



Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?

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First Amendment Protected Activity

- Historically, states and municipalities addressed problems associated with panhandling and solicitation by simply prohibiting the activity.
- Modern cases, however, make clear that both panhandling and solicitation are activities that fall within the protections of the First Amendment.



Foundation of Modern Jurisprudence

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)

- *Village of Schaumburg* lays the foundation for the Supreme Court's modern solicitation jurisprudence.
- The Court found ban on door-to-door charitable solicitations to be unconstitutional and set forth the standard for evaluating restrictions on charitable solicitation.



Foundation of Modern Jurisprudence

The standard in *Village of Schaumburg* establishes that charitable solicitation regulations are constitutional only if:

- The regulation serves a sufficiently strong, subordinating interest that the government is entitled to protect (such as fraud prevention).
- The regulation is narrowly drawn to serve the interest without unnecessarily interfering with First Amendment freedoms.



Collection Bins

Relatively new arena of regulation:

- Some courts evaluated the bins' charitable nature and applied the *Village of Schaumburg* standard.
- Recent decisions focus on content-neutrality of the regulations to determine constitutionality.



Collection Bins

Recycle for Change v. City of Oakland, 856 F.3d 666 (9th Cir. 2017)

- Upheld regulations that restricted the placement of bins and created license requirements.
- Assumed, without deciding, that the regulations implicated First Amendment, finding the regulations discriminated on the basis of non-expressive, non-communicative conduct that did not trigger strict scrutiny.



Collection Bins

Recycle for Change v. City of Oakland

- Distinguished the regulations from the *Planet Aid* case, saying they applied to all donation bins regardless of charitable intent.
- Also found the regulations were not rendered content-based just because they may require enforcing officer to determine if the bin was intended to collect, distribute, or recycle personal items.



Collection Bins

Planet Aid v. City of St. Johns, MI, 782 F.3d 318 (6th Cir. 2015)

- Sixth Circuit rejected a total ban on donation bins.
- Used the time, place and manner test for a public forum, saying it was a content-based restriction that prohibited bins with expressive messages but allowed bins with no messages.



Forum Classification



Forum Classification

- Traditional public forum
 - Where people have traditionally been able to express their ideas: park, public street, sidewalk
- Nonpublic forum
 - Government property traditionally not open to the free exchange of ideas: courthouse lobby, prison, military base



Tests for a Public Forum

Time, place and manner test:

1. Content-neutral;
2. Narrowly-tailored to serve a significant government interest; and
3. Leaves open ample alternative channels of communication.



Tests for a Public Forum

Strict scrutiny for content-based restrictions of a public forum:

Content-based
regulations
only pass
muster if

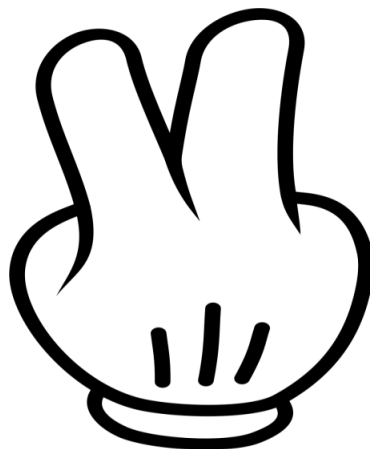
- Least restrictive means
- To further a compelling government interest

Test for a Nonpublic Forum

**Most lenient test
for nonpublic/limited public forum:**

Restrictions need only be:

Reasonable and



Viewpoint neutral

Public Forum: Roadways

Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936 (9th Cir. 2011)

Plaintiffs challenged regulations prohibiting any person from standing on streets or highways and soliciting employment, business or contributions from an occupant of any motor vehicle.



Public Forum: Roadways

Comite de Jornaleros de Redondo Beach v. City of Redondo Beach

- On *en banc* review, the 9th Circuit found the regulations failed the narrow tailoring requirement.
- They were geographically over-inclusive and covered more speech than necessary.



Content Based v. Content Neutral Regulations

Can solicitation/panhandling regulations be defined in a content-neutral manner?



Reed v. Town of Gilbert, Ariz.

Reed v. Town of Gilbert, Ariz., 135 S.Ct. 2218 (2015)

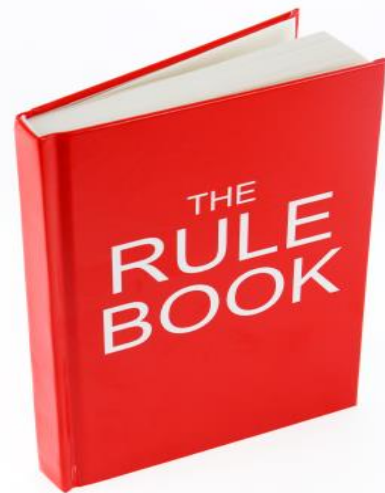
- The Supreme Court decision in *Reed* put the content neutrality issue in the spotlight.
- *Reed*'s impact is profound and extends to solicitation and panhandling.



