THE FIRST AMENDMENT "LAW OF BILLBOARDS"

The Supreme Court frequently has faced the task of establishing first amendment[1] parameters that protect different media of expression.[2] Recognizing that each medium demands individual consideration with respect to the determination of its sphere of first amendment protection, the Court has promulgated a separate body of first amendment law applicable to each mode of communication.[3] In *Metromedia, Inc.*

1. The first amendment declares that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

2. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 500 (1981). *See, e.g.*, Consolidated Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530 (1980) (invalidating as an unjustified subject matter restriction a New York Public Service Commission order prohibiting public utility companies from including controversial inserts in monthly billings); Carey v. Brown, 447 U.S. 455 (1980) (invalidating as a subject matter restriction an Illinois statute that prohibited picketing of residences or dwellings, while it exempted peaceful picketing of a place of employment involved in a labor dispute); Shamburg v. Citizens for Better Env't, 444 U.S. 620 (1980) (invalidating a village ordinance prohibiting door-to-door solicitation of contributions by charitable organizations that did not use at least 75% of their receipts for charitable purposes as unconstitutionally overbroad because the purported governmental interests in preventing fraud, protecting public safety and ensuring residential privacy could be sufficiently served by less drastic limitations); Greer v. Spock, 424 U.S. 828 (1976) (upholding military post regulations that permitted civilian access to designated areas but banned speeches and demonstrations of a partisan political nature and required prior post headquarter's approval of literature distribution because civilians have no generalized constitutional right to make political speeches or distribute leaflets on a military base); Ernoznik v. City of Jacksonville, 422 U.S. 205 (1975) (invalidating a city ordinance as unjustified content censorship that punished a drive-in movie theatre for exhibiting nudity when the screen is visible from a public street or place); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding a municipal policy of not permitting political advertising on city transit system vehicles, while allowing other types of advertising; space on a city vehicle is not first amendment forum, but rather is a commercial venture not required to accept every advertising offer).

3. Metromedia, Inc. v. San Diego, 452 U.S. 490, 501 (1981). *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (broadcasting has the most limited first amendment protection of all communication forums because of its uniquely pervasive presence in people's lives); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 446, 557-58 (1975) (although each medium of expression must be assessed for first amendment purposes by standards suited to it, the nature of a theater does not necessitate the application of a standard drastically different from that applied to other forms of expression

v. San Diego,[4] the Court addressed the freedom of expression issue in the context of billboard regulation for the first time[5] and purported to

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that make freedom of expression the rule); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-03 (1952) (expression by means of motion pictures is included within the free speech and press guarantee of the first and fourteenth amendments, and although motion pictures are not necessarily subject to the precise rules governing other methods of communication, basic first amendment principles do not vary); Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (each method of communication is a law unto itself; freedom of speech does not include the freedom to use sound amplifiers attached to moving vehicles to drown out the natural speech of others).

4. 453 U.S. 490 (1981).

5. Although the Court previously had considered attacks on the constitutional validity of certain billboard regulations, *Metromedia* was the first billboard regulation case the Court decided on first amendment grounds. *Metromedia*, 453 U.S. at 498. *See also* Packer Corp. v. Utah, 285 U.S. 105 (1932) (validating a state statute forbidding the advertisement of tobacco products on billboards under equal protection, due process and commerce clause attacks); St. Louis Poster Adv. Co. v. City of St. Louis, 249 U.S. 269, 273-74 (1919) (validating a city ordinance regulating the size and placement of billboards over objections of unconstitutional limitations of individual liberty and of property rights in land; holding that billboards may be prohibited in residential city districts in the interest of safety, morality, health and community decency); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 529 (1917) (validating a city ordinance prohibiting billboards in residential districts challenged on equal protection grounds). *Cusack* is an amusing example of the extreme a court will go to accept evidence produced at trial to substantiate the city's implementation of its police power to regulate billboards. The court relied on evidence of an accumulation of combustible material around billboards, offensive and unsanitary accumulations around billboards and evidence that billboards provide a convenient shield for immoral practices. *See id.* at 529.

Interestingly, in the early days of the automobile, the outdoor advertising industry sufficiently regulated itself to quiet public disfavor over the effect of billboard advertising on landscape. *See* F. PRESBREY, THE HISTORY AND DEVELOPMENT OF ADVERTISING, 504-05 (1929) (noting the industry's concern for aesthetics and traffic safety). After governmental regulation replaced industry self-regulation, commentators and legislators felt confident that billboard regulation legislatively imposed could not fall to first amendment attack, at least with respect to commercial advertising. *See, e.g.*, HIGHWAY RESEARCH BOARD NATIONAL ACADEMY OF SCIENCES—NATIONAL RESEARCH COUNCIL, BULLETIN NO. 337, CONTROL OF ROADSIDE ADVERTISING ALONG THE INTERSTATE SYSTEM, 28-29 (1962):

> When one reviews the cases interpreting the scope of the First Amendment, it is apparent that its application to protection of commercial advertising is a novel suggestion . . . .
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> Although the question of how far commercial advertising when viewed as a medium of communication may clear a preferred position under the constitution is . . . still unresolved . . . , there is little doubt as to the question of how far billboard advertising as a form of private commercial business may claim this advantage. The answer is 'not at all' . . . .
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> [I]t is very late in the day to be told now that commercial billboard advertising embodies the characteristics of communication and performs communicative func-

establish the "law of billboards."[6]

In establishing the law of billboards, the *Metromedia* plurality set out numerous restrictions on municipal power to regulate billboard advertising.[7] The continuing validity of those restrictions, however, is questionable because the majority[8] of the *Metromedia* Court did not reach a consensus on the issues presented. Recently, in *Members of the City Council v. Taxpayers for Vincent*,[9] the Court partially clarified the *Metromedia* holding by reaffirming local governments' authority to regulate outdoor advertising to curb visual blight.[10] Despite this clarification, however, the vitality of many principles the *Metromedia* plurality established remains in doubt.

The purpose of this Recent Development is to examine first amendment principles as they apply to billboard regulations with *Metromedia* and *Taxpayers for Vincent* as focal points. This article also will survey and compare post-*Metromedia* lower court decisions to determine the force and effect of the *Metromedia* decision.

I. FIRST AMENDMENT PRINCIPLES BILLBOARD REGULATIONS RAISE

Billboards, like other modes of communication, have noncommunicative characteristics and communicative capabilities, which both are susceptible to government regulation.[11] Although the first amendment

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tions to such a great extent that it may be regulated as to form, location, and structural features without violating the First Amendment.

Id. See also C. FLOYD AND P. SHEDD, HIGHWAY BEAUTIFICATION: THE ENVIRONMENTAL MOVEMENT'S GREATEST FAILURE 50-54 (1979) (first amendment's provisions generally do not protect outdoor advertising). For a discussion of pre-*Metromedia* lower court decisions dealing with freedom of speech and billboard regulation, see Annot., 81 A.L.R. 3d, 486, § 8 (1977)

6. *Metromedia*, 453 U.S. at 501. This expression is borrowed from the plurality's author, Justice White.

7. *See infra* text accompanying notes 53-66.

8. *See infra* note 67.

9. 104 S. Ct. 2188 (1984).

10. *Id.* at 2130.

11. For an artist's perspective of the noncommunicative aspect of billboards, see P. BLAKE, GOD'S OWN JUNKYARD 27 (2d ed. 1979). The author wrote:

When people talk about the flood of ugliness engulfing America, they think first of billboards—and, more specifically, of the billboards that line our highways and dot our landscape.

protects both mediums of expression against undue regulation,[12] the applicable first amendment analysis is different for each. Thus, the Court has developed a body of first amendment law regulating time, place and manner restrictions,[13] while also establishing a separate body of first amendment law limiting the regulation of the subject matter of protected expressions.[14]

A. *Time, Place and Manner Restrictions*

The first amendment guarantees persons freedom of expression. Courts, however, have held that this guarantee does not provide individuals with the right to communicate at all times, places and manners.[15] Rather, communicative activities are subject to reasonable[16]

The problem was stated rather succinctly by Ogden Nash:

> I think that I shall never see
> A billboard lovely as a tree,
> Perhaps unless the billboard fall,
> I'll never see a tree at all.

Id. For a judicial perspective of the particularly "intrusive" nature of billboards see State v. Packer Corp., 77 Utah 500, 515, 297 P. 1013, 1019 (1931). The Court stated:

> Billboards . . . placards and such are in a class by themselves . . . . Advertisements of this sort are constantly before the eyes of observers on the streets: to be seen without the exercise of choice or volition on their own part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all arts and devices that skill can produce.

Id.

12. Note that restrictions on noncommunicative aspects of a forum necessarily restrict the forum's communicative aspect to some extent. Therefore, some degree of first amendment protection arises even with respect to noncommunicative restrictions. *Metromedia*, 453 U.S. at 502. *See also* Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977) (laws regulating time, place or manner of speech stand on a different footing from laws prohibiting speech altogether, but a regulation leaving the speaker with a less than a satisfactory forum of expression violates the first amendment).

13. *See infra* notes 16-20, 29-30 and accompanying text.

