

Sign Ordinances:

A Primer on

Constitutional Limitations

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“Differing rules promote many signs of confusion.”¹

This front-page headline in the *St. Petersburg Times* clearly and concisely sums up the constitutional problem faced by local governments that enter the often politically popular but legally difficult area of regulating signage. Nevertheless, despite the treacherous First Amendment terrain mapped out by court decisions across the country, including several decisions from the U.S. Supreme Court, localities are attempting to navigate the constitutional hills and valleys by regulating signage with increasing frequency and strictness.

From Anchorage, Alaska,² to Myrtle Beach, South Carolina,³ local governments are proposing and enacting sign ordinances that set forth the rules for posting and maintaining signs and billboards in their communities. Sometimes these sign ordinances pass without fanfare, but increasingly they are met with fierce opposition by political candidates who need to use yard signs in their campaigns, business interests that want to protect outdoor advertising options, and free speech advocates who are aware of the constitutional rights at stake. Furthermore, the battle is not ending in the legislative arena; sign ordinances face legal challenges after enactment on a consistent basis. A simple electronic search using the keywords “sign ordinance” in the Lexis-Nexis™ news database turns up hundreds of articles published this year alone that detail political and legal challenges to sign restrictions all over the country. Sign regulation is no longer an issue solely considered by major metropolitan governments; it is an agenda item at even the smallest town meetings.

Local governments are often completely unaware of the constitutional ramifications of regulating signs and billboards, apparently believing that, like residential and commercial buildings, signs are subject to zoning and land use restrictions without limitation. But, as explained by the U.S. Supreme Court, signs and billboards possess both “communicative and noncommunicative aspects” and, as a consequence, while “the government has legitimate interests in controlling the noncommunicative aspects of the medium, . . . the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects.”⁴ Thus, “[b]ecause regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, it has been necessary for the courts to reconcile the government’s regulatory interests with the individual’s right to expression.”⁵

To be sure, “[w]hile signs are a form of communication protected by the Free Speech Clause [of the First Amendment], they pose distinctive problems that are subject to municipalities’ police powers.”⁶ The U.S. Supreme Court has noted that, “[u]nlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.”⁷ For these reasons, “governments may regulate the physical characteristics of signs — just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.”⁸ Nevertheless, “because regulation of a medium inevitably affects communication itself,” the Constitution places significant limits on how and to what extent local governments can restrict or regulate signage.⁹

Four Categorical Distinctions

The constitutionality of a sign ordinance depends upon what signs and billboards the restriction prohibits and how it prohibits them. The courts have articulated four criteria that, when mixed

and matched, serve as a blueprint to determine whether a sign and billboard restriction violates the First and Fourteenth Amendments: (1) whether the prohibited signs are posted on *public or private property*; (2) whether the prohibited signs display *commercial or noncommercial messages*; (3) whether the prohibited signs convey *information related to premises where the sign is located (an on-site sign) or not (an off-site sign)*; and (4) whether the prohibition restricts *particular content (a content-based restriction) or not (a content-neutral restriction)*. No single criterion is dispositive of whether a particular sign ordinance passes constitutional muster. Instead, when the four criteria are examined in combination, prior court decisions dealing with similar ordinances expose whether the current restriction is constitutionally permissible.

**The Two Easy Cases:
Localities *May* Ban All Signs on Public Property,
But *May Not* Ban All Signs on Private Property**

The U.S. Supreme Court has made two things clear concerning the issue of sign and billboard regulation. First, a local government *may* constitutionally prohibit all signs from being posted on public property.¹⁰ Second, a community *may not* prohibit all signs from being posted on private property without running afoul of the First Amendment.¹¹

In *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, the U.S. Supreme Court upheld a section of the Los Angeles Municipal Code that “prohibit[ed] the posting of signs on public property.”¹² Roland Vincent was a candidate running for city council, and his supporters posted campaign signs bearing his name on utility poles around the city. City workers removed the signs as violating the sign prohibition for public property, and the Vincent campaign sued to enjoin the city from removing the signs. Specifically, the Taxpayers for Vincent claimed that removal of campaign signs, even from public property, violated the First Amendment. The High Court disagreed.

