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The Changing Tradition of Constitutional Review of Sign and Billboard Regulation

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The twentieth century has been an unparalleled period of growth and change in the United States. In 1900, the total U.S. population stood at just over seventy-six million people while almost one hundred years later it has nearly reached two hundred and seventy-five million. Change has also occurred in the form of growth and development and during the last quarter century we have ceased to be a nation predominantly of city dwellers to become a country of suburbanites with more than more than fifty percent of the nation's residents living in metropolitan suburbs. Although change has been the watchword over this century, certain local government concerns have remained constant. One such consistent issue has been the municipal desire to regulate the aesthetic quality of the community under the authority of the police power. As the discussion below will reveal, sign regulation has been a local government policy goal and one which has been legally controversial and frequently litigated throughout much of this period. Sign regulation, as one form of police power-based land use control, touches a number of constitutional values and throughout the century has encountered a changing series of constitutional law challenges reflective of the changing mix in emphasis of those values. The general thesis of this article is that over the century judicial review of sign regulation, as an aspect of aesthetic regulation, has become more hospitable and in recent years this form of land use control has generally emerged intact.

Part 1. Early Twentieth Century Sign and Billboard Control: The Journey to Finding Aesthetic Regulation within the Police Power

Municipalities have attempted to regulate signs throughout the twentieth century. At the turn of the century, there was a surge in interest in classical urban architectural design and monumental city planning. This emphasis, which has been termed the City Beautiful Movement by urban historians, is believed to have developed as an outgrowth of the Chicago World's Fair of 1893. This movement affected more than just the design of large public buildings like the New York Public Library and the form of city planning like the McMillan Plan for Washington, D.C. As a complex cultural movement, it emphasized a range of values related to municipal improvement and the achievement of quality of life and aesthetic goals for urban places. One aspect of this desire to beautify cities was the control and occasionally the elimination of signs. The burgeoning commercial life of the turn of the century developed a world where signs began to be viewed as a form of visual pollution justifying municipal regulation based upon the state's police power.

Municipal attempts to control the location and composition of signs coincides with the urbanization of the United States which was accelerating at the last turn of the century. Although a strong public desire to improve the visual characteristics of the urban environment existed at this time, state courts were surprisingly reluctant to approve early twentieth century local government sign regulations. Even though the authority to exercise regulatory power was usually not in doubt, American courts appeared concerned that an ordinary use of land for a previously lawful business would be eradicated in order to satisfy the subjective tastes of public authorities. The use of police power regulatory devices for the avoidance of such aesthetic or visual harms was difficult for most courts to support in the first decade of the century. This restrictive view of municipal sign regulation coincides with increased substantive due process analysis which resulted in the invalidation of many state laws as reflected by the famous Lochner decision. The following quote from a prominent New Jersey case captures the sentiment of the times.

We think the control attempted to be exercised is in excess of that essential to effect the security of the public. It is probable that the enactment of ... the ordinance was due rather to aesthetic considerations than to considerations of the public safety. No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the
police power to take property without compensation.

City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co., 72 N.J.L. 285, 62 A. 267-8 (Err. & App. 1905). Although some of the earliest sign regulation decisions were grounded in other non-aesthetic police power justifications, state courts generally ruled against such regulations as "unauthorized" under the police power. This criticism recognized the unfamiliarity of aesthetic control as well as the perceived danger of encouraging personally subjective forms of municipal regulation. The overarching themes during this period were that signs constituted an acceptable and natural land use and that the approval of aesthetically-based regulation would lead to a tyrannical majoritarianism disconnected from traditional police power concerns. As a result, numerous cases struck down municipal billboard bans,¹ sign size and setback limitations,² and parkway location prohibitions.³

These early holdings, while usually striking down the sign restrictions based upon illegitimate aesthetic purposes, would occasionally acknowledge other valid police power purposes for sign controls. These justifications, which gradually appeared in later cases, emphasized issues of public safety by being blown down, falling, burning, or coming into contact with electric wires,⁴ and the preservation of property values as an additional acceptable rationale.⁵ Some opinions during this early period would find extremely inventive, non-aesthetic rationales for limiting signs. For instance, in St. Louis Gunning Advertisement Co. v. City of St. Louis, 235 Mo. 99, 137 S.W. 929 (1911), the Missouri court found that signs were "constant menaces to the public safety and welfare of the city" in that they "endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscreants." Whether or not using these extended rationales, reviewing courts slowly began to rule more favorably on sign and billboard regulation as they came to accept the protection of community aesthetic quality as a valid police power purpose.

