Reconciling Speech and Structural Elements in Sign Regulation

Darrel C. Menthe*

TABLE OF CONTENTS

I. INTRODUCTION

Signs are both physical structures and speech acts. Consequently, sign regulation is simultaneously the regulation of land use and speech. This dual character has hindered the development of a coherent constitutional regime for sign regulation because the jurisprudential tendencies of these two areas of law pull in opposite directions. In disputes over zoning and land use regulation, courts commonly favor broad applications of police power, fearing that overeager "takings" jurisprudence might turn every adverse decision into a constitutional deprivation. For regulations concerning speech, however, an additional liberty interest is at stake: the fundamental right of free speech protected by the First Amendment and parallel state constitutional

* Darrel C. Menthe, J.D. Stanford (1996), is an attorney with McGuireWoods LLP in Los Angeles, California. I would like to thank the staff of Gonzaga Law Review for a merciful but insightful review.

provisions. Decisions concerning speech regulation are generally permissive of speech and hostile to the exercise of police power.

These contradictory pressures bear heavily on substantive outcomes. Of particular interest in designing sign regulation is that speech regulation and land-use regulation differ radically in their treatment of government permitting schemes and the availability of injunctive relief. Under the First Amendment doctrine prohibiting "prior restraints," injunctions to prevent speech acts are rarely permitted.[1] Similarly, licensing schemes for speech are strictly controlled.[2] The rule has become clear that a licensing scheme that gives an official "unbridled discretion" to accept or reject an application runs afoul of First Amendment protections against prior restraints.[3] Permit requirements for speech are often subject to high levels of judicial scrutiny requiring they be tailored to substantial governmental interests.[4] So, a speaker may not be prohibited from speaking except as punishment in response to an adverse judicial determination.

By contrast, courts assume that a municipality or other local authority may require a land owner to obtain permits before commencing any activity. Injunctions against unpermitted activities are readily enforced. Decisions by municipal authorities concerning building permits and zoning are generally subject to much lower standards of judicial scrutiny and are even accorded deference.[5] One of the more significant checks on land-use regulation is the doctrine of vested rights, which is often raised in sign cases.[6] However, the doctrine of vested rights is not a First Amendment doctrine; rather, it protects property owners who have already acquired permits for certain activities from subsequent government revocation of those permits. The doctrine of vested rights is rooted in the protection of property rights.[7]

It is worth observing that differences between land-use regulation and speech regulation stem not just from doctrine, but from judicial outlook. In each sphere of regulation, courts (and legislatures) work from different assumptions about: (1) the nature of the plaintiffs; (2) the proper role of government; (3) the proper functioning

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1. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556-59 (1976) (discussing cases in which the Court has consistently held that prior restraints are "the least tolerable infringement on First Amendment rights."). The term "prior restraint" describes an order forbidding certain communications that is issued before the communications occur. Alexander v. U.S, 509 U.S. 544, 549 (1993). Temporary restraining orders and permanent injunctions- i.e., court orders that actually forbid speech activities - are classic examples of prior restraints. *Id.*

2. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969).

3. City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 755-56 (1988); *Shuttlesworth*, 394 U.S. at 151; Niemotko v. Maryland, 340 U.S. 268, 271 (1951).

4. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567 (1991) (citing United States v. O'Brien, 391 U.S. 367, 376-77 (1968)).

5. *See, e.g.*, Scott v. Greenville County, 716 F.2d 1409, 1416, 1420 (4th Cir. 1983).

6. *See infra* Part I.B.3 for an in-depth discussion of the vested rights doctrine.

7. *See generally* Grayson P. Hanes & J. Randall Minchew, *On Vested Rights to Land Use and Development*, 46 WASH. & LEE L. REV. 373 (1989).

of permit regimes; and (4) the proper role of injunctive relief. Like neighboring gravitational bodies, the doctrines behind speech and land-use regulation exert conflicting, tidal forces on the courts.

In theory, the distinction between speech regulation and the proper exercise of police power to regulate land use seems relatively clear. More than half a century ago, Justice Frankfurter explained in his concurrence to *Niemotko v. Maryland,* "A licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like."[8] For a sign, however, the theoretical distinction so clear to Justice Frankfurter is significantly attenuated. As the Delaware Court of Chancery explained, "Implicit in the statutory scheme that governs the regulation of outdoor advertising, is the premise that erecting an outdoor advertising sign without a permit is enjoinable conduct *per se*."[9] Such a premise runs contrary to standard First Amendment treatment of other forms of speech. Recently, a federal court in Illinois became among the first to recognize that it was laboring under two disparate strands of case law.[10]

To make matters worse, the most significant body of case law concerning the interaction of land-use and speech regulation deals with the regulation of pornographic businesses. Those cases are a frequent source of precedents for outdoor advertising. Of course, a whole host of unrelated concerns occupy that field of law. The result is very unhelpful language. For example, the sweeping language of *Young v. American Mini Theatres, Inc.,* concerning regulation of adult businesses, broadly pronounced that content regulation should be the norm for commercial speech:

> We have recently held that the First Amendment affords some protection to commercial speech. We have also made it clear, however, that the content of a particular advertisement may determine the extent of its protection. A public rapid transit system may accept some advertisements and reject others. A state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere, and regulatory commissions may prohibit businessmen from making statements which, though literally true, are potentially deceptive. The measure of constitutional protection to be afforded commercial speech will surely be governed largely by the content of the communication.[11]

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8. *Niemotko*, 340 U.S. at 282 (Frankfurter, J., concurring).

9. Del. River & Bay Auth. v. Del. Outdoor Adver., Inc. 1998 WL 83056 *4 (Del. Ch. 1998).

10. Covenant Media of Ill., L.L.C. v. City of Des Plaines, 476 F. Supp. 2d 967, 978-82 (N.D. Ill. 2007).

11. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 68-69 (1976) (citations omitted).

Such language departs from the normal understanding that "time, place, and manner" regulation "must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication."[12] Such language also runs counter to the now familiar *Central Hudson* test that, at least on its face, requires that content-based regulation of commercial speech be narrowly tailored to a substantial governmental interest.[13]

Equally difficult is the fact that sign regulation is generally justified on aesthetic grounds.[14] Aesthetic concerns generally do not inform speech regulation.[15] Although traditionally regarded as part of the police power,[16] aesthetic justifications for regulation closely resemble otherwise impermissible "content-based" regulation inasmuch as aesthetic preference can be protected expressive activity under the First Amendment.[17] Aesthetic judgments by public authorities affect the content of expression, even if they do not restrict propositional content.

Rather than confront the First Amendment implications of aesthetic regulation of signs, courts frequently make the unappealing decision to exclude such expressive activity from First Amendment protection altogether, thereby treating a person's interest in a sign entirely as a property interest.

So, for example, the prohibition on prior restraints is all but read out of sign cases. The *per se* nuisance doctrine allows a local jurisdiction to declare that any violation of a city ordinance is a nuisance and abate it with summary process or preliminary injunction. *Per se* nuisance doctrine also allows jurisdictions to declare, by legislative fiat, that certain activities constitute public nuisances without adducing any evidence of harm to the public. In the context of sign regulations, the *per se* nuisance doctrine permits local governments to order signs torn down with minimal judicial process or permits a preliminary injunction to remove signs. If the First Amendment were honored for signs as for other speech acts, the prohibition on prior

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12. Thomas v. Chicago Park Dist., 534 U.S. 316, 323-24 (2002) (quoting Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992)); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("time, place or manner restrictions . . . are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

13. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564-66 (1980).

14. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510-12 (1981).

15. *See* Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984).

16. *See id.*

17. *See* White House Vigil for ERA Comm. v. Clark, 746 F.2d 1518, 1536 n.115 (D.C. Cir. 1984).

restraints would restrict the application of the *per se* nuisance doctrine for signs, permitting injunctive relief against such a "nuisance" only where public harm is actually justified by competent evidence. Worse yet, once a sign is removed under this doctrine, courts frequently hold that the sign owner has lost standing to test the constitutionality of the applicable regulation. Thus, even a gross constitutional violation becomes effectively unchallengeable. This also does not honor First Amendment principles.

Unfortunately, the U.S. Supreme Court has not considered sign regulation in any serious way since *Metromedia* was decided nearly thirty years ago.[18] Signs have made it to the Supreme Court, but sign law has not. *Morse v. Frederick*, like *Cohen v. California* before it, may have involved publicly-displayed signs, but the temporary nature of the written messages in those cases makes them analytically indistinguishable from utterance cases.[19]

This article argues that signs are not ordinary structures and the law must take account of this fact. Signs involve expressive activity that, to some extent, falls under the protection of the First Amendment. There must, therefore, be a place for limited First Amendment challenges to various regulatory, zoning, and licensing schemes applied to other land-use activities. At some point, we must find that the burden on expression becomes significant enough to trigger application of First Amendment principles, even in areas traditionally considered to be purely land-use regulation. This article argues that the Constitution requires us to recognize the liberty interest at stake in the display of signs—their size, shape, location, message, color, configuration, and content—and guard against the arbitrary exercise of police power by local governments in regulating for "aesthetic" purposes.

Supreme Court precedent is not without guidance in this area of mixed regulation. In *United States v. O'Brien,* a person was arrested for burning his draft card in a protest against the Vietnam War, the Court stated: "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[20]

The Court in *O'Brien* announced a test now known as intermediate scrutiny.[21] For a variety of reasons, it has never been fully applied to sign cases. And when applied, as explained in this article, it has not been applied consistently. This author believes the reason is that signs are not a "course of conduct"—they are permanent structures or at least not bound by time into discrete events. A set of rules designed to

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

19. Morse v. Frederick, 127 S.Ct. 2618, 2622 (2007) (involving a banner that read "Bong Hits 4 Jesus" held by students at an Olympic Torch Relay); Cohen v. California, 403 U.S. 15, 16 (1971) (involving a jacket that read "Fuck the Draft" worn by the defendant in a courthouse).

20. United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

21. *See id.* at 377.

govern moments of expression is ill-suited to comprehend the competing interests at stake in sign regulation.

This article argues that the scrutiny regimes (generally known as strict scrutiny, intermediate scrutiny, rational basis review) do not work well for signs. For instance, the police power to regulate "time, place, and manner" of non-content-based speech regulation[22] is ill-suited to signage for a variety of reasons. The concept of regulating the "manner" of speech concerns physical or verbal conduct such as selling books. Signs cannot be easily regulated temporally because, for signs, the speech "act" is permanent or, at least, ongoing. Competing interests are going to be in tension at all times and little prioritization can be done. Additionally, place matters a great deal more in signage cases than in ordinary speech cases. In ordinary speech cases, the normal place of controversy is the public square or some public place where a speaker can be heard. Signs, by contrast, are almost always on private property. Indeed, the *location* of a sign can be part of its message.[23]

The content-based/content-neutral distinction that defines much of First Amendment law is also difficult to apply to sign regulation. All sign regulation lies somewhere on a continuum from "pure" land-use regulation (e.g., requiring that signs meet safety codes) to a pure regulation of expression (e.g., a requirement that certain signs be "creative").[24] The underlying problem, as noted above, is that aesthetic considerations drive sign regulation and all aesthetic considerations are content-based to a greater or lesser extent. Deciding when a regulation is content-based in the sign context borders on the arbitrary. Yet flipping the "content-based" switch triggers an awesome level of judicial scrutiny or the total lack of it.[25]

Fortunately, there is a means of escape from the tyranny of choosing a level of judicial scrutiny. The Supreme Court, in some areas of fundamental rights, has begun to move from applying a level of scrutiny to an "undue burden" analysis.[26] The "undue burden" standard arose, in the first instance, in First Amendment overbreadth cases (i.e. cases where statutes are challenged because they not only restrict unprotected speech, but also constitutionally-protected speech).[27] But the "undue burden" standard has wider applications. In *U.S. v. National Treasury Employees Union*, the Supreme Court applied this overbreadth standard to strike down a rule

22. *See* Thomas v. Chicago Park Dist., 534 U.S. 316, 323 (2002).

23. City of LaDue v. Gilleo, 512 U.S. 43, 56-58 (1994).

24. *E.g.*, West Hollywood, Cal., Municipal Code § 19.34.060 (2000).

