BYU Law Review

Volume 2006 | Issue 2 Article 4

5-1-2006

Speech Interests Inherent in the Location of Billboards and Signs: A Method for Unweaving the Tangled Web of Metromedia) Inc. v. City of San Diego

Jason R. Burt

Speech Interests Inherent in the Location of Billboards and Signs: A Method for Unweaving the Tangled Web of *Metromedia, Inc. v. City of San Diego*

I. INTRODUCTION

Project Billboard is an anti-war movement that has gained attention by posting anti-war billboards in Times Square and other high-profile locations.[1] With billboards portraying messages such as "Democracy is best taught by example, not by war," and "Stop intelligence failures. Fund public education."[2] Project Billboard has sought to spread its anti-war message to the masses. Project Billboard's campaign against the Iraq War is a paradigmatic example of using billboards to advance a political agenda. Billboards serve a unique role in our society by placing both noncommercial messages, such as Project Billboard's anti-war message, and commercial messages before a captive audience.[3] In so doing, billboards represent a major means of advertising both commercial and noncommercial messages. There are more than 500,000 billboards along major highways in America, with an annual increase of anywhere from 5000 to 15,000 billboards.[4] Billboards are a $1.8 billion industry.[5]

Despite their utility in communicating commercial advertisements or political viewpoints to a mass audience, many critics see billboards as an eyesore to the community.[6] Indeed, because billboards are "designed to stand out and apart from [their]

1. Project Billboard, http://www.projectbillboard.org (last visited Jan. 20, 2006).

2. *Id.*

3. In *Packer Corp. v. Utah*, Justice Brandeis determined that viewers of billboards and streetcar signs were captive audiences in the sense that the messages were "thrust upon them by all the arts and devices that skill can produce." 285 U.S. 105, 110 (1932). While ads in magazines can be ignored and radio ads can be turned off, a billboard advertisement has a captive audience of drivers along a road. *Id.*

4. Scenic America, Billboards & Sign Control, http://www.scenic.org/Default.aspx?tabid=166 (last visited Feb. 6, 2006).

5. *Id.*

6. *See generally* Scenic America, http://www.scenic.org (last visited Mar. 29, 2006) (explaining one advocacy group's objection to billboards).

surroundings," they create unique problems for governments enacting zoning and land-use ordinances—problems particularly affecting the aesthetics of the community.[7] As a result of these unique problems, the Supreme Court has held that governments may regulate the noncommunicative aspects of billboards, i.e., their size and location.[8]

In so regulating, however, governments often run into First Amendment difficulties because they cannot regulate the noncommunicative aspects of billboards without affecting their communicative aspects—the speech that is located on the billboard. Conceptually, regulation of the noncommunicative aspects of a given medium of speech under a state's police powers is unrestrained so long as the constitutionally protected communicative aspects of the expression are unaffected; practically, however, regulation of the noncommunicative aspects of the medium always affects the communicative aspects. Thus, the free speech protections of the First Amendment are restraints on the police powers of the state to regulate mediums of communication.[9] As a medium of

7. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502 (1981) (plurality opinion).

8. *Id*. at 502–03. The power of the state to regulate the noncommunicative aspects of the medium of communication is premised in the state's police power. *See, e.g.*, *id*. at 502 (stating that "the government has legitimate interests in controlling the noncommunicative aspects of the medium"); Kovacs v. Cooper, 336 U.S. 77, 83 (1949) (dealing with a zoning ordinance affecting free speech and explaining that "[t]he police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community"); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 386–89 (1926) (holding that a municipality's zoning ordinance was a valid use of the police power); *see also* Anne E. Swenson, *A Sign of the Times: Billboard Regulation and the First Amendment*, 15 ST. MARY'S L.J. 635, 639–45 (1984) (explaining the historical development of the police power as a power to enact zoning ordinances).

9. One state's zoning manual adeptly characterized the relationship between the police powers that allow regulation and the constitutional protections that limit regulation as follows:

> Even if the exercise of the zoning power may be justified as a legitimate exercise of the police power, zoning regulations will not be enforced that unduly interfere with the exercise of fundamental rights protected under the U.S. . . . Constitution. The police power is not a universal solvent by which all constitutional guarantees and limitations can be loosened and set aside. Accordingly, zoning regulations have been invalidated in situations where the courts have found a violation of the equal protection clause or of the due process clause. Enforcement of zoning regulations has also been refused where the courts have perceived a conflict with the constitutional guarantees of free speech or with the developing "substantive due process" rights of privacy, family relations, and the like.

MARTIN R. HEALY & JONATHAN S. KLAVENS, MASSACHUSETTS ZONING MANUAL: ZONING POWERS AND ITS LIMITATIONS § 2.3 (2000). This principle plays an important role in the

communication, billboards and signs represent a unique and messy intersection of First Amendment free speech interests and government regulatory interests. Beginning with the Court's decision in *Metromedia, Inc. v. City of San Diego*, courts struggling to determine the parameters of the free speech/regulatory intersection of billboards and signs have had little success in formulating and applying consistent, predictable rules.

The main hindrance to the development of clear rules to govern the intersection of free speech and zoning power involved with signs and billboards is the decision in *Metromedia* itself: a badly fractured opinion that produced no majority.[10] The justices failed to agree even on the framing of the issue, the standard of review, or the impact of the San Diego ordinance at issue.[11] Because of the disunity among the Court, *Metromedia* "yielded only limited definitive principles to guide lower courts and municipalities, especially with regard to restrictions on non-commercial speech."[12]

Since *Metromedia* produced no majority opinion and consisted of five separate opinions that each suggested different lines of reasoning, courts and governments seeking a clear rule to apply to billboard regulations face a difficult constitutional quandary. Each government that seeks to enact an ordinance dealing with billboards and signs must consider the confusion of *Metromedia* and enact ordinances that somehow fit within the confusing guidelines of that decision, which is hardly a simple task. In addition, because *Metromedia* is applicable to any regulation that deals with signs in a community, including signs on personal property, the uncertainties of the decision do not end on the billboard street corner—rather, they extend as far as signs in one's living-room window.

proposal of this Comment, particularly in the ability of governments to regulate a category of signs this Comment characterizes as "offsite." *See infra* Part V.B.

10. The decision itself produced five opinions but no majority opinion. There is a four-judge plurality written by Justice White and joined by Justices Stewart, Marshall, and Powell, *Metromedia*, 453 U.S. at 493 (plurality opinion), a concurrence written by Justice Brennan and joined by Justice Blackmun, *id.* at 521 (Brennan, J., concurring), and three separate dissents written by Justice Stevens, *id.* at 540 (Stevens, J., dissenting in part), Chief Justice Burger, *id.* at 555 (Burger, C.J., dissenting), and Justice Rehnquist, *id.* at 569 (Rehnquist, J., dissenting).

11. *See* Mark Cordes, *Sign Regulation After* Ladue*: Examining the Evolving Limits of First Amendment Protection*, 74 NEB. L. REV. 36, 49 (1995).

12. *Id.*

The purpose of this Comment is twofold. First, it provides a practical summary of the current state of the law regarding billboard regulation by summarizing relevant Supreme Court decisions and noting two important lines of application of *Metromedia* and its progeny by the lower courts. Second, this Comment proposes a modification of the decision in *Metromedia* that will produce a more practical approach to billboard and sign regulation.

Specifically, this Comment advocates the following modification: rather than placing primary emphasis on the distinction between commercial and noncommercial speech to determine the constitutionality of sign and billboard ordinances, the Court should broaden the definition of "onsite" as established in *Metromedia*. Beyond including only businesses advertising on their own property,[13] the definition of onsite should also include individual property owners' signs and location-specific signs as explained by the Third Circuit in *Rappa v. New Castle County*.[14] Because these types of signs are without suitable alternatives, a concept taken from the Court's speech jurisprudence, the speech interest in these signs outweighs government's regulatory interest in all but the most limited of circumstances. Were government to restrict these signs, the lack of suitable alternatives would lead to an extinguishing of the sign owner's speech interest. Hence, courts should grant these signs heightened speech protection and apply strict scrutiny to any government regulation of signs that fall within this broadened category.

This proposal defines all signs that do not fall within one of the three categories of onsite signs as "offsite" signs. An offsite sign's utility is not dependent on its location because sign owners have alternative and effective means of communicating their message. Since alternatives exist, sign owners have a reduced speech interest in the particular sign. In the case of offsite signs, government's regulatory interests outweigh the speech interest in the signs in all but the most limited of circumstances—a situation directly inverse to the constitutional/regulatory intersection in onsite signs. Therefore, while strict scrutiny is required when regulating onsite signs, a

13. *Metromedia*, 453 U.S. at 511–12 (plurality opinion).

14. 18 F.3d 1043, 1052–53 (3d Cir. 1994) (quoting DEL. CODE ANN. tit. 17, § 1121(1)–(7) (1990)); *see* discussion *infra* Part IV.A.2.

government must satisfy only rational basis scrutiny to restrict offsite signs, including a complete restriction of offsite signs.

This thesis will be explored throughout this Comment, with particulars being fully developed in Part V. To establish the necessary context for this development, this Comment begins in Part II by reciting basic Speech Clause principles. Part III discusses the Court's major billboard/sign and commercial/noncommercial speech cases, illustrating how the Court has developed the principles that are modified together in this Comment's thesis. Part IV explains the major weaknesses of the *Metromedia* jurisprudence by focusing in Section A on two divergent strands of *Metromedia* interpretation and in Section B on the practical deficiencies in *Metromedia*'s onsite/offsite and commercial/noncommercial distinctions. Part V brings together the doctrines discussed in Parts II–IV into a modified *Metromedia* test. Part VI offers a brief conclusion.

