2 High Court Rulings Complicate Gov't Regulation Of Speech

By **Brady Wilson and Justin Burns** (May 20, 2022)

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Recent headlines from the U.S. Supreme Court focus on leaks, but City of Austin v. Reagan National Advertisements of Austin and Shurtleff v. City of Boston, two recent First Amendment decisions, are also worth nothing. Both decisions affect when the government can regulate speech.

Although they rely on similar ideas, the two decisions came out very differently. One thing is clear: When government officials touch on speech, they must tread lightly to be sure their regulations hold water.

Both cases involve the government regulating what private entities are saying. Generally, the government's regulation of speech because of what the high court called "its message, its ideas, its subject matter, or its content"[1] in its 1972 decision in Police Department of Chicago v. Mosley — also known as content-based restrictions — must satisfy strict scrutiny, a standard the government rarely meets.[2]

Such regulation could include restrictions on criticizing wars and political messaging, or they could include restrictions on where signs critical of foreign governments can be displayed near embassies in the District of Columbia.

In such situations, the government becomes a regulator of speech: It has the power to control the messaging, and the power to prefer certain messages and viewpoints over others. Such regulations may be rare, but likely even more rare is when such regulations pass constitutional muster.

Some — perhaps most — regulation of speech does not outright discriminate or prefer certain messages, but rather, it only regulates when or how speech, regardless of message, may occur. Examples include noise ordinances, regulations of the sizes of signs, and permit requirements for parades or demonstrations.

These restrictions apply generally to all speech. They do not focus on what is communicated, but remain neutral with respect to any preference for one message over another — hence why they are referred to as content-neutral regulations.

Generally speaking, these regulations do not focus on what is being said, but rather only on how it is said. These restrictions can still be problematic, but this speech is subjected to a lower constitutional test that is easier to satisfy, known as intermediate scrutiny.

Two recent Supreme Court cases demonstrate the difficulty in determining when government regulation falls into one of these two buckets — and the challenges government has when navigating First Amendment protections.

On April 21, the court decided City of Austin v. Reagan National Advertisements of Austin, which addressed an Austin, Texas, ordinance regarding billboards that may advertise goods and services available off the premises on which the billboard stands.

If a billboard communicates about a product sold on the premises, it is permissible; if it

speaks about a product sold down the road, it is not. The U.S. Court of Appeals for the Fifth Circuit took issue with the ordinance because it focused on what the billboard said, reasoning that if one must ask who the speaker is and what is said, the ordinance must be content-based and, presumably, unconstitutional.

The Supreme Court, however, saw the ordinance as unrelated to the content of speech, but rather only the location. Simply because a regulation requires examination of the message does not mean that it is content-based.

Rather, content-based limitations are those that discriminate about the specific topic or message expressed.[3] The message on the billboards is apparently irrelevant, in that the government does not single out any topic or show deferential treatment to certain messages.

Under the ordinance, signage is treated differently because of where it is located, and not because of the message it contains. In other words, the government can regulate the manner of speech because it is not promulgating different standards for different messages.

From Austin to Boston, the court's view changed. On May 2, the court decided Shurtleff v. City of Boston,[4] which addressed whether Boston can regulate outside groups from flying flags on public flagpoles outside city hall.

Boston had long allowed groups to hold ceremonies outside of city hall while hoisting a flag on one of three flagpoles. Over nearly 12 years, the city had approved the raising of about 50 unique flags for some 284 ceremonies — flags ranging from those of other countries to those of particular groups or causes.

In 2017, a religious organization asked to fly a Christian flag to celebrate accomplishments by the Christian community. Boston rejected this request, because it feared that flying a religious flag would violate the establishment clause — ironically, also in the First Amendment — by suggesting that the city was promoting a specific religion. The organization challenged the rejection.

The Supreme Court agreed with the organization. Setting aside the establishment clause issue — and the related issue of whether the flags could be considered the city "speaking," which would involve analysis worthy of an entirely separate article — the court found that Boston violated the organization's right to free speech by rejecting a flag application based solely upon the religious message contained on it.

In other words, the city could not, on the one hand, approve an application to fly a pride flag for Boston Pride Week, and a flag for a local bank, while on the other hand, denying flags containing religious messages because the denial was based solely upon the message. The fact that the city had good intentions was of little consequence.

The Supreme Court's opinions in City of Austin and City of Boston raise many important questions for government officials, but they also illustrate the complicated framework through which these officials must act. The First Amendment remains of critical importance to the court, but with the scope of protections offered by the First Amendment, government officials may be forced to make difficult decisions with the best of intentions — such as whether to permit religious speech at risk of violating other constitutional principles, as was the case in City of Boston.

To complicate matters, the varying discussions between the justices in both cases

demonstrate that many approach First Amendment issues differently, and even when they agree on the outcome, they may disagree on the path to it. This, in and of itself, shows that providing legal counsel on these issues is not only complicated, but also an ever-changing endeavor.

James Madison is credited with referring to restrictions on speech as causing "universal alarm" and threatening the self-governance envisioned after the Revolutionary War. Accordingly, it should come as no surprise that the Supreme Court is steadfast in protecting the First Amendment.

How government officials must evaluate situations and make decisions within the First Amendment framework, however, remains an area with many unanswered questions. A universal alarm bell should ring whenever the government may restrict a private party's speech — and government officials facing decisions that could interfere with speech should tread carefully, to be sure that their policies are in line with the latest developments in First Amendment jurisprudence.

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[1] Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

[2] U.S. v. Playboy Entertainment Group Inc., 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible").

[3] City of Austin v. Reagan Natl. Advertising of Austin LLC, ___ U.S. ___ (2022).

[4] Shurtleff et al. v. City of Boston et al., ___ U.S. ___ (2022).