SIGN LAW 101

From the Foundations to the Frontier

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PART ONE: FOUNDATIONS

I. INTRODUCTION

Signs involve both the free speech right and the property right. In addition to the constitutional principles, various state laws also must be considered.

> 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 [U.S. Supreme] Court's treatment of the subject (sign regulation) be a virtual Tower of Babel, from which no definitive principles can be clearly drawn.

Justice Rehnquist, dissenting in *Metromedia v. San Diego*, 453 U.S. 490 (1981)

II. CONSTITUTIONAL FREEDOMS

1. Historical background

The speech freedom is rooted in history. The founders were keenly aware of Europe's bloody history of putting people to death, or depriving them of property or liberty, because of their religious, political, and philosophical positions and allegiances. The 1735 sedition trial of John Peter Zenger, for publishing anonymous criticisms of the British Crown, burned into the American consciousness the need for constitutional protection of press and other expressive freedoms. See *McIntyre v. Ohio Elections Com'n,* 514 U.S. 334, 361 (1995).

2. First Amendment to the U.S. Constitution (1791)

Congress shall make no law respecting
[1] the establishment of religion, or
[2] prohibiting the free exercise thereof; or
[3] abridging the freedom of speech, or
[4] of the press; or
[5] the right of the people peaceably to assemble, and
[6] to petition the Government for redress of grievances.

The First Amendment is made applicable to state and local governments, *Near v. State of Minnesota ex rel. Olson*, 51 S.Ct. 625 (1931); *Gitlow v. People of State of New York*, 45 S.Ct. 625 (1925), *Schneider v. State*, 308 U.S. 147 (1939), through the Fourteenth Amendment (1868):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the **privileges and immunities of citizens of the United States**; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [bolding added; more, not relevant here]

3. State Constitutions

State constitutions may not abridge freedoms protected by the federal constitution, but they may provide an independent source of additional freedoms. See *Texas Dept. of Transp. v. Barber*, 111 S.W.3d 86 (2003).

Texas (Art. I, section 8)	**Oregon (Article I, section 8)**
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. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.	No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely **on any subject whatever**; but every person shall be responsible for the abuse of this right. [Only in Oregon is it unconstitutional – under the state constitution – to make the on-site / off-site distinction, or the commercial - non-commercial distinction.]
California (Article I, section 2) Every person may freely speak, write and publish his or her sentiments **on all subjects**, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.	Under *Robins v. Pruneyard*, 23 Cal.3d 899 (1979), a large regional shopping mall is a traditional public forum, even if privately owned. Such a right under the state constitution does not violate any federal constitutional rights, *PruneYard v. Robins* 447 U.S. 74 (1980). Very few states follow *Pruneyard*. See *Cross v. State (TX)*, 2004 WL 1535606 (TX-App - El Paso No. 08-03-00283, July 8, 2004)

III. WHICH HAT?

The validity of sign rules often turns on the regulator's role or capacity, and corresponding authority.

* Regulator of private property: *Metromedia v. San Diego*, 453 U.S. 490 (1981), *Lorillard Tobacco v. Reilly,* 533 U.S. 525 (2001), *Ladue v. Gilleo*, 512 U.S. 43 (1994)

* Owner / manager of "traditional public forum" areas: *U.S. v. Grace,* 461 U.S. 171 (1983) (sidewalks around U.S. Supreme Court building); *U.S. v. Kokinda*, 497 U.S. 720 (1990) (non-thoroughfare sidewalk was not TPF), *Boos v. Berry*, 485 U.S. 312 (1988) (streets and sidewalks in foreign embassy section of Washington DC)

* Owner of property or systems that are not "traditional public forum": *Heffron v. ISKCON*, 452 U.S. 640 (1981) (religious solicitation at state fair), *Lehman v. Shaker Heights*, 418 U.S. 298 (1977) (political ad cards inside public transport vehicles), *Children of the Rosary v. Phoenix*, 154 F.3d 972 (9th Cir. 1998) (protest signs on exterior of municipal bus)

* Employer: *Horstkoetter v. Dept. of Public Safety*, 159 F.3d 1265 (10th Cir. 1998) (banning police officer from placing political signs in his own yard); see also: *Garcetti v. Ceballos*, 547 U.S. 410 (2006) and *City of San Diego v. Roe*, 543 U.S. 77 (2004), *Hoover v. Morales*, 164 F.3d 221 (5th Cir. 1998) (state rule, preventing professors from giving expert testimony for parties opposing state in litigation, violated First Amendment).

* Speaker: *People for the Ethical Treatment of Animals v. Gittens*, 414 F.3d 23(DC Cir. 2005) (city sponsored public art project, with private participants);

* Military: *Goldman v. Weinberger*, 475 U.S. 503 (1986) (military could prohibit rabbi from wearing of yarmulke on duty and in uniform); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996), citing to James M. Hirschhorn, The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights, 62 N.C. L.Rev. 177, 237-238 (1983).

* Compelling gov't messages on private property: *Wooley v. Maynard*, 430 U.S. 705 (1977) (vehicle license plates required state's ideological message - unconstitutional);

* Funder or Collector of Assessments Used For Speech or Advertising Purposes: *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997); *U.S. v. United Foods*, 533 U.S. 405 (2001); *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005); *Rust v. Sullivan*, 500 U.S. 173 (1991);

* Private parties / regulation by contract – statutory limits on sign bans

See VTCA, Property section 202.009 (property owners' association may not enforce prohibition on political signs 90 days before and 10 days after an election)

IV. THE *MOSLEY* PRINCIPLE: NO GOVERNMENT FAVORITISM

The most basic idea in sign regulation comes from *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972):

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. **But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.**

This statement must be read in the context of its time. It was issued before First Amendment protection had been extended to commercial speech; the *Metromedia* decision (below) limited its applicability to non-commercial speech.