Adverse court decisions did not deter local governments nor abate popular support for sign controls. In the 1920's, local governments in most urban areas came under public pressure to limit billboards and other signs. The rapid urban and suburban expansion of this period drove municipal action to plan and regulate the form of the physical environment. During this period, courts demonstrated increasing receptivity to the municipal use of the police power to control community development. Prominent in this development was the judicial approval of the local government use of planning and zoning techniques found to be constitutional in 1926 in Euclid v. Ambler Realty, 272 U.S. 365 (1926). With the approval of land use control in Euclid, courts increasingly began to rule more approvingly on municipal efforts to regulate signs and billboards. They did so by altering their analysis by accepting aesthetics as one of the appropriate governmental goals for regulation under the police power. At base, this had previously represented a serious substantive due process problem for this form of land use regulation. Courts needed to determine that the exercise of governmental power for the protection of aesthetic values could be considered to be a valid regulatory object so as to satisfy the demands of due process.  

¹ Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909) and Posting Sign Co. v. Atlantic City, 71 N.J.L. 72, 58 A. 342 (Sup. Ct. 1904).
⁴ Cream City Bill Posting Co. v. City of Milwaukee, 158 Wis. 86, 147 N.W. 25 (1914) (upholding Milwaukee sign ordinance on safety grounds); Horton v. Old Colony Bill Posting Co., 36 R.I. 507, 90 A. 822 (1914) (upholding Providence sign ordinance upheld for safety reasons); and State v. Staples, 157 N.C. 637, 73 S.E. 112 (1911) (upholding Asheville ordinance requiring billboards to be at least two feet off the ground to prevent collection of leaves and other debris creating the risk of fire and unsanitary conditions).
process review. Rather than accepting aesthetic purposes as a freestanding police power purpose, states courts beginning in the 1930's and 1940's took an intermediate approach which held that aesthetic goals could be an appropriate governmental purpose as long as it was found to be supplementary to the achievement of other, traditional police power goals. Consequently, court opinions during this time usually discussed a long list of conventional police power factors connected to safety, morality, health and general welfare of the community to create a composite justification for the regulation.6

As late as 1969, the Virginia Supreme Court had expressed this same sentiment in Kenyon Peck v. Kennedy, 210 Va. 60, 168 S.E.2d 117 (1969), where it upheld a section of Arlington County's zoning ordinance which prohibited outdoor moving signs. Concurring in the view that aesthetic values could not, standing alone, support the exercise of the police power, this court said that, although aesthetic considerations alone may not justify police regulations, the fact that they enter into the reasons for the passage of an act or ordinance will not invalidate it if other elements within the scope of the police power are present. Id. at 63, 168 S.E.2d 120. Consequently, as long as there was another valid police power purpose for the prohibition - such as traffic safety as in Kenyon Peck - the existence of an additional aesthetic justification did not invalidate the restriction. Reviewing courts in Virginia have not always been so accepting of local government explanations of regulatory purpose and have even second-guessed legislative motives. In the 1975 case of Board of Supervisors v. Rowe, 216 Va. 128, 146, 216 S.E.2d 199, 213 (1976), the Kenyon Peck rationale was used to strike down a county's architectural design review requirement because its "predominant purpose...[was] to promote aesthetic values and the purpose recited in the ordinance to protect property values was merely an incidental goal." It is ironic that in its most recent decisions, the Fourth Circuit has held that aesthetic justifications, by themselves, are sufficient governmental interests to support a municipal sign ordinance from First Amendment attack.7