II. FREE SPEECH FUNDAMENTALS

Before examining the Supreme Court's billboard jurisprudence and the proposal to refine the *Metromedia* analysis, it is first necessary to recite relevant specifics involved in Speech Clause analysis to highlight the principles that are at play in billboard regulations. Despite its "absolutist language,"[15] the First Amendment has never guaranteed an unrestrained freedom of speech. Consequently, the Speech Clause grants different categories of speech different levels of constitutional protection and grants some speech no protection at all.[16] An understanding of what the Speech Clause guarantees and what it does not guarantee will provide the background necessary for understanding the particulars of the Supreme Court's sign jurisprudence in Part III and the details of the proposal in Part V.

15. Swenson, *supra* note 8, at 646.

16. *See, e.g.*, *Metromedia*, 453 U.S. at 507–08 (plurality opinion) (holding that traffic safety and aesthetics in the community could justify infringement on commercial speech); Roth v. United States, 354 U.S. 476, 484–85 (1957) (explaining that obscenity is not protected speech); Beauharnais v. Illinois, 343 U.S. 250, 252–56 (1952) (holding that the First Amendment does not protect libelous speech); Dennis v. United States, 341 U.S. 494, 509–17 (1951) (explaining that a clear and present danger could necessitate infringement on speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (explaining that fighting words that incite breach of the peace are not protected speech); Schenk v. United States, 249 U.S. 47, 52 (1919) (explaining that free speech does not protect a right to falsely shout "Fire!" in a crowded theater).

Thus, this Section will briefly explore: (1) the requirement that speech regulations of fully protected speech be content-neutral and the resulting doctrine of time, manner, and place regulations; and (2) the Court's judicial distinction between two important categories of speech that are at play in billboard and sign regulation, commercial and noncommercial speech, and the accompanying tests for analyzing restrictions of both types of speech.

A. Content-Neutral Regulation

The guiding principle in enacting regulations designed to limit speech that is fully protected by the Constitution[17] is that the regulations "must have a neutral effect on speech"[18]; that is, government must not direct the regulation at the content of the speech but rather design the regulation to "protect governmental interests unrelated to speech."[19] Since the Court's holding in *Police Department of Chicago v. Mosley*,[20] the initial inquiry in a Speech Clause analysis is whether the speech regulation is content-neutral or content-based.[21]

1. Content-based regulation

A speech regulation is content-based if it is aimed at regulating a particular type of speech. More specifically, content-based regulation might be aimed either at a particular viewpoint or, more broadly, at a particular subject or content. Each type of content-based regulation raises serious First Amendment concerns and must satisfy a strict scrutiny analysis to be found constitutional.[22] For a regulation to

17. See discussion *infra* Part II.B.1–2 for an explanation of how noncommercial speech is fully protected speech that is analyzed under the tests set forth in this section.

18. Daniel R. Mandelker, *Free Speech Issues in Sign Regulation*, *in* LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION 159, 164 (ALI-ABA 2002).

19. *Id.*

20. 408 U.S. 92, 99 (1972).

21. *See* Rappa v. New Castle County, 18 F.3d 1043, 1053 (3d Cir. 1994); Cordes, *supra* note 11, at 42 ("In recent years the Court's primary requirement has been that regulation of First Amendment activity be content-neutral."); Mark Tushnet, *The Supreme Court and Its First Amendment Constituency*, 44 HASTINGS L.J. 881, 882 (1993) ("Today the central organizing concept of First Amendment doctrine is the distinction between content-based regulations and content-neutral ones.").

22. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000); Boos v. Barry, 485 U.S. 312, 321 (1988).

survive strict scrutiny, government must narrowly tailor the regulation to meet a compelling governmental interest and use the least restrictive means to achieve its objective.[23] The clear presumption in Speech Clause analysis, therefore, is that both viewpoint neutrality and content neutrality are required when a government seeks to regulate speech.

Viewpoint neutrality means simply that speech regulation may not regulate a certain point of view.[24] For example, a city may not prohibit only speech that opposes abortion while allowing speech in favor of abortion. Such a regulation would clearly be directed at a particular viewpoint, which would necessarily make it unconstitutional, unless it could survive strict scrutiny or somehow be found to be a content-neutral time, manner, or place regulation.[25]

Content neutrality, on the other hand, allows government to restrict speech based on its noncommunicative impact. Analyzing whether a regulation is content-neutral involves nuanced considerations and can cause great difficulties in free speech analysis. Content neutrality stems from the Supreme Court's assertion that "government has no power to restrict expression because of its message, its ideas, its subject matter, *or its content*."[26] Whereas viewpoint neutrality is concerned with regulations restricting a particular viewpoint, content neutrality is concerned with regulations restricting the content of speech.[27] For example, a speech regulation

23. *Playboy*, 529 U.S. at 813; *see also* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874 (1997); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). A further requirement, which is not at issue in this Comment, is that the "regulation not be overbroad so as to chill protected speech." O. Lee Reed, *Is Commercial Speech Really Less Valuable than Political Speech? On Replacing Values and Categories in First Amendment Jurisprudence*, 34 AM. BUS. L.J. 1, 14 (1996). While the overbreadth doctrine is important in many free speech analyses, it is not at issue in this Comment and, therefore, will not be discussed further.

24. Mandelker, *supra* note 18, at 164.

25. *Hill v. Colorado*, 530 U.S. 703 (2000), is an illustrative example of the Court upholding what arguably was a viewpoint-based regulation that prohibited approaching within eight feet of another person within one hundred feet of a health-care facility to protest, pass out leaflets, display signs, or engage in other similar behaviors. *Id.* at 707. The statute arguably applied most directly against protests at abortion clinics, *id.* at 708–11, and thus, arguably could have been characterized as viewpoint regulation. The Court rejected this argument and found it to be a content-neutral time, manner, place restriction. *Id.* at 719–25.

26. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (emphasis added) (citation omitted).

27. The theory behind requiring content neutrality is not to allow government to determine which noncommercial topics are suitable for public debate: "To allow a government the choice of permissible subjects for public debate would be to allow that government control

prohibiting any statement of any kind about abortion would violate content neutrality. The Supreme Court has stated that the "principal inquiry" in determining whether a regulation is content-neutral is "whether the government has adopted a regulation because of a disagreement with the message it conveys."[28] Absent content neutrality, government would be able to select topics in the public debate and thereby appropriate the content of the public debate to itself.

2. Content-neutral regulation: time, manner, and place regulations

Because of the serious speech concerns associated with content-based regulations, content neutrality is almost always a requisite in speech regulation. The most typical form of content-neutral regulation is time, manner, or place regulation of speech to further an important governmental interest.[29] These types of regulations are content-neutral—in theory—and seek only to regulate the "total *quantity* of speech by regulating the time, the place or the manner in which one can speak . . . ."[30] The Supreme Court has explained that

> even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided (1) the restrictions "are justified without reference to the content of the regulated speech, (2) that they are narrowly tailored to serve a significant governmental interest, and (3) that they leave

over the search for political truth." Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 538 (1980), *quoted in* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 515 (1981) (plurality opinion); Rappa v. New Castle County, 18 F.3d 1043, 1062 (3d Cir. 1994).

28. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citation omitted); *see also* Mandelker, *supra* note 18, at 164–65. But compare *Hill*, which illustrates that determining content neutrality is not an easy analysis. 530 U.S. at 719–25. Justice Scalia in dissent argued that "[e]ven a law that has as its purpose something unrelated to the suppression of particular content cannot irrationally single out that content for its prohibition." *Id.* at 746 (Scalia, J., dissenting).

29. *See, e.g.*, *Ward*, 491 U.S. at 791; Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding regulation that prohibited the posting of political signs on public property); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Kovacs v. Cooper, 336 U.S. 77 (1949); Cordes, *supra* note 11, at 42; Mandelker, *supra* note 18, at 164–65.

30. *Rappa*, 18 F.3d at 1053 (emphasis added); *see also Ward*, 491 U.S. at 791; *Taxpayers for Vincent*, 466 U.S. at 804–05.

> open ample alternative channels for communication of the information."[31]

As this language demonstrates, the scrutiny level applicable to content-neutral regulations is an intermediate level of scrutiny. These regulations "must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . need not be the least restrictive or least intrusive means of doing so."[32]

The validity of such time, manner, and place restrictions is premised on the idea that with these restrictions, government is not attempting to regulate the content of the speech but is determining where and how the speech will occur so as to avoid conflict with other important government interests.[33] The Court explained that a "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[34] For example, in *Ward v. Rock Against Racism*, the Court upheld a New York City sound-amplification guideline designed to limit the volume at an outdoor

31. *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293 (numbering added)); *see also* 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 20.47 (3d ed. Supp. 2005).

32. *Ward*, 491 U.S. at 798.

33. *See* Cordes, *supra* note 11, at 42.

34. *Ward*, 491 U.S. at 791. Professor Redish disputed the characterization of time, manner, and place restrictions as content-neutral and argued that "[m]any 'time-place-manner' regulations depend on the content of expression, and content-neutral restrictions may prohibit expression under any circumstances, and thus regulate considerably more than time, place, or manner." Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 114–15 (1981). Professor Redish further argued that the "opposite of time-place-manner restriction . . . is not a content-based regulation; it is an absolute prohibition on expression." *Id.* at 115–16. Susan Williams argued the opposite based on her reading of the early time, manner, and place cases:

> The language in these early cases indicates, however, that a [time, place, manner] regulation is distinguished primarily by its lack of content discrimination . . . . It regulates the circumstances of speech rather than the content of the speech. The "opposite" of a [time, place, manner] regulation is a content-based regulation.

Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 637 (1991). These arguments illustrate the divergent views of time, manner, and place restrictions extant in the academy. While this Comment does not seek to reconcile these divergent views, the language of *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council* is particularly relevant to support the view of time, manner, and place restrictions being content-neutral. There, the Court stated that speech regulations are constitutional "provided that they are *justified without reference to the content of the regulated speech*, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information." Va. State Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976) (emphasis added).

concert venue in Central Park while providing for adequate sound amplification.[35] The Court found that the city's justifications for the guideline—controlling noise levels and preserving the character of the surroundings "and [their] more sedate activities"—were entirely unrelated to the content of the speech at the concert venue.[36]

Time, manner, and place regulations are not as easily applied, or analyzed, as it initially might appear. Two problems are particularly relevant to the billboard analysis in this Comment: (1) how to validly regulate the time, manner, and place of speech without regulating content—which leads directly to a problem that is conspicuous in billboard regulations, the "all-or-nothing" problem; and (2) leaving open sufficient alternative methods of communication.[37]

a. The all-or-nothing problem. The first problem arises because when a government undertakes to regulate the time, manner, and place of a particular type or medium of speech, billboards for example, it is necessarily regulating the content of the speech involved unless it either completely allows or completely prohibits all speech within the time, manner, and place regulation.[38] In other words, "regardless of whether the state is required to accommodate speech in a particular place or time, once it has opened a particular forum to some speech it cannot exclude other speech contents"[39] lest the government engage in choosing which topics are appropriate for public discourse. Thus, because of the all-or-nothing problem, many regulations that are thought to be content-neutral are, in reality, content-based. The statute in *Boos v. Barry*[40] paradigmatically illustrates the point.

There the statute prohibited signs critical of foreign governments within five hundred feet of any government's embassy in Washington

35. *Ward*, 491 U.S. at 803.

36. *Id.* at 792.

37. Both of these concepts play major roles in this Comment, which necessitates their background explanation here. As will be explained *infra*, the all-or-nothing problem poses a major obstacle in enacting content-neutral time, manner, or place regulations of billboards. Similarly, the requirement of leaving open adequate alternative forms of communication plays a central role in this thesis. *See infra* Part V.

38. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (holding that when a state university allowed use of its facilities for student groups to meet but denied religious student groups from using those facilities, the university was improperly regulating based on the content of speech).

39. Cordes, *supra* note 11, at 42.

40. 485 U.S. 312 (1988).

D.C.[41] Both the respondents and the United States argued to the Supreme Court that this regulation was content-neutral "because the government is not itself selecting between viewpoints."[42] Although the Court agreed the statute was not viewpoint based, it rejected the contention that the regulation was content-neutral because *only one* category of speech (critical signs) was "completely prohibited within 500 feet of embassies"—but all signs *not critical* of foreign governments were allowed within 500 feet of the embassies.[43] Consequently, although the regulation facially appeared to be a content-neutral time, manner, and place restriction of speech critical of foreign governments because it restricted only the location of the speech, the regulation was, in fact, a content-based restriction of a particular type of speech. If Congress wished to restrict critical speech within five hundred feet of foreign embassies, Congress would have to restrict all types of speech within the five hundred foot radius[44]—all or nothing.

A further illustration will solidify the point. A hypothetical ordinance that allowed billboards to contain views only on abortion—a regulation nominally aimed at the manner of non-abortion speech—would be content-based unless the city allowed all other types of noncommercial speech on billboards. To allow otherwise would permit the city to discriminate among topics of noncommercial speech in its regulations, a scenario the Court's jurisprudence clearly prohibits because the regulation would amount to nothing more than a content-based discrimination.[45] The essence of the all-or-nothing problem associated with time, manner, and place restrictions is that the "rule against content discrimination forces the government to limit all speech—including the speech the government does not want to limit—if it is going to restrict any speech at all."[46]

41. *Id*. at 315–18.

42. *Id*. at 319.

43. *Id*. at 318–19.

44. *Id*. at 319 ("One category of speech has been completely prohibited within 500 feet of embassies. Other categories of speech, however, such as favorable speech about a foreign government or speech concerning a labor dispute with a foreign government, are permitted.")

45. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 515 (1981) (plurality opinion) (stating that "[b]ecause some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego *must similarly allow billboards conveying other noncommercial messages throughout these zones*" (emphasis added)).

46. Rappa v. New Castle County, 18 F.3d 1043, 1063 (3d Cir. 1994).

Once a court finds that a regulation is content-based because of the all-or-nothing problem, the court will apply the strict scrutiny analysis for content-based restrictions rather than the intermediate scrutiny analysis for content-neutral restrictions to determine whether the regulation is constitutional.[47] Thus, the practical effect of the all-or-nothing problem is that many regulations that appear to be content-neutral—and, therefore, require only means narrowly tailored to serve a substantial governmental interest—are struck down because they fail to meet the much more stringent standard of least restrictive means to meet a compelling governmental interest.[48]

b. Requirement of alternative channels of communication. Second, the Court has explained that time, manner, and place restrictions on speech must not only be content-neutral but also "leave open ample alternative channels for communication of the information."[49] This requirement is premised on the Court's concern that content-neutral regulation of speech is not restricting the existence of the speech but is restricting only one manner of its purveyance to further an important government interest.[50] An important facet involved in considering whether alternative channels of communication are available is whether other alternative channels are practically available or are available in theory only.[51] The Supreme Court has made it clear that when alternative channels are not available in practice, or involve "more cost and less autonomy"[52] than the regulated avenue of speech, the Court is likely to find the time, manner, and place restriction unduly burdensome on speech interests.[53]

47. Upon finding that the statute at issue in *Boos v. Barry* was content-based because of the all-or-nothing problem, the Court applied "the most exacting scrutiny," 485 U.S. at 321, and struck the statute down because it was not narrowly tailored to meet a compelling governmental interest. *Id.* at 322–34.

48. See *supra* notes 22–23 and accompanying text for an explanation of the strict scrutiny standard for content-based regulations and *supra* notes 31–32 and accompanying text for an explanation of the intermediate scrutiny standard for content-neutral regulations.

49. *Metromedia*, 453 U.S. at 516 (plurality opinion) (quoting Va. State Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976)).

50. *See, e.g.*, Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 93 (1977).

51. *See Metromedia*, 453 U.S. at 516 (plurality opinion); *Linmark*, 431 U.S. at 93.

52. *Linmark*, 431 U.S. at 93.

53. See *infra* Part V for an explanation of how this judicial requirement is utilized in the thesis of this Comment. In particular, this Comment relies on the distinction between conceivable alternatives and suitable alternatives the Court set out in *Linmark* to help define the categories of onsite and offsite signs. *See* discussion *infra* Parts III.A, V.A, V.B; s*ee also Linmark*, 431 U.S. at 93.

In sum, the intermediate scrutiny involved in analyzing the constitutionality of content-neutral regulations of speech requires a determination that a time, manner, and place regulation is narrowly tailored to further an important governmental interest, that the regulation is content-neutral, which determination involves the all-or-nothing analysis described above,[54] and that the regulation leaves open suitable alternative methods of communicating the same speech.

B. Commercial vs. Noncommercial Speech

1. Distinction between commercial and noncommercial speech

Because billboards convey both commercial and noncommercial speech, the next important First Amendment principle relevant to the billboard analysis in this Comment is the judicial distinction between commercial and noncommercial speech.[55] The basic qualitative distinction between commercial and noncommercial speech is that commercial speech "promotes commercial products or services,"[56] whereas noncommercial speech has "ideological or political content."[57] The Supreme Court has traditionally held that

54. *See supra* Part II.A.2.a.

55. The importance of this distinction and the reason for the explanation here is the rationale of the *Metromedia* plurality that has been relied on by subsequent lower court decisions that a regulation violates the Speech Clause when it allows commercial speech in circumstances where noncommercial speech is prohibited. *Metromedia*, 453 U.S. at 513 (plurality opinion) ("[T]he city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages."); *see also infra* Parts III.B (explaining the *Metromedia* holding), IV.A (explaining lower court application of the decision).

56. Mandelker, *supra* note 18, at 162.

57. *Id*. Importantly, other categories of speech also exist but receive less protection than noncommercial and commercial speech. For example, sexual speech and sexual expression, such as nude dancing, are protected by the First Amendment, albeit to a lesser degree than commercial and noncommercial speech. *See* Barnes v. Glenn Theater, Inc., 501 U.S. 560, 570 (1991); Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). The Court has also deemed some types of speech completely beyond First Amendment protection. Speech falling in this unprotected category includes fighting words, *see* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), obscenity, *see, e.g.*, Miller v. California, 413 U.S. 15 (1973); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957), and false or misleading commercial speech, *see* Central Hudson v. Public Serv. Comm'n, 447 U.S. 557, 564 (1979). *See also* cases cited *supra* note 16; Reed, *supra* note 23, at 12–13 (explaining the expansion of First Amendment protection in the twentieth century).

the Speech Clause "was initially enacted to shield the expression of unfavorable *political* opinions from federal government interference"[58] and, thus, has granted noncommercial political speech greater protection than commercial speech.[59] Historically, noncommercial speech has been the standard example of fully protected speech.[60]

In fact, prior to the Supreme Court's decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[61] "purely commercial advertisements of services or goods for sale were considered to be outside the protection of the First Amendment."[62]

Another consideration to call attention to here is that making the distinction between commercial and noncommercial speech is oftentimes an extremely difficult endeavor. Justice Brennan, concurring in *Metromedia*, explained that "our cases recognize the difficulty in making a determination that speech is either commercial or noncommercial." *Metromedia*, 453 U.S. at 834 (Brennan, J., concurring); *see also* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628–45 (1990) (describing and criticizing judicial attempts at quantifying and applying the distinction between commercial and noncommercial speech). Although examining the subtleties of this distinction is beyond the scope of this discussion, it is a point worth noting as it adds credence to the proposal to place primary emphasis not on the commercial/noncommercial distinction but on the onsite/offsite distinction. *See infra* Part V.

