SIGN REGULATION AND FREE SPEECH:
SPOOKING THE DOPPELGANGER

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No area of land use law is more difficult than sign regulation. The difficulties arise from free speech law and how it affects the regulation of signs and the messages they contain. Bedeviled by a Supreme Court decision described as a "Tower of Babel,"(1) municipalities(2) must struggle to regulate signs without provoking free speech objections.(3)

This article examines this constitutional thicket to make sense of free speech doctrines that shape sign regulation. It first considers the rules courts apply when they review sign regulations for free speech violations. It then examines three problems in sign control that are especially contentious. These are the justification municipalities must have for regulating the aesthetics of signage, the content neutrality issue, and the problems that arise in regulating off-premise signs, often called billboards.

I conclude that federal and state courts have upheld municipalities when they regulate sign aesthetics despite the Supreme Court's failure to develop clear free speech principles for sign regulation. Content neutrality and the control of off-premise signage are more difficult issues, but municipalities can find ways to deal with these problems.

I. SETTING THE STAGE: FREE SPEECH PRINCIPLES

Sign regulation historically triggered objections that it is facially unconstitutional because aesthetic judgments are subjective. This argument is essentially a substantive due process objection that the aesthetic purposes of sign regulation are not legitimate. However, most state courts reject it by holding that "aesthetics

alone" is a proper basis for land use regulation.[4] They also apply a presumption of constitutionality to sign regulation, as they do to all municipal regulation of economic interests. The presumption means a regulation is constitutional if it has a reasonable basis. For example, state courts apply the presumption to uphold regulations that govern the time, place and manner of sign display.[5]

This state law background is critical, because the judicial landscape changes when courts apply the free speech clause of the federal constitution.[6] They reverse the usual presumption of constitutionality, but the depth of the reversal depends on the type of speech affected.[7] One critical distinction is between commercial and noncommercial speech. In sign regulation, a message on a sign that promotes commercial products or services is commercial speech. All other messages are noncommercial, such as a message that has ideological or political content. Examples are signs that say "Abortion is Evil" or "Elect Grimsted to Congress."

Commercial and noncommercial speech enjoy different levels of constitutional protection. The courts apply a less demanding test to laws that affect commercial speech, including sign regulations, than they apply to regulations that affect noncommercial speech. The landmark Supreme Court case on laws affecting commercial speech is Central Hudson Gas & Electric Co. v. Public Service Commission.[8] There the Court held that a regulation of commercial speech must meet a three-part test. If the speech concerns lawful activity and is not false or misleading, then it must (1) serve a substantial governmental interest, (2) directly advance the asserted governmental interest, and (3) be no more extensive than necessary to serve that interest.[9] Rumblings in the Supreme Court may suggest it may be willing to reconsider and perhaps tighten the judicial review standards adopted by Central Hudson,[10] but until it does so that case still controls.

The leading Supreme Court case that applied free speech principles to sign ordinances is Metromedia, Inc. v. City of San Diego,[11] the case described as a Tower of Babel. There a badly divided Court approved a ban on billboards contained in the city's comprehensive sign ordinance, but held it unconstitutional because it also contained provisions found to violate the free speech clause. The opinion that attracted the most support was a plurality opinion signed by four Justices, none of whom are still on the Court. Nevertheless, with some exceptions,[12] most courts continue to follow the free speech principles laid down in the plurality opinion.[13] Because the Metromedia plurality opinion has become

so decisive, the discussion that follows relies on it as the basis for examining the free speech issues presented by sign regulation.

II. SOME COMMON SIGN REGULATION PROBLEMS

A. Regulating Aesthetics

Recall that Central Hudson requires municipalities to show that a regulation affecting commercial speech will serve a substantial governmental interest. Traffic safety and aesthetics are the two governmental interests municipalities usually assert, and the Metromedia plurality opinion approved both as a basis for upholding the city's ordinance. It seemed to accept traffic safety as a per se justification, noting the California Supreme Court held as a matter of law that an ordinance prohibiting billboards "designed to be viewed from streets and highways reasonably relates to traffic safety."(14) The plurality agreed, holding it would "likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers" and many courts that billboards "are real and substantial hazards to traffic safety."(15)

This holding is helpful when sign regulation prohibits signs visible from highways or improves traffic safety by restricting their size, height and spacing. Sign regulation deals with much more, however, and requires an aesthetic basis when traffic safety issues do not dominate. The California Supreme Court accepted aesthetics alone as a sufficient basis for upholding the San Diego ordinance, though it also noted that the aesthetic and economic justifications for the ordinance were identical because the state relied on its scenery to attract traffic and commerce.(16) The Metromedia plurality went further, holding it was not "speculative to recognize that billboards, by their very nature, wherever located and however constructed, can be perceived as an esthetic harm."(17) The Supreme Court later confirmed its holding that aesthetic interests justify sign regulation under the free speech clause by upholding an ordinance prohibiting the posting of signs on public property that prohibited political signs.(18)