14. *See infra* notes 21-28 and accompanying text. *See also* Consolidated Edison Co. v. Public Serv. Comm'n, 417 U.S. 530, 535 (1980): "We must determine whether the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest." *Id.*

15. *See* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981). *See also* Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding an anti-noise ordinance that prohibited wilful diversion of classroom activities while schools are in session); Adderley v. Florida, 385 U.S. 39, 47-48 (1966) (upholding a trespass statute that prevented demonstrators from entering jail premises); Poulos v. New Hampshire, 345 U.S. 395, 404-05 (1953) (upholding a city ordinance that prohibited religious serv-

time, place and manner restrictions. These restrictions must serve both a significant governmental interest[17] and permit alternative modes of expression.[18] Constitutional time, place and manner restrictions may not be based on the content or subject matter of speech.[19] This content-neutral requirement extends to prohibiting public expression of an

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ices held in public parks without a license; construed as leaving licensing officials no discretion as to the granting of licenses); Cox v. Louisiana, 379 U.S. 536, 554, 558 (1965) (recognizing the validity of time, place and manner restrictions, but holding unconstitutional an obstructing public passages statute as applied discriminatorily against civil rights demonstrators); Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding city ordinance that prohibited sound trucks).

16. Reasonableness in this context means no greater restriction than is essential to further an important or substantial governmental interest. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (upholding a federal criminal statute that prohibited knowing mutilation of a draft card). The Court stated:

> [W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms . . . . [A] governmental regulation is sufficiently justified if it is in the constitutional power of the Government.

Id.

17. In determining the validity of an asserted governmental objective, the attributes of the particular regulated forum are an important consideration because the significance of the stated interest is analyzed with respect to the forum's nature and function. Thus, a governmental objective to maintain the orderly movement of crowds for the safety and convenience of fairgoers is valid as to a fairgrounds regulation prohibiting the sale or distribution of printed material, except from a duly licensed location, because the asserted objective is sufficiently important in light of the peculiar fairgrounds crowd control problems. *See* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 650-51 (1981).

18. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980). The Court declared: "Thus, the essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals." *Id. See also* Linmark Assoc. v. Township of Willingboro, 431 U.S. 85, 93 (1977) (striking down a township ordinance prohibiting the posting of real estate "For Sale" signs because the ordinance did not leave ample alternative means of expression; ordinance was not content-neutral); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) (striking down a state statute declaring the advertisement of the prices of prescription drugs to be unprofessional conduct and holding the statute to exceed the bounds of time, place and manner restrictions because the statute was not content-neutral).

19. *See Consolidated Edison*, 447 U.S. at 536. *See also* Carey v. Brown, 447 U.S. 455, 470 (1980); Ernoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); Papish v. Board of Curators, 410 U.S. 667, 670 (1973) (per curiam) (striking down a state university bylaw prohibiting on campus distribution of publications containing indecent speech); Police Dep't v. Mosley, 408 U.S. 92, 99 (1972) (striking down an ordinance prohibiting peaceful picketing at schools).

entire topic as well as restrictions on particular viewpoints.[20]

B. *Regulations Based on Subject Matter*

First amendment analysis of government regulations based on a particular subject matter varies according to the type of expression restricted. The first amendment affords commercial speech[21] less protection than other protected expressions.[22] Thus, separate tests

20. *Consolidated Edison*, 447 U.S. at 537 (rejecting the Public Service Commission's argument that its regulation prohibiting bill inserts that discuss nuclear power was content-neutral because it applied to all discussion of nuclear power).

21. The Supreme Court has defined commercial speech as expression proposing a commercial transaction and related solely to the economic interests of the speaker and its audience. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561-62 (1980) (regulation banning an electric utility from advertising to promote the use of electricity is a regulation of commercial speech); Friedman v. Rogers, 440 U.S. 1, 11 (1979) (optometrists' use of trade names is commercial speech because it is used as part of a proposed commercial transaction); Bates v. State Bar, 433 U.S. 350, 363-64 (1977) (disciplinary rule prohibiting attorneys from advertising in newspapers or other media is regulation of commercial speech); Virginia State Board of Pharmacy v. Citizens Consumer Council, 425 U.S. 748, 762 (1976) (regulation of the advertisement of prescription drugs prices is regulation of commercial speech). Thus, an advertisement for, or sale of, an activity which itself is protected by the first amendment and therefore not solely related to economic interests, is not within the scope of commercial speech. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 818 (1975) (commercial aspects of a paid advertisement held not in itself to negate all first amendment guarantees); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384 (1973) (speech is not rendered commercial because it relates to an advertisement); Ginzburg v. United States, 383 U.S. 463, 474 (1966) (profit from the sales of allegedly obscene publication given no weight in considering the first amendment protection afforded such publication); New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964) (alleged libelous statements published as part of a paid advertisement held not to have forfeited first amendment protection when published in that form); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (the sale of religious literature held not to convert evangelism into a commercial enterprise); Jamison v. Texas, 318 U.S. 413, 416 (1943) (inclusion of an advertisement for the sale of a religious book held not to move down prohibition distribution of handbill). *See also* Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV., 205, 234-36 (1976): "To treat such advertising as commercial speech would inhibit the rights of publishers and authors to distribute their works and the rights of various organizations to recruit members, solicit funds, and publicize their ideas." *Id.* at 236. *See also* Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 38-39 (1979) (noting the justifiable limitation of first amendment protection afforded commercial speech to truthful and legitimate commercial information even though such a limitation for noncommercial expression would be invalid; the core evil the first amendment seeks to avoid is official determination of the truth or falseness of political opinion).

22. *Central Hudson Gas*, 447 U.S. 557, 563 (1980). *See also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456-57 (1978) (regulation of in-person solicitation by a lawyer

have evolved for determining the validity of content-based regulations of commercial and noncommercial speech.[23]

When ruling on content-based regulations of protected noncommercial speech, the Supreme Court consistently has held that any regulation based on the speech's subject matter or content violates both the first amendment and the fourteenth amendment's equal protection clause.[24] In cases dealing with content-based regulations of protected commercial speech, however, the Court has taken a less rigid stance,

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invokes a lower level of judicial scrutiny); Bates v. State Bar, 433 U.S. 350, 381 (1977) (application of the overbreadth doctrine is necessary in the context of the regulation of commercial speech); Young v. American Mini Theatres, 427 U.S. 50, 69 n.32 (1976) (content of communication governs extent of constitutional protection of commercial speech; distinction between commercial and noncommercial speech permits regulation of commercial speech that would be unconstitutional if applied to noncommercial speech).

Prior to 1975, commercial advertising, whether or not incorporated with expressions of possible public interests, was afforded no first amendment protection. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942) (handbill advertising boat for charter and containing a protest against city agency held unprotected speech). In Bigelow v. Virginia, 421 U.S. 809 (1975), the Court, without overruling *Valentine*, held that advertising is not necessarily denied first amendment protection merely because it has commercial aspects or reflects the advertiser's commercial interests. The Court reaffirmed and strengthened commercial speech protection in Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977) (recognizing the importance of the free flow of commercial information in making significant economic decisions). *See also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) (informational function of advertising forms the basis for first amendment protection of commercial speech).

23. Not all noncommercial communications fall within the protective sphere of the first amendment. Unprotected messages are those which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighted by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (fighting words likely to provoke the average person to retaliation not protected). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (media defamation of private persons not protected even when an issue of public interest is involved); Miller v. California, 413 U.S. 15 (1973) (obscene material that is patently offensive not protected); Schenk v. United States, 249 U.S. 47 (1919) (Congress has power to prevent expressions that create a clear and present danger of harm).

24. *See* Police Dep't v. Mosley, 405 U.S. 92, 95-96 (1972): The Court stated:

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' . . . Necessarily, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favorable or more

upholding such regulations under specified conditions.[25]

In *Central Hudson Gas and Electric Corp. v. Public Service Commission*,[26] the Court established the prevailing constitutional test for determining the validity of content-based regulation of commercial speech. Under the test, a regulation is valid if: (a) the restricted communication is either misleading or related to unlawful activity; or (b)(1) the government asserts a substantial interest, (2) the restriction directly advances the state interest involved,[27] and (3) the restriction imposed is the least restrictive means of accomplishing the asserted goal.[28]

C. *Total Prohibitions*

A total ban upon a forum of protected expression is the most restrictive means for accomplishing an asserted government goal and is, by definition, content-neutral. Because such a ban represents the most extreme version of time, place or manner restrictions, it is subject to rigid judicial analysis. Thus, a regulation totally prohibiting a method of communication will be held invalid unless it is the only method by which the government can accomplish a substantial governmental interest[29] and the remaining modes of expression meet the communica-

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controversial views. And it may not select which issues are worth discussing or debating in public facilities.

Id. (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). *See also* Carey v. Brown, 447 U.S. 455, 461-63 (1980) (invalidating content-based picketing prohibition). For cases and commentaries on the first amendment equal protection intersection, see *Mosley*, 408 U.S. at 95 n.3.

25. *See supra* notes 21-22 (cases cited).

26. 447 U.S. 557 (1980).

27. *Id.* at 564. A regulation ineffective or only remotely supportive of a stated purpose is invalid. *Id.*

28. *Id.* at 564-66. *See also In re* R.M.J., 455 U.S. 191 (1982) (invalidating state regulation of attorneys soliciting for nonmisleading expressions). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 580 (1978) (discussing governmental interference with first amendment communicative and noncommunicative rights); Stone, *Restrictions on Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 82 (1978) (pre-*Central Hudson Gas* article discussing the confusion in the law with respect to content-based, but viewpoint-neutral, regulations).

29. *See, e.g*, Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (invalidating a zoning ordinance forbidding live entertainment in commercial zones). *See also* Martin v. City of Struthers, 319 U.S. 141 (1943) (striking down a municipal ordinance forbidding door-to-door distribution of handbills as an unnecessarily restrictive means of protecting households from annoyances); Jamison v. Texas, 318 U.S. 413, 416 (1943) (total ban of right to distribute handbills held unconstitutional because the public has a constitutional right to express views in an orderly fashion on a public street); Schneider v.

tive needs of all speakers affected by the prohibition.[30]

D. *The First Amendment Overbreadth Doctrine*

A substantial barrier to comprehensive constitutional review of litigation involving restriction of freedom of expression lies in the general justiciability requirement that a litigant may only assert his own consti-

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State, 308 U.S. 147 (1939) (ordinance's purported purpose of keeping streets clean held insufficient to justify forbidding circulation of handbills on public streets because less restrictive methods were available); Hague v. Commission for Ind. Org., 307 U.S. 496 (1939) (ordinances forbidding the distribution of printed matter on streets and public places without a permit held invalid as an arbitrary suppression of an undeniable constitutional right). *But see* Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949) (upholding prohibition of sound trucks even though they are the most economical means to communicate).

30. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1335-36 (1970). Professor Ely stated:

> On . . . occasions neutrality with regard to expressive conduct is not good enough. Sometimes the government is affirmatively obligated to deviate from its policy respecting similar nonexpressive conduct in order to accommodate expression. For example, the state's interest in keeping the streets and sidewalks clean cannot constitutionally be served by outlawing the distribution of handbills. Here, neutrality—in absence of any special restrictions on expression—is not good enough. The state is obligated to protect the channels of communication, even if it takes a special exception and some sacrifice of the state's expression-unconnected interest in clean cities to do it. That there must be some such affirmative obligations is clear. Were the constitutional requirement simply one of neutrality toward expressive conduct, channels of communication such as pamphleteering, picketing and public speaking could effectively be closed altogether, given the state's undeniable interest in keeping thoroughfares clear, and controlling crowds, noise and litter. It is difficult to determine what factors lead the court to say in a given context that neutrality will not suffice, that the means of expression in issue simply must be respected. A review of the results reached in the relevant cases suggests, however, that the controlling inquiries are the importance of the interest the state is pursuing, the extent to which that interest could be served by less inhibiting regulations, and the existence of alternative means of communicating with the same audience with approximately equal effectiveness.
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> Once again the relevance of motivation must be a function of the judge's view of the scope of the First Amendment. That is, he first must decide whether in the context presented the state need only refrain from comparatively disfavoring expressive conduct, or whether it simply must keep the channel of communication open—even if it takes a special deviation from some broader policy to do it. If in his opinion neutrality is enough, anti-expression motivation is relevant. But if neutrality is not enough, motivation is beside the point; he need only ask whether the medium involved has been given the accomodation he feels is requisite.

Id. This reasoning may explain the distinction between *Kovacs*, 336 U.S. 77 (1949), and the intimations of the *Metromedia* plurality that a total ban of billboards would be invalid. *See infra* note 68 and accompanying text.

tutional rights.[31] A litigant may not challenge the constitutionality of a statute because the statute could be applied unconstitutionally to others in dissimilar factual circumstances.[32] Thus, a litigant may not normally challenge legislation as facially invalid, but only can challenge its validity by alleging it impinges on his constitutional rights. The Supreme Court, however, has recognized a limited exception to this rigid standing requirement,[33] referred to as the overbreadth doctrine. This exception applies to first amendment controversies.[34]

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31. *See, e.g.*, Tileston v. Ullman, 318 U.S. 44 (1943); *see generally* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 150-241 (2d ed. 1973) (evolution of standing requirement).

32. *See* Bates v. State Bar, 433 U.S. 350, 380 (1977); Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973); United States v. Raines, 362 U.S. 17, 21 (1960); Ashwander v. TWA, 297 U.S. 288, 347 (1936) (Brandeis J., concurring). The overbreadth doctrine is supported by our constitutional system in which "courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick*, 413 U.S. at 610-11. *See infra* note 53.

33. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 445-46 (1972) (granting a married man standing to assert the rights of unmarried persons that were denied access to contraceptives by a Massachusetts statute making it a criminal offense to distribute contraceptives to unmarried persons, because unmarried persons' ability to obtain contraceptives would be materially impaired by enforcement of the statute); NAACP v. Alabama, 357 U.S. 449, 458-60 (1958) (an organization has standing to assert the constitutional right of its members to be protected from being compelled by the state to reveal their affiliation with the organization because "[t]o require that [the right] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion"). *See also* Bigelow v. Virginia, 421 U.S. 809, 817 (1975). The Court stressed the limited application of the doctrine: "Declaring a statute facially unconstitutional because of overbreadth 'is, manifestly strong medicine,' and 'has been employed by the Court sparingly and only as a last resort.'" *Id.* (citing Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

34. The Court, in Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973), explained the reasoning for a first amendment exception:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. As a corollary, the Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on the overly broad statute with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' 'Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'

Id. (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)).

See also Bates 433 U.S. 350, 380 (1977) (first amendment interests are fragile in the

Under the first amendment overbreadth doctrine, when a statute regulates speech and the reviewing court is unable to construe the statute to avoid addressing constitutional issues other than those a plaintiff has standing to raise in his own right,[35] the plaintiff may attack the statute as being broader in scope than necessary or permissible under first amendment principles without demonstrating that the relief sought will vindicate his own constitutional right to engage in protected conduct.[36] To invoke the doctrine, the person asserting the rights of third persons must show either specific and present objective harm, or a threat of specific future harm.[37] In addition, the Court has held the

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sense that an overbroad statute may chill protected speech with its in terrorem effect inhibiting challenge by a protected speaker); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-24 (stating that the deterrent effect of regulating protected speech is not effectively removed if the permissible scope of the regulation would have to be decided on a case by case basis by plaintiffs willing to risk the penalty attached to statutory violations).

35. For example, if the California Supreme Court had construed the San Diego ordinance in *Metromedia* as inapplicable to noncommercial speech, the Court could have avoided analysis in those terms and the ordinance would have passed constitutional muster. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 494 n.2 (1981). Of course, the Court must accept the state court's construction of state legislation. *See* Gooding v. Wilson, 405 U.S. 518, 520 (1972).

36. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 815-16 (1975) (granting standing to the managing editor of a newspaper convicted of violating a Virginia statute making it a misdemeanor to encourage or prompt, by the sale or circulation of any publication, the processing of an abortion, to assert the first amendment rights of noncommercial advertisers not subject to the statute); Grayned v. City of Rockford, 408 U.S. 104, 114 (1972) (allowing plaintiff who claimed no infliction of harm, to challenge an anti-noise ordinance as overbroad because such laws deter privileged activity); Gooding v. Wilson, 405 U.S. 518, 520-21 (1972) (allowing standing for a person convicted of violating a Georgia statute prohibiting the utterance of provocative words, though convicted for having uttered allegedly constitutionally unprotected "fighting" words); Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971) (allowing an overbreadth challenge to a city ordinance making it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . ."); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) (allowing civil rights organization and its executive director to sue for injunctive relief to enjoin enforcement of antisubversive activity statutes allegedly designed to inhibit its members' right to free expression, some of whom had been arrested and convicted thereunder); Baggett v. Bullitt, 377 U.S. 360, 366 (1964) (allowing members of the faculty, staff and students of the University of Washington to sue to enjoin enforcement of state statute requiring teachers and all other state employees to take an oath as a condition of employment); NAACP v. Button, 371 U.S. 415, 432 (1963) (allowing an organization to assert first amendment rights of its members to remain anonymous).

37. Bigelow v. Virginia, 421 U.S. 809, 816-17 (1975); Laird v. Tatum, 408 U.S. 1, 13-14 (1972).

doctrine inapplicable in the commercial context of professional advertising.[38] The Supreme Court discussed these first amendment principles in *Metromedia*, its only[39] case concerning billboard regulations.

II. *METROMEDIA*: THE LAW OF BILLBOARDS

In *Metromedia*, outdoor advertising companies[40] in San Diego sought to enjoin enforcement of a city ordinance that imposed restrictions on the use and location of permanent advertising structures.[41] In the past, purchasers had used the advertising space to convey both commercial and noncommercial messages.[42]

The San Diego ordinance[43] generally prohibited off-site,[44] outdoor

38. Bates v. State Bar, 433 U.S. 350 (1977). The Court stated that:

> [T]here are 'common sense differences,' between commercial speech and other varieties . . . . Since advertising is linked to commercial well being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation . . . . Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected . . . . Since overbreadth has been described by this court as 'strong medicine,' which 'has been employed . . . sparingly and only as a last resort,' . . . we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective.

Id. at 380-81 (quoting Broadrick v. Oklahoma, 421 U.S. 601, 613 (1973)).

39. Although *Metromedia* represents the first billboard regulation-first amendment controversy the Court resolved on the merits, several cases were appealed to the Court but dismissed summarily on one ground or another. *See* Lotze v. Washington, 444 U.S. 921 (1979) (did not raise a substantial federal question on appeal from a judgment rejecting first amendment challenge of a billboard ordinance that allowed on-site commercial but not noncommercial billboard advertising); Newman Signs, Inc. v. Hjelle, 440 U.S. 901 (1979); Suffolk Outdoor Advertising Co. v. Hulse, 439 U.S. 808 (1978) (did not present a substantial federal question, thereby rejecting the proposition that prohibiting off-site commercial advertising violates the first amendment); Markham Advertising Co. v. Washington, 393 U.S. 316 (1969) (statutes prohibiting billboards in specified areas and included on-site/off-site distinctions). *See also Metromedia*, 453 U.S. at 498-500. Relying on these decisions, the California Supreme Court found the San Diego ordinance constitutional. The Supreme Court maintained the propriety of such reliance, but reserved its right to disregard any precedential significance of the prior summary dismissals, especially *Lotze*, and proceeded to find the San Diego ordinance facially invalid. *Id.* at 521.

40. The outdoor advertising companies were successful both at the trial and in the California Court of Appeals. The California Supreme Court, however, reversed, rejecting appellants' argument that the San Diego ordinance was facially invalid under the first amendment. *See Metromedia*, 453 U.S. at 497.