58. Swenson, *supra* note 8, at 646 (emphasis added); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273–76 (1964); Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 248–51 (1833) (explaining that the First Amendment protects only against government encroachment).

59. 2 EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 17:10 n.1 (4th ed. 2005) [hereinafter ZONING AND PLANNING] (explaining that the lesser protection accorded commercial speech "is because commercial speech which is firmly grounded in the profit motive, bears little relation to individual self-expression or political expression, interests that are normally considered fundamental to the core values protected by the First Amendment"). *See generally* Reed, *supra* note 23 (putting forth an argument in support of greater protection of commercial speech); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 207–14 (1982) (explaining in great detail the Court's rationale for the primacy of political speech).

60. *See, e.g.*, Reed, *supra* note 23, at 3–15 (discussing the historical developments of free speech from its political speech beginnings to its multifaceted nature today); Swenson, *supra* note 8, at 646 ("The first amendment guarantee was initially enacted in order to shield the expression of unfavorable *political opinions* from federal government interference." (emphasis added)).

61. 425 U.S. 748 (1976).

62. *Metromedia*, 453 U.S. at 505 (plurality opinion); *see also* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("We are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising."). Some have argued that the *Valentine* decision created an otherwise unknown distinction between commercial and noncommercial speech that is nowhere to be found in the Constitution. *See, e.g.*, Kozinski & Banner, *supra* note 57, at 627 (1990) ("In 1942, the Supreme Court plucked the commercial speech doctrine out of thin air."). Justice Douglas referred to the decision as "casual, almost offhand,"

Such a distinction was based, at least theoretically, on the belief that noncommercial or political speech made up the heart of the First Amendment's guarantee of a "free marketplace of ideas,"[63] whereas commercial speech involved nothing more than "a seller hawking his wares and a buyer seeking to strike a bargain."[64] With the Court's decision in *Virginia Pharmacy*, however, it brought commercial speech within the protection of the First Amendment, albeit to a lesser degree than noncommercial speech.[65]

Despite calls to abandon the distinction and treat commercial and noncommercial speech the same for First Amendment purposes[66] and, conversely, calls to eliminate commercial speech protection altogether,[67] the Court continues to "observe the distinction between commercial and noncommercial speech,

Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring), and a mere seventeen years after its pronouncement claimed that it had "not survived reflection." *Id*.

63. *Virginia Pharmacy*, 425 U.S. at 781 (Rehnquist, J., dissenting); *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1967) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . .").

64. *Virginia Pharmacy*, 425 U.S. at 781 (Rehnquist, J., dissenting). Advocates of the commercial/noncommercial distinction are quick to argue that the distinction is based on the historical importance the Framers placed on free speech in a democracy. For example, Judge Kozinski, although not an advocate of the distinction, concedes that the "Framers' commentary on freedom of speech focuses entirely on the importance of free speech to self-government." Kozinski & Banner, *supra* note 57, at 632. *But cf.* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 5–6 (1993) (explaining that "the principle of free expression is not limited to 'political' speech, or to expression with a self conscious political component"); Reed, *supra* note 23, at 5–6 ("Nor is there much evidence that the constitutional framers intended to eradicate censorship through the First Amendment. More likely, they wanted to limit the central government's power over the rights of states."); David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1710 (1991). Sunstein argues that the "founders' conception of free speech was a good deal narrower than ours," SUNSTEIN, *supra*, at xiv, and that reference to the Framers' understanding of free speech "does not reveal a clear-cut understanding of what speech was protected and what speech was not." *Id*.

65. *Virginia Pharmacy*, 425 U.S. at 770–73 & 772 n.24. In *Metromedia*, the Court explained that in *Virginia Pharmacy*, it "plainly held that speech proposing no more than a commercial transaction enjoys a substantial degree of First Amendment protection." *Metromedia*, 453 U.S. at 505 (plurality opinion). However, the Court went on in *Metromedia* to explain that *Virginia Pharmacy* "did not equate commercial and noncommercial speech for First Amendment purposes; indeed, it expressly indicated the contrary." *Id.; see also* Cordes, *supra* note 11, at 45 ("Although the Supreme Court . . . extended First Amendment protection to commercial speech, the Court made clear that commercial speech does not enjoy the same degree of protection as non-commercial speech . . . ."); Mandelker, *supra* note 18, at 163 ("Commercial and noncommercial speech enjoy different levels of constitutional protection.").

66. *See, e.g.*, Kozinski & Banner, *supra* note 57, at 651–53; Reed, *supra* note 23, *passim*.

67. *See, e.g.*, SUNSTEIN, *supra* note 64, *passim*.

indicating that the former could be forbidden and regulated in situations where the latter could not be."[68] This lesser protection manifests itself in an intermediate level of scrutiny when examining whether government regulation of commercial speech is constitutional as opposed to the content-neutral requirement when examining whether government regulation of noncommercial speech is constitutional.[69]

2. Judicial tests for restricting noncommercial and commercial speech

Because the Court affords commercial speech and noncommercial speech different levels of constitutional protection, the tests it has promulgated for examining regulations of both types of speech vary somewhat. Although both tests are a form of heightened scrutiny, noncommercial speech regulation must survive

68. *Metromedia*, 453 U.S. at 506 (plurality opinion). *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553–56 (2001) (rejecting calls to apply a higher standard of scrutiny to commercial speech cases—a level of scrutiny akin to noncommercial speech cases—and holding that the *Central Hudson* test for commercial speech continues to "provide[ ] an adequate basis for decision"). See *infra* Part II.B.2.b for an explanation of the *Central Hudson* test.

The Court has given commercial speech a lesser degree of First Amendment protection for a number of reasons. Some include: (1) "commercial speech is less likely to be chilled by regulation than other forms of speech because of economic incentives," Cordes, *supra* note 11, at 45; *see also* Friedman v. Rogers, 440 U.S. 1, 10 (1979); (2) "commercial speech is less central to the primary interests of the First Amendment," Cordes, *supra* note 11, at 45; *see also* Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985); (3) the objectivity of commercial speech makes it reasonable to assume that consumers can independently verify the truthfulness of the commercial message, *Virginia Pharmacy*, 425 U.S. at 772 n.24; *see also* Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 61 (1999); and (4) a general wariness that equating the speech protections of commercial speech to noncommercial speech could effectuate an attrition of the noncommercial speech protections, s*ee Metromedia*, 453 U.S. at 506 (plurality opinion) ("To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to [noncommercial] speech." (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978))); Cordes, *supra* note 11, at 45. Judge Kozinski severely criticizes this last rationale and posits that this "argument seems to assume that the total amount of first amendment protection available for judges to draw upon is constant, so that protecting speech in one place will leave less protection for speech in another place where we might really need it." Kozinski & Banner, *supra* note 57, at 648.

69. *See* Cordes, *supra* note 11, at 46 (stating that the *Central Hudson* test "suggests that the Court will apply a form of heightened scrutiny, rather than strict scrutiny, for restrictions on commercial speech content"); *see also Metromedia*, 453 U.S. at 506 (plurality opinion) ("[W]e . . . have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." (quoting *Ohralik*, 436 U.S. at 456)).

a strict scrutiny analysis, unless it is a valid content-neutral regulation,[70] while commercial speech regulation, because commercial speech is not fully protected, must survive an intermediate level of scrutiny.

a. Restricting noncommercial speech: strict scrutiny. As stated, the First Amendment provides noncommercial speech more protection than commercial speech; consequently, government efforts to restrict noncommercial speech, except in the most limited of circumstances, are limited to content-neutral time, manner, and place restrictions.[71] The Supreme Court has clearly stated that a "*content-based* restriction on *political speech* in a *public forum*, . . . must be subjected to the most exacting scrutiny."[72] Hence, if a regulation is not content-neutral, a court will subject it to strict scrutiny and will almost certainly strike it down.[73]

If a regulation of noncommercial speech is a content-neutral time, manner, or place regulation, a court will apply the intermediate scrutiny described above.[74] The main difference between the strict and intermediate scrutiny is that in cases of intermediate scrutiny, the government interest need be only important or substantial rather than compelling,[75] and the means need be only narrowly tailored to achieve the interest rather than the least restrictive means.[76]

70. *See* discussion *supra* Part II.A.

71. *See supra* Part II.A.2.

72. Boos v. Barry, 485 U.S. 312, 321 (1988).

73. *See, e.g.*, *id.*; Widmar v. Vincent, 454 U.S. 263 (1981). See discussion of *Boos v. Barry*, *supra* text accompanying notes 40–44, for an illustration of the difficulty of enacting a content-neutral time, manner, and place regulation without crossing over to a content-based regulation due to the all-or-nothing problem. *But cf.* Burson v. Freeman, 504 U.S. 191 (1992) (upholding, 6-3, a prohibition on electioneering within one hundred feet of a polling place). See discussion *supra* Part II.A for a full explanation of the content-neutral test.

74. *See supra* Part II.A.2.

75. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791–98 (1989).

