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Selective Ban of Street Signs
Metro Lights, LLC v City of Los Angeles (9th Cir 2009)
55 F3d 898

City ban of off-site commercial signs, excepting those installed under exclusive contract with city for sale and display of such signs at city-owned transit stops, does not violate First Amendment.

In December 2001, the City of Los Angeles entered into a long-term contract with a vendor for the installation and maintenance of certain public facilities at transit sites in exchange for the exclusive right to sell and display advertising on those facilities. In addition, the vendor agreed to make annual payments to the city according to an agreed formula. In April 2002, the city adopted a sign ordinance that prohibited off-site commercial signs. The sign ordinance is part of the city's Building Code, which excepts the public way, including transit stops, from its provisions. Metro Lights owns and operates outdoor, off-site signs in Los Angeles. After receiving several citations for violating the sign ordinance by installing new off-site signs, Metro Lights sued the city for relief, alleging, among other things, violation of the First Amendment. The United States District Court granted Metro Lights partial summary judgment on its First Amendment claim, ruling that the city could not preclude Metro Lights from installing off-site signs while at the same time permitting its own contractor to install off-site signs in the public way throughout the city. The Ninth Circuit reversed.

The Ninth Circuit's analysis began by noting that commercial speech is accorded less protection than other constitutionally guaranteed speech. *Central Hudson Gas & Elec. Corp. v Public Serv. Comm'n of New York* (1980) 447 US 557, 564, 65 L Ed 2d 341, 349, 100 S Ct 2343. *Central Hudson* announced a four-part test to determine the constitutionality of a restriction on commercial speech, which the Ninth Circuit applied to the city's sign ordinance:

1. If the communication is neither misleading nor related to unlawful conduct, the restriction merits scrutiny under the First Amendment.
2. The government must have a substantial interest to be served by the restriction.
3. The restriction must directly advance the government's interest.
4. The restriction must not be more extensive than necessary.

The parties agreed that the advertising merited First Amendment protection and that the government had a substantial interest to advance. Under *Metromedia, Inc. v City of San Diego* (1981) 453 US 490, 69 L Ed 2d 800, 101 S Ct 2882, which considered a similar ordinance banning off-site signs but providing several exemptions, including for bus stops, the restriction satisfies the third element (direct advancement of the governmental interest). As to the fourth element, the city's vendor contract did not invalidate the ordinance. Although the city may not prohibit one advertiser and permit another simply because the latter paid a tax, the city may prohibit advertisers in general but permit them to bid for the right to advertise on city-owned property. In sum, applying the *Central Hudson* assessment, *Metromedia* compelled the conclusion that the sign ordinance, even in light of the city's vendor agreement, was not unconstitutional.

THE EDITOR'S TAKE: The court of appeal's decision was much more difficult to follow than the district court's (which simply held that "the city cannot, on the one hand, preclude plaintiff from displaying messages on its off-site signs as a supposed legitimate exercise of its police powers while, on the other hand, authorizing its Street Furniture contractor to erect off-site signs in or near the public rights of way throughout the City of Los Angeles"). The issue was made difficult because Supreme Court decisions do permit cities to discriminate between on-site and off-site advertising signs, even though both of them cause visual clutter. Thus, the fact that signs away from transit shelters are prohibited while those attached to the shelters are allowed does not automatically make this ordinance "underinclusive" or demonstrate a failure to directly advance a substantial state interest. The Ninth Circuit contended that a "ban on some off-site signs still advances traffic safety and esthetics more than a ban on none." Because a city may "value one kind of commercial speech—on-site advertising—more than another kind of commercial speech—off-site advertising," Los Angeles could

prefer “controlled off-site advertising on public transit facilities” over “uncontrolled off-site advertising spread willy-nilly about the streets.”

On its own, that distinction is respectable. But there was another fact in the opinion that intrigued me. The transit shelters where the signs were permitted had all been donated to the city by the company that collected the revenues for the signs hanging there. Indeed, the court noted, “the city has been compensated handsomely for this classically legislative decision, not only in money but in the installation of presumably more attractive public transit facilities and in a veto over the design of advertisements that appear at these facilities.” Does that feature bear on the First Amendment issue?

In Fifth Amendment takings cases, the fact that the government itself is the prime beneficiary of restrictions it imposes on a property owner makes the regulation more suspect. For instance, in *Fred F. French Investing Co. v City of New York* (1976) 385 NYS2d 5, 350 NE2d 381, two small parcels across the street from the United Nations building had been rezoned as a “special park district” so as to permit only “passive recreational uses” (after the developer had announced plans to construct a 50-story tower over them). The New York Court of Appeals held that the rezoning constituted a taking of property because the government was acting in its “enterprise capacity” rather than in its “arbitral capacity”—*i.e.,* acquiring private resources for itself to perform public functions rather than simply intervening to resolve private conflicts between its citizens.

The Ninth Circuit decision in *Metro Lights* makes it seem that the distinction between enterprise and arbitral activity does not also apply to First Amendment issues. According to the briefs, the plaintiff’s expert testified that signs on transit shelters were more distracting and more likely to cause accidents than signs elsewhere, but that got nowhere. But when local economic considerations may taint or outweigh esthetic ones, does First Amendment analysis remain unaltered? (The enactment of the off-site sign ordinance just four months after the city’s transit shelter contract with plaintiff’s competitor does add some plausibility to an inference of connectedness.)

What else might a city do by way of speech restriction that carries with it the side benefit of revenue enhancement? Can it prohibit signs on taxicabs while allowing their continued display on municipal buses? Can it also make a profit by how it regulates on-site signs? Are there other ways to raise revenue by rationing public speech to those who can pay the most for it?

The question of what kind of profit the government makes does not seem to be currently included as one of the relevant factors in determining the validity of commercial speech regulation. But perhaps it should be.—*Roger Bernhardt*