NOTE

The Media Win the Billboard Battle, but Metro Wins the War: *Metromedia, Inc. v. City of San Diego*

In Metromedia, Inc. v. City of San Diego, *the United States Supreme Court held that a city-wide prohibition of billboards violated the first amendment. This note analyzes the* Metromedia *decision and proposes a model ordinance that attempts to balance advertisers' free speech interest with that of cities in safer and more pleasant environments.*

INTRODUCTION

Billboards[1] are a familiar mode of outdoor advertising.[2] They

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[1] As used in this note, "billboard" refers to the 12-feet by 24-feet "poster panels" and the 14-feet by 48-feet "painted bulletins" that are the "two basic standardized forms" of outdoor advertising display signs. *See* Joint Stipulation of Facts No. 25, Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981). The parties in *Metromedia* used the term "outdoor advertising" instead of "billboard." Joint Stipulation No. 22 stated that outdoor advertising differs from on-site business signs. On-site signs identify businesses, goods, or services available on the property on which the sign is located. These signs are rarely the size of billboards. *See* notes 8-9, 20, 80, 96-97, 105-123 and accompanying text *infra*.

[2] Billboards were popular in ancient Greece and Rome, and today are pervasive fixtures along the thoroughfares of America. *See generally* A. BELIN, M. BILOTTO & T. CARHART, A LEGAL HANDBOOK FOR BILLBOARD CONTROL 1-17 (STAN. ENVT'L L. SOC'Y 1976); K. CLAUS & R. CLAUS, HANDBOOK OF SIGNAGE AND SIGN LEGISLATION (1976); R. HENDERSON & S. LANDAU, BILLBOARD ART (1980); OUTDOOR ADVERTISING—HISTORY AND REGULATION (J. HOUCK ed. 1969); M.I.T. PRESS, CITY SIGNS AND LIGHTS (1973); F. PRESBREY, THE HISTORY AND DEVELOPMENT OF ADVERTISING (1929).

are subject to numerous federal,[3] state,[4] and local[5] regulations.

The United States Supreme Court recently addressed the constitutionality of a city ordinance prohibiting billboards in *Metromedia, Inc. v. City of San Diego*.[6] In March, 1972, the San Diego City Council enacted an ordinance regulating outdoor advertising. This ordinance sought to promote traffic safety, preserve aesthetic values, enhance the city's tourist industry, and protect the "public health, safety and general welfare."[7] The ordinance prohibited all commercial and noncommercial off-site "outdoor advertising display signs" within the city limits.[8] The

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[3] Federal Highway Beautification Act of 1965, Pub. L. No. 89-285, 79 Stat. 1028 (codified at 23 U.S.C. § 131 (1977)). *See* note 45 and accompanying text *infra*.

[4] *See, e.g.*, California Outdoor Advertising Act, CAL. BUS. & PROF. CODE §§ 5200-5231 (West 1974 & Cum. Supp. 1981). Maine, Vermont, and Hawaii have totally prohibited billboards. *See* notes 66, 110 and accompanying text *infra*. The Maine statute was held unconstitutional in John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980), *aff'd*, 101 S. Ct. 3151 (1981), *rev'g* John Donnelly & Sons v. Mallar, 453 F. Supp. 1272 (D. Me. 1978). *See* notes 65-66 and accompanying text *infra*.

[5] *E.g.*, 17 counties and 209 cities in California have regulations prohibiting outdoor advertising. Brief for *amicus curiae* Outdoor Adv'g Ass'n of Am. at 2, Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981). *See generally* Thompson, *Billboards: Roadside Blight in the Golden State*, 7 J. BEVERLY HILLS B.A. 17 (Jan.-Feb. 1973); Note, *State and Local Billboard Control in California*, 11 CAL. W.L. REV. 193 (1974).

[6] 101 S. Ct. 2882 (1981). *See* notes 67-104 and accompanying text *infra*.

[7] San Diego, Cal., Municipal Code § 101.0700 A (1972).

[8] *Id.* § 101.0700 B. The ordinance did not apply to on-site business signs: "Only those . . . signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed shall be permitted." The language of this exception confused the United States Supreme Court and was in part responsible for the Court's invalidation of the ordinance. *See* notes 79-81, 96-97 and accompanying text *infra*.

Twelve categories of signs, none of which included billboards, were exempted from the prohibition. Eleven categories were originally exempted: Governmental signs, bench signs at public bus stops, historical plaques, religious symbols and holiday decorations, shopping mall signs not visible from any point on the mall boundaries, signs designating property "for sale," rent, or lease, public service signs for news, time, or temperature, signs or transport vehicles such as buses and taxis, temporary off-site subdivision directional signs, signs on licensed commercial vehicles such as trailers, and any sign in the process of being made, stored, or transported. San Diego, Cal., Municipal Code § 101.0700 F (1972).

ordinance did not define "outdoor advertising display sign,"[9] but presumably the city intended the description to include billboards. While many localities had previously enacted total billboard bans,[10] none approached the breadth of the San Diego regulation.[11]

Within eight weeks of the ordinance's adoption, Metromedia, Inc. and Pacific Outdoor Advertising Co. — two advertisers affected by the ban — sued to enjoin its enforcement.[12] The trial

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In 1977, the city added a twelfth exception for temporary political campaign signs maintained for no longer than 90 days. This addition followed the Ninth Circuit Court of Appeals decision in Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977). The Ninth Circuit held that an ordinance that regulated temporary political signs by requiring application fees and by limiting their size and distribution violated the first amendment.

The San Diego ordinance required noncomforming signs to be removed after an amortization period of 90 days to four years. San Diego, Cal., Municipal Code §§ 101.0700 C, D (1972).

[9] The California Supreme court's majority opinion in Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), *rev'd*, 101 S. Ct. 2882 (1981) cured the ordinance's failure to define "outdoor advertising display sign" by adopting a definition from CAL. REV. & TAX. CODE § 18090.2 (West Cum. Supp. 1981): " '[O]utdoor advertising display' means a rigidly assembled sign, display or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public." *Id.* Justice Newman's concurring opinion expressed dissatisfaction with this definition. 26 Cal. 3d at 887-88, 610 P.2d at 430, 164 Cal. Rptr. at 533 (Newman, J., concurring). *See* notes 20, 97 and accompanying text *infra*.

[10] *See* notes 52-53 and accompanying text *infra*. Forty-three percent of the cities that responded to a 1975 survey by the California Roadside Council indicated that they had totally prohibited billboards in all zones. *See* A. BELIN, M. BILOTTO & T. CARHART, *supra* note 2, at 63.

[11] "[N]o city in the nation of or near San Diego's size . . . has enacted a prohibition on outdoor advertising . . . ." Reply Brief for Appellant at 3, Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981). The ordinance eliminated billboards from a 320 square-mile area with a population of over 715,000. (1972 population; San Diego County Map and Guide, San Diego, Cal., Chamber of Commerce (1980)). By 1980, San Diego's population was over 840,000, *id.*, making it the nation's eighth largest city. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1980, at 25.

[12] The two actions were consolidated by joint stipulation in Superior Court. Three other stipulations are significant. One stated that all of the advertisers' billboards were in areas of San Diego zoned commercial and industrial. Joint Stipulation of Facts No. 20, Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981). Another stated that the ordinance would eliminate the outdoor advertising business in San Diego. Joint Stipulation of Facts No. 2. The third

court granted the advertisers' motion for summary judgment and held that the ordinance was an unreasonable exercise of police power and a violation of the first amendment.[13] The city appealed, and the California Supreme Court reversed.[14]

The California Supreme Court stated unequivocally that the ordinance served the legitimate police power objectives of traffic safety[15] and aesthetics.[16] The court further held that the ordi-

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stated that outdoor advertising communicated valuable commercial, political, and social information, and that many businesses and politicians relied on the medium because alternatives were insufficient, inappropriate, and prohibitively expensive. Joint Stipulation of Facts No. 28. The advertisers cited this stipulation as proof that the ordinance was not a time, place, and manner regulation. *See* notes 17-18, 20, 28-30, 84, 104 and accompanying text *infra*.

[13] The memorandum opinion said that the ordinance violated the first amendment because it restricted noncommercial speech. The trial court relied on an unpublished Colorado trial court opinion, Combined Communications Corp. v. City of Denver, which was later affirmed without reference to the first amendment issue at 189 Colo. 462, 542 P.2d 79 (1975).

On appeal by San Diego, the Fourth District Court of Appeal affirmed *Metromedia* on police power grounds without reaching the first amendment issue. Metromedia, Inc. v. City of San Diego, 136 Cal. Rptr. 453 (4th Dist. 1977), *rev'd*, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), *rev'd*, 101 S. Ct. 2882 (1981).

[14] Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), *rev'd*, 101 S. Ct. 2882 (1981). The disposition of the case in the California courts is discussed in Aronovsky, Metromedia, Inc. v. City of San Diego: *Aesthetics, the First Amendment, and the Realities of Billboard Control*, 9 ECOLOGY L.Q. 295 (1981); Note, Metromedia, Inc. v. City of San Diego: *Constitutionality of Billboard Regulation*, 69 CALIF. L. REV. 1027 (1981) [hereinafter cited as *Constitutionality of Billboard Regulation*]; Note, *City-Wide Prohibition of Billboards: Police Power and the Freedom of Speech*, 30 HASTINGS L.J. 1597 (1979) [hereinafter cited as *City-Wide Prohibition of Billboards*].