These decisions are a strong endorsement of aesthetics as a substantial governmental purpose that satisfies the free speech clause, but some important questions remain unanswered. Metromedia came up on a summary judgment motion, in a case where the parties stipulated facts that did not question the city's conclusion about aesthetic impacts. This history encourages sign companies to argue the Metromedia plurality did not consider what a municipality has to show to justify a sign ordinance when there is no such stipulation. When a sign company challenges a sign ordinance in court it may argue a municipality must show that its ordinance accomplishes an aesthetic purpose as applied to its signs. This argument would make it difficult to defend sign regulations because any one company's signs are not likely to have a significant effect on the aesthetics of a community.[19]

The Supreme Court has not accepted the argument that individualized proof of a law's aesthetic effect is required in commercial speech cases. In a case upholding a federal statute prohibiting radio stations in non-lottery states from broadcasting lottery advertising, it concluded an individualistic, as-applied analysis of the statute's effect on a particular radio station was inappropriate under Central Hudson. Instead, the validity of a regulation depends on "the overall problem the government seeks to correct."[20] The sign cases have followed this decision, holding that courts should test sign regulations by their effect on a broad category of speech, not by their effect on an individual plaintiff's signs.[21] These cases mean municipalities need only identify broad categories of signs whose aesthetic problems require regulation,[22] such as billboards.[23]

B. Viewpoint and Content Neutrality

1. The Supreme Court Cases

Laws must have a neutral effect on speech.[24] The typical sign ordinance is a time, place and manner regulation that does not present a neutrality problem.[25] A time, place and manner regulation is a law that regulates activities to protect governmental interests unrelated to speech. An example is an ordinance that contains limitations on the size, number and height of signs. Because they have a neutral effect on speech, time, place and manner regulations are usually constitutional under the free speech clause.[26]

There are two types of neutrality: viewpoint neutrality and content neutrality. Viewpoint neutrality means a sign regulation may not regulate a point of view. An example is a sign ordinance that prohibits any sign containing a message that opposes abortion. This kind of ordinance is not viewpoint-neutral and clearly violates the free speech clause.[27]

Content neutrality creates more difficult problems. Content neutrality means a sign regulation may not define the content of a sign. A sign ordinance that prohibits any sign that contains any message of any kind on abortion is an example. As a leading Supreme Court case put it, the "principal inquiry" in deciding content neutrality is "whether the government has adopted a regulation because of a disagreement with the message it conveys. The government's purpose is the controlling consideration."[28] Any law that regulates content must satisfy a strict scrutiny test that requires narrow tailoring to meet a compelling governmental interest.[29] This test is more demanding than the Central Hudson that governs commercial speech. Neither may a law make distinctions based on content.

A content neutrality problem arose in Metromedia. Like many sign ordinances, the San Diego ordinance included a list of exempt signs defined by their content, such as signs that identified a property and its owner.[30] The plurality struck down all of these exemptions as content-based because it held the exemptions discriminated between different types of signs because of their content.[31]

Despite the Metromedia plurality opinion, the Supreme Court has not always applied the content neutrality rule to sign regulation. It appeared to require only viewpoint neutrality in a later case upholding an ordinance prohibiting the posting of signs on public property.[32] Then, in City of Ladue v. Gilleo,[33] the court held a sign ordinance violated free speech without relying on the content neutrality rule, although it clearly could have applied. The Court held invalid an ordinance that prohibited homeowner signs in residential areas with only a few exceptions, such as safety hazard signs. Gilleo posted a war protest sign in her window, and the city required its removal.

The Court agreed that municipalities have a valid interest in reducing visual clutter, but held they cannot do so by foreclosing an important and distinct medium of expression for political, religious or personal messages. The Court noted it had

always had a special respect for individual liberty in the home and a person's ability to speak there. Justice O'Connor, concurring, complained that the Court should have decided the case by holding that the ordinance was not content-neutral.[34]

The status of the content neutrality requirement in sign regulation is also uncertain because of the judicial response in lower courts to the invalidation of the content-based exemptions by the Metromedia plurality. Some courts have followed the Metromedia plurality holding on this problem,[35] but some have not.[36]

Whether sign regulations must be both viewpoint-neutral and content-neutral has a critical impact on their constitutionality. Viewpoint neutrality is not a serious problem. No municipality is likely to adopt a sign ordinance, for example, which prohibits signs advocating the saving of whales. Content neutrality is more difficult. Municipalities have typically defined signs by their content because this makes sense. A directional sign, for example, is a sign that gives directions. Content neutrality means that this kind of definition is not constitutional.

2. The Regulatory Risk

Although the status of the content neutrality rule may not be entirely clear, its endorsement by the Metromedia plurality cautions that content neutrality is a problem in sign regulation. Content neutrality has an impact on sign regulation because disagreement with a message, as the Supreme Court put it, is not the only basis for finding a law content-based. The Metromedia plurality made it clear that content neutrality prohibits benign regulations that define signs by their message, though it did not discuss the implications of this holding.[37] It did so, as noted earlier, by striking down perfectly innocent sections in the San Diego ordinance that exempted several signs that could contain various messages. The plurality holding on content-based exemptions, if still good law, makes it impossible to define signs by the messages they can display.[38] A federal district court case,[39] illustrates the risks municipalities take when they define signs by their content, and then use these content-based definitions as the basis for their regulations. The ordinance in this case took this approach, and the court angrily struck it down.

