FREE SPEECH LAW FOR ON PREMISE SIGNS

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PREFACE

ABOUT THE AUTHOR

Professor Daniel R. Mandelker is the Stamper Professor of Law at Washington University in St. Louis, where he is a leading scholar and teacher of land use law, state and local government law, property law and environmental law. Professor Mandelker's publications include Street Graphics and the Law (2004), published by the American Planning Association as Planning Advisory Report No. 527, a text and model code on regulations for on premise signs that has been widely followed, and Sign Regulation and Free Speech: Spooking the Doppelganger in Trends in Land Use Law from A to Z (American Bar Association, 2001). His articles include Decision Making in Sign Codes: The Prior Restraint Barrier, Zoning and Planning Law Report, Sept. 2008. He is the author of Land Use Law (5th ed. 2003), and coauthor of law school casebooks including Planning and Control of Land Development (8th ed. 2011), and State and Local Government in a Federal System (7th ed. 2010).

Professor Mandelker was the principal consultant for the American Planning Association's Legislative Guidebook (2002), which proposed model planning and zoning legislation to replace existing laws, and for a joint American Bar Association committee that prepared a model land use procedures law adopted by the ABA House of Delegates. He also was the principal author of amendments to the New Orleans city charter that require a comprehensive planning process and give the comprehensive plan the force of law. Mandelker received the ABA's State and Local Government Section Daniel J. Curtin Lifetime Achievement Award in 2006.

Professor Mandelker is a frequent lecturer at national and regional conferences on land use and environmental law. He has also lectured internationally, including the keynote lecture at

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A NOTE

All statutes cited in this handbook were current at the time of publication. Omissions in quotations from cases are shown by an ellipsis.

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CHAPTER I: AN INTRODUCTORY NOTE

§ 1:1. Why This Handbook Was Written

Free speech law is critically important for on premise sign regulation. Signs are an expressive form of free speech protected by the free speech clause of the Federal Constitution. Courts decide how local governments can regulate signs, including on premise signs, in order to ensure the principles of freedom of expression are observed. If free speech requirements are not met, courts will hold an on premise sign law unconstitutional. This handbook explains the free speech principles that apply to the regulation of on premise signs.

Free speech law need not be discouraging. On premise sign messages are often classified as commercial speech, and courts usually find the regulation of commercial speech does not present constitutional problems. On premise sign regulation is also constitutionally protected because it seldom prohibits the display of signs. Instead, sign ordinances specify the way in which on premise signs are displayed. Local governments can regulate sign display through content-neutral sign ordinances that are fair, objective, even-handed and supported by accepted government purposes without creating constitutional problems.

§ 1:2. What This Handbook Is About

This handbook begins in Chapter II by discussing Supreme Court cases that have decided the basic principles of free speech law. These principles state the rules that apply to laws that regulate commercial speech, such as on premise sign ordinances. Content neutrality is one of the most important principles. A law is content-neutral if it does not specify the content of the speech that is regulated. The chapter next discusses the tests the Supreme Court has developed for regulating commercial speech, and the related requirements for time, place and manner regulations. A final section discusses prior restraint doctrine, which applies to the process in

which decisions about the display of signs are made, including the standards that must be used to make these decisions.

Chapter III discusses basic issues concerning on premise sign ordinances, such as how a municipality can show that an ordinance advances its aesthetic and traffic safety objectives, the importance of a statement of purpose, how on premise signs should be defined, sign exemptions and the treatment of on premise signs under the Federal Highway Beautification Act. Chapter IV reviews the law that applies to the different types of signs that can be displayed on premise, such as time and temperature signs, portable signs and digital signs. A final chapter discusses the regulations that apply to on premise signs, such as size, height and spacing regulations. Objective sign standards based on research, such as that conducted by the United States Sign Council, can help decide what kind of regulations to adopt.

§ 1:3. How to Use This Handbook

This handbook discusses the case law that applies to the regulation of on premise signs. There are two sets of cases. Supreme Court cases are one set. They provide interpretations of the constitutional free speech clause that apply to all laws, including sign ordinances. Only a few of these cases dealt with sign ordinances, but all Supreme Court free speech decisions may apply to and affect the constitutionality of on premise sign ordinances. Lower federal court and state court cases are the second set. They interpret and apply the free speech principles adopted by the Supreme Court. The important decisions that affect the display of on premise signs are in the lower federal and state courts. They provide the guidelines that municipalities must use when they adopt on premise sign ordinances, because they indicate what kinds of ordinances will receive judicial approval, and what kind will not.

The textual discussion is usually organized around one or two critical decisions that provide a primer for the topic being discussed. This discussion is intended to provide basic guidance on the free speech principles that apply. More detail is provided in footnotes through additional citations that support and explain the decisions discussed in the text. Contrary decisions are included if there are any. Footnote decisions and law review articles cited in the footnotes provide leads to additional detail on the case law. The intention is to make the list of citations as complete as possible.

Deciding on which cases are controlling is difficult. Free speech law is complex, and court decisions often conflict. Supreme Court decisions are clearly controlling, but they have not considered the detail that occurs in on premise sign ordinances. Attention must be given to lower federal court and state court decisions that consider sign ordinance detail, especially decisions by courts of appeal, which are the appellate courts in the federal system. Decisions by the court of appeal having jurisdiction over the state in which a municipality is located are controlling. Decisions by other courts of appeal should be consulted if there is no decision by the court of appeal that has geographic jurisdiction. Sometimes there are no court of appeal decisions on the problem at issue, so decisions by the federal district courts, which are the federal trial courts, and by state courts, must be consulted. These decisions are important but have less precedential value.

Most important, using this handbook requires judgment. Free speech law is rarely precise, and judgment is required to decide what law is relevant, and how it should be applied.

CHAPTER II: FREE SPEECH LAW PRINCIPLES

§ 2:1. Basic Concepts

Free speech is the dominant constitutional issue in sign regulation. State law dealing with aesthetic and other issues is important, but free speech law overrides state law because sign regulations must satisfy constitutional free speech principles. One important principle is that free speech law modifies the presumption of constitutionality that laws regulating economic activity usually enjoy. A sign ordinance is a law regulating an economic activity. The presumption of constitutionality allows a legislature to make choices when there is reasonable disagreement about what a law should contain. Free speech law modifies this presumption and places a greater burden on government to uphold a sign regulation. How free speech law limits the discretion legislatures can exercise when enacting sign ordinances is a major issue that decides whether they are constitutional.

The standard of review courts use when they review the constitutionality of sign ordinances decides how this legislative discretion is limited. Courts uphold economic regulation if there is a rational relationship between the law and the legislative purpose it serves. Aesthetic purposes justify the enactment of sign ordinances, for example, so a court will uphold a sign ordinance under the rational relationship standard of judicial review if it is rationally related to its aesthetic purpose.

Free speech law changes the standard of judicial review that courts apply. Two alternatives are available. The Supreme Court adopted an intermediate standard of judicial review for laws that regulate commercial speech, such as sign ordinances.[1] That standard places some limits on legislative discretion in adopting legislation, but is not impossible to meet. When

[1] Central Hudson Gas & Elec. Co. v. Public Service Comm'n, 447 U.S. 557 (1980).

a law regulates the content of speech, however, the Court applies a strict scrutiny standard of judicial review that requires a compelling governmental interest to support its constitutionality.[2] A sign ordinance that specifies the message a sign can contain is a regulation of content, and the courts call this kind of ordinance content-based. Strict scrutiny judicial review is usually fatal. Courts rarely, if ever, find a compelling governmental interest that justifies content-based legislation. The Supreme Court also rejects laws that treat noncommercial speech less favorably than commercial speech.

These principles are straightforward. Unfortunately, they have not been applied by the courts with the clarity and predictability they require. There are a number of reasons for this failure. One is that the free speech clause requires an important balancing of the constitutional interest in freedom of expression against government's need to regulate in the public interest. Balancing these competing interests demands a sensitivity from the courts that is difficult to express in categorical, bright-line rules, and that produces judicial doctrine that may require interpretation.

§ 2:2. Federal and State Court Decisions and What They Mean

The Supreme Court is the binding interpreter of the constitution, but its decisions on free speech are sometimes inconsistent and contain ambiguities that lower courts find difficult to interpret. Its decisions may also not gain a majority of the Court and are adopted by a plurality of four or fewer Justices, including an important decision on sign regulation. These decisions may have limited precedential value. Only a few of the Court's free speech decisions considered sign regulations and only one considered the regulation of on premise signs. The question is how much respect Supreme Court free speech decisions should receive that did not consider sign

[2] Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

regulations, especially since the Court has said that signs are a medium of expression that requires special treatment.[3]

Despite ambiguities in Supreme Court free speech law, lower federal courts have provided helpful guidance on free speech principles that apply to sign regulation, including on premise sign regulation. Not all lower courts agree, however, and there are conflicts on some issues, some of them important. To understand the role of the lower federal courts, and what these conflicts mean, it is important to understand the differences between federal district courts and federal courts of appeal in the federal court system. The courts of appeal are appellate courts that hear appeals from single-judge district courts, which are the federal trial courts with original jurisdiction. The entire country is divided into courts of appeal for 11 different geographic circuits and an additional court of appeal for the District of Columbia. They decide cases in panels of three, which differ from case to case and may reach different conclusions on the same issue in the same circuit. Panel decisions are sometimes reconsidered by the entire court of appeal en banc. District courts must follow decisions by the court of appeal in its geographic circuit, if there are any. When there are no court of appeal decisions that apply, a district court judge is free to apply decisions by other courts of appeal or by other district court judges.

State courts also apply the federal free speech clause because the federal constitution is enforceable in state courts. They are free to pick and choose from federal court of appeal and district court decisions, but federal courts do not have to follow state court decisions on the federal constitution and seldom cite them. State court decisions are cited in this handbook as examples of how the free speech clause of the federal constitution can be applied to sign

[3] Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984) ("With respect to signs posted by appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape.").

ordinances. They usually apply federal cases faithfully, and have done so in on premise sign cases. Better staffing and more familiarity with federal free speech cases are reasons to sue in federal court, though state courts have more flexibility in choosing federal precedent.

§ 2:3. Commercial and Noncommercial Speech

§ 2:3[1]. Strict Scrutiny Review for Noncommercial Speech

Courts make important constitutional distinctions between laws that regulate noncommercial speech, and laws that regulate commercial speech. Sign ordinances do not usually require a distinction between commercial and noncommercial speech, such as an ordinance regulating the size of signs. But a sign ordinance may apply to noncommercial speech, such as an ordinance that regulates signs displayed by religious organizations.

The Supreme Court has explained the difference between commercial and noncommercial speech, and has held that laws regulating noncommercial speech require a higher standard of judicial review:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.[4]

Courts do not allow sign ordinances to treat commercial speech more favorably than noncommercial speech.[5] An example is a sign ordinance that includes more restrictive display requirements for noncommercial signs than it does for commercial signs, such as a smaller size

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[4] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

[5] Reed v. Town of Gilbert, 587 F.3d 966, 981 (9th Cir. 2009) (discussing Metromedia to hold in a sign ordinance case that "[m]unicipalities stray beyond the boundaries of acceptable time, place and manner regulation when an ordinance favors commercial forms of speech over noncommercial speech"); KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261 (11th Cir. 2006); John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980).

requirement. A court will hold this difference in treatment unconstitutional, and may invalidate the entire ordinance.[6]

Courts also hold sign ordinances unconstitutional that discriminate between different types of signs with noncommercial messages. As a plurality of the Supreme Court held in the San Diego sign case, "[a]lthough the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests."[7] The ordinance provided exceptions for some noncommercial signs but not others. The courts have consistently struck down sign ordinances that treat different types of noncommercial signs differently.[8]

§ 2:3[2]. How to Decide When a Sign Message is Commercial or Noncommercial

A test for deciding whether a sign ordinance regulates noncommercial or commercial speech is necessary because courts apply different standards of judicial review to each. Defining these categories of speech is difficult,[9] however, and the Supreme Court has admitted that "ambiguities may exist at the margins of the category of commercial speech."[10] These

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[6] This happened in the Metromedia case on remand to the state supreme court. 649 P.2d 902 (1982).

[7] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 514 (1981).

[8] Ackerley Comm'ns of Mass., Inc. v. City of Cambridge, 88 F.3d 33, 37 (1st Cir. 1996) (invalidating exemption only for on premise noncommercial signs); National Advertising Co. v. Orange, 861 F.2d 246, 249 (9th Cir. 1988) (only certain noncommercial signs exempted from restrictions); Savago v. Village of New Paltz, 214 F. Supp. 2d 252, 257 (N.D.N.Y 2002) (some noncommercial signs that exceeded size restrictions were subject to the permit requirement, but others were not); Outdoor Sys. v. City of Merriam, 67 F. Supp. 2d 1258, 1264 (D. Kan. 1999) (noncommercial signs allowed to limited extent).

[9] City of Cincinnati v. Discovery Network, 507 U.S. 410, 419 (1993), reviewed the cases that defined noncommercial and commercial speech and concluded that "[t]his very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category."

[10] Edenfield v. Fane, 507 U.S. 761, 765 (1993). See Nat Stern, In Defense of the Imprecise Definition of Commercial Speech, 58 Md. L. Rev. 55 (1999).

ambiguities are evident in a series of examples given by a Supreme Court Justice in one case.[11] He compared a billboard containing the message "Visit Joe's Ice Cream Shoppe" with another containing the message "Joe's Ice Cream Shoppe Uses Only The Highest Quality Dairy Products." The first message is commercial, while the second combines a noncommercial message about dairy products with an arguably commercial message about the store. How should the second message be characterized? Supreme Court tests for deciding whether speech is commercial or noncommercial, including intermingled speech as in the second example, do not give clear and unambiguous guidance, and use a multi-factor approach that courts must apply on a case-by-case basis.

The Supreme Court has adopted general guidelines, however. Speech is considered commercial even though it contains "discussions of important public issues,"[12] and does not lose its commercial character because it "links a product to a current public debate."[13] Speech is not commercial simply because money is spent to advertise it, or because it solicits a purchase.[14] These statements provide only general principles, and the Court has supplemented them with more detailed tests.

The test for commercial speech most often applied by the Court is the "'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."[15] This test, if

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[11] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 538, 539 (1981) (Justice Blackmun, concurring).

[12] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67, 68 (1983).

[13] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 n.5 (1980).

[14] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 761 (1976) (citing cases).

[15] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). This test was first proposed in Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations, 413 U.S. 376, 385 (1973), and recently confirmed in Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001). The Court has also defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." Central Hudson, 447 U.S. at 561. Later cases have not applied this definition, however. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422 (1993).

literally applied, means that most on premise signs would not contain commercial speech if they only contained information about a business. Price and quantity information about a product is also classified as commercial.[16]

Bolger v. Youngs Drug Prods. Corp.,[17] adopted a multifactor approach to the definition of noncommercial speech that qualifies these categorical tests. There the Court struck down a federal law that prohibited the mailing of information about contraceptives. Most of the mailings fell within the "core notion" of commercial speech that proposes a transaction, but they also included informational pamphlets. The informational mailings were not necessarily commercial speech, though they were conceded to be advertisements, referred to a specific product and had an economic motivation for mailing them. However, the combination of all these characteristics provided strong support for a conclusion that the informational mailings were commercial speech, even though they contained discussion of important public issues. Earlier decisions, the Court said, made it clear that advertising is not noncommercial speech just because it links a product to public debate. A pamphlet advertising an activity protected by the free speech clause might require a different conclusion.

Problems occur in deciding whether a message is commercial or noncommercial when it contains intermingled content, as in the ice cream shop sign example that included a commercial message about the store and a noncommercial message. The Supreme Court considered this problem in Board of Trustees v. Fox,[18] where it upheld a state university regulation that did not allow "private commercial enterprises" to operate on state campuses. The regulation was applied to prohibit a demonstration of commercial products in a student dormitory that included

[16] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 n.12 (1983).

[17] 463 U.S. 60 (1983).

[18] 492 U.S. 469 (1989).

noncommercial topics, such as how to be financially independent and how to run an efficient home. The Court held the commercial and noncommercial elements of the presentation were not so "inextricably commingled" that the entire presentation was noncommercial. There was nothing "inextricable" about the noncommercial aspects of the presentations. "No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares."[19] This case suggests an intermingling of commercial and noncommercial messages on a sign does not make it noncommercial.

§ 2:3[3]. Must Noncommercial and Commercial Speech be Defined in a Sign Ordinance?

Should a sign ordinance define the distinction between commercial and noncommercial signs because this distinction is so critical to the constitutional issues? The courts have held a definition is not required. For example, the Fourth Circuit Court of Appeals rejected an argument that a sign ordinance was unconstitutionally vague because it lacked standards and held:

> Although the ordinance provides no definition of "commercial" or "non-commercial" speech, sufficient guidance is given for such determination by City officials by the various decisions of the Court relating to billboards and commercial speech. We agree with the district court that "no codification of these terms is necessary, since the Supreme Court has already defined them."[20]

Other courts have agreed with the Fourth Circuit.[21] By this time the important Supreme Court cases defining commercial speech had been decided.

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[19] Id. at 474. The Court distinguished Riley v. National Fed'n of Blind, 487 U.S. 781 (1988), where charitable fundraising presentations were considered noncommercial speech when state law required commercial content to be "inextricably intertwined" with them.

[20] Major Media of Southeast, Inc. v. Raleigh, 792 F.2d 1269, 1272 (4th Cir. 1986).

[21] National Advertising Co. v. City & County of Denver, 912 F.2d 405 (10th Cir. 1990); City of Salinas v. Ryan Outdoor Advertising, 234 Cal. Rpr. 619 (Cal. App. 1987); National Advertising Co. v. Village of Downers Grove, 561 N.E.2d 1300 (Ill. App. 1990).

§ 2:4. Content and Viewpoint Neutrality

§ 2:4[1]. Strict Scrutiny Judicial Review

Another important free speech principle is that laws must have a neutral effect on speech. Most on premise sign ordinances have a neutral effect on speech because they regulate the way in which signs are displayed, such as the size, number and height of signs.. Problems may arise, however, if on premise sign regulations violate the neutrality requirement. Two types of neutrality are required: viewpoint neutrality and content neutrality.[22] A sign ordinance violates viewpoint neutrality if it regulates a point of view.[23] An example is a sign ordinance that prohibits signs that oppose the hunting of whales. A sign ordinance violates content neutrality if it regulates the content of a sign. An example is a sign ordinance that prohibits any sign about whales. The neutrality principle has important consequences, because a high standard of strict scrutiny judicial review applies to content-based regulations of noncommercial speech.[24] This standard of judicial review requires that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[25] Because courts seldom find a narrowly tailored compelling interest sufficient to justify a content-based regulation of speech, this standard of judicial review is sometimes called strict scrutiny in theory but fatal in fact. A

[22] See Dan V. Koslowski, Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine, 13 Comm. L. & Pol'y 131 (2008); Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615 (1991).

[23] Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), suggested that sign ordinances need only be viewpoint neutral, but this suggestion has not been followed.

[24] Sugarman v. Village of Chester, 192 F. Supp. 2d 282 (S.D.N.Y. 2002) (political signs; held unconstitutional).

[25] Boos v. Barry, 485 U.S. 312, 321 (1988).

less-burdensome alternative to the regulation must also be adopted if it is available,[26] and a law must leave open ample alternate means of communication.[27]

The Supreme Court has now held that strict scrutiny review applies to content-based regulations of commercial speech,[28] though an earlier case had suggested the contrary.[29] The Court held invalid, as a burden on commercial speech, a law that prohibited the distribution of information about persons who prescribed medical prescriptions. The law's burden was more than incidental and "directed at certain content and ... aimed at particular speakers."[30] Heightened scrutiny applies to commercial speech whenever disagreement with the message is

The Supreme Court has not been consistent in applying the content neutrality requirement and has decided some sign regulation cases without applying it.[31] Lower federal courts take the content neutrality requirement seriously, however, and local governments must consider it when they adopt sign ordinances.

§ 2:4[2]. How to Decide When a Regulation is Content-Based

The leading case defining when a regulation is content neutral is Ward v. Rock Against

[26] United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000).

[27] Thomas v. Chicago Park District, 534 U.S. 316 (2002) (stating all three requirements).

[28] Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011).

[29] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983) ("By contrast, regulation of commercial speech based on content is less problematic".). See also North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755 (N.D. Ohio 2000) (content-based restrictions on commercial speech receive intermediate scrutiny).

[30] Sorrell, 131 S.Ct. at 2665.

[31] City of Ladue v. Gilleo, 512 U.S. 43 (1994) (invalidating ordinance that prohibited display of message sign in window of residence; content neutrality rule not applied). See also Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (noting general principle that free speech clause requires only viewpoint neutrality), applied in Messer v. City of Douglasville, 975 F.2d 1505, 1509 (11th Cir.1992). See Randall M. Morrison, Sign Regulation, in Protecting Free Speech and Expression: The First Amendment and Land Use Law 105, 108-109 (Daniel R. Mandelker & Rebecca L. Rubin eds., American Bar Association, 2001) (noting that Supreme Court decisions are conflicting).

Racism.[32] The Court held:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech." (citations omitted).[33]

This definition of content neutrality justifies on premise sign ordinances that regulate the physical characteristics of signs, such as their location, size and height.

A content-neutral purpose is not enough, however, if a sign ordinance discriminates on its face.[34] A sign ordinance discriminates on its face even if it is a benign regulation that authorizes a certain type of sign, and that does not suppress speech because of the sign's message. In the leading Supreme Court sign case, Metromedia v. City of San Diego,[35] for example, a plurality of the Court held invalid a list of exemptions in the ordinance that defined signs by their content, such as government signs, realty signs and temporary political signs. These exemptions permitted, and did not suppress, speech. Not all lower federal courts follow this holding,[36] but this problem requires attention in on premise sign regulation.

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[32] 491 U.S. 781 (1989) (upholding regulation of amplified music at concert). See also Renton v. Playtime Theatres, 475 U.S. 41, 48 (1986) (upholding zoning of adult business).

[33] Id. at 791, applied in Hill v. Colorado, 530 U.S. 703, 719 (2000) (upholding ordinance prohibiting protest picketing as content-neutral). Compare City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993) (distinguishing Ward because ordinance prohibiting commercial handbills in newsracks was content-based).

[34] Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994) (mere assertion of content-neutral purpose not enough to save law that discriminates based on content on its face). See Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011) (content neutrality decided on the face of the ordnance).

[35] 453 U.S. 490 (1981).

[36] H.D.V. - Greektown, LLC v. City of Detroit, 568 F.3d 609, 622 (6th Cir. 2009), rejecting Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1266 (11th Cir. 2005),

§ 2:4[3]. The "Need to Read" Requirement

Sign ordinances may require an officer to read a sign in order to decide how the ordinance applies. An ordinance may make special provision, for example, for signs displaying "qualifying events."[37] An officer has to read a sign to decide whether it is a temporary event sign regulated by the ordinance. The question is whether the "need to read" a sign to decide whether or how an ordinance applies means the ordinance is content-based. A court of appeals pointed out the absurdity of construing the "officer must read it" test as a bellwether of content. If applied without common sense, this principle would mean that every sign, except a blank sign, would be content based.[38]

Supreme Court cases have not applied a "need to read" requirement. The Court held, for example, that a federal statute regulating currency reproductions did not regulate content because the statute had color and size requirements. An official did not have to evaluate a message when deciding whether the statute was violated.[39] Then, in Hill v. Colorado,[40] the Court upheld a state statute that regulated speech-related conduct within 100 feet of the entrance to any health care facility. The statute made it unlawful within regulated areas for any person to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or

[37] Reed v. Town of Gilbert, 587 F.3d 966 (9th Cir. 2009) (upholding provision).

[38] Reed v. Town of Gilbert, 587 F.3d 966, 978 (9th Cir. 2009).

[39] Regan v. Time, Inc., 468 U.S. 641 (1984) (federal statute regulating currency reproductions). See also Nichols Media Group, LLC v. Town of Babylon, 365 F. Supp. 2d 295 (E.D.N.Y. 2005) (ordinance not invalid because town officials must read permit applications to determine whether a sign meets lighting and/or size specifications); Burke v. City of Charleston, 893 F. Supp. 589 (D.S.C. 1995) (color, size, and other restrictions affected only format or manner in which plaintiff's artwork was displayed).

[40] 530 U.S. 703 (2000), noted, 114 Harv. L. Rev. 289 (2000).

counseling with such other person." The statute did not apply to persons who were not leafletters or sign carriers, unless their approach was for the purpose of engaging in oral protest, education, or counseling.

The Court upheld the statute as a content-neutral time, place and manner regulation.[41] It rejected an argument that the law was content-based, because the content of oral statements by approaching speakers sometimes had to be examined to decide whether they were covered by the statute. The Court held it was "common in the law to examine the content of a communication to determine the speaker's purpose," and that it had "never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct."[42] It would not be necessary to know "exactly what words were spoken" in order to decide whether they were covered by the statute. "[C]ursory examination" to decide whether speech was casual conversation excluded from the coverage of a regulation of picketing would not be problematic.[43]

The Supreme Court cases are not consistent, however. In an earlier case[44] the Court held invalid as content-based a statute prohibiting editorials by noncommercial radio stations. It noted that enforcement authorities had to examine the content of a message in order to decide whether a statement by station management was a prohibited editorial.