[15] Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 859, 610 P.2d 407, 413, 164 Cal. Rptr. 510, 515 (1980), *rev'd*, 101 S. Ct. 2882 (1981). *See* notes 48, 64, 66, 76, 94 and accompanying text *infra*.

[16] Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 860-61, 610 P.2d 407, 412-13, 164 Cal. Rptr. 510, 515-16, (1980), *rev'd*, 101 S. Ct. 2882 (1981). *See* notes 36, 47, 54 and accompanying text *infra*. This note focuses on the first amendment issues in the case. The use of aesthetics as a valid police power goal in *Metromedia* is discussed in Note, *Zoning—Billboards—Exercise of Police Power for Aesthetic Purposes*, 47 TENN. L. REV. 901 (1980) [hereinafter cited as *Zoning—Billboards*].

The court added that the scope of the prohibition and the size of the city were irrelevant. 26 Cal. 3d at 864-65, 610 P.2d at 415-16, 164 Cal. Rptr. at 518-19. The court relied on John Donnelly & Sons v. Outdoor Adv'g Bd., 369 Mass. 206, 223-24, 339 N.E.2d 709, 719-20 (1975), which upheld a billboard ban in a

nance was a reasonable time, place, and manner regulation[17] consistent with the free speech provisions of the United States and California constitutions.[18] Under the court's analysis, the ordinance was not a restriction on the content of speech because it banned billboards without reference to the subject matter of the message.[19] In addition, the ordinance allowed for alternative means of communication such as leaflets, newspapers, and broadcast media.[20]

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commercial area. *See* note 24 and accompanying text *infra*.

[17] A state may reasonably regulate the time, place, and manner of speech that occurs in a public place. *See* note 29 *infra*. Such a restriction cannot, however, be based on the content or subject matter of the speech. *See* notes 28-30 and accompanying text *infra*.

The advertisers had urged that because the ordinance was a total prohibition, it was not amenable to time, place, and manner analysis. They argued that the ordinance must serve a compelling governmental interest. The court disagreed and said that billboards, "as permanent intrusive uses of land, may reasonably be distinguished from other media . . . ." Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 871, 610 P.2d 407, 420, 164 Cal. Rptr. 510, 523 (1980), *rev'd*, 101 S. Ct. 2882 (1981).

The United States Supreme Court and the California courts have often struck down total prohibitions of various media such as live entertainment, Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176 (1981); door-to-door solicitation, Martin v. City of Struthers, 319 U.S. 141 (1943); leaflets and maps, Welton v. City of Los Angeles, 18 Cal. 3d 497, 556 P.2d 1119, 134 Cal. Rptr. 668 (1976); newsracks, California Newsp. Publ. Ass'n v. City of Burbank, 51 Cal. App. 3d 50, 123 Cal. Rptr. 880 (2d Dist. 1976); parades and demonstrations, Dillon v. Municipal Court, 4 Cal. 3d 860, 484 P.2d 945, 94 Cal. Rptr. 777 (1971); and sound trucks, Wollam v. City of Palm Springs, 59 Cal. 2d 276, 379 P.2d 481, 29 Cal. Rptr. 1 (1963). *See* notes 80, 89-90, 93, 104 and accompanying text *infra*.

[18] The court cited the United States Supreme Court's summary dismissal of Suffolk Outdoor Adv'g Co. v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977), *appeal dismissed*, 439 U.S. 808 (1978). Metromedia, Inc. v. City of San Diego, 26 Cal.3d 848, 867, 610 P.2d 407, 417, 164 Cal. Rptr. 510, 520 (1980), *rev'd*, 101 S. Ct. 2882 (1981). In *Suffolk v. Hulse*, the New York Court of Appeal upheld a commercial billboard prohibition as a reasonable time, place, and manner regulation. *See* note 61 and accompanying text *infra*.

One commentator has pointed out that the California Supreme Court's reliance on *Suffolk v. Hulse* was wrong for two reasons. First, a summary dismissal by the United States Supeme Court has limited precedental value, and second, the ordinance in *Suffolk v. Hulse* applied only to commercial billboards. *Constitutionality of Billboard Regulation, supra* note 14, at 1038-40, 1044-45.

[19] Metromedia, Inc. v. City of San Diego, 26 Cal.3d 848, 868, 610 P.2d 407, 418, 164 Cal. Rptr. 510, 521 (1980), *rev'd*, 101 S. Ct. 2882 (1981).

[20] Joint Stipulation of Facts No. 28 stated that the alternatives were insufficient and prohibitively expensive. *See* note 12 and accompanying text *supra*.

Metromedia appealed, and the United States Supreme Court reversed.[21] The Court's decision rested solely on the ground that the ordinance violated the first amendment.[22] The Court's 6-3 decision generated five opinions. Each justice, however, acknowledged that under certain circumstances a well-drafted billboard regulation would be valid.[23]

This note examines the *Metromedia* decision and its impact. It begins by discussing the Supreme Court's development of the commercial speech doctrine. It next analyzes billboard litigation and critiques the *Metromedia* decision. Finally, the note proposes a model ordinance based on the commercial speech doctrine and the *Metromedia* decision. The model ordinance attempts to balance the advertiser's free speech and economic interests with the city's interest in a safer, more pleasant environment.

The majority's interpretation diminished the stipulation's effect: "The possibility that the ordinance may impede an occasional advertiser . . . is not sufficient to invalidate the ordinance on its face." Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 869 n.14, 610 P.2d 407, 419 n.14, 164 Cal. Rptr. 510, 522 n.14, *rev'd*, 101 S. Ct. 2882 (1981).

Two justices who concurred in the result were uneasy with the ordinance's prohibitory effects. Justice Richardson said that the summary disposition in *Suffolk v. Hulse* was controlling. 26 Cal. 3d at 886, 610 P.2d at 429, 164 Cal. Rptr. at 532 (Richardson, J., concurring). Justice Newman recommended that the ordinance be redrafted, and chided the majority for adopting the "cryptic, tax-based" definition of "outdoor advertising display sign" from the California Revenue and Taxation Code. 26 Cal. 3d at 887-88, 610 P.2d at 430, 164 Cal. Rptr. at 533 (Newman, J., concurring). *See* note 9 and accompanying text *supra*; note 97 and accompanying text *infra*.

In his dissenting opinion, Justice Clark attacked the majority's first amendment analysis. He dismissed the numerous cases that predated the recognition of first amendment protection for commercial speech. 26 Cal. 3d at 890, 610 P.2d at 431-32, 164 Cal. Rptr. at 534-35 (Clark, J., dissenting). He pointed out that none of the remaining cases had upheld a total ban of commercial and noncommercial billboards; *Suffolk v. Hulse*, for example, had applied only to commercial billboards. 26 Cal. 3d at 890-91, 610 P.2d at 432, 164 Cal. Rptr. at 535 (Clark, J., dissenting). Justice Clark emphasized that the parties had stipulated to the lack of adequate alternatives, and concluded that there was no basis upon which the absolute prohibition could be justified. *Id.* at 895-96, 610 P.2d at 435-36, 164 Cal. Rptr. at 538-39 (Clark, J., dissenting).

[21] 101 S. Ct. 2882 (1981).

[22] *See* notes 67-104 and accompanying text *infra*.

[23] *See* notes 105-123 and accompanying text *infra*.

I. The Commercial Speech Doctrine

The first amendment mandates that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[24] Until recently, billboard companies infrequently challenged outdoor advertising regulations on first amendment grounds because purely commercial speech was not constitutionally protected.[25]

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[24] United States Const. amend. I. The Supreme Court has not limited itself to protecting speech and the press, but has applied first amendment principles to numerous means of expression, including leaflets and handbills, *see, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 101 S. Ct. 2559 (1981); Schneider v. State, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938); door-to-door solicitation, *e.g.*, Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Martin v. City of Struthers, 319 U.S. 141 (1943); public meetings, *e.g.*, Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); picketing and demonstrations, *e.g.*, Carey v. Brown, 447 U.S. 455 (1980); Cox v. New Hampshire, 312 U.S. 569 (1941); sound trucks, *e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York, 334 U.S. 558 (1948); broadcast media, *e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); motion pictures, *e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1974); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); live entertainment, *e.g.*, Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176 (1981); Southeastern Promotions, Ltd., v. Conrad, 420 U.S. 546 (1975); Schacht v. United States, 398 U.S. 58 (1970); various means of symbolic speech, *e.g.*, Spence v. Washington, 418 U.S. 405 (1974) (display of flag); Cohen v. California, 403 U.S. 15 (1971) (jacket inscribed with obscene phrase); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (black armbands); United States v. O'Brien, 391 U.S. 367 (1968) (burning of draft card); Stromberg v. California, 283 U.S. 359 (1931) (display of flag); and political communication, *e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). *See generally* Kaufman, *The Medium, The Message, and the First Amendment*, 45 N.Y.U. L. Rev. 762 (1970).

[25] Commercial speech is expression that proposes a business transaction; for example, an advertisement is commercial speech. In contrast, noncommercial, ideological speech expresses ideas. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 779-80 (1976) (Stewart, J., concurring).

