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Metromedia, Inc. v. City of San Diego: Aesthetics, the First Amendment, and the Realities of Billboard Control

Ronald G. Aronovsky*

I think that I shall never see
A billboard lovely as a tree.
Indeed, unless the billboards fall,
I'll never see a tree at all. ¹

With these words of Ogden Nash, the Supreme Court of California concluded in Metromedia, Inc. v. City of San Diego² that a large city may completely prohibit off-premises billboards within the city limits. Traditionally, local governments could not regulate private property under the police power for solely aesthetic purposes.³ The Metromedia decision overruled a seventy-one-year old California case that followed the traditional approach⁴ and now allows local California governments to regulate private property for purely aesthetic purposes in order to solve the pervasive problem of billboard blight.

Throughout the twentieth century, cities across the United States have sought to avoid characterizing restrictive billboard legislation as aesthetic regulation. They instead declared billboards to be a public nuisance or characterized ordinances regulating billboards as serving standard police-power purposes, such as preserving property values, protecting tourism, or promoting traffic safety. Most courts sustained billboard controls by resorting to legal fiction, ruling that, while aesthetics alone cannot support a billboard ordinance, aesthetic considera-

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1. Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 886, 610 P.2d 407, 429, 164 Cal. Rptr. 510, 532, prob. juris. noted 101 S. Ct. 265 (1980) (quoting Nash, Song of the Open Road, SELECTED POEMS OF OGDEN NASH 31 (1975)).
2. Id.
3. See, e.g., Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909).
4. Id.
tions may be a legitimate police-power objective if the ordinance also serves more traditional police-power objectives.\(^5\)

The *Metromedia* decision is a significant accomplishment of modern jurisprudence for two reasons. First, the court abandoned the legal fiction of prior decisions and held that aesthetic considerations alone may justify a city's exercise of its police power because improving the appearance of an urban environment improves the general welfare. Second, unlike many prior billboard cases, *Metromedia* responds to some of the sensitive first amendment questions inherent in billboard control. In particular, the court recognized the potential overbreadth of the ordinance and construed it to prohibit only large, permanent, commercial billboards, rather than all offsite signs.\(^6\)

Although the *Metromedia* decision lays the foundation for future billboard-control legislation in California, it also raises several important questions. First, the extent to which local governments may regulate private property for purely aesthetic reasons remains unclear. The San Diego ordinance prohibited all billboards, leaving no room for inconsistent, arbitrary, or discriminatory administration. Difficult issues arise when a city regulates land uses affecting aesthetic values on a case-by-case basis, as with ordinances regulating architectural design or public art displays. It remains unclear at what point government-mandated conformity with majoritarian standards intrudes unduly upon matters of subjective taste, self-expression, and individual autonomy.

Second, the *Metromedia* court found that the San Diego ordinance applied only to large, permanent, offsite commercial billboards, leaving open the question whether State or local governments may prohibit all offsite signs.\(^7\) Furthermore, because the court sustained the billboard ban as a legitimate regulation of commercial speech, the extent to which a city may regulate private signs containing political, social, or religious messages remains unanswered.\(^8\)

This Comment examines the question of aesthetic zoning and first amendment limitations on comprehensive billboard controls, focusing on *Metromedia* as a leading example of a judicial response to these issues. Part I reviews the *Metromedia* decision. Part II discusses the development of aesthetic regulation of billboards in the twentieth century and considers the public policy issues raised by aesthetic zoning. Part III addresses the first amendment issues presented by offsite sign control under the emerging doctrine of limited constitutional protection for "commercial speech."

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5. See Part II.A infra.
6. 26 Cal. 3d at 856 n.2, 610 P.2d at 410 n.2, 164 Cal. Rptr. at 513 n.2.
7. Id.
8. See id. at 888-89, 610 P.2d at 430-31, 164 Cal. Rptr. at 533-34 (Clark, J., dissenting). See also Part III.D infra.
This Comment concludes that aesthetic regulation of private land use must be accompanied by procedural safeguards that protect against inconsistent, arbitrary and discriminatory administration. Legislation prohibiting offsite billboards must permit reasonable alternative methods of sign communication. Furthermore, courts should not mechanically apply the commercial speech doctrine to sign control legislation that regulates both commercial and noncommercial expression.

I

Metromedia, Inc. v. City of San Diego

On March 14, 1972, the San Diego City Council adopted an ordinance prohibiting all offsite "outdoor advertising displays."9 In addition to several narrowly drawn exceptions in the original ordinance,10 the city council amended the ordinance on October 19, 1977 to exempt "temporary political campaign signs."11 The ordinance required all existing nonconforming signs to be removed following an amortization period ranging from ninety days to four years, depending on the location and depreciated value of the sign.12 The declared purposes of the ordinance included promoting traffic safety, protecting public health, safety, and general welfare, and "preventing the destruction of the natural beauty and environment of the City."13

Plaintiffs Metromedia, Inc. and Pacific Outdoor Advertising, both of whom owned signs subject to removal under the ordinance, filed actions against the city attacking the validity of the ordinance. The trial court granted plaintiffs' motion for summary judgment,14 enjoining enforcement of the ordinance on the grounds that it constituted

9. SAN DIEGO, CAL., CODE § 101.0700 (1972). The ordinance defined such displays as signs that do not identify a use, facility, service, or product produced, sold, or manufactured on the premises. Id. § 101.0700(B). See 26 Cal. 3d at 856, 610 P.2d at 410, 164 Cal. Rptr. at 513.

10. The original ordinance permitted government signs, bench signs, commemorative plaques, religious symbols, signs within shopping centers not visible beyond the premises, real estate signs, public service signs depicting time, temperature or news, signs on vehicles, and temporary off-premises subdivision directional signs. San Diego, Cal., Ordinance 10795 (Mar. 14, 1972); 26 Cal. 3d at 856 n.1, 610 P.2d at 410 n.1, 164 Cal. Rptr. at 513 n.1.

11. San Diego, Cal., Ordinance 12189 (Oct. 19, 1977); 26 Cal. 3d at 856 n.1, 610 P.2d at 410 n.1, 164 Cal. Rptr. at 513 n.1. Such signs could not stand for more than 90 days and had to be removed within 10 days after the election to which they pertained. Id.

12. SAN DIEGO, CAL., CODE § 101.0700(C)-(D) (1972). The abatement date for all signs depends on the adjusted market value of each structure; however, signs located within 500 feet of freeways or scenic highways had to be removed within 90 days. Id.

13. Id. § 101.0700(A).

14. 26 Cal. 3d at 854-55, 610 P.2d at 409, 164 Cal. Rptr. at 512.

The parties entered into a joint stipulation of facts for the purpose of facilitating determination of their cross-motions for summary judgment. The following stipulations are particularly relevant to this Comment:

2. If enforced as written Ordinance No. 10795 will eliminate the outdoor advertising business in the City of San Diego . . . .
an unreasonable exercise of the police power and an abridgment of the first amendment.\footnote{15}

The California Supreme Court reversed in an opinion written by Justice Mathew O. Tobriner. The court sustained the ordinance as a valid exercise of the municipal police power, finding “as a matter of law that an ordinance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety.”\footnote{16} The court further stated that, even if “the principal purpose of the ordinance is not to promote traffic safety but to improve the appearance of the community, such a purpose falls within the city’s authority under the police power.”\footnote{17} In reaching this result, the court overruled \textit{Varney & Green v. Williams},\footnote{18} a 1909 case invalidating a city-wide billboard prohibition on the ground that aesthetic considerations alone could not justify the exercise of the municipal police power.\footnote{19}

The court also sustained the ordinance against a first amendment challenge.\footnote{20} The court first observed that, although the history of the ordinance demonstrated that it was intended to ban commercial billboards, the ordinance as drafted prohibited any kind of offsite sign.\footnote{21} Fearing that the ordinance could be applied to noncommercial billboards, such as picket signs announcing a labor dispute or small signs placed in a residential front yard proclaiming a political or religious message, the court construed the ordinance to prohibit only large, permanent, commercial billboards.\footnote{22} In dismissing the first amendment challenge, the court relied on the United States Supreme Court’s sum-

\footnote{20}{All of the signs owned by plaintiffs in the City of San Diego are located in areas zoned for commercial and industrial purposes. \ldots \ldots}

\footnote{21}{Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of outdoor advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive.}

\footnote{22}{Id. at 857, 610 P.2d at 410-11, 164 Cal. Rptr. at 513-14.}

\footnote{15}{Id. at 858, 610 P.2d at 411, 164 Cal. Rptr. at 514. The California Court of Appeal affirmed the Superior Court’s judgment. Metromedia, Inc. v. City of San Diego, 67 Cal. App. 3d 84, 136 Cal. Rptr. 453 (1977). Because the California Supreme Court granted a hearing, the Court of Appeal opinion is not published in the official reports. \textit{CAL. RULE OF COURT} 976(d) (West 1980).}

\footnote{16}{Id. at 859, 610 P.2d at 412, 164 Cal. Rptr. at 515.}

\footnote{17}{Id. at 860, 610 P.2d at 412, 164 Cal. Rptr. at 515.}

\footnote{18}{155 Cal. 3d at 860-65, 610 P.2d at 413-15, 164 Cal. Rptr. at 516-19.}

\footnote{21}{Id. at 866-72, 610 P.2d at 416-20, 164 Cal. Rptr. at 519-23. Because the court found three recent summary dismissals of appeals by the U.S. Supreme Court dispositive of the first amendment question, most of its analysis was actually under the free speech clause of \textit{CAL. CONST.} art. I, § 2 (West Supp. 1980). See text accompanying notes 111-14 \textit{infra}.}

\footnote{22}{Id.}
mary dismissals of appeals in three cases from other states upholding billboard-prohibition ordinances against first amendment challenges.23

Justice William P. Clark dissented from the court’s first amendment holding, observing that the prohibited signs carried political, social, and cultural messages as well as commercial advertisements. He questioned whether the court should confine its analysis to the limited constitutional protection afforded “commercial speech”24 and rejected the majority’s conclusion that radio, television, newspaper, magazine, and leaflet advertising provided adequate alternative means to communicate protected speech.25 Justice Clark contended that “[o]btrusiveness does not justify total prohibition of protected expression,”26 adding that “[t]he absolute prohibition of off-site signs is justified by neither community appearance nor traffic improvement.”27


The U.S. Supreme Court regards such summary dismissals as decisions on the merits and binding on all other courts, Hicks v. Miranda, 422 U.S. 332, 343-45 (1975), even though such dismissals are generally not based upon a full-scale decision by the Court. For a criticism of this practice, see Colorado Springs Amusements, Inc. v. Rizzo, 428 U.S. 913 (1976) (Brennan, J., dissenting from denial of certiorari).


26. Id. at 892, 610 P.2d at 433, 164 Cal. Rptr. at 536.

27. Id. at 894, 610 P.2d at 434, 164 Cal. Rptr. at 537 (emphasis in original).

Although Justices Frank Newman and Frank Richardson also shared some of Justice Clark’s doubts about the majority’s first amendment analysis, both concurred in the judgment. Justice Richardson felt bound by the recent actions by the U.S. Supreme Court discussed in note 23 supra. Id. at 886, 610 P.2d at 429, 164 Cal. Rptr. at 532. Justice Newman questioned the scope of the San Diego ordinance, but felt that the overbreadth problem was “solvable.” Id. at 887-88, 610 P.2d at 430, 164 Cal. Rptr. at 533.