As a result, municipalities cannot authorize signs that are commonly used and that can be visually attractive additions to the urban landscape. Time and temperature signs are one example. Banks and other financial institutions often display them, and they are quite attractive when displayed in clocks in public squares. Nevertheless, a sign ordinance specifically authorizing the display of time and temperature signs risks invalidation as content-based.[40]

This review of content neutrality problems suggests, at the least, that municipalities must look carefully at their sign definitions. If they do so they will find they can make marginal changes in definitions that can achieve aesthetic purposes without violating the free speech clause. For example, an ordinance can regulate time and temperature and similar signs by defining "changeable copy" as "copy that changes at intervals of more than once every six seconds."[41] The ordinance can then authorize signs with changeable copy and specify where these signs can and cannot locate. This is a time, place and manner regulation that regulates time and temperature and any other moving sign without creating content neutrality problems.

3. Standing and Severability

The content neutrality problem and its threat to sign regulation is aggravated by the rules governing standing in free speech cases, and the rules governing the severability of unconstitutional sections in sign ordinances. These rules make it essential to review every requirement in a sign ordinance for free speech problems. Municipalities may believe that benign provisions in sign ordinances, such as time and temperature provisions, are not vulnerable. They may believe that the billboard companies who are their most likely antagonists cannot attack them, and that businesses benefitted by them will not object.

They should think twice. Usually, of course, a party may only assert constitutional violations of its own rights. The rule is different in free speech cases. In these cases the courts permit facial challenges to legislation if it unconstitutionally regulates protected speech though the plaintiff's speech is not protected.[42] Examples are a sign regulation that "chills" the First Amendment rights of others not before the court, and a sign regulation claimed to be invalid because it regulates content. These standing rules mean a billboard company can challenge a provision

authorizing time and temperature signs by claiming it is content-based though it is not affected by it.

The facial vulnerability of a sign ordinance makes it more likely a court will hold it nonseverable. A court can invalidate an ordinance if it holds some of its sections unconstitutional if it believes the municipality would not have enacted what remains, and if the remainder of the ordinance cannot stand independently.(43) This risk is aggravated when plaintiffs can facially attack sections in sign regulations claimed to violate free speech law, even though they do not affect them. An ordinance is more difficult to sever if a court holds several of its sections unconstitutional.

Municipalities can attempt to encourage severability by including a clause stating a legislative intent that the remainder of an ordinance is constitutional if a court invalidates one or more sections. The difficulty is that courts may reject this statement of intent in sign cases because sign ordinances usually are highly interdependent. Severability then becomes difficult when a court holds that one or more sections violate the free speech clause, as the cases show.(44) The risk that a court will reject severability increases the stakes in sign ordinance litigation, because a municipality runs the risk it will lose the entire ordinance if a court strikes down even one section. This risk is all the more uncertain because severability is fact-intensive, and it is difficult to predict how any court will rule on this question.

C. Off-Premise vs. On-Premise Signs

1. The Metromedia Plurality Decision

The distinction between off-premise and on-premise signs is common in sign regulation. This classification originally distinguished different types of signs, as on-premise signs were usually wall or other signs attached to a building, while off-premise signs were freestanding. In addition, on-premise signs usually advertised goods and services sold on the premises, while off-premise signs usually advertised goods and services not sold on the premises. The term “billboard” is often used for off-premise signs, especially when they are adjacent to highways.(45)

Sign regulations picked up these differences by defining off-premise and on-premise signs to reflect the functions they serve. They defined on-premise signs as signs that advertise goods and services sold on the premises. They defined off-premise signs as signs that advertise goods and services not sold on the premises. The ordinance would then allow on-premise signs and prohibit off-premise signs. This type of ordinance does not prohibit off-premise signs that display noncommercial messages.

This kind of sign regulation came before the Supreme Court in Metromedia and caused problems under the free speech clause. The plurality opinion upheld a ban on off-premise signs although the ordinance allowed on-premise signs, but struck down the section that prohibited noncommercial messages on on-premise signs. The plurality believed this section improperly favored commercial speech over noncommercial speech.

The ordinance sections allowing on-premise but prohibiting off-premise commercial signs created a problem under the second Central Hudson test, which requires an ordinance to "directly advance" the interests it asserts. The problem was that allowing on-premise commercial signs while prohibiting off-premise commercial signs arguably undermined the city's aesthetic and traffic safety interests as on-premise signs can be as visually offensive and as dangerous to traffic. State courts had frequently considered this problem, but had held that this distinction was not a violation of equal protection.(46)

The Metromedia plurality upheld this distinction against free speech objections.(47) It noted that state courts and its own prior decisions had found it constitutional; that the city could decide that off-premise advertising presented a "more acute" problem than on-premise advertising; and that it would respect the city's decision to value on-premise commercial advertising more than off- premise commercial advertising. It also held a "commercial enterprise" has a stronger interest in identifying its place of business, and the products or services available there, than it has in "advertising commercial enterprises located elsewhere."(48)

This holding is a strong endorsement of ordinances that prohibit off-premise but allow on- premise commercial signs. An important qualification, however, is the clear assumption that the San Diego ordinance prohibited only off-premise

commercial signs.[49] The implication is the Court would have held the ordinance invalid as an unconstitutional restriction on noncommercial speech had it prohibited off-premise signs with noncommercial messages.