The rule that the first amendment did not protect commercial speech originated in Valentine v. Chrestensen, 316 U.S. 52 (1942). In *Valentine*, the Court unanimously upheld a New York ordinance prohibiting the distribution of advertisements in public places. Chrestensen had tried to snare first amendment protection for his handbill by adding a political message on its reverse side. The Court held that while the first amendment protected the communication of ideas and information on public streets, it imposed "no such restraint on government as respects purely commercial advertising." *Id.* at 54. The

However, in 1975 the Supreme Court hinted that commercial speech did not lack protection,[26] and a year later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[27] the Court expressly extended first amendment protection to commercial speech.

In *Virginia State Board of Pharmacy*, the Court emphasized that the first amendment coverage of commercial speech was not equivalent to that accorded to ideological, noncommercial speech.[28] The Court, however, did not suggest that the rules gov-

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Court observed that Chrestensen's inclusion of a noncommercial message was solely "for the purpose of evading the prohibition . . . . If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command." *Id.* at 55. *See* notes 86-88 and accompanying text *infra*.

[26] Bigelow v. Virginia, 421 U.S. 809, 817 (1975). The Court invalidated a Virginia statute that banned advertisements for abortions on the ground that the advertisements contained matter of public interest. *Id.* at 822. Thus, commercial speech was not directly at issue.

[27] 425 U.S. 748 (1976). At issue was a Virginia statute that prohibited licensed pharmacists from advertising the prices of prescription drugs. The Court noted that "in *Bigelow v. Virginia*, [citation omitted] . . . the notion of unprotected 'commercial speech' all but passed from the scene." 425 U.S. at 759. The Court then addressed the question of whether the first amendment protects commercial speech, and, finding that it does, struck down the statute. *Id.* at 770.

The wisdom of granting first amendment protection to commercial speech has sparked a lively debate. *See, e.g.*, Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Barrett, *'The Uncharted Area': Commercial Speech and the First Amendment*, 13 U.C. DAVIS L. REV. 175 (1980); Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372 (1979); Heller, *The End of the Commercial Speech Exception—Good Riddance or More Headaches for the Courts?*, 67 KY. L.J. 927 (1978-79); Hunter, *Prescription Drugs and Open Housing: More on Commercial Speech*, 25 EMORY L.J. 815 (1976); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080; Comment, *Prior Restraints and Restrictions On Advertising after* Virginia Pharmacy Board: *The Commercial Speech Doctrine Reformulated*, 43 MO. L. REV. 64 (1978); Comment, *Commercial Speech and the Limits of Legal Advertising*, 58 ORE. L. REV. 193 (1979); Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976).

[28] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,

erning reasonable time, place, and manner restrictions should be altered when applied to commercial speech.[29] The Court observed that time, place, and manner regulations had been upheld in noncommercial speech cases if they were content-neutral, served a significant governmental interest, and allowed ample alternative means of communication.[30]

Inc., 425 U.S. 748, 771 n.24 (1976). *See* note 24 *supra*.

The Supreme Court has reiterated this distinction. In Bates v. State Bar of Ariz., 433 U.S. 350 (1977), the Court invalidated a ban on price advertising by lawyers, but noted that the first amendment permits regulation of this type of commercial speech in the absence of any regulation for noncommercial speech. *Id.* at 379-81, 383-84. In Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), the Court upheld a regulation that disciplined lawyers who made in-person solicitations of business. The Court noted that commercial speech warranted a "limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Id.* at 456.

[29] Regulations of speech fall into two broad categories: content restrictions, *see* note 30 *infra* (discussing Linmark Assocs., v. Township of Willingboro, 431 U.S. 85 (1977)), and time, place and manner restrictions. The Court has long held that a state may reasonably regulate the time, place, and manner of speech that occurs in a public place. Time, place, and manner regulations cannot be based on the content or subject matter of the speech. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 101 S. Ct. 2559 (1981) (Court upheld a regulation that restricted the location of solicitors at the Minnesota State Fair); *see also* Grayned v. City of Rockford, 408 U.S. 104, 115-17 (1972); Kovacs v. Cooper, 336 U.S. 77, 86 (1949); Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941). The application of time, place, and manner analysis to commercial speech is discussed in Barrett, *supra* note 27, at 188-94. *See* notes 45, 60, 84, 105-123 and accompanying text *infra*.

[30] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976). Five years later, two members of the Court characterized the San Diego ordinance in *Metromedia* as a total prohibition not based on content. *See* note 89 and accompanying text *infra*.

The Court first applied a time, place, and manner analysis to commercial speech in Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977). The ordinance in *Linmark* banned the posting of "For Sale" signs on realty. The township argued that the ordinance was a time, place, and manner regulation that banned all similar signs, served the significant interest of preventing white flight from the community, and left alternatives such as newspapers and brokerage listings. The Court struck down the ordinance, noting that it regulated signs on the basis of their content, *i.e.*, only "For Sale" and "Sold" signs were banned. In addition, the Court stated that the available alternatives were expensive, ineffective, and unsatisfactory. *Id.* at 93-94. The inadequacy of alternative means of communication proved equally fatal to the ordinance in *Metromedia*. *See* notes 12, 20 and accompanying text *supra*; note 84 and accompanying text *infra*.

The Court in *Linmark* did not mention any difference in applying time,

Recently, in *Central Hudson Gas and Electric Corp. v. Public Service Commission*, the Court reiterated its view that commercial speech merits "lesser protection . . . than . . . other constitutionally guaranteed expression."[31] The Court also outlined a four-part test for determining the validity of regulations restricting commercial speech. The speech must concern lawful activity and must not be misleading; the regulation must serve a substantial governmental interest; the regulation must directly advance the governmental interest; and the regulation must be no more extensive than necessary to serve the interest.[32]

The San Diego City Council enacted the *Metromedia* billboard ordinance in 1972, four years before the Supreme Court recognized first amendment protection for commercial speech, and eight years before the adoption of the *Central Hudson* test. *Metromedia* presented the Court with its first opportunity to apply its rapidly developing commercial speech doctrine to a regulation of outdoor advertising.

II. A Review of Billboard Litigation

A. Billboards and the Police Power

Advertisers have challenged billboard regulations since the turn of the century.[33] The early cases recognized billboards as a

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place, and manner rules to commercial speech. *See also* Heffron v. International Soc'y for Krishna Consciousness, Inc., 101 S. Ct. 2559, 2563-68 (1981); Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176, 2186 (1981); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535 (1980).

[31] 447 U.S. 557, 562-63 (1980). At issue was a ban on a utility company's use of promotional advertising in its billing envelopes. The Court stated that in other contexts, the first amendment prohibits regulation of speech based on the content of the message. However, commercial speech has two attributes that permit regulation of its content. First, a commercial speaker's knowledge of his product ensures accuracy of the message. Second, the profit incentive behind commercial speech precludes the discouragement, or chilling, of commercial speakers by a content-based regulation. *Id.* at 564 n.6. *See* notes 88, 117 and accompanying text *infra*.

[32] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-66 (1980). In *Central Hudson* the Court invalidated the regulation because it was too extensive in suppressing speech unrelated to the State's interest in energy conservation. *Id.* at 569-72. *See* notes 66, 73-84, 90-95 and accompanying text *infra*.

[33] *See, e.g., In re* Wilshire, 103 F. 620 (S.D. Cal. 1900); City of Passaic v. Paterson Bill Posting Co., 72 N.J.L. 285, 62 A. 267 (1905).

unique medium of expression,[34] subject to reasonable regulation under a state's police power.[35] Because courts had not yet approved zoning based on aesthetics,[36] they struggled to find other justifications for billboard regulations. Billboards were portrayed as lethal earthquake and wind hazards,[37] shields for unsanitary, immoral, and criminal acts,[38] rubbish receptacles, and firetraps.[39] They were branded as "constant menaces to the public safety and welfare . . . the inducing cause and natural abiding

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[34] *See, e.g.*, Packer Corp. v. Utah, 285 U.S. 105, 110 (1932); St. Louis Poster Adv'g Co. v. City of St. Louis, 249 U.S. 269, 274 (1919); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 529 (1917). *See also* Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974).

The Supreme Court has repeatedly stated that each method of expression is unique and presents its own peculiar problems. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978) (radio); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) (theater); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952) (motion pictures); Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (sound trucks).

Indeed, one commentator has declared that what is said is less important than how it is said: "In a culture like ours . . . it is sometimes a bit of shock to be reminded that, in operational and practical fact, the medium is the message." M. McLuhan, Understanding Media: The Extensions of Man 23 (1964). *See also* M. McLuhan & Q. Fiore, The Medium is the Message (1967).

[35] The police power is the power of the state to promote the public health, safety, and welfare by regulating the personal rights and property rights of its citizens. Berman v. Parker, 348 U.S. 25, 31-33 (1954).

[36] *See, e.g.*, Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909); City of Passaic v. Paterson Bill Posting Co., 72 N.J.L. 285, 62 A. 267 (1905). *Varney & Green* held unconstitutional a billboard prohibition premised solely on aesthetics. 155 Cal. at 321, 100 P. at 868. Until it was overruled in Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), *rev'd*, 101 S. Ct. 2882 (1981), *Varney & Green* forced California courts to find other justifications for billboard regulations, such as traffic safety or economic benefit. *See* notes 15-16 *supra*; notes 48, 50-51 and accompanying text *infra*.