The Metromedia opinion also upheld the San Diego ordinance against several other challenges. See id. at 881-86, 610 P.2d at 426-29, 164 Cal. Rptr. at 529-32 (ordinance’s amortization provisions are not unreasonable and ordinance does not violate a California Environmental Quality Act provision, CAL. PUB. RES. CODE § 21151 (West 1977)); id. at 871-81, 610 P.2d at 420-26, 164 Cal. Rptr. at 523-29 (ordinance is not preempted by the Outdoor Advertising Act, CAL. BUS. & PROF. CODE §§ 5200-5486 (West 1974), and does not deny equal protection of the laws). The court had originally concluded that the Federal Highway Beautification Act, 23 U.S.C. § 131 (Supp. II 1978), did not require the city to compensate the billboard owners for signs removed pursuant to the ordinance, Metromedia, Inc. v. City of San Diego, 592 P.2d 728, 744-45, 154 Cal. Rptr. 212, 228-29 (1979), but reversed this ruling on rehearing. Metromedia, Inc. v. City of San Diego, 26 Cal. 3d at 873-80, 610 P.2d at 421-26, 164 Cal. Rptr. at 524-29.
II
BILLBOARD REGULATION AND AESTHETICS

A. Billboard Control Under the Police Power

Municipal authority to regulate or prohibit billboards stems from the local police power. Because the police power is “an attribute of sovereignty . . . founded on the duty of the state to protect its citizens and provide for the safety, good order and well-being of society,” the police power defies precise definition. A municipality may exercise its police power only for public purposes, which usually include peace and order, public health, safety, and morals, public convenience, and general prosperity. Legislative motive or declarations of intent do not determine the ultimate validity of a police-power ordinance. Rather, the regulation must bear a rational relation to a permissible police-power purpose and provide an impartially administered, reasonable means for accomplishing its public objective. Challengers to a local police-power ordinance carry the burden of proving that the ordinance is unreasonable, arbitrary, or discriminatory and therefore violates the fifth and fourteenth amendments. Courts will defer to the legislative judgment “if it is fairly debatable that the ordinance is reasonably related to the public welfare.” In spite of this general deference, courts have only recently upheld billboard prohibitions that are based solely on aesthetic considerations. This Part discusses the evolution of judicial attitudes toward aesthetics as a justification for billboard control.

1. The Early Cases: Aesthetics Cannot Justify Billboard Regulation

Municipal efforts to regulate or prohibit billboards date back to the “city beautiful” movement of the late nineteenth and early twenti-

29. McKay Jewelers, Inc. v. Bowron, 19 Cal. 2d 595, 600, 122 P.2d 543, 546 (1942). See also Stone v. Mississippi, 101 U.S. 814, 818 (1879) (“It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate.”).
31. Simpson v. City of Los Angeles, 4 Cal. 2d 60, 65, 47 P.2d 474, 476 (1935); Moore v. Ward, 377 S.W.2d 881 (Ky. 1964).
34. Associated Home Builders Inc. v. City of Livermore, 18 Cal. 3d 582, 604, 557 P.2d 473, 476, 135 Cal. Rptr. 41, 55 (1976). Generally, courts will not invalidate an ordinance because they consider it unwise or undesirable. Id. at 606 n.23, 557 P.2d at 487, 135 Cal. Rptr. at 55. Rather, an ordinance will be overturned only if the legislative judgment is clearly unreasonable. Southern Pacific Co. v. Railroad Comm’n of Cal., 13 Cal. 2d 89, 87 P.2d 1055 (1939).
35. See Part II.B infra.
Recognizing that "the primary offense of billboards is ugliness," courts invalidated most of these turn-of-the-century ordinances on the ground that they regulated the use of private property for solely aesthetic purposes and therefore did not serve a legitimate objective of the police power. Indeed, in the earliest cases courts seemed to take the view that the presence of any aesthetic motive would render the regulation invalid.

Early twentieth century judicial hostility toward aesthetic regulation is understandable. In 1900, the United States had a largely laissez-faire economic structure, unfettered by effective government regulation. Environmental protection was decades away from becoming a major public concern. Courts frequently struck down economic regulatory legislation under the "substantive due process" doctrine. Municipalities enjoyed only limited authority to regulate private property under the police power. Courts displayed a strong preference toward private control of land use, required police-power actions to be strictly necessary to protect public health, safety, or morals, and often presumed that police-power legislation was unconstitutional. Thus, courts refused to uphold laws that restricted a landowner's enjoyment of private property when the purpose of such restrictions was only to

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38. Rodda, The Accomplishment of Aesthetic Purposes Under the Police Power, 27 S. CAL. L. REV. 149 (1954). The concept of "aesthetics" defies precise definition. Professor Dukeminier offers this handy rule of thumb for labeling municipal legislation: "if a use is offensive to persons with sight but not offensive to a blind man in a similar position, the use is primarily offensive aesthetically." Dukeminier, supra note 37, at 223. Another commentator's unique interpretation places some responsibility for early judicial hostility toward aesthetic regulation of billboards on the very use of the word "aesthetic," concluding that while

[u]seful enough in its dictionary sense, the term had acquired an overlay of unfortunate connotations. It was effeminate, or at least not to be taken seriously where practical matters were being considered by realistic men. It referred to beauty, but suggested the esoteric schools of art and the fringes of personal preference. It invited the attention of the dilettante; it did not command the respect of the court. Aesthetics has been variously described as a "pariah word," and "a chameleon-hued term calculated to inspire misunderstanding and fears of exaggerated extensions of its application."


40. Dukeminier, supra note 37, at 224. In fact, the constitutionality of comprehensive zoning was not settled until Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926).


42. See Comment, Outdoor Advertising Control Along the Interstate Highway System, 46 CALIF. L. REV. 796, 813 (1958).
protect the sensibilities of the landowner's neighbors.\textsuperscript{43}

Early sign-control ordinances reflect this view that cities could not infringe on individual property rights solely to further general aesthetic goals. For example, in 1905 the New Jersey Supreme Court invalidated an ordinance that limited the height and location of signs in \textit{City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.}\textsuperscript{44}

The court concluded that:

\begin{quote}
a man may not be deprived of his property because his tastes are not those of his neighbors. Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.\textsuperscript{45}
\end{quote}

Four years later in \textit{Varney & Green v. Williams},\textsuperscript{46} the California Supreme Court relied on \textit{Paterson} in invalidating an ordinance that prohibited all offsite billboards solely for aesthetic purposes.\textsuperscript{47} \textit{Varney} remained the law in California for seventy-one years, until it was overruled by \textit{Metromedia}.\textsuperscript{48}

\section{The Aesthetics Plus Doctrine: A Legal Fiction}

Courts seeking to uphold billboard regulations needed to find a way around the rule eliminating aesthetics as a legitimate basis for police-power legislation. Many solved this dilemma simply by ignoring aesthetics and recharacterizing the objectives of billboard legislation to correspond to traditional police-power objectives. A leading example of this technique is found in \textit{St. Louis Gunning Advertising Co. v. City of St. Louis}.\textsuperscript{49} In this case, the Missouri Supreme Court upheld an ordinance regulating the size, structure, and location of free-standing signs and recited in justification a litany of real and imagined horribles associated with billboards:

\begin{quote}
The signboards and billboards upon which this class of advertisements are displayed are constant menaces to the public safety and welfare of the city; they endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscre-
\end{quote}


\textsuperscript{44} 72 N.J.L. 285, 62 A. 267 (1905).

\textsuperscript{45} Id. at 387, 62 A. at 268.

\textsuperscript{46} 155 Cal. 318, 320, 100 P. 867, 868 (1909).

\textsuperscript{47} 115 Cal. at 320, 100 P. at 868. \textit{See also} Spann v. City of Dallas, 111 Tex. 350, 358, 235 S.W. 513, 516 (1921) ("[I]t is not the law of this land that a man may be deprived of the lawful use of his property because his tastes are not in accord with those of his neighbors."); Haller Sign Works v. Training School, 249 Ill. 436, 94 N.E. 920 (1911); Bryan v. City of Chester, 212 Pa. 259, 61 A. 894 (1905).

\textsuperscript{48} See notes 18-19 \textit{supra} and accompanying text.

\textsuperscript{49} 235 Mo. 99, 137 S.W. 929 (1911), \textit{appeal dismissed per stipulation}, 231 U.S. 761 (1913).
ants. They are also inartistic and unsightly. In cases of fire they often cause their spread and constitute barriers against their extinction; and in cases of high wind their temporary character, frail structure and broad surface render them liable to fall upon and injure those who may happen to be in the vicinity. The evidence shows and common observation teaches us that the ground in the rear thereof is being constantly used as privies and dumping ground for all kinds of waste and deleterious matters, and thereby creating public nuisances and jeopardizing public health; the evidence also shows that behind these obstructions the lowest form of prostitution and other acts of immorality are frequently carried on, almost under the public gaze; they offer shelter and concealment for the criminal while lying in wait for his victim, and last, but not least, they obstruct the light, sunshine and air which are so conducive to health and comfort.50

*St. Louis Gunning* and similar cases51 fostered the development of the majority rule in modern billboard regulation cases, which is best described as the aesthetics-plus doctrine: "whether or not, disregarding the evidence relating to the beauty of the neighborhood and the streets and other aesthetic purposes, the ordinance should be sustained on the grounds of public health, safety, morals or general welfare."52 In other words, a court must invalidate police-power legislation based solely on aesthetics, but such legislation may be upheld if it serves traditional police-power objectives in addition to furthering aesthetic goals.53

The recognition of the general welfare as a legitimate police-power objective by State courts54 and the U.S. Supreme Court in the 1926 case of *Village of Euclid v. Ambler Realty Co.*55 broadened the permissible objectives of the police power to include public convenience, general prosperity, and the economic well-being of the community.56 This addition increased the number of possible justifications for upholding

50. *Id.* at 145, 137 S.W. at 942.
53. *See generally Comment, supra note 41, at 205.
55. 272 U.S. 365 (1926).
56. *See E. McQuillan, supra note 30, § 25.19.*
billionaire regulations under the aesthetics-plus doctrine. Courts accepting the "aesthetics-plus" doctrine could then sustain billboard controls because "economic and aesthetic considerations together constitute the nearly inseparable warp and woof of the fabric upon which the modern city must design its future." Courts have thus allowed cities to achieve the primarily aesthetic objective of removing unsightly billboards under the cover of protecting property values, promoting tourism, attracting business to the community, preventing urban decay, maintaining historic landmarks, and facilitating traffic safety.

a. Protecting Property Values

Courts have held that protection of residential property values is an adequate police-power justification to support regulations on the use of private property. For example, in State ex rel. Saveland Park Holding Corp. v. Wieland, the Wisconsin Supreme Court upheld a small residential community's ordinance prohibiting issuance of building permits whenever the local planning commission found that the proposed design contrasted with existing structures so greatly "as to cause a substantial depreciation in the property values." The court observed that, although the city council had adopted the ordinance for aesthetic reasons, "[a]nything that tends to destroy property values of inhabitants of the village necessarily adversely affects the prosperity, and therefore the general welfare, of the entire village." Similarly, the Connecticut Supreme Court sustained an ordinance prohibiting billboards from residential neighborhoods, observing that "esthetic considerations as are involved in the regulation or prohibition of signboards cannot be divorced from material and economic factors; the presence of signboards near property may definitely affect its value and the comfort of those who may be living upon it."

57. See Comment, supra note 41, at 205-06.

In the 1930's, the U.S. Supreme Court removed the doctrinal straightjacket from the regulatory efforts of State and local government by relaxing requirements of "strict necessity" and presuming that police-power enactments were valid. Comment, supra note 42, at 813. See, e.g., Nebbia v. New York, 291 U.S. 502 (1934). See generally Agnor, Beauty Begins a Comeback: Aesthetic Considerations in Zoning, 11 J. Pub. L. 260 (1962).

59. See generally, Norton, supra note 36, at 180-81.
60. 269 Wis. 262, 29 N.W.2d 217 (1955).
61. Id. at 265, 69 N.W.2d at 219.
62. Id. at 270, 69 N.W.2d at 222.
63. Murphy v. Town of Westport, 131 Conn. 292, 297, 40 A.2d 177, 179 (1944) (action to enjoin enforcement of ordinance banning billboards from residential neighborhoods remanded for additional factfinding). See also Naegele Outdoor Advertising Co. v. Village of
b. Promoting Tourism

Several State courts have upheld billboard bans designed to improve the beauty of an area, thereby attracting more tourists and improving the local economy.\textsuperscript{64} Florida courts have been particularly sensitive to the beneficial effect of aesthetic zoning on the State's substantial tourist trade.\textsuperscript{65} Before \textit{Metromedia}, California Courts of Appeal also often used the promoting-tourism rationale in upholding billboard regulations.\textsuperscript{66} Courts have been especially receptive to this rationale where billboard-prohibition ordinances are aimed at preserving unique historical districts.\textsuperscript{67}

c. Other Economic Considerations

Courts have relied on a variety of economic considerations besides tourism to justify billboard regulations under the aesthetics-plus doc-

\textsuperscript{64} Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968) (upholding a residential billboard ban because of the effects of billboards on property values); United Advertising Corp. v. Metuchan, 42 N.J. 1, 5, 198 A.2d 447, 449 (1964) (upholding billboard ban in a residential community because "aesthetics and economics coalesce" where regulation attempts to protect property values of residential neighborhood).

