

De-“coding” the Visual Landscape: Municipal Sign Ordinances, Murals, and the First Amendment.

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Purpose of Sign Ordinances and Regulations

With the birth of modern zoning acts shortly after the turn of the 20th century, municipalities assumed the right to determine what constituted a valid use of their police powers. At first, the local government role in health, safety, morals, and welfare was narrowly defined.¹ As a result, aesthetic concerns did not typically instigate an exercise of police powers.² This changed in the late 1920s as courts became more progressive and began to allow for regulation of visual elements so long as the laws in question promoted other goals such as health, safety, and morals.³ Courts began to give great deference to legislative determinations as to whether a local ordinance was a valid use of its police powers.⁴ As a result, sign ordinances proliferated, covering an abundance of visual mediums under the police power justifications of safety and, more interestingly, aesthetics.⁵

A. How Much Do These Ordinances and Regulations Cover?

Sign ordinances as a comprehensive legislative scheme may cover not only the physical characteristics of the sign but also the message it communicates. Physical elements subject to regulation include size, height, shape, number and location or placement of the sign — which can be further broken down into categories of on-premise or off-premise, private property or public property, and attached (to a structure) or detached. Given that sign regulations also often restrict content, through either the manner of its display or the message itself, such ordinances unfailingly come under judicial review for potential violations of the First Amendment.

Despite being a somewhat modern extension of zoning laws, sign ordinances have grown to cover a vast amount of content and mediums.⁶ Typically, municipalities tailor sign ordinances around their own municipal needs, governing body/elected official's preference, zoning code organization, and even legal counsel recommendations.⁷ The result is that most sign ordinances cover billboards, awnings, directional signs, monuments, projectors, vehicular signs, window signs, projectors, and most

INTRODUCTION

Murals or other works of creative expression on public walls can be classified as signs, artwork, or both, presenting challenges for municipal lawmakers and counsel. Regulation of murals and outdoor artwork is increasingly becoming an issue for municipalities, particularly as localities launch mural programs to create cultural identity, preserve history, promote economic development, focus revitalization efforts, address blight,

encourage and foster community engagement, and contribute to long-term community planning.

This article will examine the regulation of murals, beginning with a brief background into municipal sign law and the various ways in which local control of signs raises First Amendment challenges. Cases addressing whether a mural falls within the provisions of local sign laws will be reviewed and analyzed, and the legal implications of various municipal mural programs will be addressed.

curiously, murals.⁸ Within that coverage, sign ordinances address the number of signs, their height, size, weight, location, lighting, and illumination, with the specific details dependent on each municipality.⁹ However, creating a sign ordinance is not as simple as picking a type of sign and plugging in restrictions. There must be a sufficiently sensible justification for each restriction, especially as municipalities attempt to enforce such ordinances.

B. Municipal Justifications for Sign Ordinances and Regulations

One of the most common challenges in sign regulation is subjectivity. This is particularly the case when dealing with murals. What constitutes art is subjective; what is good art or appropriate art is even more so. Thus, the logical question becomes: How can municipalities regulate signs given the very subjective nature of what they are regulating? To the extent that there is an answer to this question, it is found in a municipality's police powers — where safety and general welfare have long been held as valid justifications for implementing sign laws.¹⁰ The takeaway for municipalities reviewing longstanding zoning ordinances is to ensure that the statement of purpose for the regulatory scheme clearly explains the justifications, goals, and objectives of the legislative enactment. As the Second Circuit noted in *National Advertising Co. v. Town of Babylon*, it could not find a case where “a court has taken judicial notice of an unstated and unexplained legislative purpose for an ordinance that restricts speech.”¹¹ In contrast, the Ninth Circuit found, in *Outdoors II, LLC v. City of San Diego*,¹² that the sign ordinance's statement of purpose “to optimize communication and quality of signs while protecting the public and the aesthetic character of the City” sufficed to establish the requisite governmental interest.

