Robinson+Cole

Reed v. Gilbert: 7 Months Later

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Remember the Basics

- If signage regulation is **content-neutral**, then reasonable time, place, and manner regulation of speech is generally permissible.

- If the regulation is **content based**, the courts apply strict scrutiny. The government must show that the law is narrowly tailored to further a compelling government interest.

Clarifying (Re-Defining?) "Content Based"

- Under the First Amendment, the government "has no power to restrict expression because of its message, its ideas, its **subject matter**, or its content." *Reed v. Gilbert*, 135 S. Ct. 2218, 2226 (2015) (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

- Content based = "the law applies to a particular speech because of the **topic** discussed or the idea or message expressed." *Id.* at 2227.

Clarifying (Re-Defining?) "Content Based"

"The Court has classified two kinds of regulations as content-based. One is regulation that restricts speech because of the ideas it conveys. The other is regulation that restricts speech because the government disapproves of its message. It is hard to see an anti-panhandling ordinance as entailing either kind of discrimination."

Norton v. City of Springfield, 768 F.3d 713, 717 (7th Cir. 2014).

Clarifying (Re-Defining?) “Content Based”

“The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.”

Norton v. City of Springfield, 806 F.3d 411, 412 (7th Cir. Aug. 7, 2015).

“Content Based”: A Two-Step Analysis

- First, does the regulation of speech “on its face” draw distinctions based on the message conveyed?
  - E.g., by “subject matter,” “function,” “purpose,” etc.
  - If yes → Strict Scrutiny

- If not, look to the reason for the regulation:
  - Is the law justified by referencing the content of the regulated speech?
  - Was it adopted because the government disagreed with the message conveyed?
  - If yes → Strict Scrutiny

“Content Based” Pointers

- It is content based if the regulation applies to speech because of the subject matter, topic, or idea discussed.
- If you have to consider the content to determine whether or not the regulation applies, it is content based.
- If it is content based on its face, it does not matter why the government enacted it. Strict scrutiny applies.

Beyond Signs: Panhandling

- *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. Aug. 7, 2015): Ban on oral requests for immediate donations of money is content based and unconstitutional.
- *McLaughlin v. Lowell*, 2015 U.S. Dist. LEXIS 144336 (D. Mass. Oct. 23, 2015).
- *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), judgment vacated, remanded for further consideration in light of *Reed* by *Thayer v. City of Worcester*, 135 S. Ct. 2887 (2015).

Beyond Signs: Panhandling

- *But see Watkins v. City of Arlington*, 2015 U.S. Dist. LEXIS 105574, at *1 (N.D. Tex. Aug. 12, 2015): Ordinance that regulates **all** interactions between pedestrians and the occupants of vehicles stopped at traffic lights is facially content neutral.

- Red flags:
  - Applying more favorable treatment to some types of solicitations.
  - Exemptions for certain types of speech.

Beyond Signs: Regulation of Social Media

- *Rideout v. Gardner*, 2015 U.S. Dist. LEXIS 105194 (D.N.H. Aug. 11, 2015): State law that makes it unlawful for voters to take and disclose digital images or photos of their completed ballots unconstitutional as a content-based restriction on free speech.

- Failed strict scrutiny:
  - Alleged purpose was not substantiated.
  - Voter coercion already illegal.
  - Over-inclusive so not narrowly tailored.

Beyond Signs: Regulation of Robocalling

- The Fourth Circuit held that South Carolina's anti-robocall statute that applied to calls with a consumer or political message was content-based and failed strict scrutiny.

  Cahaly v. Larosa, 2015 U.S. App. LEXIS 13736 (4th Cir. Aug. 6, 2015).

- Applying *Reed* and strict scrutiny to commercial speech?

Impacts of Reed on Commercial Speech?