The upgrading of aesthetic objectives as a legitimate basis for municipal sign regulation over the course of this century has finally reached the point where it can be said that the clear majority rule holds that aesthetics alone constitutes a legitimate governmental purpose without the necessity of establishing more traditional police power support.8 Echoed in a series of U.S. Supreme Court decisions including Berman v. Parker, 348 U.S. 26 (1954); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); and Penn Central v. City of New York, 438 U.S. 104 (1978), the idea that "it is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled" has firmly established the principle that aesthetics constitutes an important local government purpose. In practice, modern cases usually find that sign regulations advance simultaneous public purposes including the prevention of visual clutter, traffic safety and the protection of tourism. The overall result has been the expanded use of municipal sign and billboard restriction pursuant to general or specific enabling authority granted in state enabling legislation.

Part 2. Recognizing First Amendment Values in Sign Regulation

If signs were considered to be merely structural aspects of a community, like houses, roads, schools, stores, they would easily be regulated with general land use control authority. However, signs are structures imbued with a special characteristic: their function is principally that of communication of a particular message. The exact message will vary depending upon the wishes of the sign owner and can range from site information, commercial product and price data, inspirational religious and political messages, to just about any meaning that the owner wishes to communicate to the public. While outdoor signs are not the only method of communication, they represent an important avenue of idea transmission to a potentially large public audience. Due to this connection of the sign being a structure as well as a communicative device, it is not hard to predict that constitutional First Amendment values eventually would come into conflict with a locality's police power authority to regulate or ban a sign in the name of community land use control. It is the


7 See Georgia Outdoor Advertising, Inc. v. Waynesville, 833 F.2d 43, 46 (4th Cir. 1987).

balance of these two competing forces which sets the
framework for the current discussion of the law of sign
and billboard control.

The United States Supreme Court has only
recently become interested in applying First Amendment
dctrine to the subject of sign regulation. Although it
previously had struck down municipal prohibition of
residential "for sale" signs in Linmark Associates, Inc. v.
Township of Willingboro, 431 U.S. 85 (1977), its main
discussion of commercial and non-commercial sign
regulation has more recently emerged. Three principal
decisions - Metromedia, Inc. v. City of San Diego, 453
("Vincent"), and City of Ladue v. Gilleo, 512 U.S. 43,
114 S. Ct. 2038 (1994) ("City of Ladue") - set out the
central corpus of constitutional First Amendment theory
for evaluating municipal efforts to regulate signs. Each
of these decisions deserves separate attention.

A. Metromedia

In Metromedia, San Diego had passed an
ordinance which generally banned "outdoor advertising
display signs" while exempting two categories of signs
from the ban's coverage. The first exempted category
included onsite signs that identified the premises or the
products manufactured, produced, or sold there. The
second category exempted twelve carefully defined
categories including governmental and temporary
political signs. Discerning the meaning of the
Metromedia decision is not easy since the Supreme
Court split into three blocks that drafted a total of five
opinions: a plurality opinion of four Justices, a
concurrence of two other Justices and three separate
dissents. The following discussion will attempt to distill
the concrete points of majority agreement.

1. Upholding the Prohibition of Offsite
Commercial Outdoor Signs and
Billboards

The four Justice plurality and the three
dissenters all agreed that the San Diego ordinance was
constitutional as it applied to the general commercial
coffsite commercial sign ban. The speech
was protected under the first prong of the test since it
was not deceptive nor unlawful. The second element
was met because the restrictions implemented the city's
"substantial" interest in safety and aesthetics. The four
Justice plurality agreed that the ordinance did directly
advance safety and aesthetic values, acknowledging "the
accumulated, commonsense judgments of local
lawmakers" without demonstrated scientific justification.
Id. at 509. This was true even if local decisionmakers
chose to restrict commercial billboards offsite and not
onsite.

