



Sign Regulation Turned Upside Down

By William Brinton

Shocking Decision

On June 18, 2015, sign regulation in America was turned upside down. A decision involving the Town of Gilbert, AZ was labeled shocking and a blockbuster decision. The clear message to local governments across the nation is to now examine their sign regulations and determine whether they would survive challenges under the federal Civil Rights Act and the First Amendment of the U.S. Constitution.

Civil Rights and Attorneys' Fees

You may be surprised to learn that a First Amendment defect in sign regulations opens up a line of attack under federal civil rights laws. This means a successful plaintiff may be able to recover attorneys' fees from a municipality. The Town of Gilbert now faces an attorneys' fee claim reported to be in excess of \$1 million. The first step is to discuss this matter with your local government attorney. The following is a primer for your understanding of the issue.

Noncommercial Speech

The dispute before the Supreme Court involved differing treatment between different categories of temporary signs that carried noncommercial messages. You should know that noncommercial speech, e.g., political speech, is accorded a higher level of First Amendment protection than commercial speech. In fact, it was not until the 1970s that commercial speech rose to the level of First Amendment protection.

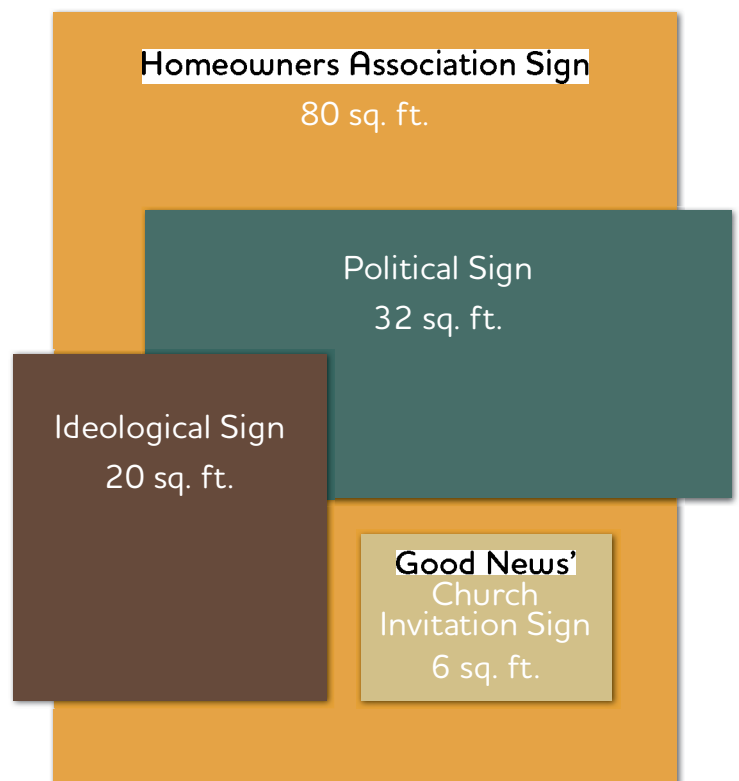
Typical American Sign Code

A typical sign code has several categories of temporary noncommercial signs, such as (1) political/election signs, (2) directional signs to an event, and (3) free speech signs (which Gilbert identified as "ideological signs") whereby the sign may display a message about any topic 24/7, such as Save the

Whales or Peace in the Gulf (or even hate speech that would be viewed as highly offensive). Criteria for their size, height, number, setback, spacing, duration, etc. may and often do vary.

The Town of Gilbert's Code

Below is a depiction of Gilbert's maximum allowed sign sizes and sign heights for common categories of temporary noncommercial signs. This depiction came from the plaintiffs' brief. The 6-square feet dimensions shown for the so-called "Invitation Sign" were those for a temporary directional sign.



Your Code

Look at your own sign code or the codes in neighboring jurisdictions. Take a pen and jot down whether the size and/or height standards are identical for the above sign categories; compare them by zoning district. What did you find?

Strict Scrutiny:

A Civil War Stomach Wound

Obviously the regulations with these differing limitations impact “speech.” Therefore they implicate the First Amendment. If the regulations are viewed as content-based, then a municipality must meet a strict scrutiny review. This exacting level of review requires the government to show a compelling governmental interest. Meeting that standard is akin to surviving a stomach wound during the Civil War: highly unlikely.

Intermediate Scrutiny and Aesthetics

Aesthetics is not recognized as a compelling governmental interest for purposes of constitutional review. Not surprisingly, however, aesthetics is recognized as a substantial governmental interest. Content-neutral regulations are subject to “intermediate scrutiny,” and under that less-exacting level of review aesthetics is a long recognized foundation for sign regulation that satisfies the First Amendment in combination with several other factors. Aesthetics is the basic underpinning of sign regulations everywhere.