Some courts, however, have refused to sustain a billboard regulation aimed at preserving property values absent evidence that the unaesthetic use is likely to depress property values. \textit{See, e.g.}, Farrell v. Township of Teaneck, 126 N.J. Super. 460, 462, 315 A.2d 424 (1974) ("Although it is a generally accepted fact that the value of property is inextricably intertwined with aesthetic considerations, we cannot assume that every tasteless choice of paint color or inartistic gardening effort results in a decrease in property values.").

\textsuperscript{65} \textit{See, e.g.}, Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (N.D. 1978); Opinion of the Justices, 103 N.H. 268, 270, 169 A.2d 762, 764 (1961) ("[W]hatever tends to promote the attractiveness of roadside scenery for visitors . . . may be held subject to the police power."); Markham Advertising Co. v. State, 73 Wash. 2d 405 (1968), \textit{appeal dismissed}, 393 U.S. 316 (1969).

\textsuperscript{66} \textit{See, e.g.}, Sunad, Inc. v. City of Sarasota, 122 So. 2d 611 (Fla. 1960); Merritt v. Peters, 65 So. 2d 861 (Fla. 1953); City of Miami Beach v. Ocean and Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941). \textit{Metromedia} cites \textit{Merritt} as approving billboard size regulation for solely aesthetic purposes. 26 Cal. 3d at 861 n.10, 610 P.2d at 413 n.10, 164 Cal. Rptr. at 516 n.10. A close reading of \textit{Merritt} and other Florida cases, however, suggests that the Florida courts view aesthetics regulation as promoting the general economic welfare of the state by making the environment more attractive for tourists. \textit{See Comment, Zoning Ordinance — Enhancement of Aesthetic Values Alone Not Sufficient Basis For Exercise of Police Power in Florida}, 4 FLA. ST. U.L. REV. 163, 169 (1976); Comment, \textit{supra} note 53, at 223 n.96.


\textit{boonnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnnn
trine. For example, in *Donnelly Advertising Corp. v. City of Baltimore*, the Maryland Court of Appeals sustained a ban on all offsite billboards in an urban renewal project area because of the effect billboards were thought to have on neighborhood blight and deterioration. A related economic consideration, attracting businesses and settlers to the community, provided an aesthetics-plus justification for a California billboard regulation. Similarly, a Washington court relied partly on the interest in protecting the public's investment in its highway system to justify a statute prohibiting billboards along roadways.

**d. Facilitating Traffic Safety**

Traffic safety is the legitimating objective most commonly used to uphold billboard regulations under the aesthetics-plus doctrine. The traffic-safety rationale permits regulation of billboards because billboards can obstruct a driver's view of cross traffic and even a fleeting distraction of a driver's attention might cause an accident. Some commentators contend that studies have not demonstrated a definite correlation between billboards and automobile accidents and that billboards may actually contribute to highway safety by reducing "highway hypnosis." As the *Metromedia* court observed, however, the legislative judgment on this question must stand unless the challenger of the ordinance has proved that the there is no rational connection between billboard control and traffic safety.

The preceding discussion demonstrates that many billboard regu-
lations will be upheld because there is an arguable police-power justification for the legislation and the burden of proof is on the challenger of an ordinance. However, many such decisions under the aesthetics-plus doctrine contain defective reasoning. First, the regulations are often broader in scope than is justified by traditional police-power objectives: a city-wide billboard ban may affect some billboards that have no effect on traffic safety or any of the other nonaesthetic objectives of the ordinance. Second, the foundation of the aesthetics-plus doctrine is even more doubtful: it is unclear why aesthetics are a proper justification when in combination with another police-power objective and yet not when standing alone. Courts would improve the reasoning in billboard cases by abandoning legal fiction and either recognizing aesthetics alone as a proper justification for billboard regulation or declaring that aesthetics are never a proper police-power objective. The following section considers the several modern cases, including Metromedia, that take the first approach and uphold billboard regulations solely on the basis of their impact on aesthetics.

B. Aesthetics Alone As a Justification For Billboard Regulations

1. The Modern Trend

In Metromedia, the Supreme Court of California abandoned the aesthetics-plus doctrine. Rejecting the rule still endorsed by a majority of jurisdictions, the California court joined the growing number of courts and commentators recognizing that aesthetics alone may be a

75. See notes 33-34 & 74 supra and accompanying text.
76. The Metromedia court stated that it could have reversed the trial court's grant of summary judgment solely on traffic-safety grounds but took a broader approach to avoid unnecessary litigation on remand. 26 Cal. 3d at 858-59, 610 P.2d at 411-12, 164 Cal. Rptr. at 514-15.
77. The court declined to distinguish Varney & Green v. Williams, see text accompanying notes 18-19 supra, even though considerations of traffic safety, tourism, or property values would have allowed it to do so. Instead it held that aesthetic considerations alone justified the San Diego billboard ban. 26 Cal. 3d at 860-61, 610 P.2d at 412-13, 164 Cal. Rptr. at 515-16.
80. See Dukeminier, supra note 37, at 218; Norton, supra note 36, at 171; Rodda, supra note 38, at 149; Sutton, supra note 73, at 194; Williams, Subjectivity, Expression and Privacy: Problems of Aesthetic Regulation, 62 MINN. L. REV. 1 (1977); Comment, Aesthetic Considerations in Land Use Planning, 35 ALB. L. REV. 126 (1970); Comment, supra note 57, at 204; Comment, The Truth About Beauty: The Role of Aesthetics in Billboard Legislation, 9 ENVT'L L. 113 (1978); Note, Beyond the Eye of the Beholder: Aesthetics and Objectivity, 71 MICH. L. REV. 1438 (1973); Note, Municipal Corporations: Sign Control Through Municipal Zoning
The court embraced the U.S. Supreme Court's reasoning in *Berman v. Parker*, an opinion relied on by several jurisdictions that permit legislation based on aesthetic considerations. In *Berman*, which affirmed the constitutionality of a Washington, D.C. slum clearance project, the Court declared that the concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. If those who govern the District of Columbia decide that the Nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

New York was an early leader in the "aesthetics alone" movement. In 1967, the New York Court of Appeals upheld a municipal ordinance banning offsite billboards from a small residential community on exclusively aesthetic grounds in *Cromwell v. Ferrier*. The court recog-
nized that "realistically, the primary objective of any anti-billboard ordinance is an aesthetic one," but limited its holding to aesthetic considerations that "bear substantially on the economic, social and cultural patterns of a community." 

Two years earlier, the Supreme Court of Oregon had accepted aesthetics as a valid police-power objective in *Oregon City v. Hartke*. The court upheld on solely aesthetic grounds an ordinance banning auto wrecking yards from a residential community, observing that it is not irrational for those who live in a community from day to day to plan their physical surroundings in such a way that unsightliness is minimized. The inhabitants of the city have the right to forego the economic gain and the person whose business plans are frustrated is not entitled to have his interest weighed more heavily than the predominant interest of others in the community.

Massachusetts, which pioneered aesthetic regulation of billboards, Kentucky, Mississippi, New Jersey, Colorado, and

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86. 19 N.Y.2d at 269, 225 N.E.2d at 753, 279 N.Y.S.2d at 27.
87. Id. at 272, 225 N.E.2d at 755, 279 N.Y.S.2d at 29-30.
88. 240 Or. 35, 400 P.2d 255 (1965).
89. Id. at 50, 400 P.2d at 263.
90. Id. See also Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964) (upholding Kentucky Junkyard Act banning auto and junk yards within 2000 feet of roadway unless hidden from view of passing motorists).
91. See General Outdoor Advertising Co. v. Dep't of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935). Although the court in General Outdoor Advertising based its decision upholding a billboard statute on both aesthetic and safety grounds, it noted that the aesthetic considerations, "the preservation of scenic beauty and places of historical interest," would have been sufficient support for the billboard regulation even in the absence of the safety considerations. Id. at 187, 193 N.E. at 816. In John Donnelly & Sons v. Outdoor Advertising Bd., 369 Mass. 206, 339 N.E.2d 709 (1975), the Supreme Judicial Court of Massachusetts followed General Outdoor Advertising and upheld an offsite billboard ban, rejecting the aesthetics-plus doctrine as a "legal fiction" that "obscures the basic issues" behind billboard control. Id. at 217, 339 N.E.2d at 716. The court deemed irrelevant any distinction between aesthetic regulation in urban and rural areas, since "urban residents are not immune from ugliness." Id. at 223, 339 N.E.2d at 719.

Utah all recognize aesthetic considerations as an element of the general welfare. Ohio will permit billboard regulation for aesthetic purposes, but only if "the maintenance of a free standing sign would be in such gross contrast to the surrounding area as to be patently offensive to the surrounding neighborhood, rather than merely a matter of taste." In addition, Maine Vermont and Hawaii have enacted comprehensive, statewide, offsite billboard prohibitions. California

92. Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964) (upholding Kentucky Junkyard Act banning auto and junk yards within 2000 feet of a roadway unless hidden from the view of passing motorists); Moore v. Ward, 377 S.W.2d 881 (Ky. 1964) (upholding statute banning offsite billboards within 660 feet of highways).

93. Mississippi State Highway Comm'n v. Roberts Enterprises, 304 So. 2d 637 (Miss. 1974) (upholding statute prohibiting billboards within 660 feet of highways, citing Berman, see text accompanying notes 82-84 supra).

94. In State v. Miller, 83 N.J. 402, 416 A.2d 821 (1980), handed down shortly after the California Supreme Court's decision in Metromedia, the New Jersey Supreme Court joined "the modern trend to recognize aesthetics as a proper basis for land use regulation," 416 A.2d at 824 n.4, observing that "[t]he development and preservation of natural resources and clean, salubrious neighborhoods contribute to psychological and emotional stability and well-being as well as stimulate a sense of civic pride." 416 A.2d at 827.


96. In Buhler v. Stone, 533 P.2d 292 (Utah 1975), the Utah Supreme Court upheld a ban on unsightly and deleterious objects, rejecting a policy that would "scorn the rose and leave the cabbage triumphant." Id. at 294. In dissent, Justice Ellett queried: "If one must remove unsightly objects should he be permitted to keep a Corvette automobile?" Id. at 295.


98. 23 Maine Rev. Stat. Ann §§ 1901-1925 (1978). The Maine statute prohibiting all offsite billboards statewide recently was held unconstitutional in John Donnelly & Sons v. Campbell, No. 79-1575 (1st Cir. Dec. 22, 1980). The court recognized that enhancement of the State's natural beauty was a proper police-power objective, but found the statute unconstitutional under the first amendment. See note 181 infra. See also Wright v. Michard, 160 Me. 164, 173, 200 A.2d 543, 548 (1964) (aesthetic considerations alone could not support a police-power enactment).


We accept beauty as a proper community objective, attainable through use of the police power. We are mindful of the reasoning of most courts that have upheld the validity of ordinances regulating outdoor advertising and of the need felt by them to find some basis in economics, health, safety or even morality. We do not feel so constrained.

Id. at 36, 429 P.2d at 827 (citation omitted). Hawaii presents a special case, because article VIII(8), section 5 of the Hawaii Constitution provides that "The State shall have power to conserve and develop its natural beauty, objects and places of historic or cultural interest, sightliness and physical good order, and for that purpose private property shall be subject to reasonable regulation."
now joins these jurisdictions by finding aesthetic considerations a sufficient basis for upholding police-power legislation.

2. Policy Considerations

The trend toward aesthetic zoning is consistent with the policies behind traditional land-use regulation and contributes substantially to the general welfare of urban society. As with other land-use regulation, aesthetic zoning involves balancing community interests, here in beautification, against individual interests in the unfettered use of private property. Aesthetic regulation of land use is not a radical departure from traditional police-power regulation, but rather is based on the same policies underlying other zoning and environmental protection laws. The traditional common law doctrine of nuisance protects property owners against offensive sounds or odors emitted by neighboring owners. Aesthetic regulation simply places a premium on protection of another aspect of individual sensibilities, extending the respect accorded the ears and nose to the eyes as well.