Noting that the Los Angeles ordinance banned the posting of *all* signs on public property and was, therefore, content-neutral,¹³ the Court upheld the ordinance as a valid time, place, or manner restriction on speech. Under that test, the Court examined whether the regulation “further[ed] an important or substantial governmental interest; . . . the governmental interest [was] unrelated to the suppression of free expression; and . . . the incidental restriction on alleged First Amendment freedoms [was] no greater than [was] essential to the furtherance of that interest.”¹⁴

The Court held that Los Angeles’ aesthetic interest in banning the posting of signs on public property was substantial because “the visual assault on the [city’s] citizens . . . presented by an accumulation of signs posted on public property . . . constitute[d] a significant substantive evil within the [c]ity’s power to prohibit.”¹⁵ Moreover, the Court found that “[b]y banning . . . signs [posted on public property], the [c]ity did no more than eliminate the exact source of the evil [of visual clutter and blight] it sought to remedy.”¹⁶ As a result, the Los Angeles ordinance was constitutionally permissible because it “curtail[ed] no more speech than . . . necessary to accomplish its purpose.”¹⁷

The Court also took note of the difference between prohibiting the posting of signs on public versus private property. “[T]he validity of the [city’s] [a]esthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property. The private citizen’s interest in controlling the use of his own property justifies the disparate treatment.”¹⁸ Moreover, the Court explained that the preservation of allowing signs on private property served an important constitutional purpose in leaving open ample alternative channels of communication, another constitutional requirement. “[B]y not extending the ban to all locations, a significant opportunity to communicate by means of temporary signs is preserved, and private property owners’ [a]esthetic concerns will keep the posting of signs on their property within reasonable bounds.”¹⁹

The Court was able to fully consider whether prohibiting all signs posted on private property violated the First Amendment in *City of Ladue v. Gilleo*. And, as foreshadowed in *Taxpayers for Vincent*, the Court struck down the ordinance, which “prohibit[ed] homeowners from displaying any signs on their property except ‘residence identification’ signs, ‘for sale’ signs, and signs warning of safety hazards,”²⁰ as an unconstitutional violation of the property owner’s free speech right. According to the Court, a total ban on signs posted on private property “simply prohibit[ed] too much protected speech.”²¹

Margaret P. Gilleo was a homeowner in Ladue, Missouri, who placed a sign in her yard urging those who saw it to “Say No to War in the Persian Gulf, Call Congress Now.” Her sign soon disappeared, and a second sign was knocked down. Gilleo contacted the police, who “advised her that such signs were prohibited in Ladue.”²² She then petitioned the city council to allow her sign, but was denied, so she filed suit alleging the prohibition violated her First Amendment rights. Gilleo won in each court, including the U.S. Supreme Court — communities could not prohibit private homeowners from posting signs on their property.

The Supreme Court explained that restricting signage on private property raised different concerns than the public property at issue in *Taxpayers for Vincent*. “Whereas the government’s need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, its need to regulate . . . speech from the home is surely much less pressing.”²³ Moreover, the Court explained that if local governments could constitutionally ban signage on private property, then sign prohibitions on both public and private property would not “‘leave open ample alternative channels of communication’”²⁴ as required by the First Amendment. According to the Court, allowing communities to ban the posting of all signs on private property posed the danger of “eliminating a common means of speaking”²⁵ through signs. Accordingly, such

restrictions were unconstitutional because they “suppress[ed] too much speech.”²⁶

The Hard Cases: Prohibiting Fewer Than All Signs

After *Taxpayers for Vincent*, it is clear that local governments *can* prohibit the posting of *all* signs on public property without violating the Constitution. Likewise, after *City of Ladue*, communities *cannot* prohibit the posting of *all* signs on private property without offending the First Amendment. But moving away from these extremes, can a local government prohibit only some signs on public property or private property? And if so, when? These are the questions that are of most interest and trouble for local governments and their constituents.

