Presented:
2009 Land Use Conference

March 25 – 27, 2009
Austin, Texas

Regulating Signs Without Reading Them

Richard L. Rothfelder

Richard L. Rothfelder
Jana L. Dundas
Rothfelder & Falick, L.L.P.
1201 Louisiana, Suite 501
Houston, Texas 77002

rrothfelder@swbell.net
jdundas@swbell.net
(713) 220-2288
(713) 658-8211 (facsimile)
www.rothfelderfalick.com

ROTHFELDER & FALICK, L.L.P.

ATTORNEYS AT LAW

RICHARD L. ROTHFELDER
rrothfelder@swbell.net
BOARD CERTIFIED - CIVIL TRIAL LAW

1201 LOUISIANA
SUITE 550
HOUSTON, TEXAS 77002

TELEPHONE: 713-220-2288
FACSIMILE: 713-658-8211
WWW.ROTHFELDERFALICK.COM

REGULATING SIGNS WITHOUT READING THEM

March 2009

INTRODUCTION

The First Amendment offers broad protection for the freedom of speech: "**Congress shall make no law** respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[1]

While the right to freedom of speech generally allows individuals to express themselves without interference or constraint by the government, the Supreme Court has recognized the government may prohibit some speech, such as that which causes a breach of the peace or violence. Various exceptions to free speech have also included obscenity, defamation, breach of the peace, incitement to crime, "fighting words", and sedition.

The right to free speech includes many mediums of expression that communicate a message. Indeed, the word "speech" in the First Amendment has been extended to a generous sense of "expression", including verbal, non-verbal, visual, and symbolic expression.

The right to free speech extends to signage, and is generally violated when the government regulates messages displayed on signs based on the content of the message, instead of reasonably restricting the time, place, and manner of such speech. In other words, signs should be regulated without reading them.

[1] The Texas Constitution also protects speech under Article 1, Section 8, which states: "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press..."

U.S. Supreme Court and Federal Lower Court Cases

Central Hudson: The Four-Part Test

In 1978, the U.S. Supreme Court refused to consider the possibility that billboard regulation raised constitutional issues related to the First Amendment, when it summarily dismissed a case for lack of a substantial federal question.[2] Two years later, it handed down the opinion in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*[3] In *Central Hudson*, the Public Service Commission of New York issued an order banning electric utilities in New York State from using all advertising that promoted the use of electricity. The 1973 regulation was based on the Commission's finding that the interconnected utility system in New York State did not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-74 winter. Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corp. opposed the ban on First Amendment grounds. After reviewing public comments, the Commission extended the prohibition in a Policy Statement which divided advertising into two broad categories: promotional (advertising intended to stimulate the purchase of utility services), and institutional and informational (a broad category inclusive of all advertising not clearly intended to promote sales). The latter category of advertising was allowed, while the former was not, because the Commission declared promotional advertising contrary to the national policy of conserving energy.

The state trial court upheld the Commission's order, and the New York Court of Appeals affirmed. The U.S. Supreme Court reversed, holding the government is not free to restrict commercial speech at will, and adopted a four-part test: (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.[4]

Metromedia: Aesthetics and Traffic Safety are Substantial Government Interests; On-Premise v. Off-Premise Commercial Advertising Distinctions are not Unconstitutional

One year after *Central Hudson*, the *Metromedia* case was decided.[5] More than a quarter century after *Metromedia,* it appears the case, although still valid law, is under heavy attack.

In *Metromedia, Inc. v. City of San Diego,* the city of San Diego enacted an ordinance which imposed substantial prohibitions on the erection of outdoor advertising displays within the city. The stated purpose of the ordinance was "to eliminate hazards to

---

[2] *Suffolk Outdoor Adver. Co. v. Hulse,* 439 U.S. 808 (1978).
[3] 447 U.S. 557 (1980)
[4] *Central Hudson,* 447 U.S. at 566.
[5] *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 101 S.Ct. 2882 (1981).

pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City". The ordinance permitted on-premise commercial advertising, but did not allow other commercial advertising and non-commercial advertising using fixed-structure signs[6], unless permitted by one of the ordinance's 12 specified exceptions. The exceptions included government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and temporary political campaign signs.

A group of outdoor advertising companies, each of whom owned approximately 500 to 800 off-premise signs within the city, filed suit in a California state court to enjoin enforcement of the ordinance. After extensive discovery, the parties filed a stipulation of facts which included a statement that if enforced as written, the ordinance would eliminate the outdoor advertising business in San Diego altogether, and that outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public, as well as communicates valuable commercial, political and social information. Additionally, the parties stipulated that many businesses and politicians rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate, or prohibitively expensive.

Both sides filed motions for summary judgment, and the trial court held that the ordinance was an unconstitutional exercise of the city's police power and an abridgment of the sign owners' First Amendment rights. The California Court of Appeals affirmed on the first ground alone and did not reach the First Amendment argument. The California Supreme Court reversed, and held that the two purposes of the ordinance were within the city's legitimate interests and that the ordinance was "a proper application of municipal authority over zoning and land use for the purpose of promoting the public safety and welfare."[7] The court rejected the sign owners' argument that the ordinance was facially invalid under the First Amendment, and relied on certain summary actions of the U.S. Supreme Court, dismissing for lack of a substantial federal question appeals from several state court decisions sustaining government restrictions on outdoor sign

---

[6] San Diego Ordinance No. 10795 (New Series), enacted March 14, 1972. The general prohibition of the ordinance read as follows:

B. OFF-PREMISE OUTDOOR ADVERTISING DISPLAY SIGNS PROHIBITED

Only those outdoor advertising display signs, hereinafter referred to as signs in this Division, which are either 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 shall be permitted. The following signs shall be prohibited:

1. Any sign identifying a use, facility or service which is not located on the premises.
2. Any sign identifying a product which is not produced, sold, or manufactured on the premises.
3. Any sign which advertises or otherwise directs attention to a product, service or activity, event, person, institution or business which may or may not be identified by a brand name and which occurs or is generally conducted, sold, manufactured, produced or offered elsewhere than on the premise where such sign is located.

[7] 26 Cal.3d, at 858, 164 Cal.Rptr., at 514, 610 P.2d, at 411.

displays.[8] The sign owners then sought review by the U.S. Supreme Court, arguing that the ordinance was facially invalid on First Amendment grounds and that the city's threatened destruction of the outdoor advertising business was prohibited by the Due Process Clause of the Fourteenth Amendment.

The justices failed to agree on even the most fundamental aspects of the case, including the framing of the issue, the standard of review, and the impact of the ordinance, and consequently, the U.S. Supreme Court was unable to reach a majority decision. Instead, a plurality opinion was written by Justice White, with Justices Stewart, Marshall, and Powell joining. The plurality opinion struck down the sign ordinance as unconstitutional. A concurring opinion was written by Justice Brennan, with Justice Blackmun joining, which did the same, but on radically different grounds. As a result, three separate dissents were written by Justice Stevens, Chief Justice Burger, and Justice Rehnquist. In the end, *Metromedia* produced a splintered opinion which offered only limited definitive principles to guide lower courts and cities regarding restrictions on non-commercial speech.

The plurality opinion held that the San Diego ordinance was unconstitutional under the First Amendment of the U.S. Constitution, but did not find that the distinction between on-premise and off-premise commercial advertising violated First Amendment rights. Instead, the plurality found the constitutional violation was due to the distinction regarding non-commercial speech. Stating that each method of communicating ideas is "a law unto itself" and that law must reflect the "differing natures, values, abuses and dangers" of each method, the Court stated it was dealing in *Metromedia* with "the law of billboards."[9] No doubt to avoid the perception that billboards were being treated differently under the law simply because they are billboards, the plurality wrote "because it is designed to stand out and apart from its surroundings, the billboard creates a unique set of problems for land-use planning and development."[10] [11]

---

[8] *See Suffolk Outdoor Advertising Co. v. Hulse,* 439 U.S. 808, 99 S.Ct. 66, 58 L.Ed.2d 101 (1978); *Newman Signs, Inc. v. Hjelle,* 440 U. S. 901, 99 S.Ct. 1205, 59 L.Ed.2d 449 (1979); *Lotze v. Washington,* 444 U.S. 921, 100 S.Ct. 257, 62 L.Ed.2d 177 (1979).