This implication is reinforced by the plurality's treatment of the provision in the ordinance that did not allow on-premise signs to display noncommercial messages.[50] The plurality held this provision unconstitutional because it decided the city could not prevent a business from displaying "its own ideas or those of others."[51] This particular problem is easily fixed if the ordinance allows on-premise signs to display noncommercial messages.[52] A more difficult problem arises if this holding means a municipality cannot disfavor noncommercial speech by prohibiting it on off-premise signs.

2. The Content Neutrality Problem

This discussion of the Metromedia plurality suggests a municipality that wants to prohibit off- premise signs faces a serious dilemma. It runs the risk a court will hold its ordinance unconstitutional if it prohibits all off-premise signs, including signs with noncommercial messages. A municipality can avoid this problem by defining an off-premise sign as a sign that "advertise a business, products or services not sold or offered on the premises on which the sign is located."[53] It then runs the risk a court will hold the definition unconstitutional because it is content-based.

The plurality in Metromedia did not address the definition problem, but objectors can argue this definition is content-based because it is necessary to look at a sign to decide whether the definition covers it. This argument will not succeed. The Supreme Court rejected it[54] and the lower courts have agreed.[55] Messer v. City of Douglasville[56] went even further, faced the content neutrality issue directly, and held a definition of off-premise signs similar to the one quoted above was content-neutral. It did not regulate speech according its viewpoint, which is forbidden; it regulated the sign based on its location; and it did not legislate a preference for either commercial or noncommercial speech. This is not a unanimous view, as the Supreme Court and some lower courts have held a regulation is content-based when the message conveyed determines whether the speech is subject to restriction.[57] These cases indicate an off-premise sign definition like the one

quoted above is content-based. Another approach to the regulation of off-premise signs may be necessary.

3. Prohibiting Off-Premise Signs With Noncommercial Speech

An ordinance can solve the content neutrality problem by prohibiting signs with both commercial and noncommercial messages, but it will then face other free speech problems. Recall that the Metromedia plurality implied that an ordinance prohibiting off-premise signs with noncommercial messages would be unconstitutional.[58] Some courts have taken this position.

For example, in National Advertising Co. v. City of Orange,[59] the Ninth Circuit interpreted a sign ordinance to prohibit off-premise noncommercial and commercial signs and then found this prohibition unconstitutional. It held that noncommercial speech requires more protection than commercial speech, that merely treating commercial and noncommercial speech equally is not enough, and that regulations that are valid for commercial speech may be invalid for noncommercial speech.[60] Other courts have agreed,[61] or upheld off-premise sign prohibitions only when they were limited to signs displaying commercial messages.[62] Other cases upheld ordinances prohibiting off-premise signs with commercial or noncommercial speech only because they were limited to designated areas of the city, such as historic areas.[63] This view is not universal. Some courts upheld a prohibition on off-premise containing both commercial and noncommercial messages,[64] while the Eleventh Circuit eased the off-premise vs. on-premise distinction by holding that all noncommercial speech is on-premise.[65]

The constitutionality of prohibiting off-premise signs is even more confused after Discovery Network, Inc. v. City of Cincinnati.[66] There the Supreme Court struck down an ordinance that prohibited the display of commercial newspapers on newsracks but permitted the display of noncommercial newspapers. It held this distinction did not provide the “reasonable fit” between legislative purpose and the means to chosen to achieve that purpose which the third Central Hudson test requires.[67] The Court carefully limited its holding to the facts, however. It noted the city had regulated newsracks under an outdated ordinance enacted long before newsracks became a problem. The apparent purpose of that ordinance was to prevent visual blight caused by littering, not the harm associated with permanent

newsracks. Neither had the city calculated the "costs and benefits" of burdening speech with a newsrack prohibition because it had not addressed newsrack problems by regulating their "size, shape, appearance, nor number."[68] The Court also said its holding was "narrow," and that it might be possible for a community to justify the differential treatment of commercial and noncommercial newsracks.[69]

This case is important to sign regulation because it considered the converse of the problem considered in Metromedia. By striking down an ordinance that treated commercial speech more severely than noncommercial speech, Discovery Network undermined the Metromedia plurality holding, that a sign ordinance may regulate commercial speech more restrictively. Discovery Network recognized this problem. It distinguished Metromedia in a footnote[70] because that case considered a distinction between off-premise and on-premise signs that "involved disparate treatment of two types of commercial speech." The footnote also emphasized the Metromedia plurality's holding that off-premise signs require regulation because they present more of a problem than on-premise signs.

These statements comfortably distinguished Metromedia, but the Court then confused its treatment of that decision. It continued its footnote with the puzzling comment that Metromedia did not consider a distinction between commercial and noncommercial off-premise billboards "that cause the same esthetic and safety concerns."It said this question was not presented in Metromedia because the San Diego ordinance banned all off-premise billboards "with only a few exceptions." This reading of Metromedia is incorrect.

How courts should deal with this confused reading of the Metromedia plurality is not clear. The Seventh Circuit has upheld restrictions on off-premise commercial signs that did not apply to noncommercial signs despite Discovery Network's suggestion that this distinction might be unconstitutional.[71]

4. An Alternate Solution

This discussion suggests that a regulatory distinction between off-premise and on-premise signs is difficult to make without creating problems under the free speech

clause. Neither does this distinction make a useful classification between signs that do and do not present aesthetic problems.[72] On-premise pole signs can present as much of an aesthetic problem as off-premise commercial "billboards."

