

*Hindsight in 2020: Sign Regulation Five Years after
Reed v. Town of Gilbert*



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TEXAS



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The Story of Sign Regulation

- ▶ Texas Law Requirements
- ▶ Case Law and Constitutional Considerations
- ▶ What Comes Next: Examples and Guidance



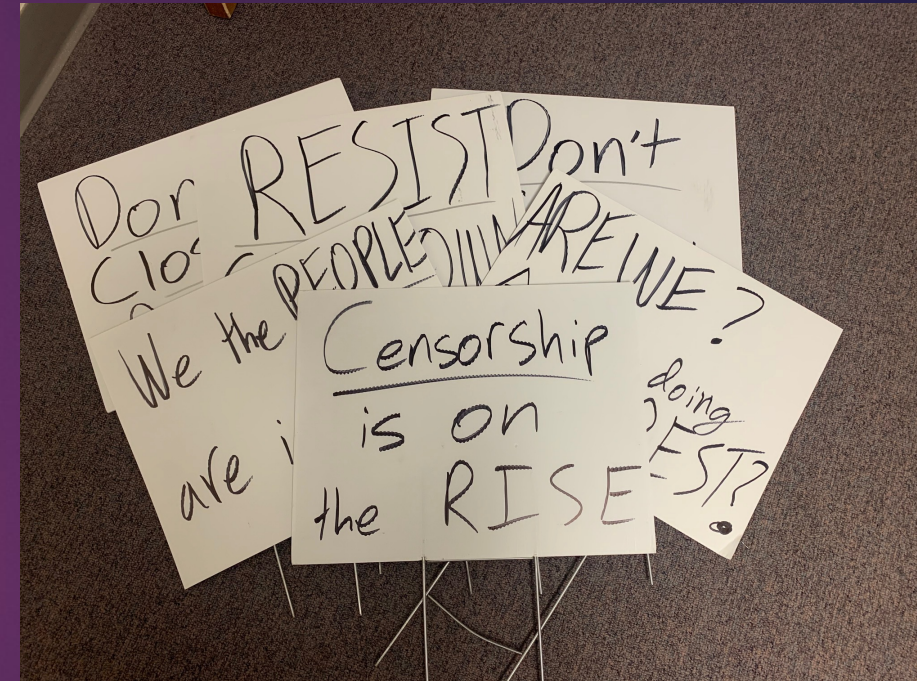
Remember... you belong to the State of Texas



- Chapter 216 of the Local Government Code: Regulate, Remove, Relocate
- Chapter 393 of the Transportation Code: Regulate in the Right of Way
- Chapter 259 of the Texas Election Code: affects how Cities regulate political signs (??)

Constitutional Conventions

- ▶ Free Speech rights under the First Amendment of the U.S. Constitution are not absolute; they are balanced against personal rights or interests of society—such as public safety and aesthetics
- ▶ Speech may be regulated, but restrictions must pass muster
 - ▶ **Intermediate scrutiny: must be narrowly tailored to serve a significant government interest**
 - ▶ **Strict scrutiny: must be narrowly tailored to serve a compelling government purpose and be the least restrictive means necessary to achieve the purpose**



Look at where we started-*City of Ladue v. Gilleo*

▶ Overinclusive

- ▶ “Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means.” *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).
- ▶ Visual Clutter elimination is a good reason for regulations, but the regulation foreclosed the important ability to put a sign in your own yard.
- ▶ Noncommercial signs deserve special protection.

OVERINCLUSIVE



Reed the Sign Ordinance

- *Reed v. Town of Gilbert*, No. 13-502 (**June 18, 2015**).
- If you must read a sign to regulate, the ordinance is **content based**.

- **UNDERINCLUSIVE**



How to *Reed*: Facts

- ▶ Town of Gilbert ordinance distinguished between *political* (electoral), *ideological* (non-commercial), and *directional* signs with different rules for time, location, and size
- ▶ “Temporary Directional Signs”: signs intended to direct passersby to a “qualifying event” of a non-profit organization
- ▶ Must be < 6 sqft; no more than 4 signs on any property; and displayed < 12 hours before event and up to 1 hour after
- ▶ Church challenged ordinance



How to *Reed*: the Law

U.S. Supreme Court: a regulation can be *content based* in two ways:

- by distinguishing speech by the *topic discussed*
- if the regulation's purpose or justification depends on the underlying *idea or message expressed*—i.e., regulation is facially content neutral, but motives were content based.