[9] *Metromedia,* 453 U.S. at 501. The comment by the plurality that this case dealt with "the law of billboards" is significant. Almost all sign codes differentiate between on premise and off premise signs, defining the two differently. For example, the regulations applicable to outdoor signs on rural roads in Texas define off-premise sign as "a sign displaying advertising copy that pertains to a business, person, organization, activity, event, place, service, or product not principally located or primarily manufactured or sold on the premises on which the sign is located", while on-premise sign is defined as "a freestanding sign identifying or advertising a business, person, or activity, and installed and maintained on the same premises as the business, person, or activity." 43 Tex. Admin. Code § 21.411.

[10] *Id.* at 502.

[11] Courts have historically distinguished between off-premise signs commonly referred to as "billboards" and on-premise signs, accepting comprehensive billboard bans which carve out an exception for on-premise signs under the theory that off-premise advertising is merely a nuisance while on-premise signs are necessary for commerce. This line of thinking dates back to at least 1964, when the Supreme Court of New Jersey stated in *United Advertising Corp. v. Metuchen,* 198 A.2d 447, 42 N.J. 1, "(t)here are obvious differences between an on-premise sign and an off-premise sign. Even if the baleful effect of both be in fact the same, still in one case the sign may be found tolerable because of its contribution to the business or enterprise on the premises. The hurt is thus supported by a need or gain not present in the case of the off-premise sign. This difference, it seems to us, suffices to support the classification." This distinction has

The plurality in *Metromedia* also analyzed commercial speech and non-commercial speech separately. Regarding commercial speech, the decision agreed with the holding one year earlier in the *Central Hudson* case, namely, that commercial speech deserved some First Amendment protection, but the purposes offered for sign regulation, traffic safety and aesthetics, were substantial governmental interests. Justice White stated his hesitation to disagree with the accumulated common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety, and went on to conclude that there was nothing improper about a legislative judgment that billboards are aesthetically harmful. Concluding the first two prongs of the *Central Hudson* test were satisfied, the Court turned to the third prong: whether the regulation directly advanced the interests of traffic safety and aesthetics. The plurality concluded the on-premise/off-premise distinction was sufficiently tailored by stating that the changing content of off-premise advertising presented more acute problems than on-premise advertising, and by placing a higher value on the identification of a business and its products or services as opposed to an advertisement for a commercial enterprise located elsewhere.

With regard to non-commercial speech, the plurality stated that a municipality may not constitutionally distinguish between the non-commercial messages that were permitted under the 12 exceptions to the prohibition in the ordinance, and other types of non-commercial messages, without a compelling state interest in doing so. Such a distinction would be content based, which is subject to a higher level of constitutional scrutiny. The plurality did not hold that the ordinance had incorrectly allowed on-premise commercial messages over non-commercial messages, but instead held that the city's substantial interests of traffic safety and aesthetics were not directly advanced by banning non-commercial messages if on-premise commercial messages were permitted there. The *Metromedia* plurality opinion has been interpreted as holding that all non-commercial messages must be allowed in every place where even one non-commercial message is permitted.[12]

In the concurring opinion, Justices Brennan and Blackman criticized the plurality's analysis as failing to understand the regulation of signage as a regulation of speech, which should be viewed without extraordinary deference to local regulatory desires and customs. Believing the issue of signage as medium to be paramount, the

---

been upheld in other cases. *See Newman Signs, Inc. v. Hjelle,* 268 N.W.2d 741 (N.D. 1978), appeal dism'd by 440 U.S. 901; *Suffolk Outdoor Advertising Co., Inc. v. Hulse,* 56 A.D.2d 365 (N.Y.A.D. 2 Dept. 1977), appeal dism'd by 439 U.S. 808; *Markham Advertising Co. v. State,* 439 P.2d 248 (Wash. 1968), appeal dism'd by 393 U.S. 316 and rehearing denied by 393 U.S. 1112.

[12] *See Maldonado v. Kempton,* 422 F.Supp.2d 1169, at 1178: "Second, the background constitutional rules at issue are clearly established: the United States Supreme Court and lower federal courts have consistently held that a billboard law may not prohibit non-commercial speech where it permits commercial speech. Indeed, in light of this clearly established law, nearly all billboard ordinances explicitly permit non-commercial speech where they permit commercial speech. *See e.g.,* Clear Channel Outdoor Inc., 340 F.3d at 814; *Outdoor Sys., Inc.,* 997 F.2d at 608-609; *see also* Nat'l Adver. Co. v. Town of Babylon, 900 F.2d 551, 556-57 (2d Cir.1990) ("After *Metromedia* struck down the San Diego ordinance as granting more protection to commercial than noncommercial speech, municipalities responded by adding provisions to their sign ordinances to overcome this defect by permitting noncommercial messages wherever commercial messages are allowed")."

justices considered the San Diego ordinance a total ban on all billboards, and disagreed with the plurality's statement that "a total prohibition of outdoor advertising is not before us in this case." Analyzing the ordinance as a content-neutral prohibition of an entire medium of communication, the two justices found the total ban to be unconstitutional because it was not narrowly drawn (due to the 12 exceptions to the prohibition) and because banning an entire medium of communication was not justified. Justice Brennan and Justice Blackman also stated their unwillingness to accept that a total ban on all billboards would advance the interests of traffic safety or aesthetics, stating "(a) billboard is not necessarily inconsistent with oil storage tanks, blighted areas, or strip development."

The concurring opinion also pointed out an issue raised by the plurality opinion, i.e., whether an ordinance may totally ban commercial (off-premise) billboards while simultaneously permitting non-commercial billboards without violating Free Speech rights. By way of illustration, Justice Brennan writes about his objection to giving cities virtually unbridled discretion to grant or deny licenses, and provides a series of examples of messages which could be found on a billboard.[13]

In his dissent, Chief Justice Burger denounced the limitation on a municipality's ability to regulate billboards which are "traffic hazards and eyesores." Indicating his understanding of the difficulty in separating the medium from the message, he further observed that "the messages conveyed on San Diego billboards—whether commercial, political, social, or religious—are not inseparable from the billboards that carry them." In so stating, the Chief Justice identified a critical issue with the plurality's holding, but failed to analyze it with a fresh approach.

Justice Stevens, in his dissent, noted that the plurality focused its attention on the exceptions to the total ban and, somewhat ironically concluded that the ordinance is an unconstitutional abridgment of speech because it does not abridge *enough* speech. In Justice Stevens' opinion, the real issue was whether a city could entirely ban one medium of communication. His conclusion: yes, much as a city could ban graffiti, another form of communication.

Justice Rehnquist's dissent delivered the strongest blow of all to the billboard industry, stating he would have upheld a total ban on all billboards based solely on aesthetic grounds.

Despite the disagreement between the justices, when various aspects of the plurality, concurring, and dissenting opinions are combined, the *Metromedia* case did in fact establish three principles relating to billboard regulation. First, seven justices agreed that a government's aesthetic and traffic safety concerns are a substantial government

---

[13] "I would be unhappy to see city officials dealing with the following series of billboards and deciding which ones to permit: the first billboard contains the message 'Visit Joe's Ice Cream Shoppe'; the second, 'Joe's Ice Cream Shoppe uses only the highest quality dairy products'; the third, 'Because Joe thinks that dairy products are good for you, please shop at Joe's Shoppe'; and the fourth, 'Joe says to support dairy price supports; they mean lower prices for you at his Shoppe." *Metromedia,* 453 U.S. at 538.

interest, sufficient to justify regulation of billboards. Second, five justices agreed that it is not unconstitutional to distinguish between on-premise and off-premise commercial advertising, the end result being that off-premise commercial billboards may be prohibited while on-premise commercial signs are permitted. Finally, six justices agreed that an ordinance violates Free Speech rights when it prohibits noncommercial speech in locations and circumstances in which it permits commercial speech. In other words, the fact that a city may value commercial messages relating to onsite goods and services more than it values commercial communications relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others.[14] Although *Metromedia* applied specifically to billboards, these principles may have some application to the regulation of on-premise signage as well.

