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Developments in Constitutional Law: The First Amendment as Applied to Signs

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The "free speech" clause of the First Amendment to the U.S. Constitution provides that: "Congress shall make no law . . . abridging the freedom of speech."[1] The legal definition of "speech" is broad and includes various mediums of communication.[2] Thus, government laws or regulations relating to signs have prompted legal challenges on First Amendment grounds.[3] This issue brief discusses the legal standards courts apply in cases involving signs and summarizes recent U.S. Supreme court decisions on this topic.

GENERAL LEGAL STANDARDS

When a law restricting constitutionally protected speech is challenged on First Amendment grounds, a court generally must first determine whether the law is content-based or content-neutral. Content-based laws "apply to particular speech because of the topic discussed or the idea or message expressed," whereas content-neutral laws restrict speech "without reference to the content of the regulated speech."

Content-based laws are presumptively unconstitutional and subject to the "strict scrutiny" test. Under the strict scrutiny test, the government must prove that the regulation is "narrowly tailored to serve compelling state interests." In contrast, content-neutral laws may be imposed if the government proves that the regulation is reasonable and "narrowly tailored to serve the government's legitimate content-neutral interests."[4] This "intermediate scrutiny" test is less burdensome than the strict scrutiny test.

RECENT U.S. SUPREME COURT DECISIONS RELATED TO SIGNS

Reed v. Town of Gilbert

In the 2015 case *Reed v. Town of Gilbert*, 576 U.S. 155, the U.S. Supreme Court applied the legal standards discussed above to a town's sign code, emphasizing that the first step in the content-neutrality analysis is to look at a law "on its face."[5] Here, the sign code defined multiple categories of signs based on the information a sign conveyed, with varying restrictions between sign categories.[6] The Court concluded that while the sign code was enacted with innocent motives and without discrimination among viewpoints, it was nevertheless content-based on its face because it targeted specific subject matter for differential treatment.[7] The Court applied the strict scrutiny test to strike down the town's sign code.

City of Austin v. Reagan Nat. Advertising of Austin, LLC

In *City of Austin v. Reagan Nat. Advertising of Austin, LLC*, 596 US (2022), the Court analyzed a City of Austin, Texas ordinance that differentiated between "on-premises" and "off-premises" signs.[8] Under the ordinance, on-premises signs could be digitized, but off-premises signs could not. Relying on the *Reed* decision, Reagan National Advertising of Austin argued that the ordinance was content-based on its face because it defined a category of signs, i.e. off-premises signs, based on their function or purpose. It argued this distinction meant the ordinance was subject to strict scrutiny.

The Court disagreed. Concluding that the ordinance was content-neutral, the Court explained that a distinction between on- and off-premises signs may be justified by "neutral, location-based" interests. While regulating speech based on its function or purpose may classify the regulation as content-based, the court clarified that this is not always the case.[9] Under the ordinance, the Court observed, an on- or off-premises sign's content "matters only to the extent that it informs the sign's relative location."[10] Unlike the sign code in *Reed,* the Court concluded, the location-based distinction in the City of Austin's ordinance does not target specific subject matter and is therefore neutral as to content.

The Court also rejected Reagan National's argument that the Court should adopt a broad rule that a government regulation "cannot be content neutral if it requires reading the sign at issue" to determine the applicable restriction. Instead, the Court explained, a regulation that requires some evaluation of the sign itself may still be content-neutral as long as it does not target "the topic discussed or the idea or message expressed," and the city ordinance only targets a sign based on location.[11]

Thus, the Court's decision in *City of Austin* clarifies that regulations that distinguish between on- and off-premises signs based on neutral interests and not specific subject-matter are considered facially content neutral. For that reason, these types of regulations are subject to intermediate scrutiny, meaning that they will be upheld as long as they are reasonable and narrowly tailored.[12]

