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The Volokh Conspiracy

Supreme Court reaffirms broad prohibition on content-based speech restrictions, in today's *Reed v. Town of Gilbert* decision

By Eugene Volokh June 18, 2015

The Supreme Court has often said that the government generally may not impose content-based speech restrictions. Content-neutral restrictions, such as evenhanded restrictions on sound amplification, on blocking traffic, and the like are often constitutional; and that extends to content-neutral restrictions aimed at promoting aesthetics, such as limits on the size and quantity of signs.

But when the government restricts speech based on its content, such restrictions are generally unconstitutional. (I'm speaking here of restrictions that the government imposes in its capacity as regulator, and not as employer, educator, or speaker; and I'm setting aside the historically recognized content-based exceptions, such as for libel, obscenity, threats, and the like.) They can only be upheld if they are "narrowly tailored" to a "compelling government interest" — the famous "strict scrutiny" test, which is quite hard to satisfy. And this is true not just for *viewpoint*-based laws (e.g., "no antiwar speech" or "no racist speech") but also for viewpoint-neutral but not content-based ones (e.g., "no advocacy by corporations or unions related to any political candidate").

The question, though, is what exactly constitutes content discrimination. In particular, can a law that treats different kids of speech differently based on its content nonetheless be "content-neutral," on the theory that the government is not motivated by "disagreement with the message [the speech] conveys"? In *Reed v. Town of Gilbert*, which the Supreme Court just decided this morning, the Ninth Circuit had said yes: A ban that on its face distinguished "political [i.e., campaign-related] signs," "ideological signs," and "temporary directional signs relating to qualifying event[s]" — and set up different size, duration, and location restrictions for each category — should be seen content-neutral, because the government wasn't motivated by hostility to any message. But the Supreme Court reversed, and concluded that laws that are facially content-based must be subject to strict scrutiny regardless of their motivations.

[*Supreme Court rules for church in case against Arizona town's sign law*]

1. Justice Thomas wrote the majority opinion, joined by the other conservatives and by Justice Sotomayor (interestingly, the same lineup as in *Sorrell v. IMS Health Inc.* (2011), another content discrimination case, which dealt with restrictions on the distribution of information about doctors' prescription practices). The opinion stressed that, if a law is content-based "on its face" — if it "draws distinctions based on the message a speaker conveys" — it is to be treated as content-based. The law may *also* be treated as content-based even if it is facially content-neutral, if the law cannot be "'justified without reference to the content of the regulated speech,'" or the law

was adopted by the government "because of disagreement with the message [the speech] conveys." But a good motivation won't turn a facially content-based law into a content-neutral one:

> 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.

2. The majority also noted that the distinction between political signs, ideological signs, and event-promoting signs was facially content-based, because it turns "on the communicative content of the sign":

> If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government [which would make it a "qualifying event sign"], that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election [a "political sign"], and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government [an "ideological sign"]. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas.

3. The majority then concluded that the law failed strict scrutiny. Even "[a]ssuming for the sake of argument" that the Town's interests — preventing visual clutter caused by excessive signs, and promoting traffic safety — were compelling interests, "the Code's distinctions fail as hopelessly underinclusive":

> Starting with the preservation of aesthetics, temporary directional signs are "no greater an eyesore," than ideological or political ones. Yet the Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.
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> The Town similarly has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not. The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.

But the Court acknowledged that some narrow content-based exceptions might pass strict scrutiny, if they are "narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers"; the examples the Court gave were special treatment for "warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses."