25. *See* Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring). *But see* Grutter v. Bollinger, 539 U.S. 306, 326-27 (2003) (arguing that strict scrutiny is not always fatal).

26. *See, e.g.*, Crawford v. Marion County Election Bd., 128 S.Ct. 1610, 1616 (2008) (concerning the right to vote); Washington v. Glucksberg, 521 U.S. 702, 720-22 (1997) (concerning assisted suicide); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 874 (1992) (concerning abortion).

27. *See* Paul M. Secunda, *Lawrence's Quintessential Millian Moment and its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL. L. REV. 117, 155 n.197 (2005).

prohibiting federal employees from receiving any compensation for making speeches or writing articles.[28] It did so with reference to the burden on speech posed by such a rule.[29] Indeed, some commentators argue that several well-known First Amendment precedents are best understood as "undue burden" cases.[30] Of course, the most well-known application of the "undue burden" standard is not in a speech case at all, but in *Planned Parenthood v. Casey*,[31] the case that defines modern abortion law.

As a balancing test, the "undue burden" approach is also similar to *Pickering v. Board of Ed.* and its progeny.[32] In *Pickering*, the Supreme Court held that when an important governmental interest conflicts with the First Amendment, the competing interests should be carefully balanced.[33] Such an approach recognizes that First Amendment interests are not being balanced merely against a generalized police power, but against other equally important societal interests.

This general approach can be made workable for sign regulation. Under an "undue burden" standard, courts would inquire whether there is a "substantial obstacle" placed on free speech by the regulation.[34] Such analysis is necessarily fact-intensive and contextual. For example, a rule exempting signs of historic or cultural interest from certain size limitations might not ordinarily seem to burden the right to speak but does become something of a burden on speech where the property changes hands and the new owner wishes to display a different message.

A new standard of this kind invites many problems to be sure. Certainly it will require considerable judicial work to apply the standard, and there will be some confusion and inconsistent rulings in the meantime. However, a new rule is necessary because the current law is so inconsistent and unpredictable that it is simply indefensible. Thus, to explain why a new constitutional framework is necessary for signs, this article attempts to provide a thorough explanation of how and why existing law fails to adequately address any of the interests involved.

Part II of this article discusses the traditional application of land-use doctrines in sign cases with particular emphasis on the doctrine of vested rights. It shows that

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28. United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 465-70, 477 (1995).

29. *Id.* at 468-70. In discussing the burden this regulation placed on speech, Justice Stevens recalled Samuel Johnson's famous line that "nobody but a blockhead ever wrote, except for money." *Id.* at 469 n.14.

30. *E.g.*, John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1117 n.68 (2005) (commenting on Cohen v. California, 403 U.S. 15 (1971)); Barry P. McDonald, *Government Regulation or Other "Abridgments" of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment*, 54 EMORY L.J. 979, 1041 (2005).

31. 505 U.S. 833, 874 (1992).

32. Pickering v. Board of Ed., 391 U.S. 563, 568 (1968) ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.")

33. *Id.* at 568.

34. *See Casey*, 505 U.S. at 877.

application of the vested rights doctrine disregards significant interests in free speech and expression in violation of constitutional principles.

Part III discusses the First Amendment considerations that should be at issue in sign cases. It further explains that, even where courts address the First Amendment, they often misapply First Amendment principles in ways that both undermine the free speech values and the judicial system as a whole.

Finally, Part IV elaborates upon a more constitutionally sound approach to sign regulation that honors First Amendment concerns without negating states' traditional police power or neutering legitimate aesthetic regulation.

II. LAND USE DOCTRINES IN SIGN CASES

A. *Vested Rights Doctrine Generally*

One of the core doctrines of land use regulation is the "vested rights" doctrine. Under this doctrine, the exercise of police power to bar a land owner from engaging in certain activity is constitutionally impermissible where the property owner has a "vested right" in that regulated activity.[35] As explained below, the vested rights doctrine has been the primary mechanism through which sign owners assert standing to challenge sign regulations. It is also the primary method for disposing of those challenges. However, the application of the vested rights doctrine in sign cases presents significant challenges to the vindication of First Amendment principles, primarily due to its origin as a land-use doctrine.

The doctrine of vested rights generally arises in the context of zoning and construction, not speech cases.[36] As a general matter, rights in construction only vest where a builder has relied in good faith on a legally obtained permit issued by a governmental authority. Courts readily hold that builders have no "vested right to build . . . [when the builder has] not applied for or received a building permit for its project."[37] Accrual of vested rights generally requires substantial work in good faith reliance upon a permit issued by the government.[38] Through the permitting process, a municipality can prevent a would-be sign owner from gaining the vested rights with which he or she could challenge the permitting scheme.[39]

35. Hanes et al., *supra* note 7, at 375-76.

36. *See id.* at 388.

37. *E.g.*, Stubblefield Constr. Co. v. City of San Bernardino, 38 Cal. Rptr. 2d 413, 424 (Cal. App. 1995).

38. *Id.* at 423.

39. *See, e.g., id.*

Robert Brauneis sets forth a solid description of the historical genesis of the vested rights doctrine.[40] He argues that the doctrine of vested rights is a nineteenth century doctrine regarding the limits on the legislature to change existing rights created under positive law. [41] "Under the vested rights doctrine, a legislature exceeded the scope of its power when it enacted a law that took away rights that had 'vested' in individuals under preexisting positive law." [42] According to Brauneis, a vested right was created when a privilege was transmuted into an "immunity from subsequent legislative interference."[43] The affirmative act by the legislature to create a right by positive law—not some species of natural rights—was what bound the legislature against revoking that right at a later time.[44] While the doctrine is largely limited to land use today, the origin is unmistakable.[45]

Although of great stature, the exact nature and extent of the vested rights doctrine is contested and not uniform across the country. Delaney and Vaias' survey of the fifty states from 1996 shows that requirements for vested rights in building cases range from a building permit, without more, to a straightforward equitable estoppel analysis.[46] Unfortunately, the existence of vested rights depends entirely on state law.[47]

Some commentators contend that the vested rights doctrine is simply in the nature of estoppel.[48] Estoppel theory places significant limitations on the doctrine because a successor-in-interest must independently meet the elements of the equitable estoppel test.[49] Under an estoppel theory, a person cannot acquire vested rights by purchasing a property with a nonconforming sign from its owner since he or she is presumed aware of the regulations upon acquiring a non-conforming sign.

Other commentators give the vested rights doctrine a more constitutional basis, viewing it as related to Fifth Amendment "takings" jurisprudence. Florida case law, for example, seems to head in this direction.[50] Florida law also contemplates that a

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40. *See generally* Robert Brauneis, *The Foundation of our "Regulatory Takings Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon,* 106 YALE L. J. 613 (1996).

41. *Id.* at 625.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 625-27.

46. *See* John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims,* 49 WASH. U. J. URB. & CONTEMP. L. 27, 32-33 (1996).

47. Crown Media L.L.C. v. Gwinnett County, 380 F.3d 1317, 1325 (11th Cir. 2004).

48. Robert M. Rhodes & Cathy M. Sellers, *Vested Rights: Establishing Predictability in a Changing Regulatory System,* 20 STETSON L. REV. 475, 476 (1991).

49. *See* Calusa Golf, Inc. v. Dade County, 426 So. 2d 1165, 1167 (Fla. 1983).

50. *See* A. A. Profiles, Inc. v. City of Ft. Lauderdale, 850 F.2d 1483, 1488 (11th Cir. 1988) (finding a new zoning ordinance was confiscatory and constituted a violation of the due process

builder may acquire vested rights to build where the denial of a building permit manifests a "clear showing of bad faith."[51] Although Florida courts generally view the vested rights doctrine as being of constitutional pedigree, other Florida courts call the vested rights doctrine an application of equitable estoppel, a straightforward common law doctrine.[52] Still, application of equitable estoppel as against the government implicates the protection of due process since it alleges that the challenged governmental action is procedurally unjust or arbitrary.

The uncertainty about the theoretical footing of the vested rights doctrine finds peculiar expression in case law concerning signs. For example, in California, a court found a sign operator only acquires vested rights in a sign where: (1) a permit has been issued; (2) the owner has "performed substantial work" in reliance on the permit; and (3) the owner has "incurred substantial expense in reliance on the permit."[53] The court's emphasis on reliance highlights estoppel as the basis for vested rights.

Delaware courts emphasize estoppel also, stating that the vested rights doctrine may be invoked only by one who "in fact obtains a valid permit and incurs some substantial expenditures, obligation, or change in position in lawful and good faith reliance on the permit."[54]

In Connecticut, however, it has also been held that vested rights do not accrue absent a permit, but such rights, once they so accrue, are then akin to covenants that run with the land:

> Brentwood wanted to replace the sign structure on 1945 State Street with its own billboard sign. As discussed *supra*, although Brentwood did not have nonconforming use rights to operate a sign on 1945 State Street, Brentwood did have vested rights to the property at the time it filed its applications. Brentwood's vested rights included the right to erect a billboard sign on its property at 1945 State Street because Brentwood, as Mihalov's successor in

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rights); Corn v. City of Lauderdale Lakes, 816 F.2d 1514, 1519 (11th Cir. 1987) (holding that there could be an due process action against a local government that revoked previously-approved site plans and building permits).

51. Lockridge v. City of Oldsmar, 475 F. Supp. 2d 1240, 1252 (M.D. Fla. 2007) (citations omitted).

52. Action Outdoor Adver. JV, LLC v. City of Destin, 2005 WL 2338804 *11 (N.D. Fla. 2005) ("Additionally, unless equitable estoppel applies, a permit may be revoked where the zoning law has been amended after issuance of the permit.").

53. Get Outdoors II, L.L.C. v. City of Lemon Grove, 378 F. Supp. 2d 1232, 1240 (S.D. Cal. 2005).

54. Delaware River & Bay Auth. v. Delaware Outdoor Adver., Inc., 1998 WL 83056 *3 (Del. Ch. 1998).

> interest, was entitled to the benefit of Mihalov's sign permit because permits run with the land and not the user of the land.[55]

Clearly, estoppel alone could not support Connecticut's rule because it reads out a need for the successor-in-interest to prove the element of reliance. The successor-in-interest has full knowledge of the new law when he or she takes possession.

In Indiana, the rule appears to be that vested rights can arise upon the issuance of a permit, whether or not there has been construction, if there was effort expended in *obtaining* the permit.[56] The Indiana court rejected the argument that the owner had to rely on the permit to begin construction.[57]

Michigan courts have applied vested rights doctrine more narrowly in sign cases.[58] In a recent case, the Michigan Supreme Court determined that a leasee of rooftop space did not have a vested right to display rooftop signs.[59] The court noted, in formulating their opinion, that the so-called "nonconforming use" doctrine cannot override health and safety regulations.[60] In concurrence, Justice Kelly would have gone even further, stating that a sign owner who operates by virtue of a contract on another's property cannot invoke the vested rights doctrine because she has no real property interest to which the billboards are attached."[61] It is not clear what Judge Kelly would make of the fact that billboards are usually erected pursuant to contracts called "lease agreements."

In yet another concurrence, Chief Justice Weaver argued that vested rights doctrine should require compensation based on the Court's earlier ruling that the City of East Lansing had the power to "forcibly terminate nonconforming billboards and signs over a reasonable period of time."[62] Chief Justice Weaver wrote that the implication of the phrase "reasonable period of time" is that the ordinance effected a taking in violation of the Fifth and Fourteenth amendments and required some form of compensation.[63]

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55. Brentwood Extension, L.L.C. v. Planning & Zoning Comm'n of Bridgeport, 2004 WL 203153 *15 (Conn. Super. 2004).

56. Metro. Dev. Comm'n v. Pinnacle Media, L.L.C., 846 N.E.2d 654, 656 (Ind. 2006).

57. *Id.*

58. *See, e.g.*, Adams Outdoor Adver. v. City of East Lansing, 614 N.W.2d 634, 637 n.2 (Mich. 2000).

59. *Id.* at 640.

60. *Id.* at 637 n.2 (citing Adams Outdoor Adver. v. City of East Lansing, 483 N.W.2d 38, 39 (1992)).

61. *Id.* at 643 n.7 (Kelly, J., concurring).

