January 12, 2015

All Signs Point To a Headache When Court Hears This Case

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Free speech cases are not always about flag burners and marching Nazis. Sometimes they’re about more mundane forms of speech. For example, on Monday the Supreme Court will hear a case about a Gilbert, Arizona, municipal ordinance that regulates “temporary directional signs” that guide people to community events.

You might think that a case about directional signs wouldn’t raise complex First Amendment issues. But free speech issues have a way of morphing from no-brainers into brain teasers. Let’s consider some hypothetical sign regulations to understand why.

Imagine that Wilmington passed an ordinance forbidding billboards supporting any candidate for public office. Billboards for McDonald’s would be fine. Billboards for a Republican or Democratic candidate for city council would not.

Now imagine a Wilmington “beautification” ordinance that banned all billboards.

Which ordinance is more troubling? The second suppresses more speech than the first. But the first suppresses speech based on its content.

The Supreme Court would find the first more troubling. The justices don’t like it when the government regulates speech based upon its message. Their concern is that the government may use these “content-based” regulations to pick and choose which ideas the public can hear.

An extreme example would be if Wilmington banned billboards supporting only Republican candidates. This would be an obvious attempt by the government to control public opinion by restricting what the public could hear. The Supreme Court would strike it down in a heartbeat.

But the Court would also be troubled by a law that banned billboards supporting either party’s candidates. It is still censorship when an entire subject area is declared off limits. It makes one wonder why the government is permitting hamburger ads and not core political speech about candidates for public office.

The Supreme Court is much more tolerant of “content-neutral” regulations of speech. These laws regulate speech without regard to its message.

The justices recognize that the government has legitimate reasons for enacting these types of laws to promote aesthetics, order, and tranquility. Thus, the justices are likely to uphold laws that regulate the placement of signs, limit the decibel levels of loudspeakers, or require permits for parades. But to be content-neutral these laws must apply whether the speech is racist rants by the Klan or thin mint ads by the Girl Scouts.

While the Court usually upholds content-neutral laws, it does not give them a free pass. The justices recognize that even content-neutral laws can severely curtail speech — imagine a law banning all parades and rallies.

Content-neutral laws can also have an underlying censorial motive — perhaps that “beautification” law banning all billboards was really enacted because the city council didn’t like the current billboard messages.

Now we’re ready for the Gilbert ordinance at issue in Monday’s case. The ordinance generally requires permits to post signs within the town, but there are numerous exceptions. The most notable exceptions are for “political signs” such as those supporting a candidate for office and “directional signs” that direct people to community events.

The rules governing political signs are more liberal than those governing directional signs. Political signs can be as large as 32 square feet, can be displayed for months before an election, and on a single piece of property can be unlimited in number. Directional signs can be no greater than 6 square feet, are limited to four on a single property, and may be displayed for only 12 hours before and one hour after an event.

The challenger is a small church that would like to leave up signs directing people to its church for long stretches of time, just as people do with political signs.

The issue is how the Court should evaluate this law. Is this an unconstitutional content-based regulation of speech because it regulates signs differently based upon their message? Or is it a constitutional content-neutral regulation of speech because the town is not trying to suppress a particular message but only to regulate for aesthetics and safety?

No-brainer or brain-teaser? Can we at least agree it’s a headache-inducer?

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