The *Metromedia* plurality opinion did not consider a distinction between on-premise and off-premise commercial advertising to be violative of First Amendment rights. In analyzing commercial speech and non-commercial speech, the plurality decision agreed with the holding in *Central Hudson.* That is, commercial speech deserved some First Amendment protection, but the purposes offered for sign regulation, traffic safety and aesthetics, were substantial government interests. In other words, as far as the principle announced by the Court, there is different criteria for commercial and non-commercial speech, but commercial speech is still afforded some protection under the First Amendment. This tenet of analyzing commercial and non-commercial speech differently applies to both on-premise and off-premise signs and regulations. The plurality also believed the changing content of off-premise advertising presented more acute problems than on-premise advertising, and placed a higher value on the identification of a business and its products or services than an advertisement for a commercial enterprise located elsewhere. By holding that a municipality's substantial interests of traffic safety and aesthetics were not directly advanced by banning non-commercial messages if on-premise commercial messages were permitted, they effectively held that all non-commercial messages must be allowed in every place where even one commercial message is permitted.

Metromedia and the three principles for which it stands, that is, that aesthetic interests are substantial government interests, the distinction between on-premise and off-premise commercial advertising, and the prohibition of barring noncommercial speech where commercial speech is allowed, continue to be valid law. However, the case has served as a poor guide to subsequent courts as they have sought to develop billboard and sign law that stands up to the First Amendment while recognizing governmental regulatory interests.[15]

---

[14] *See* Jason R. Burt, Comment, *Speech Interests Inherent in the Location of Billboards and Signs: A Method for Unweaving the Tangled Web of* Metromedia, Inc. v. City of San Diego, 26 B.Y.U. L.Rev. 473 (2006).

[15] In his dissent, Justice Renquist observed that "in a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn…and I regret even more keenly my contribution to this judicial clangor…"

Taxpayers for Vincent: Uniquely Valuable Means of Communication

Several years after the decision in *Metromedia,* in *Members of City Council v. Taxpayers for Vincent*[16], the U.S. Supreme Court considered whether a Los Angeles ordinance prohibiting the posting of signs on public property abridged the freedom of speech rights under the First Amendment of a group of supporters of a political candidate. The federal district court concluded that the city ordinance was constitutional, and granted Los Angeles' summary judgment motion. The Court of Appeals for the Ninth Circuit reversed, reasoning that the ordinance was presumptively unconstitutional because significant First Amendment interests were involved, and that the City had not justified its total ban on all signs on the basis of its asserted interests in preventing visual clutter, minimizing traffic hazards, and preventing interference with the intended use of public property.[17]

The Supreme Court reversed, noting it was within the City's constitutional power to attempt to improve its appearance, and this interest was basically unrelated to the suppression of ideas. The Court stated, "(w)hile the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate."[18] Finding the Los Angeles ordinance did not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property was prohibited, the Court noted that there was nothing to indicate that the posting of political posters on public property was a uniquely valuable or important mode of communication.

Fox: The Least Restrictive Means to Achieve the Desired End

A few years later, the U.S. Supreme Court in *Board of Trustees of State University of N.Y. v. Fox*[19] addressed the question of whether governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end. Justice Scalia authored the opinion which held that governmental restrictions upon commercial speech need not be the *absolute least restrictive* means to achieve the desired end, reversing the decision reached by the Court of Appeals for the Second Circuit below.[20] A divided panel of the Court of Appeals viewed the university regulation at issue as a restriction on commercial speech, and

---

[16] 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). In this case, Roland Vincent was a candidate for election to the Los Angeles City Council. A group of his supporters known as Taxpayers for Vincent entered into a contract with a political sign service company known as Candidates' Outdoor Graphics Service (COGS) to fabricate and post signs with Vincent's name on them. COGS produced 15 x 44-inch cardboard signs and attached them to utility poles at various locations by draping them over crosswires which support the poles and stapling the cardboard together at the bottom. Acting under the authority of § 28.04 of the Municipal Code, employees of the city's Bureau of Street Maintenance routinely removed all posters attached to utility poles and similar objects covered by the ordinance, including the COGS signs.

[17] 682 F.2d 847.

[18] *Taxpayers for Vincent,* 466 U.S. at 810.

[19] 429 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989).

[20] 841 F.2d 1207 (1988).

therefore applied the test articulated in *Central Hudson.* Reiterating prior holdings that government restrictions upon commercial speech may be no more broad or no more expansive than "necessary" to serve its substantial interests, the Supreme Court stated that governmental restrictions upon commercial speech require only a reasonable "fit between the legislature's ends and the means chosen to accomplish those ends..., 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...; that employs not necessarily the least restrictive means but, ... a means narrowly tailored to achieve the desired objective."[21] This is a form of heightened scrutiny, though still not approaching the level of strict scrutiny that is applicable to noncommercial speech regulations that are content based.[22]

***Discovery Network:* Reasonable Fit**

Four years after the *Fox* case, and more than a decade after the holding was announced in *Metromedia*, the U.S. Supreme Court handed down the opinion in *City of Cincinnati v. Discovery Network, Inc.*[23] In that case, a group of commercial publishers brought a civil rights action requesting declaratory and injunctive relief against enforcement of a city ordinance prohibiting distribution of commercial handbills on public property, used as a basis of ordering the removal of news racks. The federal district court entered judgment preventing enforcement of the ordinance, and the City appealed. The Court of Appeals for the Sixth Circuit affirmed.[24] In an opinion written by Justice Stevens, the U.S. Supreme Court affirmed and held that: (1) the ban on news racks containing "commercial handbills", which did not apply to news racks containing "newspapers" was not a "reasonable fit" between the City's legitimate interest in safety and aesthetics and the means chosen to serve the interest, and (2) enforcement of the ordinance did not constitute a valid time, place, and manner restriction of protected speech, as it was not content neutral.

***Rappa:* Location-Specific Exceptions to General Bans**

The next year, the Court of Appeals for the Third Circuit issued its ruling in *Rappa v. New Castle County.*[25] This decision contains the most extensive analysis of the *Metromedia* case. In 1990, Daniel Rappa sought the Democratic nomination for Delaware's seat in the U.S. House of Representatives in a primary election contest which pitted him against the incumbent, Thomas Carper. Rappa was a businessman who had not held public office and had little public name recognition. In an effort to achieve it, he placed a large number of signs along Delaware's roadways, only to have many of them peremptorily removed by state and local authorities on the grounds that they were in violation of laws and ordinances enacted by the State of Delaware, the County of New Castle, and the City of Wilmington. Although Rappa's signs were barred, a number of

---

[21] 492 U.S. at 480.
[22] *See* Burt, *supra* note 9, at 473.
[23] 507 U.S. 410, 113 S.Ct.1505, 123 L.Ed.2d 99 (1993).
[24] 946 F.2d 464.
[25] 18 F.3d 1043 (3rd Cir. 1994).

other types of signs, such as "for sale" signs and highway beautification signs were permitted. The state statute at issue, Chapter 11, allowed signs advertising local industries, meetings, buildings, historical markers and attractions. Rappa brought suit in federal district court challenging the regulatory schemes on First Amendment grounds. The district court granted partial summary judgment, holding that the Delaware statute and the New Castle County ordinance were facially unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution because they impermissibly restricted speech on the basis of content. The court issued an injunction requiring the state and county defendants to permit political signs to the same extent that commercial or other non-political signs were allowed. The district court believed that the Supreme Court's holding in *Metromedia* was controlling, but the Court of Appeals thought it had little precedential effect, stating *"Metromedia* was a badly splintered plurality opinion which has arguably been undermined by the recent decision in *Cincinnati v. Discovery Network..."*[26]