Recently, many courts have adopted Justice Douglas' *dictum* in Berman v. Parker, 348 U.S. 26, 33 (1954), which said that the concept of the public welfare is broad enough to include aesthetics. Thus, it is within a legislature's power to regulate for aesthetic purposes. *See generally* Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 U. Mo. K.C.L. Rev. 125 (1980).

[37] *In re* Wilshire, 103 F. 620, 623 (S.D. Cal. 1900).

[38] Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 529 (1917).

[39] St. Louis Gunning Adv'g Co. v. City of St. Louis, 235 Mo. 99, 145, 153-54, 137 S.W. 929, 942-45 (1911).

place for filth, disease and noxious odors. . . ."[40]

With the advent of mass-produced automobiles and improved roads, billboards became prevalent throughout the country.[41] Concomitantly, courts abandoned the public menace rationales for more conventional analyses.[42] By the 1970s, advertisers regularly challenged billboard ordinances as unreasonable exercises of the police power,[43] violations of constitutional due process and equal protection, and uncompensated takings.[44]

While most of the challenged regulations merely limited the size, height, spacing, or location of billboards,[45] several total prohibitions of billboards were attacked.[46] Some courts readily accepted aesthetics as a legitimate independent goal of billboard regulation[47] and upheld these regulations. Others combined the

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[40] *Id.* at 145, 155, 137 S.W. at 942, 945.

[41] *See generally* R. HENDERSON & S. LANDAU, BILLBOARD ART (1980); Tucker, *Standardized Outdoor Advertising: History, Economics and Self-Regulation,* in OUTDOOR ADVERTISING—HISTORY AND REGULATION 11 (J. HOUCK ed. 1969).

[42] *See* cases cited in notes 47-51 & 54 *infra.*

[43] *See* cases cited in notes 47-51 *infra.*

[44] *See* cases cited in note 45 *infra.*

[45] Many of these regulations were enacted pursuant to the Federal-Aid Highway Act of 1958, Pub. L. No. 85, 85-381, § 12, 72 Stat. 96 (codified at 23 U.S.C. § 131 (1958)) and the Federal Highway Beautification Act of 1965, Pub. L. No. 89-285, 79 Stat. 1028 (codified at 23 U.S.C. § 131 (1977)). Cases involving challenges to these regulations include E.B. Elliot Adv'g Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970), *cert. denied,* 400 U.S. 805 (1970); City of Escondido v. Desert Outdoor Adv'g, Inc., 8 Cal. 3d 785, 505 P.2d 1012, 106 Cal. Rptr. 172 (1973), *cert. denied,* 414 U.S. 828 (1973); Desert Outdoor Adv'g, Inc. v. County of San Bernardino, 255 Cal. App. 2d 765, 63 Cal. Rptr. 543 (4th Dist. 1967), *appeal dismissed,* 393 U.S. 8 (1968); County of Santa Barbara v. Purcell, Inc., 251 Cal. App. 2d 169, 59 Cal. Rptr. 345 (2d Dist. 1967); Moore v. Ward, 377 S.W.2d 881 (Ky. App. 1964); *In re* the Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961); New York State Thruway Auth. v. Ashley Motor Court, Inc., 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (1961); *In re* Columbus Outdoor Adv'g Co., 51 Ohio App. 2d 187, 367 N.E.2d 920 (1977); Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 200 N.E.2d 328 (1964); Kelbro, Inc. v. Myrick, 113 Vt. 64, 30 A.2d 527 (1943). *See generally* Cunningham, *Billboard Control Under the Highway Beautification Act of 1965,* 71 MICH. L. REV. 1295 (1973); Price, *Billboard Regulations Along the Interstate Highway System,* 8 KAN. L. REV. 81 (1959); Wilson, *Billboards and the Right to be Seen from the Highway,* 30 GEO. L.J. 723 (1942).

[46] *See* notes 52-53 and accompanying text *infra.*

[47] *See, e.g.,* State v. Diamond Motor, Inc., 50 Hawaii 33, 36, 429 P.2d 825, 827-28 (1967); General Outdoor Adv'g Co. v. Department of Pub. Works, 289 Mass. 149, 187, 193 N.E. 799, 816 (1935); Westfield Motor Sales Co. v. Town of Westfield, 129 N.J. Super. 528, 539-44, 324 A.2d 113, 122 (1974); *accord,* Mur-

aesthetics rationale with those of traffic safety,[48] historical interest,[49] economic well-being,[50] and public nuisance.[51] Although courts upheld several total prohibitions,[52] they struck down many others.[53] Moreover, a substantial minority or courts failed

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phy, Inc. v. Town of Westport, 131 Conn. 292, 296-300, 40 A.2d 177, 179-83 (1944); Merritt v. Peters, 65 So. 2d 861, 862 (Fla. 1953); Cromwell v. Ferrier, 19 N.Y.2d 263, 272, 225 N.E.2d 749, 755, 279 N.Y.S.2d 22, 30 (1967).

[48] *See, e.g.*, E.B. Elliott Adv'g Co. v. Metropolitan Dade County, 425 F.2d 1141, 1152 (5th Cir. 1970); Moore v. Ward, 377 S.W.2d 881, 884 (Ky. App. 1964); *accord*, Inhabitants of the Town of Boothbay v. National Adv'g Co., 347 A.2d 419, 422-23 (Me. 1975); General Outdoor Adv'g Co. v. Department of Pub. Works, 289 Mass. 149, 180-82, 193 N.E. 799, 813-14 (1935); *In re* the Opinion of the Justices, 103 N.H. 268, 270, 169 A.2d 762, 764 (1961); New York State Thruway Auth. v. Ashley Motor Court, 10 N.Y.2d 151, 156-57, 176 N.E.2d 566, 568-69, 218 N.Y.S.2d 640, 643-44 (1961); Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 433-39, 200 N.E.2d 328, 335-40 (1964); Kenyon Peck, Inc. v. Kennedy, 210 Va. 60, 63-65, 168 S.E.2d 117, 120-21 (1969).

[49] *See, e.g.*, City of New Orleans v. Levy, 223 La. 14, 28-29, 64 So. 2d 798 (1953) (New Orleans' French and Spanish Quarters); City of New Orleans v. Pergament, 198 La. 852, 858, 5 So. 2d 129 (1941) (New Orleans' French and Spanish Quarters); Donnelly Adv'g Corp. v. City of Baltimore, 279 Md. 660, 671, 370 A.2d 1127, 1133 (Ct. App. 1975) (Oldtown Baltimore); General Outdoor Adv'g Co. v. Department of Pub. Works, 289 Mass. 149, 197, 193 N.E. 799, 821 (1935) (Concord, Mass.). The opinion in *General Outdoor Adv'g Co. v. Department of Pub. Works*, an extensive essay on the nature of outdoor advertising, "is still the basic primer on the subject of billboards." Brief for *amicus curiae* City of Alameda at 5, Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981).

[50] *See, e.g.*, County of Santa Barbara v. Purcell, Inc., 251 Cal. App. 2d 169, 173, 59 Cal. Rptr. 345, 348 (2d Dist. 1967) (scenic environment is commercial); Metromedia, Inc. v. City of Pasadena, 216 Cal. App. 2d 270, 30 Cal. Rptr. 731 (2d Dist. 1963) ("Today, economic and aesthetic considerations together constitute the nearly inseparable warp and woof of the fabric upon which the modern city must design its future." *Id.* at 273, 30 Cal. Rptr. 733); *accord*, National Adv'g Co. v. County of Monterey, 211 Cal. App. 2d 375, 379, 27 Cal. Rptr. 136, 138 (1st Dist. 1962); Naegele Outdoor Adv'g Co. v. Village of Minnetonka, 281 Minn. 492, 499-500, 162 N.W.2d 206, 211-13 (1968).

[51] *See, e.g.*, City of Escondido v. Desert Outdoor Adv'g, Inc., 8 Cal. 3d 785, 788-89, 505 P.2d 1012, 1015, 106 Cal. Rptr. 172, 174-75 (1973), *cert. denied*, 414 U.S. 828 (1974).

[52] *See, e.g.*, Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944); Inhabitants of the Town of Boothbay v. National Adv'g Co., 347 A.2d 419 (Me. 1975); United Adv'g Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964); United Adv'g Corp. v. Borough of Raritan, 11 N.J. 144, 93 A.2d 362 (1952); Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).