A Call from a Colleague

A number of years ago, I received a call from a colleague, Randal Morrison from San Diego, CA. He warned me of what had the makings of a threat to the ability of local governments to regulate signs in the manner that they had become accustomed. He noted that a pastor of a small itinerant church had filed a federal action against the Town of Gilbert. The nature of the dispute was framed as big government trying to squash the religious speech of a small church.

Saturday Signs for Sunday Services

In 2005, Pastor Reed had placed seventeen temporary noncommercial directional signs for his church services. Nothing would seem wrong with that. The signs, however, were placed on a Saturday morning long before the commencement of the church services, which were the following Sunday morning.

Twelve Hours Not Enough

The lawsuit asserted among other claims that the one-hour durational limit before the event was too short and a violation of free speech rights. The town then amended its code to extend the durational limit to twelve hours. Twelve hours did not satisfy the plaintiffs, and an amended complaint was filed.

Ping Pong

From 2007 to 2014, the case went back and forth between the federal district court and the federal appeals court. In these four rounds, the town won every time. In the last two rounds, the judicial focus was on the distinction in the code between temporary directional signs and other types of noncommercial signs like political signs and ideological signs.

What, Me Worry?

The takeaway at that time for the local officials was likely that their municipality had won every round in court. As Alfred E. Neuman of Mad Magazine fame would say, “What, Me Worry?”

One-in-a-Hundred Chance

But there is always that one-in-a-hundred chance that the Supreme Court will accept discretionary review. And the Supreme Court did just that. The oral arguments were rough. The decision was a game changer.

Justice Thomas’ Majority Opinion

Justice Clarence Thomas, joined by five other justices, held that the town’s temporary noncommercial sign regulations were content-based on their face. The regulations did not meet a compelling governmental interest and they were struck down. Justice Thomas wrote that facial distinctions based upon message, whether defining regulated speech by subject matter or defining regulated speech by its function or purpose are both distinctions drawn based upon the message that the speaker conveys, and, therefore, are subject to strict scrutiny. In *Reed*, the regulated speech was noncommercial speech. Unless the town’s distinctions were content-neutral, there was little chance that they could survive scrutiny where aesthetics could play no role.

Entirely Reasonable Sign Ordinances Will Have To Be Struck Down

In a concurring opinion, joining in the result but not the reasoning, Justice Kagan joined by Justices Breyer and Ginsberg, observed that courts would have no choice but to strike down thousands of reasonable ordinances:

As the years go by, courts will discover that thousands of towns have such ordinances, many of them “entirely reasonable.” And as the challenges to them mount, courts will have to invalidate one after the other...And courts will strike down those democratically enacted local laws even though no one—certainly not the majority—has ever explained why the vindication of First Amendment values requires that result.

Justice Kagan, tongue in cheek, mused that the Supreme Court may soon find itself a veritable supreme board of sign review.

Justice Breyer's Warning

Justice Breyer joined by Justice Kagan separately warned of the far-reaching consequences of the majority's decision, one that was beyond just sign regulations. Their prediction is coming true as all manner of laws are now being challenged and some are falling. As one federal appellate judge exclaimed when a majority on a panel struck down a Florida statute pertaining to credit card transactions, we have a Greek tragedy "where a federal court has struck down a state statute for no good reason."

Justice Alito Talks "Properly Understood"

Justice Alito, joined by Justices Sotomayer and Kennedy, authored a critical concurring opinion. The opinion recited that properly understood today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.

Justice Alito then listed rules that would be content-neutral, including the distinction between on-site and off-site signs. This is certainly a basis for understanding that off-site commercial billboards can be treated separately from on-site commercial billboards.



Different Manner of Regulating Going Forward

This outcome means that all manner of temporary noncommercial signs should be regulated in an identical manner as to their allowed size, height, spacing, number, duration, setback and other such criteria. Differences in criteria between or among zoning districts would be permissible, but they cannot be separately distinguished or categorized by their message, whether by subject matter or by their function or purpose.

Recommendation

Of course, not all lawyers are in agreement as to the meaning of the decision under various scenarios. Those lawyers who have spent decades in the intersection of First Amendment law and land use law are now sorting this out and assisting local governments in replacing their sign codes. Many codes have an assortment of other constitutional problems. The recommendation of this practitioner is to replace a code and replace or revise definitions.

Consultation with Municipal Attorneys

It bears repeating that elected officials should consult with their own municipal attorneys in taking steps to replace current sign codes with new codes that serve legitimate "esthetic objectives" and that the new codes otherwise meet First Amendment considerations. Consultation with experts in the field is highly recommended.



Justice Alito

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