62. *Id.* at 646-47 (citing Adams Outdoor Adver. v. City of East Lansing, 483 N.W.2d 38, 39 (1992).

63. *Id.*

These state-law differences clearly matter. In a recent case, the Ninth Circuit found such differences dispositive.[64] The court found that where California law applied, it only contemplated that a person could acquire vested rights by relying on an issued permit to establish vested rights, thereby rejecting Florida case law recognizing vested rights where a person is wrongfully denied the opportunity to obtain an issued permit.[65] This Ninth Circuit decision undercuts the notion that the vested rights doctrine is an adequate safeguard for federal constitutional rights (i.e., the takings clause).

Of course, whatever value this decision or others above may have as a matter of land-use regulation, they fail to consider First Amendment interests. In the modern land-use context, the vested rights doctrine presumes that: (a) a government license can—indeed will—be required for the proposed land use activity; and (b) in the absence of a permit, the government may ordinarily exercise its police power to prohibit such activity.[66] In the absence of vested rights, very little justification is required for the exercise of police power—an administrative decision will be upheld unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[67] Needless to say, this regulatory regime differs substantially from regulation concerning free expression.

B. *Application of Vested Rights Doctrine to Sign Cases*

1. History of Application

First Amendment challenges in sign cases were not regularly countenanced by federal law in the early days.[68] In fact, the earliest sign cases in state or federal courts did not consider either vested rights or First Amendment challenges. For example, a 1960 case from Connecticut approved a sign ordinance requiring the removal of a sign that had stood without incident for twenty years.[69] A zoning ordinance was adopted banning signs in residential areas, and the sign at issue (for a restaurant) was in such a place.[70] The city then gave all such sign owners two years to remove their signs.[71] The regulation was upheld as not "arbitrary or illegal."[72] Sadly for the sign

64. Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 903 (9th Cir. 2007).

65. *Id.*

66. *See, e.g.*, Tanner Adver. Group, L.L.C. v. Fayette County, 451 F.3d 777, 787-88 (11th Cir. 2006); Mang v. Santa Barbara County, 5 Cal. Rptr. 724, 730 (1960) (discussing vested rights under the title "nonconforming use" doctrine).

67. A Helping Hand, L.L.C. v. Baltimore County, 515 F.3d 356, 372 (4th Cir. 2008) (citations omitted).

68. *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

69. Murphy, Inc. v. Board of Zoning Appeals, 161 A.2d 185, 186 (Conn. 1960).

70. *Id.*

71. *Id.*

owner, the municipality adopted the sign regulation shortly before Connecticut adopted a statute precluding a municipality from using a zoning regulation to prohibit an existing nonconforming use. [73] No First or Fifth Amendment concerns were considered.

Nonetheless, the application of vested rights doctrine to billboards extends at least as far back as 1967 in *West Coast Advertising Co. v. City and County of San Francisco.*[74] The *West Coast Advertising* court held, however, that a *pending* ordinance to prohibit a sign was a sufficient justification to deny a permit for an otherwise legal sign:

> The situation here is similar to that involving the revocation of a permit after the passage of prohibitory legislation. In view of the pending ordinance, the administrator was well within his discretion in refusing the permit. As stated by the court in the Russian Hill Improvement case, the administrative bureau has the '*discretion* to deny the permit application on the ground that the structure described therein would soon be rendered illegal by the pending ordinance.'[75]

Without a permit, there could be no vested rights and the regulation would almost certainly be upheld. In other words, under *West Coast Advertising,* a sign permit was treated no differently than any other land-use permit, even though it concerned expressive activity. In *West Coast Advertising,* free speech issues were not even *raised*, even though the structure at issue was a sign.

Another early case shows that sign operators were not afforded First Amendment protection in the recent past. In *Lubbock Poster Co. v. City of Lubbock,* the court was confronted with a billboard ordinance that set up zoning requirements and "require[d] all existing billboards to either conform to the regulations or be removed at the end of a six and one-half year amortization period."[76] Apparently, only two such signs would survive the rule, and only thirty-six could be made to conform.[77]

The *Lubbock Poster* court took a step toward recognizing that a sign owner's rights were not extinguishable at the sovereign's will, but did not go very far in practice. First, the court held that the "amortization" provision eliminated any concern over vested rights.[78] Next, it rejected the First Amendment arguments relying on the proposition that local police power encompasses the authority to ban

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72. *Id.*

73. *Id.* at 186-87 (quoting Conn. Gen. Stat § 8-2 (2001) (adding "Such regulations shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations.").

74. *See* 64 Cal. Rptr. 94 (Cal. Ct. App. 1967).

75. *Id.* at 96 (emphasis in original).

76. Lubbock Poster Co. v. City of Lubbock, 569 S.W.2d 935, 937 (Tex. Ct. App. 1978).

77. *Id.* at 940.

78. *See id.* at 938.

expressive activity in a given area.[79] In doing so, the court relied on *Young*, which permitted a municipality to consign adult businesses to "red light districts." [80] However, the *Lubbock Poster* court did not acknowledge the different context or secondary effects at issue in *Young*.[81] Rather, the court found the Lubbock ordinance sought "to regulate the time, place and manner of outdoor advertising rather than the content."[82]

The *Lubbock Poster* court upheld the statute as an ordinary exercise of police power under the barest scrutiny: "If reasonable minds may differ as to whether or not a particular zoning restriction has a substantial relationship to the public health, safety, morals or general welfare, no clear abuse of discretion is shown and the restriction must stand as a valid exercise of the city's police power."[83]

In 1980, however, the Supreme Court decided *Central Hudson*.[84] *Central Hudson* established a form of "intermediate scrutiny" for regulation of commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[85]

Central Hudson should have changed everything. Indeed, when the Supreme Court in *Metromedia* analyzed sign regulation on First Amendment grounds, the phrase "vested rights" did not appear in its pages.[86]

As set forth below, however, even after *Central Hudson* and *Metromedia*, "vested rights" analysis has continued unabated with respect to sign cases, generally without reference to First Amendment concerns.

2. Vested Rights and Just Compensation

The vested rights doctrine also posits that a property right or privilege is at issue. As property, such rights may be taken for public use with just compensation.

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79. *Id.* at 945 (citing Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)).
80. *See Young*, 427 U.S. at 72-73.
81. *See Lubbock*, 569 S.W. 2d at 945.
82. *Id.*
83. *Id.* at 939 (quoting City of Waxahachie v. Watkins, 275 S.W.2d 477, 481 (Tex. 1955)).
84. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of N.Y., 447 U.S. 557 (1980).
85. *Id.* at 566.
86. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 *passim* (1981).

Unfortunately, while billboards are valuable, governments are cheap. Accordingly, one method of paying "compensation" is to declare a sign illegal and then give the owner an additional period of years to use the sign past its date of illegality. Those additional years are meant to compensate for the value of the sign and are referred to as "amortization" provisions. Such amortization provisions are common in sign ordinances.[87]

It is not hard to see that these "amortization" provisions do some violence to the Fifth Amendment requirement of just compensation. The justification given for why such "amortization" qualifies as just compensation under the Fifth Amendment is usually given as follows: just compensation for a sign means only that the state must put the property owner in the same financial position as if she had never erected a sign.[88] To accomplish this, the state may either pay the owner the present value of the sign or "amortize" that value by allowing the sign to remain profitably nonconforming for a fixed period of years.[89] "Amortization" thus allows a property owner with a commercially profitable sign to continue its use past the time that the law declares the use to be nonconforming in order to allow the owner to recoup his or her investment in the sign.

The assumption behind amortization is that a sign owner has no property right in displaying a sign into the future, so it is not a "taking" to deprive the sign owner of the right to continue to display a sign on her property. The only taking is in depriving the sign owner of her existing investment in that sign. As a substitute for "just compensation," amortization is of dubious constitutional pedigree.[90]

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87. *See generally* LA. REV. STAT. ANN. § 4722(c) (West 2008); ME. REV. STAT. ANN. tit. 23, § 1916 (1992); CAL. BUS. & PROF. CODE § 5410 (West 2003); SANTA MONICA, CAL., MUNICIPAL CODE § 9.52.210(d) (1985), *available at* http://www.qcode.us/codes/santamonica (giving fifteen years to remove signs); Santa Monica, Cal., Ordinance No. 1956 (Sept. 28, 1999), *available at* G:/atty/muni/laws/barry/signamend-1.wpd (repeating earlier amortization period). *But see* ALA. CODE § 23-1-280 (LexisNexis 2007) (barring amortization as substitute for just compensation); IND. CODE § 8-23-20-16 (LexisNexis 2000) (barring amortization for signs as substitute for just compensation).

88. *E.g.*, Suffolk Outdoor Adver. Co. v. Hulse, 373 N.E.2d 263, 266 (N.Y. 1977). As late as 1973, some courts still found that requiring removal of a sign did not require just compensation at all. *See* Art Neon Co. v. Denver, 488 F.2d 118, 121 (10th Cir. 1973) (holding that amortization was only about notice, not about just compensation).

89. *See, e.g.*, City of Salinas v. Ryan Outdoor Adver., 234 Cal. Rptr. 619, 623 (Cal. Ct. App. 1987).

90. *See, e.g.*, Georgia Outdoor Adver. v. City of Waynesville, 833 F.2d 43, 47 (4th Cir. 1987) (stating that four-year future amortization was not "just compensation"); Nat'l Adver. Co. v. City of Ashland, 678 F.2d 106, 107-09 (9th Cir. 1982) (remanding for further determination of amortization issue); G.K. Ltd. Travel v. City of Lake Oswego, 2004 WL 817142, *14 (D. Or. 2004), *aff'd by* 436 F.3d 1064 (2006) (requiring exhaustion of state remedies before bringing "takings" action based on amortization clause). *But see* Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269, 1272, 1274 (4th Cir. 1986) (upholding reasonableness of district court's determination that 5 ½ year amortization for sign satisfied the Fifth Amendment); Wigginess Inc. v. Fruchtman, 482 F. Supp.

However, the graver error is viewing signs simply as property rights that can be taken for public use. This error is not, in the first instance, nefarious—it happens naturally because economics dictates that commercially profitable signs (billboards) are the only subjects of litigation. However, no such "amortization" would be permissible if the rights at stake were viewed as First Amendment interests because there is no such thing as "just compensation" for loss of fundamental rights. The right to speak, implicit in a sign, should not simply disappear with the right to maintain the structure.

3. The Persistence of Vested Rights Doctrine in Sign Cases

The practical effect of applying the vested rights doctrine in sign cases is that free speech rights are not vindicated. A case in point is *Outdoor Media Group, Inc. v. City of Beaumont*. There, a billboard company initially applied for four billboard permits but was denied.[91] After the sign owner brought suit, the city passed an "urgency ordinance" banning all billboards.[92] The court found that the putative sign owner, having failed to obtain a permit, lacked the vested rights necessary to challenge the underlying sign ordinance.[93] Without such "vested rights," the court held that the sign operator had no standing to raise First Amendment claims with respect to any deprivation under the unconstitutional sign ordinance.[94] Thus, the city was able to effectively deny the sign operator a permit pursuant to an *unconstitutional* statute, yet avoid judicial review *because the sign owner possessed no permit.*[95]

This Catch-22 is not uncommon in sign cases. In *City of Riverside v. Valley Outdoor,* the City of Riverside argued that the sign operator needed a permit to challenge the sign ordinance, and the state appellate court agreed:

681, 683-84 (S.D.N.Y. 1979) (refusing to grant injunction against act banning "adult physical culture establishments" based on one-year amortization period); *Art Neon*, 488 F.2d at 122 (finding amortization method fundamentally "reasonable" but disapproving different amortization periods for signs with different replacement costs as irrelevant to the proper exercise of police power); Lamar Adver. Assoc. of East Florida v. City of Daytona Beach, 450 So.2d 1145, 1150 (Fl. Dist. Ct. App. 1984) (upholding amortization period as constitutional compensation); City of Ft. Collins v. Root Adver., Inc., 788 P.2d 149, 156 (Colo. 1990) (holding that 5-year amortization period ran afoul of Federal Highway Beautification Act concerning signs within 660 feet of a freeway, but not invalid for other sign ordinances); Klicker v. State, 197 N.W.2d 434, 436 (Minn. 1972) (holding four-year amortization period arbitrary).