[53] *See, e.g.*, Combined Communications Corp. v. City of Denver, 189 Colo.

to find sufficient justification in aesthetics or traffic safety and held billboard regulations unconstitutional.[54]

B. Billboards and the First Amendment

One of the first cases to attack a billboard ordinance on first amendment grounds was *United Advertising Corp. v. Borough of Raritan*,[55] which involved a total prohibition of commercial billboards. The New Jersey Supreme Court held that the rule of *Valentine v. Chrestensen*,[56] which denied first amendment protection to commercial advertising, imposed no restraints on the Borough's regulation of commercial billboards.[57] Before 1976, three other courts rejected first amendment challenges to billboard ordinances.[58]

462, 542 P.2d 79 (1975); City of Naples v. Polk, 346 So. 2d 1076 (Fla. App. 1977); Metromedia, Inc. v. City of Des Plaines, 26 Ill. App. 3d 942, 326 N.E.2d 59 (1975); Central Adv'g Co. v. City of Ann Arbor, 391 Mich. 533, 218 N.W.2d 27 (1974); Wolverine Sign Works v. Bloomfield Hills, 279 Mich. 205, 271 N.W. 823 (1937); O'Mealia Outdoor Adv'g Co. v. Mayor of Rutherford, 128 N.J.L. 587, 27 A.2d 863 (1942); Central Outdoor Adv'g Co. v. Village of Evendale, 54 Ohio Op. 354, 124 N.E.2d 189 (1954); Norate Corp. v. Zoning Bd. of Adjustment, 417 Pa. 397, 207 A.2d 890 (1965); Daikeler v. Zoning Bd. of Adjustment, 1 Pa. Commw. Ct. 445, 275 A.2d 696, (1971).

[54] *See, e.g.*, Sunad, Inc. v. City of Sarasota, 122 So. 2d 611, 615 (Fla. 1960); Metromedia, Inc. v. City of Des Plaines, 26 Ill. App. 3d 942, 946, 326 N.E.2d 59, 62 (1975); Stoner McCray v. City of Des Moines, 247 Iowa 1313, 1319, 78 N.W.2d 843, 848 (1956); Mayor of Baltimore v. Mano Swartz, Inc., 268 Md. 79, 92, 299 A.2d 828, 835 (Ct. App. 1973); *accord*, City of Santa Barbara v. Modern Neon Sign Co., 189 Cal. App. 2d 188, 11 Cal. Rptr. 57 (2d Dist. 1961); City of Sarasota v. Sunad, Inc., 181 So. 2d 11 (Fla. App. 1965). *See generally* 7 E. McQUILLIN, LAW OF MUNICIPAL CORPORATIONS 296-312 (rev. 3d ed. 1981).

[55] 11 N.J. 144, 93 A.2d 362 (1952).

[56] 316 U.S. 52 (1942). *See* note 25 and accompanying text *supra*.

[57] United Adv'g Corp. v. Borough of Raritan, 11 N.J. 144, 152, 93 A.2d 362, 366 (1952) (Brennan, J.).

[58] In Markham Adv'g Co. v. Washington, 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316, *rehearing denied*, 393 U.S. 1112 (1969), the Washington Supreme Court held that a statute regulating billboards along interstate highways did not violate the first amendment. The court noted the "intrusive quality" of billboards, the hazard they posed to traffic safety, and their "purely commercial nature," and found the statute to be a reasonable regulation. 73 Wash. 2d at 428-29, 429 P.2d at 262-63.

Citing *Markham*, the Tenth Circuit Court of Appeals upheld another statute that regulated billboards along interstate highways in Howard v. State Dep't of Highways, 478 F.2d 581, 584 (10th Cir. 1973).

The Massachusetts Supreme Judicial Court, citing *Markham*, sustained a to-

After the Supreme Court extended constitutional protection to commercial speech in 1976,[59] first amendment attacks on billboard regulations increased. Four state courts, citing traffic safety and aesthetics as significant governmental interests, used time, place, and manner analyses to uphold regulations of billboards along interstate highways.[60] Three other state courts upheld city-wide billboard regulations.[61] The Supreme Court dismissed the advertiser's appeal in each case.[62]

Two courts invalidated billboard controls on free speech grounds. In *Oklahoma ex rel. Department of Transportation v.*

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tal ban on billboards in John Donnelly & Sons, Inc. v. Outdoor Adv'g Bd., 369 Mass. 206, 227-28, 339 N.E.2d 709, 722 (1975). This decision was notable for sustaining on solely aesthetic grounds a total ban in the relatively populous city of Brookline, Massachusetts (Pop. 58,689. *Id.* at 223 n.14, 339 N.E.2d at 720 n.14). The court declared that the ban was justified as to residential and urban areas alike. *Id.*; *see* note 16 and accompanying text *supra*; notes 98-103 and accompanying text *infra*. The *Donnelly* court distinguished the United States Supreme Court's decision in Bigelow v. Virginia, 421 U.S. 809 (1975), which had hinted at protection for commercial speech. *See* note 26 and accompanying text *supra*. The *Donnelly* court explained that the billboards in question contained "purely commercial copy." 369 Mass. at 226, 339 N.E.2d at 721.

[59] *See* notes 25-30 and accompanying text *supra*.

[60] Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M. 312, 600 P.2d 258 (1979), *appeal dismissed*, 446 U.S. 930 (1980); Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (N.D. 1978), *appeal dismissed*, 440 U.S. 901 (1979); Ackerley Communications, Inc. v. City of Seattle, 92 Wash. 2d 905, 602 P.2d 1177 (1979), *appeal dismissed*, 444 U.S. 804 (1980); State v. Lotze, 92 Wash. 2d 52, 593 P.2d 811, *appeal dismissed*, 444 U.S. 921 (1979).

[61] Veterans of Foreign Wars v. City of Steamboat Springs, 195 Colo. 44, 575 P.2d 835 (city ordinance prohibiting billboards justified by substantial governmental interests of traffic safety and aesthetics), *appeal dismissed*, 439 U.S. 809 (1978); Suffolk Outdoor Adv'g Co. v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977) (total prohibition of commercial billboards upheld; the New York Court of Appeal disposed of the first amendment issue in a short paragraph, holding that the ordinance was a content-neutral time, place, and manner regulation that advanced the significant interest of aesthetics. 43 N.Y.2d at 489, 373 N.E.2d at 265, 402 N.Y.S.2d at 370), *appeal dismissed*, 439 U.S. 808 (1978); Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (1977) (statute prohibiting billboards in state parks did not violate the first amendment), *appeal dismissed*, 439 U.S. 809 (1978); Lubbock Poster Co. v. City of Lubbock, 569 S.W.2d 935 (Tex. App. 1978) (city ordinance regulating size, height, spacing, and location of billboards upheld as a valid time, place, and manner regulation), *cert. denied*, 444 U.S. 833 (1979).

[62] *See* notes 60-61 *supra*.

Pile,[63] the Oklahoma Supeme Court struck down a statute prohibiting billboards along interstate highways.[64] In *John Donnelly & Sons v. Campbell*,[65] the First Circuit Court of Appeals voided a Maine statute that prohibited billboards throughout the state.[66]

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[63] 603 P.2d 337 (Okla. 1979), *cert. denied*, 101 S. Ct. 3158 (1981).

[64] Defendant had erected a noncommercial sign near an interstate highway. The Oklahoma Supreme Court held that the statute violated a provision of the state constitution, which guaranteed the right to "freely speak, write or publish . . . sentiments on all subjects." OKLA. CONST. art. 2, § 22. The court concluded that the statute could not apply to noncommercial signs. Oklahoma *ex rel.* Department of Transp. v. Pile, 603 P.2d 337, 343 (Okla. 1979), *cert. denied*, 101 S. Ct. 3158 (1981). In doing so, the court dismissed the state's traffic safety and aesthetic justifications as contradictory:

> The argument is made that our residents are entitled to look at the beauty of the countryside, untrammeled by the blight of billboards, in the face of the statement that billboards can be banned because they constitute a distraction to the drivers of automobiles. Using this reasoning, one could argue the countryside should be covered with billboards to reduce the temptation to avert one's eyes from the road.

603 P.2d at 342-43. *See* notes 66, 76-77, 90-94 and accompanying text *infra*.

[65] 639 F.2d 6 (1st Cir. 1980), *aff'd*, 101 S. Ct. 3151 (1981), *rev'g*, John Donnelly & Sons v. Mallar, 453 F. Supp. 1272 (D. Me. 1978).

[66] John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980), *aff'd*, 101 S. Ct. 3151 (1981) (citing Maine Traveller Information Services Act, ME. REV. STAT. ANN. tit. 23, §§ 1901-1925 (1980 & Cum. Supp. 1981)). The Maine statute permitted state-approved traveler information centers and official business directional signs. *Id.* §§ 1905, 1906. The statute excepted ten other types of signs, including governmental, vehicular, civic, and religious signs. *Id.* § 1913. *Cf.* San Diego, Cal., Municipal Code § 101.0700 (1972), which did not provide for traveler information centers or business directional signs. Although the geographical scope of Maine's statewide statute was broader than San Diego's city ordinance, both regulations banned all billboards, with exceptions for certain noncommercial messages. *See* notes 7-11 and accompanying text *supra*.

The majority in *Campbell* used a time, place, and manner analysis to invalidate the statute. *See* notes 17, 28-30 and accompanying text *supra*. First, the court found the statute to be content-neutral. 639 F.2d at 8. The court discarded the state's traffic safety justification, but found aesthetics to be a sufficient governmental interest. *Id.* at 11. The statute also satisfied the requirement for alternative means of communication by providing for official business directional signs and tourist information centers. *Id.* at 13. Thus, the statute was valid as applied to commercial billboards.

The statute was, however, unconstitutional because its prohibition of all billboards, with ten limited exceptions, was an impermissible restriction on ideological, noncommercial speech. *Id.* at 16.