41. *Id.* at 493-96.

42. *Id.* at 496.

43. *Id.* at 493 n.1.

advertising display signs[45] subject to certain exceptions. The exceptions included signs: (1) conveying enumerated commercial and noncommercial messages;[46] and (2) business signs not visible from any point on the boundary of the premises.[47] Additionally, the ordinance restricted on-site billboard messages to: (1) designating the owner of the premises to which the sign was attached; (2) identifying the premise; and (3) identifying the goods produced or services rendered on the premises.[48]

The San Diego ordinance raised numerous first amendment concerns. First, because the billboard companies challenged the ordinance as to its effect on the free flow of both noncommercial and commercial information, the issue of their standing to assert the rights of potential noncommercial speakers arose.[49] Second, the general off-site advertising prohibition arguably represented a total prohibition of outdoor advertising, the most extreme version of time, place and manner restrictions.[50] Because the city framed the statutory exemptions in terms of the proposed message of conveyance, however, the ordinance placed the off-site prohibition outside the sphere of time, place or manner restrictions and within the sphere of content-based regulations. Because the exemptions permitted only specified commercial and noncommercial messages, the ordinance could be interpreted as a content-based regulation of both commercial and noncommercial speech.[51] The final first amendment concern was that the ordinance arguably discriminated against noncommercial speech by permitting some commercial messages, but prohibiting all noncommercial communications.[52]

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44. Off-site signs are unattached to the premises of the advertising purchaser. *Id.* at 493 n.1.

45. Noting the constitutional difficulties of applying the ordinance's general prohibition to other media of expression, the California Supreme Court construed "advertising display signs" to include only permanent advertising structures. *See id.* at 494 n.2.

46. For instance, signs exempt from the ordinance included those used to perform governmental functions, signs used to convey religious messages or holiday greetings, and public service signs limited to the depiction of time, temperature, or news were exempt. *See id.* at 495 n.3.

47. *See id.* at 495 n.3.

48. *See id.* at 493 n.1.

49. *Id.* at 504.

50. *Id.* at 515 n.20, 525 (Brennan, J., concurring).

51. *Id.* at 516-17 (Brennan J., concurring).

52. *Id.* at 503. The plurality summarized the ordinance:

The *Metromedia* plurality established six guidelines for review of billboard regulations. First, outdoor advertising companies whose off-site billboards convey a substantial amount of noncommercial advertising have standing to assert the first amendment rights of noncommercial speakers, both as to on-site and off-site regulations, notwithstanding the billboard owner's purely commercial interest in making the challenge.[53] The plurality, however, left the parameters of "substantial amount of noncommercial advertising" undefined.[54]

Second, a court must analyze the restrictive effect a content-based regulation has on commercial and noncommercial speech separately

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Thus, under the ordinance (1) a sign advertising goods or services available on the property where the sign is located is allowed; (2) a sign on a building or other property advertising goods or services produced or offered elsewhere is barred; (3) noncommercial advertising, unless within one of the specific exceptions, is everywhere prohibited. The occupant of property may advertise his own goods or services; he may not advertise the goods or services of others, nor may he display most noncommercial messages.

Id.

Because the ordinance contained a severability clause, the Court remanded the case, thereby leaving state courts to determine the meaning and application of the clause. *Id.* at 521 n.26. On remand, the California Supreme Court determined that construing the statute so that it prohibits only commercial signs, as dictated by the *Metromedia* decision, would be inconsistent with the ordinance's language and with the underlying legislative intent. Therefore, the court held that severance was impossible. Metromedia, Inc. v. City of San Diego, 32 Cal. 3d 180, 190, 185 Cal. Rptr. 260, 266, 649 P.2d 902, 908 (1982). As a final backhanded comment, the California court held that an ordinance framed in the terms prescribed in *Metromedia* would require the city to police the content of advertising messages and would compel the city to distinguish between commercial and noncommercial speech, "an extremely difficult task, and one which presents serious constitutional problems." *See* Metromedia, Inc. v. City of San Diego, 453 U.S. at 536-40. *See infra* note 67 for a discussion of the *Metromedia* concurring and dissenting opinions.

53. 453 U.S. at 504. The plurality stated that appellants may challenge the prohibition of both off-site commercial and noncommercial advertising under the auspices of the overbreadth doctrine. Note, however, that part V of the *Metromedia* opinion addressed the validity of content-based regulation of on-site advertising even though appellants made no showing that they own on-site signs or, perhaps more significantly, that on-site signs had been used to convey a substantial amount of noncommercial messages. Apparently, then, a billboard owner who can show that any of his signs are used to a substantial degree for noncommercial expression has standing to challenge all aspects of billboard regulations affecting his business. *See infra* note 67 for a discussion of Justice Stevens' dissent, in which he found no standing to challenge the ordinance as applied to on-site signs.

54. The plurality cited no figures to support their finding that appellants rented billboard space in a sufficiently substantial amount to noncommercial speakers. *See Metromedia*, 453 U.S. at 496, 504.

and in terms of the standards applicable to each type of speech.[55]

Third, a regulation generally prohibiting off-site billboard advertising, but exempting certain commercial and noncommercial messages, is not content-neutral and, therefore, is not a time, place or manner restriction.[56] Similarly, a restriction limiting permissible on-site communications is content-based and, therefore, a court must analyze individually the regulation's effect on commercial and noncommercial speech.[57]

Fourth, under the *Central Hudson Gas* test,[58] if the goals of a general prohibition of off-site commercial advertising are traffic safety and aesthetic enhancement, the regulation is valid absent a showing of intent to suppress speech.[59] Courts have judicially noticed[60] that traffic safety and aesthetics are sufficient justifications for statutory prohibition of billboard advertising.[61] A general prohibition of off-site commercial advertising is not overbroad because it permits other advertising.[62]

Fifth, relying on *Central Hudson Gas*, the Court ruled that an ordinance generally prohibiting off-site commercial advertising, but allowing on-site commercial advertising is valid.[63] This rule applies even if the regulation limits the scope of permissible, on-site commercial communication to specified messages, as long as there is some reasonable commercial or public basis for discrimination in favor of the enu-

55. *Id.* at 504-05.

56. *Id.* at 516-17.

57. *Id.*

58. *See supra* note 26-28 and accompanying text.

59. *Metromedia*, 453 U.S. at 507-12.

60. *Id.* at 508-10. Judicial notice of traffic safety and aesthetic interests means that the government is not required to empirically show that the statute furthers the governmental interests.

61. *Id.* at 508. Although judicial notice provides an acceptable justification to a billboard regulation, a total prohibition is not necessarily valid because it might leave affected speakers with inadequate means of expression. *See supra* note 18 and accompanying text.

62. *Id.*

63. *Id.* at 510-12. The Court viewed the on-site/off-site distinction and the permissible enumeration of allowable commercial communications as the city's resolution of the conflict between its land use interests and the commercial advertising interests of sellers of services and goods. Finding the distinctions to be in line with the furtherance of the city's asserted goals, the Court felt obligated to leave the appropriate resolution of the conflict to the local authority.

merated communications.[64]

Sixth, whenever commercial billboard communication is permissible, the government may not prohibit noncommercial expression.[65] Furthermore, whenever billboard communication is permissible, the government may not determine the permissible topics of noncommercial communication, notwithstanding that the noncommercial communication might be viewpoint neutral.[66]

Although the *Metromedia* plurality[67] established these six guidelines

64. *Id.*

65. *Id.* at 512-17.

66. *Id.*

67. In *Metromedia*, Justice Brennan, joined by Justice Blackmun, reached a result concurring with the plurality, but based on substantially different grounds. They construed the San Diego ordinance as a total prohibition on billboard advertising and proposed the rule that a city may totally ban billboards if it can show that a sufficiently substantial governmental interest is directly furthered by the total ban and that anything less than a total ban would promote the achievement of that goal less effectively. *See* 453 U.S. at 525-28.

First, Justices Brennan and Blackmun refused to accept traffic safety and aesthetics as an adequate justification for upholding the ordinance, absent a strong showing by the city that billboards substantially contributed to those messages. *Id.* The Justices found the ordinance overbroad regarding traffic safety because the on-site exception permitted signs not visible from any point on the boundary of the premises, yet excluded signs not visible from the streets but visible from some point on the boundary of the premises. *Id.* at 528-30. With respect to the city's aesthetic interest, the Justices maintained that this asserted goal was so susceptible to being illusory that a reviewing court should require the city to show its earnestness by demonstrating that it had engaged in a comprehensive effort, including a wide range of legislative controls of other aesthetic nuisances, to improve the unattractive environment in commercial and industrial areas. *Id.* at 529-33.

Second, applying their own test to the total ban, the Justices maintained that if the city could substantiate its asserted goals in legislating a total prohibition, it could enact content-based exemptions discriminating against noncommercial speech if the exceptions directly further an interest at least as important as the interest underlying the total ban, if the exceptions were not overbroad with respect to their asserted goals, and if the exceptions were narrowly drawn so as to minimize their constraint of the goals underlying the total ban. *Id.* at 532 n.10. Without deciding this question, the Justices speculated that an "identification of premises" exception would pass constitutional muster.

Third, Justices Brennan and Blackmun rejected the plurality's "bifurcated approach" of testing legislation separately with respect to its effect on noncommercial and commercial speech. *Id.* at 534-40. In their view, this approach would result in legislation framed in the vague terms of commercial and noncommmercial speech, thus leaving city officials with wide discretion to control the exercise of free expression and leaving commercial advertisers with a convenient device to escape regulation.