76. *Id.* at 798 ("Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so."). A point to note here is that the Court has also expressed the test for content-neutral regulations of noncommercial speech in terms of the *O'Brien* test for regulation of expressive conduct. In *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804–05 (1984), the Court explained that the framework for examining content-neutral regulations of noncommercial speech was set forth in *United States v. O'Brien*:

> A government regulation is sufficiently justified it if is within the constitutional power of the Government; it if furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free

b. Restricting commercial speech: the Central Hudson *test.* Because the Court has granted commercial speech a degree of protection under the First Amendment, the government is not free to restrict commercial speech at will. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*[77] the Court articulated a four-part test to determine the validity of government restriction of commercial speech. Importantly, since commercial speech receives less constitutional protection than noncommercial speech, the *Central Hudson* test, rather than the content-neutral test, is the relevant analysis when examining any regulation of commercial speech. As explained in *Metromedia*, the test is as follows:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.[78]

This examination requires an initial inquiry into the lawfulness of the commercial speech before determining whether government has an interest in regulating the speech. Hence, implicit in the commercial speech protection is that the First Amendment does not protect commercial speech that is in any way unlawful or misleading. Justice Stevens explained in *44 Liquormart, Inc. v. Rhode Island* that "[i]t is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be

> 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 805 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)). The Court later equivocated on whether it had adopted the *O'Brien* test whole-cloth as its test for content-neutral regulations of noncommercial speech when it noted that it has "held that the *O'Brien* test 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'" *Ward*, 491 U.S. at 798 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 (1984)); *see also* Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 85–88 (2000) (explaining that although they constitute two separate tests, the *O'Brien* test and the content-neutral time, manner, or place test are essentially the same). Whether the tests are the same or substantially similar only is immaterial to this Comment, although this Comment frames the analysis in terms of the content-neutrality test rather than the *O'Brien* test.

77. 447 U.S. 557 (1980).

78. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507 (1981) (plurality opinion); *cf. Central Hudson*, 447 U.S. at 563–66.

subject to greater governmental regulation than noncommercial speech.'"[79]

Upon overcoming this initial hurdle, the remaining three parts of the test involve a balancing of the purpose for the government regulation against the methods used to accomplish that purpose.[80] The government must have a substantial interest and use means that directly achieve that interest without unduly restricting the speech to accomplish that objective. However, in *Board of Trustees of the State University of New York v. Fox*[81] the Court modified the final prong of the *Central Hudson* test and, thereby, made it clear that the "government may regulate commercial speech without showing that its regulation is necessarily the most narrowly tailored"[82] to achieve the substantial ends. The Court explained that to survive constitutional scrutiny, commercial speech regulation requires a "'fit between the legislature's ends and the means chosen to achieve those ends'—a fit that is not necessarily perfect, but reasonable . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective."[83] This is clearly a form of *heightened* scrutiny—though still not approaching the level of *strict* scrutiny—that is applicable to noncommercial speech regulations that are content-based.[84]

Further, like noncommercial speech regulation, courts are concerned with the availability of alternative channels of communication in the face of the commercial speech regulation. While this factor is likely to be more important in noncommercial regulation,[85] it has played a role in commercial speech regulation

79. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 502 (1996) (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993)).

80. ZONING AND PLANNING, *supra* note 59, § 17:10 n.1 ("Although the Central Hudson test for the validity or restrictions on commercial speech is almost identical to the O'Brien test for the validity of restrictions on noncommercial speech . . . the degree of First Amendment protection accorded commercial speech is more limited than that extended to political or ideological expression.").

81. 492 U.S. 469, 478 (1989).

82. Katherine Dunn Parsons, Comment, *Billboard Regulation After* Metromedia *and* Lucas, 31 HOUS. L. REV. 1555, 1572 (1995).

83. *Board of Trustees*, 492 U.S. at 480 (quoting Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 341 (1986)) (citation and internal quotation marks omitted).

84. *See* Cordes, *supra* note 11, at 46 ("This test suggests that the Court will apply a form of heightened scrutiny, rather than strict scrutiny, for restrictions on commercial speech content.").

85. *See* ZONING AND PLANNING, *supra* note 59, § 17:10 n.2.

cases.[86] A regulation that cuts off all avenues of commercial expression is likely unconstitutional.[87]

As will be seen in the next Part, which discusses the Supreme Court's billboard and sign jurisprudence, each of the above-described First Amendment concerns is at play in billboard and sign regulation. The inherent complexity of applying these various principles in a consistent manner is surely a factor not only in the Court's own confusion in *Metromedia* but also in the confusion that *Metromedia* has created. Ultimately, this Comment seeks to unify these divergent principles in instances of billboard regulation in a simple yet comprehensive manner.

III. THE SUPREME COURT CASES

The Court has held that the guarantees of the First Amendment apply to sign/billboard regulation. The Court in *Metromedia* stated that "[b]illboards are a well-established medium of communication, used to convey a broad range of different kinds of messages."[88] The Court cited the California Supreme Court approvingly, explaining that "[t]he outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster . . . to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes."[89] The Court, therefore, recognizes that billboards are a means of conveying both commercial and noncommercial ideas and causes, and billboards therefore clearly have a communicative aspect that is protected by the First Amendment.[90]

Nonetheless, because billboards are "designed to stand out and apart from [their] surroundings, the billboard creates a unique set of problems for land-use planning and development."[91] The physical,

86. *See, e.g.*, Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 93 (1977) (holding the prohibition of "for sale" signs on residential property unconstitutional because, *inter alia*, it did not leave open "ample channels of communication" (quoting Va. State Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976))).

87. *Id.*

88. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (plurality opinion).

89. *Id.* (quoting Metromedia, Inc. v. City of San Diego, 610 P.2d 407, 430–31 (Cal. 1980) (Clark, J., dissenting)).

90. *Id.* at 502.

91. *Id.*

noncommunicative aspect of billboards is not subject to the requirements of the First Amendment, and, as a result, governments have a "legitimate interest in controlling [this] aspect[] of the medium"[92] through use of their police powers.[93] Inherent in billboard regulation is the delicate balance between the protected communicative aspects of billboards (the messages portrayed on the billboard) and the noncommunicative aspects of billboards (the physical nature of the billboard). This balance requires "assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."[94]

As the following analysis will show, the Court has struggled to enunciate a clear rule to guide this delicate balancing. Rather than detail the facts and intricacies of the major Supreme Court cases, something that has been exhaustively done elsewhere,[95] this Comment seeks only to detail the major points of analysis that have resulted from these cases for the purpose of both providing a quick summary of these points of analysis and establishing the necessary context for this Comment's proposal in Part V.

A. Linmark Associates, Inc. v. Township of Willingboro

In *Linmark Associates, Inc. v. Township of Willingboro*,[96] the Court considered whether an ordinance that prohibited "for sale" signs on individual property owners' property unduly restricted free speech.[97] Finding that the ordinance ran afoul of the First Amendment, the Court set forth two major criteria for determining whether a regulation is a permissible time, manner, and place regulation.

First, time, manner, and place regulations must leave open realistic and suitable forms of communicating the information that

92. *Id.* (citing Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)).

93. *See* Swenson, *supra* note 8, at 652.

94. Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 91 (1977) (quoting Bigelow v. Virginia, 421 U.S. 809, 826 (1975)).

95. For example, the holding in *Metromedia* has been the subject of numerous articles seeking to understand the plurality's badly fractured opinion. *See, e.g.*, Cordes, *supra* note 11, at 48–53; Stephan, *supra* note 59, at 244–50; Swenson, *supra* note 8, at 655–61; R. Douglas Bond, Note, *Making Sense of Billboard Law: Justifying Prohibitions and Exemptions*, 88 MICH. L. REV. 2482, 2488–2500 (1990); Parsons, *supra* note 82, at 1573–80; *The Supreme Court, 1980 Term—Commercial Speech*, 95 HARV. L. REV. 211 (1981).

96. 431 U.S. 85 (1977).

97. *Id.* at 87–91.

the regulations are restricting. Although the Court recognized that "leaflets, sound trucks, [and] demonstrations,"[98] were all available as alternative communication methods, the Court stressed that the only *realistic* alternatives were "newspaper advertising and listing with real estate agents."[99] Despite the availability of these realistic alternatives, the Court found they were not *suitable*: they were costlier, reduced the autonomy of the property owner, were less likely to reach persons "not deliberately seeking sales information," and were generally less effective than "for sale" signs on the property owners' property.[100]

Second, regulation of *only* a specific category of signs on a property owners' property, such as "for sale" signs, is not content-neutral. Here, the township was not attempting to regulate the manner or place of a type of speech—lawn signs—but was instead regulating the content of the speech.[101] The ordinance did not restrict other lawn signs that would generate the same aesthetic and property value concerns[102] as the "for sale" signs.[103] The Court went on to reject the ordinance as a valid content-based regulation because the township failed to show how it directly furthered the goal of racial integration.[104]

B. Metromedia, Inc. v. City of San Diego

Described by Justice Rehnquist as a "virtual Tower of Babel, from which no definitive principles can be clearly drawn,"[105] the *Metromedia* plurality decision remains the seminal billboard case and, consequently, is the starting point for any analysis of government

98. *Id*. at 93.

99. *Id*.

100. *Id*.; *see also* Cordes, *supra* note 11, at 47.

101. *Linmark*, 431 U.S. at 93–94.

102. *Id*. at 90 (explaining the aesthetic and property value as the justifications put forth for the regulation).

103. *Id*. at 93–94; *see also* Cordes, *supra* note 11, at 47 ("[T]he ordinance could not be considered a permissible time, place, or manner restriction because it only restricted 'for sale' signs and was therefore not content-neutral. The aesthetic and traffic concerns which might otherwise justify the regulation of signs could not justify this restriction because the ordinance did not regulate signs which generated comparable concerns." (citation omitted)).