In a concurring opinion, Judge Pettine refused to call the prohibition a time,

Two months after the *Donnelly v. Campbell* decision, the Supreme Court heard oral argument in *Metromedia, Inc. v. City of San Diego*. By then, many issues relating to billboard regulations had been addressed. A remaining question, presented in *Metromedia*, was how the Supreme Court would react to San Diego's total prohibition of commercial and noncommercial billboards.

III. A Critique Of The Supreme Court Decision In *Metromedia*

In *Metromedia*,[67] the Supreme Court held for the first time that an ordinance prohibiting billboards violated the first amendment.[68] During oral argument before the Court, C. Alan Sumption, counsel for the city, asked the justices,"How can we better, more narrowly, get at the problem?"[69] The Court's 6-3

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place, and manner regulation, and instead applied the *Central Hudson* test. This test states that if the commercial speech is not unlawful or misleading, then the regulation must directly and narrowly serve a substantial governmental interest. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). *See* notes 31-32 and accompanying text *supra*. Judge Pettine questioned whether a ban on billboards in commercial and industrial areas would further the state's aesthetic interest: "In undeveloped areas, it may very well be that signs and billboards are the principal eyesores; here, the benefit will be great . . . . In industrial and commercial areas, however, signs and billboards are but one of countless types of manmade intrusions on the natural landscape." 639 F.2d at 23 (Pettine, J., concurring). *See* notes 98-103 and accompanying text *infra*. Judge Pettine concluded that the statute did not directly advance the state's safety and aesthetics goals, and was therefore unconstitutional as applied to all speech. 639 F.2d at 22-25.

Two other states totally prohibit billboards. *See* Hawaii Rev. Stat. §§ 264-71 to -79, §§ 445-111 to -121 (1976); Vt. Stat. Ann. tit. 10, §§ 488-505 (1973 & Cum. Supp. 1981). The Hawaii and Vermont statutes are discussed in Comment, *The Regulation of Outdoor Advertising: Past, Present and Future*, 6 B.C. Envir. Aff. 179, 195-200 (1977) [hereinafter cited as *Regulation of Outdoor Advertising*].

Interestingly, Hawaii's billboards were eliminated extralegally in 1926 by a women's civic group, which over a fifteen-year period boycotted and bought out the state's billboard companies. *See* A. Belin, M. Bilotto & T. Carhart, *supra* note 2, at 26.

[67] Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981).

[68] The case was remanded to the California Supreme Court. San Diego immediately enacted a one-year "emergency interim" ordinance, which regulates size, height, spacing, and location of billboards. San Diego, Cal., Municipal Code § 101.0760 (1981).

[69] Transcript of oral argument at 46, Metromedia, Inc. v. City of San Diego,

decision gave Sumption five different answers.[70] None of the five opinions commanded a majority of the Court. Each opinion, however, indicated circumstances under which a billboard ban would be constitutional.

A. The Plurality Opinion

After noting that billboards create unique problems for land-use planning and development,[71] Justice White's plurality opinion[72] analyzed separately the ordinance's effects on commercial and noncommercial speech. Using the four-part test of *Central Hudson*,[73] the plurality explained that the commercial speech at issue did not concern unlawful activity and was not misleading. It added that the goals of traffic safety and aesthetics were substantial governmental interests,[74] and that the ordinance was no broader than necessary to serve those interests.[75] After a lengthly discussion, the plurality decided that the ordinance directly advanced traffic safety.[76] It concluded by noting that, despite

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101 S. Ct. 2882 (1981).

[70] In his dissent, Justice Rehnquist said, "[I]t is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn . . . ." Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2924 (1981) (Rehnquist, J., dissenting). The press commented similarly: "[T]he Court, in one of its most confusing performances of the year, offered little guidance for cities, states, and counties . . . ." Wash. Post, July 3, 1981, § A, at 14, col. 1; "[T]he justices left unclear the extent to which local governments can regulate billboards . . . ." N.Y. Times, July 3, 1981, § B, at 12, col. 1; The decision "was handed down by a severely divided Court." L.A. Times, July 3, 1981, § 1, at 1, col. 5, p.10, col. 1.

[71] Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2889-90 (1981).

[72] Justice White was joined by Justices Stewart, Marshall, and Powell. *Id.*

[73] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). *See* notes 31-32, 66 and accompanying text *supra.*

[74] Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2892-93 (1981).

[75] *Id.* at 2893. The advertisers had argued vigorously that the ordinance was too broad. *See, e.g.*, Brief for Appellant at 17, 29 ("San Diego has utterly failed to meet the standards set forth . . . in *Central Hudson* . . . which [demand] that regulation of even commercial speech . . . be 'no more extensive than necessary.' "); Transcript of oral argument at 27-28.

[76] Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2893 (1981). The plurality acknowledged the rejection of the traffic safety justification in Oklahoma *ex rel.* Department of Transp. v. Pile, 603 P.2d 337 (Okla. 1979), *cert. denied*, 101 S. Ct. 3158 (1981) and John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980), *aff'd*, 101 S. Ct. 3151 (1981); *see* notes 63-66 and accompanying text *supra*, and admitted to the "meager record" on the traffic

the exception for on-site signs, the ordinance also directly promoted aesthetics.[77] Thus, the ordinance was valid as applied to commercial billboards.[78]

However, the plurality held the ordinance unconstitutional because of its effect on noncommercial speech. Citing the First Circuit's decision in *Donnelly v. Campbell*,[79] the plurality stated that the city had impermissibly restricted noncommercial speech by prohibiting on-site noncommercial billboards[80] and by limiting all other noncommercial speech to the twelve excepted categories.[81] The plurality added that, although the ordinance did not create a total prohibition,[82] it was not a reasonable time, place, and manner regulation.[83] This was because the twelve narrow exceptions were based on content, and the alternative means of communication were insufficient and prohibitively expensive.[84]

B. Justice Brennan's Concurring Opinion

Justice Brennan concurred in the judgment. His opinion[85] dis-

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safety issue. 101 S.Ct. at 2893. However, the plurality said, "We hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Id.* *See* note 48 and accompanying text *supra*.

[77] Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2893-94 (1981). The plurality observed that "[i]t is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived an 'esthetic harm'." *Id.* at 2893.

[78] *Id.* at 2895.

[79] 639 F.2d 6 (1st Cir. 1980), *aff'd*, 101 S. Ct. 3151 (1981) (statute prohibiting all billboards struck down on the ground that it impermissibly restricted noncommercial speech). *See* notes 65-66 and accompanying text *supra*.

[80] Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2895-96 (1981). The ordinance did not explicitly prohibit on-site noncommercial billboards, and in his concurring opinion, Justice Brennan said that the plurality had misread the ordinance. *See* notes 96-97, 107 and accompanying text *infra*.

[81] Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2895-96 (1981). *See* notes 8-9 and accompanying text *supra*. Furthermore, the plurality saw the ordinance as underinclusive because it permitted on-site commercial billboards, yet overinclusive because it restricted noncommercial billboards. 101 S. Ct. at 2895-99.

[82] Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2896 n.20 (1981).

[83] *Id.* at 2896-97.

[84] *Id.* at 2895-97, 2897 n.21 (citing the parties' stipulation). *See* note 12 *supra*.

[85] Justice Blackmun joined in Justice Brennan's opinion. Metromedia, Inc.

agreed with the plurality in almost every respect but the result. He recognized the probable practical effects of the plurality's separation of commercial and noncommercial speech.[86] Advertisers may seek first amendment protection by including a few public service words in otherwise commercial messages. A liquor advertisement could be appended with the advice, "Don't drink and drive"; a tobacco company could argue that, by virtue of the Surgeon General's warning that appears in all cigarette advertisements, its messages are protected, noncommercial speech. Ironically, the Court rejected these very tactics in its seminal commercial speech decision, *Valentine v. Chrestensen*.[87]

Justice Brennan noted that if advertisers attempt such avoidance strategies, city officials will have to decide whether particular messages contain enough noncommercial material to qualify for first amendment protection. However, grants of unwarranted discretion to officials to dictate first amendment rights have prompted the Court to invalidate numerous ordinances.[88] Thus, the plurality's holding could spur evasive behavior by commer-

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v. City of San Diego, 101 S. Ct. 2882, 2901 (1981).

[86] Justice Brennan warned that commercial advertisers would "engage in the most imaginative of exercises to place themselves within the safe haven of noncommercial speech, while at the same time conveying their commercial message." *Id.* at 2909 (Brennan, J., concurring). He gave a hypothetical. How, he asked, would city officials classify the following messages: "Visit Joe's Ice Cream Shoppe"; "Joe's Ice Cream Shoppe uses only the highest quality dairy products"; "Because Joe thinks that dairy products are good for you, please shop at Joe's Shoppe"; "Joe says to support dairy price supports; they mean lower prices for you at his Shoppe." *Id.* at 2908.

[87] 316 U.S. 52 (1942). *See* note 25 and accompanying text *supra*.

[88] A regulation that restricts expression before it is uttered or published is a "prior restraint." Prior restraints were invalidated in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (city could not require theater company to obtain prior approval of city officials); Saia v. New York, 334 U.S. 558 (1948) (city could not require users of sound trucks to obtain a permit); Lovell v. City of Griffin, 303 U.S. 444 (1938) (city could not require leaflet distributors to obtain a license to hand out leaflets).