The general conclusion from Metromedia is
that all commercial billboards can be constitutionally
banned either totally or partially. Importantly, the city
was not required to present scientific or other highly
detailed proof that the billboard ban advanced safety and
aesthetic quality with the Court willingly to rely on
common sense and the experience of local legislators.9

2. The Ordinance Exemptions Deemed
Unconstitutional

The San Diego ordinance contained two
exemptions from the general prohibition. The first
category excluded onsite signs identifying the premises
and the products sold at the location. This was viewed
by the Court as limiting the content of onsite signs to
commercial messages and banning non-commercial
ones. The four Justice plurality interpreted this feature as
a preference for commercial speech over non-commercial
speech and consequently unconstitutional. Id. at 513.

The second category of exemptions defined
twelve types of signs permissible in spite of the general
ban on offsite signs. Seven of the twelve exempted types
were defined by their content - including a variety of

9 Later case decisions reaffirm this position. See e.g., Ackerley Communications of the Northwest, Inc. v.
Krochalis, 108 F.3d 1095 (9th Cir. 1997).
governmental signs and temporary political signs - and the plurality opinion ruled that this part of the ordinance violated essential first amendment principles that non-commercial speech is entitled to the highest level of protection and that government may not pick and choose between forms of acceptable non-commercial speech.

B. Vincent

In the Vincent decision, 466 U.S. 789 (1984), a Los Angeles ordinance prohibited the posting of any type of sign on public property. The Court, in a 6 to 3 ruling, upheld the ordinance in a challenge by a candidate for local political office who had campaign signs removed by the city. Vincent asserted that the law was an unconstitutional interference with his First Amendment right to free political speech. The Court concluded that the ordinance was a "viewpoint neutral" time, place and manner regulation following the analysis in United States v. O'Brien, 391 U.S. 367 (1968).

In conclusion, the Vincent opinion has held that an ordinance prohibiting signs form public property is constitutionally permissible if 1) the property is not a public forum, 2) the ban is a viewpoint neutral, 3) the prohibition satisfies the United States v. O'Brien tests, and 4) it leaves open adequate alternative channels of communication.

C. City of Ladue

City of Ladue, 114 S. Ct. 2043 (1994), presented an exclusive St. Louis suburb prohibiting homeowners from displaying all signs yet providing ten classes of exceptions including those for residence identification, safety hazard, and "for sale" signs. In addition, the ordinance allowed churches, schools, and some nonprofit organizations to display signs forbidden at residences. Commercial signs were also exempted in commercial or industrial zones. The city's main focus was the elimination of residential signs. This case was brought by a city resident prohibited from displaying a small 8 1/2 by 11 inch window sign reading "For Peace in the Gulf." A unanimous Court determined that the municipal law violated the First Amendment.

The city defended its ordinance largely on an aesthetic basis seeking to prevent signs from creating "visual clutter" in its affluent residential neighborhoods. The Court accepted the city's claim that the regulation was neutral as to sign content or viewpoint. However, its major analytical focus was upon 1) the significance of the government's interests and 2) the existence of alternative channels of communication for traditionally protected political speech. On the first of these two elements - aesthetics - the Court seemed less convinced of the city's interest even though this value had been recognized as being significant in the Metromedia and Vincent cases. Casting doubt on the city's suggested justifications for the prohibitory ordinance including ten categories of exemption, Justice Stevens concluded that the exemptions "may diminish the credibility of the government's [aesthetic] rationale for restricting speech in the first place." Id. at 2044. This statement raises some doubt about municipal efforts to design a non-uniform, prohibitory sign ordinance and at least would seem to require a convincing, rational justification for the exemption.

The second element of the City of Ladue holding - the availability of alternative channels of communication - focuses the emphasis on the traditional or non-commercial nature of the speech involved. Following this holding, an ordinance forbidding political message signs at residences would seem to be unconstitutional under nearly any interpretation of the case. The sweeping ban on the most protected form of speech, eliminating a "cheap and convenient" form of communication, at such a location most closely associated with individual liberty and expression would appear to have no equivalent alternative channel of communication. Interestingly, this total ban on residential private property was struck down while Metromedia's ban on commercial billboards and Vincent's prohibition of signs on public property were both constitutionally permissible.