The Court of Appeals went on to find the statute unconstitutional, and affirmed the summary judgment in favor of Rappa, although it did so based on different reasoning than had the district court. It held:

> Based on the principles underlying the First Amendment, we conclude that statutes aimed at a legitimate end unrelated to the suppression of speech but which nonetheless restrict speech in a certain locality may constitutionally contain content-based exceptions as long as the content exempted from restriction is significantly related to the particular area in which the sign is viewed—for example, a sign identifying the property on which it sits as a restaurant, or a sign alongside a highway which tells drivers how to reach a nearby city. Such exceptions must also be substantially related to advancing an important state interest that is at least as important as the overall goal advanced by the underlying regulation, be no broader than necessary to advance the special interest, and be narrowly drawn so as to impinge as little as possible on the overall goal. Although under this approach some content-based exceptions will pass constitutional muster, the exception in Chapter 11 relating to signs advertising local industries, meetings, buildings, historical markers, and attractions...fails the test.[27]

The court in *Rappa* analyzed the concurring and dissenting opinions in *Metromedia* that considered the twelve content-based exceptions to the ordinance passed by the city of San Diego *de minimis* because they did not raise traditional concerns about content based regulation of speech. The *Rappa* court was persuaded by the concurring opinion written by Justice Brennan, and stressed that "when government has a significant interest in limiting speech that is unrelated to the content of that speech, government should not be left with a choice of enacting a regulation banning all signs in a particular

---

[26] *Rappa,* 18 F.3d at 1047.
[27] *Rappa,* 18 F.3d at 1047.

geographic location or none."[28] The *Rappa* court stopped short of adopting a *de minimis* test, however, and held that 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.[29] The court was able to avoid the concerns that accompany the prohibition on content based restrictions on speech by allowing location specific exceptions to general bans if the exception is viewpoint neutral and does not determine the content of public debate. The court stated that allowing location specific exemptions to general bans is not discriminating in favor of the content of the signs; rather, it is accommodating the special nature of such signs so that the messages they contain have an equal chance to be communicated. *Rappa* treats commercial speech no differently than non-commercial speech, and would allow a complete ban of off-premise signs with exceptions for on-premise signs regardless of whether they contain commercial or non-commercial messages. A regulation so holding would not prefer commercial speech to non-commercial speech because it would prohibit all speech that occurs off-premise, without concern for that distinction. *Rappa* interprets *Metromedia* as requiring only that non-commercial speech be allowed in the same circumstances in which commercial speech is allowed.

44 Liquormart: Truthful, Non-misleading Advertising is Protected Free Speech

In *44 Liquormart, Inc. v. Rhode Island*[30], the U.S. Supreme Court held that a state's statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages is invalid, concluding that such an advertising ban is an abridgement of speech protected by the First Amendment and that it is not shielded from constitutional scrutiny by the Twenty-first Amendment.[31] In this case, the Rhode Island Legislature had enacted two separate prohibitions against advertising the retail price of alcoholic beverages. The first applied to vendors licensed in Rhode Island as well as to out-of-state manufacturers, wholesalers, and shippers. It prohibited them from "advertising in any manner whatsoever" the price of any alcoholic beverage offered for sale in the State; the only exception was for price tags or signs displayed with the merchandise within licensed premises and not visible from the street.[32] The second statute applied to the Rhode Island news media, and contained a categorical prohibition against the publication or broadcast of any advertisements—even those referring to sales in other States—that "make reference to the price of any alcoholic beverages."[33] Two liquor stores, one of which operated exclusively in Rhode Island and the other of which operated several stores in Massachusetts which were patronized by Rhode Island residents, filed suit in federal district court seeking a declaratory judgment that the two statutes and the administrator's implementing regulations violated the First

---

[28] *Rappa,* 18 F.3d at 1064.
[29] *Id.* at 1065.
[30] 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996).
[31] The Twenty-first Amendment to the U.S. Constitution repealed the Eighteenth Amendment to the U.S. Constitution, which had mandated nationwide Prohibition.
[32] Rhode Island Gen. Laws § 3-8-7 (1987).
[33] Rhode Island Gen. Laws § 3-8-8.1 (1987).

Amendment and other provisions of federal law. The District Judge concluded that the price advertising ban was unconstitutional because it did not "directly advance" the State's interest in reducing alcohol consumption and was "more extensive than necessary to serve that interest."[34] He reasoned that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it and that the Twenty-first Amendment did not shift or diminish that burden. Acknowledging that it might have been reasonable for the state legislature to "assume a correlation between the price advertising ban and reduced consumption," he held that more than a rational basis was required to justify the speech restriction, and that the State had failed to demonstrate a "reasonable fit" between its policy objectives and its chosen means.[35] The Court of Appeals reversed,[36] finding "inherent merit" in the State's submission that competitive price advertising would lower prices and that lower prices would produce more sales.[37] Moreover, it agreed with the reasoning of the Rhode Island Supreme Court that the Twenty-first Amendment gave the statutes an added presumption of validity.[38] The Court of Appeals alternatively concluded that reversal was compelled by the U.S. Supreme Court's summary action in *Queensgate Investment Co. v. Liquor Control Comm'n of Ohio.*[39]

The U.S. Supreme Court, by contrast, stated there was no question that Rhode Island's price advertising ban constituted a blanket prohibition against truthful, nonmisleading speech about a lawful product, and served an end unrelated to consumer protection. Accordingly, the Court found it must review the price advertising ban with "special care,"[40]..."mindful that speech prohibitions of this type rarely survive constitutional review".[41] The Court found that the price advertising ban could not survive the stringent constitutional review that *Central Hudson* concluded was appropriate for the complete suppression of truthful, nonmisleading commercial speech.

***Lorillard Tobacco:* Commercial v. Non-commercial Speech Distinction Lives On**

In *Lorillard Tobacco Co. v. Reilly*[42], the U.S. Supreme Court held that the distinction between commercial and non-commercial speech is still in effect. In that case, manufacturers and sellers of tobacco products challenged Massachusetts regulations restricting the sale, promotion, and labeling of tobacco products. The United States District Court for the District of Massachusetts rejected preemption arguments, and thereafter rejected Commerce Clause claims and, with one exception, First Amendment

---

[34] *44 Liquormart, Inc. v. Racine,* 829 F.Supp. 543, 549 (D.R.I. 1993).
[35] *Id.,* at 555.
[36] 39 F.3d 5 (C.A.1 1994).
[37] *Id.,* at 7.
[38] *Id.,* at 8.
[39] 459 U.S. 807, 103 S.Ct. 31, 74 L.Ed.2d 45 (1982). *See* 39 F.3d, at 8. In that case the Court dismissed the appeal from a decision of the Ohio Supreme Court upholding a prohibition against off-premise advertising of the prices of alcoholic beverages sold by the drink. *See Queensgate Investment Co. v. Liquor Control Comm'n of Ohio,* 69 Ohio St.2d 361, 433 N.E.2d 138 (1982).
[40] *Central Hudson,* 447 U.S., at 566, n. 9.
[41] *ibid.*
[42] 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001).