91. Outdoor Media Group, Inc. v. City of Beaumont, 374 F. Supp. 2d 881, 882 (C.D. Cal. 2005).

92. *Id.*

93. *Id.* at 886.

94. *See id.*

95. *See id.*

> The whole point of the City's motion in limine was that, because it could constitutionally require Valley to remove the billboards based on the violation of the permit requirement, Valley's other contentions were irrelevant. These included the contentions Valley raised in opposition to the motion in limine, including that: (1) portions of the original sign ordinance and the amended sign ordinance, other than the permit requirement, were unconstitutional; (2) the City had processed Valley's permit applications improperly and in "bad faith"; and (3) the City had a practice of accepting late-filed permit applications.[96]

The First Amendment problem here is quite obvious once considered. Speech is a fundamental right, not one that "vests." Viewing speech interests as vested rights endangers the equal right to speak implicit in the Fourteenth amendment.

In a recent South Dakota case, a sign operator challenged a city's failure to enforce a "public purpose" requirement against a rival sign company that had already begun construction of signs.[97] The plaintiff, which could not obtain permits because of the new requirement, wanted a stop-work order issued to its rival.[98] The court concerned itself with whether the new ordinance could be retroactively applied to the vested rights in construction, not whether there was an equal protection requirement.[99] Thus, it approved the city's decision on the grounds that only one sign company had some vested rights in construction.[100]

In First Amendment terms, however, the effect was that one person was permitted to speak, while the other was not. The fundamental right to free speech must have a place somewhere in this scheme.

At other times, vested rights doctrine can resuscitate a challenge that really should be moot. For example, sometimes a permit is denied under an unconstitutional ordinance, but a new ordinance is passed correcting the defects in the sign ordinance. Under neither ordinance would the sign be permitted. In such a case, the sign owner builds a sign during the interim period and subsequently seeks to keep it up. A Florida court recently addressed this strategy directly:

> Ordinarily, one might ask: if the city has passed a new ordinance, what does it matter that its old ordinance discriminated against noncommercial speech? However, in addition to its heartfelt concern about the First Amendment value of noncommercial speech, Florida Outdoor has its own very commercial self-interest at stake.

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96. City of Riverside v. Valley Outdoor, Inc., 2005 WL 2233617, at *7 (Cal. Ct. App. 2005).

97. Lamar Outdoor Adver. of South Dakota, Inc. v. City of Rapid City, 731 N.W.2d 199, 202 (S.D. 2007).

98. *Id.*

99. *Id.* at 205.

100. *Id.*

> For while the First Amendment issues in this case are interesting and difficult, the case is really about the use of the concept of vested rights to create a window of opportunity to build a large (sixteen feet by forty-two feet) and valuable billboard which would not be approved under the old or the new ordinance. The linchpin of this strategy is an unpublished opinion of the Eleventh Circuit which has been followed by this Court. . . . [citations omitted]. In *National Adver. Co.*, the Eleventh Circuit held that a billboard company had a vested right to issuance of a permit without the necessity of a showing of reliance where, when it applied for the permit and was denied, the city had no valid prohibiting ordinance since the existing ordinance was unconstitutional.[101]

These comments encapsulate the tangled interplay of the vested rights doctrine and First Amendment principles. Standing for First Amendment challenges may depend on whether a speaker can assert a vested right to erect a sign.

Consider, however, other recent cases. In two cases near San Diego, a small outdoor advertising outfit named "Get Outdoors II" sought approval for nine billboards "for the purpose of communicating commercial and noncommercial messages regarding products, services, ideas, candidates, issues, events, and other topics."[102] The sign owner correctly recognized that the City of Chula Vista's sign ordinance was improperly written to favor commercial speech.[103] Within five weeks, the City of Chula Vista rejected the applications as "incomplete," then adopted an "urgency ordinance" barring new signs.[104] The new sign ordinance contained a message substitution provision, more or less fixing the constitutional problem.[105] Chula Vista's new ordinance read in this familiar way:

> Subject to the land owner's consent, a noncommercial message of any type may be substituted for any duly permitted or allowed commercial message or any duly permitted or allowed noncommercial message; provided, that the sign structure or mounting device is legal without consideration of message content. Such substitution of message may be made without any additional approval or permitting. This provision prevails over any more specific provision to the contrary within this chapter. The purpose of this provision is to prevent any inadvertent favoring of commercial speech over noncommercial speech, or favoring of any particular noncommercial message over any other noncommercial message. This provision does not create a right to increase the

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101. Florida Outdoor Adver. v. City of Boca Raton, 266 F. Supp. 2d 1376, 1379 (S.D. Fla. 2003).

102. Get Outdoors II, L.L.C. v. City of Chula Vista, 407 F. Supp. 2d 1172, 1173 (S.D. Cal. 2005), *aff'd*, 254 Fed. App'x 571 (9th Cir. 2007).

103. *See Get Outdoors II*, 407 F. Supp. 2d at 1173.

104. *Id.* at 1174.

105. *See id.*

> total amount of signage on a parcel, nor does it affect the requirement that a sign structure or mounting device be properly permitted.[106]

Remarkably, however, the court dismissed the challenge brought against the city's behavior under the previous (unconstitutional) ordinance on the ground that the sign operator never received a permit for any of its nine applications.[107] The sign operator could have brought a challenge only if it had received a permit.[108] Of course, a requirement that one receive a permit before challenging a statute is bizarre. If a sign operator had received a permit, there would be no challenge in the first place.

Not all courts reach the same conclusion. For example, in *Horizon Outdoor, LLC v. City of Industry,* the court agreed that a plaintiff needed "vested rights" before challenging a sign ordinance but found that vested rights could exist on the basis of an application that had been rejected.[109] "[T]his Court finds that Plaintiffs need not show reliance on the Sign Ordinance in order for their rights to vest, because Defendant's wrongful conduct has denied Plaintiffs the opportunity to rely."[110]

Horizon Outdoor made some prudential sense in that it permitted a suit to go forward.[111] The injury that gave rise to standing was described as follows: "Plaintiffs applied for permits, were not granted permits, and are not allowed to install their displays."[112] The court then stated there was an "injury in fact" because reapplying would be futile.[113] The *Horizon Outdoor* court, perhaps sensing the First Amendment issues lurking beneath this case, found a way to broaden standing.[114] But its holding does violence to the doctrine of vested rights since it says that what vests is not the right to erect a sign, but the right to bring a constitutional challenge. There must be a better way.

4. The Observations in *Covenant Media* and Grandfather Clauses

Only one court has squarely confronted the jurisprudential problem of applying the vested rights doctrine in the First Amendment context. A federal court in Illinois noted that vested rights analysis and First Amendment jurisprudence have slipped

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106. *Id.* (citing Chula Vista, CA., Municipal Code 19.60.050.C. (2004)).

107. *Id.* at 1179.

108. *Id.*; Get Outdoors II, L.L.C. v. City of Lemon Grove, 378 F. Supp. 2d 1232, 1240 (S.D. Cal. 2005).

109. Horizon Outdoor, LLC v. City of Indus., 228 F. Supp. 2d 1113, 1121-22 (C.D. Cal. 2002). *Cf.* Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 903 (9th Cir. 2007) (declining to follow the holding in *Horizon Outdoor*).

110. *Horizon Outdoor*, 228 F. Supp. 2d at 1121.

111. *See id.* at 1125.

112. *Id.*

113. *Id.*

114. *See id.* at 124-25.

past one another.[115] Judge Lefkow reviewed the case law, explaining that some courts permit a claim for damages by sign owners against sign ordinances only upon showing that there is a vested property right, but others do not.[116] However, Judge Lefkow observed that where courts did not require vested rights to make a challenge, these cases make no reference whatever to vested rights. In other words, these cases do not teach anything about when vested rights should be required[117]

The *Covenant Media* court correctly saw one source of the confusion: "although a plaintiff must have a property (or liberty) interest in order to pursue a due process claim, a property interest is not necessary for a First Amendment claim."[118] Recognizing that First Amendment claims should be distinct from claims for deprivation of property without due process, the court held a sign owner should have standing to seek "damages based on the City's past enforcement of the Sign Ordinance . . . irrespective of whether it possessed a property interest in a permit."[119] So far, so good.

Unfortunately, the *Covenant Media* court then "solved" the case by finding that the plaintiff lacked standing to challenge the ordinance because its proposed signs would have been illegal under other un-challenged portions of the code, specifically a provision barring signs less than 660 feet (a furlong) from the freeway.[120] It found the 660-foot blackout zone to be separable, governing, and content-neutral, even though six billboards already existed within the 660-foot zone.[121] So the court found there would be no reason to reach a constitutional issue and denied the property owner standing to challenge the unconstitutional portions of the sign ordinance.[122]

The court also found no constitutional problem posed by the City allowing six other billboards within that 660-foot zone on the ground that those signs which pre-dated the 660-foot blackout zone ordinance were grandfathered.[123] Grandfathering, of course, is a concept connected with vested rights in the use of property, not with the First Amendment and the fundamental right of free speech. In practice, the *Covenant Media* ruling means that owners of older signs may display any messages they please within the 660-foot zone, but other property owners may not. Other

115. Covenant Media of Ill., L.L.C. v. City of Des Plaines, 476 F. Supp. 2d 967, 976 (N.D. Ill. 2007), *vacated in part*, 496 F. Supp. 2d 960 (N.D. Ill. 2007).

116. *Id.* at 975.

117. *Id.*

118. *Id.* at 976.

119. *Id.*

120. *Id.* at 980.

121. *Id.* at 982-83.

122. *Id.* at 984-85.

123. *Id.* at 981.

courts have also made the same decision that grandfather clauses do not implicate First Amendment concerns, even though they result in treating speakers differently.[124]

The court's analysis of the problems concerning application of the vested rights doctrine in speech cases was then lost when it vacated its opinion on a motion for reconsideration because of a factual error.[125] (It turned out that the city of Des Plaines *might* have been in the habit of granting sign permits notwithstanding the court's reading of the code, creating a possible "as-applied" challenge).[126] As of this writing, the *Covenant Media* court has set the matter for trial, but still has not "conclusively . . . determined" the standing issue.[127]

As set forth more fully below, this article argues that this restrictive application of standing is in error. Under the overbreadth doctrine, a sign owner has, or should have, standing to challenge an unconstitutional sign ordinance that will be applied to him, whether or not his proposed sign might also violate some other provision of the code. The First Amendment interests are substantial and worth vindicating. The putative sign owner should also be allowed to bring an equal protection challenge against "grandfathered" signs because grandfathering signs means treating speakers differently. A municipality must either uniformly extinguish all rights to speak (to post a sign) in a given zone (with appropriate compensation for any property taken) or permit all persons to speak there on an equal basis.

III. FIRST AMENDMENT DOCTRINES IN SIGN CASES

A. *The Context of Tolerance*

Development of First Amendment standing doctrines must be understood in light of what might be termed heroic case law. There is a self-congratulatory, even celebratory, aspect to this jurisprudence that encourages jurists to extol the delights of free speech.[128] Consider the ACLU's defense of American neo-Nazis in their march on Skokie in 1978.[129] As odious as these plaintiffs were, there is no shortage of

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124. *E.g.*, Gen. Auto Serv. Station v. City of Chicago, 526 F.3d 991, 1007-08 (7th Cir. 2008) ("As such, we agree with the City that the grandfather provision is a content-neutral time, place, and manner restriction on speech rather than a regulation of commercial speech.").

125. *Covenant Media*, 496 F. Supp. 2d at 962-64.

126. *Id.* at 962.

127. *Id.* at 963.

128. *See, e.g.*, Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis and Holmes, J.J, concurring) ("To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

129. Nat'l Socialist Party of America v. Vill. of Skokie, 432 U.S. 43 (1977).

laudatory comments about that effort, linking it to the development of this essential liberty.[130]

There are many other reasons why First Amendment jurisprudence is so unusually permissive in terms of both standing and outcomes. Although courts rarely mention it, most plaintiffs in First Amendment cases are presumed to have little or nothing at stake financially. The archetypal First Amendment plaintiff is not a media giant, but a lone dissenter spouting off politically unpopular messages to an inconsequential audience. Classic examples are *Cohen* with his infamous jacket,[131] the *CCNV* plaintiffs (sleeping on the Federal Mall),[132] the student displaying the "Bong Hits 4 Jesus" sign by the roadside in Alaska,[133] or anyone burning a flag.[134] Generally, these plaintiffs are kooky, impecunious, and, above all, harmless.[135] The lone political dissenter is frequently lionized. Indeed, this author believes that if the Dadaist slogan "Bong Hits 4 Jesus" in *Morse v. Frederick*[136] had been phrased in a way that the Supreme Court justices actually understood (e.g., "I Disapprove of Social Conservatives"), the case would likely have gone the other way, in favor of free speech.