> Although 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. See . . . *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

453 U.S. at 514-515.

Compare: VTCA, Local Government Code § 216.903

(a) In this section, "private real property" does not include real property subject to an easement or other encumbrance that allows a municipality to use the property for a public purpose.

(b) A municipal charter provision or ordinance that regulates signs may not, for a sign that contains **primarily a political message** and that is located on private real property with the consent of the property owner:

(1) prohibit the sign from being placed;
(2) require a permit or approval of the municipality or impose a fee for the sign to be placed;
(3) restrict the size of the sign; or
(4) provide for a charge for the removal of a political sign that is greater than the charge for removal of other signs regulated by ordinance.

(c) Subsection (b) does not apply to a sign, including a billboard, that contains primarily a political message on a temporary basis and that is generally available for rent or purchase to carry commercial advertising or other messages that are not primarily political.

(d) Subsection (b) does not apply to a sign that:

(1) has an effective area greater than 36 feet;
(2) is more than eight feet high;
(3) is illuminated; or
(4) has any moving elements.

V. COMMERCIAL SPEECH AND NON-COMMERCIAL SPEECH

1. Definitions and Distinctions

Commercial speech is debate in the marketplace of goods and services - everyday advertising. Non-commercial speech is debate in the marketplace of ideas and social policy.

The courts have defined commercial speech as that which "proposes a commercial transaction," *Pittsburgh Press v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385 (1973) or is "expression related solely to the economic interests of the speaker and its audience," *Central Hudson Gas & Electric v. Public Service Comm'n*, 447 U.S. 557, 561 (1980).

Non-commercial speech is also known as "core speech," "classical free speech," "fully protected speech" and other similar terms. Some cases indicate that full constitutional protection applies only when the subject is a matter of public concern. *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004) ("These cases make clear that public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.")

2. Abolition of the *Valentine* Doctrine

For most of the nation's history, the courts construed the free speech clause of the First Amendment as applying only to debate on topics of public concern, mostly religion and politics. Because of the historical and social importance of these topics, the courts considered commercial speech to be beneath the constitutional dignity, and thus outside the scope, of the First Amendment. "We are equally clear that the constitution imposes no such restraint on government as respects purely commercial advertising." *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

The *Valentine* doctrine was gradually eroded and then finally abolished through a series of cases in the mid 1970's. All of them concerned commercial speech in a setting which also presented important social issues.

Bigelow v. Virginia, 421 U.S. 809 (1975) (newspaper ad for abortion services which were illegal where advertised but legal where offered. Held: the advertisement was constitutionally protected).

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 760-61 (1976) (a ban on advertising prices for prescription drugs):

> The question whether there is a First Amendment exception for "commercial speech" is squarely before us. . . . The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment. [Answer: No.]

> *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977) (lawyer advertising):
> If commercial speech is to be distinguished, it 'must be distinguished by its content.' . . . [S]ignificant societal interests are served by such speech. **Advertising, though entirely commercial, may often carry information of import to significant issues of the day.** And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision making. (internal citations omitted)

3. **Categorization: Is the Message Commercial or Non-Commercial?**

<u>*Kasky v. Nike*</u>: Sport shoe company's PR campaign was alleged to have made false statements regarding labor conditions in its foreign factories. The paid announcements did not propose an economic transaction.

California Court of Appeal (3-0): 93 Cal.Rptr.2d 854 (2000): the ads were part of a public dialogue on a matter of public concern, and were protected as non-commercial speech.

California Supreme Court (4-3): 27 Cal.4th 939 (2002): The message is not removed from the category of commercial speech just because it is mixed with noncommercial speech. Even though the ads addressed a topic of public concern, the company was trying to protect its economic interests. The PR ads were commercial speech under both the federal and state constitutions; categorization requires analysis of three factors: the speaker, the intended audience, and the content of the message; advancing an economic transaction is not a necessary condition for speech to be commercial. Contrast: "Mixed Messages," below.

U.S. Supreme: cert. granted, 537 U.S. 1099 (2003); cert. dismissed as improvidently granted, 539 U.S. 654 (2003).

End result: case settled without final determination of category by U.S. Supreme Ct. The Cal. Supreme decision is precedential in that state, but has essentially no following in other states.

Commentary:

The *Nike* case has generated a huge body of academic commentary, almost all of which is highly critical of the Cal Supreme decision. A few samples:

* Volume 54 of the Case Western Reserve Law Review (2004) contains several articles on the problem of categorizing commercial speech, with an emphasis on the *Nike* case.
* Institutions in the Marketplace of Ideas, 57 Duke L.J. 821, 889+ (2008)
* Just Do It: *Kasky v. Nike, Inc.* Illustrates It Is Time to Abandon the Commercial Speech Doctrine, 12 Geo. Mason L. Rev. 179, 179+ (2003)
* A New Architecture of Commercial Speech Law, 31 Harv. J.L. & Pub. Pol'y 663, 715 (2008)
* Free Speech Protections for Corporations: Competing in the Markets of Commerce and Ideas, 117 Harv. L. Rev. 2272, 2295+ (2004)

4. Texas examples of categorization

Brammer v. KB Home Lone Star, L.P., 114 S.W.3d 101 (TX. App - Austin, 2003) (home buyers disparaging comments about builder was not commercial speech).

Pruett v. Harris County Bail Bond Bd., 249 S.W.3d 447 (TX 2008): advertisements by bail bond firms were commercial speech.

O'Quinn v. State Bar of Texas, 763 S.W.2d 397 (TX 1988) (ban on in-person solicitation by attorneys analyzed under *Central Hudson* test for commercial speech).

5. Mixed Messages

The "intertwined" test

Riley v. National Federation of the Blind, 487 U.S. 781, 796 (1988) ("we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech.")