Lower federal courts vary in their interpretation of the Supreme Court decisions. Some apply the Supreme Court's "cursory examination" rule to hold the need to read a sign to decide

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[41] See § 2:7.

[42] Id. at 721.

[43] Id. at 731-732.

[44] FCC v. League of Women Voters, 468 U.S. 364, 384 (1984). See also Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992) (ordinance authorizing fees for permits for parades and assemblies held invalid; administrator must examine content to determine amount of fee because county often required that fee be based on content of speech).

whether it complies with an ordinance does not make it content-based. For example, in Reed v. Town of Gilbert,[45] the Ninth Circuit Court of Appeals held a sign ordinance was not content-based because of the "cursory examination" required to decide whether a sign was a qualifying event sign.[46] Other cases have adopted a similar analysis.[47]

A number of other cases have held, however, that the need to read a sign to decide whether an ordinance applied,[48] or whether there was an exemption from the ordinance, made the ordinance content-based.[49] Similarly, other courts held an ordinance content-based when an official had to examine the content of a sign to decide what size and duration requirements

[45] 587 F.3d 966 (9th Cir. 2009), on remand to consider discrimination among types of commercial speech, 832 F. Supp. 2d 1070, 1081 (D. Ariz. 2011). See also Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 434 (4th Cir. 2007) ("to the extent that the Sign Regulation required looking generally at what type of message a sign carries to determine where it can be located, this 'kind of cursory examination' did not make the regulation content based").

[46] Id. at 978 ("Gilbert officer needs to briefly take in what is written on the Qualifying Event Sign to note who is speaking and the timing of the listed event").

[47] Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012) ("That Arlington officials must superficially evaluate a sign's content to determine the extent of applicable restrictions is not an augur of constitutional doom."); Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421 (4th Cir. 2007) (following Hill); G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1079 (9th Cir. 2006) ("A grandfather provision requiring an officer to read a sign's message for no other purpose than to determine if the text or logo has changed, making the sign now subject to the City's regulations, is not content based."); LaTour v. City of Fayetteville, 442 F.3d 1094, 1096 (8th Cir. 2004) ("It takes some analysis to determine if a sign is 'political,' but one can tell at a glance whether a sign is displaying the time or temperature."); Nichols Media Group, LLC v. Town of Babylon, 365 F. Supp. 2d 295 (E.D.N.Y. 2005) (reading to determine neutral information to decide type of sign or whether banned as billboard, or to distinguish real estate and business signs, does not make an ordinance content-based);Supp. 2d; B & B Coastal Enters. v. Demers, 276 F. Supp. 2d 155 (D. Me. 2003) (deciding whether a sign is an identification or advertising sign).

[48] Neighborhood Enters. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011) (must look at content of sign to determine whether particular object qualifies as a "sign" subject to regulation, or is a "non-sign" or exempt from regulation); Vono v. Lewis, 594 F. Supp. 2d 189 (D.R.I. 2009) (off premise/on premise distinction); Outdoor Sys. v. City of Merriam, 67 F. Supp. 2d 1258 (D. Kan. 1999) ("city must evaluate the content of the sign to determine whether it is allowed").

[49] Neighborhood Enters. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011) (definition of sign); Foti v. City of Menlo Park, 146 F.3d 629 (9th Cir. 1998) (exemptions for "open house" real estate signs and safety, traffic, and public informational signs were content-based); Desert Outdoor Advertising v. City of Moreno Valley, 103 F.3d 814 (9th Cir. 1996) (certain off site noncommercial signs); National Advertising Co. v. Orange, 861 F.2d 246 (9th Cir. 1988) (same).

applied,[50] or whether a sign was on premise or off premise in order to determine whether a fee must be paid.[51]

The Supreme Court gave the most detailed attention to the "need to read" requirement in Hill v. Colorado, and its decision there on this requirement deserves the most respect. The need for a cursory examination to decide whether and how an ordinance applies to a sign should not make it content-based.

§ 2:5. Speaker Neutrality

Sign ordinances often apply different regulations to different uses. Gasoline filling stations are a common example. This type of ordinance is said to be speaker-based because it applies only to particular uses. The question is whether a speaker-based ordinance, like a content-based ordinance, is subject to strict scrutiny judicial review.

Some Supreme Court decisions had not required speaker-neutrality. Turner Broad. Sys. v. Federal Communications Commission (I),[52] for example, upheld the "must-carry" provisions of a federal statute. It required cable operators to carry, according to a statutory formula, a certain number of the broadcast signals from "local commercial television stations" and "noncommercial education television stations." The Court held that "speaker-partial" laws are not presumed invalid, and adopted the limited view that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference."[53] A court of appeals applied this holding when it upheld a speaker-based sign regulation that exempted some signs from a fee and permit process.[54]

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[50] Advantage Media, L.L.C. v. City of Hopkins, 379 F. Supp. 2d 1030 (D. Minn. 2005); Clear Channel Outdoor, Inc. v. Town Bd. of Town of Windham, 352 F. Supp. 2d 297 (N.D.N.Y 2005).

[51] Clear Channel Outdoor, Inc. v. City of St. Paul, 2003 U.S. Dist. LEXIS 13751 (D. Minn. 2003).

[52] 512 U.S. 622 (1994).

[53] Id. at 658. See also Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (upholding

Despite these decisions, some lower courts struck down sign regulations found to be speaker-based.[55] One ordinance held invalid, for example, an exemption for signs located on fences or walls surrounding athletic fields and within sports arenas and stadiums, but not signs on fences and walls located elsewhere.[56] Language in some Supreme Court cases supported these decisions by indicating that speaker-based limitations on speech are prohibited.[57]

The Supreme Court, in Sorrell v. IMS Health, Inc.,[58] has now held that speaker-based regulations demand strict scrutiny judicial review. The Court held invalid a Vermont law providing that information identifying prescribers of medical prescriptions could not be sold by pharmacies or similar entities, disclosed by them for marketing purposes, or used for marketing by pharmaceutical manufacturers, unless the prescriber consented. The Court held the law invalid, in part, because it imposed a burden based on "the identity of the speaker," and was "aimed at particular speakers," such as the pharmacies and manufacturers controlled by the

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collective bargaining agreement providing that the exclusive bargaining representative, but no other union, would have access to the interschool mail system; speaker-based restrictions "may be impermissible in a public forum," but are permissible in a nonpublic forum if "they are reasonable in light of the purpose which the forum at issue serves.").

[54] G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1077 (9th Cir. 2006), 1077 ("That the law affects plaintiffs more than other speakers does not, in itself, make the law content based.").

[55] Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1266 (11th Cir. 2005) (e.g., noncommercial signs displayed by public utilities). See also Ackerley Communications of Mass., Inc. v. City of Somerville, 878 F.2d 513, 518 (1st Cir. 1989) (striking down a sign ordinance whose "grandfather" clause allowed certain speakers to use nonconforming signs, observing that "even if a complete ban on nonconforming signs would be permissible, we must consider carefully the government's decision to pick and choose among the speakers permitted to use such signs").

[56] Bonita Media Enters., LLC v. Collier County Code Enforcement Bd., 2008 U.S. Dist. LEXIS 10637 (M.D. Fla. Feb. 13, 2008).

[57] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."). But see US West v. United States, 48 F.3d 1092 (9th Cir.1994) (citing Bellotti and similar cases, and holding that Turner "flatly rejected the contention that all regulations distinguishing among speakers warrant strict scrutiny"), vacated and remanded to decide mootness, 516 U.S. 1155 (1996), dismissed as moot, sub nom., Pacific Telesis Group v. United States, 84 F.3d 1153 (9th Cir. 1996).

[58] Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011).

law.[59] It did not provide an explanation for this conclusion. The dissent argued it was not unusual for "particular rules" to be speaker-based because they affected only a class of entities, such as firms subject to an energy regulation that imposed labeling requirements for certain home appliances.[60]

As applied to sign ordinances, a rule that speaker-based regulations require strict scrutiny would apply to regulations affecting identified uses, such as gasoline stations and other uses such as shopping centers and residential developments. A law that distinguishes between commercial and noncommercial uses would not be speaker-based because it is based on use categories and not specific identified uses. Whether a court will hold a speaker-based sign ordinance unconstitutional is problematic, because the cases are divided on this issue. There is enough confusion in the cases to suggest that the problem can be ignored, unless there is a clear judicial decision at the court of appeals level holding the speaker-based rule applies within that court's jurisdiction.

§ 2:6. Judicial Standards for Regulating Commercial Speech

§ 2:6[1]. An Overview

This section considers the standards the Supreme Court has adopted for the review of regulations that affect content-neutral commercial speech. If commercial speech is content-based, the Supreme Court has now indicated it will be subject to strict scrutiny review.[61] Beginning with a decision in 1980, the court has applied a four-part balancing test to commercial speech regulation that is less than strict scrutiny,[62] but stronger than the weaker rational basis

[59] Id. at 2657.

[60] Id. at 2678.

[61] § 2:4[1], supra.

[62] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

review courts apply to economic regulation.[63] Its tests for the judicial review of commercial speech have been applied to sign ordinances.

The problem in applying the intermediate scrutiny test is to resolve the tension between an interpretation that gives some deference to legislative judgment and upholds laws even though they affect commercial speech, and an interpretation that gives less deference to legislative judgment in order to protect commercial speech. The following discussion details the development and evolution of these two approaches. Early Supreme Court cases applying the intermediate scrutiny judicial review standard deferred to legislative judgment and upheld regulations, but some later cases were less deferential and held regulations invalid. Because the Supreme Court holds that each medium of expression raises its own free speech problem, its decisions in sign regulation cases can be viewed independently, though other Supreme Court commercial speech decisions must be considered. Difficulties arise because the most important Supreme Court case dealing with sign regulation was badly divided and did not produce a majority opinion.[64]

The subsections that follow review Supreme Court decisions that have applied the four Central Hudson tests. Lower federal courts follow these decisions when they apply these tests to sign ordinances. Each of the Central Hudson tests serves a different purpose, and only two of these four tests are problematic for sign ordinances.

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[63] Edenfield v. Fane, 507 U.S. 76 (1993) ("Unlike rational basis review, the Central Hudson standard does not permit us to supplant the precise interests put forward by the State with other suppositions.").

[64] Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

§ 2:6[2]. The Central Hudson Case: A Four-Part Test for the Regulation of Commercial Speech

The leading case that established the intermediate scrutiny standard of judicial review is Central Hudson Gas & Elec. Corp. v. Public Service Commission.[65] The Court held invalid a Commission regulation that completely banned promotional advertising by electric utilities, but that allowed informational advertising designed to shift consumption to off-peak periods. The Court first recognized the distinction between commercial and noncommercial speech, and the accepted rule that commercial speech requires "lesser protection." It also provided a contextual commentary, that "[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."[66]

The Court then adopted a four-part test for the judicial review of laws affecting commercial speech. Parenthetical numbers have been inserted to identify the four parts:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, (1) it at least must concern lawful activity and not be misleading. Next, we ask (2) whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest.[67]

Although a law that fails any one of the four parts of the test violates the free speech clause, the four parts of the test are not discrete but are interrelated.[68]

Sign ordinances have not usually been a problem under the first two Central Hudson tests. They usually are not unlawful or misleading, and the Supreme Court has accepted the

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[65] 447 U.S. 557 (1980).

[66] Id. at 563.

[67] Id. at 566.

[68] Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173, 184 (1999).

aesthetic and traffic purposes of sign ordinances as substantial. The important tests for sign ordinances are the third "directly advance" test and the fourth test, sometimes called a "narrow tailoring" test. The third test is an ends/means test that requires an acceptable fit between the regulation and its objective. The fourth test is similar and limits legislative discretion by requiring selection of the alternative that does the least damage to commercial speech.

In Central Hudson the Court found the utility's advertising was protected speech. It also found that substantial governmental interests were served by the Commission's regulation, because it would promote energy conservation and prevent rate inequities that promotional advertising might create. The regulation partly satisfied the third "directly advance" test because the state's interest in energy conservation was directly advanced by the advertising ban. It partly failed the third test because the link between promotional advertising and rate inequity was "highly speculative." The advertising ban failed the "critical" fourth test because it banned all promotional advertising, even advertising that promoted energy-efficient products or that did not affect energy use. The state's interest in energy conservation could be promoted by a more limited regulation of commercial speech. As an alternative, the Court suggested the Commission could restrict the format and content of utility advertising by requiring, for example, that advertising include information about the energy efficiency and expense of an advertised utility service.

The Court in Central Hudson did not provide criteria that could be applied in later cases to decide whether the four-part test for commercial speech had been met, but applied the test ad hoc to the Commission's regulation. The Court has kept the Central Hudson tests, though several Justices have urged their rejection, and the Court reaffirmed it in a recent decision.[69] That

[69] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 544, 555 (2001).

reaffirmance has not kept a number of commentators from recommending rejection and reform.[70] It is also of interest that two Justices have been appointed since recent cases that applied the Central Hudson tests were decided. One of these new Justices joined the majority in a recent case striking down a state statute as content-based.[71]

§ 2:6[3]. The Metromedia Case: Applying the Central Hudson Test to Sign Ordinances

One year after Central Hudson, the Supreme Court in Metromedia v. City of San Diego[72] applied the Central Hudson tests to a sign ordinance from San Diego that completely banned commercial billboards, exempted a selected group of signs, and made special provision for on premise signs. A badly-split Court produced a plurality opinion signed by four Justices that most federal courts follow in free speech cases involving sign ordinances.[73] The Third Circuit is an exception, and has rejected the Metromedia plurality for a different judicial review standard.[74]

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[70] E.g., Charles Fischette, A New Architecture of Commercial Speech Law, 31 Harv. J.L. & Pub. Pol'y 663 (2008); Alan Howard, Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework, 41 Case W. Res. L. Rev. 1093 (1991); Shannon M. Hinegardner, Note: Abrogating the Supreme Court's De Facto Rational Basis Standard for Commercial Speech: A Survey and Proposed Revision of the Third Central Hudson Prong, 43 New Eng. L. Rev. 523 (2009); Brian J. Waters, Comment: A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech, 27 Seton Hall L. Rev. 1626 (1997).

[71] Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011), discussed in § 2:4[1], supra.

[72] Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), noted, 95 Harv. L. Rev. 211 (1981). Justice White wrote the opinion for the plurality, joined by Justices Stewart, Marshall, and Powell. Chief Justice Burger, then-Justice Rehnquist and Justice Stevens each wrote dissenting opinions. Justice Brennan, joined by Justice Blackmun, wrote a concurring opinion. None of these Justices are presently on the Court.

[73] Randall M. Morrison, Sign Regulation, in Protecting Free Speech and Expression: The First Amendment and Land Use Law 105, 139 n. 95 (Daniel R. Mandelker & Rebecca L. Rubin eds., American Bar Association, 2001) (listing decisions by circuit).

[74] Rappa v. New Castle County, 18 F.3d 1043, 1065 (3d Cir. 1994) ("when there is a significant relationship between the content of particular speech and a specific location or its use, the state can exempt from a general ban speech having that content so long as the state did not make the distinction in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate and so long as the exception also survives the test proposed by the Metromedia concurrence: i.e. the state must show that the exception is substantially related to advancing an important state interest that is at least as important as the interests advanced by the underlying regulation, that the exception is no broader than necessary to advance the special goal, and that the exception is narrowly drawn so as to impinge as little as possible on the overall goal.").

As explained by the plurality in Metromedia,[75] the San Diego ordinance prohibited signs on a building or other property that displayed goods or services produced or offered elsewhere. This provision effectively prohibited off premise billboards. Noncommercial advertising, unless within specified exemptions, was prohibited everywhere. Signs advertising goods or services available on the premises were allowed. The plurality upheld the billboard ban, but struck down the on premise sign limitation to commercial advertising and the sign exceptions allowed by the ordinance.

The plurality began its discussion of the billboard ban by noting that "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method."[76] This statement confirms the Court's rule, that its application of free speech law differs with the medium of expression to which it is applied. There was "little controversy" over the first, second and fourth Central Hudson tests. Commercial advertising was neither unlawful nor misleading, the traffic safety and aesthetic goals that supported the ordinance were substantial governmental interests, and the ordinance was no broader than necessary. Obviously "the most direct and perhaps the only effective approach" was to prohibit them.[77]

Whether the ordinance met the third Central Hudson test was the "more serious" question, but the plurality held the billboard ban substantially advanced the governmental interests it served. Though the record on the relationship between traffic safety and the elimination of billboards was meager, the California Supreme Court, as a matter of law, did not set aside the legislative judgment that billboards are traffic safety hazards. Agreeing with the

[75] Metromedia, 453 U.S. at 503. See also id. at 493 n.2.

[76] Id. at 500.

[77] Id. at 508.

California court, the plurality held that "[w]e likewise hesitate to disagree with the accumulated, commonsense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety," citing several cases.[78] Whether the plurality adopted a universal "common sense" test for applying the third Central Hudson test, or whether it was simply convinced by the weight of legislative judgment and judicial opinion that the necessary relationship existed, is not clear. The plurality also held the billboard ban substantially advanced the city's interest in aesthetics. It was not "speculative" to recognize that billboards were aesthetic harms wherever they were located, and however they were constructed.

On premise advertising issues also received attention. The plurality held that allowing on premise while prohibiting off premise advertising did not detract from the traffic safety and aesthetic purposes of the ordinance and was acceptable.[79] There were three reasons. Prohibiting off premise advertising was related to the traffic safety and aesthetic objectives of the ordinance. Neither was the ordinance underinclusive because it permitted on premise advertising. The city may also have believed that off premises advertising, with its "periodically changing content," presented more of a problem. Finally, the city could decide there was a stronger public interest in advertising places of business and the products and services available there than in advertising "commercial enterprises available elsewhere."

Justice Stevens concurred in the Court's holding on commercial speech,[80] and because Chief Justice Burger and then-Justice Rehnquist would have held the entire ordinance constitutional, it can be assumed they concurred as well. A majority of the Court thus agreed with the plurality's decision on the commercial speech issues.

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[78] Id. at 509.

[79] The Court noted that all of the cases considering this issue had upheld this distinction. Id. at 511 n. 17.

[80] Id. at 514.

Two features of the ordinance were held invalid by the plurality. It held invalid a provision in the ordinance limiting on premise signs to commercial speech, holding that the communication of commercial messages could not be of greater value than the communication of noncommercial information. It also held invalid a provision of the ordinance that allowed the display anywhere of 12 exempted signs. Some of these signs carried noncommercial messages, such as signs with religious symbols, signs with news, time and temperature signs and temporary political campaign signs. Though the city could distinguish between the relative value of different types of commercial speech, it could not distinguish between different types of noncommercial speech. It could not allow signs with some types of commercial speech while prohibiting others. These exceptions were content-based, and the plurality held the lack of content neutrality was a problem because the city could "not choose the appropriate subjects for public discourse."[81]

§ 2:6[4]. Taxpayers for Vincent: Applying the Central Hudson Tests to Sign Regulation After Metromedia

In Metromedia, a plurality of the Supreme Court applied the Central Hudson tests in a lenient manner to uphold restrictions on commercial speech in a sign ordinance. Members of City Council v. Taxpayers for Vincent,[82] a case decided a few years later, continued this trend. In Vincent, a majority decision, a Los Angeles ordinance prohibited the posting of signs on public property. A weekly sign report indicated the removal of 1207 signs from public property, including 48 campaign signs posted by Vincent on utility poles. After discussing other cases to hold that a municipality has a "weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression," the Court affirmed the holding by seven Justices in

[81] Id.

[82] 466 U.S. 789 (1984).

Metromedia, that a city's interest in visual clutter is sufficient to justify a prohibition on billboards. "The problem addressed by this ordinance -- the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property -- constitutes a significant substantive evil within the City's power to prohibit."[83] Although the case was not a typical sign case because it considered a restriction on the use of public property, the Court's holding on aesthetic interest is significant, especially because signs posted on public property are a type of on premise sign.

This case also followed the Metromedia plurality's application of the fourth Central Hudson test, holding the prohibition on posting signs on public property was not substantially broader than necessary to protect the city's aesthetic interest.[84] The Court upheld the ordinance as a reasonably tailored time, place and manner regulation.[85] It applied to posted signs where the Metromedia plurality's conclusion that such signs, wherever constructed or located, were an aesthetic harm.[86]

§ 2:6[5]. Later Supreme Court Cases Applying Central Hudson's Third "Directly Advance" Test

After Metromedia, the third "directly advance" test adopted in Central Hudson has been an important factor in free speech cases involving sign ordinances. The Supreme Court has said

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[83] Id. at 807.

[84] Justice Stevens stated he was applying tests adopted in United States v. O'Brien, 391 U.S. 367 (1968), to viewpoint-neutral regulations of speech. The O'Brien tests, which were first adopted for regulations of symbolic speech, are similar to the Central Hudson tests, and Justice Stevens explicitly relied on Metromedia's interpretation of the Central Hudson tests in his decision.

[85] See § 2:7.

[86] The Court rejected an argument that a prohibition on unattractive signs could not be justified unless it applied to all unattractive signs everywhere. The validity of the aesthetic interest in eliminating signs in public property was not compromised by a failure to extend it to private property. This disparate treatment was justified by the private citizen's interest in controlling the use of his property, a less than total ban allowed the display of temporary signs, and a content-neutral ban would enhance the city's appearance even if some visual blight remained. Taxpayers for Vincent, 466 U.S. at 811.

that this test, which requires a reasonable "fit" between the ends and means of regulation, is critical.[87] For this reason, later free speech cases in the Court that did not involve sign ordinances but that considered the "directly advance" test should be reviewed. Some of these cases departed from the lenient application of the Central Hudson tests in Metromedia and Taxpayers for Vincent, and used them to strike down legislation under the free speech clause. Whether this shift in opinion reflects a change in attitude, or merely the different free speech issues raised by the legislation the Court considered, is not clear. An initial question is whether the Court has modified how the Metromedia plurality applied the third "directly advance" test. There the plurality adopted a "common sense" rule for this test. It did not require studies or reports to justify the billboard ban and held it was not "speculative" to recognize that billboards were aesthetic harms that could justify their prohibition everywhere.

In Edenfield v. Fane[88] the Supreme Court elaborated the implication in Metromedia that the "directly advance" test cannot be satisfied by "mere speculation and conjecture." Instead, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[89] The Court struck down a state board's ban on the solicitation of business clients by certified public accountants, noting the board did not prove with studies that solicitation would lead to fraud, overreaching or compromised independence. A report of a national accountants

[87] Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995). In Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 95-96 (1977), a case decided before Central Hudson, the Court struck down an ordinance that prohibited the display of for sale signs in order to prevent racial panic selling. In a holding that echoed and applied what became the third Central Hudson test, the Court held that prohibiting for sale signs would not reduce public awareness of real estate sales in the township.

[88] 507 U.S. 761, 770 (1993). See David S. Modzeleski, Note: Lorillard Tobacco v. Reilly: Are We Protecting the Integrity of the First Amendment and the Commercial Free Speech Doctrine at the Risk of Harming our Youth?, 51 Cath. U.L. Rev. 987 (2002).

[89] Id. at 770-771.

organization and the literature actually disputed the board's concerns. Other Supreme Court cases applied the Edenfield rule, that speculation and conjecture do not satisfy the "directly advance" test, sometimes upholding and sometimes striking down regulations affecting commercial speech.[90]

In later cases, the Court backed away from earlier decisions that applied axiomatic assumptions in order to hold that laws directly advanced a governmental interest. In these later cases the Court struck down laws that prohibited or regulated advertising for "vice" products and activities, such as beer and casino gambling.[91] The implication is that this kind of advertising does not get less protection under the free speech clause. In one of these cases a badly divided Court struck down a state law that prohibited price advertising for liquor products.[92] This case makes laws like sign ordinances, that prohibit other types of price advertising, questionable.

The Supreme Court applied the Edenfield speculation and conjecture test to a regulation by the Massachusetts attorney general that prohibited smokeless tobacco and cigar advertising

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[90] Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 187 (1999) (striking down federal legislation prohibiting advertising for gambling; statute and exemptions pierced with exceptions and inconsistencies); 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996) (striking down statute that prohibited advertising of liquor prices; plurality decision), noted, 110 Harv. L. Rev. 216 (1996); Florida Bar v. Went for It, 515 U.S. 618, 628, 629 (1995) (upholding ban on direct-mail solicitation in the immediate aftermath of accidents by attorneys as supported by bar studies), noted, 109 Harv. L. Rev. 191 (1995); Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995) (striking down federal statute prohibiting advertising of alcohol content on beer labels; no "credible evidence" to support statute); Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 143 (1994) (striking order prohibiting use of certified public account designation as misleading). See also Thompson v. Western States Medical Ctr., 535 U.S. 357 (2002) (Edenfield not cited, but striking down federal statute prohibiting advertising of compounded drugs); United States v. Edge Broadcasting Co., 509 U.S. 418 (U.S. 1993) (same, and upholding federal statute prohibiting broadcast of lottery advertisements); Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986) (upholding Puerto Rico statute and regulations restricting casino advertising pre-Edenfield, relying on legislative belief that advertising would increase demand for gambling).

[91] The Greater New Orleans, Liquormart and Rubin cases qualified the earlier Edge Broadcasting and Posadas cases, which had upheld such advertising laws. See the previous footnote. The Greater New Orleans case also clearly extinguished the "greater-includes-the-lesser" argument, that government power to ban a product or activity reduces free speech protection for truthful, non-deceptive commercial speech about that product or activity. See Michael Hoefges & Milagros Rivera-Sanchez, "Vice" Advertising under the Supreme Court's Commercial Speech Doctrine: The Shifting Central Hudson Analysis, 22 Hastings Comm. & Ent. L.J. 345 (2000).