104. *Linmark*, 431 U.S. at 94–96.

105. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 569 (1981) (Rehnquist, J., dissenting).

regulation of billboards and signs.[106] The ordinance at issue in the decision was an attempt by San Diego to regulate billboards within the city. The Court explained the ordinance as follows:

> [U]nder the ordinance (1) a sign advertising goods or services available on the property where the sign is located is allowed; (2) a sign on a building or other property advertising goods or services produced or offered elsewhere is barred; (3) noncommercial advertising, unless within one of the specific exceptions, is everywhere prohibited. The occupant of property may advertise his own goods or services; he may not advertise the goods or services of others, nor may he display most noncommercial messages.[107]

Although the various opinions disagreed about most aspects of the decision, including the standard of review and the impact of the ordinance,[108] when aspects of the plurality, concurring, and dissenting opinions are combined, *Metromedia* can be viewed as establishing three principles relating to billboard/sign regulation.

First, seven justices, including the plurality opinion and each dissenting opinion, agreed that a government's aesthetic and traffic safety concerns are a substantial government interest, sufficient to justify regulation of billboards.[109] Thus, under either the time, manner, or place test[110] for content-neutral regulations of noncommercial speech, or the *Central Hudson* test[111] for commercial speech, aesthetics and traffic safety satisfy the requirement of a substantial governmental interest to justify regulation of either type of speech on signs and billboards.[112]

106. *See* Daniel R. Mandelker, *Sign Regulation and the First Amendment*, *in* LAND USE INSTITUTE PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION 69, 72 (ALI-ABA 2000) (explaining that the plurality opinion "has been influential and followed by federal and state court decisions").

107. *Metromedia*, 453 U.S. at 503 (plurality opinion).

108. *See* Cordes, *supra* note 11, at 49.

109. *Metromedia*, 453 U.S. at 507–08 (plurality opinion); *id.* at 552 (Stevens, J., dissenting in part); *id.* at 560 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting); *see also* Mandelker, *supra* note 18, at 164 (noting that *Metromedia* is "a strong endorsement of aesthetics as a substantial governmental purpose that satisfies the free speech clause"); ZONING AND PLANNING, *supra* note 59, § 17:10. As will be seen *infra* in Part III.C., the Court confirmed that aesthetics are a sufficient governmental purpose in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806–07 (1984).

110. *See supra* Part II.A.2.

111. *See supra* Part II.B.2.b.

112. Interestingly, numerous lower courts have held that the government's interest in aesthetics is particularly substantial when it is used to protect the nature and look of a

Second, five justices, including the plurality and Justice Stevens, who dissented in part, agreed that the distinction between onsite and offsite *commercial* advertising is constitutional. Onsite signs were traditionally considered to be signs that "advertise goods and services offered at that location."[113] Naturally, offsite signs were considered to be signs that "advertise[d] goods and services available elsewhere."[114] The Court explained that "a commercial enterprise—as well as the interested public—has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere."[115] The practical result of this distinction is that "offsite commercial billboards may be prohibited while onsite commercial billboards are permitted."[116]

The final principle that the *Metromedia* decision announced is that an ordinance violates the Speech Clause when it prohibits noncommercial speech in locations and circumstances in which it permits commercial speech.[117] Both the plurality and the concurrences support this holding.[118] The plurality stressed that the "fact that the city may value commercial messages relating to onsite goods and services more than it values commercial communications

designated historic district. *See, e.g.*, Globe Newspaper Co. v. Beacon Hill Architecture Comm'n, 100 F.3d 175, 187 (1st Cir. 1996); Messer v. City of Douglasville, 975 F.2d 1505, 1510 (11th Cir. 1992) ("A government has a more significant interest in the aesthetics of designated historical areas than in other areas."); Wheeler v. Comm'r of Highways, 822 F.2d 586 (6th Cir. 1987); Burke v. City of Charleston, 893 F. Supp. 589, 610 (D.S.C. 1995) ("A government has a more significant interest in the aesthetics of designated historic areas than nonhistoric areas."); Pigg v. State Dep't of Highways, 746 P.2d 961, 969 (Colo. 1987); *see also Metromedia*, 453 U.S. at 533–34 (Brennan, J., concurring) ("I have little doubt that some jurisdictions will easily carry the burden of proving the substantiality of their interest in aesthetics. For example, the parties acknowledge that a historical community such as Williamsburg, Va., should be able to prove that its interest in aesthetics and historical authenticity are sufficiently important that the First Amendment value attached to billboards must yield.").

113. *Metromedia*, 453 U.S. at 511 (plurality opinion); Mandelker, *supra* note 18, at 167.

114. *Metromedia*, 453 U.S. at 511 (plurality opinion).

115. *Id.* at 512.

116. *Id.*

117. *Id.* at 513.

118. *Id.*; *see* ZONING AND PLANNING, *supra* note 59, § 17.10 (stating that "at least six Justices agreed that a city cannot give more favorable treatment to commercial signs than to noncommercial (political or ideological) signs by allowing on-site commercial signs but prohibiting on-site noncommercial signs").

relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others."[119]

The plurality's rationale for this holding is based in the traditional distinction between commercial and noncommercial speech, namely, that noncommercial speech is afforded greater protection under the First Amendment than commercial speech.[120] Under the plurality's reasoning, to allow restrictions on noncommercial speech where no similar restrictions on commercial speech existed would be to "invert" this traditional distinction in First Amendment jurisprudence.[121] Thus, the plurality concluded that "[i]nsofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages."[122]

The result of the second and third principles explained above is that while government may—based on its interest in traffic safety and aesthetics, as well as the property owners' and public's interest in identifying the place of business—"distinguish between the relative value of different categories of commercial speech,"[123] government cannot make such distinctions when dealing with noncommercial speech.[124] It follows, then, that preferences for onsite commercial speech over noncommercial speech are presumptively invalid as such preferences are nothing more than a content-based discrimination.[125]

While answering *some* questions, the *Metromedia* decision does not answer other very significant questions, which unanswered impair lower courts' analysis. The difficulty in application arises when one seeks to determine what the plurality's injunction against favoring commercial over noncommercial speech means. For example, does it mean that whenever the government allows *any* commercial speech, *all* noncommercial speech must be allowed? Or, does it mean that the government simply must treat commercial

119. *Metromedia*, 453 U.S. at 513 (plurality opinion).
120. *See supra* Part II.B.
121. *Metromedia*, 453 U.S. at 513 (plurality opinion).
122. *Id.*
123. *Id.* at 514.
124. *Id.* at 514–15.
125. *Id.* at 516–17.

speech no better than it treats noncommercial speech—that is, must noncommercial speech be permitted under the same circumstances in which commercial speech is permitted?[126]

C. Members of City Council v. Taxpayers for Vincent

In *Members of City Council v. Taxpayers for Vincent*,[127] the Court considered a Los Angeles ordinance that prohibited the posting of any sign, either commercial or noncommercial, on public property.[128] The issue before the court was whether the city's interest in aesthetics and traffic safety[129] justified its restriction of noncommercial political signs posted on public utility poles.[130] The Court's holding in *Taxpayers for Vincent* is significant because in addition to reaffirming and strengthening the government's interest in aesthetics as a justification for restriction of both commercial and noncommercial speech,[131] it more importantly established that so long as a regulation is content-neutral and leaves open ample alternative methods of communication, the Constitution permits incidental restrictions of noncommercial speech in billboards and signs.[132] The Court stated:

> The Los Angeles ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited. To the extent that the posting of signs on public property has advantages over these forms of expression . . . there is no reason to believe that these same advantages cannot be obtained through other means.[133]

This aspect of the decision is extremely important to the thesis of this Comment because it clearly illustrates that the Court is willing to uphold bans of signs and billboards containing noncommercial

126. See *infra* Part IV.A for analysis of how lower courts have dealt with this dilemma.

127. 466 U.S. 789 (1984).

128. *Id.* at 791.

129. *Id.* at 823 (Brennan, J., dissenting); *see also* Cordes, *supra* note 11, at 53.

130. *Taxpayers for Vincent*, 466 U.S. at 792–93.

131. *Id.* at 805–07. The Court relied solely on the aesthetic justification in examining the governmental interest. *Id.*

132. *See* Cordes, *supra* note 11, at 54–55.

133. *Taxpayers for Vincent*, 466 U.S. at 812 (citation and footnote omitted).

messages on public property when suitable alternatives of communication exist.[134]

The Court went on to reject an argument put forth by the appellees that the alternative forms of communication had less utility than posting signs on public grounds. The Court explained that "nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication."[135] Professor Cordes contended that this holding is "arguably at odds with *Linmark*, where the Court found alternatives to 'for sale' signs inadequate,"[136] because in both cases the alternatives to the restricted speech were arguably costlier and less effective.[137] Following *Taxpayers for Vincent*, it was, therefore, unclear precisely what the Court considered to be adequate alternative methods of communication, yet it was clear that so long as the alternatives existed, incidental, content-neutral restrictions of noncommercial speech were permitted.