“A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech”

Stay Alive: Alito's Concurrence

Alito, Sotomayor, and Kennedy joined the opinion of the Court but added “a few words of further explanation” about rules that would not be “content based.” Cities may:

- ▶ Regulate the *locations* in which signs may be placed
- ▶ Distinguish between *free-standing signs* and those *attached to buildings*
- ▶ Distinguish between *lighted vs. unlighted signs*
- ▶ Distinguish between *fixed messages* and *electronic or variable*
- ▶ Distinguish between placement on *private or public property*
- ▶ Impose time restrictions on signs advertising a one-time event?



Where we are: Reed Recap

AFTER REED:

- Rules based on message: if you need to read a sign to know how to regulate it, *content-based*
- *Non-commercial* signs: content-based regulations pass muster only by surviving **strict scrutiny**
- Underinclusive, too many exceptions, can undercut the purposes of the ordinance
- *Commercial* signs: content-based regulation may still be allowed under Reed with **intermediate scrutiny???**



Austin Court Reeds State Sign Law



Austin Court of Appeals

Auspro court: “under Reed's framework, the Texas Act's outdoor-advertising regulations and associated Department rules are, on their face, content-based regulations of speech”

- ▶ Such regulations must meet strict scrutiny test
- ▶ This is close to a regulatory death sentence because meeting strict scrutiny is extremely difficult

A Message from the Texas Legislature: Good Billboard Bill that “fixes” *Auspro*

S.B. 2006 makes clear that TxDOT can still regulate signs that:

1. Advertise goods and services.
2. Where primary purpose of the sign is advertising.

See Texas Transportation Code Chapter 391.



Wait for It: 5th Circuit Punts on Commercial Question but 6th Circuit includes Commercial Content in Strict Scrutiny

- ▶ *Reagan Outdoor Adver. v. City of Austin*, 5th Circuit
 - ▶ *When regulation of off-premises signs includes non-commercial content, the regulation is content-based, reviewed under strict scrutiny, and won't be upheld*
- ▶ *International Outdoor, Inc. v. City of Troy, Mich.*, 6th Circuit
 - ▶ *Strict scrutiny when content-based regulation affects commercial content. Intermediate scrutiny is only for content neutral regulations.*



History has its eyes on the Lower Appellate Courts

9th: The Ninth Circuit upheld a city's right to prohibit billboards based on an onsite vs. offsite distinction. See *Contest Promotions, LLC v. City & Cty. of S.F.*, No. 17-15909, 2017 U.S. App. LEXIS 15375 ,at *14 (9th Cir. Aug. 16, 2017). See also *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 606 (1980).

10th: The Tenth Circuit used the *Central Hudson* test to review a curfew for commercial peddlers. The Court held that the regulation didn't achieve the purposes set by the City. *Aptive Environ., LLC v. Town of Castle Rock*, 959 F.3d 961 (2020).

3rd: The 3rd Circuit used the *Central Hudson* test to review a wage history question related to personnel hiring. The Court held that the questions were valid because they served the City's stated purposes. *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116 (2020).

2nd: The 2nd Circuit used the *Central Hudson* to review advertising in taxicabs. The limitation on advertising in taxicabs, except for certain taxis, was allowed because it met the City's purpose. *Vugo, Inc. v. City of New York*, 931 F.3d 42 (July 16, 2019).

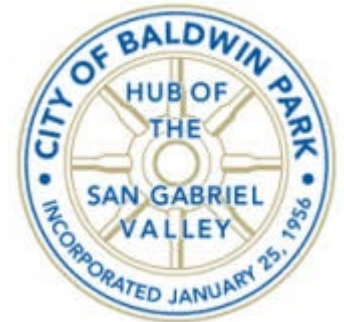
Even if your regulation is analyzed under Intermediate Scrutiny it can still fail due to underinclusiveness, overinclusiveness, or just not meeting your purposes.



Potential Political Sign Problems

District Court held that language allowing additional signs (regardless of content) during election season was unconstitutional . . .

WWW.RICARDOPACHECO.COM et al. v. CITY OF BALDWIN PARK, No. 2:16-cv-09167-CAS(GJSx), 2017 WL 2962772 (C.D. Calif July 10, 2017).



