The "Captive Audience" Argument

Despite the Court's clear recognition of First Amendment protection of commercial speech, detractors continue to claim that signs may be treated differently than other forms of speech. One common argument is that signs rely on "exposures" to people who are driving on publicly-funded roads; they depend solely on this traffic for their "circulation" and it is the easement that creates the sign's values. Because of this dependence on a "captive audience" via the public infrastructure, the public has a legitimate interest in regulating the content of the sign.

Consider for a moment, however, that newspapers – and even papers such as the "Nickel Ads" that contain nothing but advertisements – are frequently distributed in newsracks located adjacent to – and in many cases directly in – the public right of way, relying on passing traffic for their "circulation." Similarly, radio and television programming are broadcast across the public airways, relying on publicly-owned assets in order to communicate their messages. It is not uncommon to find entire programs – or even entire stations, such as the Home Shopping Network – that are purely commercial with little, if any, noncommercial content. Finally, Internet web sites are transmitted via the World Wide Web, another public asset, and many web sites are simply electronic storefronts.

A municipality would be hard-pressed to find a way to ban any of this speech; it could regulate the time, place and manner in which it was available, and possibly ban advertising altogether from transmission via public infrastructure, but in so doing it would be required to prove that it had not regulated further than necessary to attain a legitimate end.[1] Banning newspaper racks entirely from the public right of way would undoubtedly be per-

1. See, e.g. Lakewood v. Plain Dealer Publishing, 486 U.S. 750 (1988).

The U.S. Supreme Court has recognized the public streets as an appropriate place for the peaceful exercise of First Amendment expression.

ceived by voters as an act of censorship.[2] And it would be seen as imprudent to propose limiting the duration or quantity of radio, television, or Internet advertisements (although, as with all speech, the government may regulate for obscenity, libel, fighting words, etc.).

Nearly everyone who has something to sell or something to say in some way uses the public right of way or public square to secure "circulation," or exposures, to others. Commercial traffic uses the right-of-way to transport goods undifferentiated from any other right of way user. Commercial vehicles are often marked with logos, slogans, and other information that is similar to that typically seen on stationary signs, and are free to travel up and down the streets as much as they like. Some transport trucks have even begun to lease the surfaces of their trailers as outdoor advertising space. Similarly, many public transit agencies lease space on the sides and backs of buses, light rail trains, and transit shelters – all of which are located in the public right of way – for outdoor advertising. That advertising relies on the existence of the rights of way to create exposures. To single out one group – sign users – is discriminatory. To argue that drivers and pedestrians using the right of way are a "captive audience" to any of this commercial communication, let alone the on-premise business sign – is questionable at best.

Company vehicles function as outdoor advertising utilizing the public roads to communicate a commercial message.

It is true that the public has paid for a large share of the construction of the right of way, but the public also benefits financially from allowing adjacent properties to communicate with those who use the right of way. Because signs increase the productivity of the business, they also increase the taxes paid to the local government. If the local government relies on property taxes, increased business results in increased property value, which translates into increased revenue for the local government. If the local government is funded through sales taxes, the increased sales that result from better signage again translate into increased revenue for the local government. The people themselves also benefit. When businesses are more successful, they pay more taxes, relieving pressure on individuals and residential property owners.

Beyond that, the U.S. Supreme Court has recognized public streets as an appropriate place for the peaceful exercise of First Amendment expression. In *Edwards v. South Carolina*,[3] the Court recognized that public streets, parks, and even the grounds of a state capital were public forums where civil rights demonstrations, for example, could occur, subject to time, place, and manner regulations. This protection does not only apply to physical public spaces – it applies to all public infrastructure. The state cannot censor speech broadcast across the public airwaves or over the Internet (except for obscenity, libel, fighting words, sedition, etc.).

Reader boards and temporary signs often give businesses the freedom to instantly communicate timely information with the public without prior restraint.

In *Consolidated Edison Co. v. Public Service Comm'n*[4] the Court overturned a regulation prohibiting a public utility from including inserts discussing controversial issues of public policy with monthly bills. The Court ruled that prohibiting the inclusion of the inserts directly infringed upon the company's freedom of speech. In writing for the Court, Justice Powell opined, "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." Ten years earlier, the Court had upheld a law in *Rowan v. Post Office*[5] that allowed mail recipients of objectionable mail to put their names on a list and require the mailer to send no more such material. The difference between the two laws – the reason one was struck down and the other upheld – was that in *Consolidated Edison* the state blocked the dissemination of the speech, whereas in Rowan it was the individual choosing not to receive the speech.

Another example of this principle is the difference in the Court's treatment of bans on door-to-door solicitation. Each person has the right to decide for themselves whether to receive strangers as visitors, thus it is not appropriate for the state to ban door-to-door solicitation.[6]

Regulators often fail to see the irony in efforts to limit signs occurring simultaneously with efforts to raise money for public programs through sale of commercial speech opportunities on public assets.

2. Cincinnati v. Discovery Network, 507 U.S. 410 (1993).
3. 372 U.S. 229 (1963).
4. 447 U.S. 530 (1980).
5. 397 U.S. 728 (1970).
6. *See* Frisby v. Schultz, 487 U.S. 474 (1988) and its treatment of noise and sound trucks (the sounds are inescapable and may be prohibited); Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002); and Grayned v. City of Rockford, 408 U.S. 104 (1972).