D. City of Ladue v. Gilleo

In *City of Ladue v. Gilleo*,[138] the Court considered an ordinance that prohibited homeowners from displaying any sign on their property "except 'residence identification' signs, 'for sale' signs, and signs warning of safety hazards."[139] The ordinance concurrently allowed churches, nonprofit organizations, and commercial establishments to display signs that it prohibited homeowners from displaying.[140]

The Court broadly phrased the issue presented as whether the city "may properly *prohibit* [a private citizen] from displaying her sign, and then, only if necessary, consider the separate question whether it was improper for the City simultaneously to *permit* certain other signs."[141] Thus, the Court put off examination of content-based arguments, choosing instead to consider first whether the regulation, "by eliminating a common means of speaking,"

134. *See infra* Part V.A.
135. *Taxpayers for Vincent*, 466 U.S. at 812.
136. Cordes, *supra* note 11, at 55; *see supra* Part III.A.
137. Cordes, *supra* note 11, at 55.
138. 512 U.S. 43 (1994).
139. *Id.* at 45.
140. *Id.*
141. *Id.* at 53.

simply regulated "too much speech."[142] In concluding that the regulation did regulate too much speech, the Court noted that, compared with the regulation in *Linmark* that had prohibited "for sale" signs only,[143] the regulation at issue here had a far greater impact on free communication of ideas because it eliminated virtually any opportunity for homeowners to display signs on their property.[144] The Court explained that residential signs were an important means of direct expression of political, religious, and personal messages of the homeowner,[145] and that by all-but-eliminating this important means of communication, the regulation restricted "too much speech."[146]

Further, the Court held that no viable alternative methods of communication existed. The Court stated that "[r]esidential signs are an unusually cheap and convenient form of communication," that may "have no practical substitute."[147] The Court also stressed that signs on one's property are often intended to reach neighbors—an intention that is ill-replaced by other forms of communication such as newspaper advertisements or leaflets.[148]

Finally, the Court distinguished *Taxpayers for Vincent*, which upheld a broad prohibition of posting signs on public property, by explaining that unlike the prohibition of speech on public property,[149] the prohibition of speech on private property had "almost completely foreclosed a venerable means of communication that is both unique and important."[150]

This reasoning concerning the right of a property owner to express her beliefs was centered in the Court's declaration that "[a] special respect for individual liberty in the home has long been part

142. *Id*. at 55.

143. *See supra* Part III.A.

144. *Gilleo*, 512 U.S. at 54.

145. *Id*. at 55–56 ("Often placed on lawns or in windows, residential signs play an important part in political campaigns, during which they are displayed to signal the resident's support for particular candidates, parties, or causes. They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression." (footnote omitted)).

146. *Id*. at 54–58.

147. *Id*. at 57.

148. *Id*.

149. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (stating that putting signs on public property was not a "uniquely valuable and important mode of communication"); *see also* Cordes, *supra* note 11, at 56.

150. *Gilleo*, 512 U.S. at 54.

of our culture and our law."[151] The Court went on to say that this "principle has special resonance when the government seeks to constrain a person's ability to *speak* there."[152] This rationale plays a central part in the proposal of this Comment to adopt a broader definition of onsite including homeowners in expressing themselves on their property.[153]

E. Lorillard Tobacco Co. v. Reilly

The case of *Lorillard Tobacco Co. v. Reilly*[154] deserves mentioning because it is a 2001 case that held that the distinction between commercial and noncommercial speech is still in effect. Specifically, the Court rejected the petitioner's argument to drop the *Central Hudson* test for commercial speech and apply strict scrutiny to commercial speech as it does to noncommercial speech.[155] The Court stated that it saw "no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision."[156] Had the Court adopted a strict scrutiny analysis for commercial speech, it would have implicitly overruled the plurality's holding in *Metromedia* because the plurality's holding was premised on the traditional practice of affording noncommercial speech greater protection than commercial speech.[157] It thus appears that the Court is still at least somewhat

151. *Id.* at 58.

152. *Id.* Further language is worth quoting here:

> Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8- by 11-inch sign expressing their political views. Whereas the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable . . . its need to regulate temperate speech from the home is surely much less pressing . . . .

Id.

153. *See infra* Part V.A.

154. 533 U.S. 525 (2001).

155. *Id.* at 554–55.

156. *Id.* (quoting Greater New Orleans Broad. Ass'n., Inc. v. United States, 527 U.S. 173, 184 (1999)).

157. *See supra* notes 117–126 and accompanying text. For a full description of the Court's holding in *Lorillard*, see 3 KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 16:3 (4th ed. 1996).

comfortable with the commercial/noncommercial distinction and that the *Metromedia* principles continue to be valid.[158]

F. City of Cincinnati v. Discovery Network, Inc.

Finally, while *City of Cincinnati v. Discovery Network, Inc.*[159] does not significantly add to the Court's development of billboard/sign and free speech jurisprudence, it illustrates that the Court itself has difficulty applying the *Metromedia* decision. In *Discovery Network*, the Court considered a situation that mirrored the circumstances in *Metromedia*: here, the ordinance "treated commercial speech more severely than noncommercial speech."[160] Cincinnati had likely designed a regulation that prohibited commercial news racks while permitting noncommercial news

158. An important point to consider here that is slightly askew from the main thesis of this Comment is whether the additions of Chief Justice Roberts and Justice Alito will affect the Court's adherence to the *Central Hudson* test. Certain members of the Court have appeared willing to abandon strict adherence to *Central Hudson* in past cases. Justice Thomas, for example has repeatedly stated that where a regulation is aimed to "keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," the *Central Hudson* test is inapplicable. *Greater New Orleans Broad.*, 527 U.S. at 197 (Thomas, J., concurring in the judgment) (quoting 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in the judgment)). Conceivably, then, given the right situation, Justice Thomas would be willing to apply the same standard to commercial speech that is applied to noncommercial speech. A similar concern was expressed by Justices Stevens, Kennedy, and Ginsburg in *44 Liquormart*, where they argued that "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." 517 U.S. at 501 (joint opinion of Stevens, Kennedy, and Ginsburg, JJ.).

Also in *44 Liquormart*, Justice Scalia expressed his agreement with Justice Thomas' view of the *Central Hudson* test—which Justice Scalia characterized as having no support other than "policy intuition"—and his agreement with Justice Stevens' dislike of "paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them." *Id.* at 517 (Scalia, J., concurring in part and concurring in the judgment).

Given these views, it is possible to envision a majority of five Justices willing, in a particular circumstance, to modify or even replace the *Central Hudson* test. With the addition of Chief Justice Roberts replacing Chief Justice Rehnquist and Justice Alito replacing Justice O'Connor, it is conceivable that given another opportunity, the Court might very well modify the *Central Hudson* test. Because, however, the Court has not done so, and there is no firm evidence that it will, this Comment approaches its analysis below on the assumption that the distinction between commercial and noncommercial speech continues to guide First Amendment billboard/sign analysis.

159. 507 U.S. 410 (1993).

160. Mandelker, *supra* note 18, at 169–70.

racks[161] to fall within the plurality's opinion in *Metromedia*, yet the Court nevertheless struck the ordinance down.[162] The city attempted to justify the distinction on the grounds that commercial speech is afforded less protection than noncommercial speech under the First Amendment.[163] Importantly, the Court "rejected the argument that the commercial/non-commercial distinction, standing alone, was a valid basis for regulation where the distinction bore no relationship to the interest asserted."[164]

Recognizing that this holding was contra to the holding in *Metromedia*, the Court attempted to distinguish the cases by explaining that the ordinance at issue in *Metromedia* did not distinguish between commercial and noncommercial speech; rather, the ordinance was centered only on onsite and offsite signs.[165] Relying on this interpretation, the Court noted that *Metromedia* did *not* hold that government could distinguish between commercial and noncommercial offsite billboards.[166] This conclusion has been recognized as a flat-out misreading of *Metromedia*.[167]

Although this decision conceivably alters the *Metromedia* distinction between commercial and noncommercial speech in cases of billboard/sign regulation, the Court stressed that the holding was narrow:

> As should be clear from the above discussion, we do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks [sic]. We simply hold that on this record Cincinnati has failed to make such a showing.[168]

Thus, it is still possible that communities can justify restrictions of commercial speech under the rationale that commercial speech is afforded less protection than noncommercial speech. Upholding

161. *Discovery Network*, 507 U.S. at 412–14.

162. *Id*. at 429–30.

163. *Id*. at 428.

164. Cordes, *supra* note 11, at 74.

165. *Discovery Network*, 507 U.S. at 425 n.20.

166. *Id*.

167. *See, e.g.*, Cordes, *supra* note 11, at 75 (stating that "[a]s a practical matter, the *Discovery* majority interpretation of *Metromedia* is inaccurate"); Mandelker, *supra* note 18, at 170 (recognizing that the Court's "reading of *Metromedia* is incorrect").

168. *Discovery Network*, 507 U.S. at 428.

such a regulation would require limiting *Discovery Network* to its facts and continuing to apply the uncertain principles of *Metromedia*—something that some lower courts have already done.[169]

G. Summary of the Supreme Court Cases

The above cases illustrate the long, tortuous path the Court has tread in the realm of billboard/sign regulation and the accompanying speech interests inherent in the analysis. The *Metromedia* decision and the three principles for which it is recognized—that aesthetic interests are substantial government interests, the distinction between onsite and offsite commercial advertising, and the prohibition of barring noncommercial speech where commercial speech is allowed[170]—continue to be valid law despite the Court's confusing opinion in *Discovery Network*.[171]

Regarding valid time, manner, and place regulations of speech, including billboard/sign regulations, the Court's decisions in *Linmark*, *Taxpayers for Vincent*, and *Gilleo* create a confusing precedent as to when adequate alternative forms of communication exist. At best, it can be said that when signs are located on one's property, the Court appears unwilling to recognize substitutes both because of the interests of property owners in communicating their ideas or proposals of sale and because of the inability of substitutes to meet or exceed the value of having signs on one's property.[172] This interest does not carry over to situations involving public property.[173] Further, it seems clear that when a city attempts to restrict a certain type of sign on one's property or on public property, this is facially unconstitutional as an invalid content-based regulation.[174] Finally, *Lorillard* makes clear that despite indications to the contrary, the

169. *See, e.g.*, Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999); Ackerley Commc'ns of the Nw., Inc. v. Krochalis, 108 F.3d 1095, 1099 (9th Cir. 1997) (rejecting a contention that *Metromedia* had been superceded by subsequent cases and stating that "*Metromedia* continues to control the regulation of billboards").