Justice Stevens, partially dissenting, also construed the San Diego ordinance as a total prohibition, but reached the opposite result. *Id.* at 540. In his view, appellants lacked standing to challenge the on-site prohibition because the likelihood that the ordinance

for future review, it failed to resolve two significant issues. Having

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would have a significant impact on the users of on-site signs was purely speculative. *Id.* at 542-48. Proceeding to the issue of the validity of the off-site prohibition, Justice Stevens agreed with the plurality's holding that traffic safety and aesthetics were facially sufficient substantial governmental interests but rejected the plurality's analysis of the exemptions to prohibition. *Id.* at 540-43. According to Justice Stevens, the constitutionality of the San Diego ordinance's total ban depended on the resolution of two questions. First, was there any indication that the ordinance was viewpoint biased—not merely content based discriminatorily against noncommercial speech—or that it was in actuality a tool implemented to control topics of public discourse? Second, are remaining forums of expression adequate to meet the communicative needs of billboard users? Finding no hint of bias or censorship, and seeing no reason to believe that the overall communicative market in San Diego would not meet billboard users' communicative needs, Justice Stevens found no constitutional violation in the ordinance. *Id.* at 552-53.

In a separate dissenting opinion, Chief Justice Burger took a different position, stating that characterizing the ordinance as either a total prohibition with content-based exemptions or as a time, place, and manner restriction was inconsequential. *Id.* at 557-63. In Chief Justice Burger's view, the relevant judicial inquiry as to any billboard regulation should be limited to whether the enacting body narrowly legislated in response to legitimate governmental goals, whether the restriction imposed left alternative means of expression, and whether the legislation was viewpoint-neutral in that it did not attempt to give one side of a debatable public question an advantage in expressing its view. *Id.* at 561. In accord with Justice Stevens and the plurality, the Chief Justice agreed that traffic safety and aesthetics are substantial governmental interests that are directly furthered by billboard regulation. *Id.* at 560. Like Justice Stevens, the Chief Justice found adequate remaining modes of expression and found no implication of viewpoint bias. *Id.* at 562-63. Finally, the Chief Justice rejected the plurality's comparative approach with respect to impingement of commercial speech as against noncommercial speech, concluding that the ordinance withstood a first amendment scrutiny. *Id.* at 567-68.

Moreover, Chief Justice Burger was most concerned with the throttling effect he perceived the plurality decision would have on the ability of local governments to mitigate the dangers inherent in billboard advertising. *Id.* at 561. As Chief Justice Burger viewed the plurality decision, local governments were left with two unsatisfactory alternatives: (1) exempt noncommercial signs from all regulation, or (2) prohibit billboards entirely. *Id.* at 556. Indeed, viewing the plurality opinion with any imagination would leave local governments with only the first choice.

Justice Rehnquist, in the final dissenting opinion, generally subscribed to the views of Justice Stevens and Chief Justice Burger. In his short and rather uninformative opinion, Justice Rehnquist agreed that an aesthetic justification for billboard regulation is facially substantial and that the exemptions to the total ban in the San Diego ordinance did not render the ordinance invalid. *Id.* at 569-70.

In summary, seven Justices found that the asserted aesthetic goal was sufficient on its face. Six Justices agreed that the asserted traffic safety goal was equally sufficient. Five Justices rejected the plurality's comparative analysis of the statute's effect on noncommercial versus commercial speech. Four Justices agreed that outdoor advertising companies have standing to assert the first amendment rights of all billboard users provided that they show that clients have conveyed a substantial amount of noncommercial information on their billboards. Four Justices seriously questioned the validity of the federal Highway Beautification Act. Stated with some reservation, four Justices agreed that a total billboard ban is valid when adequate alternate means of expression remain, four

construed the San Diego ordinance as something less than a total ban on outdoor advertising, the plurality did not decide whether total prohibition could withstand constitutional scrutiny.[68] The plurality also did not address the validity of the Federal Highway Beautification Act.[69] The Act requires states to prohibit billboards in areas adjacent to interstate and primary highways constructed with federal funds.[70] Although the Act permits on-site commercial billboards in areas where it does not permit billboards conveying noncommercial messages, thereby contravening the *Metromedia* decision,[71] the plurality distinguished the Act from *Metromedia*. Because the Act gives local authorities power to regulate billboards on lands adjacent to highways zoned as commercial under state law or commercially unzoned areas,[72] the Act was not subject to an overbreadth attack. Those areas left to local control, the Court stated, may represent the only areas where substantial noncommercial billboard advertising occurs.[73]

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impliedly disagreed, and one avoided the issue altogether. Special reservation lies in the fact that the Court arguably split equally on the issue of whether the San Diego ordinance was a total prohibition. No more than two Justices agreed on any other issue or mode of analysis as to particular problems.

68. In a footnote, however, the plurality cited Schad v. Borough of Mount Ephriam, 452 U.S. 61 (1981), a case invalidating a borough ordinance that imposed a total ban of live entertainment, and intimated that a total ban would be unconstitutional. *See Metromedia*, 453 U.S. at 515 n.20.

Three states maintain statewide bans on billboards that, as yet, have not faced constitutional challenges. *See* ME. REV. STAT. ANN. titl. 23, § 1901 (1980); HAWAII REV. STAT. § 264-71, 455-111 (1976); VT. STAT. ANN. tit. 10, § 488 (1973).

69. 23 U.S.C. § 131 (1982).

70. *See Metromedia*, 453 U.S. at 510 n.16. *See* C. FLOYD & P. SHEDD, HIGHWAY BEAUTIFICATION: THE ENVIRONMENTAL MOVEMENT'S GREATEST FAILURE (1979) for a summary of the history and substance of the Act and a pessimistic view of its efficacy as a tool for aesthetic improvement.

71. *See Metromedia*, 453 U.S. at 510 n.16. The Act provides that signs located outside of urban areas and visible from the main traveled way of the interstate system shall be limited to directional and official signs and notices, signs advertising the sale or lease of property upon which they are located, signs advertising activities conducted on the property on which they are located, landmark signs, and signs advertising the distribution of free coffee by nonprofit organizations to individuals traveling on the interstate system or the primary system. 23 U.S.C. § 131(c).

72. 23 U.S.C. § 131(c)(d).

73. *Metromedia*, 453 at 510 n.16. As the plurality stated: "Whether, in fact, the distinction is constitutionally significant can only be determined on the basis of a record establishing the actual effect of the Act on billboards conveying noncommercial messages." *Id.* at 515 n.20.

To date, the Act remains unchallenged. For some insight into why the Act remains unchallenged, see C. FLOYD & P. SHEDD, *supra* note 70, at 77-90. The authors state:

III. *TAXPAYERS FOR VINCENT*: THE AESTHETIC INTEREST CONFIRMED

The Supreme Court, in *Members of the City Council v. Taxpayers for Vincent*,[74] reaffirmed *Metromedia*'s fourth rule set out above. The Court held that an asserted interest in preserving aesthetic beauty justified a content-neutral ban of outdoor advertising.[75] The Court assessed the constitutionality of a Los Angeles ordinance that prohibits posting handbills or signs on public property.[76] Supporters of a political candidate challenged the validity of the ordinance when the city removed signs they had posted.[77] Claiming unjustified infringement of free expression, plaintiffs lost at trial but won on appeal.[78] The city appealed to the Supreme Court.

Justice Stevens, writing for the majority, initially outlined the trial court's finding of facts and conclusions of law. The lower court had found that: (1) the proliferation of illegally posted signs in Los Angeles constituted a clutter and visual blight; and (2) the posting of professionally printed political signs would exacerbate the blight and encourage the practice of illegally posting unattractive signs.[79] Justice Stevens held the ordinance was a time, place and manner restriction.[80]

> The year 1965 marked the passage of the . . . Act, known to some as the Lady-bird Johnson Bill and to others as the Billboard Baron's Financial Relief Act. The Act was conceived with lofty intentions—to expand the Bonus Law to make billboard control mandatory in all the states, and to extend this control to the primary system (most U.S.-numbered and some state-numbered highways). What emerged offers a classic case of a powerful industry gutting environmental legislation.

Id. at 77. Thus, the significance of the issue is questionable in first amendment terms.

74. 104 S. Ct. 2118 (1984).

75. *Id.* at 2130. Thus, the Court explicitly rejected the comprehensive scheme for determining the validity of aesthetic justifications that Justice Brennan established in his *Metromedia* concurrence. *See supra* note 67.

76. LOS ANGELES, CAL., MUNICIPAL CODE § 28.04. The entire text of the ordinance appears at 104 S. Ct. 2122.

77. *See* 104 S. Ct. at 2122. Candidates Outdoor Graphics Services, the company that supplied the Vincent supporters with the removed signs, joined as co-plaintiff in the action. *Id.* Plaintiffs named the city, the Director of the Bureau of Street Maintenance and members of the City Council as defendants; plaintiffs sought injunctive relief, and compensatory and punitive damages. *Id.* at 2122-23.

78. *Id.* at 2123-24. The appellate court invalidated the ordinance after holding that the city had failed to prove the sincerity of its asserted aesthetic purpose by demonstrating that the city was engaging in a comprehensive effort to curb visual blight. *Id.* at 2124.

79. *Id.* at 2123.

80. *Id.* at 2130-32.