Governments often rely on two interests to support the position that a sign regulation is a valid exercise of its police powers—traffic safety and community aesthetics.¹³ The Supreme Court upheld these two elements as significant governmental interests sufficient to satisfy intermediate scrutiny in its analysis of sign ordinances in *Metromedia, Inc. v. City of San Diego*, stating “[n]or can there be substantial

doubt that the twin goals that the ordinance seeks to further — traffic safety and the appearance of the city are substantial government goals.”¹⁴

Following *Metromedia*, it has become standard practice for municipalities to recite in their sign ordinance statements of purpose that the regulatory interests at stake are safety and community aesthetics. These have often been augmented with other legitimate municipal concerns. For example, other regulatory interests could include economic development, encouragement of free speech, blight prevention, community enhancement, and even protection of property values.

C. Areas Where Local Governments Regulate Artwork

Although beyond the scope of this article, it is worth noting that municipalities potentially regulate artwork in many areas of daily operations. Some common areas of such regulation exist in nuisance abatement controls, such as graffiti abatement, bidding and procurement processes for improvements to public buildings or parks that include art installations, or zoning codes addressing sculptures. As such, these may be other areas of government activity subject to First Amendment or other constitutional challenges.

II. Constitutional Rights: The First Amendment

The First Amendment states in relevant part, “Congress shall make no law... abridging the freedom of speech.” Courts, including the Supreme Court, continue to grapple with the extent to which local governments can restrict signs — whether digital, artistic, or traditional signage — without violating the free speech protections afforded by the First Amendment. Courts continue to use different analytical approaches and levels of scrutiny, which in turn results in a lack of clarity and predictability with few bright-line rules. As discussed further below, when the cases involve murals, these different analytical approaches seem to result in inconsistent outcomes, which are difficult to reconcile.

Any regulation that implicates the First Amendment must balance

carefully on a tightrope between regulating too much speech and not regulating enough. Regulate too much speech, and a court will be more likely to find the law violates the First Amendment for not providing sufficient means and manner of communication; regulate too little, and a court will be more likely to find that enforcement is biased toward or favors one particular type of speech.

A. Judicial Review and Constitutional Law Scrutiny Levels

In order to determine how well a regulation walks that tightrope, courts will apply one of three scrutiny frameworks to challenged regulations: rational basis (the least demanding standard), intermediate scrutiny (the middle tier of review) and strict scrutiny (the most exacting test). The level of scrutiny applied will heavily influence the outcome of the review. Courts that apply the rational basis framework commonly uphold regulations targeting signs; likewise, courts that apply the strict scrutiny framework commonly strike down or invalidate these laws. As such, a basic understanding of those standards of review is helpful in drafting regulations.

1. Rational Basis Review

Rational basis review is the default standard when constitutional challenges arise and is generally used unless the question involves fundamental rights or suspect classifications. The rational basis test affords great deference to the government and governmental action, because the ends or objectives of the regulating entity need only promote a “legitimate” governmental purpose.¹⁵ The means adopted by the government to achieve those ends only need to be reasonable. Applying this test requires that a challenger establish the law does not serve any conceivable legitimate purpose and/or is not reasonably related to achieving or attaining the stated ends. Essentially, rational basis review merely prohibits the government from imposing restrictions that are arbitrary, capricious, or irrational and require the court to speculate as to the legitimate interests at stake.¹⁶

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Thus, courts infrequently invalidate laws when applying this test and local governments are likely to be successful in defending their laws under such a deferential standard.