Ultimately, the facts in the City of Ladue case can be understood as presenting an example of municipal regulatory extremism with little convincing justification. In its conclusion the Court notes that "we are confident that more temperate measures could in large part satisfy Ladue's stated regulatory needs without harm to the First Amendment rights of its citizens." Id. at 2047. Just exactly what "temperate measure" it had in

10 Although Justice O'Connor, concurring, did not accept this assumption and would have preferred to test the city's ordinance as a content-based restriction. She said, "with rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one." 114 S. Ct. at 2047. Certainly, though, she would have reached the same conclusion as Justice Stevens.
Second, a locality's governmental interests supporting sign and billboard regulation - usually traffic safety and aesthetics - have been completely accepted by the Fourth Circuit to the point that a challenge is "foreclosed." Georgia Outdoor Advertising, 833 F.2d at 46. Basing its holding on this point on language in the Metromedia decision, the Fourth Circuit does not appear interested in examining the validity of governmental purposes underlying sign regulations and will not consider an argument that such an ordinance is "merely" an aesthetic regulation and therefore not rationally related to legitimate police power purposes. Attempts to derail such an ordinance by highlighting the weakness of the traffic safety justification would seem doomed to failure.

Third, the only potential serious First Amendment concern derived from the Metromedia case was the allegedly preferential treatment accorded to commercial over non-commercial speech by virtue of definitions or exceptions benefiting commercial signs. See 453 US. at 509-10. This had been a major issue in San Diego's ordinance in Metromedia and it is often present in sign regulations barring off-premises signs yet allowing a broad range of on-site commercial advertising. The Fourth Circuit found in all three of these decisions that an ordinance could be "saved" from this attack by a feature which allows a non-commercial sign in any situation where a commercial sign would be lawful. This technique has been copied in other Fourth Circuit jurisdictions and has received approval in recent cases. The only U.S. District Court decision in Virginia considering such an issue - Jackson v. City of Charlottesville - ruled that a city law permitting on-site commercial signs but prohibiting virtually all non-commercial communication and all off-site advertising of any nature violated the First Amendment. 659 F. Supp. 470, 473 (1987).

In Adams Outdoor Advertising v. City of Newport News, 236 Va. 370, 387-88, 373 S.E.2d 917, 926-27 (1988), the Virginia Supreme Court also struck down the city's sign ordinance rejecting the argument that the regulation was a valid time, place and manner regulation and finding that it impermissibly favored commercial over non-commercial speech. The court based its decision on both the Virginia and the United States Constitutions although only citing federal case decisions. Viewing this discrepancy as a content-based distinction according higher value to commercial speech, the Virginia court noted that the ordinance did not contain a general exemption for all noncommercial communication. Although never referring to the contemporaneous Fourth Circuit decisions, this allusion suggested that non-commercial speech be provided with at least equal public access with commercial speech in order to be constitutional.

C. Focused Prohibition of Signs and Billboards on an Industry Specific Basis

During the last few years local governments have attempted to restrict the advertising of certain products thought to be harmful to minors. In particular, localities have designed billboard and sign ordinances to prohibit the advertisement of cigarettes and alcoholic beverages in certain publicly visible areas. These industry-specific sign restrictions were adopted in Baltimore, Maryland in early 1994 and have since undergone judicial review to determine their compatibility with constitutional commercial speech norms. In both instances, these "focused" sign prohibition ordinances have been upheld by the Fourth Circuit U.S. Court of Appeals.

