

1



## *AGENDA*

- Introduction
- First Amendment Overview
- Government Speech vs Private Expression
- Commercial Speech vs Noncommercial Speech
- Prior Restraint
- Analytical Framework
- Cases of Interest
- Examples
- Practical Tips for Crafting Permissible Public Art Regulations

2

## *FIRST AMENDMENT TEXT*

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”



3

## *REVIEW: LEVELS OF SCRUTINY*

### Rational Basis

- Ends or objectives of a regulating entity need only promote a “legitimate” governmental purpose.
- Affords great deference to governmental action.

### Intermediate Scrutiny

- Must be narrowly tailored to achieve a specific goal.
- Action will be upheld if it is substantially related to a “significant” or “important” government purpose.

### Strict Scrutiny

- Law must achieve a “compelling” governmental purpose and means must be specifically tailored to accomplish purpose.
- Must be least restrictive means.
- “Strict in name, fatal in practice.”

4

# *LEVELS OF SCRUTINY FOR FIRST AMENDMENT CLAIMS*

## Central Hudson Test → Intermediate Scrutiny

- Threshold Prong: Does the Commercial Speech regulate lawful activity AND is the speech non-misleading
- If so:
  - Does the government have a substantial interest in regulating the speech?
  - Does the regulation directly and materially advance the government's substantial interest?
  - Is the regulation narrowly tailored?

## Strict Scrutiny Test

- Is a Fundamental Right being infringed or has the government applied a suspect classification?
- If so:
  - Does the Government have a compelling (necessary or crucial) interest to justify their action?
  - Is their restriction narrowly tailored to achieve that goal?
  - Is the restriction the last restrictive means for achieving that interest?

5

# *GOVERNMENT SPEECH VS PRIVATE EXPRESSION*

## • Government Speech

- Not required to be content-neutral.
- "Meant to convey and have the effect of conveying a government message."
- Would the speech be associated with the government?



## • Private Expression

- Regulation cannot evaluate content of expression; otherwise, strict scrutiny is triggered.
- Open forum for private expression.



6

## *COMMERCIAL VS NONCOMMERCIAL*

- Commercial Speech

- Subject to more rigid regulation
- Expression related solely to the economic interests of the speaker and its audience
- Speech that does no more than propose a commercial transaction



- Noncommercial Speech

- Afforded greater protection under First Amendment
- Relates to something more than the economic interests of the appellants and their customers



7

## *PRIOR RESTRAINT*

- If you create a review/approval process that is so unnecessarily arduous that speech is completely censored, you have created a prior restraint.
- Ensure that your permitting structures have:
  - An appeals process
  - A chance for a hearing
  - Written criteria for what is being evaluated
  - Clear steps and timelines
- Do not allow one person to make all decisions with no oversight.

8

## *ANALYTICAL FRAMEWORK*

- How do avoid the dreaded strict scrutiny standard of review?
  - Differentiate between commercial and noncommercial speech.
  - Justify decisions and regulations without reference to the content of the art.
  - Tailor regulations narrowly to accomplish safety or aesthetic concerns.
  - Establish consistent, content-neutral, and unbiased review procedures to avoid prior restraint issues.

9

## *CASES OF INTEREST*



10

## *REED V. TOWN OF GILBERT*

- Facts: A pastor placed seventeen signs in an area announcing time and location of their church services. Gilbert’s sign code restricted temporary directional signs.
- **Holding:** Even if it does not single out any viewpoint for oppression, a law that is applied differently depending on the message the sign is conveying is content-based on its face and is subject to strict scrutiny under the First Amendment.
- Not permissible to treat certain signage differently from others depending on its content.
- Cannot regulate the message or analyze content if private, noncommercial speech.
- If a municipality wishes to differentiate between signs and murals (or just art) it should define the two separately.
- **Substitution clause:** “any non-commercial speech may be substituted in lieu of any or all commercial or non-commercial speech otherwise allowed under this chapter with no permit or other approval required from the City solely for such substitution.”