2. Intermediate Scrutiny

The middle level of review, used in only selected contexts, is intermediate scrutiny. It applies to gender-based classifications, restrictions based on illegitimacy, and elements of free speech. In particular, this level of scrutiny is used in the evaluation or analysis of regulation of commercial speech; speech in public forums; content-neutral speech laws; and time, place, and manner restrictions on speech.¹⁷

To satisfy intermediate scrutiny the regulation must be narrowly tailored to achieve the stated goal. A law reviewed under this standard will be upheld if it is substantially related to a “significant” or “important” government purpose. As the Supreme Court has stated, “[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.”¹⁸ However, satisfying intermediate scrutiny is difficult to pin down, as it seems to float between absolute rigidity (strict scrutiny) and no rigidity at all (rational basis review).¹⁹

3. Strict Scrutiny

Under strict scrutiny, the law must be necessary to achieve a “compelling” governmental purpose. Furthermore, the means chosen must be specifically fashioned to accomplish that purpose. As the most stringent standard of judicial review, strict scrutiny applies when a regulation implicates a suspect classification such as race or nationality, or a fundamental right such as voting or freedom of speech. To survive strict scrutiny, the regulation must be the least restrictive means for achieving the asserted governmental interest — in other words, there exists no other less restrictive method of achieving the regulation’s end. Strict scrutiny is known for being “strict in name, but fatal in practice,” meaning that a regulation subjected to strict scrutiny review is almost always struck down as being unconstitutional.

B. Murals and First Amendment–Related Challenges

Mural regulations will be subject to the aforementioned trilogy of review standards. Under a generic dictionary definition, a mural is “a painting or other work of art executed directly on a wall.” Based on this definition, and on the applicable case law, it is simple to classify murals as a painting or image on a structure. However, it far less simple to determine whether a “mural” is a “sign” subject to regulation under a municipal ordinance. As one federal court aptly and succinctly noted, “[i]t is truly a Herculean task to wade through the mire of First Amendment opinions to ascertain the state of law relating to sign regulations.”²⁰

The Supreme Court addressed the validity of a sign ordinance in *Metromedia*, applying the *Central Hudson* test.²¹ The San Diego ordinance in question banned commercial billboards by imposing various restrictions on the erection of “outdoor advertising display signs,”²² prohibiting all off-premise outdoor advertising display signs and imposing special provisions for on-premise signs. In addition, like most sign ordinances, it contained specified exceptions. In a plurality decision, the Court upheld the billboard ban, but found that the on-premise limitation to commercial advertising and the

no definitive principles can be clearly drawn.”²³ His dissent was prescient: since *Metromedia*, lower courts have applied widely analytical approaches in mural cases — and handed down equally disparate decisions. However, despite the confusion surrounding *Metromedia* and the shaky foundation for sign law it provided, the decision made clear that there are two distinct First Amendment issues relating to sign ordinances that will also arise in the context of murals: commercial versus non-commercial analysis and content neutrality analysis. More importantly, many consider *Metromedia* to be the leading case on the distinction between commercial and noncommercial speech, which is the starting point for analysis with murals related to businesses.

1. Commercial Speech vs. Non-Commercial Speech

Determining whether a mural constitutes commercial speech (and is thereby subject to more rigid regulation as a sign by a municipality) or non-commercial speech (and afforded greater protections under the First Amendment) is a fact-based inquiry. Making this determination is rarely simple and courts reach different conclusions in factually similar cases. Moreover, level and framework of judicial scrutiny plays a significant role in whether or not the court will deem government regulations permissible.



exceptions were unconstitutional.

Justice Rehnquist in his dissent described the plurality decision as a “virtual Tower of Babel, from which

For example, in *Complete Angler, LLC v. City of Clearwater*,²⁴ a Florida bait shop challenged the city’s sign and banner ordinances, both on their face and as

applied, regarding the marine-themed mural on the outside wall of its shop, (as well as the First Amendment banner the owners placed over the mural when the City of Clearwater attempted to order the mural's removal). The court applied strict scrutiny and concluded that the mural was protected non-commercial speech. The ordinance at issue included 26 different categories of signs exempt from the permit process, including "[a]rtwork and/or architectural detail."²⁵ The court reasoned that the mural's primary purpose was not commercial activity, but rather to promote the local marine environment. Stated differently, the mural qualified as artwork because it contained non-commercial speech. The local artist who had painted the mural, who demonstrated the mural was his impression of the local habitat, and that he intended it to bring attention to endangered species of fish, evidenced this non-commercial character. As a result, the court determined the mural did more than "propose a commercial transaction,"²⁶ classifying it as artistic expression (non-commercial speech), which enjoys First Amendment protections.