In Penn Advertising of Baltimore, Inc. v. City of Baltimore, 63 F.3d 1318 (4th Cir. 1995), and Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305 (4th Cir. 1995), the appeals court viewed the city's effort to limit the advertisement of products as implementing an important and well-considered social policy of not encouraging minors to drink alcohol or smoke cigarettes. Both cases, facial challenges to each respective ordinance, followed the rule announced in the U.S. Supreme Court's holding in Central Hudson Gas and Electric Corp. v. Public Serv. Commission, 447 U.S. 557 (1980), which placed the burden upon the local government to justify its legislative action in enacting each law regulating commercial speech. However, even

13 The Waynesville ordinance in Georgia Outdoor Advertising contained language that "any sign authorized in this ordinance is allowed to contain non-commercial copy in lieu of other copy." 833 F.2d at 46. While the Raleigh ordinance in Major Media stated that "nothing in this ordinance...shall apply to non-commercial signs." 792 F.2d at 1271.


15 The court struck down the entire ordinance, ignoring the severability argument, based upon its appraisal that the restrictions on commercial and non-commercial speech were "inextricably intertwined."
though it was undertaking "intermediate scrutiny" of the commercial speech regulation, the court did not define the locality's burden too high nor make the court's review too intrusive. Judge Niemeyer wrote in Schmoke that,

the court's inquiry is limited to consideration of the ordinance on its face against the background of the government's objective and the prospect of the ordinance's general effect. If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met.

63 F.3d at 1311. Then, the court applied the now common Central Hudson four-part test to determine the constitutionality of the Baltimore regulations. Under Central Hudson, in order for commercial speech to be entitled to any First Amendment protection, the speech must (1) concern lawful activity and not be misleading. If it meets those threshold elements, local government may still regulate it if (2) the government is able to assert a substantial interest in support of the regulation; (3) it demonstrates that the regulation directly advances the governmental interest; and (4) the regulation is not more extensive than necessary to serve the government's interest. 447 U.S. at 563-66.

In its analysis the Fourth Circuit had no difficulty in finding that prongs one and two had been met finding that protecting minors from the harm of cigarettes and alcohol were obviously substantial governmental purposes. However, the main dispute focused upon the third and fourth factors in the Central Hudson test. Prong three required that the sign regulation "directly advance" the governmental interests. It is notable that the test set out only requires a "logical nexus" between the government's ends and the means it has selected. This relationship need not be as strict a nexus as that required for tort causation and it does not have to demonstrate that the regulation is the perfect policy choice. The locality must only show that "it was reasonable for the legislative body to conclude that its goal would be advanced in some material respect by the regulation." 63 F.3d at 1313. Ultimately, a reviewing court will evaluate the "reasonableness" of the local government's belief that the means chosen will advance its ends. In Schmoke the court placed emphasis on the city council's findings and the explicit reference to research studies to reinforce the reasonableness of its action.

A more serious issue lay in the fourth prong of the Central Hudson test - that is, whether the commercial speech regulation "is not more extensive than is necessary" to serve the identified governmental interest. This requirement is sometimes referred to as the "narrow tailoring" element. Although the city's declared purpose was to insulate minors from the reach of cigarette and alcoholic beverage advertisements, its sign restrictions clearly also prevented adults from receiving the commercial messages. While this concerned the court, it ruled that local governments must be given "some reasonable latitude" in dealing with serious social problems. 63 F.3d 1316. Consequently, the ordinances, especially considering their exemptions for commercial and industrial zones, although not perfect were sufficiently well tailored to satisfy Central Hudson's fourth prong. It is not clear how much deference courts will give to the achievement of less compelling public purposes with weaker background support for the technique chosen.

D. Sign Regulation Affecting Non-Commercial Speech

While this area is one of free speech, rarely does a case present a non-commercial or traditional free speech interest challenging a municipal sign control ordinance. However, in Arlington County Republican Committee v. Arlington County, 983 F.2d 587 (4th Cir. 1993), such a case arose. The plaintiffs sued to enjoin the county's sign ordinance in four ways: (1) limiting the number of temporary signs that could be posted in residential districts to two; (2) allowing seven work days for the processing of sign permit applications; (3) prohibited portable signs except for bumper stickers and owner identifications; and (4) limiting the content of signs at commercial sites to the advertising of products or services available on the premises. In the U.S. District Court, plaintiffs won a preliminary injunction against enforcement of all four of these ordinance provisions based upon the conclusion that the requirements either were not narrowly tailored, did not serve stated interests, or favored commercial over non-commercial speech.