[92] Liquormart v. Rhode Island, 517 U.S. 484 (1996).

within 1000 feet of a radius of a school or playground,[93] but held the regulation met the "directly advance" requirement. The Court extensively discussed Federal Drug Administration and other studies supporting the state's argument, that advertising plays a significant and important contributing role in a young person's decision to use tobacco products. Earlier in the decision the Court also emphasized it did not require empirical data to justify free speech restrictions. Studies and anecdotes could be enough.[94] The Court held that the prohibition failed the fourth Central Hudson test, however.[95]

§ 2:6[6]. Later Supreme Court Cases Applying Central Hudson's Fourth "More Extensive than is Necessary" Test

In its fourth Central Hudson test, the Supreme Court requires courts to consider whether a regulation is "more extensive than is necessary to serve" the governmental interest. This is a reasonable fit tailoring test that complements the third "substantially advance" test,[96] and which the Supreme Court has called the "critical inquiry."[97] Regulations must be narrowly tailored to avoid unconstitutional burdens on free speech.

Ambiguity in how this test was stated raises questions about what it means. A need to consider different alternatives seems implied, so that a regulation can include the alternative that is narrowly tailored. What is not clear is whether tailoring demands more, and requires selection of the least-burdensome means[98] to achieve the regulatory purpose. As applied to sign regulation,

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[93] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

[94] Id. at 555, quoting Florida Bar v. Went for It, 515 U.S. 618, 628 (1995).

[95] The Court also held that a restriction on the point-of-sale advertising of smokeless tobacco and cigars failed the third Central Hudson test. Id. at 566.

[96] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001).

[97] Central Hudson Gas & Elec. Co. v. Public Service Comm'n, 447 U.S. 557, 569 (1980).

[98] The Court uses this phrase when it discusses this requirement as it might apply under the fourth Central Hudson test, but the phrase "less-restrictive means" has also been used to describe this requirement in other regulatory

a least-burdensome means requirement requires selection of the alternative that places the least burden on commercial speech. For example, a court might require an ordinance that allowed the display of digital signs as an alternative to prohibition on their display. Though the Supreme Court first applied the fourth Central Hudson test liberally, later cases applied it to strike down commercial speech regulations. No bright line rule has emerged.

The Court first applied the fourth test shortly after Central Hudson in the Metromedia case.[99] There it deferentially upheld a ban on billboards, and dealt curtly with an argument that it was more extensive than necessary by deferring to the city's legislative judgment. "If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them."[100] Moreover, the city had not prohibited all billboards, but allowed onsite advertising and exempted some signs.

In a case decided a few years later, Posadas de Puerto Rico Associates v. Tourism Co.,[101] the Court was even more permissive, and upheld a Puerto Rico statute that prohibited casino advertising to Commonwealth residents. It again dealt curtly with the fourth Central Hudson test, rejecting a government-sponsored advertising campaign to discourage gambling by residents as a less-burdensome means. It was "up to the legislature" to decide whether this less-burdensome means would be effective.[102]

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contexts.

[99] Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

[100] Id. at 508.

[101] 478 U.S. 328 (1986). The trial court narrowed the statute and its regulations by permitting certain local advertising addressed to tourists even though it might incidentally reach the attention of residents, and adopted other exceptions.

[102] Id. at 344. The authority of this case is questionable, however. See Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 187 (1999) (striking down federal legislation prohibiting advertising for gambling; statute and exemptions pierced with exceptions and inconsistencies).

A definitive interpretation of the fourth Central Hudson test came a few years later in Board of Trustees of the State University of New York v. Fox.[103] As noted earlier, in this case the Court upheld a state university regulation that did not allow "private commercial enterprises" to operate on state campuses, which the university applied to prohibit a demonstration of commercial products in a student dormitory. The Court held a less-burdensome means did not have to be selected,[104] called the fourth test an ends and means test and adopted a deferential "reasonableness" standard of judicial review:

> What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," [citing Posadas] -- a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," [citing case]; that employs not necessarily the least restrictive means but, as we have put it ..., a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.[105]

The Court added that it required "the government goal to be substantial, and the cost to be carefully calculated."[106] Government has the burden of proof.

A few years later, however, in City of Cincinnati v. Discovery Network,[107] the Court applied the fourth Central Hudson test to strike down an ordinance that prohibited commercial handbills in newsracks, but not newspapers containing noncommercial speech. The city claimed the ban furthered its aesthetic interests, but the Court held that newsracks carrying commercial

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[103] 492 U.S. 469 (1989). See Todd J. Locher, Comment: Board of Trustees of the State University of New York v. Fox: Cutting Back on Commercial Speech Standards, 75 Iowa L. Rev. 1335 (1990). For a recent case applying Fox to uphold offsite advertising regulations see Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94, 104, 105 (2d Cir. 2010) ("That the City considered, and rejected, an alternative scheme is of no constitutional moment.").

[104] The Court commented that "The ample scope of regulatory authority ... [over commercial speech] would be illusory if it were subject to a least-restrictive-means requirement, which imposes a heavy burden on the State." Id. at 477.

[105] Id. at 480.

[106] Id.

[107] 507 U.S. 410 (1993).

material the ordinance banned were no more eyesores than the newsracks carrying newspapers with noncommercial speech the ordinance permitted. The city had not established "a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition on newsracks as the means chosen to serve those interests."[108] Only 62 newsracks were affected, while 1500 to 2000 remained in place. The distinction between commercial and noncommercial newspapers had absolutely no bearing on the city's aesthetic interests.[109] In a footnote,[110] the Court distinguished Metromedia, because that ordinance treated two types of commercial speech differently by banning outdoor but permitting on site commercial advertising.[111]

In another footnote, the Court clarified the standard of judicial review that should apply. It rejected "mere rational-basis review," but did not reject Fox by adopting a less-burdensome means test. However, "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."[112] The city had not "carefully calculated" the costs and benefits associated with the ban because it failed to consider regulating their size, shape, appearance or number as a less-burdensome means.

The city in Discovery Network may have believed that Metromedia's relaxed acceptance of a ban on billboards signaled the Court's willingness to accept a ban on the distribution of

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[108] Id. at 416.

[109] Id. at 428. For discussion of this issue see 102 Harv. L. Rev. 224 (1993). The Court held that its holding was narrow. It did "not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks." Id.

[110] Id. at 425, n.20.

[111] See § 2:6[3], supra.

[112] Id. at 418, n.13. Chief Justice Rehnquist, dissenting, believed the Court had revived the discredited less-burdensome means test. Id. at 441.

commercial handbills. The Court disagreed, tightened the fourth Central Hudson test, and held the availability of less-burdensome alternatives was a factor to consider. Another factor that certainly weighed on the calculation of costs and benefits was the city's reliance on an outdated regulation, aimed at littering, which it used to ban commercial handbills from distribution on public property.

Later Supreme Court cases struck down or upheld commercial speech regulations under the fourth Central Hudson test, but did not always consider the less-burdensome means requirement nor clarify how the Fox and Discovery Network decisions applied it.[113] One of these cases was an important advertising case discussed earlier, Lorillard Tobacco Co. v. Reilly.[114] Here the Court struck down Massachusetts regulations that prohibited the advertising of smokeless tobacco and cigars within 1000 feet of schools or playgrounds, which were adopted to protect youth from the harm of smoking. Noting that the regulations prohibited advertising in a substantial portion of major metropolitan areas in the state, the Court held their uniformly broad geographical sweep demonstrated a lack of tailoring. In addition, the ban in the regulations on all

[113] United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) (citing Fox but not Discovery Network, the Court upheld a federal statute that prohibited broadcasting stations from advertising state-run lotteries in a state that did not run a lottery; it handled the "reasonable fit" issue by holding that the prohibition "advances the governmental interest in enforcing the restriction in nonlottery States, while not interfering with the policy of lottery States like Virginia."); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (the Court struck down a federal statute that prohibited the disclosure of the alcohol content of beer on labels or in advertising; without citing any authority, it held that other alternatives to the prohibition existed, such as directly limiting the alcohol content of beer); Florida Bar v. Went for It, 515 U.S. 618 (1995) (upholding Florida Bar's restriction on targeted mail, and finding many alternatives for "communicating necessary information about attorneys;" Fox and Discovery Network quoted); Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173 (1999) (same; invalidating federal scheme for regulating broadcast of gambling advertisement because "pierced by exemptions and inconsistencies"); Thompson v. Western States Medical Center, 535 U.S. 357 (U.S. 2002) (striking down ban on advertising compounded drugs; government must "achieve its interests in a manner that does not restrict speech, or that restricts less speech"); Fox and Discovery Network not cited).

[114] 533 U.S. 525 (2001). Following Lorillard: N.A. of Tobacco Outlets v. City of Worcester, 2012 U.S. Dist. LEXIS 4638 (D. Mass. 2012). Cf. 44 Liquormart v. State of Rhode Island, 517 U.S. 484 (1996) (invalidating state statute prohibiting price advertising of liquor products; plurality opinion per Stevens, J., "perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance"), discussed in 110 Harv. L. Rev. 216 (1996).

signs of any size was "ill suited to target the problem of highly visible billboards, as opposed to smaller signs."[115] To the extent that studies had identified advertising and promotional practices that appealed to youth, "tailoring would involve targeting those practices while permitting others."[116] The regulations made no such distinction. They failed the fourth Central Hudson test because they impinged unduly on the ability to propose a commercial transaction, and the opportunity of an adult listener to obtain information about products.

The Court did not discuss the Metromedia case, where it upheld a ban on commercial billboards under the fourth Central Hudson test. The purpose for which the ban was adopted distinguishes the two decisions. In Metromedia the purpose was to further the aesthetic and traffic safety interests of the city, and the Court believed that only a billboard ban could be effective. In Lorillard the purpose was to protect youth from the harm of tobacco, and means other than a ban could have been adopted. Nevertheless, as in Metromedia, the Court in Lorillard could have held that a the ban on advertising was the only effective way to protect youth from the harm of tobacco. Its close examination of the narrow tailoring requirement shows it might be equally as demanding when it considers other sign ordinances.

The Supreme Court's application of the fourth Central Hudson test is therefore mixed. Discovery Network modified the generous interpretation adopted in Fox, but the Court did not reconcile the tension between the two cases in later decisions and did not always explicitly rely on either one. Its earlier relaxed application of the test in Metromedia to uphold a ban on billboards may have been modified by later cases. The Court has also been inconsistent in applying the less-burdensome means requirement. It was quick to find less-burdensome means that should have been adopted when it held a law invalid, but sometimes ignored such

[115] Id. at 564.

[116] Id.

possibilities when it upheld a law. What emerges is a case-by-case calculation of costs and benefits that depends on the regulatory purpose, that requires convincing evidence to support the regulatory choice, and that requires consistency in regulatory requirements.

§ 2:7. Time, Place and Manner Regulations

§ 2:7[1]. Supreme Court Doctrine

Long before the Supreme Court adopted the four tests for commercial speech in Central Hudson, it approved regulations affecting free speech it called time, place and manner regulations. They had their origin in early licensing cases, where the Court upheld content-neutral regulations in the public forum, such as regulations for licensing parades in public streets.[117] Time, place and manner regulations are also upheld outside public forums. Sign regulations can be defended as a time, place and manner regulation, which the courts view as an independent basis for constitutionality different from other tests the courts apply to commercial speech.

Ward v. Rock Against Racism[118] clarified Supreme Court doctrine on the validity of time, place, and manner regulations. New York city regulated the volume of amplified music that could be played at rock concerts at a park bandshell. It had to be satisfactory to the audience, but could not intrude on those using an adjacent quiet grassy area designated for passive recreation, or on those living in nearby apartments and residences. The Court decided the case as if the bandshell were a public forum where the government's right to regulate free speech was subject to first amendment protections. It held:

> Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the

[117] E.g., Cox v. New Hampshire, 312 U.S. 569 (1941) (licensing upheld). For discussion of this history see Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615, 636-645 (1991).

[118] Ward v. Rock Against Racism, 491 U.S. 781(1989).

> restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[119]

The rules for time, place and manner regulations are similar but add to the Central Hudson tests for commercial speech. Content neutrality is required, but it is also required for commercial speech if, as the Court has now held, all commercial speech must be content-neutral. City of Cincinnati v. Discovery Network[120] illustrates a case where the Court held a law was not a time, place and manner regulation because it was content-based. An ordinance prohibited commercial handbills in newsracks, but not newspapers containing noncommercial speech. The Court held the ordinance content-based because it's very basis was the difference in content between ordinary newspapers and commercial speech. There was no acceptable justification for the ordinance, because the city's only justification was its "naked assertion" that commercial speech has low value.[121]

The narrow tailoring requirement is similar to the fourth Central Hudson "more extensive than is necessary" test. In language echoing that test, the Court in Ward held a regulation must not be substantially broader than necessary, and may not burden a substantial portion of speech in a manner that does not achieve its goals. Narrow tailoring is met if the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[122] The adoption of a less-burdensome-alternative is not required.[123] "[O]ur cases quite clearly hold

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[119] Id. at 791, citing cases.

[120] 507 U.S. 410 (1993).

[121] Id. at 429.

[122] Id. at 799, quoting from case. The Court added that judges do not have to agree that a "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," or on the degree to which those interests should be promoted. Id. at 800, quoting from case.

[123] In the cases applying the Central Hudson fourth test the Court uses the phrase "less-burdensome alternative," but the two phrases are equivalent.

that restrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.'"[124] Recall it is not clear whether a less-burdensome alternative is required under the fourth Central Hudson test.

The requirement for ample alternative channels of communication as a basis for upholding time, place and manner regulations differs from narrow tailoring, and is not part of the Central Hudson requirements. Ample alternative channels exist if there are other adequate means for communicating the expressive conduct whose communication is affected by the regulation. This test is concerned with the speaker's ability to communicate, not with governments' ability to regulate.

These differences would seem to distinguish time, place and manner regulations from the Central Hudson tests for commercial speech, but the Court has held the two doctrines are similar.[125] Litigants have nevertheless claimed that regulations of advertising could be upheld as time, place and manner regulations in cases where the Supreme Court also considered the Central Hudson requirements. These cases are discussed in the next section.

§ 2:7[2]. Supreme Court Cases Applying Time, Place and Manner Doctrine to the Regulation of Advertising

The Court has considered the time, place and manner doctrine in four cases involving the regulation of advertising. All of these cases considered an ordinance that banned a particular type

[124] Id. at 797, citing case. The dissenting Justices disagreed with this holding.

[125] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) (tests substantially similar, citing Fox); United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993) ("the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context"); San Francisco Arts & Athletics, Inc.. v. United States Olympic Comm., 483 U.S. 522, 537 n.16 (1987) (tests substantially similar); Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 477 (1989) (same, quoting San Francisco Arts).

of sign. The Court struck down three of these ordinances in a group of decisions that arguably are inconsistent.

In the first case, Linmark v. Township of Willingboro,[126] decided before Central Hudson, the ordinance banned for sale and sold signs, except signs on model homes, in order to prevent white flight from the township and promote racial integration. The Court held the ordinance was not a time, place and manner regulation because ample alternate channels of communication were not available. Alternatives, such as newspaper advertising and listing with real estate agents, were less effective because they were less likely to reach persons not deliberately seeking sales information. Neither was the ordinance "genuinely" concerned with the place and manner of speech on the signs. It was content-based because it regulated particular signs based on their content, but the township's interest in regulating content was not enough to save the ordinance.[127]

Time, place and manner issues appeared next in the Metromedia case,[128] where a plurality upheld a ban on commercial billboards, but struck down exceptions that favored certain types of noncommercial speech over others. Its discussion of the city's time, place and manner defense appears in that part of the opinion dealing with the exceptions, where it was curtly rejected. The plurality held the ordinance was not a "manner" regulation because signs were

[126] 431 U.S. 85 (1977).

[127] The goal of stable, racially integrated housing did not save the ordinance, because the evidence did not show that the ordinance was needed for this purpose. This holding suggests the ordinance would not meet the Central Hudson test, that a regulation must directly serve a governmental interest. More basically, the Court said, the ordinance prevented citizens of the township from obtaining vital information, but only because the township feared homeowners would make decisions inimical to its interests by leaving if sale and rental information could be displayed on signs. Relying on an earlier case, Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748. (1976), the Court rejected the "claim that the only way it could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading." Linmark, 431 U.S. at 97. Because the ordinance was content-based, a court today would probably say the governmental interest was not compelling.

[128] Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

banned everywhere, an apparent reference to the ban on noncommercial billboards.[129] This is a puzzling statement, because the Court had upheld the ban on billboards under the Central Hudson tests, and later upheld a ban on posting signs on public property as a time, place and manner regulation. The Court in Metromedia also held it could not be assumed that alternate channels of communication were available because the parties had stipulated the opposite. Finally, the distinctions made in the ordinance were content-based, an apparent reference to the special treatment given to some noncommercial signs. What the Court apparently meant was that it would not consider a time, place and manner defense as an alternate basis for upholding the ordinance.

The Court next applied time, place and manner doctrine, in part, to uphold an ordinance banning signs on public property. In Taxpayers for Vincent v. City of Los Angeles[130] the Court held an ordinance that prohibited the posting of signs on public property, as applied to prohibit the posting of campaign signs, was content-neutral. "The incidental restriction on expression which results from the City's attempt to accomplish such a purpose is considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest."[131] The city "did no more than eliminate the exact source of the evil it sought to remedy" by prohibiting signs that caused visual clutter and blight. The ordinance curtailed no more speech than was necessary to achieve its purpose.

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[129] But see Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615, 637 (1991) (arguing that the time, place and manner doctrine applies to total bans).

[130] 466 U.S. 789 (1984). The Court rejected an argument that the signs deserved special treatment because the sign posts were a public forum. Id. at 813-814. This case was decided five years before the Court restated the time, place and manner doctrine in Ward v. Rock Against Racism. The free speech analysis in Vincent was mixed. See Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615, 650-651 (1991). See also, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), decided six weeks later.

[131] Id. at 807.

Neither were alternate modes of expression inadequate. Individuals could speak and distribute literature at the same place where the posting of signs was prohibited. Any advantages obtained by the posting of political signs could be obtained by other means. "[N]othing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication."[132] In a footnote, the Court added that it had shown "special solicitude" for expressive forms that were less expensive than feasible alternatives, but that "this solicitude has practical boundaries."[133]

Ten years after Vincent the Court rejected a time, place and manner defense in another sign case, City of Ladue v. Gilleo.[134] There it struck down an ordinance that prohibited a political sign on the lawn of a home, but allowed the display in residential areas of residence identification signs, for sale signs, and signs warning of safety hazards. Commercial establishments, churches, and nonprofit private organizations could display signs not allowed in residential areas. Ladue asserted a time, place and manner defense by claiming residents could convey their messages by other means, such as hand-held signs, speeches and banners. The Court rejected these alternatives, holding that "[r]esidential signs are an unusually cheap and convenient form of communication,"[135] and that a sign displayed from a residence can often carry a message quite distinct from placing a message someplace else.

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[132] Id. at 811. The Court added that plaintiffs' ability to communicate effectively was not threatened by ever-increasing restrictions on expression.

[133] Id. n.30.

[134] 512 U.S. 43 (1994). For discussion of the Ladue case see Note: Stephanie L. Bunting, Unsightly Politics: Aesthetics, Sign Ordinances, and Homeowners' Speech in City of Ladue v. Gilleo, 20 Harv. Envtl. L. Rev. 473 (1996). For discussion by the lawyers who argued the case see Jordan B. Cherrick, Do Communities Have the Right to Protect Homeowners from Sign Pollution?: The Supreme Court Says No in City of Ladue v. Gilleo, 14 St. Louis U. Pub. L. Rev. 399 (1995) (attorney for city); Gerald P. Greiman, City of Ladue v. Gilleo: Free Speech for Signs, A God Sign for Free Speech, 14 St. Louis U. Pub. L. Rev. 439 (1995) (attorney for plaintiff).

[135] Id. at 56. The Court earlier assumed the ordinance was content and viewpoint neutral. Id. at 46. Justice O'Connor's concurring opinion disagreed with this characterization. Id. at 59.

The Court's application of the alternate channels of communication requirement in these cases is inconsistent. It is difficult to see why alternate modes of expression were adequate in the Vincent case but not in the Linmark and Ladue cases, unless advertising homes for sale, and the display of signs on residential property, have a more protected place under free speech law than advertising on public property. Neither did the Court provide clear guidance on when it would hold alternate channels of communication adequate, beyond its decision on the facts in these cases. The solicitude for less expensive means of communication was apparently more important in the Ladue case than it was in the Vincent case. Nevertheless, the factual context of these cases may provide an explanation. In Linmark and Ladue the Court was protecting the display of information, and the Ladue ordinance favored commercial over noncommercial signs. In Vincent the interest of the public in preventing displays on public property may have influenced the Court.

§ 2:8. The Prior Restraint Doctrine[136]

§ 2:8[1]. General Principles

Prior restraints are the most serious and least tolerable infringements on free speech rights.[137] A prior restraint occurs when a law like a sign ordinance includes a discretionary administrative review procedure.[138] A requirement for a sign permit is a typical example. Sign

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[136] See Daniel R. Mandelker, Decisionmaking in Sign Codes: The Prior Restraint Barrier, Zoning and Planning Law Report, Vol. 31, No. 8, at 1 (2008), (discussing standing to challenge laws as prior restraint and validity of substantive standards), available at www.ussc.org.

[137] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). Some courts have indicated that whether the prior restraint doctrine applies to commercial speech is an open question. E.g, Hunt v. City of Los Angeles, 638 F.3d 708, 718 n.3 (9th Cir. 2011), quoting Central Hudson Gas & Elec. Co. v. Public Service Comm'n, 447 U.S. 557, 571 n.13 (1980) ("We have observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it.").

[138] The prior restraint doctrine does not apply to legislative decisions. An exception is when a legislature reserves decisionmaking authority to itself. World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676, 688 (9th Cir. 2010).

ordinances may also include discretionary review procedures for conditional uses, also known as special exceptions, and variances.

A discretionary review procedure in a sign ordinance is invalid as a prior restraint unless it contains required procedural and substantive standards.[139] The procedural standards are intended to prevent delays in making decisions. The substantive standards are intended to prevent arbitrary decisions. An ordinance will suppress the expression of speech if decisions can be delayed for too long a time, or if arbitrary decisions denying can be made because the ordinance does not provide adequate substantive standards. The burden to show that procedural and substantive standards are adequate is a heavy one.[140]

§ 2:8[2]. The Procedural Standards

The leading Supreme Court case on procedural standards is Freedman v. Maryland,[141] which held invalid a statute that required approval by a state board of censor before movies could be shown. The Court adopted three procedural standards. Government has the burden of initiating judicial review, prompt judicial review within a specified brief period is required, and any restraint prior to judicial review must be limited to the shortest period compatible with a sound judicial resolution.[142] These standards are known as the "Freedman Standards," after the case in which they were adopted.

Later Supreme Court cases do not entirely explain how the Freedman Standards should be applied to land use regulations like sign ordinances. FW/PBS, Inc. v. City of Dallas[143]

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[139] For a detailed review of Supreme Court cases on the prior restraint doctrine as it applies to signs see Brian W. Blaesser & Alan C. Weinstein, Federal Land Use Law and Litigation §§ 4:26-4:30 (2011).

[140] Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

[141] 380 U.S. 51(1965).

[142] These are the standards as restated in Blount v. Rizzi, 400 U.S. 410, 417 (1971).

[143] FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990). The Court was split three ways in three opinions, each with

considered the Freedman Standards as applied to a conditional use for an adult business, a use protected as free speech. A plurality of three Supreme Court Justices accepted the legitimate and customary role that licensing plays in land use laws. It found a weaker inference that censorship was involved in such laws, as in the Freedman case. For adult uses, it applied only two of the three Freedman standards: that a decision must be made within a specified reasonable time during which the status quo is maintained, and that there must be prompt judicial review. A later Supreme Court decision[144] in an adult use case held a state's ordinary rules of judicial review were adequate to meet the prompt judicial review requirement. This case means that state judicial review procedures will also satisfy the prompt judicial review Freedman standard for sign ordinances.[145]

A later case, Thomas v. Chicago Park District,[146] created an exemption from the Freedman Standards for content-neutral regulation that may apply to sign ordinances, and that may mean these ordinances do not need time limits. The Thomas case upheld a Chicago ordinance that required a permit for large-scale events in public parks. It concluded that "Freedman is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum."[147] Public forum regulations for parks that ensure safety and convenience, it held, were not inconsistent with civil liberties but provide the good order on which civil liberties ultimately

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three Justices.

[144] City of Littleton v. Z. J. Gifts D-4, L.L.C, 541 U.S. 774 (2004). The Court also held the ordinance did not involve censorship because it had neutral and nondiscretionary criteria that applied to the operation of adult businesses.

[145] But see Lusk v. Village of Cold Spring, 475 F.3d 480, 492 n.14 (2d Cir. 2007) (licensing scheme not brief, no judicial review, and village not required to initiate litigation when disapproving a sign).

[146] 534 U.S. 316 (2002), noted, 12 Seton Hall Const. L.J. 825 (2002). See also Robert H. Whorf, The Dangerous Intersection at "Prior Restraint" and "Time, Place, Manner": A Comment on Thomas v. Chicago Park District, 3 Barry L. Rev. 1, 8026 (2002).