APPLICATION IN WISCONSIN

Similar to the ordinance in *City of Austin*, Wisconsin outdoor advertising laws distinguish between on-premises and off-premises signs. While both categories of signs are subject to various restrictions, off-premises sign owners must meet a number of additional requirements. For example, a state permit is required to erect an off-premises sign if it is on private land and near a state-controlled highway. This permit is not required, however, to erect an on-premises sign.[13]

Less directly relevant to the specific topic addressed in *City of Austin,* other Wisconsin statutes reflect First Amendment protections for signs. For example, s. 12.04 of the Wisconsin statutes generally prohibits local governments from regulating the size, shape, placement or content of any sign containing a political message on residential property during an election campaign period. Furthermore, while the actions of private parties cannot be challenged under the free speech protections in the U.S. and Wisconsin Constitutions, Wisconsin law limits a condo association's ability to restrict the display of the U.S. flag and, generally, political signs.[14]

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[1] While the First Amendment refers to "Congress," it also applies to states and local governments, through the "due process" clause of the Fourteenth Amendment. [*Gitlow v. New York*, 268 U.S. 652 (1925).] Wisconsin Courts interpret Wis. Const. art. I, s. 3. as providing the same protection as the free speech clause in the First Amendment. [*State v. Douglas*, 2001 WI 47, fn. 2.]

[2] See *Cohen v. California*, 403 U.S. 15 (1971) (relating to written speech) and *Texas v. Johnson*, 491 U.S. 397 (1989) (relating to symbolic speech). Some forms of speech are not protected by the First Amendment, including obscenity and the burning of draft cards in protest of the war. [See *Roth v. United States*, 345 U.S. 476 (1957), and *United States v. O'Brien*, 391 U.S. 367 (1968).]

[3] These laws may be challenged on other legal grounds, as well. For example, in a recent Wisconsin Supreme Court case involving a claim under the "takings clause" of the U.S. and Wisconsin Constitutions, the Court reaffirmed that there is no right to visibility of private property from a public road. Therefore, a billboard owner seeking just compensation when a city bridge had obstructed the view of the billboard was unable to recover in this case. *Adams Outdoor Advertising Ltd. Partnership v. City of Madison*, 382 Wis.2d 377 (2018).

[4] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *Reed* at 163; *Ward v. Rock Against Racism*, 491 U.S. 481, 490 (1989).

[5] There are two general categories of content-based laws: (1) laws that are content based "on their face" and; (2) laws that are adopted by the government because of disagreement with the message or idea the speech conveys. [*Reed* at 164.]; *Id.* at 165.

[6] For example, the sign code was more restrictive regarding the display of temporary directional signs (promoting the time and location of a specific event) than political signs and ideological signs. [*Reed* at 160.]

[7] Laws that discriminate among viewpoints are a "more blatant" and "egregious form" of content-based laws whereby the regulation of speech is based on "the specific motivating ideology or the opinion or perspective of the speaker." [*Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. at 819, 829 (1995).]; *Reed* at 169.

[8] On-premises or on-property signs advertise activities that are conducted on the property on which a sign is located. Off-premises or off-property signs advertise activities that are not conducted on that property.

[9] The Court references *Cantwell v. Connecticut*, 310 U.S. 296 (1940), a case involving a regulation of solicitation, to illustrate that regulating speech based on its function or purpose, with no other reference to specific subject matter, may be permissible.

[10] *City of Austin v. Reagan Nat. Advertising of Austin, LLC*, 142 S.Ct 1464, 1471-72 (2022).

[11] *Id.* at 1474, citing *Reed*, 576 U.S. at 171.

[12] Note, the Court did not opine as to whether the law was enacted because of disagreement with the message, or for an otherwise impermissible purpose. Laws of this nature may be considered content based.

[13] s. Trans 201.035 (1) (a), Wis. Adm. Code.

[14] Condo associations are barred from prohibiting a unit owner from respectfully displaying the United States flag or displaying in his or her condominium a sign that supports or opposes a candidate for public office or a referendum question. However, condo association bylaws or rules may regulate the size and location of signs, flags, and flagpoles. [s. 703.105, Stats.]