1. Commercial vs. Noncommercial Speech

Perhaps the most oft-cited reason for prohibiting signage is aesthetics, or the advancement of community beauty. And for those who wish to promote aesthetics by restricting signage, there is one notable target — the billboard. Billboards are large, lit up, and located so they are seen from as many different vantage points as possible. For these reasons, community beautification advocates argue that billboards block views and sight lines, distract the attention of motorists and passersby, and detract from the beauty of the community. These aesthetics watchdogs want to restrict the posting of billboards, if not ban them altogether, and many local governments are going along, often without inquiring whether such restrictions are constitutionally permissible.

According to the U.S. Supreme Court, communities can constitutionally prohibit billboards, while not restricting other signage, as long as they observe two rules: (1) commercial speech cannot be favored over noncommercial speech;²⁷ and (2) some

noncommercial speech cannot be favored over other noncommercial speech. Thus, if a community allows any billboards at all, it must allow billboards displaying any and all noncommercial messages.

These rules are derived from *Metromedia, Inc. v. City of San Diego*, a case in which the U.S. Supreme Court struck down as unconstitutional San Diego's ordinance prohibiting all billboards and commercial signs except those that related to products produced or sold or activities conducted on the premises (on-site signs). The Court noted that "[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."²⁸ For this reason, "[i]nsofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages" ²⁹ Additionally, if "some noncommercial messages may be conveyed on billboards . . . [then the city] must similarly allow billboards conveying other noncommercial messages" ³⁰

2. *On-Site vs. Off-Site Speech*

Another consequence of the lower constitutional scrutiny courts give to commercial speech is that local governments may choose to regulate signs displaying different commercial messages differently. Specifically, courts, including the U.S. Supreme Court, have found that sign ordinances may constitutionally prohibit or restrict off-site commercial signs while allowing on-site commercial signs.

In *Metromedia*, the U.S. Supreme Court explained that a "city could reasonably conclude that a commercial enterprise — as well as the interested public — has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the

purpose of advertising commercial enterprises located elsewhere.”³¹ Moreover, since commercial speech tends to receive lesser constitutional protection under the First Amendment, courts have allowed local governments to regulate commercial signs based on such a conclusion.

In the words of the Court, “[i]t does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising.”³² Instead, as long as “the prohibition of off[-]site advertising is directly related to [and advances the city’s] stated objectives of traffic safety and [a]esthetics,”³³ a city may constitutionally prohibit off-site commercial signs while allowing on-site commercial signs.

3. *Content-Based vs. Content-Neutral Restrictions*

As seen in the *Metromedia* decision, courts, including the U.S. Supreme Court, have constitutionally allowed local governments to make the content-based distinction between on-site and off-site in restricting commercial signs. However, beyond this distinction, sign ordinances that prohibit or regulate signs based on their content are subject to the highest constitutional scrutiny under the First Amendment and are presumptively invalid.

Local governments often make one of two mistakes in enacting content-based sign ordinances. These mistakes render the resulting content-based sign ordinance subject to the highest constitutional scrutiny and often are constitutionally fatal. First, many sign ordinances define the different categories of signs to be regulated based on the subject matter or message conveyed. For instance, in *North Olmstead Chamber of Commerce v. City of North Olmstead*, the city’s sign ordinance defined the various sign categories by reference to their content, *e.g.*, “Bulletin Board,” “Directional Sign,” “Identification Sign,” “Informational Sign,” “Organizational Sign,” “Nameplate,” “Project Sign,” “Real Estate Sign,” “Murals,”

“Political Signs,” etc.³⁴ Of course, while such definitions are easy to understand, they also raise the particular concern the Constitution tries to avoid in disfavoring content-based speech distinctions — namely, that the government will attempt to restrict certain speech based on its disfavored subject or viewpoint. As such, sign ordinances that categorize the signs subject to regulation by the messages conveyed are content-based and almost always violate the First Amendment.

Special restrictions on political or campaign signs are a second content-based distinction often found in sign ordinances. Given the fact that political speech lies at the core of the First Amendment, any such special regulations that single out political or campaign signs are extremely problematic and presumptively unconstitutional.

On the other hand, ordinances that prohibit or regulate signs without regard to the messages or information displayed face lesser scrutiny and are generally upheld. Thus, limitations on size, number, construction, placement, setback from rights of way, and illumination are usually upheld, as long as they are reasonable, rational, and do not eviscerate the effectiveness of signs as a medium of communication.