[147] Id. at 322.

depend. This traditional exercise of authority did not raise censorship concerns that required "the extraordinary procedural safeguards on the film licensing process in Freedman." The Court distinguished the FW/PBS case, where it applied two of the Freedman Standards, because it "involved a licensing scheme that 'targeted businesses purveying sexually explicit speech.'"[148] Like the licensing scheme in Thomas, sign regulation that is content-neutral should be considered a traditional exercise of authority exempt from the Freedman Standards because it does not involve censorship.[149]

The rejection of the Freedman Standards in the Thomas case should include its time limit requirement, but confusion is created because the Chicago ordinance contained a 28-day time limit. The Court noted but did not discuss the time limit.[150] This failure makes it unclear whether the Court's mention of the time limit in the ordinance means a time limit is required, even in content-neutral regulations. A number of federal courts have not adopted this interpretation, and have read Thomas to mean that sign ordinances do not require time limits if they are content-neutral, like the regulation in that case. The Sixth Circuit Court of Appeals, for example, reached this conclusion in a case involving an adult business ordinance. Requiring time limits, it held, would "negate" the holding in Thomas that content-neutral time, place and manner regulations

[148] Id. n. 2. This statement is puzzling, because the Court had previously held that a zoning ordinance regulating adult uses was content-neutral. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

[149] The Court's statement in Thomas, that the permit ordinance was a time, place and manner regulation, may present a problem for sign ordinances because the tests for time, place and manner regulations are somewhat different from, though similar to, the Central Hudson tests for commercial speech. See § 2:7. However, the Court in Thomas merely mentioned that the permit ordinance was a time, place and manner regulations, and did not actually apply the requirements for these regulations to the permit ordinance.

[150] Id. at 318.

do not have to meet the Freedman Standards.[151] The cases have held that content-neutral sign ordinances do not require time limits.[152]

Despite these cases, local governments should use caution in omitting time limits from permit and other procedures in sign ordinances that require discretionary decisionmaking. A sign ordinance can omit time limits if it is content-neutral, but difficulties in defining content neutrality mean a court can always find an ordinance content-based if an ordinance is challenged in court. Including acceptable time limits can avoid the risk that an ordinance will be found to be an invalid prior restraint.

§ 2:8[3]. The Substantive Standards: Controlling Administrative Discretion

An ordinance that is a prior restraint on speech requires clear substantive standards for discretionary administrative and executive decisions, even if it is content-neutral. As the Supreme Court held in the Thomas case,[153] "[w]here the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content." This rule is well-established. Another Supreme Court case added, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a

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[151] H.D.V. - Greektown, LLC v. City of Detroit, 568 F.3d 609 (6th Cir. 2009).

[152] Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421 (4th Cir. 2007); Granite State Outdoor Adver., Inc. v. City of Clearwater, 351 F.3d 1112 (11th Cir. 2003); Granite State Outdoor Adver., Inc. v. City of St. Petersburg, 348 F.3d 1278 (11th Cir. 2003); National Adver. Co. v. City of Miami, 287 F. Supp. 2d 1349 (S.D. Fla. 2003); B & B Coastal Enters. v. Demers, 276 F. Supp. 2d 155 (D. Me. 2003); Lamar Adver. Co. v. City of Douglasville, 254 F. Supp. 2d 1321 (N.D. Ga. 2003). Accord in cases not involving sign ordnances: Southern Oregon Barter Fair v. Jackson County, 372 F.3d 1128 (9th Cir. 2004) (Oregon Mass Gathering Act); Griffin v. Secretary of Veterans Affairs, 288 F.3d 1309 (Fed. Cir. 2002) (regulation applied to prohibit display of Confederate flag at national cemetery; procedural requirements only apply to explicit censorship schemes). But see Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. Fla. 2005) (time limits required when ordinance content-based); Mahaney v. City of Englewood, 226 P.3d 1214 (Colo. App. 2009) (ordinance held invalid for lack of time limits; Thomas not cited).

[153] Thomas v. Chicago Park District, 534 U.S. at 323. The Court has also pointed out that the absence of express standards makes it impossible to distinguish between " a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power." See also City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 758 (1988); Heffron v. Intl. Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981) (uncontrolled discretion may suppress a particular point of view).

license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."[154]

A sign ordinance that does not contain any standards for decisionmaking is clearly an invalid prior restraint.[155] Conversely, an ordinance that contains objective and precise standards for decisionmaking, such as size, height, location, area, and setback standards is not a prior restraint. A permit requirement in a sign ordinance with such standards is an example.[156]

More difficult prior restraint problems are presented by substantive standards that fall between these two extremes. Standards for sign variances are an example.[157] While not as objective as size and setback standards, courts have found them specific enough to avoid prior

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[154] Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969). As the Court also stated in City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 763, (1988), without standards controlling the exercise of discretion, government officials may determine "who may speak and who may not based upon the content of the speech or viewpoint of the speaker."

[155] Café Erotica of Fla., Inc. v. St. Johns County, 360 F.3d 1274 (11th Cir. 2004) (billboards; permits to be reviewed by County Administrator "in accordance with Standard Building Code", but no specific grounds for denial in Code); Lamar Co., L.L.C. v. City of Marietta, 538 F. Supp. 2d 1366 (N.D. Ga. 2008) (unguided discretion to grant, deny or waive a permit); Lamar Adver. Co. v. City of Douglasville, 254 F. Supp. 2d 1321 (N.D. Ga. 2003) (no precise and objective standards for temporary sign permits); King Enters. v. Thomas Twp., 215 F. Supp. 2d 891 915 (E.D. Mich. 2002); Knoeffler v. Town of Mamakating, 87 F. Supp. 2d 322, 327 (S.D.N.Y. 2000) (temporary permits for signs in the public interest).

[156] H.D.V. - Greektown, LLC v. City of Detroit, 568 F.3d 609 (6th Cir. 2009) (very particular requirements for sign permits, including limitations on size, height, location, area, and setback conditions); Granite State Outdoor Adver., Inc. v. City of Clearwater, 351 F.3d 1112 (11th Cir. 2003) (objective criteria for permits such as height, size, or surface area of a proposed sign); Granite State Outdoor Adver., Inc. v. City of St. Petersburg, 348 F.3d 1278 (11th Cir. 2003) (billboard permits; only on lot zoned commercial/industrial; only if there no other structures are there; only one off-premise sign per lot; height, area, separation, and setback requirements); B & B Coastal Enters. v. Demers, 276 F. Supp. 2d 155 (D. Me. 2003) (sign must be within the maximum number of signs permitted for each zoning district, must meet square footage, height, and setback requirements, must not be located on the roof of a building; must meet restrictions on illuminated signs, must meet definite, objective standards for a temporary permit; portable and banner signs have maximum square footage requirement and time limit; signs prohibited "which prevent[] safe vehicular or pedestrian passage along public rights-of-way or sidewalks"); Township of Pennsauken v. Schad, 733 A.2d 1159 (N.J. 1999) (number, size, location and placement). See also Thomas v. Chicago Park Dist., 534 U.S. 316 (2002) (approving objective standards for park permit).

[157] Sign variances can disrupt the administration of a sign ordinance and are not recommended. If authority for variances is included, the variance provision should be restrictive. One model ordinance authorizes sign variances only from height and setback requirements and requires that the variance vary not more than 25 percent from code requirements. Daniel R. Mandelker, Street Graphics and the Law, American Planning Association, Planning Advisory Rep. No. 527, at 70 (2004).

restraint problems. A court of appeals,[158] for example, upheld a variance provision that contained typical "practical difficulty" and "unnecessary hardship" standards. The ordinance also required the city to consider whether a denial "would deprive the applicant of privileges enjoyed by owners of similarly zoned property," whether a variance would constitute a "grant of special privilege," and whether a variance would allow the applicant to engage in conduct otherwise forbidden by the city.

Historic district ordinances usually require permit or other procedure to decide whether a proposed development or modification of an existing structure is compatible with the character of the district. These procedures can raise a prior restraint problem, though a district's historic character can provide an acceptable reference point that validates a substantive compatibility standard. A court of appeal, for example, upheld an ordinance that required the review of sign permit applications "for conformity in exterior material composition, exterior structural design, external appearance and size of similar advertising or information media used in the architectural period of the district in accordance with the Resource Inventory of building architectural styles of the Bradford Historic District." The presence of individuals knowledgeable about historic preservation on the review board also guarded against arbitrary decisionmaking.[159] A district

[158] Desert Outdoor Adver., Inc. v. City of Oakland, 506 F.3d 798 (9th Cir. 2007). See also accord Clear Channel Outdoor, Inc. v. City of Portland, 262 P.3d 782 (Or. Ct. App. 2011) (billboards, sign adjustment criteria; objective, physical aspects of the sign and extent to which proposed sign, so viewed, would significantly increase street level sign clutter, adversely dominate the visual image of an area, be inconsistent with plan or design district objectives, create traffic or safety hazards, be of exceptional design or style so as to enhance an area or be a visible landmark, and be more consistent with site architecture and development). Standards held invalid: City of Indio v. Arroyo, 191 Cal. Rptr. 565 (Cal. App. 1983) ("will not be injurious to public welfare" and "shall be in harmony with the general purpose and intent of the [sign] ordinance and general plan"). Compare Pica v. Sarno, 907 F. Supp. 795 (D.N.J. 1995) (invalid, no standards provided).

[159] Riel v. City of Bradford, 485 F.3d 736, 755 (3d Cir. 2007). See also Lusk v. Village of Cold Spring, 475 F.3d 480 (2d Cir. 2007) ("alteration of designated property shall be compatible with its historic character, and with exterior features of neighboring properties;" in applying compatibility principle Review Board to consider "(a) The general design, character and appropriateness to the property of the proposed alteration or new construction; (b) The scale of proposed alteration or new construction in relation to the property itself, surrounding properties, and the neighborhood; (c) Texture and materials, and their relation to similar features of the properties in the neighborhood; (d) Visual compatibility with surrounding properties, including proportion of the property's front facade, proportion

court, however, reached a contrary conclusion in a sign permit case, and held a similar but less complete set of standards invalid.[160]

The most difficult prior restraint problem created by decisionmaking procedures occurs in sign ordinances that apply outside historic districts but that contain similar compatibility standards, such as ordinances authorizing conditional uses. The cases that have considered these ordinances are difficult to classify because the ordinances vary, but some courts hold them invalid when standards are stated in general terms without additional detail. In Desert Outdoor Advertising v. City of Moreno Valley,[161] for example, all off-site signs required a conditional use permit. It could be granted if "such a display will not have a harmful effect upon the health or welfare of the general public and will not be detrimental to the welfare of the general public and will not be detrimental to the aesthetic quality of the community or the surrounding land uses." The Ninth Circuit held the ordinance conferred an unbridled discretion because it placed "no limits" on a decision to deny a permit. Though courts in cases not involving free speech issues have upheld similar standards,[162] the Moreno case indicates that generally stated standards of this type can be an invalid prior restraint under the free speech clause.

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and arrangement of windows and other openings within the facade and roof shape; and (e) The importance of architectural or other features to the historic significance of the property").

[160] Lamar Adver. Co. v. City of Douglasville, 254 F. Supp. 2d 1321 (N.D. Ga. 2003) ("effect on the aesthetic, historic, or architectural significance and the value of the historic property," as well as "any design review guidelines which may be developed by the commission").

[161] 103 F.3d 814 (9th Cir. 1996). See also accord Outdoor Sys. v. City of Merriam, 67 F. Supp. 2d 1258 (D. Kan. 1999) (requirement that "all signs shall conform, generally, to the aesthetics of the immediate area in which they are placed"); Macdonald Advertising Co. v. City of Pontiac, 916 F. Supp. 644 (E.D. Mich. 1995) (billboard, standards applied to all special exceptions: that the proposed development will not unreasonably injure the surrounding neighborhood or adversely affect the development of the surrounding neighborhood, and that any proposed building shall not be out of harmony with the predominant type of building in the particular district by reason of its size, character, location, or intended use); City of Indio v. Arroyo, 191 Cal. Rptr. 565 (Cal. App. 1983) (sign's relationship to overall appearance of subject property as well as surrounding community; compatible design, simplicity and sign effectiveness). See generally, Daniel R. Mandelker, Land Use Law § 6.57 (5th ed. 2003 & Supp. 2011).

[162] Daniel R. Mandelker, Land Use Law § 6.03 (5th ed. 2003 & Supp. 2011).

The Fourth Circuit, however, upheld a similar compatibility standard for exemptions from the ordinance,[163] and Courts have upheld such standards when the ordinance provided more specific direction and content. In G.K. Ltd. Travel v. City of Lake Oswego,[164] for example, the Ninth Circuit upheld sign permit standards that required signs to be "compatible with other nearby signs, other elements of street and site furniture and with adjacent structures." The ordinance provided directions for the compatibility determination, stating that "[c]ompatibility shall be determined by the relationships of the elements of form, proportion, scale, color, materials, surface treatment, overall sign size and the size and style of lettering." This standard, the court held, provided a "limited and objective set of criteria" more specific than the standard it held invalid in Moreno. The court in Lake Oswego also held that a requirement for reasons to be

[163] Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012) (board may grant exemption if it finds that the ordinance will not "(1) affect adversely the health or safety of persons residing or working in the neighborhood of the proposed use; (2) be detrimental to the public welfare or injurious to property or improvements in the neighborhood; [or] (3) be in conflict with the purposes of the master plans of the County.") The court held that the "normally amorphous" general welfare standard was not a problem because it was modified by the language after the "or" in clause (2).

[164] 436 F.3d 1064 (9th Cir. 2006). See also accord Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895 (9th Cir. 2007) (can approve application within 15 days if in conformance with chapter and consistent with its intent and purpose, which included encouraging a desirable urban character with minimum of overhead clutter; enhancing the economic value of the community and each area thereof through the regulation of the size, number, location, design and illumination of signs; and encouraging signs that are compatible with on-site and adjacent land uses; signs must also be compatible with the style and character of existing improvements upon lots adjacent to the site, including incorporating specific visual elements such as type of construction materials, color, or other design detail); Lamar Corp. v. City of Twin Falls, 981 P.2d 1146 (Idaho 1999) (distinguishing Moreno; standards were that location and placement of sign will not endanger motorists; that sign will not cover or blanket prominent view of structure or facade of historical or architectural significance; that sign will not obstruct views of users of adjacent buildings to side yards, front yards, or to open space; that sign will not negatively impact visual quality of a public open space; that sign is compatible with building heights of existing neighborhood and does not impose a foreign or inharmonious element to an existing skyline; and that sign's lighting will not cause hazardous or unsafe driving conditions for motorists). But see, holding standards invalid, CBS Outdoor, Inc. v. City of Kentwood, 2010 U.S. Dist. LEXIS 107172 (W.D. Mich. 2010) (whether request "preserves the health, safety, and welfare of the public, and is in harmony with the general purpose and intent of this ordinance;" whether request "may have a substantial and permanent adverse effect on neighboring property;" whether request "is generally aesthetically compatible with its surroundings;" proposed use must "[b]e designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance, with the existing or intended character of the general vicinity;" and "The construction or maintenance of a billboard may not act as a detriment to adjoining property, act as an undue distraction to traffic on nearby streets, or detract from the aesthetics of the surrounding area").

stated for approvals or denials, a fourteen-day processing period, and the availability of an appeal to the city council helped support the validity of the ordinance.[165]

None of these cases considered the validity of a design review process, which can be included in sign ordinances for on premise signs, and which may authorize a special design review board to review sign designs. A design review process contains design standards that specify the design elements that will be considered. They can include compatibility and similarity standards that require a sign to relate to the building on which it will be displayed. For example, the Street Graphics and the Law model ordinance provides for a design review process for signs by authorizing the submission and approval of a Program for Graphics.[166]

A design review process can also contain design standards not based on compatibility. For example, one of the design standards in the West Hollywood, California sign ordinance for Creative Signs states that the design shall "[p]rovide strong graphic character through the imaginative use of graphics, color, texture, quality materials, scale, and proportion."[167] This standard is similar to the standard upheld in the Lake Oswego case, because it identifies the design elements that must be considered in a sign design. This case suggests that courts may uphold design review standards of this type because they are sufficiently detailed and specific.

A district court case upheld an ordinance for a tourist destination city in Washington State that adopted a Bavarian theme for its commercial districts, and that prohibited any sign

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[165] An ordinance is valid even though it provides that the decisionmaking body "may" rather than "must" give approval if the standards in the ordinance are met. Thomas, 534 U.S. at 324-325. See also Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012).

[166] Daniel R. Mandelker, Street Graphics and the Law, American Planning Association, Planning Advisory Rep. No. 527, at 68-69 (2004) (model ordinance authorizing Program for Graphics).

[167] West Hollywood, California Sign Ordinance, § 19.34.060 (standards for creative signs), available at www.law.wustl.edu/landuselaw. The West Hollywood ordinance, also contains the following standards for design quality: a. Constitute a substantial aesthetic improvement to the site and shall have a positive visual impact on the surrounding area; b. Be of unique design, and exhibit a high degree of thoughtfulness, imagination, inventiveness, and spirit.

within the commercial districts that was "not compatible in design, lettering style, and color with the Old World Bavarian-Alpine theme."[168] A Design Review Board (DRB) reviews applications for sign permits to decide whether a sign is in compliance with applicable policies and design guidelines, with a primary focus on the Bavarian Theme. Though the criteria for compliance with the Bavarian theme were elastic and required the exercise of reasonable discretion by the DRB, the lack of rigid definitions did not make the sign code an unconstitutional prior restraint. The sign permitting process reflected the city's overall legitimate interest in aesthetics, the DRB members were knowledgeable about the theme, the city created a portfolio of photos to assist permit applicants, and the code contained multiple procedural safeguards. Any person could request administrative interpretations or seek administrative and judicial review of DRB decisions.

However, the previous discussion highlights a conundrum presented by a sign design review process under free speech law. If it is true that sign ordinances in general and sign design review specifically should attempt to avoid content-based regulations, and instead suggest objective content-neutral time, place and manner regulations, then design review may require special consideration. For instance, can local sign regulations give a design review process a power over aesthetics and sign character that a local zoning department could not exercise (i.e. subjective power over a sign's color, shape, size, and so forth)? Finally, what the courts have not done to date is give consideration to the validity of a design review process where aesthetic standards and rules conflict with traffic safety standards related to on premise signs.

[168] Demarest v. City of Leavenworth, 2012 U.S. Dist. LEXIS 89185 (E.D. Wash. 2012).

CHAPTER III: SOME BASIC CONSTITUTIONAL ISSUES CONCERNING ON PREMISE SIGN REGULATIONS

§ 3:1. An Overview

This chapter considers a number of free speech issues that are important for on premise sign ordinances. First, a threshold free speech issue is often created in sign regulations, because on premise signs have their own set of regulations in sign ordinances, distinct from any other type of sign. For instance, they can be permitted even though off premise signs are prohibited, and they are regulated differently from other signs. The courts have approved these differences in treatment. As a plurality of the Supreme Court held in the Metromedia case,[169] a sign ordinance can treat on premise signs differently from off premise signs, and can allow on premise signs even though it prohibits off premise signs. Almost all courts follow the Metromedia plurality, and allow municipalities to make distinctions between on premise and off premise signs.[170]

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[169] § 2:6[3].

[170] E.g., Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012) (held not content-based); Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94 (2d Cir. 2010); Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421 (4th Cir. 2007); Clear Channel Outdoor, Inc. v. City of L.A., 340 F.3d 810, 813 (9th Cir. 2003); Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999); Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 611 (9th Cir. 1993); National Advertising Co. v. City & County of Denver, 912 F.2d 405 (10th Cir. 1990); Major Media of Southeast, Inc. v. Raleigh, 792 F.2d 1269 (4th Cir. 1986); Action Outdoor Adver. JV, L.L.C. v. Town of Shalimar, 377 F. Supp. 2d 1178 (N.D. Fla. 2005); Infinity Outdoor Inc. v. City of New York, 165 F. Supp. 2d 403 (E.D.N.Y. 2001); Outdoor Sys. v. City of Merriam, 67 F. Supp. 2d 1258 (D. Kan. 1999); National Advertising Co. v. Bridgeton, 626 F. Supp. 837 (E.D. Mo. 1985); Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1445 n.15 (N.D. Ill. 1990) , aff'd without opinion, 989 F.2d 502 (7th Cir. 1992); National Advertising Co. v. Downers Grove, 561 N.E.2d 1300 (Ill. App. Ct. 1990); State by Spannaus v. Hopf, 323 N.W.2d 746 (Minn. 1982) (highway beautification act); Summey Outdoor Advertising, Inc. v. County of Henderson, 386 S.E.2d 439 (N.C. Ct. App. 1989). See also Pigg v. State Dep't of Highways, 746 P.2d 961 (Colo. 1987) (highway beautification act; regulations construed ideological signs as on premise signs). Contra Vono v. Lewis, 594 F. Supp. 2d 189 (D.R.I. 2009) (state highway beautification act).

On premise sign regulations[171] can raise additional significant free speech issues, and this chapter considers several of them. One issue is how to show a sign ordinance directly advances its aesthetic and traffic safety purposes in order to satisfy the third Central Hudson test. Some courts hold that it is not necessary to introduce evidence that this test has been met, but other courts require evidentiary proof. Another issue is whether it must be shown that a sign regulation's purposes are directly advanced as applied to a plaintiff who brings a case to court. Whether a sign ordinance must have a statement of purpose is another problem. Some courts refuse to hold a sign ordinance valid if it does not have a statement of purpose.

Sign ordinances also determine what kind of message an on premise sign may have. The Metromedia plurality held that an on premise sign regulations must make allowances for the display of both commercial and noncommercial messages, and the courts have applied this requirement. Sign ordinances also contain exemptions, and these exemptions may include on premise signs. The Metromedia plurality also held that exemptions in an ordinance must not favor commercial over noncommercial speech, or one type of noncommercial speech over another. Most, but not all, courts accept this holding. Chapter III concludes by discussing free speech issues raised by the regulation of on premise signs under the Federal Highway Beautification Act.

[171] A model on premise sign ordinance is included in Daniel R. Mandelker, Street Graphics and the Law, American Planning Association, Planning Advisory Rep. No. 527, ch. 7 (2004). For a case rejecting free speech objections to a sign ordinance based on this model see National Advertising Co. v. City of Bridgeton, 626 F. Supp. 837 (E.D. Mo. 1985).

§ 3:2. Is Evidentiary Proof that a Sign Regulation Directly Advances its Aesthetic and Traffic Safety Purposes Necessary?

The third Central Hudson test requires a law regulating commercial speech to directly advance its governmental purposes. In Metromedia[172] a plurality of the Supreme Court adopted a "common sense" approach to this issue. They did not require studies or reports to show that a billboard ban directly advanced aesthetic and traffic safety purposes. Later Supreme Court cases, such as Edenfield v. Fane,[173] may have undermined Metromedia's easy handling of this issue by requiring studies or reports to show that aesthetic and traffic safety purposes are directly advanced. Some cases relied on the Metromedia plurality to hold that such evidence is not necessary, but other cases relied on later Supreme Court cases to hold that they are necessary.

Ackerley Communications of the Northwest v. Krochalis[174] illustrates cases holding that evidentiary proof is not necessary. The Ninth Circuit upheld a Seattle ordinance placing restrictions on billboards that included a statement of purpose expressing its interest in aesthetics and traffic safety. Both parties offered evidence on whether the ordinance met its announced goal that billboards should be regulated because they can be traffic hazards, contribute to visual blight, and reduce property values. The district court held a trial was not necessary on whether the ordinance met the Central Hudson tests, and granted summary judgment to the city. The

[172] See § 2:6[3].

[173] 507 U.S. 761 (1993), see § 2:6[5]. The Court struck down a ban on solicitation by accountants, because there were no studies proving that solicitation would lead to fraud, overreaching or compromised independence.

[174] 108 F.3d 1095, 1098 (9th Cir. 1997). Other courts relied on statements of purpose in a sign ordinance to hold that evidence was not needed to support the governmental interest in signs. Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886 (9th Cir. 2007) (billboards; statement of purpose of sign code was "to optimize communication and quality of signs while protecting the public and the aesthetic character of the City;" that is all our review requires to prove a significant interest); Outdoor Systems, Inc. v. City of Lenexa, 67 F. Supp.2d 1231, 1238-1239 (D. Kan. 1999) (billboards; following Metromedia and accepting legislative findings that ordinance promoted governmental interests in traffic safety and aesthetics; expert opinions or other evidence not needed where common sense will logically suffice).

plaintiff disagreed and argued Metromedia was distinguishable because it came up on stipulated facts, and because later cases placed a greater evidentiary burden on municipalities to justify a restriction on commercial speech.

The court of appeals affirmed the district court, held the Metromedia plurality was still good law, and that a Supreme Court majority confirmed in the Vincent case[175] that an interest in avoiding visual clutter justified a prohibition on billboards. "As a matter of law Seattle's ordinance, enacted to further the city's interest in esthetics and safety, is a constitutional restriction on commercial speech without detailed proof that the billboard regulation will in fact advance the city's interests."[176] Courts have applied the rule that evidentiary support of an aesthetic interest is unnecessary to on premise signs as well as billboards.[177] The Fourth Circuit, for example, rejected as an "unprecedented contention" an argument that evidence was needed to justify on premise sign restrictions.[178]

A Sixth Circuit case, Pagan v. Fruchey,[179] reached a contrary conclusion. It struck down an ordinance prohibiting for sale signs on cars supported only by an affidavit from the police chief. In an extensive opinion that relied on Edenfield, the court held the police chief's affidavit

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[175] Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984). There the Court extended its Metromedia holding by recognizing the aesthetic interest of the city in prohibiting "the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property." Id. at 808.