A better approach is to regulate freestanding signs in all locations. The key to a sign ordinance that can effectively do this yet withstand free speech objections lies in comments in Discovery Network. There the Court complained the city had not adopted time, place and manner regulations, such as regulations on "size, shape, appearance, or number," that could remedy the problems caused by newsracks.[73] Similarly, a content-neutral time, place and manner sign ordinance would not make the off-premise vs. on-premise distinction and would not distinguish between commercial and noncommercial speech. It would include a content-neutral definition of a sign[74] and would add time, place and manner regulations for different types of signs, including freestanding signs, no matter where they are.[75]

Regulations for freestanding signs could differ in different areas. For example, different regulations could apply in commercial and industrial than in residential districts.[76] The ordinance could also contain a special set of regulations for signs adjacent to highways and located in other areas that have special concerns, such as historic districts.[77] It could also prohibit freestanding signs in designated districts or along designated streets or highways. An ordinance of this kind would be a content-neutral regulation of freestanding signs that does not discriminate against noncommercial speech.

III. CONCLUSION

The Supreme Court has made it clear that the free speech clause applies to sign regulations. What it has not made clear is how municipalities can draft sign regulations that will survive constitutional attack as a violation of the free speech clause. This problem arises in part from ambiguities and confusions in Supreme Court decisions; a Court that cannot remember and apply its own precedent hardly deserves credibility.

Meanwhile, municipalities must try to interpret and apply Supreme Court guidelines that determine what the free speech clause requires. This is no easy task, but careful drafting should be able to produce effective sign regulations that are constitutionally correct. With practice, municipalities can spook the doppelganger.[78]

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FOOTNOTES

1. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 569 (1981) (then Justice Rehnquist dissenting).

2. The term "municipalities" is intended to apply to cities, villages, towns and townships and counties. This article will hopefully encourage city planners and municipal attorneys to carefully review their sign regulations for free speech problems.

3. Readers should be aware that free speech law is from settled. This article considers some, but not all, of the uncertainties. For full treatments of the subject see Daniel R. Mandelker, Land Use Law §§§§ 11.12-11.21 (4th ed. 1997 & Supp. 2000), hereinafter cited as Land Use Law; Daniel R. Mandelker, Jules B. Gerard & E. Thomas Sullivan, Federal Land Use Law Pt. II (updated annually), hereinafter cited as Federal Land Use Law. The Supreme Court may possibly provide more enlightenment when it reviews a case upholding state regulations prohibiting advertising for cigarettes near places where children are likely to be. Consolidated Cigar Corp. v. Reilly, 218 F.3d 30 (1st Cir. 2000), cert. granted, 2000 U.S. Lexis 42 (U.S., Jan. 8, 2001).

4. See Land Use Law §§ 11.05.

5. Id., §§ 11.10.

6. State courts must apply the federal constitution, so federal free speech problems now tend to dominate sign litigation, even in state courts.

7. For definitions of commercial speech adopted by the Court see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562 (198) (expression related solely to economic interest of speaker); Bigelow v. State of Virginia, 421 U.S. 809, 822 (1975) (suggesting that commercial speech proposes a commercial transaction). Difficulties may arise when a publication contains both commercial and noncommercial speech. See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993).

8. 447 U.S. 557 (1980).

9. The Court has made it clear that this test does not impose a less restrictive means requirement. Board of Trustees v. Fox, 402 U.S. 469, 480-81 (1989).

10. 44 Liquormart, Inc. v. State of Rhode Island, 517 U.S. 484 (1996). See Greater New Orleans Broadcasting Ass'n v. United States, 119 S. Ct. 1923 (1999) (Court refused to reconsider Central Hudson tests). See also Ackerley Communications of the Northwest v. Krochalis, 108 F.3d 1095 (9th Cir. 1997) (holding that later Supreme Court decision do not undermine Central Hudson tests).

11. 453 U.S. 490 (1981).

12. Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994). See also Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999).

13. E.g., Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604 (9th Cir. 1993); National Advertising Co. v. City & County of Denver, 912 F.2d 405 (10th Cir. 1990); National Advertising Co. v. Town of Babylon, 900 F.2d 551, 556-57 (2d

Cir.), cert. denied, 498 U.S. 852 (1990); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988); Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987), cert. denied, 484 U.S. 1010 (1988); Don's Porta Signs, Inc. v. City of Clearwater, 820 F.2d 1051 (11th Cir. 1987), cert. denied, 485 U.S. 981 (1988);

14. Metromedia, at 508.

15. Id., at 509.

16. Metromedia v. City of San Diego, 610 P.2d 407, 413 (Cal. 1980). For this reason, the court did not find a distinction between the economic and aesthetic basis for the sign regulation.

17. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510 (1981).

18. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) (holding it is "well-settled" that government may exercise its police powers to regulate aesthetic values). See also id., at 806-07, holding a majority of the Justices in Metromedia had held that the city's aesthetic interests were enough to justify the ordinance.

19. See Suburban Lodge of America v. City of Columbus Graphics Comm'n, 2000 Ohio App. LEXIS 4701, at *12 (decided Oct. 12, 2000, appeal pending).