State Control of Signs: Election Code 259.003

In the same vein, Election Code 259.003, which provides that “a municipal charter provision or ordinance that regulates signs may not, for a sign that contains primarily a political message and that is located on private real property with the consent of the property owner: (1) prohibit the sign from being placed ...[etc.],” is likely unconstitutional under *Reed*. **Content-based**

However, is the purpose of protecting political speech compelling? Is this a narrowly tailored law? Could this survive strict scrutiny?

Political Signs: Vote for Content-Neutral Temporary Signs

Choices:

- 1. All signs (including noncommercial can be a smaller size); or**
- 2. Increase allowed size of all signs to 259 requirements.**

Still keep all signs out of right-of-way.

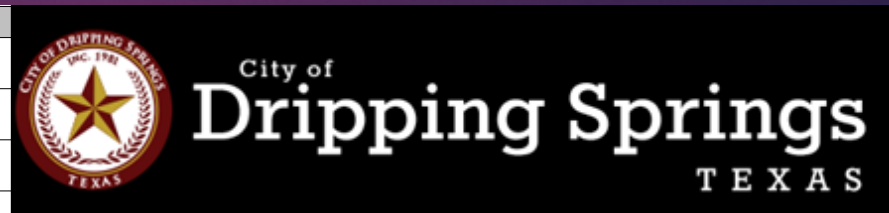
Other Potential Problems: Real Estate Signs



- Commercial or Non-Commercial?
- Temporary signs with dates (read the sticker not the sign)
- Prohibit?
- Allow only on Sundays?

Why do you write like you're writing out of time?

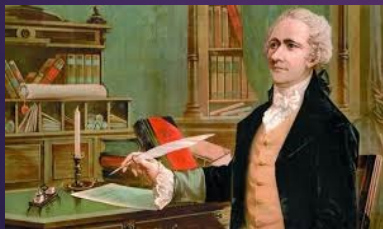
Residential Districts						
Residential developments-monument identification sign (small)	18 sq ft	6 ft	1	yes	26.02.001	\$200 plus pre-application
Residential developments-monument identification sign (large)	24 sq ft	6 ft	1	yes	26.02.001	\$225 plus pre-application
Flags - noncommercial	5' X 8' ft	Flagpole can be up to 25 ft	2	No	26.02.001	N/A
Home occupation	4 sq ft	4 ft	1	No	26.02.001	N/A
Residential - noncommercial signs	4 sq ft	4 ft	None	No	26.02.001	N/A
Residential-address (required)	Letters and numbers 6" to 8"		One (required)	No	26.02.001	N/A
Residential-temporary sign	9 sq ft	9 ft	One	no	26.02.001	N/A
Construction/development sign	48 sq ft	8 ft	One	yes-project completion or 24 months	26.02.001	\$50
Traffic-control signs (not MUTCD)	2 sq ft	6 ft from grade	As required	no	26.02.001	N/A



Follow-up after sign ordinance changes, upheld.

Residential Signs allowed:

- (a)** Up to 3 flags or pennants of up to 10 square feet on a staff or pole of no longer than 8 feet;
- (b)** Up to 3 permanent signs with a combined area of no more than 10 square feet and a height of no more than 4 feet;
- (c)** Up to 6 temporary window signs with a combined area of no more than 9 square feet, except that no more than 50% of the area of any given window may be covered by window signs;
- (d)** Up to 4 other temporary signs with a combined area of no more than 10 square feet and a height of no more than 3 feet.



Ten Sign Commandments

10. Take the words “political” and “holiday” out of your sign ordinance.
9. Ensure that you address dilapidated signs.
8. Decide whether Real Estate Signs are commercial.
7. Have your code enforcement officer and prosecutor read your drafts for enforceability.
6. List of Prohibited Signs (content neutral or could include commercial messaging).



Ten Sign Commandments

5. List of always approved signs (without permits): government signs, traffic signs, extra signs that everyone can have-noncommercial signs.
4. Flags.
3. Content-neutral or content-neutral for non-commercial and some commercial regulation. By Zoning District, size of lot, sign type, lighting.
2. Clearly state what your purposes for your regulations generally including traffic safety and aesthetics, character of the City.



The Final Commandment

1. Ensure that your sign code matches your significant/compelling governmental interests and that no exceptions or definitions cause underinclusiveness or overinclusiveness.

I AM THE ONE THING IN LIFE I CAN CONTROL.

--AARON BURR (HAMILTON)

Questions?