Sign owners rarely strike such poses. They are likely to be corporations, to have large sums of money at stake, and to be interested in promoting only the most mundane commercial messages. It is hard to imagine anyone becoming so excited over liberty in the *Skokie* case if it had, instead, concerned organizers for a Snack Cake Parade who were denied a permit on the grounds that such crass advertising was unwelcome (or even on the grounds that twinkies are unhealthy). Indeed, some commentators believe all corporate speech should be *per se* disfavored.[137] When a sign owner cites these storied civil rights cases, she might be accused of wrapping herself in the flag—in other words, overblowing the issue.

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130. *See, e.g.*, Ruth Bader Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States,* 7 WASH. U. J.L. & POL'Y 1, 4 (2001); Kathleen M. Sullivan, *Free Speech Wars,* 48 SMU L. REV. 203, 203 (1994).

131. Cohen v. California, 403 U.S. 15 (1971).

132. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

133. Morse v. Frederick, 127 S. Ct. 2618 (2007).

134. Texas v. Johnson, 491 U.S. 397 (1989). This is a form of political protest that has largely gone the way of the tarring and feathering, but that can still inflame passions on all sides.

135. One need look no further than the American Civil Liberties Union to see these assumptions in action. First, the ACLU represents First Amendment plaintiffs free of charge. Second, the messages expressed by its speakers have rarely reached any significant number of people. Third, as many an exasperated member can attest, the ACLU almost seems to revel in representing the most unpopular plaintiffs it can find. The unpopularity is even something of a badge of honor.

136. 127 S. Ct. 2618.

137. *See, e.g.*, Tom Bennigson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?,* 39 CONN. L. REV. 379, 380, 383 (2006); *accord* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech is not Free,* 83 IOWA L. REV. 995, 1002 (1998).

Sign owners also intend to succeed in communicating where most political speakers fail. Namely, they intend, and frequently accomplish, their communication to reach a huge audience. Enthusiasm for the *Skokie* decision might also have been more subdued if the litigants' desire had been to display a swastika in lights on Times Square, rather than during an obnoxious march down a deserted suburban street.[138] We should not underestimate the fact that most political speech is easy to tolerate in part because it is, ultimately, so very ineffective. For example, in *Cohen v. California,* the Court wrote of Cohen's offensive message: "Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes."[139] It might be harder to swallow that sentiment for Superbowl ads. Indeed, Justice Harlan tipped his hand when he wrote, "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated."[140] When such instances cease to be trifling, fundamental societal values are still implicated, but our aesthetic values are more at risk.[141]

In *Packer Corp. v. Utah*, one of the earliest Supreme Court cases concerning billboards, the Court simply held that classifying billboards separately from other forms of advertisement was not arbitrary.[142] Notably, the Court wrote:

> Billboards, street car signs, and placards and such are in a class by themselves. . . [a]dvertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard . . . [t]he Legislature may recognize degrees of evil and adapt its legislation accordingly.[143]

In other words, the sheer effectiveness of this communication is damning. Advertisements that are harder to find (more a "matter of choice") are not to be so regulated. There is no talk of "averting one's eyes" here.[144]

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138. *See* Nat'l Socialist Party of America v. Vill. of Skokie, 432 U.S. 43, 43 (1977).

139. Cohen v. California, 403 U.S. 15, 21 (1971).

140. *Id.* at 25.

141. Those who have been to the Stanley Mosk courthouse where Cohen displayed his jacket will not be overly impressed by its intrinsic aesthetic virtues.

142. Packer Corp. v. Utah, 285 U.S. 105, 108-10 (1932).

143. *Id.* at 110.

144. At this early date, of course, the First Amendment does not even appear in the case law.

As noted in the introduction, signs are a form of permanent, continuing speech. Signs differ from the utterances normally protected in First Amendment cases in that their aesthetic impact is not only meant to be massive, but ongoing. As shown below, where asserted in sign cases, First Amendment doctrines are sidelined to avoid permissive results, such as in *Cohen*. Indeed, in the *Packer* case the word "evil" is hard to miss.[145]

However, it is important to understand that sign ordinances *are* often highly politicized. Far more than "beautification" is at stake. Rights to erect signs are frankly treated as political favors. For example, the Federal Highway Beautification Act contains a special exemption for signs promoting free coffee, which appears to have been intended to favor the Jaycees.[146] In Vermont, there was a recent hullabaloo where a special exemption to the state's forty-year-old ban on billboards was granted to construct a favored billboard.[147] Special billboard districts can be small enough to encompass a single sign.[148] Those who do not win special favor are, in effect, silenced.

Sign laws are also big business. Hurricanes Katrina and Rita destroyed, or left in unsightly tatters, large numbers of signs in the South. Under the Federal Highway Beautification Act[149] and implementing regulations, signs that are "nonconforming" (meaning they would no longer be permitted if new, but are "grandfathered")[150] may be maintained in the ordinary course but not rebuilt if they fall down entirely.[151] After the hurricanes, sign operators sought the right to rebuild those signs even though total reconstruction was required. Senators Bennett (Utah), Landrieu (Louisiana), and Reid (Nevada) sought to amend the emergency spending bill to allow rebuilding of these signs.[152] Those in opposition trotted out the legacy of

145. *Packer Corp.*, 285 U.S. at 110.

146. 23 U.S.C. § 131(c)(5) (2000).

147. John Curran, *Exemption to 40-year-old Billboard Ban Worries Some*, USA TODAY, May 6, 2008, *available at* http://www.usatoday.com/news/nation/2008-05-07-2943780878_x.htm.

148. *See, e.g.*, LOS ANGELES, Cal. Mun. Ordinance 178134 (Jan. 27, 2007) (see also a footnote to Table 4 of that ordinance specifying exemptions for individual signs); David Zahniser, *Koreatown Billboard District is Proposed*, L.A. TIMES, Apr. 18, 2008, *available at* http://www.articles.latimes.com/2008/apr/18/local/me-billboard18 (referring to a proposed special one-block billboard district).

149. 23 U.S.C. § 131 (2000).

150. 23 U.S.C. § 131(c)(4).

151. *See* 23 C.F.R. § 750.104(c), (d) (2007).

152. H.R. 4939, 109th Cong. (2d Sess. 2006); Kathy Kiely, *Bill Would Shelter Unsightly Billboards,* USA TODAY, Mar. 26, 2007, *available at* http://www.usatoday.com/news/washington/2007-03-25-billboards-bill_N.htm (last visited Mar. 26, 2007).

former first-lady Lady Bird Johnson, considered the driving force behind the original Federal Highway Beautification Act.[153]

Also, in the City of Los Angeles, City Attorney Delgadillo was attacked for a series of settlements with sign companies who maintained illegal billboards throughout the city.[154] The settlements were very generous in forgiveness and permitted many to be exchanged for lucrative legal billboards.[155] Perhaps not surprisingly, Delgadillo was criticized for having previously received significant campaign contributions from sign companies.[156]

Thus, there are considerable reasons to believe that aesthetic justifications for certain sign regulation may be pretextual. There is certainly no reason to presume, as courts seem to, that sign regulations are always in the public interest.

B. *Overbreadth and Facial Challenges*

It is well understood that the Article III standing requirement "limits the judicial power of the United States to the resolution of 'Cases' and 'Controversies,'" and the lawsuit is not a mere request for an advisory opinion.[157] Furthermore, it is well understood that the standing doctrine limits the set of potential plaintiffs to those who would directly benefit from the relief sought.[158]

Current standing requirements may be summarized as follows:

> a plaintiff must show (1) it has suffered an "injury in fact," that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely . . . that the [injury] will be redressed by a favorable decision."[159]

Prudential standing is sometimes said to be an additional requirement: is the claim "sufficiently individualized to ensure effective judicial review?"[160]

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153. *See, e.g.*, Lawrence Wright, *Lady Bird's Lost Legacy*, N.Y. TIMES, July 20, 2007, *available at* http://www.nytimes.com/2007/07/20/opinion/20wright.html; Kiely, *supra* note 152.

154. Alana Semuels, *Billboard Settlement Draws Criticism*, L.A. TIMES, Feb. 2, 2007, *available at* http://www.articles.latimes.com/2007/feb/02/business/fi-billboards2; David Zahniser, *Clear Channel Outdoor Lobbyist Throwing a Party for Delgadillo*, L.A. TIMES, Mar. 7, 2008, *available at* http://www.articles.latimes.com/2008/08/07/metro/me-rocky7.

155. Semuels, *supra* note 154.

156. Zahniser, *supra* note 154.

157. *See* Hein v. Freedom From Religion Found., Inc., 127 S.Ct. 2553, 2562-64 (2007).

158. *Id.*

159. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc., 528 U.S. 167, 180-81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)); *see also* Joseph M. Stancati, *Victims of Climate Change and their Standing to Sue*, 38 CASE W. RES. J. INT'L L. 687, 705 (2007).

160. Get Outdoors II L.L.C. v. City of San Diego, 506 F.3d 886, 891 (9th Cir. 2007).

Standing doctrine is a subject of much debate, which is worth briefly discussing here. Some scholars argue that standing was meant to be a very low hurdle, almost of a definitional nature—little more than a requirement that one be able to state a cause of action under some statute.[161] Professor Sunstein argues that, after *Lujan,*[162] courts have begun taking a more factual approach to assessing injury.[163] He argues that the notion of injury-in-fact approaches a metaphysical judgment (almost a "natural law" injury), and the law should be concerned only with injury as the invasion of a right created by positive law.[164] Much of these standing discussions seem to take place at the outer edges of the standing doctrine in environmental law where a policy debate rages as to who should be able to enforce environmental laws.[165]

First Amendment standing doctrine arose in a very different setting because citizen suits against signs as some form of "visual pollution"—which might raise analogous environmental standing issues—are unknown. In First Amendment cases, the primary standing issue is whether the speaker can challenge the statute, not whether the government can enforce it.[166]

For the First Amendment, unlike environmental regulation, courts have developed special jurisprudential doctrines that relax standing requirements for plaintiffs, namely the overbreadth doctrine and the facial challenge, so they may contest ordinances that have a "chilling effect" on their right to speak. The overbreadth doctrine "allow[s] persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity."[167] Overbreadth in this context means *substantial* overbreadth.[168]

Standing to bring overbreadth challenges is frequently poorly understood, or at least poorly explained, by courts and litigants alike. Take, for example, this passage from the 11th circuit:

> In other words, the overbreadth doctrine does not change the statutes or provisions of an ordinance a plaintiff may challenge; she can only contest those

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161. *See generally* Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III,* 91 MICH. L. REV. 163 (1992).

162. *Lujan,* 504 U.S. 555 (1992).

163. *See* Sunstein, *supra* note 161, at 202-03.

164. *See id.* at 236.

165. *See* Jim Wedeking, *Addressing Judicial Resistance to Reciprocal Reliance Standing in Administrative Challenges to Environmental Regulations,* 14 N.Y.U. ENVTL. L.J. 535, 536-38 (2006).

166. *See* Maverick Media Group, Inc. v. Hillsborough County, 528 F.3d 817, 819-20 (11th Cir. 2008).

167. New York v. Ferber, 458 U.S. 747, 769 (1982).

168. *Id.*; *see also* Foti v. City of Menlo Park, 146 F.3d 629, 635 (9th Cir.1998) ("An ordinance may be facially unconstitutional" if "[1] it is unconstitutional in every conceivable application or [2] it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad.").