[176] Krochalis, 108 F.3d at 1099.

[177] See, e.g., Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999) (approving aesthetic interest for ordinance regulating off premise and on premise signs); Carlson's Chrysler v. City of Concord, 938 A.2d 69 (N.H. 2007) (on premise electronic message sign); Suburban Lodge of America v. City of Columbus Graphics Comm'n, 761 N.E.2d 1060 (Ohio App. 2000) (approving aesthetic interest for ordinance regulating off premise and on premise signs), appeal dismissed, 759 N.E.2d 1260 (Ohio 2002).

[178] Wag More Dogs, LLC v. Cozart, 680 F.3d 359, at *11-*12 n.3 (4th Cir. 2012) (wall sign). The court did not cite Krochalis or any other cases.

[179] 492 F.3d 766 (6th Cir. 2007). Accord Beck v. Coats, 2012 U.S. Dist. LEXIS 101020 (N.D.N.Y. 2012) (no rationale for number and size restrictions); Burkow v. City of Los Angeles, 119 F.Supp.2d 1076, 1080-1081 (C.D. Cal. 2000) (rejecting claim that mere passing of ordinance is evidence of serious problems).

was inadequate because it was only "a conclusory articulation of governmental interests."[180] The court distinguished the Metromedia plurality because it relied on legislative and judicial history to uphold the billboard ban, but this type of history was not available to support the ban on for sale signs. A later federal district court case distinguished Pagan. It upheld an ordinance prohibiting certain words in bench billboard advertising because Pagan was not a billboard case,[181] so Pagan may be limited to ordinances that prohibit for sale signs. A later federal district court, however, struck down an ordinance that prohibited billboards, and held that "Metromedia deference is warranted only when the municipality provides the court with a rationalization supported by relevant evidence."[182]

The Supreme Court, in United States v. Edge Broadcasting Co.,[183] decided a related issue. It held that whether a regulation of commercial speech directly advances a substantial governmental interest is not solely decided by its application to the speech of a complaining party. There the Court upheld a federal statute that prohibited radio stations in nonlottery states from broadcasting lottery advertising. The lower courts struck down the statute as applied to a specific radio station in a nonlottery state, but that broadcast into a state where lotteries were allowed. They held the statute did not directly advance the governmental interest in discouraging lottery participation where it was prohibited, because more than 90 percent of the radio station's audience was in a state that allowed lotteries. The Supreme Court reversed, and held the lower court's as-applied analysis was incorrect under the Central Hudson test. Whether a regulation

[180] The court noted the Supreme Court rejected a similar affidavit as conclusory in Edenfield.

[181] Bench Billboard Co. v. City of Toledo, 690 F. Supp. 2d 651, 664 (N.D. Ohio 2010) (no other cases cited).

[182] Interstate Outdoor Adver. v. Zoning Bd. of Township of Cherry Hill, 672 F. Supp. 2d 675, 678-679 (D.N.J. 2009), dismissed for lack of standing, 2011 U.S. Dist. LEXIS 103462 (D.N.J. 2011). See also Bell v. Township of Stafford, 541 A.2d 692 (1988) (striking down ordinance prohibiting billboards in absence of studies).

[183] 509 U.S. 418 (1993).

directly advances a governmental interest, it held, is not answered by considering its application to a single person or entity. The validity of a regulation depends on the general problem a regulation seeks to correct.

The cases have applied this decision to sign ordinances. A court of appeals, for example, quoted the Edge case and rejected an as-applied attack on an ordinance that regulated off premise and on premise signs.[184] The challenge, the court said, must be to a "broad category of commercial speech," not simply the regulation of the plaintiff's speech.[185] As an Ohio court decided in reaching the same conclusion, "the effect of any particular sign on traffic safety and aesthetics would likely be de minimis."[186] It did not have to be considered.

These decisions provide conflicting signals, which are complicated because not all of these cases were aware of other decisions on this issue. A majority of the courts, however, do not require evidentiary proof that the aesthetic interests of a sign ordinance have been served. Though on premise sign regulation does not have a legislative and judicial history similar to that for billboards that supports aesthetic and traffic safety interests, as recognized by the Metromedia case, extensive guidance is provided by studies of on premise signs done by the United States Sign Council that can provide support for on premise sign regulation.[187] A well-written statement of purpose is also an essential element in any ordinance.[188]

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[184] Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999).

[185] Id. at 1115 n. 18.

[186] Suburban Lodge of America v. City of Columbus Graphics Comm'n, 761 N.E.2d 1060, 1066 (Ohio App. 2000), appeal dismissed, 759 N.E.2d 1260 (Ohio 2002).

[187] The studies are available on the Council's web site, www.ussc.org.

[188] See § 3:3.

§ 3:3. Must a Sign Ordinance Include a Statement of Purpose?

A statement of purpose is a necessary part of a sign ordinance. It should contain an adequate expression of the aesthetics and traffic safety interests the ordinance is intended to advance.[189] A statement of purpose also plays an important role in upholding a sign ordinance. Some courts rely on a statement of purpose to hold, without additional proof, that a sign ordinance directly advances its legislative purposes under the third Central Hudson test.[190] If a sign ordinance does not contain a statement of purpose, courts will hold the ordinance is not supported by a governmental interest in aesthetics or traffic safety, or that this interest is not directly advanced.[191] In National Adver. Co. v. Town of Babylon,[192] for example, the Second Circuit held it had not found any case where "a court has taken judicial notice of an unstated and unexplained legislative purpose for an ordinance that restricts speech."

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[189] For example, the statement of purpose in the street graphics model ordinance authorizes the use of signs that are "1. compatible with their surroundings; 2. appropriate to the activity that displays them; 3. expressive of the identity of individual activities and the community as a whole; and 4. legible in the circumstances in which they are seen." Daniel R. Mandelker, Street Graphics and the Law, American Planning Association, Planning Advisory Rep. No. 527, at 50 (2004). For a case holding a statement of purpose based on this model was not an unconstitutional delegation of power see Rodriguez v. Solis, 2 Cal. Rptr.2d 50 (Cal. App. 1991). The case did not discuss free speech issues. The statement of purpose should also state that it is intended to preserve "the right of free speech and expression in the display of signs."

[190] Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886 (9th Cir. 2007) (billboards; statement of purpose of sign code was "to optimize communication and quality of signs while protecting the public and the aesthetic character of the City;" that is all our review requires to prove a significant interest); Outdoor Systems, Inc. v. City of Lenexa, 67 F. Supp.2d 1231, 1238-1239 (D. Kan. 1999) (billboards; following Metromedia and accepting legislative findings that ordinance promoted governmental interests in traffic safety and aesthetics; expert opinions or other evidence not needed where common sense will logically suffice).

[191] Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F. 3d 814, 819 (9th Cir. 1996) (no statement to show aesthetics or safety interest; clear statement would have shown governmental interest in aesthetics and traffic safety); National Adver. Co. v. Town of Babylon, 900 F.2d 551, 555, 556 (2d Cir. 1990); International Outdoor, Inc. v. City of Romulus, 2008 U.S. Dist. LEXIS 87384 (E.D. Mich. 2008) (cross-references to statutes that had statements of purpose not enough); Abel v. Town of Orangetown, 759 F. Supp. 161 (S.D.N.Y. 1991) (following National Advertising;). See also Adams Outdoor Adver. of Atlanta, Inc. v. Fulton County, 738 F. Supp. 1431, 1433 (N.D. Ga. 1990) ("[T]his court cannot permit defendant to justify its restriction of protected speech with after the fact invocations of esthetics and traffic safety."). Contra, Covenant Media of S.C., LLC v. Town of Surfside Beach, 321 Fed. Appx. 251 (4th Cir. 2009) (such a requirement not implicit in Central Hudson standard).

[192] 900 F.2d 551, 555, 556 (2d Cir. 1990) ("At most, courts have taken judicial notice of a common-sense linkage between a stated governmental interest and a restriction in order to assess whether the third part of the Central Hudson test -- that a restriction directly advance the governmental interest asserted -- has been satisfied.").

Zoning ordinances may also contain an all-inclusive "health, safety and general welfare" statement of purpose that applies to the entire ordinance. Courts hold a general statement of purpose of this type is not enough to uphold the sign regulations that are part of the zoning ordinance.[193] The Eleventh Circuit, however, held that a general statement of purpose in an ordinance permits a court to examine the record for evidence of an interest that supports the sign regulations.[194] The court also held that a narrow reading of the general statement of purpose in that case, and the "obvious aim" of most of the measures in the sign ordinance, showed that traffic concerns partially supported the sign regulations.

§ 3:4. The Noncommercial Message Requirement for On Premise Signs

Attention must be paid to the messages that sign ordinances allow for on premise signs. The Metromedia plurality held unconstitutional an ordinance that allowed only commercial messages for on premise signs.[195] It did not allow noncommercial messages. The ordinance authorized on premise signs

> designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed.

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[193] National Adver. Co. v. Town of Babylon, 900 F.2d 551, 555 (2d Cir. 1990); Abel v. Town of Orangetown, 759 F. Supp. 161 (S.D.N.Y. 1991); International Outdoor, Inc. v. City of Romulus, 2008 U.S. Dist. LEXIS 87384 (E.D. Mich. 2008).But see People v. Target Adver. Inc., 708 N.Y.S.2d 597 (N.Y. City Crim. Ct. 2000) (relying on general statements of purpose to uphold rule prohibiting operation of vehicles solely for purpose of displaying commercial advertising).

[194] Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982) (restrictions on portable signs). But see Tinsley Media, LLC v. Pickens County, 203 Fed. Appx. 268 (11th Cir. 2006) (inquiry into record not allowed when ordinance contained no all-inclusive statement of purpose). Compare Bell v. Township of Stafford, 541 A.2d 692 (N.J. 1988) (record almost completely devoid of evidence to support interests justifying billboard ban).

[195]An ordinance that discriminates against content-based noncommercial speech is subject to strict scrutiny judicial review, which requires a compelling interest to justify the discrimination. See § 2:4[1]. Proving that a compelling interest exists is almost impossible. See Vono v. Lewis, 594 F. Supp. 2d 189 (D.R.I. 2009) (state highway beautification act).

The plurality held this provision unconstitutionally favored commercial over noncommercial speech. Sign ordinances usually include similar provisions, and courts uniformly follow the Metromedia plurality to hold that an ordinance restricting on premise signs to commercial speech is unconstitutional.[196]

This problem is easily fixed by a substitution clause in the sign regulations. A substitution clause should provide that any sign authorized by the sign ordinance may display noncommercial messages.[197] An ordinance authorizing on premise signs to display commercial speech would then be constitutional, because the substitution clause allows the display of noncommercial messages on all signs, including on premise signs. The courts have upheld sign ordinances authorizing the display of commercial messages if they have a substitution clause.[198]

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[196] Desert Outdoor Advertising v. City of Moreno Valley, 103 F.3d 814, 819 (9th Cir. 1996) (on premise signs "to advertise goods sold, business conducted or services rendered" allowed everywhere; off premise signs that could display noncommercial messages allowed only in restricted zones); Burritt v. N.Y. State Dep't of Transp., 2008 U.S. Dist. LEXIS 102434 (N.D.N.Y 2008) (state highway beautification act; allowed display of commercial but not religious messages); Vono v. Lewis, 594 F. Supp. 2d 189 (D.R.I. 2009) (state highway beautification act); Burritt v. N.Y. State Dep't of Transp., 2008 U.S. Dist. LEXIS 102434 (N.D.N.Y 2008) (state highway beautification act; allowed display of commercial but not religious messages); Maldonado v. Kempton, 422 F. Supp. 2d 1169 (N.D. Cal. 2006) (lack of substitution class prohibits non-commercial speech where it permits commercial speech); Clear Channel Outdoor, Inc. v. Town Bd., 352 F. Supp. 2d 297, 309 (N.D.N.Y 2005); Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, 467 S.E.2d 875 (Ga. 1996); Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 433 N.E.2d 198 (Ohio 1982); Town of Carmel v. Suburban Outdoor Advertising, Inc., 492 N.Y.S.2d 664 (Sup. Ct. 1985). See also Ackerley Communs. v. City of Cambridge, 88 F.3d 33 (1st Cir. 1996) (substitution provision gave right to display noncommercial messages on nonconforming signs only to signs that previously carried onsite messages; primary effect of provision gave only commercial speakers option of changing their signs to noncommercial messages); Outdoor Sys. v. City of Merriam, 67 F. Supp. 2d 1258 (D. Kan. 1999) (holding invalid ordinance similar to ordinance invalidated in Metromedia). See also Adams Outdoor Advertising v. Newport News, 373 S.E.2d 917 (Va. 1988) (only allowing noncommercial speech related to activity on premises).

[197] Here is one example: "Signs containing noncommercial speech are permitted anywhere that advertising or business signs are permitted, subject to the same regulations that apply to such signs." See also the substitution clauses considered in the cases in the next footnote.

[198] Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895 (9th Cir. 2007); Nat'l Adver. Co. v. City of Miami, 402 F.3d 1329 (11th Cir. 2005) (substitution clause mooted constitutional claim); Clear Channel Outdoor, Inc. v. City of L.A., 340 F.3d 810 (9th Cir. 2003) (ordinances neutral concerning noncommercial speech because substitution clause guaranteed that political and other noncommercial messages not limited by type of sign-structure); Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604 (9th Cir. 1993) (substitution clause made ordinance content-neutral as it affected noncommercial speech); Georgia Outdoor Advertising, Inc. v. Waynesville, 833 F.2d 43 (4th Cir. 1987) ("any sign authorized in this chapter is allowed to contain non-commercial copy in lieu of any other copy."); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986) (same); Lamar Adver. of Penn, LLC v. Town of Orchard Park, 2008 U.S. Dist. LEXIS 27647 (W.D.N.Y. Feb. 25, 2008); Covenant

§ 3:5. Exemptions in On Premise Sign Ordinances

Exemptions in sign ordinances can present free speech problems, and sign ordinances usually contain a number of exemptions for signs that are not subject to regulation under the ordinance. Many exempted signs are on premise noncommercial signs, such as government signs, traffic and regulatory signs, flags, seasonal banners, and signs displayed by religious and charitable organizations. The exemption provision may therefore be content-based because it must identify the message a sign can have, such as an identification message.

For this reason, an exemption provision can create free speech problems. The Metromedia plurality held that 12 exemptions[199] in the San Diego sign ordinance were invalid

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Media of Cal., L.L.C. v. City of Huntington Park, 377 F. Supp. 2d 828 (C.D. Cal. 2005); Outdoor Sys. v. City of Lenexa, 67 F. Supp. 2d 1231 (D. Kan. 1999); City & County of San Francisco v. Eller Outdoor Advertising, 237 Cal. Rptr. 815 (1987) (messages of any kind permissible if they relate to some on premise activity); Gannett Outdoor Co. v. City of Troy, 409 N.W.2d 719 (Mich. App. 1986) (on premises signs could contain noncommercial messages). See also Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 434 (4th Cir. 2007) (off-premises/on-premises distinction not dependent on whether sign contained commercial or noncommercial advertising); Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987) (state highway beautification statute content-neutral because it permitted commercial and non-commercial signs in protected areas if signs related to activity on the premises); National Advertising Co. v. Babylon, 703 F. Supp. 228, 240 (E.D.N.Y. 1988) (recommending adoption of substitution clause to protect constitutionality of sign ordinance). But see Beaulieu v. City of Alabaster, 454 F.3d 1219, 1233 (11th Cir. 2006) (substitution clause did not cure ordinance when political signs not treated equally).

[199] The following signs were exempt in the San Diego ordinance: 1. Any sign erected and maintained pursuant to and in discharge of any governmental function or required by any law, ordinance or governmental regulation. 2. Bench signs located at designated public transit bus stops; provided, however, that such signs shall have any necessary permits required by Sections 62.0501 and 62.0502 of this Code. 3. Signs being manufactured, transported and/or stored within the City limits of the City of San Diego shall be exempt; provided, however, that such signs are not used, in any manner or form, for purposes of advertising at the place or places of manufacture or storage. 4.Commemorative plaques of recognized historical societies and organizations. 5. Religious symbols, legal holiday decorations and identification emblems of religious orders or historical societies. 6. Signs located within malls, courts, arcades, porches, patios and similar areas where such signs are not visible from any point on the boundary of the premises. 7. Signs designating the premises for sale, rent or lease; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located. 8. Public service signs limited to the depiction of time, temperature or news; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located. 9. Signs on vehicles regulated by the City that provide public transportation including, but not limited to, buses and taxicabs. 10. Signs on licensed commercial vehicles, including trailers; provided, however, that such vehicles shall not be utilized as parked or stationary outdoor display signs. 11. Temporary off-premise subdivision directional signs if permitted by a conditional use permit granted by the Zoning Administrator. 12. Temporary political campaign signs, including their supporting structures, which are erected or maintained for no longer than 90 days and which are removed within 10 days after election to which they pertain. Metromedia, at 496.

because they made impermissible distinctions among different types of content-based, noncommercial speech. The city could "not choose the appropriate subjects for public discourse."[200] There are some problems with this holding as applied to the list of exempted signs, however. The ordinance exempted for sale or for rent signs, for example, but the Supreme Court held earlier that an ordinance prohibiting such signs was unconstitutional.[201] Exemption was a logical response to that decision. The ordinance also exempted temporary political signs, but this exemption was a reasoned response to a California court of appeals decision holding that restrictions on political signs were content-based and invalid.[202]

Federal and state courts disagree on whether they should follow the plurality decision in Metromedia on sign exemptions. A substantial number of courts[203] follow the plurality, and hold

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[200] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 514 (1981). See § 2:6[3]. The sign ordinance upheld by the Supreme Court in the Vincent case contained some of the same exemptions as those contained in the San Diego ordinance, but the Court did not discuss them. See § 2:6[4].

[201] Linmark v. Township of Willingboro, 431 U.S. 85 (1977), discussed in § 2:7[2].

[202] Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976). Another option is to create a temporary sign category with content-neutral regulations that can include political signs.

[203] Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005) (numerous exemptions, some content-based); Foti v. City of Menlo Park, 146 F.3d 629 (9th Cir. Cal. 1998); Desert Outdoor Advertising, Inc. v. City of Moreno Valley, 103 F.3d 814 (9th Cir. 1996) (official notices and directional and informational signs); Dimitt v. City of Clearwater, 985 F.2d 1565 (11th Cir. 1993) (ordinance limited permit exemptions to governmental flags); National Advertising Co. v. Town of Niagra, 942 F.2d 145 (2d Cir. 1991); National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2d Cir.)(1990) (but approving exemption of for sale signs);National Advertising Co. v. City of Orange, 861 F.2d 246 (9th Cir. 1988) (exemptions similar to those invalidated in Metromedia); National Advertising Co. v. Orange, 861 F.2d 246, 249 (9th Cir. 1988); Bowden v. Town of Cary, 754 F. Supp. 2d 794 (E.D.N.C. 2010) (giant flashing Christmas sign exempt though causes as many traffic problems as plaintiff's protest sign); Nichols Media Group, LLC v. Town of Babylon, 365 F. Supp. 2d 295 (E.D.N.Y. 2005) (broad exemption for government signs, but suggested limited exemption for government signs may be constitutional); Clear Channel Outdoor, Inc. v. Town Bd., 352 F. Supp. 2d 297 (N.D.N.Y 2005)(flags, pennants and insignias; exemptions from portable sign prohibition); Lamar Adver. Co. v. City of Douglasville, 254 F. Supp. 2d 1321 (N.D. Ga. 2003) (government flags); Savago v. Village of New Paltz, 214 F. Supp. 2d 252 (N.D.N.Y 2002) (exemptions from size requirement); North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755, 775 (N.D. Ohio 2000) (exemptions from pole sign prohibition); Revere Nat'l Corp. v. Prince George's County, 819 F. Supp. 1336 (D. Md. 1993); Lakewood v. Colfax Unlimited Asso., 634 P.2d 52 (Colo. 1981) (ideological signs); City of Tipp City v. Dakin, 929 N.E.2d 484 (Ohio Ct. App. 2010); Adams Outdoor Advertising v. Newport News, 373 S.E.2d 917 (Va. 1988). See also King Enters. v. Thomas Twp., 215 F. Supp. 2d 891(E.D. Mich. 2002) [203] Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976). Another option is to create a temporary sign category with content-neutral regulations that can include political signs.

that content-based exemptions of noncommercial signs are invalid. Solantic, LLC v. City of Neptune Beach,[204] an Eleventh Circuit case, is an example. The sign ordinance contained 17 exemptions from the ordinance, and six exemptions of temporary signs from its permit requirements. The court noted the Metromedia plurality decision on exemptions was not binding, but that it had earlier adopted the same reasoning.[205] That reasoning applied to this case because most, though not all, of the exemptions were content-based. As an example, the court noted that a directional sign in the form of a large neon arrow was exempt and could be displayed permanently in a residential area, while a political sign could only be displayed temporarily and was restricted in size. Holiday lights and decorations were exempt, so a homeowner could have an illuminated reindeer but not a less festive animal, such as a dog.

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[203] Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005) (numerous exemptions, some content-based); Foti v. City of Menlo Park, 146 F.3d 629 (9th Cir. Cal. 1998); Desert Outdoor Advertising, Inc. v. City of Moreno Valley, 103 F.3d 814 (9th Cir. 1996) (official notices and directional and informational signs); Dimitt v. City of Clearwater, 985 F.2d 1565 (11th Cir. 1993) (ordinance limited permit exemptions to governmental flags); National Advertising Co. v. Town of Niagra, 942 F.2d 145 (2d Cir. 1991); National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2d Cir.)(1990) (but approving exemption of for sale signs);National Advertising Co. v. City of Orange, 861 F.2d 246 (9th Cir. 1988) (exemptions similar to those invalidated in Metromedia); National Advertising Co. v. Orange, 861 F.2d 246, 249 (9th Cir. 1988); Bowden v. Town of Cary, 754 F. Supp. 2d 794 (E.D.N.C. 2010) (giant flashing Christmas sign exempt though causes as many traffic problems as plaintiff's protest sign); Nichols Media Group, LLC v. Town of Babylon, 365 F. Supp. 2d 295 (E.D.N.Y. 2005) (broad exemption for government signs, but suggested limited exemption for government signs may be constitutional); Clear Channel Outdoor, Inc. v. Town Bd., 352 F. Supp. 2d 297 (N.D.N.Y 2005)(flags, pennants and insignias; exemptions from portable sign prohibition); Lamar Adver. Co. v. City of Douglasville, 254 F. Supp. 2d 1321 (N.D. Ga. 2003) (government flags); Savago v. Village of New Paltz, 214 F. Supp. 2d 252 (N.D.N.Y 2002) (exemptions from size requirement); North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755, 775 (N.D. Ohio 2000) (exemptions from pole sign prohibition); Revere Nat'l Corp. v. Prince George's County, 819 F. Supp. 1336 (D. Md. 1993); Lakewood v. Colfax Unlimited Asso., 634 P.2d 52 (Colo. 1981) (ideological signs); City of Tipp City v. Dakin, 929 N.E.2d 484 (Ohio Ct. App. 2010); Adams Outdoor Advertising v. Newport News, 373 S.E.2d 917 (Va. 1988). See also King Enters. v. Thomas Twp., 215 F. Supp. 2d 891(E.D. Mich. 2002); Knoeffler v. Town of Mamakating, 87 F. Supp. 2d 322 (S.D.N.Y. 2000) (ordinance exempted permanent on-site advertising, address signs, identification signs for hotels and non-dwelling buildings, and sale or rental signs without a permit, but required permit for temporary signs in the public interest, or noncommercial signs).

[204] 410 F.3d 1250 (11th Cir. 2005).

[205] Dimmitt v. City of Clearwater, 985 F.2d 1565 (11th Cir. 1993) (exemptions from permit requirement).

Some courts do not follow the Metromedia plurality, and uphold sign ordinances that include similar exemptions.[206] In Lavey v. City of Two Rivers,[207] for example, the Seventh Circuit held that exemptions in the ordinance were fully justified, common sense exemptions, and that the city did not need to develop a voluminous record to uphold them. Other cases upheld exemptions more limited than those held invalid in Metromedia.[208] H.D.V. - Greektown, LLC v. City of Detroit,[209] a Sixth Circuit case, rejected the holding in the Solantic decision. Greektown did not consider a list of exemptions in a sign ordinance, but an ordinance that made distinctions between different types of signs, which it upheld. It held:

> The Solantic court's classification of the sign regulations before it as content-based appears to us to reflect an overly narrow conception of the definition of content-neutral speech. The ordinances at issue in Solantic seem to satisfy all three of the possible independent bases for content neutrality listed by the Supreme Court[210]... (i.e., (1) the regulation is not a regulation of speech, but controls only the places where the speech may occur; (2) the regulation was not adopted because of disagreement with the message that the speech conveys; or (3) the government's interests in the regulation are unrelated to the content of the affected speech). Indeed, we doubt that there are many municipal sign ordinances around the country that would not be classified as content-based prior restraints under Solantic.