Gaudiya Vaishnava Soc. v. San Francisco, 900 F.2d 1059, 1064 (9th Cir. 1990) (cert. denied 504 U.S. 914, 1992): "Where the pure speech and commercial speech by the nonprofits during these activities is inextricably intertwined, the entirety must be classified as noncommercial and we must apply the test for fully protected speech."

The "dominant purpose" test

Mastrovincenzo v. City of New York, 435 F.3d 78 (2nd Cir. 2006): Where an [tangible] object's dominant purpose is expressive, the vendor of such an object has a stronger claim to protection under the First Amendment; conversely, where an object has a dominant non-expressive purpose, it will be classified as a "mere commercial good[ ]," the sale of which likely falls outside the scope of the First Amendment.

VI. *Central Hudson*: The Standard Test for Regulation of Commercial Speech

1. Formalizing a Test for Restrictions on Commercial Speech

Central Hudson Gas and Electric v. Public Service Comm'n, 447 U.S. 557 (1980)

> "The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."

2. The *Central Hudson* four factor test:

> Commercial speech enjoys a limited degree of First Amendment protection. In *Central Hudson*, the Supreme Court established a four-part test for reviewing governmental restrictions on commercial speech. Specifically, the validity of a restriction on commercial speech depends on the following factors:
>
> (1) whether the speech is concerning a lawful activity and is not misleading;
> (2) whether the restriction seeks to implement a substantial governmental interest;
> (3) whether the restriction directly advances the governmental interest; and
> (4) whether the restriction reaches no further than necessary to accomplish the objective.

Eller Media Co. v. City of Houston, 101 S.W.3d 668 (Tex.App.- Houston [1 Dist.] 2003). See also: *Allstate Ins. Co. v. Abbott,* 495 F.3d 151 (5th Cir. 2007).

> The fourth prong is not a "least restrictive means" requirement. The Court requires only a " '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," a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decision makers to judge what manner of regulation may best be employed."

Board of Trustees SUNY v. Fox, 492 U.S. 469, 475 (1989). See also: *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993).

Texas state courts use *Central Hudson* analysis for restrictions on commercial speech. *Pruett v. Harris County Bail Bond Bd.*, 249 S.W.3d 447 (TX 2008).

3. Applying the *Central Hudson* Factors

Deceptiveness or illegality: *Neely v. Commission For Lawyer Discipline*, 196 S.W.3d 174 (TX-App - Houston [1 Dist.] 2006) (no protection for misleading commercial speech; three prong test applies only after first hurdle cleared).

Substantiality of the governmental interest: *Western States Medical Center v. Shalala,* 238 F.3d 1090, 1094 (9th Cir. 2001) ("There is insufficient evidence in the record to conclude that

the government has a substantial interest in preventing widespread compounding" [of custom drugs]); affirmed on other grounds, *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

Actual advancement and reasonable fit: *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) (newsrack rule distinguished between "commercial handbills" and other newspapers; city claimed justification in safety and esthetics; "We accept the validity of the city's proposition, but consider it an insufficient justification for the discrimination against respondents' use of newsracks that are no more harmful than the permitted newsracks, and have *only a minimal impact* on the overall number of newsracks on the city's sidewalks." (italic added)

RTM Media v. Houston, __ F.Supp.2d __, 2008 WL 4381540 (S.D. TX, Sept. 29, 2008) ("the City here has addressed its concern about billboards by regulating their size, shape, appearance, and number. This illustrates that the City has strongly considered both the positive and negative effects its prohibition. Additionally, the benefits derived from the prohibition of off-premise commercial signs has neither been "minute" nor "paltry" as is demonstrated by the 50.64% and 48.91% decrease in sign faces and sign structures, respectively, from 1980 until 2008. This is drastically different than the minor effect the newsrack ordinance had in *Discovery Network*, and RTM's reliance on that case is misplaced.)

Need for Evidence of Actual Advancement:

* *Ackerley of the Northwest v. Krochalis*, 108 F.3d 1095 (9th Cir. 1997) (billboard amortization scheme: "As a matter of law Seattle's ordinance, enacted to further the city's interest in esthetics and safety, is a constitutional restriction on commercial speech without detailed proof that the billboard regulation will in fact advance the city's interests.)

Contrast:

* *Pagan v. Fruchey*, 92 F.3d 766 (6th Cir. 2007) (en banc, 15 judges) (banning "car for sale" signs on public streets):

Eight vote majority: "If 'For Sale' signs are a threat to the physical safety of Glendale's citizens or implicate aesthetic concerns, it seems no great burden to require Glendale to come forward with some evidence of the threat or the particular concerns."

Seven vote minority: "The justification for forbidding the placement of for-sale automobiles on the public streets-for inspection by potential buyers - is simply obvious: people may be drawn to stand in the street for nontraffic purposes. The act of selling a car in a public street invites prospective buyers into the road to examine the car, and common sense supports a ban on such acts. To read into the First Amendment a requirement that governments go through pointless formalities before they enact such a commonsense rule is, in my view, to cheapen the grandeur of the First Amendment. To require a study, or testimony, or an affidavit, to demonstrate the obvious is to turn law into formalistic legalism. Nothing in Supreme Court precedent requires such a step."

Cert denied: 128 S.Ct. 711 (2007).

4. Criticism of *Central Hudson*

The concept of lower level protection for commercial speech and the *Central Hudson* test have long been criticized, primarily on the grounds that: 1) "speech is speech," 2) commercial advertising serves an information function which helps a capitalist, free market system work efficiently; 3) most people care more about information on how to spend their money than they do about the great debates. A leading article: Kozinski & Banner, Who's Afraid of Commercial Speech?, 76 Va.L.Rev. 627, 641 (1990).

In spite of the criticism, the Supreme Court has repeatedly rejected calls to abandon *Central Hudson*. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001).