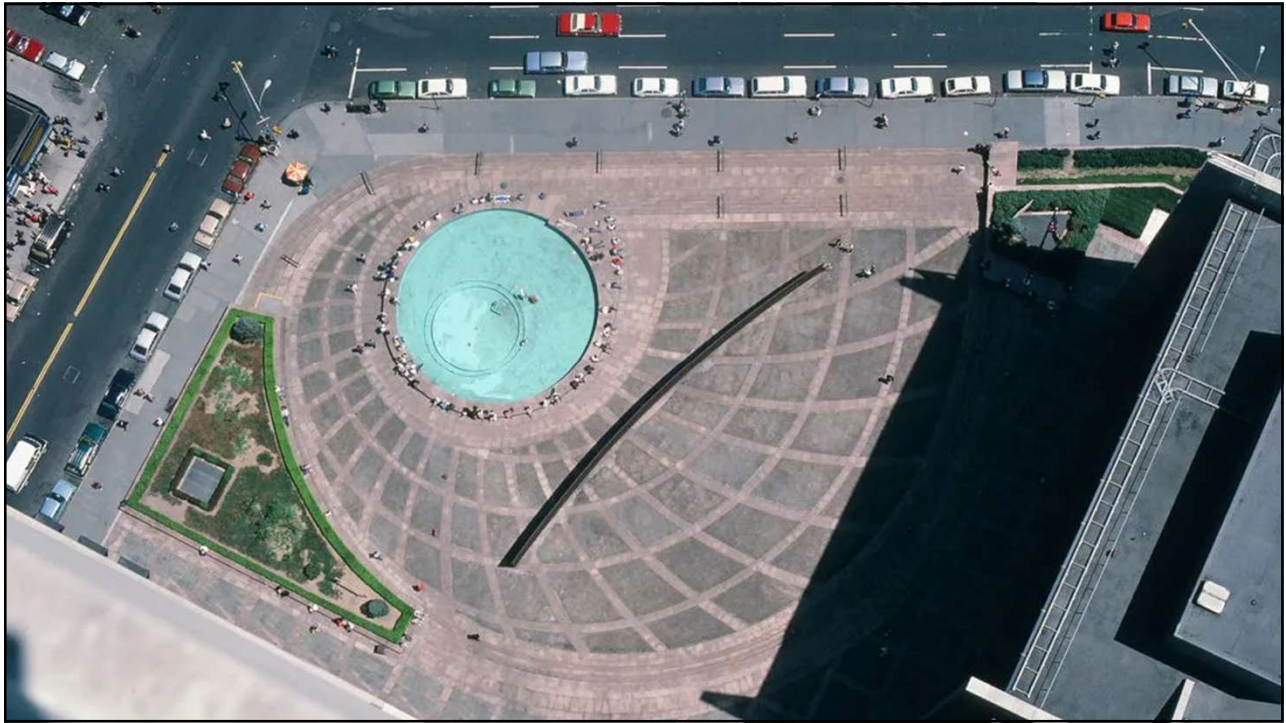
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## *PLEASANT GROVE CITY V. SUMMUM*

- **Holding:** Placing a monument in a public park is government speech, so it is excepted from the First Amendment’s neutrality constraints.
- Accepting one donor’s art does not obligate you to accept all donor’s art.
- Make sure the government retains “final approval authority.”
- Ensure there are specific design standards for areas where donor art is accepted.
- Monuments in parks are *probably* government speech.