He then applied the *Central Hudson Gas* test to determine the ordinance's constitutionality. The issues were: (1) whether the city's asserted aesthetic interest was substantial; (2) whether the ordinance directly advanced that interest; and (3) whether the ordinance constituted the least restrictive means of accomplishing the aesthetic goal.[81]

Justice Stevens held that the city had a substantial interest in regulating posted temporary signs.[82] In accord with the *Metromedia* plurality, he then held that because prohibition of temporary sign-posting on public property was the only means to prevent blight, the ordinance was sufficiently necessary and narrowly tailored to effectuate the aesthetic goal.[83]

Thus, the Court held that when a municipality proves[84] that a medium of expression constitutes an aesthetic harm, the municipality constitutionally may prohibit use of the medium in any zoning district[85] if alternative means of expression remain open. In the context of prohibiting public sign-posting, the Court determined that expression through handbill distribution, picketing or sign-posting on private property remained open as means of expression.[86] Moreover, the Court stated that the nuisance political posters pose overrides the need to preserve accessibility to an inexpensive medium of expression like sign-posting.[87] Finally, the Court explicitly held that a government can prohibit a medium of expression without establishing a compulsive beautification scheme for an area.[88]

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81. *Id.* at 2129.

82. *Id.* at 2130-31. Justice Stevens explained that, unlike handbills that municipalities may not subject to prohibition based upon aesthetic concerns, temporarily posted signs like billboards constitute visual blight in themselves. *Id.* at 2131-32.

83. *Id.* at 2130-32.

84. *Id.* at 2128 n.22. The Court stated: "The fact that the ordinance is capable of valid application does not necessarily mean that it is valid as applied to these litigants. We may not simply assume that the ordinance will always advance the asserted stated interests significantly to justify its abridgement of expressive activity." *Id.*

85. Significantly, the Court held that temporary signs like billboards may constitute aesthetic harm whether located in the inner-city or in rural or suburban areas. To satisfy the substantial goal requirement, the municipality need only prove that the regulated medium poses an aesthetic threat in itself; it need not prove that such threat is greater than the threat posed by other aesthetically destructive eyesores. *Id.* at 2135.

86. *Id.* at 2133.

87. *Id.* at 2133 n.30.

88. *Id.* at 2130 n.25. Justices Brennan, Marshall and Blackmun joined in dissent and again asserted the need to require proof of a comprehensive effort to beautify in order to expose impermissible legislative motives. *Id.* at 2141-42. Note that the major-

IV. RECENT DECISIONS

A. *Post*-Metromedia: *First Amendment—Billboard Decisions*

Eight reported cases[89] have considered the first amendment-billboard regulation problem since the *Metromedia* plurality purported to establish the "law of billboards." The following survey of these cases reveals substantial confusion as to many of the issues raised and purportedly resolved in *Metromedia*.

Three of the decisions[90] addressed the overbreadth-standing issue differently. In *M. Callahan & Sons v. Outdoor Advertising Board*,[91] a Massachusetts court of appeals denied overbreadth standing to a billboard company because it had not proven use of its signs for noncommercial speech.[92] In *Norton Outdoor Advertising, Inc. v. Village of Arlington Heights*,[93] however, the Ohio Supreme Court granted overbreadth standing, stating only that the ordinance challenged by the commercial advertiser impinged both upon his right to communicate and the public's right to receive political, economic, social and philo-

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ity's requirement of proof that the regulated medium constitutes an aesthetic harm serves the same exposure function, but in a less bridled fashion. The majority's approval allows the party defending the regulation to prove the regulated medium's aesthetic deficiencies by presenting evidence that the regulation is a part of a comprehensive beautification scheme, thus circumstantially proving the medium to be an aesthetic harm, as well as by presenting direct evidence to the same effect. Unfortunately, however, the majority offered no explanation as to the nature or quantity of sufficient proof.

The dissent also argued that the Los Angeles ordinance banned a medium of expression without leaving alternative means of expression. *Id.* at 2137.

89. Metromedia, Inc. v. Mayor of Baltimore, 538 F. Supp. 1183 (D.C. Md. 1982); Donrey Communications Co., Inc. v. City of Fayetteville, 200 Ark. 408, 660 S.W.2d 900 (1983); City of Lake Wales v. Lamar Adv. Ass'n, 414 So. 2d 1030 (Fla. 1982) (not mentioned further due to insignificance of decision; ordinance upheld under police power); Department of Transp. v. Shiflett, 251 Ga. 873, 310 S.E.2d 509 (1984); H & H Operations, Inc. v. City of Peachtree City, 248 Ga. 500, 283 S.E.2d 867 (1982); R.O. Givens, Inc. v. Town of Nags Head, 58 N.C. App. 697, 294 S.E.2d 388 (1982); Maurice Callahan & Sons, Inc. v. Outdoor Advertising Bd., 12 Mass. App. Ct. 536, 427 N.E.2d 25 (1981); Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 69 Ohio St. 2d 539, 433 N.E.2d 198 (1982).

90. Metromedia, Inc. v. Mayor of Baltimore, 538 F. Supp. 1183 (D.C. Md. 1982); Maurice Callahan & Sons, Inc. v. Outdoor Advertising Board, 12 Mass. App. Ct. 536, 427 N.E.2d 25 (1981); Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 69 Ohio St. 2d 539, 433 N.E.2d 198 (1982).

91. 12 Mass. App. Ct. 536, 427 N.E.2d 25 (1981).

92. *Id.* at 540, 427 N.E.2d at 28.

93. 69 Ohio St.2d 539, 433 N.E.2d 198 (1982).

sophical messages.[94] Finally, in *Metromedia, Inc. v. Mayor of Baltimore*,[95] the federal district court of Maryland granted overbreadth standing to a commercial advertising company after it reviewed conflicting evidence as to the "substantiality" of plaintiff's noncommercial advertising.[96] The court stated as follows: "The exact percentages are not known in this case, nor are they important. It seems to be conceded that most of the advertisers are commercial but that there are noncommercial ones as well."[97]

Two post-*Metromedia* courts[98] considered the validity of content-based regulation of on-site commercial advertising and resolved the issue inconsistently with *Metromedia*'s rules. In *Metromedia, Inc. v. Mayor of Baltimore*, the court invalidated a city ordinance that prohibited off-site advertising and limited on-site messages identifying the occupant of the premises.[99] The court's decision contravened the *Metromedia* rule that classification of permissible commercial messages need only be justified by a conceivably rational legislative choice. The *Baltimore* court stated that one ground for invalidating the ordinance was that the city did not show the ordinance was narrowly drawn to achieve traffic safety and aesthetic concerns; for example, the ordinance could have regulated the size and appearance of signs but not their content.[100]

In *H & H Operations, Inc. v. City of Peachtree*,[101] the Supreme Court of Georgia struck down a city ordinance that prohibited posting prices

94. *Id.* at 541, 433 N.E.2d at 200. Not only is the *Norton* court's reasoning incorrect under both the *Metromedia* analysis and prior law, it is incorrect under *Taxpayers for Vincent* as well. There the Court reaffirmed the necessity of a showing of specific imminent objective harm to parties not before the court in order to invoke the overbreadth doctrine. *Taxpayers for Vincent*, 104 S. Ct. at 2126.

95. 538 F. Supp. 1183 (D.C. Md. 1982).

96. *Id.* at 1185-86.

97. *Id.*

98. Metromedia, Inc. v. Mayor of Baltimore, 538 F. Supp. 1183 (D.C. Md. 1982); H & H Operations, Inc. v. City of Peachtree City, 248 Ga. 500, 283 S.E.2d 867 (1981).

99. BALTIMORE, MD., ORDINANCE no. 374 § 3(r)(a) (1977).

100. 538 F. Supp. at 1187. Thus, the court implicitly rejected the *Metromedia* plurality's rule that when a regulation allows commercial speech, it must also allow unlimited topics of noncommercial speech. Also implicit in the court's analysis is the rule that the asserted goals of traffic safety and aesthetics must warrant the on-site content-based distinctions as to commercial expression. Significantly, the court never reached the question of validity of the on-site restriction in terms of its effect on commercial expression.

101. 248 Ga. 500, 283 S.E.2d 867 (1981).

upon on-site signs.[102] The court characterized the ordinance as a content-based restriction on noncommercial speech and cited *Metromedia* as adopting the *Central Hudson Gas* test. The court then decided that the ordinance failed to pass the second prong of *Central Hudson Gas*—an ordinance must seek to implement a substantial governmental interest. The court invalidated the ordinance because the governmental interest in aesthetics could not reasonably be related to the prohibition of on-site posting of prices.[103] Although the court's determination seems reasonable, the *Metromedia* plurality adopted the *Central Hudson Gas* test in validating the off-site/on-site distinction, not in analyzing the validity of restrictions of on-site messages.[104] As noted above, such a distinction is legitimate if it is reasonably based on a legislative determination of commercial or public interest in limiting commercial billboard content to specified messages.

In the most recent decision, *Department of Transportation v. Shiflett*,[105] the Supreme Court of Georgia again violated the *Metromedia* principles by upholding the validity of the Georgia Outdoor Advertising Control Act of 1971.[106] The Act prohibits all outdoor advertising within 660 feet of a right-of-way and visible from main roadways with the following exceptions: (1) official traffic signs; (2) on-site signs; and (3) signs located in either zoned or unzoned commercial or industrial areas that provide information specifically in the interest of the traveling public.[107] Despite applying the *Central Hudson Gas* test for content-based regulation of commercial speech,[108] and thereby predictably

102. The ordinance limited on-site messages to premises identification and advertising of goods and services available there. Thus, the ordinance was identical to the portion of the San Diego ordinance limiting on-site communications.

103. *Id.* at 505, 283 S.E.2d at 869-70. Noting that numbers are not aesthetically inferior to letters of the alphabet forming words, the court cited *Metromedia* for the proposition that aesthetic judgments are necessarily subjective, and therefore, must be closely scrutinized. The court found unpersuasive the city's suggestion that prices are particularly unappealing during price wars.

104. Moreover, the *Metromedia* plurality explicitly rejected the line of reasoning the Georgia court adopted in *H & H Operations*. *See Metromedia*, 453 U.S. at 511.