5. Third Category for Non-Debate Messages?

Besides the commercial and non-commercial categories, many signs merely provide functional information which is not part of any meaningful debate: identifying the museum, stating the speed limit, warning of high voltage, giving time and temperature. Some courts put such signs in the "noncommercial" category, while others look to whether the sign message is part of public debate. The courts have not reached consensus on this important question. However, at least in the public employee setting, First Amendment rights only arise when the speech concerns a matter of public debate. *City of San Diego v. Roe*, 543 U.S. 77 (2004).

6. Conundrum: Exception for Time and Temperature

In general, courts are likely to invalidate a rule which states a general ban and then creates exceptions based on message content. *Metromedia*, 453 U.S. at 494, 514-515, *Ballen v. Redmond*, 466 F.3d 736 (9th Cir. 2006).

Courts are widely split on whether a general ban on moving images, with an exception for time and temperature (t&t) indicators, is constitutional. *Desert Outdoor v. Oakland*, 506 F.3d 798, 805 (9th Cir. 2007) ("Severing the exception for time and temperature displays did not cause § 1501 to restrict more speech. Since noncommercial speech is not covered under § 1501 at all, eliminating the exception had no actual impact on the legality of time and temperature displays under that ordinance"), *Chapin Furniture v. Town of Chapin*, 252 Fed.Appx. 566 (7th Cir. 2007) (revised ordinance removed exception for t&t; case moot), *La Tour v. Fayetteville, Ark*. (8th Cir. 2006) (ban on flashing, blinking and animated signs was valid, even though city admitted the rule was not enforced against time and temp indicators), *Solantic v. Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005) (t&t was among many content based exceptions; entire ordinance invalid), *Coral Springs Street Systems v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004) (court severed t&t and other exceptions, scattered throughout the code, to save it), *Rutherford Management v. Columbus* (167 N.C.App. 806, 606 S.E.2d 459, 2005) (apparently approving an exception for "time, temperature and other public information"), *Williams v. Denver*, 622 P.2d 542 (Colo. 1981) (t&t were excluded from definition of sign; ordinance valid); *Flying J Travel Plaza v. Commonwealth of Kentucky Transportation Cabinet*, 928 S.W.2d 344 (Kentucky 1996) (exception for t&t: "the state has chosen to allow some noncommercial messages to be displayed, and it must allow all noncommercial messages within the time frame to be displayed.")

Query: where is the debate in an accurate display of time and temperature? How and why is any meaningful debate affected in any way by a clock or thermometer? Or a STOP sign?

7. When *Central Hudson* Does Not Apply

Several courts have held that when a given regulation does not make the commercial / non-commercial distinction, then *Central Hudson* does not apply; instead, the courts invoke the TPM test. *Solantic v. Neptune Beach*, 410 F.3d 1250, 1268-69 n. 5 (11th Cir.2005) (where code did not distinguishing between commercial and noncommercial messages, "the *Central Hudson* test has no application"); *Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382, 386 (6th Cir. 1996) (ordinance regulating placement and size of signs in residential neighborhoods; "use of the commercial speech test would be inappropriate"); *Moser v. F.C.C.*, 46 F.3d 970, 973 (9th Cir. 1995) (where statute regulating automated telemarketing calls did not distinguish between commercial and non-commercial speech, *Central Hudson* test not applicable).

VII. THE FOUNDATION CASE ON BILLBOARDS: *METROMEDIA*

The *only* sign case decided by the U.S. Supreme Court, after First Amendment protection was extended to commercial speech, and which involves analysis of an entire sign ordinance, is *Metromedia v. San Diego*, 453 U.S. 490 (1981). The Court issued five dueling opinions which run over 90 pages in the law books. Note that the *Metromedia* decision does not define the word "billboard," and apparently uses the word to mean any large sign, since there are references to both "on site billboards" and "off site billboards."

The "rules" emerging from this "Tower of Babel" are:

1. Billboards May Be Banned (seven votes)

A city may completely ban billboards, permanent signs which display offsite commercial messages, so long as the ban does not discriminate against non-commercial speech. (Not decided: whether the government may impose a ban on billboards which covers both commercial and non-commercial messages. Most lower courts say YES. Examples: *Covenant Media v. North Charleston*, 493 F.3d 421 (4th Cir. 2007), *Get Outdoors v. San Diego*, 506 F.3d 886 (9th Cir. 2007), *Eller Media Co. v. City of Houston,* 101 S.W.3d 668 (Tex.App.-Houston [1 Dist.] 2003) (ban on new billboards - valid); *E. B. Elliott Adv. Co. v. Metropolitan Dade County* 425 F.2d 1141 (5th Cir. 1970 - same).

2. No Favoring of Commercial Speech (four votes, plus two concurring in result, on different reasoning)

The government may not favor commercial speech over non-commercial speech. Doing so inverts the hierarchy of First Amendment values, specifically the idea that commercial speech has lower protection. 4 votes (plurality). (While this is only a plurality holding, most lower courts treat it as controlling until they have something more definite. But see *Rappa v. New Castle County*, 18 F.3d 1043 (3rd Cir. 1994).)

3. No Favoring Certain Classes of Non-Commercial Messages (same vote as previous point)

The government may not give preferential sign display rights to certain classes of non-commercial speech (historical markers, *etc.*) while banning other classes. 4 votes (plurality). (This is simply a restatement of the *Mosley* principle, above.)

VIII. MESSAGE SUBSTITUTION

The government can avoid most "*Metromedia* problems" (*i.e.*, "favoring commercial speech" and "favoring particular noncommercial message") by including a "message substitution" in the sign ordinance. Such a provision which allows any noncommercial message to be substituted in place of any commercial message on any legal sign structure. *Outdoor Systems v. Mesa*, 997 F.2d 604 (9th Cir. 1993), *Get Outdoors v. San Diego*, 506 F.3d 886 (9th Cir. 2007). Sample language: *Get Outdoors v. City of Chula Vista*, 407 F.S.2d 1172, 1174 (SD CA 2005).