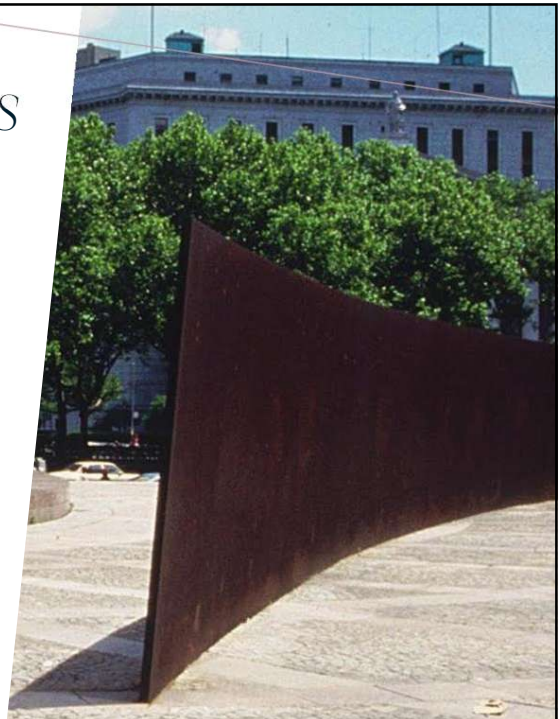
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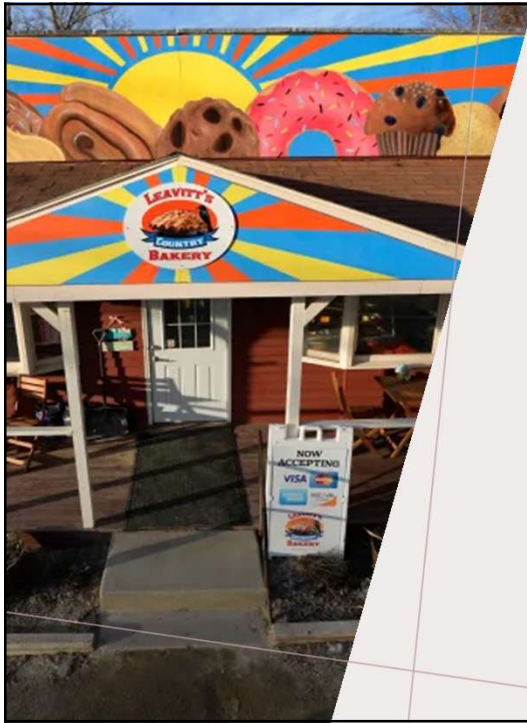
13

*SERRA V. UNITED STATES  
GEN. SERVS. ADMIN.*

- **Holding:** A government may regulate art over which it has control.
- If the government owns the art, its regulation is content neutral.
- If the government is unsure about its level of control, it should ensure that due process (i.e, a hearing) is had.
- If the art is in a government space, the art can almost certainly be removed from that space.
- Be prepared to have public hearings, even if not strictly necessary.



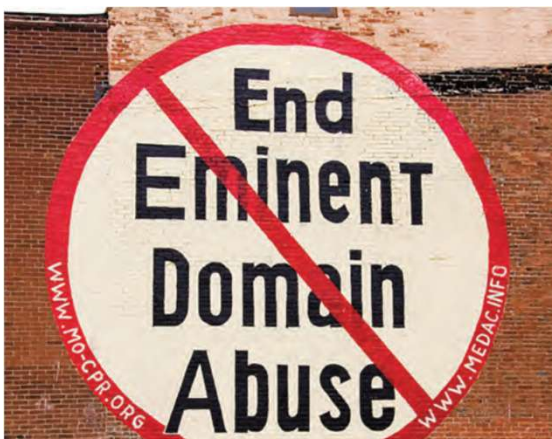
14



## *SEAN YOUNG V. TOWN OF CONWAY, NEW HAMPSHIRE*

- **Holding:** The Town's enforcement of their ordinance was too inconsistent and illogical: equal protection clause implicated.
- Leavitt's Bakery commissioned a mural on the roof and façade of his bakery depicting various baked goods.
- Town code compliance provided notice that the mural failed to comply with the Town's sign ordinance and would need to be altered or removed.
- Leavitt's appealed to the ZBA for a variance but was denied.
- Trial court found that the Town's ordinance was constitutional while the Town's application of the ordinance was unconstitutional.