In *Metromedia*, the California Supreme Court accepted aesthetics as a legitimate police-power objective, refusing to perpetuate the aesthetics-plus doctrine. The court recognized that there is a significant community interest in maintaining and improving the aesthetic qualities of our residential, occupational, and recreational environments. The remaining aesthetics-plus jurisdictions should recognize that enhancing aesthetic values promotes the general welfare. Courts should not feel compelled to grasp at more traditional police-power objectives to uphold aesthetic regulations. Stubborn judicial adherence to conventional, doctrinal labels prevents effective use of the police power to meet pressing social problems. In addition, eliminating the legal fiction of aesthetic-plus will promote responsible, intellectually honest jurisprudence. For these reasons, other jurisdictions should follow the California Supreme Court and the growing minority of States that recognize the legitimacy of aesthetic interests and evaluate aesthetic regulations under the same reasonableness standards applied to other police-power legislation.

Once a court recognizes the validity of aesthetic bases for regula-

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101. For a general discussion of the balancing of community and individual interests, see Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-95 (1926).
102. Thus, in *Metromedia*, the court observed that "[p]resent day city planning would be virtually impossible under a doctrine which denied a city authority to legislate for aesthetic purposes under the police power." 26 Cal. 3d at 862, 610 P.2d at 414, 164 Cal. Rptr. at 517. See generally W. PROSSER, THE LAW OF TORTS 571-612 (4th ed. 1971).
103. Most nuisance cases involve activities that produce unpleasant sounds or smells rather than sights. See id. at 583-85.
104. The court declined to distinguish *Varney & Green v. Williams*, see text accompanying notes 16-19 supra, but overruled it instead. See note 77 supra.
tion, it faces a critical question: to what extent may government regulate private property solely for aesthetic purposes? The Metromedia court did not reach this question. The San Diego billboard ordinance, because it prohibited rather than regulated billboard use, raised no problems of arbitrary or discriminatory application by enforcement or prosecuting officials. Thus, the court did not confront a critical problem that may be presented by billboard regulation: the absence of objective standards necessary to ensure meaningful judicial review, to limit administrative discretion, and most importantly, to prevent excessive governmental intrusion into matters of subjective taste and individual expression.

What is beauty? If government may regulate private land use for solely aesthetic purposes, this question becomes relevant to jurists and lawmakers as well as philosophers. Municipal beautification in principle may be an easily understood and generally approved objective, but aesthetic tastes vary from person to person. As a result, the terms of any ordinance serving primarily aesthetic ends often will be somewhat imprecise. Nonetheless, constitutional guarantees of due process and equal protection require that a police-power ordinance contain objective, predictable limitations on governmental power before the legislature may act in the name of aesthetics. 106

a. Meaningful Judicial Review

Objective standards for aesthetic regulation are essential for meaningful judicial review. Courts cannot identify governmental interests in aesthetic regulation, evaluate the legitimacy of such interests, and determine whether the regulations are reasonably designed to protect those interests without clearly drawn standards setting forth specific limitations applicable to a regulated land use. Courts also cannot, with consistency, assess the reasonableness of ordinances proscribing "unaesthetic" or "unattractive" uses or enforce such ordinances with predictability. Courts lack the institutional competence to substitute their aesthetic judgments for those of the legislature; they cannot declare something beautiful as a matter of law. Effective judicial supervision over enforcement officials requires objective criteria within aesthetic regulations. Judicial deference to administrative enforcement

106. Several commentators insist that the term "aesthetics" is no more imprecise than other legal concepts such as property and malice aforethought. See Dukeminier, supra note 37, at 218; Agnott, Beauty Begins a Comeback: Aesthetic Considerations in Zoning, 11 J. Pub. L. 260 (1962). But cf. Cromwell v. Ferrier, 19 N.Y.2d at 272, 225 N.E.2d at 755 (aesthetic considerations should "bear substantially on the economic, social and cultural patterns of a community"); State v. Buckley, 16 Ohio St. 2d 128, 132, 243 N.E.2d 66, 70 (1968) (proscribed uses must be patently and grossly unattractive, not just in bad taste); Norton, supra note 36, at 183 (suggesting standard of incompatability with surrounding neighborhood).
of such regulations in the absence of objective standards raises serious constitutional problems.

b. Administrative Discretion

Because aesthetic considerations are largely matters of personal taste, local legislative bodies may be unable to reach the political consensus necessary to formulate aesthetic standards that will be acceptable to an entire community. Consequently, legislators may adopt vague, subjective standards that leave vast discretion in enforcement officials. The San Diego ordinance upheld in *Metromedia* avoids this problem by completely prohibiting an entire class of uses, leaving no room for individual administrative judgments. But when an administrative body, armed only with a general mandate proscribing “unaesthetic” uses, must approve architectural style, public art displays, billboard placements, or other land uses on a case-by-case basis, the potential for arbitrary, inconsistent, or discriminatory enforcement looms ominously over the community.  

107 A legislative scheme that regulates rather than prohibits must necessarily vest some discretion in enforcement agencies. Nevertheless, legislative bodies should incorporate objectively ascertainable standards into aesthetic regulations to prevent abuse of administrative discretion.

c. Individual Autonomy

Aesthetic zoning legislation must include specific limitations on governmental power to satisfy constitutional guarantees of due process and equal protection and the need for judicial review. In this respect, the problems created by aesthetic zoning differ only by degree from those presented by other forms of land-use control. The unique nature of aesthetic regulation, however, raises a new and special problem — the danger of excessive governmental intrusions into matters of subjective taste and individual expression — that makes imperative the need for objective standards.

In a democratic society, regulation of private interests necessarily involves the imposition of majoritarian values on minority interests.  

108 Unlike many subjects of governmental regulation, however, aesthetic values are difficult to articulate and often stem from deeply personal feelings. Thus, attempts to regulate in this area are likely to be felt as especially intrusive. Definitions of art and beauty belong to the individual, not the government. For this reason, regulation for aesthetic


108. See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding ordinance that restricted land use to one-family dwellings that could not be inhabited by more than two unrelated persons).
purposes must be subject to clear limits. Aesthetic legislation without objectively ascertainable standards and specific limits on government authority threatens the fundamental dignity of the individual. In drafting aesthetic legislation, governments must take care not to “trespass through aesthetics on the human personality.”

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d. Guidelines for Aesthetic Regulation

The following policy guidelines for aesthetic regulation under the police power can check the potential abuses inherent in an aesthetic zoning system. These four points, which focus on the problem of sign control, are also applicable to other forms of aesthetic zoning. They require specific limitations on the power of government to regulate land use for solely aesthetic purposes in order to prevent unfettered administrative discretion and protect against government intrusion into matters of subjective taste and individual expression.

First, an ordinance may completely prohibit a particular use. The billboard ban in *Metromedia* provides an example of such an ordinance. An ordinance prohibiting all uses within a specifically described class avoids the danger of arbitrary or discriminatory administrative discretion and provides a judicially manageable standard for review. In addition, complete prohibition ordinarily will require broad community consensus that the prohibition of the proscribed use would contribute to the general welfare of the community.

Second, an ordinance may regulate the location of uses for aesthetic purposes if limited to protecting objectively ascertainable government interests bearing a direct connection with the aesthetic objective, such as protecting areas of historic significance or scenic beauty. Although at first glance they appear quite similar, this requirement differs from the aesthetics-plus doctrine. This proposed guideline recognizes aesthetics alone as a legitimate police power objective. In order to limit the intrusion on private interests in matters of personal taste and ensure meaningful judicial review, however, this rule requires the local government body to identify the interest it seeks to promote, such as protecting the character of residential neighborhoods or preserving areas of scenic beauty. The courts then may evaluate the reasonableness of the ordinance and the fairness of administrative enforcement by comparing the government’s actions with the nature of its stated interest.

Third, the scope of aesthetic legislation and administrative enforcement must not exceed the government’s stated interest. This requirement provides an additional check on the possible manipulation

of regulatory powers by providing reasonably objective guidelines for judicial review. A reviewing court could protect individual property owners' interests by striking down a statute broader than the terms of the government's stated interest. This requirement also enables reviewing courts to monitor administrative action for consistency and evenhandedness within the proper scope of an aesthetic regulatory ordinance and to strike down as unconstitutionally vague any ordinance that prohibits uses described in general terms such as "unaesthetic" or "unattractive."

Finally, an aesthetic zoning ordinance may not require affirmative conduct. Forcing an individual to paint her house a specific color or rebuild an existing structure to meet a particular architectural design threatens first amendment rights of free expression. While the line between affirmative and negative conduct under an aesthetic ordinance at times may be difficult to draw, fundamental constitutional interests mandate inclusion of this final requirement.

III
BILLBOARD REGULATION AND THE FIRST AMENDMENT

Billboards may contain either commercial or noncommercial messages. Courts, however, have generally treated billboards as commercial speech by focusing on the medium of expression rather than on the content of the message. Since the 1940's, the U.S. Supreme Court has accorded "commercial speech" less protection under the first amendment than has traditionally been granted to other types of speech. Thus, billboards initially received no first amendment protection and later attained limited protection.¹¹⁰

In Metromedia, the California Supreme Court held that the San Diego ordinance did not violate the first amendment to the Federal Constitution. The court relied heavily on the U.S. Supreme Court's summary dismissals of similar challenges in three recent cases.¹¹¹ In a further discussion supporting its validation of the ordinance under the California Constitution, the court applied the test developed in commercial speech cases and found that the San Diego ordinance satisfied that standard.¹¹² Contributing in part to its decision were the court's recognition that billboards are a particularly obtrusive form of communication¹¹³ and its construction of the ordinance to allow "adequate alternative means of communication."¹¹⁴

¹¹⁰ See Part III.B infra.
¹¹¹ Metromedia, Inc. v. City of San Diego, 26 Cal. 3d at 867, 610 P.2d at 417, 164 Cal. Rptr. at 520. See note 23 supra and accompanying text.
¹¹² Id. at 867-71, 610 P.2d at 417-20, 164 Cal. Rptr. at 520-23.
¹¹³ Id. at 870, 610 P.2d at 419, 164 Cal. Rptr. at 522.
¹¹⁴ Id. at 869, 610 P.2d at 418, 164 Cal. Rptr. at 521.
Metromedia addresses the first amendment issues raised by the San Diego ordinance, but it and other recent billboard opinions do not discuss several critical first amendment problems inherent in billboard prohibition. First, by placing the "commercial speech" label on all billboard communication, the courts ignore the effect of sign prohibitions on political and ideological speech. Second, by applying the commercial speech doctrine, courts in billboard cases necessarily face all the shortcomings of that doctrine in its present form, including the absence of articulated first amendment values justifying limited protection for commercial speech and the difficulty of distinguishing between commercial and other types of speech. Third, courts have engaged in result-oriented balancing of the first amendment interests and countervailing considerations giving rise to billboard regulation both by manipulating the commercial speech test itself and by resorting to other make-weight doctrines, such as the captive-audience theory, which are inappropriate in billboard cases. In this fashion, these cases often dispose of first amendment arguments with jargon-laden, superficial analysis and overlook the problems of banning a unique medium of communication that carries a specific type of message to a particular audience in a public forum.

This Part will discuss first amendment analysis of billboard legislation. The discussion first sets forth the reasons that treatment of billboard cases solely under the commercial speech doctrine fails to protect the full range of first amendment values at stake in these cases. Recognizing, however, that the courts frequently apply commercial speech standards to sign control regulations and that the doctrine may justifiably be applied to regulations of purely commercial signs, this Part reviews the development of the commercial speech doctrine and its use in billboard cases and discusses the problems presented by its application. This Part concludes with a first amendment analysis of the ordinance challenged in Metromedia.

A. Applicability of the Commercial Speech Doctrine to Billboard Cases

Courts in many jurisdictions have sustained billboard-control legislation under commercial speech standards. Judicial insistence on classifying such legislation as regulation of commercial speech is a fundamental flaw in the first amendment analysis of these cases. Characterizing all billboard communication as commercial speech confuses a medium of expression with the kinds of messages it may carry. Although billboards often are constructed and maintained by commercial
enterprises, are used to display information for a price, and frequently carry commercial advertisements, they may also present political, cultural, social, and religious messages. These types of messages, if broadcast by radio, television, newspaper, or any other medium would receive full first amendment protection, whether or not such information was presented for a price. No rational basis exists in the first amendment for distinguishing information presented in a newspaper from the same information displayed on a billboard. The Constitution protects the statement and the right to communicate the statement, regardless of the physical means by which it is presented.