In contrast, the court in *Wag More Dogs, LLC v. Cozart*²⁷ concluded that a mural on the side of a dog daycare business constituted commercial

of their building that depicted happy cartoon dogs and dog-related imagery. Zoning administrators cited the business and demanded that it cover the cartoon dog mural. The owner filed suit. The court found that many of the cartoon dogs in the mural incorporated the Wag More Dogs, LLC cartoon logo and therefore concluded the mural was commercial speech. The locality's restriction therefore satisfied intermediate scrutiny.

The factual similarities between these two cases make it difficult to reconcile their differing outcomes. Both involved large painted murals which were located on the business-owners' respective shops, and both were commissioned with the goal to bring attention to the related commercial enterprise.

To reconcile these decisions, one must review the Supreme Court's definition of commercial speech. In *Central Hudson*, the Supreme Court characterized commercial speech as an "expression related solely to the economic interests of the speaker and its audience."²⁸ Further, the court in *United States v. United Foods, Inc.* found that commercial speech typically consists of "speech that does no more than propose a commercial transaction."²⁹ Thus, when applying the emphasized aspects of these

local environment while the mural in *Wag More Dogs* incorporated elements of a business logo makes all the difference. Hence, while these murals ostensibly served the same purpose, the fact that the message in *Complete Angler* was not solely economically motivated and did more than market a commercial enterprise explains the divergent outcomes in the two cases.

Some may argue that any "secondary purpose" is a matter of semantics and can easily be crafted for the purposes of avoiding the commercial speech label. This may be true, but these cases accurately depict the aforementioned tightrope that lawmakers must walk when sign ordinances and regulations restrict speech.

Another court's interpretation and application of the commercial and noncommercial definitions supports this view. In *Tipp City v. Dakin*,³⁰ an Ohio municipality obtained an injunction against a business, alleging that its mural violated the local sign ordinance. The mural depicted a mad scientist with beakers and chemical molecules on a building occupied by "Warrior Racing," a business that sold racing fuel additives. The court framed the issue as "whether the expression depicted in the ... mural either extends beyond proposing a commercial transaction or relates to something more than the economic interests of the appellants and their customers," adding "[i]f so, it qualifies as noncommercial speech and is entitled to stronger First Amendment protection."³¹ The court concluded that the mural constituted commercial speech since it "plainly is intended to attract attention to Warrior Racing" because "the chemicals and molecules depicted on the sign propose a commercial transaction to racing aficionados and others."³²

2. Content Neutral vs. Non-Content Neutral

A second overriding issue in mural cases is the determination of whether the regulation is content-based. As previously mentioned, regulations must be justified without reference to the content of the mural. While most mural regulations will fall under

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speech. Attempting to capitalize on their location near a dog park, the owners of Wag More Dogs, LLC commissioned a mural on the rear

definitions to *Complete Angler* and *Wag More Dogs* the fact that the artist in *Complete Angler* created the imagery in the mural to bring awareness to the