In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), the Court noted that the truth of commercial speech is more easily ascertained than that of noncommercial speech, and that the profit motive involved in commercial speech provides a strong incentive for advertisers' expression. These attributes, said the Court, "may also make inapplicable the prohibition against prior restraints." *Id.* at 771-72 n.24. *See* Barrett, *supra* note 27, at 198-201; *see also* note 31 and accompanying text *supra*; note 117 and accompanying text *infra*.

cial advertisers, who will themselves be at the mercy of city officials.

In contrast to the plurality, Justice Brennan termed the ordinance a total prohibition.[89] He applied a test similar in form but differing in substance from the plurality's *Central Hudson* test.[90] Justice Brennan stated that a mere rational relationship between the ordinance and its goals would not suffice.[91] Instead, a city may ban billboards only if the governmental interests are "sufficiently substantial,"[92] a stricter standard than the "substantial interest" required by the plurality.[93] Without distinguishing between commercial and noncommercial speech, Justice Brennan found that the city had failed to show that its traffic safety and aesthetics concerns were sufficiently substantial,[94] and concluded that the ordinance was unconstitutional as applied to all billboards, commercial or noncommercial.[95]

Justice Brennan differed with the plurality on two additional points. First, he interpreted the ordinance differently. The plurality had voided the ordinance partly because it exempted on-site commercial billboards but failed to similarly exempt on-site noncommercial billboards.[96] Justice Brennan, however, found no such limitation and stated that he interpreted the ordinance to allow on-site noncommercial billboards.[97]

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[89] Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2901-02 (1981) (Brennan, J., concurring).

[90] *Id.* at 2903 (Brennan, J., concurring). *See* notes 31-32, 66 and accompanying text *supra*.

[91] Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2903 (1981) (Brennan, J., concurring).

[92] *Id.*

[93] *See* notes 73-77 and accompanying text *supra*.

[94] "Indeed, the Joint Stipulation of Facts is completely silent on this [traffic safety] issue." Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2903 (1981) (Brennan, J., concurring).

[95] *Id.* at 2906-07 (Brennan, J., concurring).

[96] *See* notes 79-81 and accompanying text *supra*.

[97] Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2906-07 (1981) (Brennan, J., concurring). Justice Brennan was not the first to have difficulty understanding the ordinance. The California Supreme Court noted the ordinance's imprecision. *See* notes 9, 20 and accompanying text *supra*. Counsel for the city admitted during oral argument that the ordinance failed to specify whether temporary political signs could be posted on permanent billboard structures. Transcript of oral argument at 36-37. An *amicus curiae* brief filed on behalf of the city also admitted that "[f]rom a theoretical point of view San Diego could have written a narrower ordinance." Brief for *amicus curiae* City

In addition, the plurality had reserved comment on the relevance of San Diego's size, population, and urban nature. Justice Brennan disagreed and emphasized that a strong justification would be required for a large, populous city to ban billboards in its commercial and industrial areas.[98] Justice Brennan stated that an urban area could ban all billboards only if it demonstrated a genuine, comprehensive commitment to improve aesthetics in its industrial and commercial zones.[99] He observed

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of Alameda at 23, Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981).

[98] Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2904-06 (1981). (Brennan, J., concurring). Counsel for the city argued that, despite the lack of a comprehensive plan, "the esthetic justification of the ordinance should apply equally in commercial areas because municipalities . . . are recognizing . . . their past mistakes in allowing commercial areas to be eyesores. . . ." Transcript of oral argument at 40. In his dissenting opinion, Justice Rehnquist said that city officials "should not be prevented from taking steps to correct, as best as they may . . ." the unsightliness of urban industrial zones. 101 S. Ct. at 2924 (Rehnquist, J., dissenting).

[99] Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981) (Brennan, J., concurring) ("San Diego has failed to demonstrate a comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors to an unattractive environment." *Id.* at 2904). Justice Brennan's argument was similar to Judge Pettine's in John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980), *aff'd*, 101 S. Ct. 3151 (1981). *See* note 66 *supra*.

The California Supreme Court had rejected the distinction between residential and industrial areas, *see* note 18 *supra*; the United States Supreme Court plurality had ignored the issue. Thus, Justice Brennan vindicated the advertisers, who on several occasions urged the importance of San Diego's size and commercial development: "a number of decisions have upheld prohibitions . . . they differ markedly from the present one in that generally they involved small residential or rural communities." Brief for Appellant at 40; *see also* Reply Brief for Appellant at 3, Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981); Transcript of oral argument at 6.

Commentators have questioned whether aesthetic interests are furthered by prohibitions of billboards in industrial and commercial zones. One writer has argued that because "[s]igns are a creation of the commercial sector and have always been a part of it," they are an accepted element of a business district's visual backdrop. *Regulation of Outdoor Advertising, supra* note 66, at 187. The commentator added that billboards contribute to a community's economic well-being. He somewhat ingenuously explained that "the billboard thrusts its message at an audience willing and eager to participate in the marketplace . . . . Such [commercial and industrial] areas flourish with commercial hustle and bustle, caused in part by outdoor advertising displays." *Id.* at 188.

Another writer agrees that billboards may generate increased revenues for a community's business sector. She argues that aesthetic zoning in business districts may not enhance a city's tourist trade because tourists do not visit such

that historic and scenic locales such as Williamsburg, Virginia and Yellowstone National Park would easily prove the substantiality of their interest in aesthetics, but questioned whether cities like San Diego could meet this burden.[100] Justice Brennan termed the San Diego ordinance underinclusive because it was not part of a comprehensive plan to improve the appearance of the city's commercial and industrial zones.[101]

Unfortunately, Justice Brennan's requirement of a comprehensive plan will be as troublesome for city officials as the plurality's separation of commercial and noncommercial billboards. Justice Brennan admitted that, "from a planning point of view, attacking the problem incrementally and sequentially may represent the most sensible solution."[102] Under Justice Brennan's view, a city eventually may have to ban on-site signs to justify an aesthetically-based ban on billboards and other off-site devices. However, city officials will have difficulty enacting comprehensive plans because of the favored status enjoyed by on-site signs. On-site signs, although often garish and intrusive, nonetheless identify a place of business and are innumerable in commercial and industrial areas. The right to maintain on-site business signs is a property right recognized by Justice Brennan himself in *United Advertising Corp. v. Borough of Raritan.*[103] Thus, a ban of on-site signs in furtherance of a comprehensive plan would infringe on merchants' property rights and would not

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areas. *Zoning—Billboards, supra* note 16, at 915. A third writer points out that "billboards can create artificial an unrealistic desires for luxury products and encourage viewers to overspend." *City-Wide Prohibition of Billboards, supra* note 14, at 1622.

Finally, it has been noted that only 32.4% of a randomly sampled group of people perceived any difference in the physical environment of a commercial zone when billboards were removed. Herrmann, *Human Responses to Visual Environments in Urban Areas,* in OUTDOOR ADVERTISING—HISTORY AND REGULATION (J. HOUCK ed. 1969).

[100] Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2904-06 (1981) (Brennan, J., concurring).

[101] *Id.* at 2904 (Brennan, J., concurring).

[102] *Id.* at 2905 (Brennan, J., concurring).

[103] 11 N.J. 144, 93 A.2d 362 (1952) (Brennan, J.). "The business sign is in actuality a part of the business itself . . . and the authority to conduct the business . . . carries with it the right to maintain a business sign on the premises subject to reasonable regulation in that regard . . . ." *Id.* at 150, 93 A.2d at 365. Because the first amendment did not protect commercial speech, Brennan did not require a comprehensive plan from Borough officials. *Id.*

be a reasonable regulation. Yet in Justice Brennan's view, a city could not totally ban billboards without a comprehensive plan.

The polarity of opinion on the fundamental issues of billboard regulation offers little guidance to city officials who must enact and enforce land-use and zoning controls.[104] The *Metromedia* decision leaves unclear the quantum of proof needed for a city to show its "substantial" or "sufficiently substantial" interest in police power objectives such as traffic safety and aesthetics. The Court's vagueness on this question is important because the validity of a billboard regulation depends in part on the substantiality of the interests served. *Metromedia* also clouds the distinction between a billboard regulation and a prohibition. The difference is important because a prohibitory ordinance is subjected to a more stringent analysis than is a regulatory ordinance.

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[104] This problem was foreshadowed during oral argument. Counsel for Metromedia urged that the ordinance be subjected to the "compelling state interest test." *See* note 17 *supra*. The justices disagreed over the existence of this test. Justice Stewart said, "this test, this so-called test, I'm sure, is meaningful to many members of the Court . . ., but to at least one it is no test whatsoever." Transcript of oral argument at 25. Justice Stewart voted with the plurality, which did not use the compelling interest test.

Chief Justice Burger, Justice Rehnquist, and Justice Stevens filed separate dissents. Chief Justice Burger said that the ordinance was a reasonable time, place, and manner regulation which left advertisers with the adequate alternatives of newspapers, magazines, television, and radio. Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2921 (1981) (Burger, C.J., dissenting). He dismissed the parties' stipulation as to the lack of alternatives, *see* note 20 and accompanying text *supra*, as a "sweeping, conclusory and rather vague generalization." 101 S. Ct. at 2921 n.5 (Burger, C.J., dissenting).