105. 251 Ga. 873, 310 S.E.2d 509 (1984).

106. GA. CODE ANN. § 32-6-70 (1982). The trial court, relying on *Metromedia*, held that the Act violated the plaintiff's right of free expression. *See* 251 Ga. at 874, 310 S.E.2d at 510.

107. GA. CODE ANN. § 32-6-70.

108. Plaintiff-appellee was the owner of four billboards, all of which advertised his own commercial interests. Therefore, although not addressed directly, plaintiff lacked standing to challenge the statute's effect on noncommercial speech. In fact, the opinion

validating the statute as an exercise of the state's police power to attain traffic safety and preserve natural beauty, the court held that the Act did not intentionally control expression, but did so indirectly while pursuing other goals.[109] Thus, the court implicitly rejected *Metromedia*'s analysis, and should a future plaintiff have standing to challenge the statute's impingement of noncommercial expression, the court could analyze the effect on noncommercial speech as an indirect control of expression and not as an unlawful content-based regulation of noncommercial speech.[110]

In *R.O. Givens, Inc. v. Township of Nags Head*,[111] the North Carolina Court of Appeals upheld the validity of a complete prohibition of off-site commercial advertising structures.[112] The case is significant because the court relied on the absence of noncommercial speech restrictions.[113] Implicitly, the court was concerned that *Metromedia* may have foreshadowed the unconstitutionality of total prohibition of off-site commercial *and* noncommercial billboard communications.[114]

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could be read to include analysis as to the statute's effect on noncommercial speech. 251 Ga. at 874-75, 310 S.E.2d at 511.

109. The Georgia court did not rely on *Metromedia* in reaching its decision but rather, relied on L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 580 (1978), for authority. According to TRIBE, state statutes may violate freedom of expression in two ways: (1) the direct purpose of the legislation is to control the flow of information, or (2) the legislation may represent only an indirect restriction on the free flow of information while pursuing other goals. *Id.* at 580. A statute fitting within the first category is presumptively invalid, while a statute fitting within the second category is subject to a balancing of the state interest against the right of speech. 251 Ga. at 874-75, 310 S.E.2d at 511. Finding the Georgia Act to fit within the second category, the court implemented the *Central Hudson Gas* test in lieu of Tribe's balancing test. *Id.* at 251 Ga. at 875, 310 S.E.2d at 511-12. The convoluted approach of the court and the arguably misplaced reliance on academic authority in a field the Supreme Court has addressed may again indicate the inadequacy of the *Metromedia* opinion.

110. The Georgia Supreme Court has become the primary detractor of *Metromedia* by twice disregarding its mandates. *See supra* notes 104-06 and accompanying text.

111. 58 N.C. App. 697, 294 S.E.2d 388 (1982).

112. Unlike the California Supreme Court in *Metromedia*, the North Carolina court construed "outdoor advertising structures" as used in the ordinance to apply only to commercial signs. 58 N.C. App. at 701, 294 S.E.2d at 291. Unlike the village in *Norton*, the Town of Nags Head explicitly expressed its purpose as eliminating structures that detract from the town's scenic beauty. *Id.* at 699, 294 S.E.2d at 399. The court noted the *Metromedia* plurality's approval of off-site bans based on such a goal but again made no mention of a supplemental purpose.

113. *Id.* at 701, 294 S.E.2d at 391.

114. *Id.* Note that the Florida Supreme Court in *Lamar* and the federal district court in *Metromedia-Baltimore* showed no concern in this regard. The *Givens* court found support in the *Suffolk* summary decision. *See supra* note 39.

In *Donrey Communications Co. v. City of Fayetteville*,[115] the Supreme Court of Arkansas upheld the validity of a city ordinance that restricted the size of both off-site and on-site freestanding signs to a maximum of seventy-five square feet and prescribed minimum setback requirements.[116] The sign ordinance's preamble established goals of promoting safety and preserving beauty.[117] In addition, the court cited city findings of uncontrolled proliferation of signs hazardous to users of city streets. The finding also noted the importance of the city's aesthetic charm and the detrimental effect of billboards on tourism. Thus, the court found that the asserted goals were substantial in fact and not a pretext for purposeful impingement of the free flow in information. Citing *Metromedia*, the court found the ordinance to be narrowly drawn.[118]

The second part of the *Donrey* court's analysis raised a more controversial question. The billboard owner argued that the size restriction effectively closed the billboard forum as a channel for communication because advertisements prepared for nationwide and statewide distribution were designed for 300 square feet panels.[119] The ordinance's seventy-five feet limit, the owner argued, would eliminate distribution of those messages, and thus eliminate the use of the standard poster panel as an inexpensive form of communication.[120] The court rejected this argument because the owner had not demonstrated that the size of widely distributed messages could not be reduced to seventy-five square feet without unduly increasing the cost of this medium.[121]

Finally, in *Norton Outdoor Advertising, Inc. v. Village of Arlington Heights*,[122] the Supreme Court of Ohio invalidated a village ordinance that prohibited all off-site billboard advertising and limited on-site

115. 280 Ark. 408, 660 S.W.2d 900 (1983).

116. CITY OF FAYETTEVILLE, ARK., ORDINANCE No. 1893 (1970).

117. *Id.*

118. *Donrey*, 280 Ark. at 413, 660 S.W.2d at 903.

119. *Id.*

120. *Id.*

121. *Id.*, 660 S.W.2d at 903-04. This part of the *Donrey* opinion evidences the most blatant inadequacy of the *Metromedia* decision. Two important issues remain unresolved: (1) what constitutes a total prohibition of billboard advertising; and (2) whether a total prohibition is constitutional. At any rate, the *Metromedia* plurality clearly would not consider the Fayetteville ordinance a total ban and presumably would uphold its validity as a reasonable time, place and manner restriction.

122. 69 Ohio St. 2d 539, 433 N.E.2d 198 (1982).

business.[123] In accordance with the *Metromedia* plurality, the court held that the on-site preference given commercial messages over non-commercial messages rendered the ordinance unconstitutional.[124] The court, however, also held that the ordinance violated the strictures of *Central Hudson Gas* because the village had not offered proof supporting the ordinance's goals.[125]

B. *Post*-Taxpayers for Vincent: *First Amendment—Temporary and Portable Sign Decisions*

The four reported post-*Taxpayers for Vincent* temporary and portable sign decisions evidence continued confusion with respect to the principles purportedly established by *Metromedia* and *Taxpayers for Vincent*.[126] Unlike the post-*Metromedia* billboard cases, however, the

123. VILLAGE OF ARLINGTON HEIGHTS, OHIO, ORDINANCE No. 5-1981 § 33(c); *see Norton*, 69 Ohio St. 2d at 542, 433 N.E.2d at 199-200.

124. *Norton*, 69 Ohio St. 2d at 543, 433 N.E.2d at 200.

125. *Id.* The court refused to speculate as to the ordinance's purpose. Considering the fact that seven *Metromedia* Justices agreed that aesthetic and traffic safety concerns would justify an off-site prohibition coupled with an on-site limitation to premises identification, it is strange that the village's attorneys failed to even make the argument. A dissenting judge, citing the *Metromedia* plurality, argued that those goals were sufficient—articulated or not—as a matter of law. *Id.* at 547, 433 N.E.2d at 204 (Locher, J., dissenting).

126. Five reported decisions considered first amendment-temporary/portable sign disputes after *Metromedia* and before *Taxpayer for Vincent*. *See* Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982); Candidates' Outdoor Graphic Serv. v. City of San Francisco, 574 F. Supp. 1240 (N.D. Cal. 1983); City of Antioch v. Candidates' Outdoor Graphic Serv., 557 F. Supp. 52 (N.D. Cal. 1982); Rhodes v. Gwinnett County, 557 F. Supp. 30 (N.D. Ga. 1982); City of Lakewood v. Colfax Unlimited Ass'n, 634 P.2d 52 (Colo. 1981). Each of these cases, other than *City of San Francisco*, resulted in the invalidation of the challenged regulation. All of the cases addressed the aesthetic justification issue, while only the *Rhodes* and *Dills* courts denied the existence of the asserted aesthetic goal because the municipalities had failed to articulate sufficiently the purposes that underlied the challenged regulations. *See Rhodes*, 557 F. Supp. at 32; *Dills*, 674 F.2d at 1381. The *City of Antioch* court, unlike any of the other courts, denied the existence of an aesthetic purpose because the city failed to show an interest in maintaining a comprehensive scheme of beautification. 557 F. Supp. at 60. The *Rhodes* and *Dill* courts, however, analyzed the constitutional issues assuming *arguendo* that the municipalities had articulated the aesthetic goal.

Although the courts in each of the above cases, other than *City of Antioch*, proceeded upon the assumption that the aesthetic goal was substantial, the most common shortcoming of the challenged regulations was the failure to significantly advance the asserted goal. In *City of Lakewood*, the court invalidated, in contravention of *Metromedia*, ordinances that prohibited the posting of prices or help wanted signs and the changing of messages on nonconforming signs because the ordinances did not directly advance the asserted goals of traffic safety and aesthetics. *See* 634 P.2d at 64. In

post-*Metromedia* temporary sign cases reveal a clear trend of invalidating regulations in favor of free expression in spite of the apparently regulation-favoring approach of *Taxpayers for Vincent*.[127]

Three of the four temporary sign cases resulted in the invalidation of the challenged regulation. In *Meros v. City of Euclid*[128] the court invalidated an ordinance that prohibited the display of political lawn signs but allowed "For Rent" and "For Sale" signs as accessories to the advertised residence.[129] Although the court held that the ordinance violated the first amendment because the restriction preferred commercial speech over noncommercial speech,[130] the court based its decision on the city's failure to explain why political lawn signs in residential areas posed more of a threat to safety or the community's beauty than "For

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Dills, the court used the same reasoning to invalidate an ordinance that restricted by permit the use of portable signs to a specified number of days at the expiration of which the ordinance required removal. *See* 674 F.2d at 1381. In *Rhodes*, the court invalidated an ordinance that limited business signs to one per premises, thus destroying the market for portable signs. 557 F. Supp. at 33.