claims. Plaintiffs appealed and the state cross-appealed. The Court of Appeals for the First Circuit affirmed in part and reversed in part, and certiorari was granted. The Supreme Court affirmed in part, reversed in part, and remanded, holding that (1) regulations governing outdoor and point-of-sale cigarette advertising were preempted by the Federal Cigarette Labeling and Advertising Act, (2) regulations prohibiting outdoor advertising of smokeless tobacco or cigars within 1,000 feet of a school or playground violated the First Amendment, (3) regulations prohibiting indoor, point-of-sale advertising of smokeless tobacco and cigars lower than 5 feet from the floor of a retail establishment located within 1,000 feet of a school or playground violated the First Amendment, but (4) regulations requiring retailers to place tobacco products behind counters and requiring customers to have contact with a salesperson before they are able to handle such products did not violate the First Amendment. The Court acknowledged that, in prior holdings, commercial speech has been afforded a measure of First Amendment protection commensurate with its position in relation to other constitutionally guaranteed expression, and noted that the framework for analyzing regulations of commercial speech that is substantially similar to the test for time, place, and manner restrictions was previously set out in *Central Hudson.* The Court affirmed the holding in *Central Hudson,* and stated "we see no need to break new ground."[43]

***Pagan:* Burden of Proof is on the Governmental Agency**

In 2007, the Court of Appeals for the Sixth Circuit issued a decision in *Pagan v. Fruchey.*[44] Pagan filed suit against a city and its police chief alleging a violation of his constitutional rights by virtue of a city ordinance which he claimed constituted impermissible restrictions on his right to engage in protected commercial speech. Pagan had placed a "for sale" sign in the window of his automobile and placed it on the street in violation of the ordinance. The district court granted summary judgment for the city and police chief determining the ordinance was a constitutional regulation of commercial speech under the *Central Hudson* framework, and Pagan appealed.

The Court of Appeals for the Sixth Circuit reversed and remanded, holding (1) the ordinance regulated commercial speech, not conduct of parking, (2) the police chief's affidavit was insufficient to show that the ordinance advanced municipal interests in a direct and material way, (3) the ordinance unconstitutionally restricted commercial speech, and (4) the ordinance could not be evaluated as content-neutral time, place, or manner regulation of speech. Relying on the U.S. Supreme Court's statement by the *Metromedia* plurality 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. We deal here with the law of billboards"[45], the Court of Appeals stated *Metromedia* did not control the outcome of this non-billboard case. Instead, it applied the test outlined in *Central Hudson,* and reversed the district court's grant of summary judgment. Parts 1 and 2 of the *Central Hudson* test were satisfied because the parties agreed the posting of a "For Sale" sign was protected commercial speech, and because Pagan did not take issue

[43] 533 U.S. at 555.
[44] 492 F.3d 766 (6th Cir. 2007).
[45] *Metromedia,* 453 U.S. at 501.

with the substantiality of the city's regulatory interests: traffic/pedestrian safety and aesthetic concerns.

The Court of Appeals addressed the third prong of the *Central Hudson* test, i.e., whether the speech regulation advances the government's asserted interests in a direct and material way, stating that the government must come forward with some quantum of evidence, beyond its own belief in the necessity for regulation, that the harms it seeks to remedy are concrete and that its regulatory regime advances the stated goals. Instead of actual evidence of the harms remedied by the ordinance, the city and police chief asked the Court of Appeals to adopt a standard of "obviousness" or "common sense". The Court of Appeals, having framed the issue before it narrowly, stated, "(t)his is not a question of the quality of the evidence supporting a speech regulation. It is the absence of any evidence of the need for regulation that is fatal to [the ordinance at issue]."[46] Having determined the failure to satisfy the third prong of the *Central Hudson* test as dispositive in the case, the Court of Appeals failed to address the fourth prong of the *Central Hudson* test: whether the speech restriction is narrowly tailored; that is, whether the speech restriction at issue was more extensive than necessary to serve the asserted interests. However, the Court noted that, contrary to the district court's conclusion, the regulatory authority bears the burden of establishing a reasonable fit when regulating commercial speech. It went on to state that the obligation rests with the government to establish that its regulation is "narrowly tailored" and that it has carefully calculated the costs and benefits of regulation.[47]

***Naser Jewelers:* Testing "Reasonable Fit"**

Following the holding in *Pagan,* which announced the burden rests with the government to establish a "reasonable fit" when regulating commercial speech, two cases involving the City of Concord, New Hampshire attempted to put this to the test. In *Naser Jewelers, Inc. v. City of Concord, N.H.*[48] a retail business seeking to install an on-premise sign brought suit against a city challenging the constitutionality under the First Amendment of an ordinance prohibiting all Electronic Messaging Centers, or signs which displayed electronically changeable messages. The federal district court denied the application for preliminary injunction against enforcement of the ordinance, and the business appealed. The Court of Appeals for the 1st Circuit affirmed the trial court's decision to uphold the ordinance under the rule that content neutral regulations are constitutional provided they are narrowly tailored to serve a significant governmental interest and allow for reasonable alternative channels of communication. The business argued that the city had the burden of proof on all issues, and that Concord must perform studies to prove that the ban on electronic signs in fact supports its stated interests. The Court of Appeals disagreed, holding Concord was under no obligation to do such studies or put them into evidence, and further stating, "(w)e need not resolve here the intricacies of burdens of proof and production. For our purposes, and indeed in many First Amendment cases of content neutral regulations, the issue of who has the burden of proof

---

[46] *Pagan,* 492 F.3d at 773.
[47] *Id.,* at 778.
[48] 513 F.3d 27 (1st Cir. 2008).

will not be important. After all, the government's purpose for the regulation is often expressly stated, as are the reasons for that choice and not others, thus removing those issues from having to be proven."[49]

Carlson's Chrysler: Detailed Proof of Safety and Aesthetics Not Required

In the companion state court case against Concord over electronic changeable signs, *Carlson's Chrysler v. City of Concord,*[50] a property owner appealed the decision of the city zoning board of adjustment that upheld the code administrator's decision denying an application to erect an on-premise electronic sign. The property owner appealed the zoning board of adjustment's decision to the superior court, which held that the City's ordinance violated the First Amendment as an unlawful infringement upon commercial speech. The City appealed, arguing that the trial court erred: (1) in finding that the zoning ordinance constituted an unconstitutional infringement upon commercial speech; (2) by applying the wrong standard of review when it found no evidence that regulating electronic signs will promote public safety or aesthetics; and (3) in finding that there are less intrusive methods the City could use to achieve its goals. Disagreeing with the trial court's finding that the City failed to meet its burden of proving that the ordinances advanced its asserted interests and reached no further than necessary, and that no evidence was presented to support the City's concern that the changing displays of the proposed sign might be distracting to motorists and lead to increased traffic accidents, the New Hampshire Supreme Court reversed. It stated, "(t)he City need not provide detailed proof that the regulation advances its purported interests of safety and aesthetics…and we hold that the trial court erred in substituting its judgment for that of the City's…"[51]

Vono v. Lewis: Content Based Restrictions in Signage are Unconstitutional

In January of this year, a federal district court in Rhode Island reached a decision in *Vono v. Lewis*[52] finding a state law that restricts the content of billboards near highways to be unconstitutional. In this case, Vono operates a sole proprietorship that designs and creates promotional and marketing materials such as t-shirts and cups, and leases space in a commercial property zoned for industrial use in Providence. The lease allows Vono to use the property's rooftop outdoor advertising sign, which is visible from the nearby interstate. In 2002, Vono began to make use of the sign, and displayed advertising for several clients, including the Providence Tourism Council, Blockbuster Video, and other commercial and non-commercial entities. In July 2005, Vono received a letter from the Rhode Island Department of Transportation ("RIDOT") notifying him that the sign violated the prohibition against off-premise signs. RIDOT eventually declared the sign a public nuisance.

---

[49] 513 F.3d at 33.
[50] 938 A.2d 69 (N.H. 2007).
[51] 938 A.2d at 73.
[52] --- F.Supp.2d ---, 2009 WL 210705 (D.R.I.)