4. Of course, the strongest justification for the content classifications in the Town's ordinance had to do not with differences in *harm* caused by speech, but differences in *value*. The ordinance allowed temporary signs related to candidates or ballot measures to be up to 32 square feet in size; allowed signs related to particular events to be only up to 6 square feet in size; and allowed signs related to other ideological topics to be up to 20 square feet in size. It also imposed no duration limits on the ideological signs, required political signs to be removed by 10 days after the election, and allowed event signs only for 12 hours before and one hour after the event. The rationale, presumably, is that campaign-related signs are especially valuable to the community, because political campaigns are so important, but lose their value after the campaign is done; ideological signs are less valuable than campaign-related signs, but still quite valuable, and retain that value permanently; and signs promoting specific events are less valuable than the other signs, and also lose their value after the event.

The majority never expressly discussed these arguments, but the strong implication — especially given past precedents, such as *Carey v. Brown* (1980) — is that the government may *not* favor certain speech (even in viewpoint-neutral ways) on the grounds that its content is seen as more valuable. Whatever might be the status of discrimination against "low-value speech" (such as commercial advertising), the government may not distinguish among fully protected speech even based on viewpoint-neutral and not implausible judgments about what speech is most valuable.

5. So far, things seem clear — but wait! Three of the six Justices in the majority (Justices Alito, Kennedy, and Sotomayor) fully joined the majority opinion but also wrote a separate concurrence pointing out the kinds of ordinances that would be content-neutral and thus quite possibly constitutional. Some of these examples are indeed fully consistent with the majority, such as content-neutral limits on size, location, lighting, changing messages on electronic signs, and the like. But two of the examples actually seem content-based under the majority's test (which, recall, the three concurring Justices claim to endorse):

> Rules distinguishing between on-premises and off-premises signs.
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> Rules imposing time restrictions on signs advertising a one-time event.

Whether a sign advertises a one-time event turns on "the communicative content of the sign": To borrow the majority's John Locke example, "if a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government" on one occasion, "that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election." And distinctions between on-premises and off-premises signs likewise turn on "the communicative content of the sign" — a sign communicating something related to what is on the premises ("Home of the John Locke Society") would be treated better than a sign communicating something related to an off-premises activity ("Vote for Joe Schmoe"). The majority seems quite firm on the prohibition on content-based restrictions:

> Here, the Code singles out signs bearing a particular message: the time and location of a specific event. This type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem "entirely reasonable" will sometimes be "struck down because of their content-based nature."

Yet the Alito/Kennedy/Sotomayor concurrence suggests that ordinances that "single[] out signs bearing a particular message: the time and location of a specific [one-time] event" might be content-neutral, as could ordinances that allow messages related to on-premises activity but not messages related to off-premises activity.

This question is sure to be litigated in coming years, because on-premises/off-premises sign distinctions appear in many sign ordinances, and have been expressly upheld by some circuit courts.

6. Also, what about the Court's "secondary effects" cases? Those cases hold that certain facially content-based speech restrictions can be treated as content-neutral if they are justified by the "secondary effects" of speech, rather than by the effects that flow more directly from the offensiveness or persuasiveness of the content of the speech. The classic example, and the only one in which the Court has actually upheld laws under the "secondary effects" rationale, is the "erogenous zoning" cases, which limit bookstores that primarily sell pornographic materials, and movie theaters that primarily show such materials, see, e.g., *City of Renton v. Playtime Theatres, Inc.* (1986). Indeed, the secondary effects cases are the clearest example of the rare situation in which the Court has done precisely what the Ninth Circuit thought was proper: treated a facially content-based restriction as content-neutral because the government was supposedly

motivated by reasons other than hostility to the content of the speech (for instance, a concern that the presence of the stores or theaters would decrease property values or attract crime).

Yet the majority never mentions "secondary effects" or cites *Renton* or any of the other secondary effects cases. Presumably it isn't trying to silently overrule those cases, especially since (1) they have been endorsed by some of the Justices in the majority, and (2) there are enough such cases that they can't be lightly dismissed as outliers (though I do think they are inconsistent with the great bulk of free speech doctrine). Yet it's hard to see how those cases could be logically reconciled, on their own terms, with the majority's firm condemnation of facially content-based laws.