Courts should adjust the focus of first amendment analysis in billboard cases and look to the type of message in question rather than the method for communicating that message. Because the courts already apply different standards of first amendment protection to different kinds of communication, such an approach would not necessarily violate the maxim prohibiting regulation of expression on the basis of content. Expression involving obscenity, fighting words, defamatory statements, commercial speech, and political

117. See Metromedia, Inc. v. City of San Diego, 26 Cal. 3d at 888-90, 610 P.2d at 430-31, 164 Cal. Rptr. at 533-34 (Clark, J., dissenting).
120. See Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748, 761 (1976) ("Speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. . . . Speech likewise is protected even though it is carried on in a form that is sold for a profit."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964).
121. Although most courts have analyzed billboard-control legislation under the commercial speech doctrine, thereby confusing the medium with the type of messages being conveyed, a few courts have engaged in a more careful analysis. For example, in State v. Miller, 83 N.J. 402, 416 A.2d 821 (1980), the court struck down a municipal ordinance prohibiting all signs from residential areas, excepting real estate, government, or lot identification signs. The court noted that defendant's "public interest" sign constituted "political speech and occupies a preferred position in our system of constitutionally protected interests." 416 A.2d at 826 (citing Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943)). See also John Donnelly & Sons v. Campbell, No. 79-1575 (1st Cir. Dec. 22, 1980) (finding Maine billboard ban unconstitutional because of its burden on ideological speech; implying that the ban would have been constitutional if it had applied only to commercial speech); Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1975), cert. denied sub nom. Leipzig v. Baldwin, 431 U.S. 913 (1977).
122. Regulation of expression based on its content is generally held to violate the first amendment. See Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972).
126. See Part III.B infra.
messages all receive distinctive first amendment treatment. The first amendment affords a sliding scale of constitutional protection to these various forms of expression, depending on the values to be served by protecting each one. That a billboard rather than a book conveys information does not change these basic principles.

Despite longstanding recognition of these principles as fundamental to first amendment analysis, the courts presently find the all-encompassing "commercial speech" label a more comfortable vehicle for addressing the first amendment issues raised by billboard regulation. The courts must reject this simplistic mode of analysis before they can fully serve the values protected by the first amendment. Because most courts continue to apply the commercial speech doctrine, however, the following section will discuss the first amendment issues raised by application of this doctrine to sign control.

B. The Development of the Commercial Speech Doctrine

I. The Valentine Era

The U.S. Supreme Court held in Valentine v. Chrestensen that the first amendment does not protect purely commercial speech. In Valentine, the defendant had been convicted under a local ordinance prohibiting distribution of commercial advertising handbills. The Court upheld his conviction on the ground that, although "the streets are proper places for the exercise of the freedom of communicating information . . . [and government] may not unduly burden or proscribe its employment in these public thoroughfares. . . . [t]he Constitution imposes no such restraint on government as respects purely commercial advertising." The Court also held that the defendant could not evade the ordinance and elevate the leaflet to a constitutionally protected status by adding a political message on the back of the leaflet, because "if that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append

127. See Cohen v. California, 403 U.S. 15 (1970) (reversing conviction of defendant for disturbing the peace by wearing jacket bearing words "Fuck the Draft" inside courthouse; rejecting characterization of defendant's expression as obscenity or fighting words); Roth v. United States, 354 U.S. 476, 484 (1957) (discussing contrasts between first amendment protection of the "interchange of ideas for the bringing about of political and social changes" and expressions that are "utterly without redeeming social importance," such as obscenity and libel). See also Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).


129. See Part III.B.3 infra. Their reluctance to address the varying types of messages conveyed on billboards may stem from the difficulties of distinguishing between commercial and political speech. See Part III.C.3 infra.

130. 316 U.S. 52 (1942).

131. Id. at 54.
a civic appeal or moral platitude to achieve immunity from the law's command."\textsuperscript{132}

Almost immediately following this bold first step establishing the commercial speech exception the Court began limiting its scope. In three cases decided one year after \textit{Valentine}, the Court overturned the convictions of Jehovah's Witnesses who distributed religious tracts and solicited funds in violation of statutes similar to that upheld in \textit{Valentine}\.\textsuperscript{133} Recognizing that "[s]ituations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial,"\textsuperscript{134} the Court nevertheless held that handbills distributed "in the pursuit of a clearly religious activity" could not be prohibited only because they invited the purchase of religious books or solicited funds "for religious purposes."\textsuperscript{135} Thus, it became clear that the commercial speech doctrine would not be applied to deprive speech of its protected status only because it was disseminated as a paid advertisement.\textsuperscript{136} In addition to this limitation of the doctrine to "purely commercial" expression,\textsuperscript{137} the commercial speech rule was harshly criticized in later cases.\textsuperscript{138}

\begin{itemize}
  \item \textsuperscript{132} Id. at 55.
  \item \textsuperscript{133} Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943).
  \item \textsuperscript{134} Murdock v. Pennsylvania, 319 U.S. 105, 110 (1943).
  \item \textsuperscript{135} Jamison v. Texas, 319 U.S. 413, 417 (1943). The same linedrawing problem between commercial and other forms of speech continues today because of the subordinate level of protection afforded commercial speech. See Part III.C.3 infra.
  \item In Breard v. Alexandria, 341 U.S. 622 (1951), the Court affirmed a conviction for selling periodicals door-to-door in violation of ordinance prohibiting solicitation for the purpose of selling merchandise at private homes without prior consent of the occupant, distinguishing religious tract cases on ground that this was purely commercial transaction. In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), the Court observed that "[s]ince the decision in \textit{Breard}, however, the Court has never denied protection on the ground that the speech in issue was \textquoteleft commercial speech.'" \textit{Id.} at 759 (emphasis in original).
  \item \textsuperscript{136} See also N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964). The Court distinguished the \textit{Valentine} advertising leaflet from a political advertisement printed in a newspaper by a clergyman that criticized a police official's actions directed against the civil rights movement. The \textit{Sullivan} Court observed that the latter message "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." \textit{Id.} at 266.
  \item \textsuperscript{137} Murdock v. Pennsylvania, 319 U.S. 105, 110 (1943).
  \item \textsuperscript{138} Justice Douglas, a member of the \textit{Valentine} majority, subsequently described that decision as "casual, almost offhand," Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring), and later declared the commercial speech rule "ill-conceived" and "not weather[ing] subsequent scrutiny." Dunn & Bradstreet, Inc. v. Grove, 404 U.S. 898 (1971) (Douglas, J., dissenting from denial of certiorari). In \textit{Grove} he further stated: The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as
Although questioned, criticized, and distinguished, *Valentine* remained the law, and the Court continued to deny first amendment protection to "purely commercial" speech into the 1970's.\(^{139}\) Lower courts dismissed first amendment challenges to billboard ordinances by classifying sign communication as "commercial speech" and holding it unprotected under *Valentine*.\(^{140}\) The *Valentine* hurdle inhibited most challengers from even raising free speech objections to content-neutral municipal sign ordinances.\(^{141}\)

### 2. Later Development of the Commercial Speech Doctrine: Limited Protection

The evolution of the commercial speech doctrine took a radical turn with three U. S. Supreme Court decisions in the mid-1970's. In *Bigelow v. Virginia*,\(^{142}\) the Court reversed the conviction of a Virginia newspaper editor who violated a state statute prohibiting the circulation of information "encouraging" abortion\(^{143}\) by publishing an advertisement for legal abortion services available in New York. The Court distinguished the *Bigelow* advertisement from the flyer banned in *Valentine*, concluding that while the handbill did no more than "simply propose a commercial transaction," the abortion ad "contained factual material of clear public interest."\(^{144}\) The Court adopted a balancing approach\(^{145}\) and declared that "a state cannot foreclose the exercise of constitutional rights by mere labels."\(^{146}\) Lower courts were admonished not to use the "commercial speech" label to escape the task of assessing the first amendment interest at stake and weighing it against

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\(140\) See generally L. Tribe, supra note 123, § 12-15.

\(141\) See, e.g., United Advertising Corp. v. Borough of Raritan, 11 N.J. 144, 93 A.2d 362 (1952) (upholding prohibition of offsite billboards in small residential community).


\(144\) 421 U.S. at 822.

\(145\) See id. at 826.

\(146\) Id. at 826 (quoting NAACP v. Button, 371 U.S. 415, 429 (1963)).
the public interest allegedly served by the restriction.\textsuperscript{147}

\textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council}\textsuperscript{148} extinguished whatever life remained in \textit{Valentine} after \textit{Bigelow}. The Court in \textit{Virginia Pharmacy Board} held unconstitutional a Virginia statute prohibiting price advertising by pharmacists. Observing that in \textit{Bigelow} "the notion of 'unprotected commercial speech' all but passed from the scene,"\textsuperscript{149} the Court declared that speech that only proposes a commercial transaction is not "so removed from any 'exposition of ideas' . . . that it lacks all protection."\textsuperscript{150}

The Court attempted in \textit{Virginia Pharmacy Board} to articulate values justifying first amendment protection for "purely commercial" speech. First, the "consumer's interest in the free flow of commercial information . . . may be . . . keener than his interest in the day's urgent political debate."\textsuperscript{151} Second, advertising "is indispensable to the proper allocation of resources in a free enterprise system" and to "the formation of intelligent opinions as to how that system ought to be regulated or altered." Thus, protection of commercial speech furthers the first amendment's primary goal of "enlighten[ing] public decisionmaking."\textsuperscript{152} The Court recognized, however, that a state could impose proper time, place, and manner restrictions\textsuperscript{153} on the dissemination of commercial information and prohibit false or misleading advertising.\textsuperscript{154} Significantly, the Court noted that the "common-sense differences" between commercial and other forms of speech "suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired."\textsuperscript{155} Thus, the Court replaced the definite, though difficult to draw, line between protected political and unprotected commercial speech with a shadowy, vague, and equally difficult to draw line distinguishing fully protected political speech from only partially protected commercial speech.

\textit{Linmark Associates, Inc. v. Willingboro}\textsuperscript{156} completed the trilogy of cases revolutionizing the commercial speech doctrine. The Court struck down a Willingboro, New Jersey ordinance prohibiting the post-

\textsuperscript{147} \textit{Id.} at 831-32. Justices Rehnquist and White dissented, objecting to the majority's distinguishing the \textit{Bigelow} advertisement on the basis of content. They concluded that whatever minimal public interest and factual information was contained in the notice did not alter the advertisement's "classically commercial character." \textit{Id.} at 832.

\textsuperscript{148} 425 U.S. 748 (1976).

\textsuperscript{149} \textit{Id.} at 759.

\textsuperscript{150} \textit{Id.} at 762.

\textsuperscript{151} \textit{Id.} at 763.

\textsuperscript{152} \textit{Id.} at 765.

\textsuperscript{153} \textit{Id.} at 771.

\textsuperscript{154} \textit{Id.} at 771-72.

\textsuperscript{155} \textit{Id.} at 771 n.24.

\textsuperscript{156} 431 U.S. 85 (1977).
ing of "For Sale" and "Sold" signs on real property, establishing a three-part test for determining the validity of time, place, and manner restrictions on commercial speech. First, the restriction on speech must not relate to the content of the regulated expression. Second, the ordinance must serve a compelling state interest unrelated to the suppression of speech. Third, the legislation must leave open ample alternative channels of communication. Although the Court found that the Willingboro ordinance satisfied the second requirement, it struck down the regulation as failing to meet the first and third requirements. The ordinance was related to the content of the regulated speech because it banned only signs that carried a specific message rather than all signs of a certain size, shape, or location. Moreover, the regulation did not leave open a practical substitute for the prohibited form of expression because "in practice realty is not marketed through leaflets, sound trucks, demonstrations or the like" and the options left open to sellers "involve more cost and less autonomy than 'For Sale' signs" and may be less effective for communicating the message or less likely to reach "persons not deliberately seeking sales information." The Court reiterated the proposition set forth in Virginia Pharmacy Board that common-sense differences justify different degrees of protection for commercial and other types of expression.