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[206] Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012) (15 types of signs exempt); Lavey v. City of Two Rivers, 171 F.3d 1110, 1116 (7th Cir. 1999) (exemptions fully justified; city need not develop voluminous record to justify such common-sense exemptions); Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1445-47 (N.D. Ill. 1990) (holding that majority of Justices in Metromedia found the exemptions constitutional), aff'd without opinion, 989 F.2d 502 (7th Cir. 1992); City & County of San Francisco v. Eller Outdoor Adver., 237 Cal. Rptr. 815 (Cal. Ct. App. 1987) (exceptions broad enough to include most noncommercial signs); Sackllah Invs. v. Charter Northville, 2011 Mich. App. LEXIS 1452 (Mich. Ct. App. 2011) (exemptions upheld). See also Messer v. Douglasville, 975 F.2d 1505 (11th Cir. 1992) (upholding exemptions from permit requirement). Contra Knoeffler v. Town of Mamakating, 87 F. Supp. 2d 322 (S.D.N.Y. 2000).

[207] 171 F.3d 1110, 1116 (7th Cir. 1999).

[208] Messer v. City of Douglasville, 975 F.2d 1505, 1512-13 (11th Cir. 1992) (exemptions only from permit requirements and more limited; no specific exemptions for political, historical, religious, or special event signs); National Advertising Co. v. Babylon, 900 F.2d 551, 557 (2d Cir. 1990) (for sale signs); Pigg v. State Dep't of Highways, 746 P.2d 961 (Colo. 1987) (state highway beautification act; tourist-related sign); State by Spannaus v. Hopf, 323 N.W.2d 746 (Minn. 1982) (highway beautification act; signs advertising sale or lease of property). See also H.D.V. - Greektown, LLC v. City of Detroit, 568 F.3d 609 (6th Cir. 2009) (distinctions between different types of signs not content-based and distinguishing Solantic); Clear Channel Outdoor, Inc. v. City of L.A., 340 F.3d 810, 815 (9th Cir. 2003) (ordinance not content-based because amendment included exemption for noncommercial off-site signs).

[209] 568 F.3d 609 (6th Cir. 2009).

[210] The court cited Hill v. State of Colorado, 530 U.S. 703, 719-720 (2000), discussed in § 2:4[3].

These comments indicate that the court in Greektown would uphold the exemptions held invalid by the Metromedia plurality.[211]

§ 3:6. The Federal Highway Beautification Act

The Federal Highway Beautification Act has an exemption problem. It prohibits billboards adjacent to the right-of-way along federally-aided highways, except in commercial and industrial areas.[212] States must adopt legislation that includes the requirements in the federal law. There are exemptions in the federal law for "(2) signs, displays, and devices advertising the sale or lease of property upon which they are located, [and] (3) signs, displays, and devices including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located."[213] These exemptions raise free speech problems similar to those raised by exemptions in sign ordinances.

The cases are divided on whether these statutory exemptions are valid. Early state cases accepted the different treatment of off premise and on premise signs, accepted limited exemptions allowed under state law, and accepted state laws allowing commercial and noncommercial messages on premise.[214] More recent federal district court cases held the

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[211] See Sackllah Invs. v. Charter Northville, 2011 Mich. App. LEXIS 1452 (Mich. Ct. App. 2011) (upholding exemptions in ordinance and agreeing with Greektown's rejection of Solantic).

[212] 23 U.S.C. § 131.

[213] 23 U.S.C. § 131(c). For the regulations implementing this section see 23 C.F.R. § 750.105(a). See also § 750.110 (states may prohibit permitted signs).

[214] Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987) (state highway beautification statute content-neutral because it permitted commercial and non-commercial signs in protected areas if signs relate to activity on the premises); Pigg v. State Dep't of Highways, 746 P.2d 961 (Colo. 1987) (upholding state statute exempting tourist-related signs to avoid substantial economic hardship, and upholding state regulation construing on premise signs to include ideological signs); State by Spannaus v. Hopf, 323 N.W.2d 746 (Minn. 1982) (distinction between on premise and off premise signs not content-based and recognizes unique nature of the business sign).

exemptions for on premise signs unconstitutional. Vono v. Lewis,[215] for example, held that regulations adopted under a state highway beautification act were unconstitutional because they allowed on premise signs to display only commercial messages.[216] This holding follows the Metromedia plurality. The court also held unconstitutional the statutory distinction between off premise and on premise signs. This holding is inconsistent with the Metromedia plurality decision, and with decisions by a majority of the courts.

[215] 594 F. Supp. 2d 189 (D.R.I. 2009). See also accord Burritt v. N.Y. State Dep't of Transp., 2008 U.S. Dist. LEXIS 102434 (N.D.N.Y 2008) (state highway beautification act; allowed display of commercial but not religious messages).

[216] The court suggested that a substitution clause could solve this problem. Vono, 594 F. Supp.2d at 204.

CHAPTER IV. SPECIALIZED TYPES OF ON PREMISE SIGNS, HOW THEY ARE REGULATED, AND THE FREE SPEECH ISSUES THESE REGULATIONS PRESENT

§ 4:1. An Overview

Sign ordinances regulate a wide variety of on premise signs, and some of the unique and/or specialized types of signs include digital signs, portable signs, time and temperature signs and murals. They present all of the free speech problems that the first three chapters reviewed, such as whether an ordinance, or an exemption from an ordinance, is content-based, and whether an ordinance meets either the Central Hudson or time, place and manner tests for commercial speech.

How the courts decide cases that consider sign regulations for specialized signs depends on how they apply these free speech principles, and on how they choose among conflicting rules for deciding free speech questions. If a court treats a sign ordinance as a time, place and manner regulation, for example, if must decide whether ample alternate means of communication are adequate. The courts have answered this question differently, even for the same type of sign. Courts must also decide whether they will follow the rule that aesthetic and traffic safety interests must be proved by evidence. However, if a court follows the contrary rule and does not require evidence, it can uphold a restriction by deferring to the legislative judgment.

§ 4.2. Free Speech Questions Raised By Specialized On Premise Signs

This chapter discusses the specialized on premise signs that sign ordinances can include, and the free speech problems that these ordinances can present.[217] Sign types are listed alphabetically for discussion.

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[217] See also Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380 (3d Cir. 2010) (upholding ordinance allowing identification signs on buildings under Third Circuit rules that reject Metromedia plurality); Barber v. City of Anchorage, 776 P.2d 1035 (Alaska 1989) (upholding ordinance prohibiting above roof signs).

§ 4:2[1]. Digital Signs, or Electronic Message Centers

A digital sign, also called an electronic message center (EMC), is "any sign capable of displaying words, symbols, figures or images that can be electronically or mechanically changed by remote or automatic means."[218] Sign ordinances can regulate the way in which electronic messages are displayed,[219] such as the length of time between changes in message, and at least in one instance, can prohibit them from all or part of a community. In Naser Jewelers, Inc. v. City of Concord,[220] in deciding on a request for preliminary injunction, the First Circuit held that an ordinance prohibiting the display of EMCs,[221] as applied to prohibit an EMC at a retail store, met the tests for time, place and manner regulations.[222] It was content-neutral, advanced the city's stated goals of advancing traffic safety and community aesthetics, and was narrowly tailored because these interests could not be achieved as effectively without the prohibition.

The court quoted the holding in Metromedia that billboards were a traffic hazard, and held that "EMCs, which provide more visual stimuli than traditional signs, logically will be more distracting and more hazardous."[223] There was evidence the city had considered and rejected alternatives and given reasons for their rejection. Allowing EMCs with conditions, such as a

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[218] Young, Illuminating the Issues: Digital Signage and Philadelphia's Green Future 16 (SCRUB: Public Voice for Public Space, 2010) (quoting Oklahoma City Municipal Code, Ch. 3, Art. V, § 3-82 (2007). This definition provides more clarity than defining digital signs as animated, flashing or intermittent.

[219] See § 5:2.

[220] 513 F.3d 27 (1st Cir. 2008). See also Lamar OCI North Corp. v. City of Walker, 803 F. Supp. 2d 707 (W.D. Mich. 2011) (upholding moratorium on digital signs).

[221] The ordinance prohibited all signs that "appear animated or projected," or "are intermittently or intensely illuminated, or of a traveling, tracing, scrolling, or sequential light type" or "contain or are illuminated by animated or flashing light." Id. at 31.

[222] See § 2:7[1].

[223] Id. at 35. The court adopted the view that studies were not necessary to show that the ban on EMCs supported the city's stated interests. Id.

limit on the number of times a message could change during a day, for example, would create steep monitoring costs and other complications.[224] Ample alternate channels of communication were available because the retailer could use static and manually changeable signs, "place advertisements in newspapers and magazines and on television and the internet, distribute flyers, circulate direct mailings, and engage in cross-promotions with other retailers."[225]

The Naser case is a generous reading of the requirements for time, place and manner regulations. Other courts also applied relaxed standards of judicial review to uphold similar prohibitions on digital signs.[226]

§4:2[2]. Flags

Sign ordinances often regulate flags. Free speech problems arise when a sign ordinance identifies the content that flags can display, such as by limiting the flags that are allowed, or exempts certain types of flags from the sign ordinance, such as government flags. Most courts follow the Metromedia plurality[227] and strike down content-based exemptions[228] and regulations for flags.

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[224] The court quoted another decision, citing Vincent, which held that if the medium itself is the "evil the city [seeks] to address," then a ban of that medium is narrowly tailored. Id. at 36.

[225] Id. at 36, 37.

[226] La Tour v. City of Fayetteville, 442 F.3d 1094, 1095 (8th Cir. 2006) (upholding ban on any sign that "flashes, blinks, or is animated," though not enforced against time and temperature signs, and as applied to prevent display of electronic sign in office window,); Carlson's Chrysler v. City of Concord, 938 A.2d 69 (N.H. 2007) (applying Central Hudson tests, studies not necessary to show that prohibition met stated interests, prohibition is most effective way to eliminate problems with electronic signs). See also Chapin Furniture Outlet, Inc. v. Town of Chapin, 2006 U.S. Dist. LEXIS 72483 (D.S.C. 2006) (prohibition on flashing and scrolling signs upheld as time, place and manner regulation; signs were inconsistent with rural community aesthetic; ordinance later amended to allow EMC signs that did not flash or scroll), vacated and remanded as moot, 252 Fed. Appx. 566 (4th Cir. 2007).

[227] 453 U.S. 490 (1981).

[228] See § 3:5 (discussing cases considering exemptions in sign ordinances).

The leading case on flag exemptions is Dimmitt v. City of Clearwater[229], where the Eleventh Circuit held invalid an exemption for government flags. "The deleterious effect of graphic communication upon visual aesthetics and traffic safety, substantiated here only by meager evidence in the record, is not a compelling state interest of the sort required to justify content based regulation of noncommercial speech."[230] Neither was the distinction between government and other types of flags narrowly drawn to serve these interests. The ordinance exempted government flags, but a flag displaying the Greenpeace logo or a union affiliation required a permit.

A number of courts have followed Dimmitt and have held content-based exemptions for a limited group of flags unconstitutional.[231] When a flag exemption is only from a permit

[229] 985 F.2d 1565 (11th Cir. 1993).

[230] Id. at 1570.

[231] Midwest Media Prop., LLC v. Symmes Township, 503 F.3d 456 (6th Cir. 2007) (exemption for federal, state and local flags held content-based; aesthetics and public safety not compelling interests); Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005) (flags and insignia of any government, religious, charitable, fraternal, or other organization; decorative flags or bunting for a celebration, convention, or commemoration of significance to the entire community when authorized by the city council for a prescribed period of time; held content-based and did not advance state interests); National Advertising Co. v. Orange, 861 F.2d 246 (9th Cir. 1988) (flags of national or state government, or not more than three flags of nonprofit religious; charitable or fraternal organizations; selective prohibition of noncommercial speech based on content); Clear Channel Outdoor, Inc. v. Town Bd., 352 F. Supp. 2d 297 (N.D.N.Y. 2005) (exemption of flags, pennants, and insignia of any nation or association of nations, or of any state, city or other political unit, or of any political, charitable, educational, philanthropic, civic, or professional organization, or for campaign, drive, movement or event, but not religious symbols; favors some noncommercial messages over others); XXL of Ohio, Inc. v. City of Broadview Heights, 341 F. Supp. 2d 765, 791 (N.D. Ohio 2003) (flag and emblem of official government body; held content-based); Lamar Adver. Co. v. City of Douglasville, 254 F. Supp. 2d 1321 (N.D. Ga. 2003) (exemption in historic district for flags or banners of the United States or other political subdivisions; held content-based restriction on noncommercial speech); North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755, 768 (N.D. Ohio 2000) (flags, emblems, and insignia of all governmental bodies; lack of narrow tailoring and myriad exceptions to favored speakers; safety and aesthetics rationales significantly undercut); Village of Schaumburg v. Jeep Eagle Sales Corp., 676 N.E.2d 200 (Ill. App. Ct. 1996) (exemption of official and corporate flags held unconstitutional content-based regulation of noncommercial speech). Contra, Infinity Outdoor Inc. v. City of New York, 165 F. Supp. 2d 403, 422 (E.D.N.Y. 2001) (allowing civic, philanthropic, educational and religious groups to display a "flag, pennant, or insignia" in any district without restriction).

requirement, however, a court may hold it constitutional if it does not discriminate against noncommercial speech.[232]

Flags, like other signs, must comply with valid regulations that provide how they may be displayed. In American Legion Post 7 v. City of Durham,[233] the city adopted a flexible size limit for flags, required their display on flagpoles, prohibited more than three flagpoles on a property and more than two flags on a flagpole, established a setback requirement for flagpoles, and made flags with commercial messages subject to separate provisions in the ordinance. The court held these requirements were content-neutral, served a substantial aesthetic interest, and satisfied the tests for time, place and manner regulations. They were narrowly tailored, and an exemption for flags or noncommercial entities would undermine the aesthetic interests of the ordinance. They also left adequate alternate channels for communication open because the ordinance had a relatively liberal set of size limits, and provided a special use permit procedure for obtaining temporary and permanent waivers.[234]

§ 4:2[3]. Freestanding Signs

A freestanding sign, sometimes referred to as a “pole sign,” is defined as "[a] sign principally supported by one or more columns, poles, or braces placed in or upon the ground."[235]

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[232] National Adver. Co. v. City of Miami, 287 F. Supp. 2d 1349 (S.D. Fla. 2003) (national flags and flags of political subdivisions; decorative flags, bunting, decorations; symbolic flags, award flags, house flags; exemption from permitting process not an exception to a general ban of noncommercial messages). The court relied on Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992), where the ordinance contained exemptions that did not include flags from the permit requirement. Contra Knoeffler v. Town of Mamakating, 87 F. Supp. 2d 322 (S.D.N.Y. 2000) (government flags).

[233] 239 F.3d 601 (4th Cir. 2001) (ordinance limiting size of American flags that could be displayed did not violate the First Amendment; though burdening speech, the ordinance was content-neutral, advanced the government interest in aesthetics, served that interest, and left open other avenues of expression).

[234] The court distinguished the Supreme Court's holding in the Ladue case on this issue. See § 2:76[2].

[235] Andrew D. Bertucci & Richard B. Crawford, Model On-Premise Sign Code 19 (United States Sign Council, 2011). The Code specifies where such signs may be displayed and has size and height limits for them. Id. at 35, 37-39.

Sign ordinances typically place size and height limits on freestanding signs, and courts uphold these restrictions as reasonable time, place and manner regulations when they are not content-based.[236]

In G.K. Ltd. Travel v. City of Lake Oswego,[237] the Ninth Circuit upheld an ordinance, as applied to prohibit plaintiff's sign, that substantially restricted freestanding sign height, allowed these signs only in some areas of the city,[238] and required the amortization of non-conforming signs within a period of years, or when a sign message was changed. Although the Lake Oswego case involved off premise advertising and not on premise identification, the ordinance was content-neutral because it restricted all freestanding signs in the city without creating exemptions for signs with preferred content. Court decisions supporting the city's interests in aesthetic and traffic safety were well established,[239] and the restriction on freestanding signs was narrowly tailored to achieve these interests.[240] The ordinance did not prohibit forms of communication other than signs and authorized other types of signs, including wall signs and monument signs, which gave the plaintiffs a reasonable opportunity to communicate their message. The sign code was valid even though it restricted the plaintiffs' preferred method of communication.

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[236] See § 5:5, discussing height and size limitations.

[237] 436 F.3d 1064 (9th Cir. 2006).

[238] Pole signs were permitted in the general commercial zones "when necessary to provide vision clearance at driveways or intersections and when there is no alternative, visible on-building or monument sign location."

[239] The sign code and the pole sign restriction came after considerable legislative deliberation, a dynamic dialogue with city residents and businesses and after extensive hearings. The city council also relied on the experience of other cities, producing strong evidence of the need for sign restrictions and the form these restrictions should take. Id. at 1069.

[240] The court relied on the analogous holding in Metromedia that it was not speculative to recognize that billboards by their very nature were an aesthetic harm wherever located. Id. at 1074.

In other cases, the courts upheld restrictions on freestanding signs that limited their size and height but did not prohibit them entirely as acceptable time, place and manner regulations.[241] They were narrowly tailored and content-neutral, and left ample alternate channels of communication open because the sign ordinance only limited size and height and was not a complete ban. They allowed some opportunity to display freestanding signs without allowing signs that would distract drivers or create aesthetic problems.[242]

When a sign ordinance has banned freestanding signs by restricting their height,[243] the courts have held the ordinance invalid if it contained content-based exemptions. In one case,[244] the ordinance exempted official public notices, flags, an emblem or insignia of an official government body, holiday decorations, street name signs, and "special signage" approved by the Architectural Review Board as "reasonable considering the intent and regulations" of the ordinance. It was not an acceptable time, place and manner regulation because "[t]he connection between traffic safety and aesthetics and the selective proscription of certain content on pole signs is not obvious."[245]

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[241] Sopp Signs, LLC v. City of Buford, 2012 U.S. Dist. LEXIS 93752 (N.D. Ga. 2012); (no more than 200 square feet and 20 feet in height); Herson v. City of Richmond, 827 F. Supp. 2d 1088 (N.D. Cal. 2011) (freestanding signs within 660 feet of a freeway or a parkway could not exceed 12 feet in height or 40 square feet in area); Herson v. City of San Carlos, 714 F. Supp. 2d 1018 (N.D. Cal. 2010) (largest pole sign could be 65 feet tall with a total sign area of 1125 square feet, but only on a freeway-oriented parcel with three or more businesses that received permission for a 25 per cent increase in the applicable sign allowance), aff'd on other grounds, 433 Fed. Appx. 569 (9th Cir. 2011). See also § 5:5.

[242] Herson v. City of Richmond, 827 F. Supp. 2d 1088, 1091 (N.D. Cal. 2011).

[243] See G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064 (9th Cir. 2006) (because of their height, city could reasonably conclude that freestanding signs were aesthetically harmful and distracting to travelers; restrictions on height upheld that prohibited plaintiff's sign). See also Rodriguez v. Solis, 2 Cal. Rptr.2d 50 (Cal. App. 1991) (applying Central Hudson tests to uphold denial of permit for freestanding sign for automobile dealers because it was oriented toward freeway; denial prevented visual blight, and did not require reversal because of right to conduct and advertise business on premise).

[244] XXL of Ohio, Inc. v. City of Broadview Heights, 341 F. Supp. 2d 765 (N.D. Ohio 2003). Accord North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755, 774 (N.D. Ohio 2000). These ordinances had numerous content-based distinctions.

[245] XXL, 341 F. Supp.2d at 796. Applying strict scrutiny, the court also held the aesthetic and traffic safety interests

§ 4:2[4]. Murals

Murals are signs or graphics that are painted or placed on walls. A number of cities have programs that allow murals and provide a review process for their display. References are cited in the footnote.[246]

A free speech problem can arise because a court may hold that the definition of murals in a sign ordinance is content-based and subject to strict scrutiny, which is usually fatal. An example is an ordinance that defines a mural as a "work of art." Another important question is whether a mural is commercial or noncommercial speech. A regulation of murals will usually be upheld if a mural is classified as commercial speech, but will be held invalid if a mural is classified as noncommercial speech.[247] Deciding whether a mural is commercial or noncommercial speech is difficult,[248] however, and the decisions are fact-based and hard to predict.

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were not compelling, and that the ordinance was real and substantially overbroad facially.

[246] E.g., Portland, Oregon mural ordinance, available at http://www.portlandonline.com/auditor/index.cfm?c=28169, last visited June 18, 2012; Ventura, California mural design guidelines, available at http://www.cityofventura.net/files/file/comm-service/Mural%20Design%20Approval%20Guidelines.pdf, last visited June 19, 2012. For a review of mural programs in several cities, see Savannah, Georgia Metropolitan Planning Commission, Mural Art versus Graffiti, Defining Mural Art in the City of Savannah: Case Studies, available at http://www.thempc.org/documents/HistoricPreservation/Site%20and%20Monument/Mural%20Policy/Case%20Studies.pdf, last visited June 18, 2012.

[247] However, see Burke v. City of Charleston, 893 F. Supp. 589 (D.S.C 1995), vacated and remanded for lack of standing, 139 F.3d 401 (4th Cir. 1998). The plaintiff challenged a ruling by the city that a mural on the side of a restaurant in an historic district had to be removed. It was a colorful cartoon of imaginary characters, including smiling mountains, flying creatures with impractically small wings and tiny yellow bipeds. A small commercial sign in the middle of the mural occupied 1/25th of its area. The court held the mural was noncommercial, but that color, size and other restrictions affected only the format or manner in which the artwork was displayed. The ruling that the mural was not appropriate for the historic district was a valid application of content-neutral time, place and manner rules from the city's historic preservation ordinance, which controlled the location and manner of expression in a narrowly drawn geographic area.

[248] See § 2:3[2].

A mural may clearly be noncommercial speech. In City of Indio v. Arroyo,[249] the owners of a convenience store had a mural painted on one of their outside walls to depict "aspects of our ethnic Mexican heritage." The city denied the mural a permit and a variance because it exceeded the size limit, but the court held the denial invalid because the ordinance was overbroad. "The stifling of artistic expression is a perverse result to claim as a victory for esthetics."[250]

Complete Angler, LLC v. City of Clearwater[251] held a mural noncommercial even though it related to the business for which it was displayed. The owner of a bait and tackle store had several fishes painted on most of an exterior building wall to bring attention to locally endangered game fish species. "Art work" was exempted from the ordinance unless it was displayed "in conjunction with" a commercial enterprise. This exemption applied. The painting was a local artist's impression of the "natural habitat and waterways" surrounding the shop, and alerted viewers to threats posed to the fish species it displayed. Though the painting might occasionally inspire the purchase of bait and tackle from the shop, it was not commercial speech because it did more than propose commercial transactions.[252]

Sign ordinances that regulate murals can create free speech problems if they distinguish among different types of signs. In a district court case,[253] the court held content-based and

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[249]191 Cal. Rptr. 565 (Cal. Ct. App. 1983).

[250] Id. at 570.

[251] 607 F. Supp. 2d 1326 (M.D. Fla. 2009).

[252] The city's enforcement of the ordinance was content-based, however, because it had to examine the content of the mural when it refused to apply the "art work" exemption. In addition, the city condoned the display of other murals, and a city official admitted a different subject matter for the plaintiff's mural would be acceptable. This content-based enforcement of the code did not withstand strict scrutiny because aesthetic and traffic safety interests were not compelling, and the favorable treatment of certain messages was not narrowly tailored.

[253] North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755 (N.D. Ohio 2000). Accord, Neighborhood Enters v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011). The city decided a mural painted on the side of a building was an illegal sign and not an exempted "work of art." This definition was content-based because the city had to read the content of a display to decide how it should be classified under the ordinance. See § 2:4[3]. Strict scrutiny applied, and the court held that traffic safety and aesthetics were not compelling interests that justified

unconstitutional an ordinance that allowed murals in commercial districts only if they did not contain a corporate service, product, or image, a restriction that prohibited a substantial amount of commercial speech. The ordinance did not pass strict scrutiny because safety and aesthetic interests were not compelling interests that justified the content-based ordinance, and the court did not see how some content would advance these goals while content that was not allowed would not. Neither was the ordinance narrowly drawn to advance these interests. A mural containing a corporate logo was no more distracting than a mural containing a classic painting.

Another group of cases classified murals as commercial speech even though they related to the business for which they were displayed and applied intermediate, rather than strict, scrutiny to uphold their regulation. In Wag More Dogs, LLC v. Cozart,[254] the plaintiff operated a doggy daycare center, and had a large mural of dogs painted on one of his walls that faced a dog park. The sign, which included cartoon dogs from the business's logo, was meant to attract customers from a nearby dog park. The Fourth Circuit held the mural was a commercial sign that the ordinance prohibited from display because it violated a size limit. The size limit was a content-neutral regulation[255] that was valid facially and as applied. It satisfied intermediate scrutiny because it advanced substantial aesthetic and traffic safety interests, and was drawn to achieve those interests. It also left open ample alternative channels of communication by permitting all types of signs that met size and location restrictions.

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the ordinance. Even if they were, the regulation was not narrowly tailored because there was no explanation of why the differential treatment of content in the ordinance advanced those goals. See also Clear Channel Outdoor, Inc. v. City of Portland, 262 P.3d 782 (Or. Ct. App. 2011) (distinction between painted wall signs and painted wall decorations held unconstitutionally content- based).

