

Copyright 2015 by the American Planning Association. Reprinted by permission of *Planning* magazine.

## SIGN REGULATION JUST GOT MORE COMPLICATED

With the Supreme Court's recent sign ordinance decision, *Reed v. Town of Gilbert*, local regulation of signs faces new problems—and there were plenty before. We have known for some time that messages on signs are protected free speech, and that regulating these messages demands higher scrutiny from the courts.

Before *Reed*, the rules of free speech law did pose some challenges to well-established practices in sign regulation. One was that sign ordinances are based on basic distinctions among types of sign: on-site signs and billboards, or off-premise signs, for example. Another is the tendency in many ordinances to create different categories of signs—various types of noncommercial signs, for example—and to make different rules for each category.

Another problem was free speech doctrine. Sign regulation plays a minor role in that doctrine, which has developed distinct and sometimes rigid rules for laws that affect free speech, including those that regulate content. Courts apply strict scrutiny to those laws, requiring that they be justified by a compelling governmental interest, which is a high hurdle. Some lower federal courts had held that sign ordinances authorizing the display of category signs were content-based.

### The *Reed* case

The practice in sign ordinances of regulating by categories and the specific rules of free speech doctrine came together in the *Reed* case to produce a hostile decision.

In *Reed*, the sign ordinance in a town with a population of 200,000 contained 23 exemptions with different display requirements for different noncommercial signs, such as political and ideological signs. A church without a permanent facility rented property in various locations for its services, and the town issued citations when its displays violated the time allowed for temporary signs. The church and its pastor sued in federal court, and the Ninth Circuit Court of Appeals upheld the ordinance.

In a divided decision, a majority of the Supreme Court reversed in an opinion written by Justice Thomas. Justice Alito concurred, and Justices Breyer and Kagan concurred in the judgment in two separate opinions.

### The opinions

Justice Thomas's opinion has some unusual features, including the failure to cite or discuss any of the major Supreme Court cases that considered sign regulations.

The holding of the *Reed* decision was that the town's distinctions between directional signs and political or ideological signs were impermissibly content-based. This decision, the Court said, must be made on the face of the ordinance. A regulation that was specific to directional signs was deemed content-based because, in Justice Thomas's words, even a purely directional message that merely bears "the time and location of a specific event" should be considered one that "conveys an idea about a specific event."

Such a regulation was content-based in the eyes of six justices of the Court and was presumptively unconstitutional and a violation of the First Amendment because Gilbert could not satisfy strict scrutiny.

The regulation that the Supreme Court characterized as content discrimination differentiated between types of noncommercial messages. It was also described in the majority opinion as a distinction that was based on "the topic discussed" or "a specific subject matter." As a result, a regulation of noncommercial signage that differentiates on its face between viewpoints, types of messages, topics, or subject matter is likely to trigger strict scrutiny under the holding of *Reed*. Few sign codes are completely free of those kinds of distinctions, so planners are advised to scrutinize their sign codes and replace them as they are found.

In deciding the case on this ground, the Supreme Court rejected the town's reliance on several of the Court's more pragmatic previous decisions that had found laws content-neutral because they were "justified without reference to the content of the regulated speech," and were not adopted by the government "because of disagreement with the message" the speech conveyed. In the context of a regulation that on its face included a distinction between types of messages (broadly defined), the Court only treated the test developed in those cases as one of several "swords" available to First Amendment plaintiffs, rather than as the shield available to government to fend off the need to satisfy strict scrutiny.

Justice Alito's concurring opinion, joined by Justices Kennedy and Sotomayor, provided what he called "a few words of further explanation," including a nonexhaustive list of "some rules that would not be content based." It included regulations of the size and location of signs and rules distinguishing between lighted and unlighted signs, signs with fixed messages and those with messages that change, signs on private versus public property, and those on commercial rather than residential property.

Notably, however, his list of noncontent-based rules included "[r]ules distinguishing between on-premises and off-premises signs," and "[r]ules imposing time restrictions on signs advertising a one-time event." Here, the Alito concurrence and the Thomas majority opinion send conflicting signals, meaning that lower courts may struggle to determine which approach to follow.

*Reed* puts a new burden on sign regulators. The content neutrality of sign ordinances must be determined on their face, and this requirement is governed by rules that may invalidate many sign ordinances now in effect.

—Daniel R. Mandelker and John M. Baker

*Daniel Mandelker is the Stamper Professor of Law at the Washington University School of Law in St. Louis. John M. Baker is a founding attorney of the Minneapolis law firm Greene Espel. They are coauthors, with Richard Crawford, of the fourth edition of Street Graphics and the Law, Planning Advisory Service Report 580, published this summer by APA.*