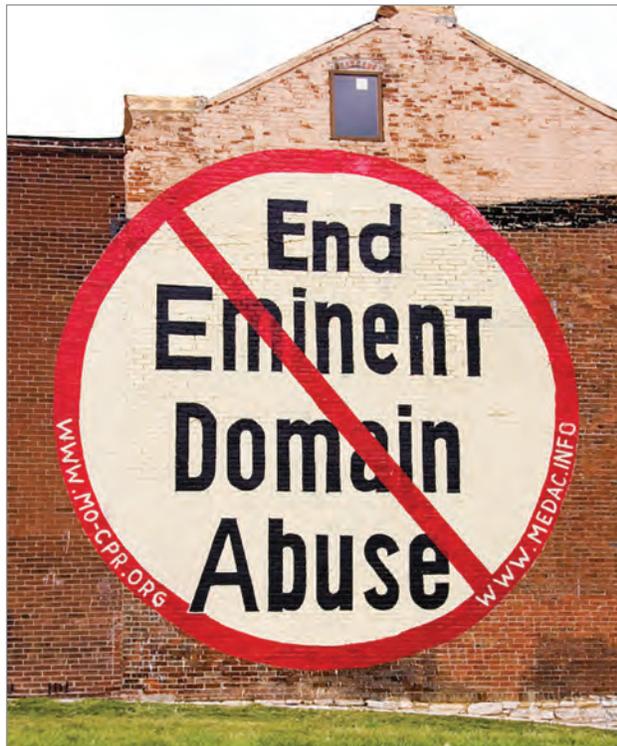
intermediate scrutiny, if a regulation is content-based it is subject to strict scrutiny and a court is almost certain to find it unconstitutional.

In *Neighborhood Enterprises, Inc. v. City of St. Louis*,³³ an individual who “describe[d] himself as a critic of St. Louis’s use of eminent domain for private development,” painted a mural on a side of a building, stating “End Eminent Domain Abuse” in a red circle with a slash through it. As you can imagine, this caught the attention of code enforcement, who issued a citation on the basis that the mural was an illegal sign for which the owner had not obtained a permit. The owner then sought a permit, which the city’s zoning administrator denied on the basis that the mural did not meet the requirements of the zoning code. Litigation commenced. The *Neighborhood Enterprises* decision is a good example of the steps necessary for a court to determine which scrutiny level to apply. Here, the court first looked at the definition of a “sign” under the St. Louis ordinance to determine whether the mural was subject to regulation, or whether it was a non-sign or exempt under the ordinance. To complete this analysis, the court explained that it “must look at the content of the object.”³⁴ The stated purposes or justifications for the sign restrictions by the city were “principally on concerns for traffic safety and aesthetics.”³⁵

The court concluded that the definition of “‘sign’ [was] impermissibly content-based because ‘the message conveyed determines whether the speech is subject to the restriction.’”³⁶ Accordingly, strict scrutiny applied and the sign code failed in that it was not narrowly tailored. More specifically, the ordinance failed because its restrictions were not narrowly tailored to accomplish the city’s interests in aesthetics or traffic safety. The court reasoned that the zoning code recited the city’s interests “only at the highest order of abstraction, without ever explaining how they are served by the sign code regulations generally, much less by its content-based exemptions

from those regulations,” and “offers no reason for applying its sign regulations to some types of signs but not to others.”³⁷

The content neutrality issue had also been raised in *Complete Angler*. The plaintiff in *Complete Angler* offered evidence of five other similar murals in the area which had been condoned or allowed by the City of Clearwater without enforcement or requiring that those businesses obtain a permit. Thus, the application of the code was not content-neutral and the City of Clearwater could not satisfy strict scrutiny.³⁸



3. The Prior Restraint Doctrine³⁹

In *Mahaney v. City of Englewood*, the plaintiff owned a smoking accessory shop and challenged a provision of the city’s sign ordinance requiring a special review procedure for wall murals. To prevent graffiti, the plaintiff hired artists to paint murals on the north and south exterior walls. The south wall mural consisted of famous musicians including Bob Marley, Jimi Hendrix, Jim Morrison, Jerry Garcia, and Janis Joplin. The north wall mural depicted scenes from *Alice in Wonderland*. Following citizen “inquiries,” which likely meant complaints about the murals, code enforcement cited the plaintiff for various violations of the sign ordinance,

namely failure to obtain a permit, failure to “obtain city manager approval,” having more than one mural, and having murals that exceeded the size permissible under the code.