Perhaps the secondary effects doctrine will at some point be jettisoned, partly in reliance on *Reed*, at least outside the erogenous zoning context. And perhaps the erogenous zoning cases will be reconceptualized along the lines set forth in Justice Kennedy's concurrence in the judgment in *City of Los Angeles v. Alameda Books, Inc.* (2002). But at this point we have some conflict between the logic of *Reed* and the logic of the secondary effects precedents, conflict that lower courts will have to struggle with.

7. Relatedly, what about *Hill v. Colorado*? In that case, the Court held that a restriction on approaching within eight feet of patients outside health care facilities "for the purpose of ... engaging in oral protest, education, or counseling" was content-neutral. Justice Scalia, joined by Justice Thomas, and Justice Kennedy both dissented, arguing (among other things) that the restriction was actually content-based. The majority opinion in *Reed* cited, and seemingly endorsed, both of the *Hill* dissents, but not the *Hill* majority. If I were the American Center for Law & Justice, which lost in *Hill v. Colorado*, I would quickly file a fresh challenge to the Colorado statute, arguing that *Reed* implicitly overrules the logic of the *Hill* majority opinion; and while lower courts might be reluctant to accept this argument, since *Reed* doesn't expressly overrule *Hill*, it does look likelier than ever that there are now at least five votes on the Court for such an overruling.

8. Justice Breyer concurred in the judgment, as did Justice Kagan, joined by Justices Breyer and Ginsburg. All three Justices agreed that this particular ordinance is unconstitutional (hence their concurrence) but disagreed with the majority's broad condemnation of content-based restrictions (hence the decision to concur only in the judgment). From Justice Kagan's opinion:

> Although the majority insists that applying strict scrutiny to all [facially content-based sign] ordinances is "essential" to protecting First Amendment freedoms, I find it challenging to understand why that is so. This Court's decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." The second is to ensure that the government has not regulated speech "based on hostility — or favoritism — towards the underlying message expressed." Yet the subject-matter exemptions included in many sign ordinances do not implicate those concerns. Allowing residents, say, to install a light bulb over "name and address" signs but no others does not distort the marketplace of ideas. Nor does that different treatment give rise to an inference of impermissible government motive.
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> We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any "realistic possibility that official suppression of ideas is afoot." That is always the case when the regulation facially differentiates on the basis of viewpoint. It is also the case (except in nonpublic or limited public forums) when a law restricts "discussion of an entire topic" in public debate. We have stated that "[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.'" And we have recognized that such subject-matter restrictions, even though viewpoint-

> neutral on their face, may "suggest[] an attempt to give one side of a debatable public question an advantage in expressing its views to the people." Subject-matter regulation, in other words, may have the intent or effect of favoring some ideas over others. When that is realistically possible — when the restriction "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace" — we insist that the law pass the most demanding constitutional test.
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> But when that is not realistically possible, we may do well to relax our guard so that "entirely reasonable" laws imperiled by strict scrutiny can survive. This point is by no means new. Our concern with content-based regulation arises from the fear that the government will skew the public's debate of ideas — so when "that risk is inconsequential, ... strict scrutiny is unwarranted." To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.

There is more to say, of course, about the Breyer/Kagan/Ginsburg position; but this post is long enough, and mostly focused on the practical effects of the Supreme Court's decision. And those practical effects chiefly flow from the majority and from the Alito/Kennedy/Sotomayor concurrence (since those Justices joined the majority, and their views might be seen as providing a guide to the limits on the majority position), which I discuss above in items 1 through 7.

NOTE: The UCLA First Amendment Amicus Brief Clinic, which I run, filed an amicus brief on behalf of several academics, urging the Supreme Court to hear the case. (We didn't file a brief on the merits, once the Court agreed to hear the case, because the regular Clinic wasn't being taught that semester and because I thought we wouldn't have as much to add at the merits phase, given the number of amicus briefs that would likely be filed by other groups.)

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