Billboards (850 words)

As anyone who has spent time driving through the U.S. could verify, billboards are a ubiquitous part of the American landscape. Indeed, in 2005 alone, advertisers spent over 6 billion dollars on displaying approximately 450,000 billboards (Outdoor Advertising Association of America, Inc., "Research and Data Facts & Figures," http://www.oaaa.org/presscenter/research.asp, Page Accessed 7/4/2006). If taken together, the collective size of these billboards would cover over five square miles. This is more than five times larger than the size of the nations of Monaco and Vatican City, combined. In the realm of First Amendment law, there are two main legal controversies: first, to what extent can the government limit access to public billboards (e.g. on mass transit systems). Second, to what extent can the government prohibit privately-owned billboards (e.g. those appearing on highways).

Access to Public Billboards

Consider first the issue of access to public billboards. At issue here is whether advertising space located on city-owned public transportation should be recognized as a public forum. In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the Supreme Court answered in the negative. Owing to the captive nature of public transportation's audience, the Court held that a city could prohibit political advertisements while allowing a myriad of other types (such as for churches and liquor companies). Consistent with its decision in *Miami Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court held that as the owner of the advertising space, the city could exercise discretion in selling space to advertisers. Such discretion, however, must not be "arbitrary, capricious, or invidious" (*Lehman* at 303).

Regulating Privately-Owned Billboards

Private billboards, like their public counterparts, are also open to extensive government regulation. This stems, most directly, from the government's ability to preserve the aesthetic value of its cities and other localities. The Court's decision in *Village of Euclid v. Ambler Reality Co.*, 272 U.S. 365 (1926) established that the government could regulate the usage of private property—even without provide compensation to the owner. This decision paved the way for the Court's 1954 decision in *Berman v. Parker*, 348 U.S. 26. In *Berman*, the Court ruled for the first time that aesthetic justification alone could permit government regulation over land issues.

The rationale in *Berman* rationale was part of the foundation for the Court's judgment in *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981). At issue in this case was whether the city San Diego could enact a ban on all offsite commercial billboards. Under San Diego's ban, businesses could not construct billboards advertising their company or products unless the products or services advertised could be obtained on the same premises as the billboard itself. Noncommercial signs featuring religious symbols or those providing time, temperature, and news—among a variety of other exceptions (see *Metromedia* at 494-495)—were permitted, however.

By a vote of six-to-three the Supreme Court held that San Diego's ban was unconstitutional. Justice White led a plurality coalition of justices in arguing that while the commercial ban was acceptable, two aspects of the noncommercial ban rendered the statute unconstitutional. First, in exempting some types of commercial speech but not providing for analogous exceptions for noncommercial speech, the statute provided elevated protection to commercial speech. This, Justice White argued, was inconsistent with the Court's previous rulings. Second, by specifying what types of noncommercial speech could be placed on

billboards, the city was able to make discretionary choices; consistent with the Court's decision in *Consolidated Edison Co v. Public Service Commission*, 447 U.S. 530 (1980), Justice White argued that the city could not retain such power.

In 1984, the Court decided *City Council of Los Angeles v. Tax Payers for Vincent*, 466 U.S. 789. This case combined aspects of both *Lehman* and *Metromedia*. At issue was whether the city of Los Angeles could prohibit the posting of political campaign advertisements on public property. By a vote of six-to-three, the Court held that it could. Given earlier distinctions made with regards to commercial and noncommercial speech, *Vincent* seems to be the closest the Court has come to formally deciding whether an outright ban of billboards is permissible. Lower courts, in assessing all-out bans, have generally accepted the bans as constitutional and tend to give the city or municipality in question broad leeway in justifying the ban (see, e.g., *Southlake Property Associates Ltd. v. City of Morrow*, 112 F.3d 1114, 1997).

Viewed holistically, the law of billboards suggests a bifurcated approach. In banning billboards, cities must satisfy separate criteria for commercial and noncommercial content. For the former, the city must satisfy the four-prong test offered by *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), where the regulation must directly advance a substantial government interest in the narrowest way possible. Noncommercial billboards need to be prohibited in a manner that is ultimately neutral to the message being conveyed.

Advertisers, in responding to these bans, have become creative. In communities where billboards have been prohibited, advertisers will often use moving billboards to communicate their message. These typical amount to nothing more than a large truck with a giant sign in its truck bed. Traffic-plagued cities such as New York have enacted bans on such advertising-only

vehicles. When examined in court, these bans have been sustained as constitutional (see, e.g., *People v. Target Advertising, Inc.*, 708 N.Y.S.2d 597, 2000).

Ryan C. Black

See Also:

Central Hudson Gas & Electric Corp. v. Public Service Commission, Content Neutral, Metromedia, Inc. v. City of San Diego, City Council of Los Angeles v. Tax Payers for Vincent, Lehman v. City of Shaker Heights, Miami Publishing Co. v. Tornillo

Further Reading:

Bond, R. Douglass. "Making Sense of Billboard Law: Justifying Prohibitions and Exceptions." Michigan Law Review 88: 2482-2525 (August 1990).

Garner, Donald W. and Richard J. Whitney. "Protecting Children From Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation." Emory Law Journal 46: 479-585 (Spring 1997).

Parsons, Katherine Dunn. "Billboard Regulation After Metromedia and Lucas." Houston Law Review 31: 1555-1607 (Spring 1995).