Definition of Content Based

- Justice Thomas' opinion in *Reed* applies an exacting standard for evaluating content neutrality:

“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”



Impact of *Reed*

- Prior to *Reed*, many courts looked to the Supreme Court's ruling in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).
- The *Ward* Court looked to whether a regulation was adopted because of disagreement with the message for a content based determination.



Definition of Content-Based Pre-*Reed*

Ward v. Rock Against Racism

- *Ward* stated that “[t]he principle inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”



Content Based v. Content Neutral

Berger v. City of Seattle, 569 F.3d 1029 (9th Cir. 2009)

Magic Mike challenged park regulations that:

- Allowed performers to passively solicit funds (*e.g.* setting out signs asking for donations)
- ***But*** prohibited performers from actively soliciting donations



Content Based v. Content Neutral

Berger v. City of Seattle

- In an *en banc* decision, the 9th Circuit found the passive solicitation regulations an unconstitutional content-based restriction.
- The regulations allowed the conduct (exchange of money) and regulated only the speech by specifying the manner of requesting money (only in writing and only passively).



Content Based v. Content Neutral

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

In contrast to *Berger*, the 7th Circuit initially found that regulations restricting the oral request for an immediate donation of money was content neutral.



Content Based v. Content Neutral

Norton v. City of Springfield, Ill.

- The regulations at issue defined panhandling as an oral request for an immediate donation of money.
- Signs requesting money were allowed, as were oral pleas to send money later.



Content Based v. Content Neutral

Norton v. City of Springfield, Ill.

7th Circuit's initial finding of content-neutrality was based on its findings that the regulation:

- Did not interfere with the marketplace of ideas
- Was not viewpoint based
- Was not an effort to suppress speech because of a disagreement with the message



Content Based v. Content Neutral

McLaughlin v. City of Lowell, 140 F.Supp.3d 177 (D. Mass. 2015)

- The court found a prohibition on attempts to obtain an immediate donation of money or other thing of value to be content-based.
- The following did not pass strict scrutiny:
 - Certain location based restrictions
 - A ban on fighting words uttered in connection with panhandling
 - Repeated requests for money
 - Panhandling in a group of two or more in an intimidating manner



Content-Neutral

Post-*Reed*, the following have been found content-neutral:

- “No person who is within a public roadway may solicit or sell or distribute any material to the occupant of any motor vehicle stopped on a public roadway in obedience to a traffic control signal light.” (*Watkins v. City of Arlington*, 123 F.Supp.3d 856 (N.D. Tex. 2015))
- “No person shall stand in or enter upon a Roadway for the purpose of distributing anything to the occupant of any vehicle.” (*KKK v. City of Desloge, Mo.*, 2016 WL 705128 (E.D. Mo. Feb. 23, 2016))



County of San Bernardino Ordinance

California New Business Bureau, Inc. v. County of San Bernardino, Case No. CIVDS 1616334, Nov. 8, 2016

- **41.3006 Prohibition**

“It shall be unlawful for any person to engage in commercial activity at or on the Hall of Records Campus.”



County of San Bernardino Ordinance

California New Business Bureau, Inc. v. County of San Bernardino

- **41.3003 Purpose**

“...to protect the right of members of the public to freely and without undue interference access governmental offices and functions at the Hall of Records...”

“...not intended in any manner to prohibit or restrict noncommercial speech.”



County of San Bernardino Ordinance

Court held:

- Hall of Records Campus is not a public forum
- Merely connects parking lot



County of San Bernardino Ordinance

Court held:

- Ordinance is content neutral, does not discriminate among commercial messages; thus subject to intermediate scrutiny.
- County's findings indicate that the ban on commercial activity serves a significant government interest.
- Ordinance is narrowly tailored:
 1. limited in scope to the Campus and
 2. "not intended in any manner to prohibit or restrict noncommercial speech"



Tips for Practitioners

- Identify the forum at issue.
- For a public-forum, draft content-neutral regulations aimed at conduct, and not speech.
- Identify the government interests at play and how the ordinance serves those interests.
- Treat all forms of solicitation the same way whether by individuals, churches, community organizations, professional fundraisers, etc.
- Be aware that city-wide bans are almost certainly impermissible.



Tips for Practitioners

- Review and tightly define the scope of activity you are regulating.
- Build your legislative record as completely as possible to identify the government interests at play, and why there is a need for government regulation.
- Evaluate unintended consequences.
- Consider whether there are non-regulatory, alternative approaches to address panhandling concerns such as housing, substance abuse and/or mental health services.



Solicitation and Panhandling Regulations

This presentation is intended for teaching purposes
and does not constitute legal advice.

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