Chief Justice Burger agreed with Justice Brennan that the plurality's separate treatment of commercial and noncommercial billboards would cause problems by vesting too much discretion in city officials. *Id.* at 2923 n.7 (Burger, C.J., dissenting). Finally, the Chief Justice added the novel suggestion that on-site signs contribute to traffic safety by identifying places of business, thus saving motorists the hazardous chore of looking for street numbers. *Id.* at 2922 n.6 (Burger, C.J., dissenting).

Justice Rehnquist stated that the aesthetic justification alone would sustain a total ban on billboards in any community, rural or urban. *Id.* at 2924 (Rehnquist, J., dissenting). Justice Stevens criticized the plurality for emphasizing the "speculative" claims of on-site noncommercial advertisers. *Id.* at 2911-13 (Stevens, J., dissenting). He thought a "wholly impartial total ban" would be constitutional and noted that the "neutral exceptions" in the ordinance, *see* note 8 *supra*, were sufficiently innocuous to allow the ordinance to be upheld. 101 S. Ct. at 2916 (Stevens, J., dissenting).

IV. A Proposed City-Wide Billboard Regulation

The San Diego ordinance failed because it was imprecise. Although entitled "Prohibition and Abatement of Outdoor Advertising Display Signs," the ordinance did not define "outdoor advertising display signs."[105] While purporting to regulate billboards, the ordinance failed to make explicit reference to them. It also included exceptions for historical plaques, religious symbols, and holiday decorations,[106] none of which resemble billboards. In addition, the exception for on-site signs confused the United States Supreme Court and led the plurality to hold the ordinance unconstitutional.[107]

A city-wide billboard ordinance might use these guidelines:

> (1) A billboard is an off-site advertising display of size 12-feet by 24-feet or 14-feet by 48-feet, posted on a free-standing or attached permanent framework.
>
> (2) A billboard does not advertise businesses, goods, or services available on the property on which it is located.
>
> (3) A commercial billboard is a billboard whose message contains any reference to a sale of a product, good, or service.
>
> (4) Commercial billboards are prohibited in all areas.
>
> (5) Noncommercial billboards no larger than 12-feet by 24-feet are permitted in areas zoned industrial or commercial.
>
> (6) Messages that do not conform to these regulations shall be removed by the city at the advertiser's expense.

The plurality in *Metromedia* found the San Diego ordinance valid as applied to commercial billboards.[108] Several lower courts also have upheld statutes prohibiting commercial billboards.[109] Thus, a more precise city[110] ordinance that prohibits commercial

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[105] The California Supreme Court was forced to borrow a definition from the Revenue and Taxation Code. *See* notes 9, 20 and accompanying text *supra*.

[106] *See* note 8 *supra*.

[107] *See* notes 79-81, 96-97 and accompanying text *supra*.

[108] *See* notes 72-78 and accompanying text *supra*. Presumably the three dissenting justices also would uphold the ordinance's validity as applied to commercial billboards. *See* note 104 *supra*.

[109] *See, e.g.*, John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980), *aff'd*, 101 S. Ct. 3151 (1981), *discussed in* notes 65-66 and accompanying text *supra*. *See also* Suffolk Outdoor Adv'g Co. v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S. 2d 368 (1977), *appeal dismissed*, 439 U.S. 808 (1978), *discussed in* notes 18, 61 and accompanying text *supra*.

[110] One commentator advocates statewide regulation of billboards. *Regulation of Outdoor Advertising*, *supra* note 66, at 195-200. Maine, Vermont, and Hawaii have statewide regulations. *See* notes 4, 66 *supra*. Maine and Vermont are rural, and Hawaii's economy depends primarily on its tourist trade. How-

billboards while merely regulating noncommercial billboards should be upheld. The model ordinance does not impermissibly restrict ideological, noncommercial speech, which is accorded maximum constitutional protection.[111] Furthermore, because the model ordinance does not apply to on-site business signs, it preserves merchants' inherent property rights.[112]

The definition of "billboard" as an outdoor advertising display of size 12-feet by 24-feet or 14-feet by 48-feet comports with the advertising industry's definition.[113] It excludes devices such as plaques, decorations, religious symbols, and bench signs, which are rarely as large or permanent as billboards.

"The line between ideological and nonideological speech is impossible to draw with accuracy."[114] The model ordinance attempts to draw the line by defining a "commercial billboard" as one whose message proposes the sale of any product, good, or service.[115] The definition encompasses all advertisements and messages that propose a business transaction. It should prevent commercial advertisers from gaining first amendment protection for their advertisements by appending public service messages to them.[116] The ordinance allows all messages to initially be displayed; however, nonconforming messages such as commercial advertisements shall be removed by the city at the advertiser's expense. This system of enforcement should ensure that city officials are not vested with constitutionally impermissible prior discretion to determine whether messages are commercial or noncommercial.[117]

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ever, statewide regulation would be impractical in densely populated, diversified industrial states such as California, New York, Illinois, Pennsylvania, and Ohio.

[111] *See* note 28 and accompanying text *supra*.

[112] *See* note 103 and accompanying text *supra*.

[113] *See* note 1 *supra*.

[114] Lehman v. City of Shaker Heights, 418 U.S. 298, 319 (1974) (Brennan, J., dissenting).

[115] However, an otherwise noncommercial message, such as "sponsored by Mobil," would not be classified as a commercial billboard. This distinction is consistent with the Supreme Court's decision in First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978). In *Bellotti*, the Court recognized that corporate speech is protected by the first amendment. *Id.* at 776-83. Inherent in a corporation's freedom of expression is the right to identify itself as the speaker.

[116] *See* notes 86-87 and accompanying text *supra*.

[117] If the ordinance were administered by a permit or license system, then all messages would be subject to city approval before being displayed. This proce-

To avoid the stricter tests applied to prohibitions of speech,[118] the model ordinance merely regulates the time, place, and manner of noncommercial billboard use. It does so by imposing reasonable restrictions on the location and size of noncommercial billboards while remaining content-neutral.[119] In accordance with *Metromedia*[120] and *Donnelly v. Campbell*,[121] the model ordinance prohibits all commercial billboards. In contrast, noncommercial billboards will be permitted in areas of the city that are zoned industrial or commercial. The size of noncommercial billboards will be limited to 12-feet by 24-feet.[122]

By following these guidelines, a city could, consistent with the *Metromedia* decision, eliminate all billboards except for 12-feet by 24-feet noncommercial billboards in industrial and commercial zones. Noncommercial billboards are relatively few in number.[123] Thus, enactment of the proposed ordinance may be a significant step toward the removal of billboards in American cities. Billboard companies would retain their unique medium of constitutionally protected expression. At the same time, cities would, to a large extent, be rid of distracting, unsightly billboards.

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dure might be construed as an impermissible prior restraint on speech. *See* note 88 and accompanying text *supra*.

However, the Court has hinted in *dictum* that the prior restraint doctrine may not apply to commercial speech for two reasons. First, commercial speakers have a thorough knowledge of their product and of the marketplace; this means that the accuracy of commercial speech, and the lawfulness of the underlying commercial activity, are more easily ascertained. Second, the profit motive behind commercial speech reduces the danger that a prior review of speech will discourage, or chill potential speakers. *See* Friedman v. Rogers, 440 U.S. 1, 10 (1979); Bates v. State Bar of Ariz., 433 U.S. 350, 381 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 n.24 (1976). *See* notes 31, 88 and accompanying text *supra*.

[118] *See* notes 17, 89-93 and accompanying text *supra*.

[119] *See* notes 17, 28-30 and accompanying text *supra*.

[120] *See* notes 67-104 and accompanying text *supra*.

[121] *See* notes 65-66 and accompanying text *supra*.

[122] Anything smaller would not, by advertising industry definitions, be a "billboard." *See* note 1 *supra*.

[123] Counsel for the advertisers noted that the City correctly "acknowledged that 'but for the commercial aspects' of the outdoor advertising business, 'noncommercial speech' could not be sustained." Reply Brief for Appellant at 3, Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981).

CONCLUSION

Billboards have long been the subject of litigation. Courts have struggled to balance advertisers' economic interests with a municipality's interest in a safer, more pleasant environment. The United States Supreme Court's recent recognition of first amendment protection for commercial speech adds a constitutional element that courts must consider in assessing the validity of billboard regulations.

Faced with these competing interests in *Metromedia, Inc. v. City of San Diego*,[124] the Supreme Court produced a divided decision that offers little guidance to city officials and advertising companies. In holding the San Diego billboard regulation unconstitutional, the Court seemed to say that the advertisers had won the battle. However, by noting that narrowly drawn billboard prohibitions could be constitutional, the Court suggested that the city could yet win the war.

The ordinance proposed in this note balances the competing interests. It preserves the commercial advertisers' first amendment rights while promoting the city's safety and aesthetic interests. Adoption of a similar ordinance by cities would be a step toward ending the legal controversy that has surrounded billboards for eighty years.

Peter P. Chen

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[124] 101 S. Ct. 2882 (1981).