In subsequent decisions, the Court has emphasized the differences between commercial and noncommercial speech, noting that "commercial speech is more objective, and hence more verifiable" than other forms of expression and that "since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." Moreover, the Court has justified retaining limited protection for commercial speech on the ground that "to require a parity of constitutional protection for commercial and non-commercial speech alike could invite dilution,

157. By affording first amendment protection to real estate signs, Linmark significantly extended protected commercial speech beyond communications arguably linking commercial advertising with significant public issues, such as abortion and prescription drug price competition.
158. 431 U.S. at 94.
159. Id. at 95. In dicta, the Court intimated that aesthetics constituted a sufficiently compelling state interest to support an otherwise valid time, place, and manner restriction on speech. Id.
160. Id. at 93.
161. Id. at 94-95.
162. Id. at 93-94.
163. Id. at 93.
164. Id. at 96. In a footnote, the Court expressly left open the question whether a community could constitutionally enact a content-neutral sign regulation or prohibition ordinance. Id. at 94 n.7.
simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech.” 167

In Central Hudson Gas & Electric Co. v. Public Service Commission, 168 the Court overturned a New York State Public Service Commission regulation ordering electric utilities to cease all advertising that promoted the use of electricity. The Court reaffirmed its earlier conclusion that the Constitution accords “a lesser protection to commercial speech than to other constitutionally guaranteed expression,” and added that “[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.” 169 The Court concluded that in commercial speech cases

a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. 170

Because the order reached “all promotional advertising, regardless of the impact of the touted service on overall energy use,” the Court concluded that the Commission’s complete suppression of speech ordinarily protected by the first amendment was more extensive than necessary to further the State’s interest in energy conservation. 171

3. The Commercial Speech Doctrine Applied to Billboard Control

The commercial speech trilogy dramatically changed the first amendment analysis in billboard regulation cases. In prior cases, courts had summarily dismissed first amendment challenges to sign control ordinances, citing Valentine, but after the trilogy they applied the three-part test set forth in Linmark. The results in billboard cases have remained the same, however; courts continue to uphold comprehensive and content-neutral 172 billboard regulation challenged under

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168. 100 S. Ct. 2343 (1980).
169. Id. at 2350.
170. Id. at 2351.
171. Id. at 2353.
172. A state or municipality generally may not regulate protected expression on the basis of its content. Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 94 (1976); Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 96 (1972); Aiona v. Pai, 516 F.2d 892 (9th Cir. 1975) (statute prohibited only political signs); People v. Mobil Oil Corp., 48 N.Y.2d 192, 397 N.E.2d 724, 422 N.Y.S.2d 33 (1979) (ordinance bans gasoline station signs advertising price). Cf. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 509 (1969) (“In order for the State... to justify prohibition of a particular expression of opin-
the first amendment.

For example, in 1968 the Washington Supreme Court upheld a statewide ban on commercial billboards along interstate highways against a first amendment challenge, citing only Valentine.\(^\text{173}\) The statute, having been amended to prohibit all offsite roadway signs, was challenged a second time after the trilogy.\(^\text{174}\) The court again upheld the statute, this time applying the Linmark test and finding that the act was content-neutral, served the interests of traffic safety and aesthetics, and allowed ample alternative means of communication.\(^\text{175}\)

Similarly, in Suffolk Outdoor Advertising Co. v. Hulse,\(^\text{176}\) the New York Court of Appeals upheld an ordinance banning offsite billboards throughout the town of Southampton as a valid "time, place, or manner" regulation of commercial speech.\(^\text{177}\) In John Donnelly & Sons v. Mallar,\(^\text{178}\) a federal district court found that Maine's statewide billboard ban satisfied the Linmark test.\(^\text{179}\) The court rejected plaintiff's claim that the statute left no alternative means of communication as economical and effective as billboards, noting that "[m]any, if not all, ion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."; Berg Agency v. Township of Maplewood, 163 N.J. Super. 542, 552, 395 A.2d 261, 267 (1978) (content-based regulation of speech is permissible only where there is a "significant government interest in suppressing the content of the communication," citing Tinker).


175. 593 P.2d at 815. With regard to the adequate alternatives requirement, the court noted:

Political and cultural messages are not normally confined to a particular situs for their efficacy and may be communicated by less visually damaging channels than billboards adjacent to scenic highways. . . . Unlike on-premises business signs and realty "for sale" signs, political messages . . . are addressed to the general universality of political ideas.

Id. The North Dakota Supreme Court applied the Linmark test to uphold statewide billboard bans along highway systems. Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (N.D. 1978), appeal dismissed, 440 U.S. 901 (1979). Cf. Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M. 312, 319, 600 P.2d 258, 265-66 (1979) (finding alternative-means requirement satisfied by New Mexico statute that strictly regulates billboards but also provides "Logo Program" in which names of roadside businesses and essential services they provide are displayed on official highway signs near the businesses).

Several courts sustaining billboard regulation have reserved judgment on the first amendment implications of total prohibition. See, e.g., Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M 312, 600 P.2d 258, 265 (1979). See also Veterans of Foreign Wars v. City of Steamboat Springs, 195 Colo. 44, 575 P.2d 835, 841-42 (1978) (upholding partial prohibition of offsite signs)


177. Id. at 489, 373 N.E.2d at 265, 402 N.Y.S.2d at 370.


179. Id. at 1277-80.
of the commercial messages displayed on off-premise signs can be conveyed to the traveling public through on-premise advertising, official business directional signs and tourist information centers and publications." The court emphasized that the statute specifically exempted "noncommercial messages such as those conveyed by political, civic and charitable signs" and noted that other inexpensive forms of advertising, such as leafletting, were "beyond the scope of the Act altogether, and thus remain available for commercial and non-commercial advertising alike."

Metromedia adds California to the list of jurisdictions upholding billboard regulations challenged on first amendment grounds. Following earlier cases in other jurisdictions, the California court applied

180. Id. at 1279-80.

Several courts have likened billboard control to legislative regulation of conduct with an incidental impact on speech. See, e.g., Barrick Realty Inc. v. City of Gary, Ind., 491 F.2d 161, 164 (7th Cir. 1974) (upholding municipal ban on “For Sale” signs as device to stop white flight by finding the purpose of the ordinance consistent with fair housing statutes, a questionable bootstrap approach); Veterans of Foreign Wars v. Steamboat Springs, 195 Colo. 44, 575 P.2d 835 (1978). The U.S. Supreme Court established the test for evaluating a statute regulating conduct with an incidental impact on expression in United States v. O’Brien, 391 U.S. 367 (1968):

[A] governmental regulation is sufficiently justified if it is within the constitutional power of government, if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

The scope of permissible state regulation increases as the regulated activity moves from pure speech to “conduct or action.” California v. La Rue, 409 U.S. 109, 117 (1972); see also Konigsburg v. State Bar of Cal., 366 U.S. 361 (1961). The speech-conduct line is difficult to rationally defend and more difficult to draw, as is demonstrated by billboard cases that have considered the existence of the billboard to be conduct rather than speech. Unless one concludes that all speech is conduct, or that “pure speech” is limited to the specific act of speaking, a printed sign or billboard must fall on the “pure speech” side of this line. See Baldwin v. Redwood City, 540 F.2d 1360, 1366 (9th Cir. 1976), cert. denied, 437 U.S. 913 (1977) (“Communication by signs and posters is virtually pure speech.”). Similarly, billboard cases relying on O’Brien rather than Linmark fall outside the mainstream of leading sign control cases.

182. The California Supreme Court quickly rejected any challenge to the San Diego ordinance under the first amendment to the Federal Constitution, relying on the U.S. Supreme Court’s dismissal of appeals for want of substantial federal questions in three state court cases sustaining offsite billboard bans. 26 Cal. 3d at 867, 610 P.2d at 417, 164 Cal. Rptr. at 520. For a list of the state cases upholding billboard bans, see note 23 supra. The U.S. Supreme Court regards such summary dismissals as decisions on the merits, binding on all other courts, even though such dismissals generally are not based upon a full-scale decision by the Court. See note 23 supra. The Metromedia court then reviewed federal first amendment cases in determining whether the ordinance violated the free speech clause of the California Constitution. See note 20 supra.
the *Linmark* test, finding the San Diego ordinance content-neutral and designed to serve the "significant state interests" in traffic safety and "improving the appearance of the community," both of which are objectives "unrelated to the suppression of free expression." The court also found that the ordinance complied with the third element of the *Linmark* test, agreeing with other State courts that a "community ordinance prohibiting off-site billboards leaves open adequate alternative means of communication."

The first amendment analysis in *Metromedia* fits within the pattern established in other leading billboard control cases. These cases, however, overlook the unique first amendment issues raised by billboard controls and often resort to the mechanical application of an easily manipulated test under the flawed commercial speech doctrine. Ironically, many of the courts that championed the cause of legal realism by abandoning the fiction of aesthetics-plus have reverted to talismanic jurisprudence in their free speech analysis of billboard cases. An examination of the basic theoretical and practical gaps in the still-emerging commercial speech doctrine and a first amendment analysis of the San Diego ordinance as drafted and as construed in *Metromedia* demonstrate the difficulties in the present treatment by the courts of the first amendment issues in billboard prohibition.

C. Flaws in the Commercial Speech Doctrine

1. Absence of Articulated Values

The commercial speech cases of the 1970's demonstrate that billboards receive some first amendment protection. The trilogy and its progeny, however, fail to clarify the extent to which the Constitution protects billboard communication. The cases say only that commercial speech is neither completely vulnerable to state regulation nor entitled to the same rigorous scrutiny applied to legislation regulating political or ideological expression. That affording any protection to commercial speech is only a recent phenomenon partially explains this uncertainty. But the lack of coherent standards protecting commercial speech also can be attributed to the Court's failure to articulate the

183. 26 Cal. 3d at 868, 610 P.2d at 418, 164 Cal. Rptr. at 521.
184. 26 Cal. 3d at 868-69, 610 P.2d at 418, 164 Cal. Rptr. at 521. The court noted: Advertisers of consumer products and services can communicate through newspapers, magazines, radio, and television. Local businesses can in addition employ on-site billboards. The relatively few non-commercial advertisers who would be restricted by the San Diego ordinance also possess a great variety of alternative means of communication, including some methods, such as leafletting, which are not more expensive than billboards.

Id. at 869, 610 P.2d at 418, 164 Cal. Rptr. at 521.
specific values served by extending first amendment protection to commercial speech.

Expression receives constitutional protection if it serves certain identifiable first amendment values. The spectrum of interests arguably encompassed by the first amendment and applicable to commercial speech stretches from the exchange of competing world views in political debate to the transmission of price information in the most misleading used-car advertisement. Political and ideological speech lie at one end of the communications continuum. Professor Meiklejohn viewed free expression of public views and political philosophies in a democracy as essential to the preservation of meaningful self-government. Professor Emerson finds that:

Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by members of the society in social, including political decisionmaking and (4) as maintaining the balance between stability and change in society.

While many would agree that expression serving the interests propounded by Professors Meiklejohn and Emerson merits complete first amendment protection, most forms of commercial speech neither bear directly on the process of self-government nor constitute meaningful expression of individual dignity.

At the opposite end of the continuum, Professor Coase would afford first amendment protection to commercial speech by equating communication in the marketplace of ideas with that in the marketplace of products. Thus, Coase would accept regulation of expression only where necessary to maximize the general welfare or to protect

187. See text accompanying notes 152-55 supra.
188. Meiklejohn, The First Amendment is an Absolute, 1961 SUP. CT. REV. 245, 255. See Cohen v. California, 403 U.S. 15, 24 (1971), where the Court states:

The Constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

See also Hynes v. Mayor and Council of Oradell, 425 U.S. 610, 627 n.3 (1976).
190. In Coase's view, "[a]dvertising, the dissemination of messages about goods and services which people consume, is clearly part of the marketplace of ideas, [although] intellectuals have not, in general, welcomed this other occupant of their domain." Coase, Advertising and Free Speech, 65 J. LEGAL STUD. 1, 8-9 (1976).
the rights of others. The U.S. Supreme Court, however, has already rejected this free market, utilitarian theory of commercial speech, which would have afforded similar protection to both political and commercial speech.