> which actually caused her injury. Rather, the overbreadth doctrine simply allows a plaintiff to bring a facial challenge to a provision of law that caused her injury, regardless of whether the provision's regulation of her conduct in particular was constitutional.[169]

If the application to the plaintiff was constitutional, then where is the injury? The issue is not whether any provision caused *injury* (iniuria), but whether the plaintiff is *subject* to that provision.[170] Standing exists under the overbreadth doctrine where there is neither injury nor redressability of injury, so long as the statute is one under which the plaintiff could be prosecuted.

The Ninth Circuit explained that overbreadth is about relaxing a "prudential standing" requirement that is an *addition* to Article III constitutional standing.[171] The prudential question is whether a "claim is sufficiently individualized to ensure effective judicial review."[172] When a plaintiff states an overbreadth claim under the First Amendment, the court "suspend[s] the prudential standing doctrine because of the special nature of the risk to expressive rights."[173]

Severability also limits overbreadth doctrine. The way to save a statute from being invalidated as a whole is to sever the offending portions of the statute. Severability, however, is a matter of state law,[174] so there is no uniform federal standard on when portions of a statute may be severed.

In sign cases, courts almost go out of their way to defeat standing. For example, many sign owners subject to a general ban of offsite signs that unconstitutionally favors commercial speech over noncommercial speech (in violation of what is often viewed as the general holding of *Metromedia*[175]) will try to raise that challenge. Courts will deny such plaintiffs standing unless the result of victory will be the ability of the plaintiff to erect a sign exactly as proposed. So, for example, if the proposed sign were too big, too high, or violated some other provision of law, the sign owner is denied standing to challenge the ordinance.[176]

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169. KH Outdoor, L.L.C. v. City of Trussville, 458 F.3d 1261, 1267 (11th Cir. 2006).

170. *See* Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973).

171. Get Outdoors II L.L.C. v. City of San Diego, 506 F.3d 886, 891 (9th Cir. 2007).

172. *Id.*

173. *Id.*

174. Horizon Outdoor, LLC v. City of Industry, 228 F. Supp. 2d 1113, 1129 (C.D. Cal. 2002); *accord* Leavitt v. Jane L., 518 U.S. 137, 138 (1996).

175. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 491 (1981).

176. *See, e.g.*, Advantage Adver., L.L.C. v. City of Hoover, 200 Fed. Appx. 831, 832, 835-36 (11th Cir. 2006) (Plaintiff's claimed injury resulted from the denial of his applications to erect billboards. As billboards are "categorically prohibited" by the ordinance, if the challenged exemptions were struck from the statute as unconstitutional, the Plaintiff still would not be able to erect a billboard); Boulder Sign Co. v. City of Boulder City, 2006 WL 1294390 *7 (D. Nev. 2006) ("Because the severable portions of the City code would have been enforceable, Boulder Sign suffered no compensable constitutional injury as a matter of law. After severance, the City's sign code

This is a clear limitation of the overbreadth doctrine that is unique to sign cases. In *Get Outdoors II*, the court stated that a plaintiff may not "leverage its injuries under certain, specific provisions to state an injury under the sign ordinance generally."[177] As another court put it, "[the sign owner's] standing with regard to the size and height requirements does not magically carry over to allow it to litigate other independent provisions of the ordinance without a separate showing of an actual injury under those provisions."[178]

Of course, what is happening in these cases is apparent to courts. Sign owners want to erect billboards that are bigger than any allowed under local law. Their hook is a sign ordinance that is unconstitutional with respect to its treatment of non-commercial speech generally, but not (apparently) with respect to its ban on signs of a certain size. Using this hook, they seek to challenge the whole statute on overbreadth grounds and hope to win, as a result, the right to erect a sign that is bigger than the law allows. The commercial purpose is obvious, and courts are hostile. This parenthetical comment from a recent billboard case betrays the bias of these courts: "See also Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886, 893 (9th Cir.2007) (endorsing our approach in KH Outdoor, so long as standing is defeated as a result of an unchallenged secondary restriction, such as one based on height or size.)"[179] You can see the court trying to figure out how to sweep these cases away.

Unfortunately, what gets lost is the fact that a municipality has enacted an unconstitutional sign ordinance. Overbreadth challenges are meant to provide avenues to attack such unconstitutional behavior on the theory that First Amendment freedoms can be chilled. One cannot imagine, for example, the Supreme Court accepting the argument that the neo-Nazis in *Skokie* had no standing to challenge a ban on marching because the planned march would have violated a noise ordinance or, say, a ban on marches on alternate Tuesdays. Surely the *Skokie* court would not have denied the neo-Nazi group standing to challenge a statute squarely aimed at its activity just because the village of Skokie could point to some other non-controversial (however pretextual) means of stopping the obviously unwanted behavior. Sign

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still contained height, width, and sign face area restrictions which Boulder Sign's proposed signs exceeded."); Harp Adver. Ill., Inc. v. Vill. of Chicago Ridge, 9 F.3d 1290, 1291-92 (7th Cir.1993) (plaintiff lacked standing to challenge sign ordinance because its inability to erect billboard would not be redressed by a favorable decision where another provision prohibiting the sign can be severed); CAMP Legal Def. Fund, Inc. v. City of Atlanta, 451 F.3d 1257, 1270 (11th Cir. 2006) (injury under one provision of a challenged sign ordinance does not automatically confer standing on plaintiff to challenge all provisions of the sign ordinance); Midwest Media Prop., L.L.C. v. Symmes Twp., 503 F.3d 456, 461 (6th Cir. 2007) (sign owner could not challenge ordinance because proposed signs violated height and size requirements).

177. *Get Outdoors*, 506 F.3d at 892.

178. Prime Media, Inc. v. City of Brentwood, 485 F.3d 343, 350 (6th Cir. 2007).

179. Maverick Media Group, Inc. v. Hillsborough County, 528 F.3d 817, 821 (11th Cir. 2008).

cases are no different—sign owners confront unconstitutional ordinances directed at their activity.

C. *Exhaustion of Remedies*

Where a facial challenge is denied, the statutory basis for bringing a constitutional challenge to a sign ordinance is normally 42 U.S.C. § 1983.[180] However, a Section 1983 challenge generally requires the litigant to exhaust all available administrative remedies before bringing suit.[181] Under the doctrine of exhaustion of administrative remedies, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[182]

Many justifications are given for the exhaustion requirement. A classic reason is the following: "The basic purpose of the doctrine of exhaustion of administrative remedies is to allow an administrative agency to perform functions within its special competence to make a factual record, to apply its expertise and to correct its own errors so as to moot judicial controversies."[183]

The requirement to exhaust administrative remedies is not absolute, particularly where pursuit of administrative remedies does not serve the purposes behind the exhaustion doctrine. Thus, for example, exhaustion of administrative remedies is not required if the remedies are inadequate or inefficacious[184] or when pursuit of administrative remedies would be a futile gesture.[185] For better or worse, application of the doctrine is within the trial court's discretion.[186]

Another concern is that an exhaustion requirement can be used by local authorities to prevent effective judicial review. Exhaustion of administrative remedies requires a clear, final "no" from the highest administrative authority to which one can appeal.[187] Preventing that "no" from issuing is sometimes a regulatory goal. Thus, the sign owner may receive a denial that does not look enough like a denial to constitute a final, appealable action. Typical is this letter issued by the City of Industry in *Horizon Outdoor:*

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180. Civil Action for Deprivation of Rights 42 U.S.C. § 1983 (2000).

181. Rhodes v. Robinson, 408 F.3d 559, 569 (9th Cir. 2005).

182. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

183. Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 499 (9th Cir. 1980) (citing Parisi v. Davidson, 405 U.S. 34, 37 (1972)).

184. Am. Fed'n of Gov't Employees, Local 1668 v. Dunn, 561 F.2d 1310, 1314 (9th Cir. 1977),

185. *Id.* (citing Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1975)).

186. Kale v. United States, 489 F.2d 449, 454 (9th Cir. 1973), *cert. denied*, 417 U.S. 915 (1973).

187. Sims v. Apfel, 530 U.S. 103, 107 (2000).

> Your applications for sign approvals at 17008 Evergreen Place and 17050 Evergreen Place cannot be processed and are enclosed. The proposed signs are not permitted in the City of Industry. A copy of the sign code is enclosed.[188]

In ensuing litigation, the municipality contests standing on "exhaustion" grounds, contending there was no final adverse decision.[189] The city explains the permits were not denied; rather, the applications could not be processed.[190] Although this sort of pretext would probably not succeed in other First Amendment cases, it does in sign cases.

D. *Mootness*

Another limitation on challenges is mootness. Mootness can be a powerful weapon to avoid challenges to sign ordinances. In almost every case cited in this article, another clear pattern of municipal behavior emerges. In response to each constitutional challenge, the municipality changes its ordinance, however slightly. As a litigation strategy, this can be quite effective. A new ordinance moots most challenges to the prior ordinance while denying the plaintiff standing to challenge the new ordinance (because the new ordinance was not the basis for any adverse governmental action against the sign owner).

Repeal of statute almost always moots the case.[191] The rare exception is where a statute is "virtually certain" to be re-enacted.[192] This author knows of no sign case applying the doctrine that a court can maintain jurisdiction where a constitutional violation is "capable of repetition, yet evading review."[193] In conjunction with nuisance abatement actions that are perpetually ripe, such a municipal strategy can curtail judicial review of sign ordinances regulating free expression.

In sign cases, the frequent changes in ordinances follow a pattern that derives from a quirk in most sign ordinances. Almost all sign ordinances distinguish between "onsite" and "offsite" signs. An onsite sign advertises the business activity conducted on the premises, or the owner of a particular building, whereas an offsite sign advertises some other business.[194] As typically written, these ordinances carelessly

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188. Horizon Outdoor, L.L.C. v. City of Industry, 228 F. Supp. 2d 1113, 1125 (C.D. Cal. 2002).

189. *See, e.g.*, Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 900 (9th Cir. 2007).

190. *Horizon Outdoor*, 228 F. Supp. 2d at 1125.

191. *See, e.g.*, Diffenderfer v. Cent. Baptist Church, 404 U.S. 412, 414-15 (1972).

192. Native Vill. of Noatak v. Blatchford, 38 F.3d 1505, 1510 (9th Cir. 1994); *see also* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 & n.11 (1982) (city announced intention to re-enact statute if case dismissed).

193. So. Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911).

194. Darrel Menthe, *Writing on the Wall: The Impending Demise of Modern Sign Regulation Under the First Amendment and State Constitutions*, 18 GEO. MASON U. CIV. RTS. L. J. 1, 12 (2007).

lump in non-commercial speech with offsite sign regulation. Typically, the "onsite" category is narrowly written to mean only signs advertising the primary business activity on the premsises, and the "offsite" category includes everything else. Such rules burden noncommercial speech because they fail to contemplate removing the large "USBank" logo and replacing it with a sign reading "Vote GOP."

Thus, cities routinely leave themselves open to a section 1983 suit contending that the relevant municipal sign ordinance is unconstitutional because the statute unfairly discriminates against noncommercial speech in favor of commercial speech in violation of *Metromedia*.[195] Now, it is doubtful that any city has ever actually had such a preference. Rather, the purpose of these sign codes is to limit permanent signage to "onsite" signs, and nobody was even thinking of non-commercial signs.[196]

Taking advantage of this constitutional infirmity in many such sign ordinances, a sign owner can bring an overbreadth claim to attack certain provisions of the sign ordinance, hoping to strike down enough important provisions so a court will not sever the remainder. Frequently, when the challenge occurs (or is suspected), the city or county will quickly enact a "message substitution" provision that superficially solves the *Metromedia* problem by allowing a noncommercial message wherever commercial messages are permitted.[197] If the statutory change does not solve the constitutional problem, the City enacts another change to its ordinance.

Usually, these frequent ordinance changes in the midst of litigation go unremarked. However, the Ninth Circuit addressed such a mootness issue in *Dream Palace L.L.C. v. County of Maricopa*.[198] Dream Palace was an adult nude dancing establishment.[199] Its owner brought an overbreadth challenge to a new license requirement being applied to adult businesses that would be denied to Dream

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195. *See generally* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

196. Because elected officials do think about elections, however, sign codes are also littered with provisions providing broad exemptions for "temporary political signs," presumably because the codes' authors consider that political messages are displayed on a temporary basis, usually around elections, and are usually printed on disposable vinyl or cardboard. *E.g.*, WASH. ADMIN. CODE 468-066-050(3)(d)(e) (2008); LOS ANGELES, CAL. CODE § 91.6201.2 (2007); Katherine Boas, *Front Yard Politics, or the Right to Bear Signs*, N.Y. TIMES, Aug. 22, 2004 (discussing Connecticut municipal rules). These content-based exceptions present their own constitutional difficulties.