The *Mahaney* court did not determine whether the murals constituted art under the sign ordinance, which would exempt the murals from regulation. Rather, the court noted that under either the work of art or the wall mural provisions of the sign ordinance, the City of Englewood could not prevail. The court concluded that the special review procedure for murals constituted an impermissible prior restraint on free speech in violation of the

Constitution, requiring strict scrutiny.

The court explained, “[a] municipal ordinance is a prior restraint when it subjects constitutionally protected speech to governmental regulation prior to the time that such speech is to occur.”⁴⁰ The availability of judicial review, by itself, was insufficient to render the special review process constitutional because it still lacked the requisite procedural safeguards including a specified period in which the city manager must decide whether to issue a permit. As such, the city’s special review process on its face, and as applied to the plaintiff’s

murals, constituted a “constitutionally impermissible prior restraint on protected speech” and the trial court erred in denying plaintiff’s cross-motion for summary judgment.⁴¹

4. Historic Property or Historic District Ordinances

The inclusion of special zoning districts related to historic properties and murals can raise interesting questions. Notably, these regulations may pose or raise prior restraint problems with the permitting and procedures to decide whether some alteration or proposed development of a historic building is compatible with the neighborhood’s historic character.

Most challenges to historic preservation

ordinances are made under the takings provisions, Due Process Clause, or Equal Protection provisions in the Fourteenth Amendment. However, in *Burke v. City of Charleston*,³⁸ the plaintiff challenged the city's historic preservation ordinance under the First Amendment in relation to a mural. Plaintiff painted a pop art-style mural in bright colors on the side of a restaurant in a historic district and the city ordered it removed. The mural included a section within the painting for the restaurant to advertise. Despite this fact, the court concluded that the mural constituted noncommercial speech for its First Amendment analysis.

The court held that the ordinance was content-neutral because the government's purpose was not to regulate the mural's content. Rather, the purpose of regulating the size, color, and format was the preservation of the historic district, and the restrictions went no further than necessary to achieve those goals.

5. Recent Mural Case Law

In a recent case, the City of San Diego was granted summary judgment in a case involving art murals. *Architectureart, LLC v. City of San Diego*⁴³ involved a requirement that signs visible from the right of way or signs on city-owned property obtain a permit. However, the San Diego sign ordinance exempted murals from the permitting process, or, specifically:

[p]ainted graphics that are murals, mosaics, or any type of graphic arts that are painted on a wall or fence and do not contain copy, advertising symbols, lettering, trademarks, or other references to the premises, products or services that are provided on the premises where the graphics are located or any other premises.⁴⁴

The city interpreted its mural exception as applying to "any painted art that is not advertising" and found that the stated purpose of the sign ordinance "is to optimize communication while protecting the aesthetic character of the City."⁴⁵ The plaintiff, a mural company, brought a challenge to the ordinance after being issued violations for its murals, which contained lettering. The plaintiff had received approval for previous murals. The plaintiff also

alleged that an annual Comic-Con event received special treatment with its murals and advertising.

The court determined that the speech at issue was commercial, without much elaboration. It analyzed the regulations under the *Central Hudson* test and concluded that the sign regulations were constitutional, reasoning that the City had established that its interests in optimizing communication and community aesthetics were substantial, which justified the restrictions, and those restrictions advanced the City's interests without going further than necessary.

III. Municipalities and Mural or Public Art Programs

Some municipalities encourage and specifically implement programs to display murals or other forms of public art to address blight, encourage and foster community, develop appreciation of art, and promote aesthetic beauty. However, code enforcement and compliance with zoning regulations are typically not at issue in these circumstances since the municipalities implement mural design guidelines. Municipalities seek to use murals in various ways, such as to promote diversity, enhance or contribute to a neighborhood's identity, and signal that an area is the focus of revitalization efforts. For a review of mural programs in several cities, the City of Savannah, Georgia Metropolitan Planning Commission did a case study, *Mural Art versus Graffiti, Defining Mural Art in the City of Savannah*.