Three More Considerations: Permitting, Prior Restraints, and Fees

Many sign ordinances include licensing and permitting provisions. While such hurdles may be constitutionally applied in many instances to many types of signs, such provisions raise the specter that the government is requiring citizens to identify themselves or receive permission before speaking.

Particularly with regard to political, ideological, and religious speech, permitting and licensing requirements for any speech, including the posting of signs, are in conflict with the First

Amendment rights for association and anonymous speech. For instance, the U.S. Supreme Court struck down a permitting law for door-to-door canvassing that required the disclosure of a person's name and contact information in *Watchtower Bible & Tract Society v. Village of Stratton*. The Court noted that “[i]t is offensive — not only to the values protected by the First Amendment, but to the very notion of a free society — that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.”³⁵ In invalidating the permit requirement, the Court explained that “[e]ven if the issuance of permits by the mayor’s office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in . . . speech constitutes a dramatic departure from our national heritage and constitutional tradition.”³⁶

Permitting and licensing requirements are also problematic as constituting possible prior restraints of protected speech. Under the U.S. Supreme Court’s decision in *FW/PBS, Inc. v. City of Dallas*, First Amendment protection against prior restraints extends to municipal licensing programs.³⁷ As a result, any permitting or licensing scheme for signage must not violate two fundamental constitutional principles: first, the sign ordinance must not “place[] ‘unbridled discretion in the hands of a government official or agency’”³⁸ in determining whether to permit a sign; and, second, the sign ordinance must “place limits on the time within which the decisionmaker must issue the license [or permit].”³⁹ Additionally, given the First Amendment concern that any permitting or licensing scheme may operate as a prior restraint on protected signage, sign ordinances that provide for permitting or licensing should include two safeguards: (1) “the licensor must make the decision whether to issue the license within a specified and reasonable time during which the status quo is maintained, and [(2)] there must be the possibility of prompt judicial review in the event that the license is erroneously denied.”⁴⁰ There is no reason the result should be any different if the message is conveyed on a sign versus orally in person.

Finally, permitting and licensing requirements are constitutionally suspect if they impose fees on the posting of signs or billboards. The First Amendment has long frowned upon the government requiring a person pay a fee to exercise his or her free speech rights. Such a rule should be of constitutional concern when local governments impose fees as part of their licensing and permitting regimes for signs and billboards. The constitutionality of taxing signage fees is particularly worrisome with regard to political, ideological, and religious signs because such fees may enable the government to drive disfavored or ill-funded subjects and viewpoints from the marketplace.

**A Word of Caution:
Governmental Liability for Unconstitutionally Restricting
Signage**

Although local governments should not need special incentive to avoid unconstitutionally restricting the rights and freedoms of their constituents, the Constitution does not provide guarantees without remedies. As a result, localities that enact and enforce unconstitutional restrictions on signage may be subject to legal liability in the form of both injunctive relief and damages. Specifically, “if any legislative body, whether the United States Congress, or a state legislature, or a city council, attempts to enact a law that violates the constitutional rights of [a] citizen, that [law] is null and void. An individual who is affected by an unconstitutional [law] may ignore it. [And] [o]ne who seeks to enforce an unconstitutional law may not rely upon it in defense.”⁴¹

As demonstrated by numerous news accounts and court cases, sign ordinances are drawing constitutional fire in our nation’s state and federal courts. These lawsuits challenge the constitutionality of signage restrictions on their face and as applied to specific signs. Moreover, these lawsuits can hit governments where it really hurts — in the pocketbook. While constitutional lawsuits often seek to strike down a law or enjoin its enforcement, they can also seek

money damages and attorney's fees. Furthermore, even if damages are not sought, the cost of defending a sign ordinance against constitutional challenge is high.

Municipalities and local governments are in an especially vulnerable position when it comes to lawsuits because, “[f]or local legislation, the vestiges of sovereign immunity for unconstitutional legislative acts are completely gone.”⁴² Thus, “[t]he municipality itself can be held directly liable for a legislative (or policy-making) act of its own that violates federal constitutional rights.”⁴³ Under such reasoning, a locality that enacts and enforces an unconstitutional signage restriction may not only need to change its sign ordinance but also pay damages for its past practices.

