

Mural Wars & Monument Battles: First Amendment Constraints on Regulating Public Art

Presented by: Bessie Bronstein and Elizabeth Yelverton

Art as expression is one of humanity's foundational concepts. Since humans began scribbling messages on cave walls, we have used art to communicate with those in our community and beyond. Over the past decade, there has been an increased scrutiny and focus on regulating the aesthetics of public spaces, even as the public has increasingly added murals and monuments to their public and private spaces.

Municipal Governments have a legitimate interest in protecting the welfare of their citizens, which includes regulating aesthetics and property values within their boundaries.¹ Still, its residents also have a First Amendment right to express themselves within those boundaries. When creating regulations that could impede speech and subject the government to the dreaded strict scrutiny standard, the government must have a working knowledge of current case law to ensure it accomplishes its goals without violating its constituents' rights. This paper will review important First Amendment concepts regarding the regulation of speech (and art), discuss important case law regarding the regulation of public art, and provide practical tips for crafting such regulations.

A. Overview of First Amendment Concepts.

The First Amendment of the United States Constitution states that "Congress shall make no law abridging the freedom of speech".² However, cities *may* pass neutral time, manner, or place restrictions on expressive activities if those restrictions serve a significant government interest, are narrowly tailored, and leave open ample alternative channels for communication.³ This presentation will examine how cities can achieve legal regulation of expressive activities, such as public art, while weighing public interest.

Additionally, it is important to note that while the First Amendment limits the government's regulation of private speech, it does not restrict the government when it speaks for itself. The

¹ Tex. Loc. Gov't. Code § 211.

² U.S. Const. amend. I.

³ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

Supreme Court has not provided a clear standard for where the government-versus-private-speech line lies. As discussed in more detail later, the Court has determined that government speech can be found in actions that are “meant to convey and have the effect of conveying a government message.”⁴ The Court has also concluded that municipal decisions to install statues and/or art on public land (even when donated by private citizens) often meet the standard of government speech and normally do not trigger strict scrutiny.⁵

B. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

While *Reed* is focused on the legality of a sign ordinance, it provides important guidance on how the courts will handle ordinances that have different restrictions on different types of speech. In *Reed*, a pastor posted several temporary directional signs indicating where the Sunday services would be held. He posted more signs than allowed, and they remained up longer than the ordinance allowed. The court found that the town’s ordinance, which restricted the size, number, duration, and location of temporary directional signs (all of which is typically permissible), violated the First Amendment. However, the problem with the ordinance in *Reed* was not the restriction, but that the Town’s ordinance treated some types of signage differently from others *depending on its content*. Because these small signs had different restrictions depending on their message, this ordinance was subject to strict scrutiny. The question was then “is the duration and number restriction of temporary directional signs narrowly tailored to forward a compelling state interest?” The Court determined that it was not.

In general, municipalities should read *Reed* as a warning that if they are passing regulations that require the municipality to read the sign to determine what restrictions apply, their justification must be narrowly tailored to forward a compelling state interest. While some signs are exempted, i.e., commercial speech and traffic control signage, a city should be very cautious in regulating art by ensuring clear definitions of what constitutes a sign and what constitutes a mural or installation. Next, this paper will examine several key cases that analyze the interplay of First Amendment regulation and public art.

⁴ *Rust v. Sullivan*, 500 U.S. 173 (1991).

⁵ *Pleasant Grove City v. Summum*, 555 U.S. 460, 484 (2009).

C. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

A religious organization requested permission to erect a monument featuring its aphorisms in a city park, but its request was rejected. At the time, the park already had fifteen permanent displays, eleven of which were donated by private individuals or organizations. One of those displays was a monument of the Ten Commandments. The organization sued, arguing that the government had violated the Free Speech Clause by accepting the Judeo-Christian Ten Commandments monument and not its own. The Supreme Court held that the placement of a permanent monument in a public park is a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.

The Court relied on several facts in reaching this conclusion, which provide municipalities with important guidelines in crafting their own ordinances. First, the Court noted that while many of the monuments were donated by third parties, the City exercised “final approval authority” over the monuments. Second, the Court noted that the City had specific criteria for evaluating monument acceptance and had cultivated an image and message it wanted visitors to the park to perceive. Justices Breyer and Souter both wrote separate concurring opinions that nonetheless urged caution in classifying all monuments in public parks as government speech. Justice Breyer advised that the question should be: “whether a government's actions burdens speech disproportionately in light of the action's tendency to further a legitimate government objective.”⁶

Based on this case, governments that wish to erect monuments in their public parks should ensure that they establish specific criteria for anyone who may want to donate a monument, and establish a written, comprehensive process for exercising “final approval” over the monument.