CONCLUSION

Murals create value in public spaces while at the same time sending a message that the community values the space as a collective. In general, First Amendment protections across all media have expanded over time, and it is unlikely that this trend will change. Meanwhile, murals have become increasingly popular and various, and business owners responding to this trend and commissioning murals on their property can often make credible claims to artistic or non-commercial expression, even when such a commission likely has some commercial motivation. As a result, First Amendment constitutional challenges related to regulations or ordinances restricting murals will likely increase. Additional open questions related to murals

include First Amendment challenges based on local design requirements for murals in public art programs. In addition, potential challenges based on a municipality's restriction on size, height, or color of murals for aesthetic purposes may impermissibly restrict the messages conveyed by the murals. For example, it is not a stretch to see an artist of a mural argue that these types of restrictions regulate the communicative content of the mural.

It would be prudent for municipal entities to review outdated sign ordinances. In that process, keep in mind the competing interests of the First Amendment and governments seeking to regulate protected forms of speech. Free speech principles require a balancing of the constitutional interest in freedom of expression against the government's need to regulate in the public interest.

Some suggestions to keep in mind during the review, revision, or amending process include: focusing on the type of sign being regulated and not its content, articulating a compelling purpose statement while referencing a comprehensive plan or other legislative findings, cleaning up definitions to reduce content-based distinctions, and determining whether the exemptions in the ordinance pose potential for challenges. Any attempt to define artwork in sign ordinances is likely to pose challenges because distinguishing between a sign and art requires an interpretation of the message conveyed, and thereby becomes a content based regulation.

For murals, it appears that the better approach is to implement a mural program. Municipalities can set forth design guidelines to enhance revitalization or beautification efforts in accordance with their goals and objectives, reducing the likelihood of challenge.

Notes:

1. Robert M. Anderson, *American Law of Zoning* 7.01 (Kenneth H. Young, 4th ed. 1996); see also, Meg Stevenson, *Aesthetic Regulation: A History*, 35 REAL EST. L. J. 519, 521 (2007); Geri Marie Rossano, *Content Neutrality and the Intermediate Scrutiny Test in Wag More Dogs, LLC v. Cozart: A Missed Opportunity to Clarify the Rules of the Fourth Circuit?* 24 GEO. MASON U. CIV. RTS. L. J. 61, 75 (2013).

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2. See *id.*
3. See *Wulfsohn v. Burden*, 150 N.E. 120 (N.Y. 1925); see also *Newman F. Baker, Aesthetic Zoning Regulations*, 25 MICH. L. REV. 124 (1927).
4. See e.g. *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality opinion).
5. Christina Chloe Orlando, *Art or Signage?: The Regulation of Outdoor Murals and the First Amendment*, 35 CARDOZO L. REV. 867, n. 21 (2013) citing Alan Weinstein, *Legal Issues in the Regulation of On-Premise Signs*, in *Context-Sensitive Signage Design* 119, 119-120 (Marya Morris et al. 2001).
6. See e.g. *Pennsylvania Land Trust* listing of the types of communication and types of media aid covered in sign ordinances (<http://conservationtools.org/guides/50-sign-ordinance>).
7. *Id.*
8. *Id.*
9. See e.g. <https://www.dos.ny.gov/lg/publications/Municipal%20Control%20of%20Signs.pdf>
10. Christina Chloe Orlando, *supra* note 5.
11. 900 F.2d 551, 555-56 (2d Cir. 1990)
12. 506 F.3d 886 (9th Cir. 2007)
13. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981)(plurality decision).
14. 453 U.S. 490, 507-08 (1981).
15. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
16. See *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993).
17. See *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980) (commercial speech; Court adopted a four-part balancing test, less than strict scrutiny, but more restrictive than rational review and appears to be an intermediate plus standard); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (speech in public forums); *United States v. O'Brien*, 391 U.S. 367 (1968) (content-neutral speech laws); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (“erogenous zoning” restrictions affecting speech).
18. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).
19. See *Bowers v. Hardwick*, 478 U.S.

