheld if supported by a substantial interest such as traffic safety or community aesthetics.

About the Author:

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18. *Id.* at 173.
19. *Id.* at 174-75.
20. *Id.*
21. Brief for Int'l Mun. Lawyers Assoc., *et al.* as Amici Curiae Supporting Petitioners, *City of Austin, TX v. Reagan Nat'l Adver. of Texas, Inc., et al.*, at 6, No. 20-1029, 2022 U.S. LEXIS 2098, 2022 WL 11774894, 596 U.S. ___ (U.S. Supreme Court, April 21, 2022).
22. *Id.*
23. *Adams Outdoor Adver. Ltd. P'ship v. City of Madison*, No. 17-cv-576, 2020 U.S. Dist. LEXIS 60861, 2020 WL 1689705 (U.S. Dist. W.D. Wis. 2020) (Appeal filed 4/23/2020).
24. *City of Austin, TX v. Reagan Nat'l Adver. of Texas, Inc., et al.*, No. 20-1029, slip op at 1-2, 2022 U.S. LEXIS 2098, 2022 WL 11774894, 596 U.S. ___ (U.S. Supreme Court, April 21, 2022).
25. *Id.*, slip op at 3.
26. *Id.*, slip op at 3-4.
27. *Id.*
28. *Id.*, slip op at 6.
29. *Id.*
30. *Id,* slip op at 8.
31. *Id.,* slip op at 1, citing C. Taylor & W. Chang, The History of Outdoor Advertising Regulation in the United States, 15 J. of Macromarketing 47, 48 (Spring 1995) and F. Presbrey, The History and Development of Advertising 500-501 (1929).