[254] 680 F.3d 359 (4th Cir. 2012). The ordinance had a broad definition of a sign. See also Eller Media Co. v. Mayor of Baltimore, 784 A.2d 614 (Md. Ct. Spec. App. 2001) (large depiction on side of building of baseball player with icon of retailer erroneously approved as mural in earlier proceeding).

[255] The court held the ordinance was adopted "to regulate land use, not to stymie a particular disfavored message." Its content neutrality was "incandescent." Wag More Dogs, 680 F.3d at 368.

Other cases reached similar results. In an Ohio case,[256] the city denied a business a permit to paint a mural on one side of its building depicting a mad scientist character. Under the usual tests for commercial speech, the mural was commercial because it was intended to attract attention to the business, a refilling station for a known racing fuel or additive. A permit requirement and color and size restrictions in the ordinance were neutral on their face, but many exceptions to these restrictions were content-based, unconstitutional and nonseverable, which made the ordinance unenforceable.[257]

§ 4:2[5]. Portable Signs

As one court described them, portable signs are "freestanding and not permanently anchored or secured to either a building or the ground. They include but are not limited to 'A' frame signs, commonly called sandwich signs, 'T' frame signs, or any other sign which by its description or nature may be, or is intended to be, moved from one location to another."[258] Portable signs are often regarded as unattractive, and can district drivers and cause a traffic safety problem if located close to streets or highways. Local governments have prohibited them, restricted the time allowed for their display and adopted height and size limitations.

Courts apply either the Central Hudson tests[259] or the tests for time place and manner regulations[260] to portable sign regulations. They have no difficulty holding that an ordinance

[256] City of Tipp City v. Dakin, 929 N.E.2d 484 (2010). The definition of "sign" in the ordinance included signs painted on a building.

[257] See also Catsiff v. McCarty, 274 P.3d 1063 (Wash. Ct. App. 2012). The owner of a toy store and gift shop named the Inland Octopus painted a wall sign depicting an octopus hiding behind a rainbow over the rear entrance of the store, and an octopus hiding behind several buildings with a rainbow above the buildings on the store front. He admitted he did this to convey it was a wonderful experience to come into his store and a wonderful place to buy toys. Because the purpose of the sign was economic, the court characterized it as commercial speech. It upheld size, height and design restrictions on the sign as content-neutral.

[258] Marras v. City of Livonia 575 F. Supp. 2d 807, 816 (E.D. Mich. 2008).

[259] See section 2:6[2], infra.

[260] See section 2:7[1], infra.

regulating portable signs advances aesthetic and traffic safety interests.[261] As the Fifth Circuit explained in upholding a ban on portable signs in Lindsay v. City of San Antonio, "It is well-established that ... the state may legitimately exercise its police powers to advance the substantial governmental goals of aesthetics and traffic safety."[262] Problems can arise under the third and fourth Central Hudson tests, however, if these interests are not directly advanced, or if the sign ordinance is not narrowly tailored. Content-based exemptions of similar signs can also create difficulties. Courts that apply the rules for time, place and manner regulations must consider whether there are ample alternate methods of communication if portable signs are banned or regulated.

The decisions on portable sign regulations are limited because many were decided before Supreme Court cases strengthened the relaxed application of Central Hudson's "directly advance" test. Courts usually uphold time, place and manner regulations, but prohibitions are more problematic.

§ 4:2[5][a]. Total Prohibitions

Portable signs present aesthetic problems, especially when they cluster together. The difficulty is that permanent signs can also present aesthetic problems, so a ban on portable signs may not "directly advance" the aesthetic interests of a community if unattractive permanent signs

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[261] Ballen v. City of Redmond, 466 F.3d 736 (9th. Cir. 2006); Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992); Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987); Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11th Cir. 1987); Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986); Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982); Marras v. City of Livonia 575 F. Supp. 2d 807 (E.D. Mich. 2008); Wilson v. City of Louisville, 957 F. Supp. 948 (W.D. Ky. 1997); Bertke v. City of Dayton, 1992 U.S. Dist. LEXIS 22757 (S.D. Ohio. 1992); Mobile Sign, Inc. v. Town of Brookhaven, 670 F. Supp. 68 (E.D.N.Y. 1987); Dills v. Cobb County, 593 F. Supp. 170 (N.D. Ga. 1984), aff'd, 755 F.2d 1473 (11th Cir. 1985); Signs, Inc. of Florida v. Orange County, 592 F. Supp. 693 (M.D. Fla. 1983); All American Sign Rentals, Inc. v. City of Orlando, 592 F. Supp. 85 (M.D. Fla. 1983); Barber v. City of Anchorage, 776 P.2d 1035 (Alaska. 1989); City of Hot Springs v. Carter, 836 S.W.2d 863 (Ark. 1992); Risner v. City of Wyoming, 383 N.W.2d 226 (Mich. App. 1985); State v. DeAngelo, 963 A.2d 1200 (N.J. 2009); Hilton v. City of Toledo, 405 N.E.2d 1047 (Ohio 1980); Kitsap County v. Mattress Outlet, 104 P.3d 1280 (Wash. 2005).

[262] 821 F.2d 1103, 1108-09 (5th Cir. 1987).

are allowed to stay or are not improved. Some courts follow the rule that they can accept the legislative judgment on whether an aesthetic interest is directly advanced, but other courts follow the rule that it must take evidence on this question.[263] These courts will hold a ban on portable signs invalid if it does not have evidentiary support.[264] A court may also decide a ban on portable signs is not narrowly tailored because other means are available to regulate them, such as size limits and limits on the number of signs allowed on premise.

Despite these problems, several courts upheld a ban on portable signs.[265] In Lindsay v. City of San Antonio,[266] the Fifth Circuit rejected a finding by the trial court that the ban would only "imperceptibly" change the community's appearance. This finding was at odds with the principle that "[t]he elimination of all visual blight is not the constitutional prerequisite to an ordinance regulating a type of signage." The city introduced photographs of various portable signs, while the plaintiffs introduced photos showing that other types of signs also caused visual blight, but the court held the balance tipped in favor of a finding that the ordinance furthered the city's aesthetic interest. Deference was owed to the city's aesthetic judgment, which the court had to respect. The court relied on the Vincent case,[267] which upheld a ban on sign posting on utility

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[263] See § 3:2 for a discussion of the differing views on this question.

[264] In some of the cases upholding a ban on portable signs, the municipality did studies and held public hearings. E.g., Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986).

[265] Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987); Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986) (prohibition eliminated aesthetic blight); Marras v. City of Livonia, 575 F. Supp. 2d 807 (E.D. Mich. 2008) (ban content-neutral); Bertke v. City of Dayton, 1992 U.S. Dist. LEXIS 22757 (S.D. Ohio 1992) (ban content-neutral and narrowly tailored; permanent signs provided an adequate alternate method of communication, especially since fifty percent of a business wall or ground sign could have changeable copy); Rigsby v. Huntsville, 1988 U.S. Dist. LEXIS 1104 (N.D. Ala. 1988) (prohibition directly advances governmental interest, reaches no further than necessary, and allows sufficient alternative modes of communication); Barber v. City of Anchorage, 776 P.2d 1035 (Alaska 1989) (ordinance content-neutral and advances aesthetic interest; alternate means available, can have permanent unlighted sign). See also accord Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11th Cir. 1987) (one portable sign allowed on a property subject to restrictions).

[266] 821 F.2d 1103 (5th Cir. 1987).

[267] See § 2:6[4].

poles, to hold that the ban on portable signs was narrowly tailored. Portable signs were not a uniquely valuable or important mode of communication, and plaintiffs' ability to communicate effectively was not threatened by ever-increasing restrictions on speech. Alternate means of communication existed.

A court may take a contrary view, and hold a ban on portable signs invalid by applying the rule that evidence must be introduced to support it. Another Eleventh Circuit case,[268] for example, held that the "mere incantation of aesthetics as a proper state purpose" did not meet First Amendment requirements. The county "must present some evidence that aesthetic interests are furthered by the statute, and that the statute is narrowly drawn to meet those interests." The county only presented bold statements in affidavits without supporting facts.[269]

Exemptions from a portable sign ban may be fatal. Ballen v. City of Redmond[270] invalidated a portable sign ban the city applied to prohibit signs held by hand on weekdays on a sidewalk in front of a bagel store. The ban was more extensive than necessary because it exempted content-based signs, such as real estate signs, that were just as aesthetically offensive. "The City has failed to show how the exempted signs reduce vehicular and pedestrian safety or besmirch community aesthetics any less than the prohibited signs."[271] This case, and similar cases that invalidated bans on unusual temporary or unusual portable signs,[272] reflect the

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[268] Dills v. Cobb County, 593 F. Supp. 170 (N.D. Ga. 1984), aff'd, 755 F.2d 1473 (11th Cir. 1985). The ordinance had a setback requirement that effectively prohibited portable signs. Accord Signs, Inc. of Florida v. Orange County, 592 F. Supp. 693 (M.D. Fla. 1983).

[269] Dills, 593 F. Supp. at 174 n.5. See also Ballen v. City of Redmond, 466 F.3d 736 (9th Cir. 2006) (rejecting city employee statement not supported by objective facts; portable sign ban held invalid).

[270] 466 F.3d 736 (9th Cir. 2006).

[271] The court relied on City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993), discussed in § 2:6[6].

[272] State v. DeAngelo, 963 A.2d 1200 (N.J. 2009) (ten-foot-tall inflatable rat-shaped balloon on a sidewalk; content-based, strict scrutiny applied because grand opening signs were exempted; a violation of the ordinance depended on the purpose for which a sign was displayed; a balloon was not more harmful to safety or aesthetics than a similar

plurality decision in Metromedia, which held invalid an exemption for noncommercial signs when some exemptions were content-based.[273]

The court in Ballen also held the city could have imposed a less restrictive alternative,[274] such as time, place and manner restrictions on all commercial signs, and could have adopted a ban limited only to hand-held signs. Unlike some cases that upheld bans on portable signs, the court held that Metromedia did not control. Portable signs were not like billboards, which are fixed and permanent structures that intrude more on community aesthetics.

§ 4:2[5][b]. Time, Size and Height Limitations

Sign ordinances can also limit the length of time that portable signs can be displayed during any one year, can limit the period of time during which these signs can be displayed continuously, and can limit their size and height. These limitations are usually upheld. An Eleventh Circuit case, for example, upheld height limits and a requirement allowing only one portable sign on a property.[275] It applied a relaxed standard of judicial review, accepted these requirements as a partial solution to the city's aesthetic problems, and noted that portable sign regulation was only one part of a comprehensive effort to improve the city's appearance.[276]

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item displayed in a grand opening; the ordinance eliminated all signs without a readily available alternative); Kitsap County v. Mattress Outlet, 104 P.3d 1280 (Wash. 2005) (reinforced, rigid and flat raincoats with messages about store; third and fourth Central Hudson tests failed; "prohibiting persons from wearing signage provides minimal, if any, benefit in aesthetics and safety"; signs prohibited were no more hazardous to traffic or aesthetically offensive than many signs exempted; ban not narrowly tailored).

[273] See § 3:5.

[274] On whether the fourth Central Hudson test requires adoption of a less restrictive alternative see § 2:6[6].

[275] Don's Porta Signs, Inc. v. Clearwater, 829 F.2d 1051 (11th Cir. 1987). See accord Wilson v. City of Louisville, 957 F. Supp. 948 (W.D. Ky. 1997) (size and height limits; hearings held and testimony taken on the ordinance). The court also upheld requirements that limited portable signs to advertising services or products available on the site or noncommercial messages, and that limited their display to the hours of operation of a business, profession, trade or occupation.

[276] The court relied on, Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986), to hold that that the regulation was no more extensive than necessary to accomplish the city's goals. The Harnish case upheld a total ban on portable signs. See § 4:2[5][a].

Another Eleventh Circuit case[277] summarily upheld a sign ordinance that limited the maximum number of portable signs for a business to one temporary permit every six months for a maximum of sixteen days. The city had expressed an interest in aesthetics,[278] and by allowing a limited number of portable signs, it narrowly tailored these restrictions to meet its purposes because it could have prohibited portable signs as an alternative.[279]

§ 4:2[6]. Price Signs

Sign ordinances may regulate price signs just as they do any other type of on premise sign. Although the display of pricing information on an on premise sign would appear to be a simple matter of sign content or speech, some ordinances have prohibited the display of prices, allowed the display of prices in some zoning districts but not others, or limited where businesses may display prices on premise. Supreme Court cases holding that prohibitions on price advertising were invalid have influenced judicial decisions on price sign ordinances. In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,[280] for example, the Court held invalid a statutory ban on the advertising of prescription drugs by pharmacists. The ban

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[277] Messer v. Douglasville, 975 F.2d 1505, 1514 (11th Cir. 1992). Accord Mobile Sign, Inc. v. Brookhaven, 670 F. Supp. 68 (E.D.N.Y. 1987) (six-month time limit, adopting relaxed view of legislative judgment that limited length of display, not necessary to regulate all unattractive media of commercial speech, and limitation did not restrict speech more broadly than necessary). See also City of Hot Springs v. Carter, 836 S.W.2d 863 (Ark. 1992) (rejecting equal protection claim); Hilton v. City of Toledo, 405 N.E.2d 1047 (Ohio 1980) (upholding time limits pre-Metromedia).Contra Risner v. Wyoming, 383 N.W.2d 226 (Mich. Ct. App. 1985) (60-day display period; safety hazards could be remedied by other provisions of sign code, time limit does not address them, periodic display more distracting to motorists, aesthetic objections not based on sign appearance).

[278] The court quoted the statement of purpose for the ordinance in a footnote. Messer, 975 F.2d at 1514 n.8.

[279] The court relied on Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986), which upheld a ban on portable signs. It rejected Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982), which invalidated time limits and restricted display options for portable signs because there was no evidence in that case to support the city's aesthetic interest in these restrictions. See also People v. Target Adver. Inc., 708 N.Y.S.2d 597, 602 (N.Y. City Crim. Ct. 2000) (Dills' requirement of additional evidence of intent based only on Supreme Court cases that arose in a completely different context, where a party to litigation attempted to assert existence of a legislative purpose that was unsupported by a court's own reading of the legislative enactment).

[280] 425 U.S. 748 (1976). See also Liquormart v. Rhode Island, 517 U.S. 484 (1996) (striking down statute that prohibited advertising of liquor prices; plurality decision); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (prohibition on advertising the prices of routine legal services invalidated).

effectively prohibited the dissemination of price information about these drugs, which only licensed pharmacists could dispense. The Court rejected an argument that the harmful effects of price advertising on the pharmaceutical profession justified the prohibition:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.[281]

Early state cases relied on Virginia Pharmacy to invalidate ordinances that regulated the display of prices on signs. In a Georgia case[282] the court struck down an ordinance, as applied to a self-service gas station that prohibited businesses from posting price signs. It permitted signs containing the name of a business and the category of products available on the premises, but not prices. The city offered only an aesthetic interest for this distinction, but numbers of prices were not inferior to letters that formed words. Alternate means of communication were more expensive and less likely to reach persons seeking or not seeking this information.

For similar reasons, a group of New York cases struck down ordinances that limited price signs to gasoline pumps at filling stations.[283] Cases in federal district court held ordinances invalid as content-based that prohibited price information on signs and that also had many other content-based distinctions.[284]

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[281] Virginia Pharmacy, 425 U.S. at 770.

[282] H & H Operations, Inc. v. Peachtree City, 283 S.E.2d 867 (Ga. 1981). Accord City of Lakewood v. Colfax Unlimited Asso., 634 P.2d 52 (Colo. 1981) (price signs permitted in some zones and prohibited in others).

[283] People v. Mobil Oil Corp., 397 N.E.2d 724 (N.Y. 1979) (county had not demonstrated that place of speech had a detrimental secondary effect on society; far from clear that law did not withhold useful consumer information from the public; serious questions concerning adequacy of available alternates); Zoepy Marie, Inc. v. Town of Greenburgh, 477 N.Y.S.2d 411 (App. Div.1984) (no triable issues of fact on aesthetic need for regulation, the availability of alternate marketing techniques, or need to control deceptive advertising); People v. Durham, 415 N.Y.S.2d 183 (N.Y. Dist. Ct. 1979) (ordinance content-based and left no ample alternate channel of communication, as shown by drastic reduction in sales when ordinance enforced). See also accord City of Lakewood v. Colfax Unlimited Asso., 634 P.2d 52 (Colo. 1981) (price signs permitted in some zoning districts but not others, along with other content-based distinctions; relationship to safety and aesthetic purposes too attenuated).

[284] XXL of Ohio, Inc. v. City of Broadview Heights, 341 F. Supp. 2d 765 (N.D. Ohio 2004) (restrictions on showing

On the opposite side of the spectrum, an Ohio case was more accepting. It upheld an ordinance that prohibited price signs adjacent to freeways with a speed limit of more than 50 miles an hour, or within 660 feet of the Interstate System, and that prevented a lodging facility from displaying its weekly rates.[285] The court did not consider the content neutrality issue, but deferred to the legislative judgment on the importance of controlling signs along highways. "Like the court in Metromedia, we will not second-guess the city's common-sense conclusion that limiting the text of advertising signs generally reduces visual clutter along the highway and reduces the possibility of traffic accidents."[286] Evidentiary proof was not required, and Metromedia applied even though the sign was on premise rather than a billboard.[287] Supreme Court cases like the Virginia Pharmacy case make this decision questionable.

4:2[7]. Time and Temperature Signs

A time and temperature sign is a sign that displays information electronically with changing or moving digits. It may or may not be lighted, but today it is typically illuminated. Except for the issue of the actual content displayed, a time and temperature sign is an electronic or digital sign. Time and temperature signs are often allowed as an exemption from an ordinance that prohibits flashing, moving or electronic signs. The Metromedia plurality held invalid the

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or not showing price were content-based along with other content-based restrictions, and did not logically advance city's goals); North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755 (N.D. Ohio 2000) (prohibition on showing price, along with other content-based restrictions, held content-based and invalid); Courts held restrictions on the display of price information unconstitutional before the Supreme Court applied the free speech clause to commercial speech. See, e.g., Carlin v. City of Palm Springs, 92 Cal. Rptr. 535 (Cal. App. 1971) (distinction between rate and nonrated sign held arbitrary and content-based).

[285] Suburban Lodges of Am., Inc. v. City of Columbus Graphics Comm'n, 761 N.E.2d 1060 (Ohio App. 2000), appeal dismissed, 759 N.E.2d 1260 (Ohio 2002).

[286] Id. at 1067.

[287] The court also held that whether the ordinance advanced the city's aesthetic interest was not to be judged by its effect only on plaintiff's prohibited sign, and that an alternate regulation limiting the size of letters and number of words for each sign would not be as effective and would not be less restrictive. In addition, the prohibition in the ordinance was not undercut because it allowed temporary real estate and construction signs along highways and freeways without limiting the text of such signs, and because it failed to limit the text on signs along other, more visually cluttered streets.

exemption of 12 noncommercial signs in the San Diego sign ordinance, some of which were content-based.[288] Time and temperature information is noncommercial, and time and temperature signs were among those exempted by the San Diego ordinance, so courts may follow Metromedia and hold an exemption of time and temperature signs invalid. One group of cases held a time and temperature sign exemption content-based and not narrowly tailored when it was one of numerous content-based exemptions that undermined the aesthetic and traffic safety interests the ordinance served.[289]

Flying J Travel Plaza v. Transportation Cabinet, Dep't of Highways[290] invalidated an exemption for time and temperature signs that was adopted under the state's highway beautification act. The regulation prohibited signs displaying flashing, moving or intermittent lights but exempted those displaying time, date, temperature or weather, limited to one cycle of four displays with a five-second maximum completion time. The Kentucky Supreme Court held that the regulation failed Central Hudson's "more extensive than is necessary" test,[291] because the content of the exempted speech did not have anything to do with highway safety or aesthetics. Simple limits on the number of displays allowed, and maximum time limits for displays, would better serve the governmental interest than a content-based prohibition on certain kinds of commercial speech.

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[288] See § 3:5.

[289] Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005); Bonita Media Enters., LLC v. Collier County Code Enforcement Bd., 2008 U.S. Dist. LEXIS 10637 (M.D. Fla. 2008) (exemption held content-based); King Enters. v. Thomas Twp., 215 F. Supp. 2d 891 (E.D. Mich. 2002) (also held to discriminate against noncommercial speech); North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755 (N.D. Ohio 2000).

[290] 928 S.W.2d 344 (Ky. 1996) (also holding the regulation discriminated among different kinds of noncommercial speech).

[291] See § 2:6[6].

Some courts, however, have upheld exemptions for time and temperature signs and have taken a very different view of the free speech issues. In La Tour v. City of Fayetteville,[292] the sign ordinance prohibited any "sign which flashes, blinks, or is animated," which kept the plaintiff from putting an electronic sign in his office window, but the city did not enforce this prohibition against time and temperature signs if they did not carry advertising. The principal opinion held the prohibition on flashing, blinking and animated signs was content-neutral and narrowly tailored because it served the city's interest in aesthetics and traffic safety. A time and temperature sign was less of a traffic hazard than other signs because its messages were "short and rudimentary," The city could allow these signs as exemptions and still have a narrowly tailored regulation that was content-neutral because it was justified without reference to content. Ample alternate channels of communication existed because the plaintiff could display messages through a non-electronic sign or by using his electronic sign in a non-flashing manner.[293]

[292] 442 F.3d 1094 (8th Cir. 2006). Accord, Chapin Furniture Outlet, Inc. v. Town of Chapin, 2006 U.S. Dist. LEXIS 72483 (D.S.C. 2006) (exemption of time and temperature signs from ordinance prohibiting flashing signs did not "suggest a preference by the Town for certain messages or discriminate against others based on content"), rev'd and remanded as moot after ordinance amended to remove exemption, 252 Fed. Appx. 566 (4th Cir. 2007); Covenant Media of Ill., L.L.C. v. City of Des Plaines, 2005 U.S. Dist. LEXIS 20395 (N.D. Ill. 2005) (exemption did not regulate with respect to a particular viewpoint or favored cause; other exemptions included).

[293] A concurring opinion held that preventing a proliferation of flashing signs was a content-neutral justification for distinguishing between electronic signs, which would likely trigger proliferation, and time-and-temperature signs, which would not. Id. at 1097-1100. There was a dissenting opinion. See also Desert Outdoor Adver., Inc. v. City of Oakland, 506 F.3d 798 (9th Cir. 2007) (upholding severance of time and temperature exemption by district court as unconstitutional, but explaining that exemption did not show that ordinance applied to noncommercial speech); Robert L. Rieke Bldg. Co. v. Overland Park, 657 P.2d 1121 (Kan. 1983) (time and temperature signs properly distinguished from searchlights, because these signs do not create traffic hazards and do not have adverse effects on adjacent property).

CHAPTER V. REGULATIONS FOR THE DISPLAY OF ON PREMISE SIGNS

§ 5:1. An Overview

Sign ordinances typically contain a number of regulations for the display of on premise signs. Some control the physical characteristics of signs, such as their size, height and setback. Courts usually uphold this type of regulation because it does not prohibit signs, and because it regulates physical characteristics that may affect aesthetics and traffic safety. Other regulations deal with less tangible elements, such as color, illumination and design review. They may raise a content neutrality problem if, for example, a design review ordinance identifies a particular type of design as a design standard. If color is content, then the regulation of color is content-based.

Sign ordinances may also prohibit certain sign elements, such as animation or illumination, but allow the display of the sign without those elements. A prohibition is harder to defend because it may not leave adequate alternate methods of communication open and may not be narrowly tailored.

The courts apply the Central Hudson and the time, place and manner tests when they review regulations for the display of on premise signs. They especially ask whether they are narrowly tailored, and whether adequate alternate methods of communication are available. They usually uphold these regulations, though case authority is limited for some of them. In some cases that upheld a regulation, the special character of the visual environment was an important supporting factor, as in cases upholding bans on certain types of illumination. The regulations for the display of on premise signs discussed in this chapter are arranged alphabetically.

§ 5.2. Animation, Flashing Illumination and Changeable Signs

Signs may have features that change their static character. For example, an animated sign is "[a] sign employing actual motion, the illusion of motion, or light and/or color changes achieved through mechanical, electrical, or electronic means."[294] An illuminated sign[295] can be flashing, which means that it is not "maintained stationary or constant in intensity or color at all times."[296] A changeable sign is "[a] sign with the capability of content change by means of manual or remote output."[297] Though these sign features can provide an attractive visual environment in some settings, a municipality may control or prohibit some or all of them, either throughout the municipality or in certain areas. The sign must then display the feature in the specified manner, or eliminate it if prohibited.

Courts have upheld prohibitions on animated and flashing signs.[298] Marras v. City of Livonia,[299] for example, held that prohibitions on flashing and "moving" signs[300] were content-

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[294] Andrew D. Bertucci & Richard B. Crawford, Model On-Premise Sign Code 15 (United States Sign Council, 2011). The definition also defines different types of animated signs.

[295] See § 5:6.

[296] "Flashing illumination" is "[i]llumination in which the artificial source of light is not maintained stationary or constant in intensity or color at all times when a [sign] is illuminated, including illuminated lighting." Daniel R. Mandelker, Street Graphics and the Law, American Planning Association, Planning Advisory Rep. No. 527, at 82 (2004).

[297] Model On Premise Sign Code, supra note 294, at 17. The definition also defines different types of changeable signs.

