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THE REGULATION OF SOLICITATION, THE HOMELESS, AND CHARITABLE DONATION BINS IN THE SHADOW OF *REED V. TOWN OF GILBERT*

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THE REGULATION OF SOLICITATION, THE HOMELESS, AND CHARITABLE DONATION BINS IN THE SHADOW OF *REED V. TOWN OF GILBERT* (& *THAYER V. CITY OF WORCESTER*)

I. INTRODUCTION.

As you read the title of this paper you may find yourself asking *"What in the world does solicitation, homelessness and charitable donation receptacles (or bins) have to do with land use?"* That's a very good question…I asked myself the same thing when I was asked to speak on this topic. As I began to mentally process how to present this topic, a few questions came to mind – the first of which was *"how are these items generally defined?"*

Solicitation:[1]
Noun

1. the act *(i.e., conduct??)* of asking for or trying to obtain something from someone.

2. the act *(i.e., conduct??)* of accosting someone and offering one's or someone else's services as a prostitute.

Homelessness:[2]
Noun

1. the state of *(i.e., expression??)* having no home.

Charitable (Receptacles / Bins):[3]
Adjective

1. relating to *(i.e., message??)* the assistance of those in need.

2. officially recognized as *(i.e., message??)* devoted to the assistance of those in need.

3. apt to judge other leniently or favorably.

When you read and think about the definitions of these various topics, one common characteristic comes to the forefront – which is that these *things* (for lack of a better word) all happen at some place or location – sometimes designated and sometimes not. Hence, the fact that they occur, especially at locations within municipal jurisdictions that want to regulate their activity – make these *things* land use issues. Add to these land use "ingredients" a healthy helping of expressive conduct and speech, and you have yourself a constitutional recipe ripe for debate, litigation, and interpretation.

II. BUT I THOUGHT I WAS DONE! A QUICK REFRESHER IN SOME 1st AMENDMENT ANALYSIS.

There are probably a lot of you reading this paper (and sitting in this year's land use conference) who thought you were done with constitutional law after the bar exam. Admittedly, I was one of those young lawyers and had no shame about taking great joy in never having to distinguish between levels of scrutiny again. After all, I was on my way to a job at a boutique personal injury litigation firm where all I had to worry about was who got hurt, which deep pocketed corporation was responsible, and how much money it needed to pay to atone for its personal injury sins. Then in 2003 tort reform came to the great state of Texas and the work dried up (at least for a little while). So, five years or so after law school, I found myself walking into a new job with a then solo practitioner (thanks J. Grady Randle for my "big break") having to learn something called

[1] Google Search. Google. 24 February 2018.
[2] *Id.*
[3] *Id.*

municipal law. Before I knew it there it was, Constitutional Law, patiently waiting for me like a jilted lover in my first case (successfully) defending a municipal billboard regulation.

Here's the deal…before we can dive into the most recent line of cases guiding the development of solicitation, panhandling and invitations for charitable giving, we have to get our head straight on the First Amendment analysis part – at least through intermediate scrutiny anyway. Here we go.

A. The "Basics."

"Congress shall make no law…abridging the freedom of speech."[4] This is the First Amendment (paraphrased) and it embodies the freedom of speech as a fundamental right under the Constitution of the United States of America. For a pretty basic concept, interpreting its meaning given any particular set of facts is perplexingly rudimentary. It is arguably the most recognized phrase in all of American constitutional law and, because it is a fluid body of law, it is arguable the most contentious given academia's analytical permutations of its breadth and limitations over time. So, without getting too deep in the constitutional weeds, let us boil it down to this:

> *The First Amendment generally prohibits any laws that regulate or restrict the free expression of messages, ideas, subject matter or content.*[5]

So, the first question we have to ask is whether the regulation is content-based.

Content-based speech. Distinguishing between content-based and content-neutral is fundamental to First Amendment law analysis because the result determines what level of analytical scrutiny applies. If the regulation being challenged is content based, then strict scrutiny analysis applies and that is a tough burden to meet because content-based laws and regulations are almost always considered illegal per se.[6] When strict scrutiny applies, the government must (1) demonstrate that it has a compelling state interest, and (2) demonstrate that the regulation is narrowly drawn (meaning by the least restrictive means possible) to achieve the specific result. In other words, the challenged regulation must be the only way for the government to accomplish its goal. If there is another way, then the regulation is unconstitutional.

Content-neutral speech. If the regulation being challenged is content neutral, then you have to determine which First Amendment analysis "bucket" it belongs – either (1) the "incidental burden on speech" bucket, or (2) the "time, place and manner of speech" bucket.[7] Depending on which bucket you fall in depends on which test gets applied (remember, the Supremes love to elucidate their analysis via tests).

Analysis Bucket 1 - United States v. O'Brien. This "bucket" could be characterized as those regulations that blend verbal and non-verbal elements into their fiber. In *United States v. O'Brien,* David O'Brien burned his Selective Service

[4] U.S. Const. amend. I.
[5] *Police Dep't v. Mosley,* 408 U.S. 92, 95 (1972).
[6] See *United States v. Playboy Entm't Grp.,* 529 U.S. 803, 818 (2000)("It is rare that a regulation restricting speech because of its content will ever be permissible.")
[7] See Kathleen M. Sullivan & Noah Feldman, Constitutional Law 1112 (18th ed. 2013)("The distinction between content-based and content-neutral regulations of speech serves as the keystone of First Amendment Law.")

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