The dispute in the case centered on the exception allowing the erection or maintenance of on-premise signs, while prohibiting off-premise signage. Plaintiff's first, and primary, contention is that the state's prohibition of off-premise signs is an impermissible content based speech restriction. Quoting *Ackerley Commc'ns of Mass. v. City of Cambridge*[53], the Court stated, since here, "whether a sign may stay up or must come down requires consideration of the message it carries", RIDOT imposes a content based restriction on non-commercial speech, and content based regulations of non-commercial speech are presumptively unconstitutional. The Court continued, "(t)o justify the preference for commercial (or on-premises non-commercial) messages, [RIDOT] must explain 'how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the [State]' than would commercial billboards ... [RIDOT] must also explain how the content-based on-premise/off-premise distinction among noncommercial messages furthers the state's goals ... Moreover, to succeed [RIDOT] must also prove that the ... RIDOT Rules represent the least restrictive method available to further the State's interests. With respect to the state's on-premise/off-premise distinction, this appears to be a near impossible task."[54]

RTM MEDIA, L.L.C. V. CITY OF HOUSTON

Factual and Procedural Background

A local and still developing case demonstrates many of these tenants of the Supreme Court's First Amendment jurisprudence. RTM Media ("RTM") is an independent Houston-based outdoor advertising company, which started constructing billboards in Houston's Extraterritorial Jurisdiction ("ETJ") adjacent to federal interstate and primary highways. It did so with permits issued only by the Texas Department of Transportation ("TxDOT"), and without obtaining permits from the City of Houston, arguing TxDOT maintains exclusive jurisdiction over off-premise signs within Houston's ETJ adjacent to federal highways. The City disagreed and issued almost 2,000 municipal court citations to RTM's principle. In addition, the City filed a lawsuit in Harris County District Court seeking an injunction for the removal of the company's alleged illegal and non-permitted signs. Simultaneously, the City began contacting RTM's advertisers and warning them that they would be in violation of the Houston Sign Code and subject to ticketing for advertising on the "illegal" signs. Thereafter, RTM filed suit in federal court, seeking an injunction against the City's contact with its customers. RTM also alleged more broadly that the Houston Sign Code violated the free speech protections of the First Amendment of the United States Constitution, by impermissibly distinguishing regulations on the commercial vs. non-commercial messages communicated on signage.

---

[53] 88 F.3d 33, 37 (1st Cir. 1996)
[54] *Vono*, 2009 WL 210705 at 13.

Houston's Sign Code

Commercial billboards are extensively regulated by the Houston Sign Code, and even prohibited under Section 4612(b). By contrast, Section 4619(c) of the Code completely excludes from regulation all structures containing non-commercial messages:

> Exclusion. The provisions of this section shall not be construed to require the removal of a structure that is used exclusively and at all times (except when there is no copy at all on the structure) for messages that do not constitute advertising, including, but not limited to, political messages, religious or church related messages, public service, governmental and ideological messages and other copy of a nature that is not commercial advertising because such a structure is not a "sign" (either on-premise or off-premise), as that term is defined, for purposes of this chapter and is not subject to regulation under this chapter. A structure that is subject to regulation under this chapter may contain non-commercial messages in lieu of or in addition to any other messages, but the structure shall not be exempt from regulation as a sign under this chapter unless used exclusively and at all times as provided above for non-commercial messages.

Preliminary Injunction Order

On September 26, 2007, a preliminary injunction was issued by the Honorable Melinda Harmon, Judge of the U.S. District Court for the Southern District of Texas, in *RTM Media, L.L.C. v. City of Houston.*[55] The City of Houston was enjoined from enforcing its Sign Code, and from fining advertisers on unpermitted off-premise signs in the City's ETJ. The Court examined the *Central Hudson* and *Discovery Network* cases discussed above, and concluded that the Houston Sign Code's different treatment and regulation of commercial and non-commercial billboards was an impermissible content based regulation and violation of the First Amendment.

During the one-half day evidentiary hearing on RTM's application for preliminary injunction, RTM created a favorable record on the difficulty in distinguishing between commercial and non-commercial billboards. Specifically, the Houston Sign Administrator was extensively cross-examined about her opinion on several billboard displays, including whether they were considered commercial and subject to her department's regulation, or non-commercial and excluded from regulation. The Sign Administrator exhibited confusion and indecision in analyzing the content of the messages on the billboards, and subjectively and arbitrarily deciding whether they were included or excluded from regulation.

The Court concluded that the Houston Sign Code's different treatment and regulation of commercial and non-commercial billboards was an impermissible content based regulation and violation of the First Amendment to the United States Constitution:

---

[55] 518 F.Supp.2d 866 (S.D.Tex. 2007)

> This Court sympathizes with the City's substantial interest in reducing and preventing "billboard blight" for reasons of aesthetics, traffic safety, and property values, but the City cannot achieve those goals by regulating billboards based on the content of their message. Noncommercial billboards are visual blights, traffic dangers, and undesirable for property values for the same reason as commercial billboards. The City can impose content neutral restrictions on time, place, and manner without reference to the content of the regulated speech and that are directly related to their goals, e.g., restricting the overall number of billboards it permits, their location, size, etc., but not by regulating and prohibiting only off-premises commercial billboards while allowing noncommercial billboards to proliferate freely. Moreover, threatening to fine or fining commercial advertisers, who have no control over a sign and cannot take it down, does not meet the requirement that restrictions on speech must be directly related to the City's goals but clearly infringes on their right of freedom of speech. The City's justification that such pressure tactics against advertisers are acceptable because they "work" does not cure the constitutional problem here.[56]

Judge Harmon then ruled that Houston's violation of RTM's constitutional right of free speech constitutes irreparable harm as a matter of law, which outweighed any damage the requested injunction could cause the City. As such, the Court granted the preliminary injunction.

Ramifications of the Preliminary Order

The preliminary injunction order was not limited just to RTM, its advertisers, billboards, federally funded highways, or the ETJ. Instead, the order states that "the City shall be enjoined from enforcing its Sign Code." Even though RTM originally disputed with the City only the permitting requirements over its off-premise signs located adjacent to federally funded highways in the ETJ, a literal reading of the preliminary order goes well beyond such a narrow issue. The order seems to cover all parties, all types of signs, all thoroughfares, and all areas. Indeed, any effort by the Houston Sign Administration to enforce any of its regulations would appear to be enjoined under the preliminary order.

Subsequent Action

Judge Harmon and the Houston City Council quickly eliminated the possibility of a completely unregulated sign industry. First, Judge Harmon significantly narrowed her original Order on October 16, 2007.[57] The Order Clarifying Preliminary Injunction Entered September 26, 2007 effectively enjoined the City from enforcing its Sign Code only against RTM and its advertisers and billboards

Second, the Houston City Council attempted to cure the constitutional defects in the Sign Code by effectively repealing the exemption from regulation for non-commercial signage contained in Section 4619(c). The October 30, 2007 City of

---

[56] Id. at 875.
[57] *See* 2007 WL 5006527 (S.D.Tex.)

Houston Ordinance changes the definitions for both on-premise and off-premise signs to "include any new sign that would otherwise meet this definition, but that would be excluded from regulation by Section 4619(c) of the Sign Code." The new Ordinance goes on to state that "the construction, erection, placement, attachment, painting, installation or other implementation of new off-premise signs is prohibited," and that "any new on-premise sign must comply with all applicable requirements of the Building Code, the Sign Code and this Ordinance." Finally, the Ordinance states it "shall not be construed to limit or restrict the City of Houston in its defense of the Sign Code in [the RTM litigation]," and that it "shall remain in full force and effect until 90 days following a final resolution of that cause of action."

Final Judgment

As mentioned, Judge Harmon ruled in her preliminary injunction order in favor of RTM after a full evidentiary hearing, by relying on the Supreme Court's decisions in *Central Hudson* and *Discovery Network*. Almost exactly a year later, on September 29, 2008, Judge Harmon ruled against RTM based on the parties' written summary judgment motions in her final decision[58]. While neither the facts nor the law changed during the passing year, the Judge reached an opposite result by factually distinguishing *Discovery Network*. Judge Harmon noted that the number of off-premise commercial signs in Houston had decreased by about 50% since the passage of the Sign Code, so that Houston's fit was reasonable and not "minute" or "paltry" like Cincinnati's efforts in *Discovery Network*. The Judge also placed more emphasis on *Metromedia* and cited the plurality opinion as holding "that, insofar as the ordinance regulated commercial speech, it satisfied the *Central Hudson* test." RTM has filed a notice to appeal the final decision to the Fifth Circuit Court of Appeals.