20. United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993), quoting Ward v. Rock Against Racism, 491 U.S. 781, 801 (1989).

21. Lavey v. City of Two Rivers, 171 F.3d 1110, 12115 n. 18 (7th Cir. 1999); Ackerley Communications of the Northwest v. Krochalis, 108 F.3d 1095, 1098 (9th Cir. 1993); Outdoor Systems, Inc. v. City of Lenexa, 67 F. Supp.2d 1231 (D.

Kan. 1999); Suburban Lodge of America v. City of Columbus Graphics Comm'n, 2000 Ohio App. LEXIS 4701, at *12 (decided Oct. 12, 2000, appeal pending).

22. This task is difficult when municipalities attempt to micromanage sign control by identifying limited types of signs for regulation that do not present a substantial aesthetic interest that

justifies regulation. See, e.g., Burkow v. City of Los Angeles, 119 F. Supp.2d 1076 (C.D. Cal. 2000) (invalidating ordinance prohibiting display of "for sale" signs in car windows). Compare Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986) (county justified ordinance prohibiting display of portable signs). Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), was an as-applied attack on a city ordinance prohibiting the display of temporary signs on public property. The Court analyzed the constitutionality of the ordinance by considering its impact on the broad category of poster signs as represented by the signs the plaintiff displayed. Id. at 807.

23. Billboards, or off-premise signs, would seem to be a "broad" category of signs after Metromedia that present substantial aesthetic problems that municipalities can regulate, see, e.g., National Advertising Co. v. City & County of Denver, 912 F.2d 405 (10th Cir. 1990). For a dissenting view see Adams Outdoor Advertising of Atlanta, Inc. v. Fulton County, 738 F. Supp. 1431 (N.D. Ga. 1990) (invalidating prohibition of off-site signs because not supported by studies).

24. See Federal Land Use Law, §§ 6.04.

25. The Supreme Court first used this term in Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding ordinance that required permit and payment of fee for a parade),

26. See Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 906 (1984).

27. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding ordinance prohibiting posting of temporary political signs on public property).

28. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Despite this holding, the Supreme Court recently had difficulty determining exactly what content neutrality is in a case in which it struck down a law prohibiting picketing at abortion clinics. Hill v. State of Colorado, 120 S. Ct. 2480, 2492-95 (2000). See also Id. at 2505-06 (Scalia, J., dissenting, arguing that Ward test is not exclusive, and that a law whose purpose is unrelated to content is content-based if it singles out content for its prohibition).

29. See United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).

30. Metromedia, at 514. In addition, "[a]ny piece of property may carry or display religious symbols, commemorative plaques of historical societies and organizations, signs carrying news items or telling time or temperature, signs erected in discharge of governmental function, or temporary political campaign signs." Id.

31. Id. Included was an exemption of for sale signs, though the Court had previously held an ordinance prohibiting these signs was unconstitutional. Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977). The plurality in Metromedia also noted that signs with other commercial messages were not allowed. Justice Burger, dissenting, believed that plurality's holding on exempt signs "trivialized" the First Amendment. Metromedia, at 465.

32. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 803 (1984) (noting "general principle" that free speech clause only requires viewpoint neutrality).

33. 512 U.S. 43 (1994). See also City of Painesville Bldg. Dep't v. Dworken & Bernstein Co. L.P.A., 733 N.E.2d 1152 (Ohio 2000).

34. Id. at 59.

35. Dimitt v. City of Clearwater, 985 F.2d 1565 (11th Cir. 1993) (ordinance limiting permit exemptions to governmental flags); National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2d Cir.), cert. denied, 498 U.S. 852 (1990); National Advertising Co. v. Town of Niagra, 942 F.2d 145 (2d Cir. 1991); National Advertising Co. v. City of Orange, 861 F.2d 246 (9th Cir. 1988) (exemptions similar to those invalidated in Metromedia); Village of Schaumburg v. Jeep Eagle Sales Corp., 676 N.E.2d 200 (Ill. App. 1996) (flags). See also Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994) (striking down exemptions in state outdoor advertising law but refusing to apply Metromedia).

36. 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); Messer v. City of Douglasville, 975 F.2d 1505, 1512-13 (11th Cir. 1992) (exemptions are only from permit requirements and are more limited), cert. denied, 508 U.S. 930 (1993); 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). See also National Advertising Co. v. Town of Babylon, 900 F.2d 551, 557 (2d Cir.), cert. denied, 498 U.S. 852 (1990) (exemption of "for sale" sign).

37. See Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994), for a contrary view.

38. For a colorful example involving an attorney see Young v. City of Roseville, 78 F. Supp.2d 970 (D. Minn. 1999) (regulation of flags held content-based). Other examples are cases invalidating ordinances regulating political signs. See, e.g., Whitton v. City of Gladstone, 54 F.3d 1400 (8th Cir. 1994).

39. North Olmsted Chamber of Commerce v. City of North Olmsted,86 F. Supp. 2d 755, 766 (N.D. Ohio 2000) (discussing, e.g., directional, informational and organizational signs).

40. See Flying J Travel Plaza v. Transportation Cabinet, Dep't of Highways, 928 S.W.2d 344 (Ky. 1996) (invalidating prohibition of signs with flashing, moving or intermittent lights except time, date, temperature or weather signs with limits on cycling).