- *Contest Promotions, LLC v. City and Cty. of San Francisco*, 2015 U.S. Dist. LEXIS 98520, at *4 (N.D. Cal. July 28, 2015): "*Reed* does not concern commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central Hudson* test."
- *California Outdoor Equity Partners v. City of Corona*, 2015 U.S. Dist. LEXIS 89454, at *10 (C.D. Cal. July 9, 2015): "*Reed* does not concern commercial speech".
- *Chiropractors United for Research & Educ., LLC v. Conway*, 2015 U.S. Dist. LEXIS 133559, at *5 (W.D. Ky. Oct. 1, 2015): "Because the [challenged] [s]tatute constrains only commercial speech, the strict scrutiny analysis of *Reed* is inapposite."
- *CTIA-The Wireless Ass'n v. City of Berkeley*, 2015 U.S. Dist. LEXIS 126071, at *10 (N.D. Cal. Sept. 21, 2015): "The Supreme Court has clearly made a distinction between commercial speech and noncommercial speech . . . and nothing in its recent opinions, including *Reed*, even comes close to suggesting that that well-established distinction is no longer valid."

Justice Breyer's Warnings

- Regulation of:
  - Securities
  - Energy conservation labeling-practices
  - Prescription drugs
  - Doctor-patient confidentiality
  - Income tax statements
  - Commercial airplane briefings
  - Signs at petting zoos
- "[T]he Court has applied the heightened 'strict scrutiny' standard even in cases where the less stringent 'commercial speech' standard was appropriate." *Reed*, 135 S. Ct. at 2235 (Breyer, J., conc.).

Remember the Basics

- First Amendment protects the freedom of speech and expression. It does not apply to:
  - Conduct that is not communicative
  - Pricing regulations
  - Requiring commercial disclosures
- There are also exceptions to content-based regulation: e.g., libel, obscenity, threats.
- Cases say that commercial speech is subject to lower scrutiny. *Wollschlaeger v. Governor of Fla.*, 25 Fla. L. Weekly Fed. C 1860 (11th Cir. Dec. 14, 2015).

Will Strict Scrutiny Become Watered Down?

- "[T]he Court could escape the problem by watering down the force of the presumption against constitutionality that 'strict scrutiny' normally carries with it." *Reed*, 135 S. Ct. at 2235 (Breyer, J., conc.).

- "The consequence—unless courts water down strict scrutiny to something unrecognizable—is that our communities will find themselves in an unenviable bind . . . ." *Reed*, 135 S. Ct. at 2237 (Kagan, J., conc.).

Will Strict Scrutiny Become Watered Down?

- Courts upholding or striking regulations on the grounds that they meet both, or fail both, the strict scrutiny and intermediate standards.
- Not compelling interests: aesthetics, public health, safety and welfare, and property values.
- Compelling interests:
  - Rights expressly guaranteed by the Constitution
  - Certain privacy interests
- Narrow tailoring gets fuzzy.

Will Strict Scrutiny Become Watered Down?

- "That said, the narrow tailoring doctrine does not require perfect tailoring. The doctrine requires only that a challenged speech restriction not burden 'substantially' more speech than is necessary to further the government's interest." *Cutting v. City of Portland*, 802 F.3d 79, 87 (1st Cir. Sept. 11, 2015) (citing *McGuire v. Reilly*, 260 F.3d 36, 48 (1st Cir. 2001) (citing *Ward*, 491 U.S. at 799)).
- "The State 'must demonstrate narrow tailoring of the challenged regulation to the asserted interest—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.'" *Wollschlaeger v. Governor of Fla.*, 25 Fla. L. Weekly Fed. C 1860, *92 (11th Cir. Dec. 14, 2015) (quoting *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999)).

Is Adult Entertainment Zoning Still OK?

- The Supreme Court's "secondary effects" cases hold that certain content based regulations of sexually oriented businesses are treated as content neutral because the government is motivated by the secondary effects of the business rather than hostility to the content of the speech. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

- "We don't think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First Amendment protection." *BBL, Inc. v. City of Angola*, 809 F.3d 317, n.1 (7th Cir. Dec. 7, 2015).

Lessons from Reed

- Justify regulations of signage and other forms of speech, and substantiate those justifications.
- Don’t regulate noncommercial speech more strictly than commercial speech.
- Steer away from exemptions for certain types of signs/speech.
- Content discrimination goes beyond signs.
- If the regulation is content based on its face, strict scrutiny applies, regardless of justification.
- More to come.

Thank You!

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