CONCLUSION

The First Amendment offers broad protection for the freedom of speech, and includes messages displayed on signage. The Supreme Court and lower federal and state courts have generally criticized and stricken regulations based on the content of the message displayed on the signage, rather than on reasonable restrictions as to the time, place, and manner of the signage. In other words, signs should be regulated without reading them. As demonstrated in the *RTM Media* case, however, virtually opposite judicial decisions can still be realized even though the courts and counsel are relying upon this same Supreme Court First Amendment jurisprudence.

[58] 578 F.Supp.2d 875 (S.D.Tex. 2008)

REGULATING SIGNS WITHOUT READING THEM

Richard L. Rothfelder
Rothfelder & Falick, L.L.P.

2009 Land Use Conference
March 27-29, 2009
Austin, Texas

The First Amendment to the U.S. Constitution

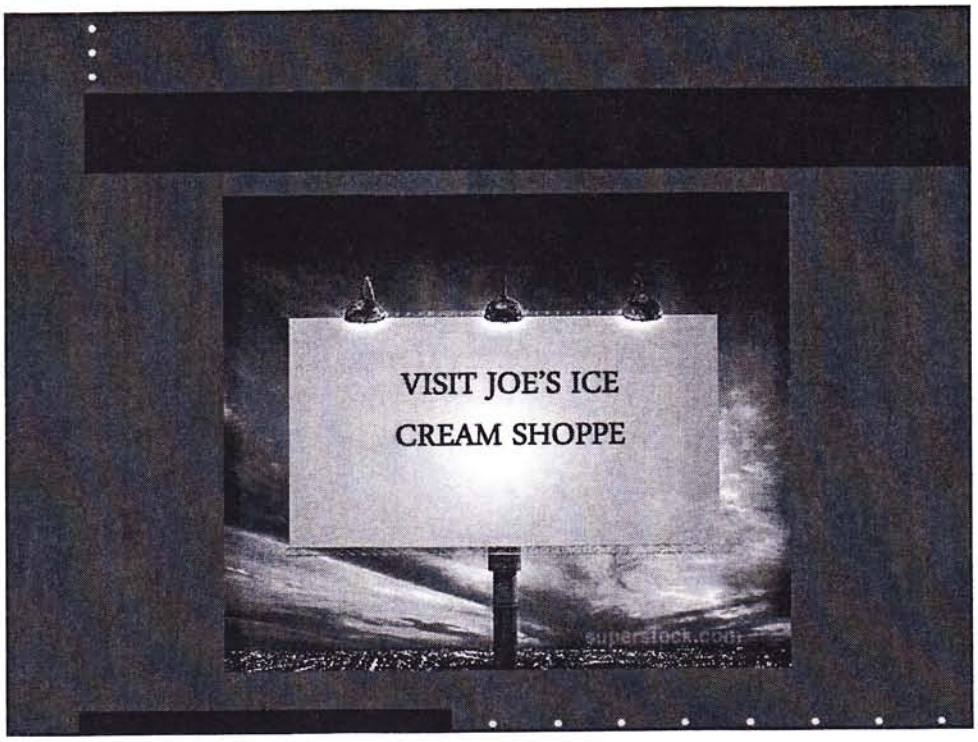
"***Congress shall make no law*** respecting an establishment of religion, or prohibiting the free exercise thereof; or ***abridging the freedom of speech***, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

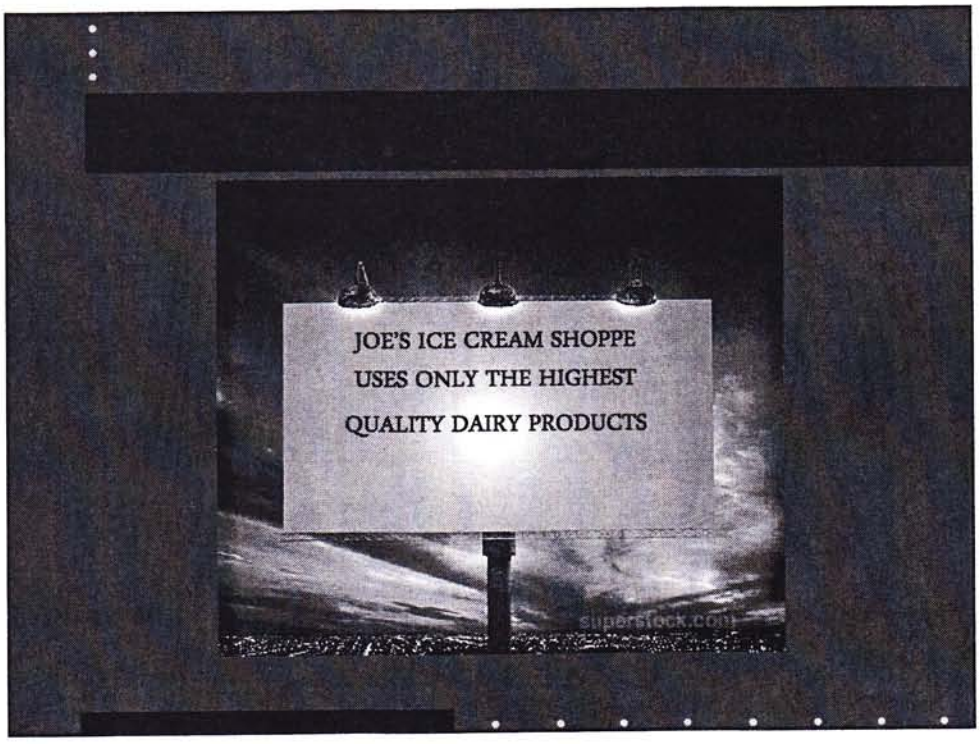
Central Hudson: The Four Part Test

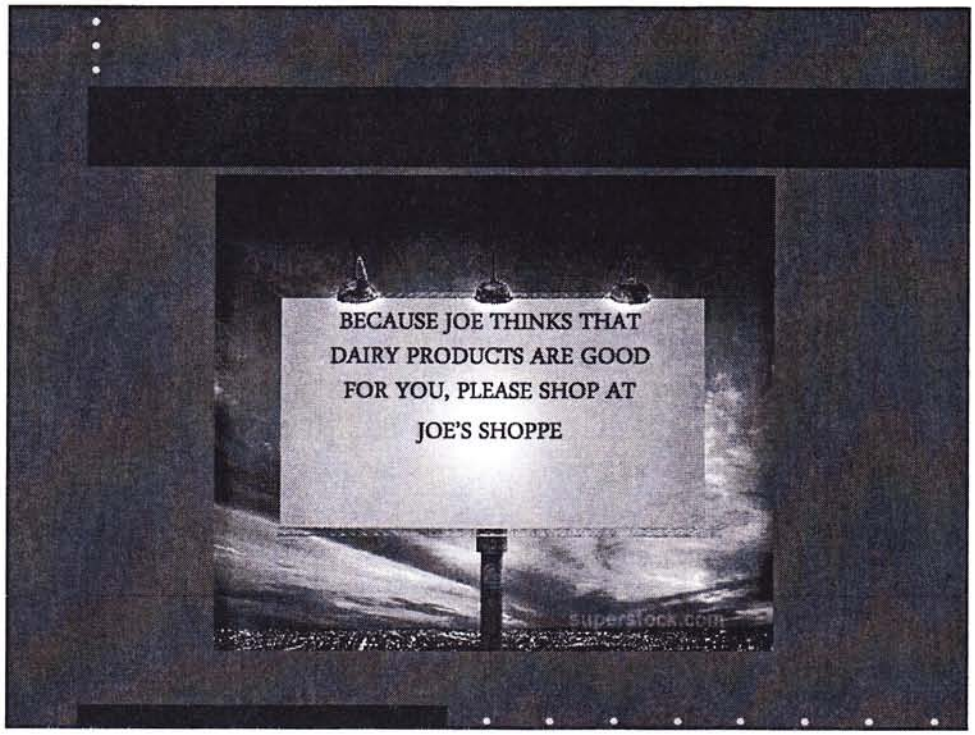
- U.S. Supreme Court - 1980
- The government is not free to restrict commercial free speech at will
- (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