[298] La Tour v. City of Fayetteville, 442 F.3d 1094 (8th Cir. 2006) (principal opinion; prohibited signs that flash, blink or are animated; content-neutral and narrowly tailored); Marras v. City of Livonia, 575 F. Supp. 2d 807 (E.D. Mich. 2008) (flashing and moving signs prohibited; content-neutral time, place and manner regulation, not a regulation of speech but of form speech takes); Singer Supermarkets, Inc. v. Zoning Bd. of Adjustments, 443 A.2d 1082 (N.J. App. Div.1982) (ban on flashing signs upheld under Central Hudson tests); Pawtucket CVS, Inc. v. Gannon, 2006 R.I. Super. LEXIS 33 (R.I. Super. Ct. 2006) (same). See Meredith v. City of Lincoln City, 2008 U.S. Dist. LEXIS 90988 (D. Or. 2008) (upholding denial of structural change to nonconforming sign for electronic display). See also Hilton v. City of Toledo, 405 N.E.2d 1047 (Ohio 1980) (upholding prohibition on flashing portable signs, free speech issues not considered).

[299] 575 F. Supp. 2d 807 (E.D. Mich. 2008).

[300] Under the ordinance, a "flashing sign" was "intermittently illuminated or reflects light intermittently from either an artificial source or from the sun, or any sign which has movement of any illumination such as intermittent, flashing, or varying intensity, or in which the color is not constant, whether caused by artificial or natural sources."

neutral. They did not draw distinctions based on the message the sign conveyed, but on how it was presented. They were not regulations of speech, but regulated "what form speech may take."[301]

A district court upheld a ban on changeable copy ground signs for two or more tenants as a measure to reduce the number of distracting signs and visual clutter.[302] A single tenant could have such signs. However, some cases questioned bans on all changeable copy signs or held them invalid because they did not present traffic and aesthetic problems any more than other signs.[303] Content-based distinctions between signs that can and cannot have changeable copy are invalid.[304]

§ 5:3. Color

Color can be an important element in the design of signs; good design makes good use of color. Sign ordinances may regulate color in several ways. They may specify the colors that signs may use, may limit the number of colors a sign can have, or may provide a design review process in which color is one of the elements that design review considers.

A moving sign "has motion either constantly or at intervals, or . . . gives the impression of movement through intermittent flashing, scintillating, or varying the intensity of illumination whether or not said illumination is reflected from an artificial source or from the sun." Id. at 815-816.

[301] Id.

[302] Rigsby v. City of Huntsville, 1988 U.S. Dist. LEXIS 1104 (N.D. Ala. 1988). See also Harnish v. Manatee County 783 F.2d 1535 (11th Cir. 1986). The court upheld a ban on portable and changeable copy signs. A "changeable copy" sign was defined as "[a]n Integral part of a sign not covering more than 65% of the total sign area and design so as to readily allow the changing of its message by removable letters, panels, posters, etc." The court held that the total ban advanced the government goal of protecting the aesthetic environment of the county, and that the county did not have to adopt less restrictive means to achieve this objective. However, the temporary nature of the changeable copy signs influenced the decision.

[303] Naser Jewelers, Inc. v. City of Concord, 2007 U.S. Dist. LEXIS 45991, *12 n.6 (D.N.H. 2007) (city would have difficult time supporting notion that all manually changeable copy signs pose a substantial threat to the safety or aesthetics of Concord's commercial zones), aff'd on other grounds, 513 F.3d 27 (1st Cir. 2008); Outdoor Sys. Inc. v. City of Clawson, 686 N.W.2d 815 (Mich. Ct. App. 2004) (prohibition of readily changeable billboards invalid; signs present same traffic or safety problem whether or not readily changeable).

[304] North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755, 768 (N.D. Ohio 2000) (unclear why "informational sign" may have changeable copy, but sign presenting "issue" to the public may not; content of one type of sign certainly not "safer" or inherently more "aesthetically pleasing" than the other).

Content neutrality is an issue when sign ordinances include color as a basis for regulation. The Supreme Court considered the content neutrality issue when it upheld a federal statute that required federal currency illustrations to be printed in black and white and at a certain size. The Court held the statute was a content-neutral time, place and manner regulation, because the color and size requirements restricted only the manner in which currency illustrations were presented.[305] Compliance did not prevent the expression of any view, and enforcement did not require the government to evaluate the nature of the message expressed. The color limitation served a compelling governmental interest in preventing counterfeiting. It made it more difficult for counterfeiters to gain access to negatives they could alter and use for counterfeiting purposes.[306]

Cases that consider color regulations in sign ordinances have relied on this case, and have held that sign ordinances can regulate color as a content-neutral time, place and manner regulation. In City of Tipp City v. Dakin,[307] an Ohio court upheld a sign ordinance that allowed no more than five colors for most signs. Though this requirement was invalid because it included content-based exemptions, the color limitation was content-neutral:

> In limiting signs to five colors, Tipp City is not seeking to suppress the content of a message. Instead, it is restricting only the manner in which the appellants' mural may be displayed.... The fact that Tipp City's color limit may have an incidental impact on an artist "who aspires to use allegedly lurid colors to express himself" does not make the five-color limit impermissibly content based. [citing case] To the contrary, if uniformly applied, a five-color limit would be a time, place, and manner restriction justified by aesthetic and safety concerns.[308]

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[305] Regan v. Time, Inc., 468 U.S. 641, 655-656 (1984).

[306] At the time, only one negative and plate were required for black-and-white printing, but color printing required multiple negatives and plates. This greater number of color negatives and plates increased a counterfeiter's access to them, and allowed him to use them more easily for counterfeiting purposes under the guise of a legitimate project.

[307] 929 N.E.2d 484 (Ohio Ct. App. 2010).

[308] Id. at 502.

A federal district court upheld, as a time, place and manner regulation, an historic district ordinance that required the review of exterior structural alterations in order to maintain harmony in style, form, color.[309] The review board applied these criteria to deny a permit for the display of a mural on the wall of a restaurant. Color, size, and other restrictions were valid and affected only the format or manner in which the mural could be displayed. Review under the ordinance did not stifle, suppress or interfere with the content or message of protected speech. It was directed only to reviewing a proposed alteration's mode of delivery of speech to decide whether it complied with specified regulatory criteria. This case involved an historic district ordinance, but it can apply to sign ordinances where color is a factor in design review.[310]

Narrow tailoring is an issue in the regulation of color, though a court may hold it is not a problem because an ordinance that controls for color only limits that single sign element. In a related case, the Eleventh Circuit held an ordinance that limited news rack colors to beige and brown was a valid time, place and manner regulation.[311] Uniform color and size of lettering requirements were narrowly tailored to achieve the city's interest in reducing visibility and minimizing visual blight. They did not completely ban news racks from public rights-of-way or prohibit the sale and distribution of newspapers, and publishers could display their name or logo in a color they selected. Courts can use the same reasoning to uphold a sign ordinance that controls for color.

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[309] Burke v. City of Charleston, 893 F. Supp. 589 (D.S.C 1995), vacated and remanded for lack of standing, 139 F.3d 401 (4th Cir. 1998).

[310] See Demarest v. City of Leavenworth, 2012 U.S. Dist. LEXIS 89185 (E.D. Wash. 2012), in which the court upheld a design review program for signs in which color was a factor. See also § 5.3, discussing design review, and § 2:8[3], discussing the validity of design review standards.

[311] Gold Coast Publications v. Corrigan, 42 F.3d 1336 (11th Cir. 1994). See also Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993) (upholding as a time, place and manner regulation an ordinance requiring uniform color requirements for newsstands).

§ 5.4. Design Review

Sign ordinances may require design review,[312] which can present a content neutrality problem if it requires a design that has an identified character. This problem arose in Demarest v. City of Leavenworth,[313] where design review was part of a program that made the city a successful tourist attraction in eastern Washington State. The design review program prohibited any sign within commercial districts that was "not compatible in design, lettering style, and color with the Old World Bavarian-Alpine theme." The court held the Bavarian theme requirement was content-neutral. It did not make "[a]nything non-Bavarian ... a disfavored message suppressed by the regulations." The city could not reject a design because of the viewpoint it contained, and the city enforced design review by regulating physical attributes, such as size, shape, number, placement, font, and colors. A sign must do more than "look nice or professional and be maintained," but the design requirements had nothing to do with an expressed viewpoint. Other cases held that design standards based on physical or architectural elements did not present a content neutrality problem.[314]

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[312] Section 2:8[3] discusses the prior restraint problem presented by standards adopted for design review programs.

[313] 2012 U.S. Dist. LEXIS 89185 (E.D. Wash. 2012). The court held that the Bavarian theme requirement was not a form of compelled speech. It also held that the aesthetics, tourism, traffic/pedestrian safety, and economic vitality interests advanced by the code were substantial, that the Bavarian theme was not an artificial made-up asset, and that the different treatment of signs in the ordinance did not violate the Central Hudson tests.

[314] Lusk v. Village of Cold Spring, 475 F.3d 480, 493-496 (2d Cir. 2007) (design and architecture standards for historic district held content-neutral; applied to signs). See also Catsiff v. McCarty, 274 P.3d 1063 (Wash. Ct. App. 2012) (upholding downtown design standards). The standards provided:

> Wall signs must be either painted upon the wall, mounted flat against the building, or erected against and parallel to the wall not extending out more than twelve inches therefrom. Wall signs shall be located no higher than thirty feet above grade … . The maximum combined area of all wall signs per street frontage shall not exceed twenty-five percent of the wall area. No combination of sign areas of any kind shall exceed one hundred fifty square feet per street frontage.

Id. at 1067-1068. The court held these standards were a reasonable fit, and that the city had a legitimate regulatory interest in adopting them. The legislative history showed the wall sign size and height restrictions were adopted as part of a comprehensive plan to address aesthetics and traffic control.

§ 5:5. Height and Size Limitations

Sign ordinances usually limit the height and size of on-premise signs.[315] These limits may differ depending on the type of sign and its location, or depending on the distance a sign is set back from a road or property line. Ordinances may set absolute size limits that vary by location for different types of signs, or provide a maximum square footage allowance for wall signs based on the ratio of the sign area to street frontage or wall area. Height limits apply to freestanding signs.[316] Courts have little difficulty upholding size[317] and height[318] limits under the Central

[315] Limitations on size are usually included with limitations on height, and courts often consider both limitations together.

[316] See § 4:2[6], discussing freestanding signs.

[317] Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012) (60 square feet or one square foot per linear foot of frontage limit); Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886 (9th Cir. 2007) (specified limits on ground signs); Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604 (9th Cir. 1993) (onsite signs limited in size and number according to location of property); Sopp Signs, LLC v. City of Buford, 2012 U.S. Dist. LEXIS 93752 (N.D. Ga. 2012) (200 square feet); Herson v. City of Richmond, 827 F. Supp. 2d 1088 (N.D. Cal. 2011) (freestanding signs within 660 feet of a freeway or a parkway could not exceed 12 feet in height or 40 square feet in area); Herson v. City of San Carlos, 714 F. Supp. 2d 1018, 1026 (N.D. Cal. 2010) (pole signs no larger than 1125 square feet), aff'd on other grounds, 433 Fed. Appx. 569 (9th Cir. 2011); Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1446 (N.D. Ill. 1990) (ground signs, 480 square feet), aff'd without opinion, 1993 U.S. App. LEXIS 4694 (7th Cir. 1993); Donrey Communications Co. v. Fayetteville, 660 S.W.2d 900, 903 (Ark. 1983) (75 square feet); Kyrch v. Town of Burr Ridge, 444 N.E.2d 229, 232-33 (Ill. App. Ct. 1982) (120 square foot size limit on ground signs); State v. Spano, 966 N.E.2d 908, 914 (Ohio. Ct. App. 2011) (special event signs limited to 32 square feet); Village of Ottawa Hills v. Afjeh, 2004 Ohio App. LEXIS 6612, (Ohio Ct. App. 2004) (ten square feet limit adopted based on research and consultation; may be visual distraction that could impact traffic safety and aesthetics); Catsiff v. McCarthy, 274 P.3d 1063, 1067 (Wash. Ct. App. 2012) (wall signs in central business district limited to 25 percent of wall area). See also Kolbe v. Baltimore County, 730 F. Supp. 2d 478 (D. Md. 2010) (upholding eight square foot size limit on temporary signs).

[318] Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886, 893-894 (9th Cir. 2007) (pole height of signs in multiple areas limited to 20 or 30 feet); Sopp Signs, LLC v. City of Buford, 2012 U.S. Dist. LEXIS 93752 (N.D. Ga. July 5, 2012) (20 feet); Herson v. City of San Carlos, 714 F. Supp. 2d 1018, 1026 (N.D. Ca. 2010) (pole signs no taller than 65 feet), aff'd on other grounds 433 Fed. Appx. 569 (9th Cir. 2011); Marathon Outdoor, LLC v. Vesconti, 107 F. Supp. 2d 355, 366-367 (S.D.N.Y. 2000) (signs within 15 feet of a street must be less than 30 feet in height); Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1446-1447 (N.D. Ill. 1990) (ground signs no more than 35 feet high), aff'd without opinion, 1993 U.S. App. LEXIS 4694 (7th Cir. 1993); Kyrch v. Burr Ridge, 444 N.E.2d 229, 232-233 (Ill. App. Ct. 1982) (16 foot height limit on ground signs); Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County, 962 A.2d 404, 421-423 (Md. 2008) (six foot height limit on signs); Catsiff v. McCarthy, 274 P.3d 1063, 1067-1069 (Wash. Ct. App. 2012) (wall signs in business district no more than 30 feet above grade). See also accord, Parrack v. Town of Estes Park, 628 P.2d 1014 (Colo. 1981) (signs that project from a structure must be more than nine feet above grade).

Hudson tests or as time, place and manner regulations. They are not content-based and advance legitimate interests in aesthetics and traffic safety.[319] They leave adequate alternate means of communication open because they are not a complete ban.[320] One case upheld ground sign size limits that were calibrated to the width and speed of adjacent streets.[321]

Marathon Outdoor, LLC v. Vesconti[322] is typical. The court upheld a New York City ordinance limiting signs within 15 feet of a street to less than 30 feet in height. It was narrowly tailored, promoted public safety and aesthetics, and did not foreclose alternate channels of communication because it only regulated maximum height. Signs were not banned entirely, but were required only to meet certain structural guidelines that promoted the government's interests in health, safety, general welfare and aesthetics. It was "common ground that governments may regulate the physical characteristics of signs."[323]

Careful study and public participation can help show that narrow tailoring requirements are met because there is a reasonable fit between legislative ends and means. As a Washington court noted:

> The legislative history shows the city carefully considered its sign size and height restrictions. Its sign code was a product of its stated policy of "working with downtown businessmen to develop a workable sign code specifically for the downtown area." A

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[319] Some of these cases noted that the ordinance contained a preamble or statement of purpose, e.g., Donrey Communications Co. v. Fayetteville, 660 S.W.2d 900, 903 (Ark. 1983); Catsiff v. McCarthy, 274 P.3d 1063, 1068 (Wash. Ct. App. 2012) (purpose section adequate though does not mention aesthetics or traffic safety; reference to "visual clutter" sufficient). See § 3:3.

[320] Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886 (9th Cir.2007) (specified limits on ground signs). See also Donrey Communications Co. v. Fayetteville, 660 S.W.2d 900, 903 (Ark. 1983) (75 square foot limit; valid even though prevented use of standard poster and required poster that was 50 percent more expensive).

[321] Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886 (9th Cir.2007) (specified limits on ground signs). This method of calculation is explained in a study done by the United States Sign Council and published in Daniel R. Mandelker, Street Graphics and the Law, American Planning Association, Planning Advisory Rep. No. 527, ch. 2 (2004).

[322] 107 F. Supp. 2d 355, 366-367 (S.D.N.Y. 2000).

[323] Quoting City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994).

> building improvement guide was commissioned that recommended a "sign should not dominate; its shape and proportions should fit your building just as a window or door fits." It suggested that "[s]ome types of signs are *not* appropriate, including … oversized signs … applied over the upper facade." The city used those considerations when choosing its sign size and height limitation in 1991, and it continues to rely on them. The city's consideration of such issues demonstrates reasonable legislative balancing based on local study and experience, which satisfies any calibration duty.[324]

Height and size limits on billboards are more easily upheld because billboards are adjacent to streets and highways, where they can present aesthetic and traffic safety problems.[325]

§ 5.6. Illumination Through Lighting, Searchlights, and Neon

The United States Sign Council's Model On-Premise Sign Code defines an illuminated sign as "[a] sign characterized by the use of artificial light, either projecting through its surface(s) [Internally or trans-illuminated]; or reflecting off its surface(s) [Externally illuminated]."[326] Illumination can be an attractive feature for on premise signs, and sign ordinances may regulate its use. Alternatively, a municipality may prohibit sign illumination, either throughout the community or in certain areas, if they believe it is inconsistent with the visual environment.

Restrictions on illumination can raise free speech problems because they are based on the color[327] or brightness of a sign. A court must be willing to accept a legislative decision that a regulation of brightness and color advances aesthetic, traffic safety or some other governmental interest. Only a few state cases have considered free speech issues raised by illumination

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[324] Catsiff v. McCarthy, 274 P.3d 1063, 1068 (Wash. Ct. App. 2012) (wall signs in central business district limited to 25 percent of wall area and no more than 30 feet above grade).

[325] E.g., Get Outdoors II, LLC v. City of El Cajon, 403 Fed. Appx. 284 (9th. Cir. 2010) (300 square foot limit and 35 foot height limit); King Enters. V. Thomas Twp., 215 F. Supp. 2d 891, 909 (E.D. Mich. 2002) (billboards limited to 200 square feet in area and 30 feet in height).

[326] Andrew D. Bertucci & Richard B. Crawford, Model On-Premise Sign Code 20 (United States Sign Council, 2011).

[327] See § 5:3.

restrictions. In the cases that upheld these restrictions, the distinctive character of the protected visual environment sometimes was a factor.

Community character was an important factor in Asselin v. Town of Conway.[328] The New Hampshire Supreme Court summarily upheld an ordinance that banned internal but allowed external illumination in an important tourist town in the White Mountain National Forest. The ban on internally lit signs was "merely a content-neutral restriction on one of the myriad ways in which outdoor messages may be conveyed at night."[329] Externally lit signs were an available and less expensive alternative. In rejecting substantive due process objections, the supreme court agreed with the trial court that the unregulated use of nighttime lighting would negatively affect "the natural appeal and general atmosphere of the area." An expert witness had testified that internally illuminated signs appear as "disconnected squares of light" at dusk and at night, while externally lit signs soften the impact of signs in darkness.

In another case in which environmental issues were important, Eller Media Co. v. City of Tucson,[330] the court summarily rejected a free speech objection to an ordinance that required top-mounted rather than bottom-mounted lights on billboards. This requirement was intended to reduce light emissions into the night sky that might unreasonably interfere with astronomical observations. The city claimed that top-mounted lights emitted fewer rays into the night sky because their rays shine downward on at least one surface before radiating upward. The regulation did not affect communicative speech because it did not affect the advertising message displayed on the billboards.

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[328] 628 A.2d 247 (N.H. 1993).

[329] Id. at 251.

[330] 7 P.3d 136 (Ariz. Ct. App. 2000).

Sign ordinances may limit the use of searchlights. Their operation may not affect communicative speech, but a Kansas case assumed they did and upheld an ordinance under which the city authorized searchlights as a special use for no more the ten days.[331] This limitation met the Central Hudson tests. High-powered searchlights visible for a distance of 30 to 40 miles, and used for promotional purposes, obviously attracted the attention of persons not on the premises. The city made a reasonable judgment that the regulation promoted traffic safety and improved the city's aesthetic appearance. A lesser regulation would not serve those interests, and the limitation was no more extensive than necessary.

Neon lighting may be an attractive feature for signs in some locations, but a municipality may decide they do not want it, either throughout the community or in certain areas. There are conflicting views on whether a ban on neon signs violates free speech principles. An Indiana court applied the Central Hudson tests to uphold a ban on neon signs in a small tourist town,[332] whose ordinance cited the town's unique scenic and architectural characteristics and public safety concerns as reasons for its adoption. The ban was no more extensive than necessary. It was neither prudent nor effective to limit neon signs to a particular area, and no type of neon lighting would be less distracting or less inconsistent with the town's aesthetic image. Reasonable alternatives were available, such as ground-lighted signs that would not contrast with the community's aesthetic character.

A New Jersey trial court took a contrary view, and struck down a ban on neon signs a township adopted to avoid a "highway commercial" appearance.[333] The ban was content-neutral, and alternate methods of lighting were available, but the evidence did not show that neon

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[331] Robert L. Rieke Bldg. Co. v. City of Overland Park, 657 P2d 1121 (Kan. 1983).

[332] Wallace v. Brown County Area Plan Comm'n, 689 N.E.2d 491 (Ind. Ct. App. 1998).

[333] State v. Calabria, Gillette Liquors, 693 A.2d 949 (N.J. L. Div. 1997).

lighting contributed to the objectionable appearance. Regulating the degree of illumination, the amount of light used, the direction of light, the times to use the light, or the number of interior neon lights permitted would allow neon lighting to meet the township's aesthetic standard. It was not clear that eliminating neon would have any impact on the undesirable "highway commercial" look.

§ 5:7. Numerical Restrictions

Sign ordinances may limit the number of signs on a property, assign numerical limits for signs on walls or facades, or provide a numerical ratio for signs based on street frontage or facade. Courts usually uphold numerical limits by applying either the Central Hudson or time, place and manner regulation tests.[334]

The cases recognize that numerical limits on signs balance the need to provide information with aesthetic and traffic safety interests. A federal district court in B & B Coastal Enterprises, Inc. v. Demers[335] applied the Central Hudson tests to uphold a sign ordinance that allowed one sign for each pump and for other product sold by gasoline stations. The town had decided to make important consumer information known, but properly limited the display of information in accord with its other interests. These aesthetic and safety interests were substantial, and "limiting the number of signs per lot materially advances the common-sense

[334] B & B Coastal Enterprises, Inc. v. Demers, 276 F. Supp. 2d 155 (D. Me. 2003) (one sign for each pump and for other product sold by gasoline stations, met Central Hudson tests); Bender v. City of Saint Ann, 816 F. Supp. 1372 (E.D. Mo. 1993) (one wall sign per business, corner lots may have one on each street fronting wall, met Central Hudson tests), aff'd on other grounds, 36 F.3d 57 (8th Cir. 1994); Williams v. City & County of Denver, 622 P.2d 542 (Colo. 1981) (three sign limit per street front, plus one additional sign for each 100 feet of street frontage in excess of 200 feet, upheld as valid time, place and manner restriction); Township of Pennsauken v. Schad, 733 A.2d 1159 (N.J. 1999) (limit of two business signs in C-1 district and four in C-2 district, met Central Hudson and time, place and manner tests); Singer Supermarkets, Inc. v. Zoning Bd. Of Adjustment, 443 A.2d 1082 (N.J. App. 1982) (only one sign allowed on the front façade of a business, met Central Hudson tests); Temple Baptist Church v. City of Albuquerque, 646 P.2d 565 (N.M. 1982) (unspecified but limited to the minimum number of signs necessary for identification purposes, upheld as valid time, place and manner regulation).

[335] 276 F. Supp. 2d 155 (D. Me. 2003).

judgments of the local lawmakers that an excessive number of signs may pose a hazard to traffic safety and detracts from the visual attractiveness of this tourist-town."[336] By controlling the size and appearance of signs rather than prohibiting them entirely, the town used less restrictive means for meeting safety and aesthetic concerns.[337]

§ 5.8. Setback Requirements

Sign ordinances usually require setbacks for on premise signs of a specified distance from a property line or street. Courts uphold setback requirements as valid time, place and manner restrictions.[338] An Ohio case[339] is typical. It upheld an ordinance requiring special event signs to be more than five feet from the property or street line. The regulation was content-neutral because it was not directed at suppressing any particular type of speech. It did not prevent the plaintiff from advertising or selling cars at his dealership, but merely restricted the size and placement of signs for special events. It was a reasonable time, place and manner regulation because "[t]he government has an interest in controlling the size and placement of special event signs for reasons of both safety and aesthetics."[340]

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[336] Id. at 165.

[337] In Rhodes v. Gwinnett County, 557 F. Supp. 30 (N.D. Ga. 1982), the court struck down a sign ordinance that allowed "[o]ne business or institution identification sign on the premises of the permitted business or institution." The county did not offer any evidence that it adopted this provision because of a concern with traffic or safety. Even if it did, there was no limit on the size of signs, so any single sign was permitted no matter how large or how offensive or distracting. The ordinance also prohibited additional signs no matter how attractive or inconspicuous.

[338] King Enters. V. Thomas Twp., 215 F. Supp. 2d 891 (E.D. Mich. 2002) (various setback requirements); Donrey Communications Co. v. City of Fayetteville, 660 S.W.2d 900 (Ark. 1983) (setback requirements for freestanding signs); State v. Spano, 966 N.E.2d 908, 914 (Ohio. Ct. App. 2011) (special event signs must be more than five feet from the street line). See also Marathon Outdoor, LLC v. Vesconti, 107 F. Supp. 2d 355, 366 (S.D.N.Y. 2000) (signs within 15 feet of the street must be less than 30 feet in height).

[339] State v. Spano, 966 N.E.2d 908 (Ohio Ct. App. 2011).

[340] Id. at 914.