On appeal to the Fourth Circuit, the court's focus concentrated solely on the issue of the county's limiting the number of temporary signs. The other issues had been rendered moot by the county's action in amending its sign ordinances to allow expressly non-commercial speech whenever the sign regulation would permit commercial speech and by requiring a temporary sign permit decision within twenty-four hours.
The court carefully analyzed both the Supreme Court's and its own precedent before concluding there was no controlling Fourth Circuit opinion. Distinguishing this case on the basis that prior cases had dealt with commercial signs or billboards and that this litigation involved regulation infringing upon highly protected, political speech, it then analyzed the regulation using "more exacting scrutiny." 983 F.2d at 592.

Using factors derived from United States v. O'Brien, 391 U.S. 367 (1968), the court concluded that the two-sign limit 1) burdened speech, 2) was content neutral and 3) furthered substantial governmental interests in aesthetics and safety. However, the remaining two elements of the O'Brien test were found lacking. First, the court determined that the two-sign rule was not narrowly tailored to accomplish the identified governmental goals. Placing the burden upon the county, the Fourth Circuit was not convinced that the limitation was needed to achieve the aesthetic and safety objectives and furthermore, that there were other, less restrictive means to achieve the same results. Secondly, the court ruled that the two-sign limit did not provide sufficient alternatives for political speech rejecting those suggested by the county as being too time consuming or too expensive. The court believed that the two-sign limit left "no viable alternative means of political speech." 983 F.2d at 594. In conclusion, the decision in Arlington County Republican Committee resonates with the same ideas that the U.S. Supreme Court would express in City of Ladue a year later. Eliminating or severely restricting a form of traditional personal expression in residential settings appears to require extensive and highly convincing municipal justification.

E. Constitutionally Valid Sign and Billboard Regulation as an Unconstitutional Taking of Property

With the successful defense of most municipal sign and billboard ordinances from First Amendment attack, local governments must be aware of another constitutionally-based challenge which has emerged to threaten local government ordinances. Commercial sign companies have raised the argument that an otherwise valid sign regulation may still violate the Takings Clause of the Fifth Amendment, that is, the sign controls prohibiting sign use and new construction, they argue, constitute a taking of commercial property without just compensation. With the upsurge in interest in private property rights as manifested in the U.S. Supreme Court's recent decisions in Nollan v. California Commission, 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); and Dolan v. City of Tigard, 512 U.S. 374 (1994), it is hardly surprising that such an argument would be raised by a previously lawful business that has its operations ended or substantially curtailed as a result of such an ordinance.

Not surprisingly the Fourth Circuit has ruled that the taking claim "obviously presents a federal question"16 and that the federal courts cannot divert such a claim to the state courts. However, while the taking argument has been regularly raised in federal litigation since the mid-1980's, it has not found any notable success for the plaintiffs. In Major Media the sign company challenged the city's 5 1/2 year grace or amortization period as being unreasonable so as to constitute a "taking" of property. 792 F.2d at 1273. While the Fourth Circuit ruled that the plaintiff had not presented sufficient evidence to create a triable issue of fact, the court did focus upon the "reasonableness" of the amortization period. The trial court had identified the factors of 1) the length of time of the amortization period and 2) whether the public gain achieved outweighs the private loss suffered by sign owners as being determinative, yet the appeals court did not analyze this issue.