41. This is the definition suggested in Daniel R. Mandelker & William R. Ewald, Street Graphics and the Law 89 (rev. ed. 1988), hereinafter cited as Street Graphics.

42. For a discussion of facial challenges the court allowed in a free speech case that considered a sign regulation see North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755, (N.D. Ohio 2000). Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), rejected a facial challenge based on regulatory overbreadth in a sign ordinance case. See also Federal Land Use Law §§ 6.05.

However, a plaintiff must have suffered an injury the litigation can redress before it can argue it can bring a facial challenge. See Harp Advertising Ill., Inc. v. Village of Chicago Ridge, 9 F.3d 1290 (7th Cir. 1993) (plaintiff did not have standing because size limit on signs prevented display of its billboards, and plaintiff did not challenge size limit).

43. E.g., Mayor of Boston v. Treasurer & Receiver General, 429 N.E.2d 691, 695 (Mass. 1981). Severability is a matter of state law.

44. Ackerley Communications of Massachusetts, Inc. v. City of Cambridge, 135 F.3d 210 (1st Cir. 1998); Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994); National Advertising Co. v. Town of Niagra, 942 F.2d 145, 149 (2d Cir. 1991) (deleting 11 provisions would make the ordinance look like a gutted building); Revere Nat'l Corp. v. Prince George's County, 819 F. Supp. 1336 (D. Md. 1993); Metromedia, Inc. v. City of San Diego, 649 P.2d 902 (Cal. 1982) (finding ordinance nonseverable on remand from Supreme Court). But see National Advertising Co. v. City of Orange, 861 F.2d 246 (9th Cir. 1988) (allowing severability).

45. Defining billboards as a separate category of sign is not entirely useful today. In the early days of outdoor advertising, billboards were those big and ugly freestanding signs located along highways, usually advertising national products and services. They were off-site because they were not located on a site where goods and services were made available. They are still there, but quite similar freestanding pole signs can be found today on business and other sites.

46. Metromedia, Inc. v. City of Pasadena, 30 Cal. Rptr. 731 (Cal. App. 1963), appeal dismissed, 376 U.S. 186 (1964); City of Lake Wales v. Lamar Advertising Ass'n, 414 So. 2d 1030 (Fla. 1982); Donnelly Adv. Corp. v. City of Baltimore, 370 A.2d 1127 (Md. 1977); State Dep't of Roads v. Popco, Inc., 528 N.W.2d 281 (Neb. 1995) (upholding distinction between on-premise and off-premise signs required by federal Highway Beautification Act); Summey Outdoor Adv., Inc. v. County of Henderson, 386 S.E.2d 439 (N.C. App. 1989); Landau Adv. Co. v. Zoning Bd. of Adjustment, 128 A.2d 559 (Pa. 1957). Contra, Metromedia, Inc. v. City of Des Plaines, 326 N.E.2d 59 (Ill. App. 1975).

47. Metromedia, at 503-12. A majority of the court affirmed this holding in Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 810-12 (1984).

48. Id. at 512.

49. This assumption is confirmed by the California Supreme Court's decision to revise the definition of off-premise signs in the ordinance to include only signs with commercial messages. Id. at 494 nn. 1, 2. The city had contended, however, that the ordinance prohibited off-premise noncommercial signs. Id. at 494, n.2.

50. Id. at 512-14.

51. Id. at 513.

52. Wheeler v. Commissioner of Hwys., 822 F.2d 586 (6th Cir. 1987) (ordinance allowed signs relating to any "activity" on premises), cert. denied, 484 U.S. 1007

(1978); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986), cert. denied, 479 U.S. 1102 (1987); City & County of San Francisco v. Eller Outdoor Advertising, 237 Cal. Rptr. 815 (1987) (also upheld exemptions in ordinance); Gannett Outdoor Co. v. City of Troy, 409 N.W.2d 719 (Mich. App. 1987). It is helpful to include a provision in a sign ordinance allowing the display of noncommercial messages on any sign authorized by the ordinance.

An argument is possible that an ordinance is content-based if it defines on-premise signs as signs displaying commercial and noncommercial messages or any combination of these messages. But see National Advertising Co. v. City & County of Denver, 912 F.2d 405, 410 (10th Cir. 1990) (holding that Supreme Court has provided "ample guidance" on the common-sense distinction between commercial and noncommercial speech). Accord, Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269, 1272 (4th Cir. 1986) (and holding that codification of these terms is unnecessary).

53. Allowing off-premise signs with noncommercial messages may be neither desirable for aesthetic reasons nor practicable. Preventing sign companies from replacing noncommercial with commercial messages can be difficult.

54. "We have 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." Hill, at 2492 (upholding statute prohibiting picketing with signs near health facility).

55. Burke v. City of Charleston, 893 F. Supp. 589 (D.S.C. 1995 (sign in historic district). See also National Advertising Co. v. City & County of Denver, 912 F.2d 405, 410 (10th Cir. 1990) (upholding ordinance with definition of off-premise sign similar to that quoted in text because Supreme Court has provided "ample guidance" on the common-sense distinction between commercial and noncommercial speech).