197. While such "message substitution" provisions may eliminate the problem of favoring commercial speech on a particular sign, they do nothing for a citizen who happens to own a vacant piece of property near a freeway and who wishes to erect a new noncommercial sign. Since no commercial sign would be permitted there (there is no "business activity" to announce), no noncommercial message may be "substituted." That citizen usually is not interested in bringing a lawsuit. *But see* Lombardo v. Warner, 391 F.3d 1008, 1008 (9th Cir. 2004).

198. 384 F.3d 990, 1008 (9th Cir. 2004).

199. *Id.* at 997. As noted in the introduction, a consistent issue in sign litigation is that so many of the precedents in zoning and free speech issues concern "adult" businesses, which introduces a whole set of concerns not present in sign cases.

Palace.[200] The district court ruled that Dream Palace was exempt from those requirements because it was a pre-existing business.[201] The Ninth Circuit was irked to learn that "rather than challenging the district court's ruling with respect to pre-existing businesses like Dream Palace, [the county was] in the process of amending those provisions so that the challenged restrictions [would] apply to pre-existing businesses."[202] Sensing that an individual business was being unfairly targeted, the Ninth Circuit chose to remain seized of the matter.[203] In sign cases, this rarely happens.[204]

These frequent changes in sign ordinances may remove a prospective constitutional violation, but do not remedy the fact that the ordinance was unconstitutional and that, in these cases, the sign owner was denied a permit under an unconstitutional ordinance. It matters, in all likelihood, the more favorable treatment for Dream Palace depends on it being perceived as the sort of "trifling and annoying" nuisance referred to in *Cohen v. California*.[205] However, there is no analytical justification for treating signs differently: the First Amendment should not be applied only to protect limited or inconspicuous speech.

E. *Unbridled Discretion and Prior Restraint*

Another closely related First Amendment doctrine bearing on signs is the issue of licensure and prior restraint. In 1969, the Supreme Court explained that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority is unconstitutional."[206]

> It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official-as by requiring a permit or license which may be granted or withheld in the

200. *Id.* at 999.

201. *Id.*

202. *Id.* at 1000.

203. *Id.* at 1000-01.

204. In another case penned by Judge O'Scannlain, however, the Ninth Circuit also expressed some exasperation at the changing statutory ground. Valley Outdoor, Inc. v. City of Riverside, 446 F.3d 948, 950 n.1 (9th Cir. 2006) ("We note that the City has yet again rewritten the section of its zoning code governing signs.").

205. 403 U.S. 15, 25 (1971).

206. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969).

> discretion of such official-is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.[207]

The *Shuttlesworth* decision is crucial to sign cases for two reasons. First, sign laws almost always involve licenses or permits. Second, *Shuttlesworth* seems to give speakers the right to engage in speech and "ignore" such unconstitutional licensing requirements:

> [O]ur decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license. 'The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands.'[208]

Shuttlesworth built on *Freedman v. Maryland*, which held a plaintiff may challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office whether or not the plaintiff applied for a license.[209] *Freedman* concerned film censorship, but held procedural safeguards alone could save Maryland's scheme.[210] In a brief but important concurrence, Justice Douglas, joined by Justice Black, replied, "As I see it, a pictorial presentation occupies as preferred a position as any other form of expression. If censors are banned from the publishing business, from the pulpit, from the public platform—as they are—they should be banned from the theatre."[211] The comment about *pictorial presentation* has bearing on sign cases.

Shuttlesworth was incorporated further into First Amendment law in *City of Lakewood v. Plain Dealer Publishing*,[212] which concerned a licensing scheme that gave the mayor discretion to deny permits for the placement of newspaper racks. The Court in *City of Lakewood* held that a licensing scheme for a permanent item (newspaper racks) that permitted the mayor to grant or deny permits at will was unconstitutional as a prior restraint on speech.[213] Notably, to strike down the ordinance, the newspaper did not have to show that the mayor was acting in an arbitrary fashion in violation of the equal protection clause. The Court stated that "Proof of an abuse of power in the particular case has never been deemed a requisite

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207. *Id.* at 151 (quoting Staub v. City of Baxley, 355 U.S. 313, 322 (1958)).

208. *Id.* at 157 (quoting Jones v. City of Opelika, 316 U.S. 584, 602 (1942) (Stone, J., dissenting), *adopted per curium on reh'g*, 319 U.S. 103, 104 (1943)).

209. Freedman v. Maryland, 380 U.S. 51, 56 (1965).

210. *Id.* at 58.

211. *Id.* at 62 (Douglas, J., concurring).

212. 486 U.S. 750, 755-56 (1988).

213. *Id.* at 772.

for attack on the constitutionality of a statute purporting to license the dissemination of ideas."[214] Rather, it was sufficient under the First Amendment to show that there could be a chilling effect on the press if they feared they might lose their newspaper racks if they angered the mayor.[215]

This is a very live issue for sign cases. Most sign ordinances give broad discretion to approve signs for "design" and other highly subjective factors. The mural ordinance of the City of Los Angeles is a case in point.[216] The mural must contain no more than three percent text, and it must be approved by a cultural commission.[217] Similarly, in Santa Monica, a licensing scheme was adopted permitting signs to remain that were deemed "meritorious."[218] Signs in historic zones must be approved by the Landmark Commission.[219] What does a property owner do when confronted with such obtuse regulations if he or she wishes to erect a sign?

Does the *Shuttlesworth* doctrine mean that one may erect a sign without a license if the licensing scheme is unconstitutional? May a sign person wishing to challenge a sign ordinance simply build the sign first and then litigate the constitutionality of the ordinance? At least one court has said yes.[220] In *Desert Outdoor,* the sign operator built billboards without permits.[221] A second sign owner then piggybacked on this decision.[222] In honoring an unusual procedure known as an *England* reservation,[223] the sign owner reserved the right to keep federal constitutional issues in the federal forum, but litigated the state proceeding to determine whether the signs should be torn down.[224] The state court entered a permanent injunction to tear down the signs.[225]

The *Desert Outdoor* court declared the municipal statute at issue unconstitutional because it gave officials "unbridled discretion" in determining whether a particular structure or sign will be "harmful to the community's health, welfare, or 'aesthetic

214. *Id.* at 757 (quoting Thornhill v. Alabama, 310 U.S. 88, 97 (1940)).

215. *Id.* at 757-58.

216. *See infra* note 217 and accompanying text.

217. LOS ANGELES, CAL., MUNICIPAL CODE § 91.6203 (2008).

218. SANTA MONICA, CAL., MUNICIPAL CODE § 9.52.210 (d) (2001), *available at* http://www.qcode.us/codes/santamonica.

219. SANTA MONICA, CAL., MUNICIPAL CODE § 9.52.041 (1992), *available at* http://www.qcode.us/codes/santamonica.

220. *See* Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814, 817 (9th Cir. 1996).

221. *Id.*

222. *Id.*

223. *See* England v. La. State Bd. of Med. Exam., 375 U.S. 411, 419-23 (1964); San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323, 338-42 (2005).

224. *Desert Outdoor*, 103 F.3d at 817.

225. *Id.*

quality.'"[226] The Court disapproved of a scheme that empowered municipal officials to deny a sign permit without offering any evidence demonstrating how the sign would have been detrimental to the community.[227]

The court in *Desert Outdoor* held that the sign operator had "standing to challenge the permit requirement, even though they did not apply for permits, because applying for a permit would have been futile."[228] It held that "[a]pplying for a permit would have been futile because: (1) the City brought state court actions against Desert and OMG to compel them to remove their signs; and (2) the ordinance flatly prohibited appellants' off-site signs located outside the three permitted zones."[229]

Similarly, in *Valley Outdoor, Inc.*, the sign owner built signs without seeking a permit (after the sign ordinance had been struck down by a state court, and before any new sign ordinance could be enacted under which a permit might be denied).[230] As with *Desert Outdoor,* the city instituted a parallel state proceeding to bring down the signs under a nuisance theory.[231] However, the Ninth Circuit intervened under the All Writs Act[232] to stay all state court proceedings and then held that where the city had a provision permitting a sign owner to file for sign permits after construction began, it could not exercise unbridled discretion in granting or denying those late-filed permits.[233] The Court left for another day the determination of whether a rule flatly barring any post-construction sign permits would be constitutional under prior restraint doctrine.[234]

Other courts have been less sanguine. Sign owners constrained by complete bans on outdoor advertising have argued that such ordinances constitute an unlawful

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226. *Id.* at 819.

227. In 1967, Desert Outdoor tried to battle the neighboring County of Riverside in federal court while the county was pursuing criminal action against in state court for illegal billboards. The federal court flatly refused to hear the challenge. Desert Outdoor Adver., Inc. v. County of Riverside, 302 F. Supp. 599, 599 (C.D. Cal. 1967), *aff'd,* 414 F.2d 832 (9th Cir. 1969). Times change.

228. *Desert Outdoor*, 103 F.3d at 818. Of course, the futility concept is an exception to both the "exhaustion of remedies" principle (and the general legal prohibition against "self-help") both of which arise in other contexts alleging violation of equal protection and due process rights.

229. *Id.*

230. Valley Outdoor, Inc. v. City of Riverside, 446 F.3d 948, 950 (9th Cir. 2006).

231. *Id.* at 952 n.2.

232. 28 U.S.C. § 1651 (2000).

233. *Valley Outdoor, Inc.*, 446 F.3d at 955.

234. *See id*; *see also* Tollis, Inc. v. County of San Diego, 505 F.3d 935 (9th Cir. 2007), *cert denied*, 128 S. Ct. 2514 (2008). In *Tollis*, the Ninth Circuit held that unreasonable time limits on processing permits for adult businesses constituted, in effect, unbridled discretion and a prior restraint on speech. *Id.* at 943. It found that severing the time limits was an inappropriate response, however, because it left the statute with no time limits. *Id.* The proper solution, according to the Ninth Circuit, was to strike down the permit requirement altogether. *Id.*

prior restraint. Such arguments have not been successful.[235] The Eleventh Circuit even held that a sign owner was not "subject" to various prior restraints *because* outdoor advertising signs were categorically banned.[236] It is not hard to imagine that few courts want to follow *Desert Outdoor* because of the concern over proliferation of billboards. Achieving this goal by contorting First Amendment doctrine is not, however, a sound judicial solution.

F. *Prior Restraint and Per Se Nuisance Doctrine*

The issue of the prohibition against prior restraints is critical in sign cases for economic reasons. The prudential question of greatest interest to most litigants is whether the sign should be permitted to remain during the litigation. A functioning billboard pays for itself and pays for its own litigation. Not surprisingly, municipalities despise this practice. Municipalities seek injunctions against signs for similar reasons: if a municipality can find a way to prevent the signs (which cost tens of thousands of dollars to erect) from making money, it can effectively win these cases by financial default. Under the prohibition against prior restraints, a challenge to a sign ordinance should probably proceed *with the sign standing* so long as the sign is not an *actual* nuisance.

One might think the issue would be noncontroversial. In First Amendment cases, the prior restraint doctrine generally permits a speaker to engage in free expression first and pay the price (if any) later.[237] For a large sign, the prohibition against prior restraint would seem to be missing in action.

The reason is that prohibition against prior restraint becomes subordinated to the municipality's nuisance claim. The physical structure of a sign implicates zoning and building safety codes. If not subject to proper inspections, the sign may be unsafe. These safety and health concerns should, perhaps, override the First Amendment

235. *See, e.g.*, Advantage Adver., L.L.C. v. City of Hoover, 200 Fed. Appx. 831, 835-36 (11th Cir. 2006) (holding that a permit requirement which imposes certain restrictions pertains to proposed signs that are completely banned).