Message substitution does not solve all "favoring" problems. *Beaulieu v. Alabaster*, 454 F.3d 1219 (11th Cir. 2006).

IX. HIGHWAY BEAUTIFICATION

1. History of federal HBA
   Statute: 23 U.S.C. § 131
   Federal regs: 23 CFR part 750

2. Texas implementation of HBA
   State statute: Transportation Code Chapter 391
   Most important sections:
   - 005 (State HBA does not apply to political signs posted on private property 90 days before election)
   - 031 – exceptions for directionals, on-site sign
   - 032 - outdoor advertising allowable in commercial and industrial areas
   - 033 - purchase or acquisition by eminent domain
   - 034 - violative outdoor advertising signs are public nuisance; removal orders
   - 091 - information logo signs (traveler services)
   - 098 - variances

3. Consequences of lack of enforcement by State: loss of 10% of federal highway funds - See: *South Dakota v. Adams*, 506 F.Supp. 50 (S.D. 1980), affirmed: *State of S. D. v. Goldschmidt*, 635 F.2d 698 (8th Cir. 1980); see also: *Wheeler v. Commissioner of Highways, Com. of Ky.*, 822 F.2d 586 (6th Cir. 1987).

4. Concurrent jurisdiction - state and local

Brooks v. State, 226 S.W.3d 607 (Tex.App.-Houston [1 Dist.], 2007) (City has HBA jurisdiction in ETJ)

City of Houston v. Harris County Outdoor Advertising Ass'n, 732 S.W.2d 42 (Tex.App.- Hous. [14 Dist.], 1987 (amortization program did not violate HBA; city was free to adopt stricter standards than state law).

5. Phony rezoning for billboards

United Outdoor v. Business, Transportation and Housing Agency, 44 Cal.3d 242 (1988)

Files v. Arkansas State Highway and Transp. Dept., 925 S.W.2d 404 (AR 1996)

Lamar Central v. State of NY DOT, NY Supreme Court, Albany County, 2008 WL 1837386, April 25, 2008

6. Freeway overpasses:

Brown v. California Dept. Of Transp., 321 F.3d 1217 (9th Cir. 2003)

7. Adopt a Highway Program

State of Tex. v. Knights of Ku Klux Klan, 58 F.3d 1075 (5th Cir. 1995)

Contrast:

Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000) (facts highly similar to TX case, opposite conclusion)

San Diego Minutemen v. California Business Transp. and Housing Agency, --- F.Supp.2d ----, 2008 WL 2781138 (June 2008) (same result as MO case)

8. HBA and non-commercial speech

Texas Dept. of Transp. v. Barber, 111 S.W.3d 86 (2003) (off-site restriction applied to messages that "advertise and inform"; such language meant both commercial and non-commercial messages; valid.)

Maldonado v. Kempton, 422 F.Supp.2d 1169 (ND CA 2006), which led to: California Business and Professions Code 5275 (effective Jan. 1, 2008) - Transportation Dept does not regulate non-commercial messages.

X. IS THE REGULATION CONSTITUTIONAL?

1. Communicative and Non-Communicative Aspects of Signs

> While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike 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. It is common ground that 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. However, because regulation of a medium inevitably affects communication itself, it is not surprising that we have had occasion to review the constitutionality of municipal ordinances prohibiting the display of certain outdoor signs.

Ladue v. Gilleo, 512 U.S. 43, 48 (1994)

2. Is the Regulation "Content Neutral"?

Even the U.S. Supreme Court is inconsistent on the precise meaning of "content neutrality." Compare *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) (the content conveyed determines if the speech is subject restriction) with *Ward v. Rock Against Racism,* 491 U.S. 781 (1989) (real test is the government's intent as to censorship or favoritism.)

Legislator's sham purposes or secret intents are generally irrelevant; the legislation must be judged on its face. *Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274 (1977), *Chicago Board of Realtors v. Euclid*, 88 F3d 382 (6th Cir. 1996).

Some courts have applied the "just one look" or "pillar of salt" theory and held that if the government official must look at the message on the sign to determine which rules apply, then the rule is automatically "content based," and thus must satisfy the most demanding level of justification. *Foti v. Menlo Park*, 146 F.3d 629 (9th Cir. 1997). However, this view was rejected by the U.S. Supreme Court in *Hill v. Colorado* (a case involving protest signs):

> It is common in the law to examine the content of a communication to determine the speaker's purpose. Whether a particular statement constitutes a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods often depends on the precise content of the statement. **We have never held, or suggested, that it is improper to look at the content of an oral or**

written statement in order to determine whether a rule of law applies to a course of conduct.

530 U.S. 703, 704 (2000).

If the challenged law includes a general ban on a certain type of sign, and then creates exceptions which are defined by content, it will likely be deemed "content based." *Ballen v. Redmond*, 466 F.3d 736 (9th Cir. 2006) (ban on portable signs with message based exceptions; invalid; attorneys' fee award: $165K.)

3. The Onsite / Offsite Distinction

"Onsite" generally means that the message on the sign pertains to the use of the land on that same parcel. "Buy your new Ford" is onsite when mounted on the Ford dealership land, but "offsite" when mounted alongside the freeway three miles from the dealership.

The on-site / off-site distinction is used to create different regulations for store signs (which encourage locals to spend their money locally) and billboards (which usually encourage locals to spend their money somewhere else).

It is often argued that a distinction between "onsite" and "offsite" is a form of content based regulation, requiring justification under the strict scrutiny standard. Most courts have rejected this view, stating that "onsite" or "offsite" is a location rule, not a message content rule, and that the difference results from the sign owner's decision. *Clear Channel Outdoor v. City of Los Angeles*, 340 F.3d 810 (9th Cir. 2003), *Texas Dept. of Transportation v. Barber*, 111 S.W.3d 86 (2003).