56. 975 F.2d 1505 (11th Cir. 1992), cert. denied, 508 U.S. 390 (1993). Accord, Wheeler v. Commissioner of Highways, 822 F.2d 586, 591 (6th Cir. 1987) (off-premises vs. on-premises distinction is not an impermissible regulation of content

just because whether a sign is permitted at a given location is a function of the sign's message).

57. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993) (regulation of newsracks). See also Whitton v. City of Gladstone, 54 F.3d 1400, 1403 (8th Cir. 1995) (quoting Discovery Network in holding regulation of political signs invalid); Burkhart Advertising, Inc. v. City of Auburn, 786 F. Supp. 721 (N.D. Ind. 1991) (holding contrary to Messer). See also Ackerley Communications, Inc. v. City of Cambridge, 88 F.3d 33, 37 n.7 (1st Cir. 1996) (stating that in "commonsense terms" the distinction between off-premise and on-premise signs is "surely" content-based because "determining whether a sign must stay up or come down requires consideration of the message it carries"); National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 738 (1st Cir.) (explaining Discovery Network), cert. denied, 515 U.S. 1103 (1995).

58. The California court had narrowed the definition of off-premise sign to apply only to commercial signs to avoid constitutional problems. Metromedia, at 494 n.2. See also id. at 521 nn. 25, 26.

59. 861 F.2d 246 (9th Cir. 1988).

60. Id. at 148.

61. Jackson v. City Council of Charlottesville, 659 F. Supp. 470 (W.D. Va. 1987), aff'd in part & rev'd in part without opinion, 840 F.2d 10 (4th Cir. 1988). See also Rzadkowolski v. Village of Lake Orion, 845 F.2d 653 (6th Cir. 1988) (commercial and noncommercial speech allowed on billboards in industrial districts).

62. Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999) (and rejecting argument that exemption of off-site signs with noncommercial messages was underinclusive); National Advertising Co. v. City & County of Denver, 912 F.2d 405 (10th Cir. 1990); R.O. Givens, Inc. v. Town of Nags Head, 294 S.E.2d 388 (N.C. App. 1982).

63. Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992) (historic district), cert. denied, 508 U.S. 1103 (1993); Major Media, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986) (off-premise signs confined to industrial areas, but all permitted signs could carry noncommercial messages). See also Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988) (prohibiting all off-premise commercial advertising signs except along highways).

64. See Georgia Outdoor Advertising, Inc. v. City of Waynesville, 833 F.2d 43 (4th Cir.) (though plaintiff had argued only that a prohibition on off-site commercial speech was invalid). See also Revere Nat'l Corp, Inc. v. Prince George's County, 1997 U.S. App. Lexis 17337 (4th Cir. 1997) (unpublished; most off-site signs banned).

65. Southlake Property Associates, Ltd. v. City of Morrow, 112 F.3d 1114 (11th Cir. 1997), cert. denied, 525 U.S. 820 (1998). This holding means an ordinance that prohibits off-premise signs will only prohibit commercial speech.

66. 507 U.S. 410 (1993). For discussion see Leading Cases: I. Constitutional Law, 107 Harv. L. Rev. 144, 225-35 (1993).

67. This requirement comes from Board of Trustees v. Fox, 402 U.S. 469, 480-81 (1989).

68. Id. at 417. The court also referenced the lower court decisions, which had held that the benefit of removing the 52 newsracks of the plaintiffs was "minute" and "paltry" while 1,500 to 2,000 newsracks remained in place. Id. at 41-18.

69. Id. at 428.

70. Id. at 425, n20.

71. Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999). See also Suburban Lodge of America v. City of Columbus Graphics Comm'n, 2000 Ohio App. LEXIS 4701, at *12 (decided Oct. 12, 2000, appeal pending) (disregarding Discovery Network and upholding ordinance restrictions on on-premise signs).

72. See Ackerley Communications of Massachusetts, Inc. v. City of Somerville, 878 F.2d 513, 513 n.1 (1st Cir. 1989) (noting that the off-site vs. on-site distinction does not distinguish between signs attached to buildings and freestanding signs).

73. See text accompanying notes 24-26, supra.

74. The definition should describe the physical elements of a sign, not its content. The following definition is one example:

A lettered, numbered, symbolic, pictorial, or illuminated visual display designed to identify, announce, direct, or inform that is visible from the public right-of-way.

Street Graphics at 91. The definition is broad enough to include both commercial and noncommercial speech, so the ordinance must be careful not to distinguish improperly between them.

75. One option is simply to place a size limit on all signs, such as 200 square feet. This size limit would effectively prohibit billboards on highways, which are much larger. A billboard company denied a sign permit because of this provision would have to attack the size limitation as a violation of free speech, which is not likely to be successful. See Land Use Law §§ 11.17.

76. Signs in residential areas present special problems. See City of Ladue v. Gilleo, 512 U.S. 43 (1994), discussed at note 30, supra.

77. See the ideas contained in the model ordinance in Street Graphics, ch. 7.

78. Readers who are interested in doppelgangers may wish to consult Edgar Alan Poe's short story, William Wilson. See also Amy Mandelker, The Haunted Poet: Essinin's "Man in Black" and Musset's "La Nuit de Decembre" in The Supernatural in Slavic and Baltic Literature 226- 245 (Amy Mandelker & Roberta Reeder eds., 1989).