D. *Serra v. United States Gen. Servs. Admin.*, 667 F. Supp. 1042 (S.D.N.Y. 1987).

Conversely, what should happen when a municipal government has already allowed art to be erected in its parks with no clear guidelines, but now wishes to remove it?

⁶*Summum* at 484 (2009).

In 1981, the General Services Administration (the “GSA”) commissioned Serra to create an art piece titled “Titled Arc” for the Federal Plaza. The GSA funded the project under a contract that specified that the art was the property of the Federal Government.

Serra found specific value in the fact that the structure created an impediment for government commuters in the square. The Plaza went from being easily traversable to commuters having to skirt around the large sculpture every day. A public hearing was held, with nearly two hundred people testifying regarding the sculpture. One hundred twenty-two people testified that it should remain, but the government raised security concerns that the sculpture could deflect explosions into other government buildings and that surveillance of the area was actively impeded. The jury voted 4-1 to remove the sculpture, and Serra sued, claiming that the government’s removal of his art violated his First Amendment right to speech and his Fifth Amendment right to due process.

The Court of Appeals ruled that, while Tilted Arc did consist of First Amendment-protected speech, it was not Serra’s speech but the government’s, since it was on government property. Further, even if the Serra had retained his interest in the art, the court reaffirmed that the government may enact certain neutral time, manner, and place restrictions on free speech. They stated that the government’s interest in keeping the plaza unobstructed was legitimate and permissible. Further, the due process claim failed because Serra both had the opportunity to have a hearing and relinquished his interest in the art.

Municipal governments should refer to this case when art appears in public or private places and no guidelines have been issued before its appearance to regulate it. First, they must ensure that their reaction to the art is based on a legitimate, neutral time, manner, or place concerns. The content of the speech **must not** drive their reaction. The court has made clear that when the government moves to impede speech, it must be able to show that due process has been afforded to the artist and that the government is motivated by a permissible reason.

E. *Tilt Vision Studios, LLC, et al. v. The City of Waller, Texas (unpublished)*.⁷

Brad Smith, owner and artist with Tilt Vision Studios, was commissioned to paint several murals on various building facades throughout the City of Waller. Shortly after Smith completed

⁷ *Tilt Vision Studios, LLC v. City of Waller*, No. 4:23-cv-03864 (S.D. Tex. dismissed Oct. 28, 2024).

a commissioned mural, several members of the public complained about his work. Specifically, one resident complained that the “colors... were too bright.”⁸ The City responded by amending its sign ordinance to strictly regulate the placement and design of murals throughout the City.

The City of Waller’s sign ordinance defined a sign as “a device, structure, or fixture that incorporates graphics, symbols, or written copy intended to attract the attention of the public and visible to [the] public right-of-way or other properties.”⁹ Notably, the ordinance did not differentiate murals from signs in its regulations. The ordinance also restricted murals to certain unappealing locations within the city, specifically banning murals on commercial building fronts, all commercial art, and imposing a heavy penalty for violations of the mural guidelines. While the case settled before it reached trial court, it should serve as a warning that municipalities should be cautious to explicitly regulate murals into nonconformity. Additionally, it highlights how it can be important to draft separate definitions of what constitutes a “sign” versus a “mural” in a city code.

F. *Sean Young v. Town of Conway, New Hampshire, 783 F. Supp. 3d 588.*

In June of 2022, Sean Young, the owner of Leavitt’s Bakery in the Town of Conway, New Hampshire, unveiled a mural on the façade of the bakery depicting various baked goods. Young was then visited by one of the Town’s Code Compliance officers and told that the mural must be modified or removed as it failed to comply with the Town’s sign ordinance. Conway’s ordinance defines a sign as “any device, fixture, placard, structure, or attachment thereto that uses color, form graphic, illumination, symbol to advertise, announce the purpose of, or identify the purpose of any person or entity, or to communicate information of any kind to the public, whether commercial or noncommercial.” Under this definition, the Town asserted that Young’s mural was an illegal commercial sign because it depicted baked goods (and his store is a bakery).