4. On-Site / Off-Site for Non-Commercial Messages

Where is the location of an idea? Compare *Southlake Property Associates v. Morrow*, 112 F.3d 1114 (11th Cir. 1997) (an idea has no location, so all noncommercial messages must be considered onsite) with *Texas Dept. of Transportation v. Barber*, 111 S.W.3d 86 (2003) (non-commercial speech is onsite when located where some related activity occurs), and *National Advertising v. City of Orange*, 861 F.2d 246 (9th Cir. 1988) (same).

5. The TPM Test

When the regulation is deemed "content neutral," then it is usually analyzed as a "Time, Place and Manner" (TPM) rule.

> Because the regulation of a medium of expression "inevitably affects communication itself," *Gilleo*, 512 U.S. at 48, the Court has subjected time, place and manner restrictions on speech to the following test: They "are valid provided
> [1] that they are justified without reference to the content of the regulated speech,
> [2] that they are narrowly tailored

[3] to serve a significant governmental interest, and
[4] that they leave open ample alternative channels for communication of the information." [citations omitted]

Prime Media, Inc. v. City of Brentwood, Tenn., 398 F.3d 814 (6th Cir. 2005).

6. Commercial Speech: The *Central Hudson* Test

When the challenged regulation affects only commercial speech, then most courts apply the *Central Hudson* test, discussed above. The TPM rule and the *Central Hudson* test are both intermediate levels of scrutiny, and are highly similar in application.

7. Non-Commercial Speech

When a regulation is not content neutral, and affects non-commercial speech, then the constitutional test is "strict scrutiny."

Burson v. Freeman, 504 U.S. 191 (1992) is one of the few content-based cases to pass this level of review. A Tennessee law forbade vote solicitation and electioneering within 100 feet of the polls on election day. Scalia concurred in the result reached by a four vote plurality; Thomas did not participate, so the effective vote was 5-3. The Court held:

> The Tennessee restriction under consideration, however, is not a facially content-neutral time, place, or manner restriction. Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech, such as commercial solicitation, distribution, and display. This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic. [¶] Content-based restrictions also have been held to raise Fourteenth Amendment equal protection concerns because, in the course of regulating speech, such restrictions differentiate between types of speech. See [*Mosley, Vincent*]. Under either a free speech or equal protection theory, a content-based regulation of political speech in a public forum is valid only if it can survive strict scrutiny.
>
> As a facially content-based restriction on political speech in a public forum, [the subject state law] must be subjected to exacting scrutiny: The State must show that the "regulation is
> [1] necessary to serve a
> [2] compelling state interest and
> [3] that it is narrowly drawn to achieve that end."

504 U.S. at 197 (internal citations omitted).

The majority found this test satisfied by the "compelling state interest" in reducing voter fraud and intimidation, and the "narrow tailoring" of the 100 foot zone (place) and the

single day (time). Later cases increasing the buffer zone distance are inconsistent. See *Anderson v. Spear*, 356 F.3d 651, 662 (6th Cir. 2004).

8. Alternate Tests

A few cases have applied other tests.

"Punishing Past Speech": *Ackerley Communications of Massachusetts, Inc. v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989).

"Site Relevance" as an alternative means of justifying content-based exceptions from a general ban: *Rappa v. New Castle County*, 18 F.3d 1043 (3rd Cir. 1994) (long, highly theoretical opinion by Judge Becker; Judge Alito (now Justice Alito) joined in result; Judge Garth dissented, arguing that the new approach violated Supreme Court precedent and was cut from "whole cloth."

Unreasonableness: In *Combined Communications v. City of Denver,* 542 P.2d 79 (1975), the Colorado Supreme Court struck down the city's billboard regulation on the ground that it was unreasonable. The court said that the city charter provision granting power to the city council to "regulate and restrict" buildings did not include the power to prohibit the entire billboard industry.

9. STRUCTURAL AND LOCATION RULES

Courts routinely sustain rules about sign size, height, setback, illumination, density, spacing, orientation, and illumination, so long as they apply without discrimination as to message content. *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935 (Tex.Civ.App., 1978); *Prime Media v. City of Brentwood*, 398 F.3d 814 (6th Cir. 2005). When severable, such rules are independently enforceable, even when the law contains some unconstitutional provisions, *Valley Outdoor v. County of Riverside*, 337 F.3d 1111 (9th Cir. 2003). *Covenant Media v. North Charleston*, 493 F.3d 421(4th Cir. 2007) (violation of separation rule meant signco had no standing).

10. DISCRETION IN PERMITTING (PRIOR RESTRAINTS)

In general, a permit system that lacks objective standards for approval or denial is unconstitutional. *Desert Outdoor v. Moreno Valley*, 103 F.3d 814 (9th Cir. 1996). Contrast: *Lamar Advertising v. Twin Falls Idaho*, 981 P.2d 1146 (1999).

Yet discretion is not necessarily fatal. When discretion is exercised as to location and architectural factors, rather than message content or graphic design, and the discretion is "sufficiently guided," most courts will approve. See, for example: *Rodriguez v. Solis*, 1 Cal.App.4th 495 (1991). Discussion of how much guidance is enough, with survey of several relevant cases see: *World Wide Rush v. Los Angeles*, 563 F.Supp.2d 1132 (CD CA 2008).

Because commercial speech is "more verifiable" than other speech and is so important to business, traditional prohibitions against prior restraint may not be applicable. *Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387, 394 (Tex.App.- Austin 2000, no pet.)

No First Amendment violation from a from permit requirement in a sign ordinance. *Purnell v. State*, 921 S.W.2d 432 (Tex.App.- Houston [1 Dist.], 1996).

When no permit is required for the particular type of display, there is no "prior restraint" issue. *Brazos Valley Coalition for Life v. Bryan*, 421 F.3d 314 (5th Cir. 2005).