- 186 (1986), contrast to *Lawrence v. Texas*, 539 U.S. 558 (2003); see also *Witt v. Department of the Air Force* 527 F.3d 806 (9th Cir. 2008).
20. *Granite State Outdoor Advertising, Inc. v. Clearwater*, 213 F.Supp.2d 1312, 1327 (M.D. Fla. 2002), affirmed in part and reversed in part, 351 F.3d 1112 (11th Cir. 2003).
21. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981)(plurality decision)
22. *Id.* at 493
23. *Id.* at 570
24. 607 F. Supp.2d 1326 (M.D. Fla. 2009).
25. *Id.* at 1331.
26. *Id.* at 1331-33.
27. 680 F.3d 359 (4th Cir. 2012).
28. 447 U.S. 557, 561 (1980).
29. 533 U.S. 405, 409 (2001) (emphasis added).
30. 186 Ohio App. 3d 558, 564-65 (Ohio Ct. App. 2010).
31. *Id.* at 573.
32. *Id.*
33. 644 F.3d 728 (8th Cir. 2011).
34. *Id.* at 736.
35. *Id.* at 732.
36. *Id.* at 736
37. *Id.* at 738.
38. 607 F. Supp.2d 1326, 1334 & fn. 9 (M.D. Fla. 2009). See also *Clear Channel Outdoor, Inc. v. City of Portland*, 262 P.3d 782 (Or. Ct. App. 2011) (holding that distinctions between “painted wall decorations” and “painted wall signs” constituted impermissible content-based restrictions).
39. 226 F.3d 1214 (Colo. Ct. App. 2009).
40. *Id.* at 1219.
41. *Id.* at 1220.
42. 893 F. Supp. 589 (D. S. C. 1995), vacated and remanded for lack of standing, 139 F.3d 401 (4th Cir. 1998).
43. 2017 WL1226913 (S.D. Cal. 2017).
44. *Id.* at *2, 6.
45. *Id.* at *5. ML



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control and responsibility in favor of the City or County Attorney.

Early in the representation of a local government, my City Manager decided she was going to choose who represented the City in a litigated matter. There was no consultation nor any discussion about who would perform the services. The whole episode was about control and establishing a pecking order, and to make sure I knew where on that pecking order I belonged. As mentioned briefly above sometimes knowing when not to fight is often more important than knowing when to fight (see *The Art of War*, Sun Tzu, quoted in Sun Tzu’s 31 Best Pieces of Leadership Advice, 15.1)⁵, and I elected not to take that battle on at that time.

Conclusion

Recognizing the need for, then selecting and supervising outside counsel can present a challenge to the City or County Attorney unlike most of the challenges faced on a daily basis. Even when supervision of other lawyer employees is part of the daily routine, supervising peers or lawyers who may have more experience than you or have expertise that far exceeds yours in a particular area can be challenging in the best of times. If the lawyer you hire knows more than you do about employee benefits, how do you know you are getting good advice? However, if you can truly evaluate the advice you receive, why did you need the expert in the first instance? It becomes a bit of a Sisyphian task to ask for, much less receive, quality advice when you need it, if that becomes the standard against which you measure the choices.

1. goo.gl/SHm65Z (last accessed August 31, 2017).
2. goo.gl/A5b5s5 (last accessed on August 31, 2017).
3. See link *supra* and text accompanying note 82.
4. See, e.g., *Bank of America, N.A. v. Superior Court of Orange County*, 212 Cal. App. 4th 1076 (2013).
5. *Forbes.com* (May 24, 2014) bit.ly/2grzmSt (last accessed August 31, 2017). ML