Young applied for a variance in September of 2022, but the Town’s Zoning Board of Adjustment unanimously voted to deny his application. Subsequently, Young sued the Town, asserting that the application of the zoning ordinance violated his First Amendment rights. The trial court agreed. It reasoned that while the Town can regulate murals to protect its natural beauty, it allowed many other murals to remain on different buildings without enforcing the guidelines the

⁸ <https://pacificlegal.org/case/tilt-vision-mural-ban-waller-texas/>

⁹ References to the ordinances are gathered from the Complaints and Attachment in the litigation, due to the City of Waller

Town cited *Young* for. The court determined that while the Town's ordinance was constitutional, its uneven enforcement had "no rational connection to any of its stated interests¹⁰" of health, safety, welfare, and Town beauty. This case demonstrates that even if a municipality passes permissible time, place, and manner restrictions, inconsistent enforcement of these regulations may still result in First Amendment liability.

G. Permitting Schemes and Prior Restraint.

If a municipality requires licensing or permitting for public art, it must ensure that it is safeguarding its constituents' due process rights and ensure that it is not, whether inadvertently¹¹ or otherwise, creating a prior restraint. While the following cases do not apply directly to murals or other art, they do apply to expressive speech.

The Supreme Court of the United States noted in *FW/PBS v. City of Dallas*¹² that "a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license."¹³ In *Riley v. National Federation of Blind of N. C., Inc.*,¹⁴ the Supreme Court held that a licensing scheme failing to provide for definite limitations on the time within which the licensor must issue the license was constitutionally unsound, because the "delay compelled the speaker's silence."¹⁵ The Court later modified the 'prompt judicial review' requirement in *City of Littleton v. Z. J. Gifts D-4, L.L.C.*¹⁶, stating instead that 'ordinary judicial review procedures [are] suffic[ient] as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly.'¹⁷ In *Lakewood v. Plain Dealer Pub. Co.*¹⁸, the Court struck down an ordinance that gave the mayor unfettered control as the final decision-maker in approving permits for newsstands. The ordinance left approval entirely to the mayor's discretion, which in turn created an incentive for newsstands to self-censor their publications in the hope that their mayor

¹⁰ *Young v. Town of Conway*, 783 F. Supp. 3d 588, 610

¹¹ "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Reed v. Town of Gilbert*, 576 U.S. 155, 167 (2015).

¹² *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990).

¹³ *Id.*, at 226.

¹⁴ *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781 (1988).

¹⁵ *Id.*, at 802.

¹⁶ *City of Littleton v. Z. J. Gifts D-4, L.L.C.*, 541 U.S. 774. (2004)

¹⁷ *Id.*, at 781-82.

¹⁸ *Lakewood v. Plain Dealer Pub. Co.* 486 U.S. 750, 764 (1988).

would approve their permit (or fear that he would deny it). As a result of these cases, while municipalities can and should create a permitting process for public art, it must carefully draft clear evaluation and timing guidelines for all permit schemes and create a clear appellate structure in case a permit is denied.

H. Practical Guidance: How to Draft Constitutional Art Regulations

So, how do we draft constitutionally neutral art regulation policies? Time, place, and manner restrictions are key. With *Reed*, the Supreme Court has signaled that it is inclined to apply strict scrutiny to any mural or sign regulation that requires the entity evaluating it to assess content **in any form**. However, this does not leave municipalities without an avenue for regulating public art. When drafting any policy regulating monuments or murals, design guidelines rationally related to a zoning purpose should control. Is there a desired color palette for the area? What size would be reasonable? How many exterior walls may the mural occupy?

It is important to focus on the type of art being regulated, not the content. When drafting art regulation guidelines, focus on your legislative findings and ensure that you reference a compelling purpose statement while referring to your client's comprehensive plan. Implement a mural or art review program that sets forth specific art design guidelines for evaluating the artwork without considering content. Additionally, as noted above, it is essential to include a sufficient permitting and appeal framework to avoid prior restraint challenges. Even for artwork that could be classified as "government speech," it is important to draft an acquisition policy that outlines evaluation criteria. While there are additional open questions related to First Amendment challenges for public art, this presentation aims to provide some high level, practical guidance for the regulation of public art to enhance the aesthetic value of certain communities while safeguarding protected expression.