XI. RESIDENTIAL SIGNS

1. Political and Protest Signs

A city may not ban political and other non-commercial signs from residential areas. *Ladue v. Gilleo*, 512 U.S. 43 (1994). However, reasonable TPM rules are permissible.

TX Property Code 202.009. Regulation of Display of Political Signs - Homeowners' Ass'n cannot prohibit political signs displayed 90 days before, and ten days after, an election.

2. Commercial Signs

Most courts approve rules which forbid commercial signs in residential neighborhoods, even if they make exceptions for garage / yard sales and signs regarding "home based occupations." *Rochester Hills v. Schultz*, 592 N.W.2d 69 (Mich. 1999).

Jim Gall Auctioneers v. Coral Gables, 210 F.3d 1331 (11th Cir. 2000) (city could prohibit advertising and conduct of commercial auctions in residential neighborhoods.)

3. REFS – Real Estate for Sale Signs

Under U.S. Supreme Court precedent, a city may not ban on-site "real estate for sale" signs in residential areas. *Linmark Realty v. Willingboro*, 431 U.S. 85 (1977).

XII. TRADEMARK

Blockbuster v. Tempe, 141 F.3d 1295 (9th Cir. 1998) (city could not force conformance with color scheme for shopping area because the TM was federally registered; however, city could limit the places where the TM could be displayed).

Lisa's Party City v. Town of Henrietta, 185 F.3d 12 (2nd Cir., 1999) (requiring conformance with local color scheme did not change federal registration, and was permissible).

XIII. POLITICAL, CAMPAIGN AND ELECTION SIGNS

Key cases:

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (complete ban on all signs on utility poles and guy wires: valid)

Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976) (limits on size and number)

Sussli v. San Mateo, 120 Cal.App.3d 1 (1981) (city can ban all inanimate signs on public property)*; see also: Grossbaum v. Indianapolis-Marion County Building Authority,* 100 F.3d 1287, 1298 (7th Cir. 1996) (counting seven votes from *Capitol Square v. Pinette,* 515 US 753 (1995) for the proposition that the state could ban all unattended private displays in the public forum.

G.K. Ltd. Travel v. Lake Oswego, 436 F.3d 1064, 1067 (9th Cir. 2006) (display right turns on event – election – not message; valid)

Verilli v. Concord, 548 F.2d 262 (9th Cir. 1977)

Whitton v. Gladstone, 54 F.3d 1400 (8th Cir. 1995)

Arlington County Republic Party v. Arlington County, 983 F.2d 587 (4th Cir. 1993)

Beaulieu v. Alabaster, 454 F.3d 1219 (11th Cir. 2006) (political signs only in residential neighborhoods; unconstitutional)

See: , Morrison: "Regulating Election Signs," Municipal Lawyer Magazine (published by IMLA, International Municipal Lawyers Ass'n), July/August 2008.

1. LIMITS ON DISPLAY TIME

Most sign ordinances contain special rules for the display of temporary signs with messages related to elections. Typically they say that such signs may be displayed only a certain number of days before and after an election. **When challenged in court, display time limits on election oriented signs are almost always invalidated.** *Whitton, Arlington* (above)*, Painesville v. Dworken*, 89 Ohio St. 3d 564 (Oh 2000), *Collier v. Tacoma*, 121 Wash. 2d 737, 854 P.2d 1046 (WA 1993). Reasons: if the display period is shorter than that allowed for temporary construction signs, then the city has violated the *Metromedia* rule of "no favoring of commercial speech." Also, the rules give preference to one class of non-commercial message – election related – and under the *Mosley* principle, the courts insist that all types of noncommercial speech be treated equally. *Curry v. Prince George's* County, 33 FS2d 447, 454 (D MD, 1999).

However, size and height rules are valid, so long as they are reasonable and non-discriminatory. *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976), *American Legion Post 7 v. City of Durham NC*, 239 F.3d 601 (4th Cir. 2001).

While message substitution solves or minimizes many problems, it is not a cure-all. For example, when a lawyer ran for an elective judgeship, the Eleventh Circuit held she should not be required to cover up her law ofc. sign in order to display an election sign on the same property. *Beaulieu v. Alabaster*, 454 F.3d 1219 (11th Cir. 2006).

XIV. PUBLIC FORUM

Rules concerning private party expression while on government property are analyzed under the "public forum doctrine" rather than the *Metromedia* case. This recognizes that the government's property rights can sometimes shift the scale of justification.

1. Traditional Forums

"Traditional public forums" are places where, by cultural tradition, people have historically expressed their views on debatable topics. They include the surfaces of city streets, public parks, and the surfaces of public sidewalks which are connected to the main pedestrian circulation system of the city. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), *U.S. v. Kokinda*, 497 U.S. 720 (1990), *Boos v. Berry*, 485 U.S. 312 (1988), *Frisby v. Schultz*, 487 U.S. 474 (1988), *Hill v. Colorado*, 530 U.S. 703 (2000), *U.S. v. Grace,* 461 U.S. 171 (1983), *Burson v. Freeman*, 504 U.S. 191 (1992). Some courts also include the "curtilage" – the area immediately around the exterior of major governmental buildings, such as courthouses, city halls, and state legislatures.

In the "traditional public forum" areas, the rules are essentially the same as under *Metromedia*. While protest and other non-commercial signs must be allowed, they can be regulated by TPM rules. The government may require that all private party speech be hand-held or personally attended. *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1298 (7th Cir. 1996), *Sussli v. San Mateo* (above). The government can prohibit commercial activity in traditional public forum areas, *Lavery v. Laguna Beach*, 64 Fed.Appx. 23, 2003 WL 21206150 (9th Cir. 2003).