Conclusion

The time has long since passed when local governments and their citizens did not have to worry about sign and billboard regulation. Given the reality that there is or will be a sign ordinance in nearly every community, the question has now turned to what signs will be restricted and how. There can be no question that the Constitution places significant and numerous limitations on what signs a locality may prohibit, where it may prohibit them, and how. Local governments must now carefully consider the constitutional ramifications of restricting signs and billboards in order to avoid the unnecessary consequences of enacting and enforcing poorly conceived signage restrictions. In the end, if the Constitution is considered first, everyone wins. Localities get sound legislation and avoid lawsuits and damages, and their constituents retain the full breadth of their constitutional rights.

¹ See James Thorner, *Differing rules promote many signs of confusion*, ST. PETERSBURG TIMES, Sept. 20, 2002, at 1.

² See Sean Cockerham, *City's forest of signs faces pruning under experts' plan*, ANCHORAGE DAILY NEWS, Sept. 20, 2002, at A1.

³ See Sarah Kershaw, *For Blue-Collar Riviera, A Conflict Over Identity*, N.Y. TIMES, Sept. 7, 2002, at A12; David Klepper, *Sign law changes proposed*, MYRTLE BEACH SUN-NEWS, May 7, 2002, at D1.

⁴ *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981) (citation omitted).

⁵ *Id.*

⁶ *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994).

⁷ *Id.*

⁸ *Id.* (citations omitted).

⁹ *Id.*

¹⁰ See *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

¹¹ See *City of Ladue*, 512 U.S. 43.

¹² *Taxpayers for Vincent*, 466 U.S. at 791.

¹³ The Court explained “[t]he text of the [Los Angeles sign] ordinance [wa]s neutral — indeed it [wa]s silent — concerning any speaker’s point of view, and the District Court’s findings indicate[d] that it [wa]s applied to [the Taxpayers for Vincent] and others in an evenhanded manner.” *Id.* at 804. However, viewpoint neutrality alone is not enough to guarantee content neutrality. Instead, to be content-neutral, a statute must not single out any particular subject matter or viewpoint for regulation.

¹⁴ *Id.* at 805 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

¹⁵ *Id.* at 807.

¹⁶ *Id.* at 808.

¹⁷ *Id.* at 810.

¹⁸ *Id.* at 811.

¹⁹ *Id.*

²⁰ *City of Ladue*, 512 U.S. at 45.

²¹ *Id.* at 51.

²² *Id.* at 45.

²³ *Id.* at 58 (citations omitted).

²⁴ *Id.* at 56 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

²⁵ *Id.* at 55.

²⁶ *Id.*

²⁷ The distinction between commercial and noncommercial speech itself raises constitutional concerns and has been subject to much legal debate. See D. Eric Schippers, *Free Speech in a Commercial World: The Nike Paradox* (Center for Individual Freedom 2002) (last modified Sept. 26, 2002) <http://www.cff.org/htdocs/legal_issues/legal_activities/policy_papers/free_speech_commercial.html>.

²⁸ *Metromedia, Inc.*, 453 U.S. at 514 (citations omitted).

²⁹ *Id.* at 513.

³⁰ *Id.* at 515.

³¹ *Id.* at 512 (citation omitted).

³² *Id.*

³³ *Id.* at 511.

³⁴ *North Olmsted Chamber of Commerce v. City of North Olmsted*, 86 F. Supp. 2d 755, 765-66 (N.D. Ohio 2000).

³⁵ *Watchtower Bible & Tract Society v. Village of Stratton*, 122 S. Ct. 2080, 2089 (2002).

³⁶ *Id.*

³⁷ *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227-30 (1990).

³⁸ *Id.* at 225 (citations omitted).

³⁹ *Id.* at 226 (citations omitted).

⁴⁰ *Id.* at 228 (citations omitted).

⁴¹ Fred L. Morrison, *The Liability of Governments for Legislative Acts in the United States of America*, 46 AM. J. COMP. L. 531, 531 (1998) (footnote omitted).

⁴² *Id.* at 541.

⁴³ *Id.*

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