The third case in the Fourth Circuit's trilogy-Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988) - presented a municipal billboard ordinance which prohibited all commercial, offsite advertising except those along interstate or primary highways. This ordinance had the effect of banning, after a 5 1/2 year amortization period, 85 billboards out of a total of 137 that the company operated in the Durham area. Acknowledging that the takings inquiry is a fact sensitive one, the court found that the granting of the city's summary judgment motion ended or substantially curtailed as a result of such an ordinance. Eliminating the taking claim "obviously presents a federal question" and that the federal courts cannot divert such a claim to the state courts. However, while the taking argument has been regularly raised in federal litigation since the mid-1980's, it has not found any notable success for the plaintiffs. In Major Media the sign company challenged the city's 5 1/2 year grace or amortization period as being unreasonable so as to constitute a "taking" of property. 792 F.2d at 1273. While the Fourth Circuit ruled that the plaintiff had not presented sufficient evidence to create a triable issue of fact, the court did focus upon the "reasonableness" of the amortization period. The trial court had identified the factors of 1) the length of time of the amortization period and 2) whether the public gain achieved outweighs the private loss suffered by sign owners as being determinative, yet the appeals court did not analyze this issue.

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First, the appellate court set the general takings analysis from the two-part test announced in the Supreme Court's decision in Agins v. Tiburon, 447 U.S. 225, 260 (1980). Under this ruling, a land use regulation affects an unconstitutional taking of property if it 1) does not substantially advance legitimate state interests or 2) denies the owner the economically viable use of the

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16 See Georgia Outdoor Advertising, Inc. v. City of Waynesville, 833 F.2d 43, 47 (4th Cir. 1987).
land. Having concluded that the ordinance did advance a legitimate state interest in the protection of aesthetics, the court concentrated on the second factor in the Agins test. At this point, the analysis turned to the question of identifying the appropriate unit of property upon which to evaluate the economic effect. This inquiry serves as a crucial point in the takings analysis since if the owner's property interest is defined expansively then the regulatory impact will have lesser economic effect than if the property interest is narrowly construed. Importantly, the Fourth Circuit looked to two Supreme Court cases - *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470 (1987), and *Penn Central* - which applied a wholistic analysis to the takings question and in neither case found an unconstitutional regulation. Approving of this view the court quoted from Justice Brennan's opinion in *Penn Central* which noted that,

'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole—here the city tax block designated as the 'landmark site.'

107 S. Ct. at 1248.

Adopting this approach, the district court, on remand, determined that the appropriate unit of property for purposes of the takings analysis was the sign company's business in the Durham metropolitan sign market. 803 F.Supp. 1068, 1074 (M.D.N.C. 1992). Once the property interest had been identified, the court determined whether the sign ordinance deprived the company of the economically viable use of its property by applying a three step balancing test taken from the *Penn Central* case. 438 U.S. at 124. The *Penn Central* factors include: 1) the economic impact of the regulation on the claimant, 2) the extent to which the regulation has interfered with distinct investment-backed expectations, and 3) the character of the governmental action. Applying these factors, the trial court concluded that the Durham ordinance did not violate the Fifth Amendment. The crucial point in this analysis was the conclusion that the relevant unit of property for takings clause analysis was the broad array of signs owned by the plaintiff. Since a portion of the sign business, so defined, had been left intact, the *Penn Central* test had been satisfied. It is unclear what the result would have been had the unit of property been described as one or a finite number of signs and all had been prohibited by ordinance. The answer to that question awaits further litigation.

The lessons derived from this brief review of the developing jurisprudence of sign regulation are several. First, it is clear that local governments and their constituencies have consistently supported the use of regulatory power to control both the form and location of signs and billboards throughout the century. Second, each attempt to accomplish this aesthetic purpose has been met by litigation resistance from the advertising industry and civil libertarians wishing to advance their own interests. Third, the tactics and arguments made by these opponents have varied over this period but have often raised issues framed in constitutional law terms. These constitutional arguments have changed with the changing emphasis of constitutional values in the nation. Sign regulation cases have come to reflect the ebb and flow of the prevailing constitutional theory. The local government attorney must be aware of this complex and changing tradition in ordinance drafting and defense, never forgetting that sign and billboard regulation is an area of land use control enveloped with special constitutional concerns and sensitivity.