2. TPF: Ownership Is Irrelevant

As long as the area is used as a public sidewalk, ownership is irrelevant. *ACLU v. Las Vegas*, 333 F.3d 1092 (9th Cir. 2002), *First Unitarian Church v. Salt Lake City*, 308 F.3d 1114 (10th Cir. 2002) (sidewalk sold to church, reserving easement for public access and passage; it was still a traditional public forum); *Utah Gospel Mission v. Salt Lake City*, 425 F.3d 1249 (10th Cir. 2005) (public access easement sold to church; area redesigned as ecclesiastical park; public forum status destroyed).

In California and a few other states, major regional shopping centers are considered "traditional public forum" areas even though they are privately owned. Reason: the private owners have opened them to the public, and they serve the same social functions as the traditional street bazaar. *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979). The "Pruneyard Rule" does not violate property rights protected by the U.S. Constitution. *Pruneyard v. Robins*, 447 U.S. 74 (1980). The rule, rooted in the free speech right of the state constitution, was recently reconfirmed by the California Supreme Court, *Fashion Valley Mall v. NLRB*, Case No. S144753 (Dec. 24, 2007) (2007 WL 4472241).

3. Designated Public Forums

See *Christ's Bride Ministries v. SEPTA*, 148 F.3d 242 (3rd Cir., 1998).

4. Non-Traditional Public Forums (also called "limited public forums")

These areas include every thing else owned or controlled by the government, including:

*city websites, *Putnam Pit, Inc., v. City of Cookeville*, 221 F.3d 834 (6th Cir. 2000)
* park and bus benches, *Uptown Pawn and Jewelry v. City of Hollywood FL*., 337 F.3d 1275 (11th Cir. 2003)
* transportation terminals, *Airline Pilots Ass'n v. Dept. of Aviation, City of Chicago,* 45 F3d 1144 (7th Cir. 1995), *Lebron v. National Railroad Passenger Corp.*, 69 F.3d 650 (2nd Cir. 1995)
* city owned vehicles, *Packer v. Utah,* 285 U.S. 105 (1932), *Lehman v. Shaker Heights*, 418 U.S. 298 (1977), *New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123 (2d Cir. 1998)
* interiors of city buildings, *Hopper v. Pasco*, 241 F.3d 1067 (9th Cir. 2001)
* utility poles and guy wires, *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984)
* school district owned baseball fields: *DiLoreto v. Downy Unified School Dist.*, 196 F.3d 958 (1999)

In these areas, the rules are almost completely opposite of *Metromedia*. The city can ban all noncommercial speech and still accept commercial messages. *Lehman*, *DiLoreto*. But, if any noncommercial messages are accepted, all must be accepted. *Brown v. Caltrans*, 321 F.3d 1217 (9th Cir. 2003) (no preferential treatment of govt'l and official flags). Usually, this rule forces the gov't into an "all or none" choice, and usually the choice is "none." The gov't may not exclude certain messages as "in poor taste" or "too controversial." *Hopper v. Pasco*, 241 F.3d 1067 (9th Cir. 2001).

5. Categorical Treatment of Commercial Speech

The government can accept commercial messages on a categorical basis (*i.e.*, car dealers are okay but pawn shops are not). *Uptown Pawn and Jewelry v. City of Hollywood FL*., 337 F.3d 1275 (11th Cir. 2003). However, within a category, all members must be treated equally; viewpoint neutrality is required.

XV. Right to Visibility?

At common law: *Regency Outdoor v. Los Angeles*, 39 Cal.4th 507 (2006)
As a statutory right: *Garden Club of Georgia v. Shackelford*, 274 Ga. 653, 560 S.E.2d 522 (GA 2002)

PART TWO: FRONTIER ISSUES

XVI. DIGITAL CONVERSION - THE NEW SIGN WAR?

1. Technologies and Economics

2. HBA: "guidance memo" from Fed Hiway; "intermittent light" rule not violated by digitals displays

3. Ability of governments to prohibit:
   Naser Jewelers, Inc. v. City Of Concord, 513 F.3d 27 (1st Cir. 2008) (complete ban on signs which displayed electronically changeable messages; valid)

4. Digital conversion as expansion of a non-conformity:
   Adams Outdoor v. Bd Zoning Appeals, Virginia Beach, 645 S.E.2d 271 (VA, 2007).

5. Legislative efforts to create a statutory right to digital conversion

XVII. NEW FORMATS FOR BILLBOARDS

1. Small format outdoor – outdoor malls, along city streets

2. Tall Wall signs: *Beverly Blvd. v. West Hollywood* (9th Cir Nos 05-55961, 05-55970, 05-56384, 238 Fed.Appx. 210, 2007 WL 1649843), cert denied.

3. Sign Twirlers - see *Ballen v. Redmond*, 466 F.3d 736 (9th Cir. 2006)

4. "Spectacular signs" as part of major new commercial developments

5. Freeway signs in the ROW ("Amber Alert," "Highway Conditions," etc.) – Test case proposed in California – highly controversial

6. Freeway landscaping shaped into corporate logos

XVIII. MOBILE BILLBOARDS

Fifth Avenue Coach v. New York City, 221 U.S. 467 (1911)
Railway Express Agency v. New York City, 336 U.S. 106 (1949)
People v. Target Advertising, 184 Misc.2d 903, 708 N.Y.S.2d 597 (2000)
People v. Professional Truck Leasing Systems, 185 Misc.2d 734, 713 N.Y.S.2d 651 (2000); on appeal: 737 N.Y.S. 2d 767 (2002)

Showing Animals Respect and Kindness v. West Hollywood, 166 Cal.App.4th 815 (2008).

Center for Bio-Ethical Reform v. Honolulu, 435 F.3d 910 (9th Cir 2006) (ban on signs towed behind low flying aircraft; valid)

Compare: *Banner Advertising v. People of Boulder*, 868 P2d 1077 (CO, 1994) (complete FAA pre-emption)

XIX. GOVERNMENT AS MARKET PARTICIPANT?

Metro Lights v. City of Los Angeles, 488 F.Supp.2d 927 (CD CA 2006)

Public / Private partnerships: risky?