In two of the cases, the courts, in accord with *Metromedia*, found ordinances invalid because the challenged regulations favored commercial over noncommercial speech. *See City of Lakewood*, 634 P.2d at 66-69 (ordinance placed durational limits on ideological signs but not on signs such as "For Sale"); *City of Antioch*, 557 F. Supp. at 56-58 (invalidated durational requirement that singled out political signs). The *City of Lakewood* court invalidated the challenged ordinance on the alternative ground that the regulation impermissibly restricted the topics of noncommercial expression to information regarding candidates for political office. *See* 634 P.2d at 69. The *City of Antioch* court invalidated the challenged ordinance on the alternative ground that the 60 day durational limit on the posting of political signs, held to be insufficient for election campaign purposes, left political supporters with inadequate means of expression. 557 F. Supp. at 59. In contrast, the *City of San Francisco* court upheld an ordinance that restricted posting to 30 days and restricted posting to lamp posts and utility poles despite plaintiff's claim that the ordinance effectively prohibited the posting of temporary signs and that no adequate alternative medium remained available. 574 F. Supp. at 1248.

To the extent that none of the courts in the above decisions premised their decisions upon a factual finding of visual clutter, they acted inconsistently with *Taxpayers for Vincent*. In addition, those courts that viewed time, place and manner restrictions as not directly advancing the aesthetic goal acted inconsistently with *Taxpayers for Vincent*. Although *Taxpayers for Vincent* assumed the constitutionality of a partial prohibition, that case's rationale would support any durational requirement because such a restriction partially contributes to obliteration of visual blight. In addition, *Taxpayers for Vincent* held that temporary political posters are an expendable medium of expression in view of their inherent ugliness so that any allowance for posting such signs is a right revocable at the municipality's legislative discretion.

127. *See infra* notes 128-41 and accompanying text.

128. 594 F. Supp. 259 (N.D Ohio 1984).

129. *Id.* at 262.

130. *Id.*

Sale" or "For Rent" signs.[131]

Similarly, in *Matthews v. Town of Needham*,[132] the court invalidated an ordinance that limited the use of temporary and portable signs to premises identification, notice of persons responsible for on-premises construction and other commercial messages.[133] The court based its decision on two grounds: (1) unlike the situation in *Taxpayers for Vincent*, the prohibition of political sign-posting extended to private property;[134] and (2) in accord with the *Metromedia* plurality, the regulation inverted the established principle that the first amendment affords non-commercial speech greater protection than commercial speech.[135] Again, the court was hesitant to apply the *Metromedia* bifurcated analysis.[136]

In *Dills v. Cobb County*,[137] the District Court for the Northern District of Georgia invalidated an ordinance that required portable sign users to position their signs behind the premise's building set-back line.[138] Having found initially that the regulation failed to advance traffic safety[139] and that the regulation was effectively a prohibition of portable sign use,[140] the court held that the ordinance was invalid because the county had failed to show that portable signs were more aesthetically displeasing than permanent advertising structures not similarly regulated.[141] Thus, the court ignored the mandate of *Metromedia* and *Taxpayers for Vincent* that piecemeal sign regulations can be valid although not part of a comprehensive rehabilitation project.

Finally, in *White House Vigil v. Clark*,[142] the Court of Appeals for

131. *Id.* The court appears to have applied equal protection analysis in the name of first amendment analysis. The significance therein is that the court failed to explicitly apply *Metromedia*'s bifurcated analysis.

132. 596 F. Supp. 932 (D. Mass. 1984).

133. *Id.* at 935.

134. *Id.* at 934.

135. *Id.* at 935.

136. *Id.* The court was so uneasy about relying solely upon the "inversion" principle that embodies the *Metromedia* bifurcated-comparative approach that the court also relied upon the *Taxpayers for Vincent* Court's "apparent willingness" to extend special protection to political speech. *Id.*

137. 593 F. Supp. 170 (N.D. Ga. 1984).

138. *Id.* at 175.

139. *Id.* at 173.

140. *Id.*

141. *Id.* at 174.

142. 746 F.2d 1518 (D.C. Cir. 1984).

the District of Columbia upheld National Park Service (Service) regulations restricting political demonstrations on the sidewalks bordering the White House lawn.[143] Although the court upheld most of the challenged regulations on the basis of governmental interest in national security,[144] the court also upheld as aethetically justified a regulation that prohibits stationary display of portable signs within the "center zone"[145] of the White House sidewalk. Specifically, the court of appeals upheld the "center zone" regulation on the ground that the restriction directly advanced the Service's substantial aesthetic interest in preserving White House cultural charm and beauty for tourists.[146] The court concluded that the "center zone" restriction left ample space and means for alternative means of expression.[147] Finally, the court of appeals noted that the regulations were part of a comprehensive White House beautification scheme.[148]

V. CONCLUSION

In summary, post-*Metromedia* billboard decisions illustrate the inadequacy of the *Metromedia* opinion; most of the lower court decisions reject the tenants *Metromedia* purported to establish. Most notably, the lower courts seem to have rejected the plurality's method of analyzing on-site preference of specified commercial messages. Moreover, only one lower court has explicitly adopted the plurality's "bifurcated" approach of analyzing a statute's effect on commercial and noncommercial speech separately.[149] Additionally, *Metromedia*'s failure to define what degree of legislative restriction constitutes a total ban of

143. *See id.* at 1538. The regulations include provisions governing the construction, size and placement of signs displayed on the sidewalk as well as a provision requiring that any such sign be in constant physical contact with a person. *Id.* at 1522. In addition, the regulations provide that a sign must not be in contact with the White House fence bordering the sidewalk or with any structure on the sidewalk. *Id.*

144. *Id.* at 1532-34. The intent underlying the regulations is to prevent the effective conversion of signs from means of communication to weapons directed at harming the White House or the Presidential family. *Id.*

145. *Id.* at 1534. The center zone of the sidewalk is the twenty foot span that comprises the longitudinal center of the sidewalk. *Id.*

146. *Id.* at 1534-35.

147. *Id.* at 1537.

148. *Id.* at 1538. This scheme provided additional proof that the Service's aesthetic goal was sincere.

149. Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 69 Ohio St. 2d 539, 433 N.E.2d 198 (1982).

billboard advertising, and its failure to determine whether a total ban is ever permissible, have left lower courts to decide these issues independently. Presently, it appears that legislators must rely on local decisions to forecast the first amendment validity of their billboard legislation. Certainly, *Metromedia* provides minimal guidance at best.[150]

Thus far, courts have not zealously protected individual freedom of expression at the expense of municipal power to regulate billboard advertising. On the other hand, post-*Metromedia* temporary and portable sign decisions reflect a clear trend favoring free expression over governmental regulation, a trend easily adaptable to billboard regulations. Specifically, the lower courts' refusal, in both billboard and temporary sign disputes, to allow municipalities to legislate disparately for different categories of commercial speech evidences a general intent by courts to review such regulations with care.[151] Again, courts have done so despite *Metromedia*'s pronouncement that legislative limitations among categories of commercial speech need only be a reasonable governmental decision on behalf of either the business community or the general public. In addition, the combination of a relaxed overbreadth standard and the rule that commercial speech may not receive preference over noncommercial speech provides reviewing courts with an effective means of checking legislative abuse.

Finally, *Taxpayers for Vincent* resolves any doubt that a proven aes-

150. A recent Supreme Court decision provides guidance with respect to the definition of commercial speech.

In Bolger v. Youngs Drug Products Corp., 103 S. Ct. 2875 (1983), the Court held that a manufacturer of contraceptives that proposed to mail to the public unsolicited advertisements, including informational pamphlets promoting its products, but also discussing disease and family planning, proposed to engage in protected commercial speech. The Court held that a communication, notwithstanding the inclusion therein of discussion of important public issues, constitutes commercial speech when three elements are present in the message conveyed: (1) an advertisement, (2) referring to a specific product, (3) which is economically motivated. *Id.* The Court was quick, however, to add two significant caveats. First, if the advertisement refers to an activity itself protected by the first amendment, such as advertisement for the sale of a religious treatise, a different conclusion may be appropriate. Second, each of the three elements described above need not necessarily be present in order for speech to be commercial. In particular, the Court expressed no opinion as to whether reference to any particular product or service is a necessary element of commercial speech. *Id.* at 2963.

151. White House Vigil v. Clark, 746 F.2d 1518 (D.C. Cir. 1984). For example, the court stated: "Arbitrariness or capriciousness in the selection of aesthetic goals may indicate the presence of an impermissible motive either to enact the preferences of individual government officials or to burden unreasonably the exercise of free speech." *Id.* at 1536.

thetic purpose, whether or not legislatively articulated, will justify *reasonable* time, place or manner restrictions. Because no lower court has invalidated a billboard ordinance solely on the aesthetics issue, however, *Taxpayers for Vincent* provides little solace for legislators, attorneys and reviewing courts dealing with billboard regulations. Moreover, as the post-*Taxpayers for Vincent* cases demonstrate, the Supreme Court's confirmation of aesthetic justification often provides no assurance to legislators that their reliance on an asserted aesthetic goal will insulate their legislation from a constitutional challenge.

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