236. Granite State Outdoor Adver., Inc. v. Cobb County, 193 Fed. Appx. 900, 906 (11th Cir. 2006). ("Granite State lacks standing to challenge the restrictions on "temporary signs," *id.* § 134-316, directional signs for the purpose of tourism or public recreation, *see id.* § 134-317, and "off-premises signs," *see id.* § 134-315(a). Because there is no evidence in the record that the signs Granite State intended to construct signs governed by any of these regulations, Granite State does not have standing to challenge them. The record shows that the only intended activity of Granite State is outdoor advertising, which is categorically banned.").

237. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) ("[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.") (emphasis included); *accord* Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 516-18 (2008).

interests at stake, and this would be a satisfactory explanation where signs present safety issues. However, safety rarely is an issue.[238]

Rather, the sign is generally declared a "*per se*" nuisance because it violates a municipal code. Most cities have a statute that declares any zoning violation—or any violation of the municipal code at all—to be a nuisance. Legislative fiat may declare something a *per se* nuisance. The "nuisance" is often nothing more than the violation of the sign ordinance itself.[239] Therefore, safety and health concerns may be nonexistent yet still be used to justify removal of a sign.

Moreover, this *per se* nuisance theory applies with equal force to signs that are little more than large banners hung on pre-existing walls or buildings—signs that obviously constitute no safety hazard. Indeed, a virtual sign (projected on a building from below), with no physical component at all, would still be subject to nuisance abatement. The *per se* nuisance doctrine thus becomes a way of enforcing anti-expressive legislation through the guise of traditional nuisance law.

In First Amendment cases, one might expect a court to take a long, hard look at a municipality that seeks to abate a nuisance under this theory where no actual safety hazard is posed by the sign. As Justice Powell said in 1976, "courts must be alert to the possibility of direct rather than incidental effect of zoning on expression, and especially to the possibility of using the power to zone as a pretext for suppressing expression."[240] California Supreme Court Justice Mosk also cautioned in a concurring opinion, "I do not mean to sanction the use of . . . the common law of nuisance as a pretext for ridding a community of First Amendment-protected activity."[241] This caution does not appear in sign cases.

A requirement that nuisance doctrine only apply to actual nuisances would go a long way to protecting First Amendment freedoms in sign cases. Once a sign owner submits evidence that its sign does not violate any substantive health or safety provision, no injunction should issue on nuisance grounds.

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238. Freestanding billboards (i.e., not fixed or anchored to a wall), are standardized items. A metal pole is sunk into the ground and secured by concrete, then a sign is hung off it like a sail. The engineer's job is to make sure it does not fall down or blow down. The mechanics and mathematics were worked out years ago.

239. *See generally, e.g.,* Executive Arts Studio, Inc. v. City of Grand Rapids, 391 F.3d 783 (6th Cir. 2004); Virtual Media Group, Inc. v. City of San Mateo, 2002 WL 485044 (N.D. Cal. 2002); City of Tucson v. Clear Channel Outdoor, Inc., 181 P.3d 219 (Ariz. Ct. App. 2008).

240. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 84 (1976) (Powell, J. concurring).

241. City of Nat'l City v. Wiener, 838 P.2d 223, 241 n.12 (Cal. 1992) (Mosk, J., concurring); *see also* Hurwitz v. City of Orange, 19 Cal. Rptr. 3d 213, 226 (Cal. Ct. App. 2004).

IV. TOWARDS COHERENT PRINCIPLES FOR SIGN REGULATION

A. *Proposal*

The foregoing review demonstrates that current sign regulations fail to take account of First Amendment concerns. The problem is not so much that courts today are unaware of the First Amendment problems, but that courts are unwilling to treat signs like other speech acts under the First Amendment because First Amendment doctrine would seem far too permissive and too unwilling to take account of other interests protected by the police power of the state. The reason it is too permissive, this author argues, is that First Amendment law is too clumsy, with its simple dichotomy between "content-based" and "content-neutral" (i.e. time, place, and manner) regulation and dramatically different levels of scrutiny for each. It is too constrained by its history of protecting lone unpopular plaintiffs against the heavy hand of regulation. Signs can be treated in ways that honor First Amendment principles, but only as a separate category of speech.

Regulations affecting signs should be understood as lying somewhere along a continuum between regulations that are purely physical and those that are exclusively about expression. A separate judicial category for sign laws will also allow sign regulators to be decoupled from land-use cases, thereby assuring that greater protection for signs will not carry-over into other areas of land use that do not implicate First Amendment concerns.

It is worth recognizing that this continuum is heavily weighted toward one end of the spectrum. While few regulations could be characterized as "purely" structural, there are many that are exclusively about speech. Banning the display of obscene words, for example, is a plain speech regulation with no structural component. By contrast, structural regulations frequently implicate expression or are pretexts for regulation of expression.

Thus, this author proposes courts should adopt an "undue burden" standard as the most appropriate method of securing the competing constitutional interests at stake in the regulation of signs. First Amendment standing should be granted to plaintiffs who seek to test the sign regulations, whether or not a proposed sign might be otherwise barred by some "content-neutral" portion of the ordinance (such as a size or height limitation). The court would then inquire as to whether the regulation places an "undue burden" on speech. The burden then should shift to the government to demonstrate the appropriate non-speech interest in the regulation. Such an interest should be factually and realistically evaluated, not simply asserted.

But limiting signage is **not**, *per se,* a legitimate governmental interest. Limiting expressive activity for its own sake is never a legitimate government interest. Such an idea runs against the whole tenor of First Amendment law and liberty. For that reason, this author differs from the otherwise excellent analysis of Jacob Loshin, who

traced the history of billboard regulation in New Haven.[242] He observed, and this author agrees, that "content-based sign regulation is usually an ineffective means of limiting the proliferation of signs."[243] He also expressed doubts about the continuing vitality of *Metromedia,* a position this author agrees with.[244] However, Loshin nonetheless proposed a regime of sign control based on laws that supposedly do not implicate First Amendment concerns: "private nuisance law, light zoning, and taxation."[245] While it is excellent in its economic analysis, this author would suggest that the constitutional premise is flawed. Such regulations can and do implicate First Amendment concerns precisely because the goal is "sign control." Recognizing that signs, even commercial signs, are protected by the First Amendment is important if we are to be faithful to First Amendment principles.

Whether commercial speech is systematically devalued compared to political speech under such a regime is a question for another day. However, a First Amendment scheme of sign regulation must make some place for aesthetic regulation in a way that would not normally be permitted for other forms of free expression. It is not necessary that signs give more offense or be less aesthetically pleasing to be regulated; rather, it is the *permanent* presence of signs in a landscape that allows a municipality to treat such structures differently than utterances.

Yet, even aesthetic interests should be substantiated in some way to avoid pretexts or total bans on expression. In *Metromedia*, Justice Brennan openly wondered if the City of San Diego could really show that billboards were so aesthetically unpleasant:

> A billboard is not *necessarily* inconsistent with oil storage tanks, blighted areas, or strip development. Of course, it is not for a court to impose its own notion of beauty on San Diego. But before deferring to a city's judgment, a court must be convinced that the city is seriously and comprehensively addressing aesthetic concerns with respect to its environment.[246]

Undertaking this inquiry would revive, for sign cases, the notion that pretextual reasons should not be honored as legitimate governmental interests.

Adopting a new standard means moving past the old, failed tactics. Vested rights analysis should be jettisoned in sign cases, at least as a *barrier* to raising First Amendment claims. In other words, two sign owners side by side, one of whom has vested rights and one of whom does not, should have the same standing to bring First

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242. *See generally* Jacob Loshin, *Property in the Horizon: The Theory and Practice of Sign and Billboard Regulation*, 30 ENVTL. L. & POL'Y J. 101, 103-43 (2006).

243. *Id.* at 157.

244. Menthe, *supra* note 194, at 49.

245. Loshin, *supra* note 242, at 171.

246. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 531 (1981) (Brennan, J., concurring).

Amendment claims. Nonetheless, vested rights should remain an option for vindicating the property interest in the sign structures themselves.

Finally, the all-important issue of whether illegal signs should remain standing during litigation must be reimagined. First Amendment rules against prior restraint should at last be brought to bear on sign cases over nuisance laws. So, in First Amendment cases, the normal presumption that any violation of a city ordinance is a nuisance subject to abatement should not apply except where the presence of an actual nuisance is demonstrated by competent evidence. Thus, signs should remain standing during litigation, just as other speech is not enjoined. The open question would be whether a sign can be declared an actual nuisance on aesthetic grounds. Perhaps this can be done. But if aesthetic grounds are ever to be sufficient for a sign to be a nuisance (however defined), there should be at least some judicial inquiry into whether the aesthetic grounds are pretextual. A sign on the edge of the Grand Canyon should be treated differently, in this respect, from a sign on the edge of I-95 near the docks in Baltimore. In other words, the case has to be made, not merely asserted. It is surely not very much more troublesome for courts to be guardians of aesthetics than legislatures, particularly in the limited area of protecting free expression.

B. *The Benefits of an "Undue Burden" Standard*

Admittedly, an "undue burden" standard can be accused of creating more questions than answers.[247] The undue burden standard has received wide criticism since it was imported into abortion law by *Casey* in 1992.[248] The tenor of these arguments is that there is no constitutional basis for such a standard in the text of the Constitution, nor did any exist in previous Supreme Court precedents.[249]

Other commentators have held the undue standard to be, at least, a balance in keeping with an important function of the courts.[250] As Neil Siegel notes, Justice Kennedy has since referred to the standard announced in *Casey* as a "balance."[251] If the standard received more condemnation than praise, it is probably because it satisfied no political constituency.

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247. *See, e.g.*, Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL'Y 519, 549 (2008).

248. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 876-78 (1992).

249. *See, e.g.*, Pushaw, *supra* note 247, at 549; Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1585 (2004); *see also* Trent L. Pepper, *The "Mystery of Life" in the Lower Courts: The Influence of the Mystery Passage on American Jurisprudence*, 51 HOW. L. J. 335, 336-37 (2008).

250. *See generally* Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008).

251. *Id.* at 976-77 (citing Gonzales v. Carhart, 127 S. Ct. 1610, 1627 (2007)).

This author advocates this standard in sign cases for two reasons. First, as this article demonstrates, there is a strong need for a single new constitutional standard for sign cases. Adopting *any* standard would, at least, focus judicial inquiry and allow a coherent body of precedent to develop. An "undue burden" standard would allow precedent to unfold that would gradually define how much of a burden is "undue." In this sense, at least, an "undue burden" standard is no more unworkable or unjudicial than such concepts as "proximate cause" or "probable cause." Justice Stewart's famous remark about hard-core pornography, "I know it when I see it"[252] is where we end up when we fail to articulate a standard and develop it through precedent.

Second, the balancing nature of the standard has merit and constitutional pedigree in the area of signage. As the cases reviewed here demonstrate, there are strong pressures and interests arrayed both for and against sign regulation. The police power of the state is an inherent part of sovereign control, while free speech is enshrined in the First Amendment. These interests are simply in conflict: there is no inherent prioritization.

Alan Brownstein persuasively wrote that the "undue burden" standard may be a decent solution where important interests are in conflict and courts have hesitated to apply strict scrutiny.[253] As he writes:

> The alternative to an undue burden approach, however, may even be more limited and restrictive. If the only choice is between protecting the exercise of a right against all burdens under strict scrutiny review or interpreting the interest at stake as something other than a right and providing it no constitutional protection at all, the latter option may be selected in far too many circumstances.[254]

Too often, that is precisely the dilemma—and the result—in sign cases.

Just as important for our purposes here, Brownstein argues that many free speech cases should already be viewed as some species of "undue burden" cases.[255] Without recapitulating these arguments here, this author concurs that there is significant constitutional pedigree for the application of an "undue burden" standard in speech cases. Certainly, the cases reviewed here demonstrate the problems that Brownstein pointed to: the willingness of courts to sacrifice fundamental freedoms altogether rather than confront the excessive results of applying searching judicial scrutiny.

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252. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J. concurring).

253. *See generally* Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55 (2006); Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 955-56, 959 (1994).

254. Alan Brownstein, *supra* note 253, at 955-56.

255. *Id.* at 920-24.

Fidelity to First Amendment principles demands this much: that we begin treating signage as free speech, not mere property, and that we begin by according to these speakers—however commercially self-interested—some of the respect afforded to more favored civil liberties plaintiffs. An "undue burden" standard will allow courts in sign cases, for the first time, to balance openly the First Amendment with the other interests at stake.