15



## *NEIGHBORHOOD ENTERPRISES, INC. V. CITY OF ST. LOUIS*

- **Holding:** It is impermissible for an ordinance to regulate signs where "the message conveyed determines whether the speech is subject to the restriction."
- Citizen who criticized the city's use of eminent domain for private development painted a mural on the side of a building.
- Code enforcement cited him for an illegal sign, City denied his permit application.
- Court turned to the City's sign ordinance and found it to be impermissible as "the message conveyed determines whether the speech is subject to the restriction."
- Sign code "offered no reason for applying its sign regulations to some types of signs but not to others."

16

## *TILT VISION STUDIOS, LLC V. CITY OF WALLER, TEXAS*

- **Unpublished case, but interesting facts**
- Tilt Vision Studios was commissioned to paint several murals throughout Waller, TX.
- Citizens began to complain about the murals as “too bright and distracting.”
- City responded to the complaints by amending their zoning ordinance to effectively eliminate the legality of murals throughout the City.
- Settled before trial, but City amended its zoning ordinance to remove burdensome mural restrictions.



17

## *REGULATION THROUGH ZONING*

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Utilize sign ordinances but keep them content neutral post *Reed*.

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Overlay districts- preservation of distinct district characteristics.

- Size, color, format
- Historic utilization of building's façade

3

Consider creating or utilizing a public art review board or preservation board.

18

*EXAMPLES-  
PERMISSIVE  
OR NOT?*



19

**New murals may be approved on a case-by-case basis if painted on a previously painted surface or affixed to buildings in a manner that does not damage historic fabric**

20

- 8.1 Public Art Mural projects initiated, commissioned, and/or funded by the City may be placed on public buildings, structures, or infrastructure in Town Square or other City-owned facilities.
- 8.2 While any City-owned property can technically hold public art, each building and structure is unique, and the context of the surrounding area shall be considered.
- 8.3 Should the City initiate and fund a Public Art Mural on a privately owned building or structure, the execution of a public art easement agreement, per State and City requirements, with the property owner is required.
- 8.4 For example, any proposed Public Art Mural in Southlake Town Square must first receive written approval from the property owner before beginning the authorization process. Upon approval, the City shall establish a public art easement with the property owner.
- 8.5 For this policy, the following guidelines should be considered when selecting a location for a Public Art Mural:
  - 8.5.1 Public buildings, structures, or infrastructure, as well as alleys or private street-facing walls, are the preferred locations for murals;
  - 8.5.2 Murals should complement and not overpower existing architectural features such as trimmed windows, molding, entryways, or similar details. Key architectural elements should remain unobstructed by murals;
  - 8.5.3 Murals should be sized appropriately to the location selected and should encourage and engage in safe pedestrian interaction;
  - 8.5.4 Color schemes should be compatible or complementary with existing building designs and colors; and



*View of Town Square Parking Garage*

*Sign* means an outdoor structure, sign, display, light device, figure, painting, drawing, message, plaque, poster, billboard, or other thing that is designed, intended, or used for purposes of advertisement, information, announcement, declaration, demonstration, display, identification, or expression.

Public Art Mural – Any graphic artwork painted or applied on a wall, ceiling, ground surface, or other architectural surface (including but not limited to mosaic tiles, photographic elements, wheat paste murals, and collages of elements) where its background differentiates it from the general color or material of the wall or other surface. These murals are displayed in a City park, public right-of-way, or the interior/exterior of a city facility or privately owned building that has entered a public-private partnership with the City.

23

## *PRACTICE TIPS*

- How do we craft constitutionally permissible public art regulations?
  - Remember: time, place, and manner!
  - Differentiate between signs vs murals and/or art.
  - Emphasize design guidelines.
  - Do not overregulate to the point of an effective ban.
  - Steer any applicable discussion away from content.
  - Create a record that legally and accurately reflects your entity's intent.
  - Utilize overlay districts.
  - Do not trust that a neighboring, unchallenged art or sign ordinance is a constitutional ordinance.
  - Ordinance recitals are important!
  - **Enforce consistently.**

24