The commercial speech cases strike a compromise between what Professor Tribe calls "the unprincipled extreme of excluding all commercial speech from First Amendment protection [and] the equally indefensible position that government cannot stop someone from selling 7-Up claiming it to be insulin." In *Virginia Pharmacy Board*, the Court declared that "if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal." Yet the Court has not suggested parity in the treatment of political and commercial expression, but "instead [has] afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values . . . ." The Court has not yet clearly defined the extent of this limited protection. This may be because purely commercial speech simply does not fit into the Court's recent first amendment analysis, which emphasizes the importance of political dialogue in the operation of democratic institutions.

As a result of the uncertain extent of protection for commercial expression, the commercial speech doctrine remains vague. The absence of an authoritative statement of the constitutional values served by protecting commercial speech transforms the doctrine into an ad hoc balancing test that defies consistent application. Thus, the outcome in commercial speech cases turns largely upon how courts characterize the communication of commercial information. If advertising is viewed only as a means of promoting economic efficiency, courts may permit extensive regulation not only of the time, place, and manner of expression, but also of its content, in order to ensure that the informa-

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191. *Id.* at 32. Professor Coase would therefore accept rules against slander, libel, loud noises (nuisance), copyright infringement, obscenity, and sedition. *Id.*
192. See text accompanying notes 142-67 *supra.*
194. 425 U.S. at 765.
197. Courts have frequently stated that evaluation of statutes regulating commercial speech requires balancing the compelled state interest against the speaker's first amendment interest. See, e.g., Young v. American Mini Theatres, 427 U.S. 50, 76 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205, 208-15 (1975); Baldwin v. Redwood City, 540 F.2d 1360, 1366-67 (9th Cir. 1976), cert. denied 431 U.S. 913 (1977). Justice Stewart recognized the danger inherent in case-by-case "balancing" in his dissenting opinion in Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 402 (1973): "So long as Members of this Court view the First Amendment as no more than a set of 'values' to be balanced against other 'values,' that Amendment will remain in grave jeopardy."
tion conveyed is truthful and conducive to maximizing productivity. If, on the other hand, they follow the Court’s declaration in *Virginia Pharmacy Board* that communication of all information, not just viewpoints relating to great political or social issues, serves the first amendment goal of “enlighten[ed] public decisionmaking,” the courts may formulate stricter standards of review for laws regulating commercial expression. Until the Court supplements the commercial speech doctrine with a meaningful articulation of the values justifying limited protection of commercial expression, the constitutional status of billboards will remain uncertain, and the potential for ad hoc, unprincipled decisionmaking will remain unchecked.

2. *Tipping the Scales with the Captive Audience Doctrine* 

The “captive audience” doctrine recognizes the validity of regulations governing the time, place, and manner of protected speech that are designed to prevent unsolicited intrusions into the privacy of others. For example, in *Kovacs v. Cooper*, the Court relied on this doctrine to sustain an ordinance prohibiting sound trucks from emitting “loud and raucous” noises on public streets on the ground that the unwilling listener is “practically helpless to escape this interference with his privacy.”

The image of an immense billboard towering menacingly over the neighborhood, commanding the attention of everyone within eyesight, makes the captive audience doctrine a convenient vehicle for tipping a first amendment balancing analysis in favor of legislation prohibiting billboards. Indeed, dicta in the 1931 U.S. Supreme Court case of *Pack-er Corp. v. Utah* suggests the applicability of the captive audience theory to billboards. Upholding a Utah statute that prohibited cigarette advertising on billboards, the Court commented:

> Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their 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 the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard.

Although the dicta in *Packer* was in response to an equal protec-

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198. 425 U.S. at 765.
200. *Id.*
201. *Id.* at 87.
203. *Id.* at 110.
tion challenge, several courts have relied on that case and *Kovacs* in upholding billboard controls challenged under the first amendment. In *John Donnelly & Sons v. Outdoor Advertising Board*, for example, the Supreme Judicial Court of Massachusetts sustained an ordinance prohibiting all offsite billboards, commenting that "due to the intrusive quality of billboards, passers-by, whether willing or not, are compelled to see the advertisements. The advertiser's message is thrust upon them as a captive audience in violation of the 'cardinal principle that no person can be compelled to listen against his will.' " Similarly, the district court in *John Donnelly & Sons v. Mallar*, sustaining a statewide ban on offsite billboards, reviewed *Kovacs* and *Packer* and concluded that "billboards fall within this category of intrusive speech." While not expressly referring to the captive audience doctrine, the California court in *Metromedia* nevertheless emphasized the "obtrusiveness" of billboards in its first amendment analysis of the San Diego ordinance. Noting the size, immobility, and permanence of billboard structures, the court declared that the city's interest in regulating the commercial use of property and prohibiting uses that "imperil traffic safety or denigrate the appearance of the community" justified more stringent restrictions than those imposed upon "more transitory or less obtrusive media."

Recent U.S. Supreme Court decisions indicate that the captive audience doctrine should not apply to billboard cases. The Court has limited the applicability of the doctrine to intrusions on the privacy of the home and forms of communication that make it impracticable for the unwilling listener to escape further exposure. The Court has also placed the burden of avoiding continued exposure to undesired

204. *Id.* at 108.


206. *Id.* at 226-27, 339 N.E.2d at 722 (1975). The Court also analogized billboard control to the regulation of sound trucks in *Kovacs*. *Id.*


208. *Id.* at 1278 n.8. The Supreme Court of Colorado observed that most courts reviewing the first amendment issue on billboard control "have focused upon the intrusive nature of signs and billboards and the fact that a 'captive audience' is required to view such signs." Veterans of Foreign Wars v. Steamboat Springs, 195 Colo. 44, 52, 575 P.2d 835, 841 (1978). See also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (upholding a municipal decision not to sell street car placard advertising space for political advertisements); *Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741, 761 (N.D. 1978). The *Lehman* Court, also relying on *Packer*, observed that street car passengers are a captive audience for signs posted inside the car.

209. 26 Cal. 3d at 870, 610 P.2d at 419, 164 Cal. Rptr. at 522.

210. *Id.*


communication on the listener or viewer. Thus, in *Erznoznik v. City of Jacksonville*, the Court invalidated an ordinance prohibiting the exhibition of motion pictures displaying nudity at drive-in theaters with screens visible from a public street on the ground that the ordinance regulated expression on the basis of content. The Court concluded that

in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes". Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrowing circumstances described above [when the speaker intrudes upon the privacy of the home or renders escape from further exposure impossible or impracticable], the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes." Billboards do not involve unsolicited invasions of the home. Nor do they make it impracticable for the unwilling viewer to escape further exposure. People walking on the street can easily avert their eyes from a billboard display, and motorists passing roadside billboards can either look down the road or to the opposite side of the street and, in any event, will quickly speed past offending signs. In short, a billboard is no more obtrusive than a large, brightly lit movie screen.

Although individuals are captives to billboard communica-

213. See Cohen v. California, 403 U.S. 15 (1971), in which the Court reversed the conviction under a disturbing the peace ordinance of a person in a Los Angeles courthouse wearing a jacket with "Fuck the Draft" inscribed across the back. The Court concluded that, while the communication may be distasteful, "[t]hose in the Los Angeles courthouse could effectively avoid further bombardment simply by averting their eyes." *Id.* at 21.
215. *Id.* at 211-12.
216. *Id.* at 210-11. The Court also distinguished Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), observing that even the *Lehman* plurality and concurring opinions "recognized that the degree of captivity and resulting intrusion on privacy is significantly greater for a passenger on a bus than for a person on the street." 422 U.S. at 209 n.5. The Court subsequently endorsed the *Erznoznik* captive-audience analysis in *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 83 (1976).
217. *Cf. Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (streetcar passengers are a captive audience to advertising placards on the inside of streetcar). *See also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465 n.25 (1978). *See generally* Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken To?*, 67 Nw. L. Rev. 153 (1972). Professor Haiman argues that the law should not attempt to insulate any persons in our society, no matter how willing or unwilling an audience they may be, from the initial impact of any kind of communication, but that the law should protect their right to escape from a continued bombardment by that communication if they wish to be free from it. *Id.* at 193.
218. Although billboards are generally closer to roadways, much more numerous than
tion to the extent that they must observe signs initially before choosing to look away, the Court has balanced the competing interests in favor of the constitutional right to communicate information, so long as the unwilling listener or viewer has a reasonable opportunity to avoid further exposure after the initial contact.

3. Linedrawing Problems

During the Valentine era, the courts had to distinguish protected political expression from unprotected commercial communication. After the U.S. Supreme Court adopted a rule of limited first amendment protection for commercial speech, a new linedrawing problem emerged; now courts must distinguish commercial speech from traditionally protected speech to determine the level of protection a particular communication will receive. Mechanical application of the commercial speech doctrine to billboard regulations, ignoring the fact that billboards can be used for political, religious, and public service statements as well as commercial messages, will not satisfactorily resolve this problem.

At the extremes, signs bearing messages like "Vote for Smith" or "Buy Clean-O Detergent" are easily classified. It is not clear, however, whether a single sign bearing both these statements should be accorded full first amendment protection as political speech or instead receive the more limited protection for commercial expression. Ambiguous statements can create even greater difficulties. For example, a sign declaring "Buy American" might be considered merely a commercial advertisement entitled to limited protection. It could also be characterized as a statement on American economic and foreign policy, meritng maximum constitutional protection. How such questions are resolved depends on whether the courts must look to content alone, to the subjective intent of the speaker, or to the reasonable response of a hypothetical viewer.

movie screens, and visible 24 hours a day, a single billboard is unlikely to be more obtrusive or distracting than an outdoor movie screen.


In Central Hudson Gas & Elec. Co. v. Pub. Serv. Comm’n, 100 S. Ct. 2343 (1980), the Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." Id. at 2349. Justice Stevens observed in his concurring opinion that the definition may be too broad because "neither a labor leader’s exhortation to strike, nor an economist’s dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience." Id. at 2358.

221. In Central Hudson Gas & Elec. Co. v. Pub. Serv. Comm’n, 100 S. Ct. 2343 (1980), the U.S. Supreme Court refused to characterize promotional advertising by electric utility
The common-sense differences between clearly commercial and other types of speech stressed by the Court are of little help in delimiting the outer boundaries of commercial speech. Treating as commercial speech all billboard advertisements that are somewhat commercial in character, despite the mixed or ambiguous nature of the message, foresees a two-hundred year tradition of according rigorous constitutional protection to political expression. On the other hand, granting greater protection to dual-message or ambiguous expressions could eventually undermine the distinctions between commercial and political speech. As long as the Court retains the present commercial speech doctrine, according different degrees of protection to commercial and noncommercial expression, these problems will remain unresolved.

The flaws in the first amendment analysis of billboard cases parallel the shortcomings of the commercial speech doctrine itself. Until the U.S. Supreme Court determines the exact scope of the limited protection for commercial speech, other courts will continue to apply highly subjective balancing analyses. The "captive audience" doctrine does not apply to billboards, and courts should not use it to tip the scales of their commercial speech balancing analyses in favor of billboard prohibition. Finally, linelawing problems will be unavoidable as long as commercial speech is treated differently under the first amendment than other types of expression.

D. The Problem of Non-Commercial Communication

I. The San Diego Ordinance: Unconstitutional as Drafted

Under Linmark, government regulation of the time, place, and
manner\textsuperscript{224} of commercial speech must be (1) content-neutral, and (2) necessary to further a compelling state interest, while (3) leaving open ample alternative means for communicating the protected expression.\textsuperscript{225} The San Diego ordinance, as drafted, met the first two elements of the \textit{Linmark} test. The ordinance prohibited all offsite signs regardless of content,\textsuperscript{226} and, as the court in \textit{Metromedia} found, the restriction on speech served the governmental interests of promoting traffic safety and improving the appearance of the community.\textsuperscript{227} By prohibiting all offsite signs, however, the San Diego ordinance failed to satisfy the third element of the \textit{Linmark} test. The ordinance left open a variety of other means of communication, including newspapers, magazines, radio, television, leaflets, and onsite displays.\textsuperscript{228} But \textit{Linmark} requires that alternative means of communication provide practical, not just theoretical, substitutes for the restricted medium.\textsuperscript{229} Thus, the alternative must be a functionally similar and practical form of communication, providing the speaker with an equal opportunity to deliver the same message to the same audience.\textsuperscript{230}

Signs are not fungible with other media. Offsite billboards may be functionally interchangeable with radio, television and newspaper advertising for nationwide retail merchandisers, presidential candidates, and local companies or politicians with substantial name recognition. But these alternatives may be prohibitively expensive for small businesses and unknown aspirants to public office. Billboards convey a short, concise message to a specifically targeted audience in a cost-effi-


\textsuperscript{226} 26 Cal. 3d at 868, 610 P.2d at 418, 164 Cal. Rptr. at 521. \textit{See} text accompanying note 9 \textit{supra}.