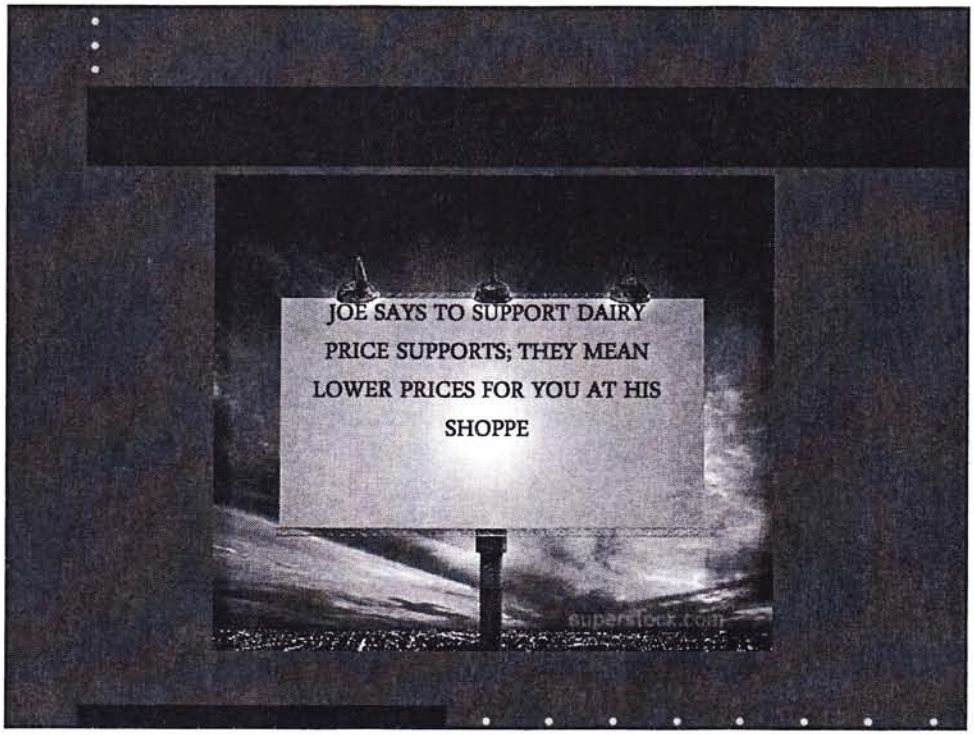
Metromedia, Inc. v. City of San Diego

- U.S. Supreme Court - 1981
- Splintered opinion - no majority
- "Tower of Babel"
- Aesthetics and traffic safety are substantial government interests
- On-premise v. off-premise commercial advertising distinctions are not unconstitutional
- Non-commercial speech may not be barred where commercial speech is allowed


VISIT JOE'S ICE
CREAM SHOPPE


JOE'S ICE CREAM SHOPPE
USES ONLY THE HIGHEST
QUALITY DAIRY PRODUCTS


BECAUSE JOE THINKS THAT
DAIRY PRODUCTS ARE GOOD
FOR YOU, PLEASE SHOP AT
JOE'S SHOPPE


JOE SAYS TO SUPPORT DAIRY
PRICE SUPPORTS; THEY MEAN
LOWER PRICES FOR YOU AT HIS
SHOPPE

Metromedia: The Tower of Babel

- "In a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn…and I regret even more keenly my contribution to this judicial clangor…"

Justice Renquist's Worst Nightmare...

Members of City Council v. Taxpayers for Vincent

- U.S. Supreme Court - 1984
- Political signs on public property prohibited by City ordinance
- Court held, it was within the City's constitutional power to attempt to improve its appearance, and this interest was basically unrelated to the suppression of ideas
- Restrictions on expressive activity may be invalid if the remaining modes of communication are inadequate

Board of Trustees of State Univ. of N.Y. v. Fox

- U.S. Supreme Court - 1989
- The least restrictive means to achieve the desired end
- Governmental restrictions upon commercial speech require only a reasonable fit between the legislature's ends and the means chosen to accomplish those ends..., a fit that is not necessarily perfect, but reasonable
- Heightened, but not strict, scrutiny

City of Cincinnati v. Discovery Network, Inc.

- U.S. Supreme Court - 1993
- Government ban on news racks containing "commercial handbills" which did not apply to news racks containing "newspapers" was not a "reasonable fit" between the City's legitimate interest in safety and aesthetics and the means chosen to serve the interest.
- Enforcement of the ordinance did not constitute a valid time, place, and manner restriction of protected speech, as it was not content neutral.

Rappa v. New Castle County

- Court of Appeals for the Third Circuit - 1994
- Extensive analysis of *Metromedia*
- Political candidate placed signs along Delaware's roadways, seeking to increase name recognition
- "For sale", highway beautification, local industry advertisements, historical signs were allowed
- Court of Appeals thought *Metromedia* was a badly splintered plurality opinion which was undermined by *Discovery Network*

44 Liquormart, Inc. v. Rhode Island

- U.S. Supreme Court - 1996
- Governmental prohibition against advertising the retail price of alcoholic beverages
- Court held, truthful, non-misleading advertising is protected free speech
- Price advertising ban could not survive the stringent constitutional review that *Central Hudson* concluded was appropriate for the complete suppression of truthful, non-misleading commercial speech

Lorillard Tobacco Co. v. Reilly

- U.S. Supreme Court - 2001
- Tobacco industry challenged Massachusetts regulations restricting the sale, promotion, and labeling of tobacco products
- Regulations prohibiting outdoor advertising of smokeless tobacco or cigars, or indoor, point-of-sale advertising lower than 5 feet from the floor, which were within 1,000 feet of a school or playground, violated the First Amendment

Pagan v. Fruchey

- Court of Appeals for the Sixth Circuit - 2007
- "For sale" sign in the window of a car parked on the street violated a city ordinance
- Court held, the ordinance regulated commercial speech, not conduct of parking
- Ordinance unconstitutionally restricted commercial speech
- Ordinance could not be evaluated as a content neutral time, place or manner regulation of speech

Naser Jewelers, Inc. v. City of Concord, N.H.

- Court of Appeals for the First Circuit - 2008
- Ordinance prohibited all signs which displayed electronically changeable messages
- Ordinance upheld under the rule that content neutral regulations are constitutional provided they are narrowly tailored to serve a significant governmental interest and allow for reasonable alternative channels of communication

Carlson's Chrysler v. City of Concord

- New Hampshire Supreme Court - 2007
- Permit to erect an on-premise electronic sign was denied
- Court did not require the City to provide detailed proof that the regulation advances its purported interests of safety and aesthetics
- Held, the trial court erred in substituting its judgment for that of the City's

Vono v. Lewis

- Federal District Court in Rhode Island - 2009
- On-premise signs allowed; off-premise signage prohibited
- State law that restricts the content of billboards near highways is unconstitutional
- Court asked how or why allowing non-commercial billboards located where commercial billboards were permitted is more threatening to safety or detrimental to aesthetics

RTM Media, L.L.C. v. City of Houston

- U.S. District Court for the Southern District of Texas
- 2007 Ruling: Houston Sign Code's different treatment and regulation of commercial and non-commercial billboards was an impermissible content based regulation and violation of the First Amendment
- 2008 Ruling: *Discovery Network* distinguished; "reasonable fit" and *Central Hudson* tests satisfied
- Appeal pending