\textsuperscript{227} \textit{Id}. at 858-65, 610 P.2d at 411-16, 164 Cal. Rptr. at 514-19. \textit{See} text accompanying note 13 \textit{supra}.


\textsuperscript{229} 26 Cal. 3d at 869, 610 P.2d at 418-19, 164 Cal. Rptr. at 521-22.

\textsuperscript{230} 431 U.S. 85, 93 (1978). \textit{See} text accompanying note 163 \textit{supra}.
cient manner than cannot be matched by other media. More importantly, an ordinance prohibiting all offsite signs eliminates one of the few reasonable means by which private citizens may express their political, economic, religious or social philosophies to the rest of the community. Most people cannot afford television, radio, or newspaper advertising costs and lack the time and dedication required to reach an equal number of people by distributing handbills on street corners.

The Ninth Circuit recognized the unique qualities of sign communication in *Baldwin v. Redwood City.* Striking down a municipal ordinance that prohibited political signs in residential neighborhoods on the ground that local residents lacked alternative means of political expression, the court noted that

> [the First Amendment interests involved in the display of political posters adjacent to public thoroughfares are substantial. Moreover, means of political communication are not entirely fungible; political posters have unique advantages. Their use may be localized to a degree that radio and newspaper advertising may not. With exception of handbills, they are the least expensive means by which a candidate may achieve name recognition among voters in a local election.]

Forbidding offsite sign communication does more than rechannel commercial speech to alternative forms of advertising; it removes one of the few outlets available to most citizens for exercising fundamental first amendment rights. Classifying offsite signs as fungible with other forms of communication ignores reality; an offsite sign prohibition eliminates a unique medium of communication and stifles protected speech.

2. *The San Diego Ordinance: Constitutional as Construed*

The California Supreme Court foresaw the overbreadth problem inherent in an ordinance banning all offsite signs and construed the San Diego statute to proscribe only billboards. This limiting construction transforms the ordinance into a valid time, place, and manner regulation of protected speech. By removing large, permanent billboard structures from city streets, the ordinance as construed continues to serve the two governmental interests intended by the city: traffic safety and municipal beautification. As construed, the ordinance also meets the third element of the *Linmark* test by leaving open adequate and practical alternative means of communication.

231. See note 239 *infra* and accompanying text.
234. Metromedia, Inc. v. City of San Diego, 26 Cal.3d at 856 n.2, 610 P.2d at 410 n.2, 164 Cal. Rptr. at 513 n.2.
The ordinance as construed still prohibits offsite billboards, a unique medium of communication. Yet the ordinance no longer affects lawn signs, window posters, labor dispute pickets, roadside "Burma Shave" signs, and some wall signs. Although these latter signs may not be the attention-grabbing functional equivalent of large, offsite, commercial billboards, they do provide an inexpensive, audience-specific means for conveying the same information in a reasonably similar fashion. Thus, as construed by the court, the ordinance leaves open one of the few generally available means by which individuals may convey their political and ideological viewpoints to the public in a traditional first amendment forum.

Similarly, the ordinance as construed does not violate the first amendment when analyzed under the four-part *Central Hudson* test. The ordinance directly advances the governmental interests of aesthetics and traffic safety by removing unattractive billboard structures and eliminating large signs that distract the attention of drivers. The ordinance as drafted might have been more extensive than necessary to serve these interests, because it would have banned smaller signs that did not significantly affect community appearance or tend to divert drivers from keeping their eyes on the road. The limiting construction, however, avoids this problem by restricting the scope of the ordinance to large, permanent billboards.

E. Sign Control and Political Speech

The *Metromedia* court recognized the dangers posed by mechanical application of the commercial speech doctrine to billboard cases. Prohibiting all offsite signs within a community affects first amendment interests other than those of commercial advertisers; a billboard ban eliminates a means of communication available to individuals and or-

235. The San Diego ordinance as drafted is content-neutral on its face, but discriminates against political speech in effect. The ordinance permits only onsite signs. Onsite signs by definition must convey only commercial information. Political and ideological signs rarely relate to a specific plot of land and thus usually will be prohibited. By favoring commercial over political speech along city streets and highways, a public forum, the ordinance arguably makes an operational distinction on the basis of content, a forbidden subject of time, place and manner regulation. *See* First Nat'l Bank of Boston v. Belotti, 435 U.S. 765, 783 n.20 (1978); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal.2d 51, 63, 434 P.2d 982, 990, 64 Cal. Rptr. 430, 438 (1967); Peltz v. City of South Euclid, 228 N.E.2d 320, 11 Ohio St. 128 (1967).


237. *See* notes 168-71 supra and accompanying text.
organizations wishing to express political ideas as well as to those seeking to advertise goods and services. The California Supreme Court solved this problem by construing the San Diego ordinance to allow signs that are smaller and less obtrusive than billboards, thereby furthering the city's interest in aesthetics and traffic safety while leaving potential billboard users with adequate alternative means of communication. Individuals and small groups still may use small signs; larger and wealthier groups may purchase newspaper, radio or television advertisements.

Because billboard prohibitions restrict political as well as commercial speech, a billboard ordinance that satisfies the *Linmark* commercial speech test may nevertheless violate the more stringent constitutional standards protecting noncommercial speech. Courts could find that the governmental interests in promoting traffic safety and municipal beautification simply do not outweigh the substantial burden on noncommercial expression caused by prohibiting large, permanent billboards.

Although such reasoning would be reasonable, courts should conclude that content-neutral bans constitute valid "time, place, and manner" regulation of protected speech whenever alternative channels of communication remain available. In *Metromedia*, for example, the ordinance as construed regulates the manner of sign communication only by limiting the size of offsite signs; it does not entirely eliminate offsite signs as a medium of expression. If a community can limit the noise emitted by sound trucks, it should be able to limit the size of offsite

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238. 26 Cal.3d at 856 n.2, 610 P.2d at 410 n.2, 164 Cal.Rptr. at 513 n.2.
239. *See also id.* at 870 n.14, 610 P.2d at 419 n.14, 164 Cal. Rptr. at 522 n.14 (ordinance might be unconstitutional as applied to an advertiser without "reasonable alternative means of communication"). *But cf. id.* at 895-96, 610 P.2d at 435-36, 164 Cal. Rptr. at 538-39 (Clark, J., dissenting) (adequate alternative means of dissemination of speech are not available).

In the jurisdictional statement filed with their appeal to the U.S. Supreme Court, appellants Metromedia, Inc. and Pacific Outdoor Advertising argue that television, radio, magazine and newspaper ads are all much more expensive than billboard ads. For example, in San Diego a 30-second, prime-time television commercial costs approximately ten times as much as a standard 30-day billboard showing; a 600-line newspaper advertisement would cost four times as much as the billboard ad. *Metromedia, Inc. v. City of San Diego*, No. 80-195, Appellant's Jurisdictional Statement at 18 n.*.

Although the availability of an alternate medium is often crucial in commercial speech cases, *see e.g.*, *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 93 (1977), in political speech cases the availability of an alternate forum may still be insufficient to protect first amendment values. *See United States v. O'Brien*, 391 U.S. 367, 388-89 (1968) (Harlan, J., concurring). In his *Metromedia* dissent, Justice Clark noted that all parties to the litigation stipulated that "'valuable commercial, political and social information is communicated to the public through the use of outdoor advertising'" and argued that San Diego ordinance "must therefore satisfy the most stringent rules flowing from the First Amendment.” 26 Cal.3d at 889, 610 P.2d at 431, 164 Cal. Rptr. at 534.

Until the courts acknowledge these issues and engage in a full first amendment analysis of billboard regulation, however, these questions will remain unanswered.

CONCLUSION

A system of laws depends upon tradition and predictability to retain legitimacy. At the same time, the law must be flexible enough to adapt traditional legal concepts to meet modern problems. Judicial reaction to billboard cases reflects this structural tension. Billboard ordinances promote municipal beautification; traditional police-power objectives do not include aesthetic considerations. The courts have tried to solve this problem and uphold billboard legislation by attributing to billboards a series of imaginary harms corresponding to traditional police power notions, thus embracing the legal fiction of the aesthetics-plus doctrine.

With *Metromedia*, California joins a small but growing number of states dealing directly and honestly with the problems of billboard blight and urban decay by holding that aesthetic considerations alone may justify police power actions. *Metromedia* legitimates municipal billboard prohibition in California but does not suggest the extent to which local government may regulate private property in the name of aesthetics. An aesthetic zoning plan must resolve a unique conflict between competing values. On the one hand, aesthetic zoning seeks to protect individual sensibilities by promoting municipal beautification. On the other hand, aesthetic regulation without clearly defined limitations presents the danger of governmental intrusion upon individual privacy and the imposition of majoritarian tastes and perspectives upon the rest of the community. The courts should uphold aesthetic legislation only if it includes objective standards guarding against open-ended administrative discretion and permits consistent, nonarbitrary administrative enforcement and meaningful judicial review.

*Metromedia* also holds that under the first amendment a city may prohibit offsite billboards. The case follows earlier billboard decisions by using only a commercial speech analysis. But unlike the cavalier treatment afforded the first amendment issues in billboard control cases

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241. In Baldwin v. Redwood City, 540 F.2d 1360, 1369 (9th Cir. 1976), cert. denied 431 U.S. 913 (1977), the court held that a city could regulate the size of political signs placed in residential neighborhoods. The court likened the regulation prescribing a maximum size for signs to the sound truck decibel limitation ordinance upheld in Kovacs v. Cooper, 336 U.S. 77 (1949), concluding that "[n]either limitation significantly deters the exercise of First Amendment rights . . . ." But see John Donnelly & Sons v. Campbell, No. 79-1575 (1st Cir. Dec. 22, 1980) (Maine billboard ban held to burden ideological speech impermissibly); State v. Miller, 83 N.J. 402, 416 A.2d 821 (1980) (ordinance prohibiting all offsite signs in residential neighborhood without providing adequate alternative means of political communication held unconstitutional on its face).
by other courts through the mechanical application of the commercial speech doctrine, the *Metromedia* court applied the commercial speech doctrine in a careful and responsible manner reflective of the unique first amendment questions found in sign control by construing the perhaps unconstitutionally overbroad San Diego ordinance to proscribe only large, permanent, offsite billboards. The courts should recognize that billboard regulation affects both commercial and noncommercial expression. But as long as the courts continue to apply the commercial speech doctrine to billboards, they must ensure that sign control legislation fully satisfies the *Linmark* requirement of practical alternative means of communication.

Most people agree that billboards detract from community appearance and that the most aesthetically offensive of the species merit removal. Although courts cannot easily fight community consensus, "[i]t is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height."\(^{242}\) Billboard control furthers the laudable objective of municipal beautification, but "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."\(^{243}\) With *Metromedia*, California joins a growing number of other States that allow communities to eliminate unsightly signs. But in the future, other courts must also engage in a careful constitutional analysis of the unique issues of sign control, rather than stands idly by as the billboards fall.\(^{244}\)


\(^{243}\) Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 403 (1973) (Stewart, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)).

\(^{244}\) On October 14, 1980, the United States Supreme Court noted probable jurisdiction over the billboard companies' appeal in *Metromedia*. 101 S. Ct. 265 (1980). The Court heard oral argument on February 25, 1981. The appellants challenged both the aesthetics and first amendment holdings of the California Supreme Court. *Metromedia*, therefore, provides the Court with an excellent opportunity to settle many of the pressing questions raised by offsite sign regulation. By acknowledging aesthetics as a legitimate police-power objective and recognizing that offsite sign prohibition affects both commercial and noncommercial speech, the Court can direct the attention of lower courts away from legal fiction and mechanical jurisprudence, and toward the realities of billboard control.