170. *See supra* Part III.B.

171. *See supra* Part III.F.

172. *See supra* Part III.D and notes 98–100 and accompanying text.

173. *See supra* notes 133–136 and accompanying text.

174. *See supra* notes 101–103 and accompanying text.

Court is, as of yet, unwilling to abandon the distinction between commercial and noncommercial speech.[175]

IV. *METROMEDIA*'S JURISPRUDENTIAL UNCERTAINTIES AND WEAKNESSES

Certain governmental restrictions on signs and billboards could likely survive Speech Clause attack. Such restrictions would come in the form of content-neutral time, manner, and place regulations that applied to *all* types of signs.[176] A court would analyze these regulations under the content-neutral balancing test set forth *supra*[177]—the restrictions need only be narrowly tailored to meet a substantial government interest and leave open suitable alternatives of communication.[178] The problem, however, arises in the specificity of the regulations, such as in the San Diego ordinance at issue in *Metromedia*:[179] the more detailed and specific the regulation, the more likely it touches on the commercial/noncommercial aspect of the speech, and resultantly, the more likely the regulation is unconstitutional. Lower courts have had little success in coming to unified conclusions in dealing with these types of ordinances. This Part first examines two different lines of lower court interpretation involving the commercial/noncommercial distinction and then more broadly explains the weaknesses of *Metromedia*.

A. Two Alternate Interpretations

Recall the dilemma put forth in the discussion of *Metromedia* above,[180] namely, that the plurality's decision in *Metromedia* is unclear as to whether it requires *all* noncommercial speech to be permitted whenever *any* commercial speech is permitted or whether it requires simply that commercial speech be treated no better than noncommercial speech. Numerous different interpretations in the

175. *See supra* Part III.E.

176. For a sampling of cases that have upheld such content-neutral regulations, see, for example, *Lindsay v. City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987) (upholding a ban on all portable signs except in permitted areas); *American Federal General Agency, Inc. v. City of Ridgeland*, 72 F. Supp. 2d 695 (S.D. Miss. 1999); *Donrey Communications Co. v. City of Fayetteville*, 600 S.W.2d 900 (Ark. 1983).

177. *See supra* Part II.A.2.

178. *See supra* notes 30–36 and accompanying text.

179. See *supra* text accompanying note 107 for a description of the sign ordinance.

180. *See supra* notes 125–126 and accompanying text.

lower courts stem from this dilemma. Rather than collect each decision that has interpreted *Metromedia*, something that has been done in other places,[181] this Comment focuses on the two alternate interpretations of the commercial/noncommercial distinction in *Metromedia*: (1) all noncommercial speech must be allowed whenever any commercial speech is allowed, or (2) noncommercial speech must be permitted to the same extent that commercial speech is allowed—an interpretation exemplified by the *Rappa* decision.

1. Treat noncommercial speech better than commercial speech

Many lower courts have interpreted *Metromedia* as constitutionally prohibiting regulations that restrict noncommercial signs whenever commercial signs are permitted because noncommercial speech must be treated better than commercial signs. Under this interpretation of *Metromedia*, courts often hold that *all* noncommercial speech must be permitted whenever *any* commercial speech is allowed because otherwise the ordinance impermissibly regulates the content of noncommercial speech.[182] By so holding, these decisions illustrate the all-or-nothing problem extant in sign regulation.[183] Thus, governments may avoid Speech Clause invalidation by drafting ordinances that apply only to signs containing commercial speech.[184] Such a regulation restricts only commercial speech, thereby leaving noncommercial speech unrestricted. Some courts have upheld this type of sign regulation in holding that offsite sign regulations are constitutional "only when they are limited to signs displaying commercial messages."[185]

A variation on this theme is to exclude noncommercial signs from the definition of offsite signs, thereby allowing regulation of

181. *See, e.g.*, STEVEN G. BRODY & BRUCE E.H. JOHNSON, ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE § 13:2.1 (2d ed. 2004); 7 MCQUILLIN MUNICIPAL CORPORATION §§ 24:382–86 (3d ed. rev. vol. 2005).

182. *See, e.g.*, Nat'l Adver. Co. v. Town of Babylon, 900 F.2d 551, 556–57 (2d Cir. 1990); Outdoor Sys., Inc. v. City of Merriam, 67 F. Supp. 2d 1258, 1266–70 (D. Kan. 1999).

183. *See supra* Part II.A.2.a.

184. *See Nat'l Adver.*, 900 F.2d at 556–57 (stating that municipalities have responded to *Metromedia* by allowing "noncommercial messages whenever commercial messages were allowed"); *Outdoor Systems*, 67 F. Supp. 2d at 1269 (same).

185. Mandelker, *supra* note 18, at 169; *see, e.g.*, Lavey v. City of Two Rivers, 171 F.3d 1110, 1112–16 (7th Cir. 1999); Nat'l Adver. Co. v. City & County of Denver, 912 F.2d 405, 408–10 (10th Cir. 1990); R.O. Givens, Inc. v. Town of Nags Head, 294 S.E.2d 388, 391 (N.C. App. 1983).

offsite signs because the regulation deals only with commercial signs. By excluding noncommercial signs from the definition of offsite, governments have more latitude to regulate offsite signs because such regulation does not affect noncommercial signs—in other words, when government regulates offsite commercial signs, by definition it does not regulate noncommercial signs.

For example, in *Outdoor Systems, Inc. v. City of Mesa*,[186] the Ninth Circuit upheld an ordinance that prohibited offsite signs but that excluded noncommercial signs from the definition of "offsite."[187] The Eleventh Circuit has taken this rationale a step further by holding that all noncommercial speech is, by definition, onsite.[188] In *Southlake Property Associates, Ltd. v. City of Morrow*, for example, the Eleventh Circuit stated that "a sign bearing a noncommercial message is onsite wherever the speaker places it."[189] Thus, in the Eleventh Circuit, any regulation dealing with offsite signs necessarily excludes noncommercial speech, and, therefore, noncommercial signs are unrestricted when offsite commercial signs are regulated.[190]

Some courts have taken the position that any prohibition of offsite noncommercial signs is unconstitutional. For example, in *National Advertising Co. v. City of Orange*,[191] the Ninth Circuit considered an ordinance that prohibited offsite commercial and noncommercial signs. The court explained that the ordinance's prohibition of both types of speech was unconstitutional because it was not affording noncommercial speech greater protection than commercial speech.[192] Because the ordinance at issue required an examination of the content of the noncommercial speech to determine whether the speech fell within an exemption to the

186. 997 F.2d 604 (9th Cir. 1993).

187. *Id*. at 608–12.

188. Southlake Prop. Assocs., Ltd. v. City of Morrow, 112 F.3d 1114, 1118–19 (11th Cir. 1997).

189. *Id*.

190. In *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004), the Eleventh Circuit upheld a municipality's prohibition of offsite signs on the rationale that all noncommercial signs are by definition onsite; thus, a prohibition of offsite signs did not treat commercial speech any better than noncommercial speech. The court stated that "this Circuit has held that noncommercial messages are inherently onsite . . . whatever [their] location." *Id*. at 1344; *see also* YOUNG, *supra* note 157, § 16:5 n.86.

191. 861 F.2d 246 (9th Cir. 1988).

192. *Id*. at 248–50.

ordinance, the court struck the ordinance down.[193] The First Circuit came to a similar conclusion in *Matthews v. Town of Needham*,[194] holding that a prohibition of all offsite signs, both commercial and noncommercial, was unconstitutional. The court reasoned that by allowing onsite signs that contained commercial messages while not allowing noncommercial signs, the ordinance accorded commercial speech greater protection than noncommercial speech.[195]

Finally, based on the implication in *Metromedia* that offsite commercial signs can be entirely banned, many courts have held that total bans on offsite commercial signs are constitutional so long as the ban does not unreasonably affect noncommercial speech.[196]

From these cases, the perpetuation of the all-or-nothing problem is evident: because government must treat noncommercial speech better than commercial speech, whenever government allows commercial signs it must allow all noncommercial signs lest it regulate the content of the noncommercial speech. Also evident is the lengths to which some courts will go to get around this problem, such as defining all noncommercial speech as onsite so as to allow more specific regulation of commercial speech, which these courts deem offsite.[197]

2. Treat commercial speech no better than noncommercial speech: the Rappa *decision*

Some courts have adopted a somewhat novel interpretation of *Metromedia* that focuses not on allowing all noncommercial speech whenever any commercial speech is allowed but on treating commercial speech no better than noncommercial speech.[198] Decisions that interpret *Metromedia* in this way shift the focus from

193. *Id*. at 249.

194. 764 F.2d 58 (1st Cir. 1985).

195. *Id*. at 61 ("By giving more protection to commercial than to noncommercial speech, the bylaw inverts a well-established constitutional principle.").

196. *See, e.g.*, Nat'l Adver. Co. v. City of Raleigh, 947 F.2d 1158, 1160–61, 1168–69 (4th Cir. 1991); Neagle Outdoor Adver., Inc., v. City of Durham, 844 F.2d 172, 173 (4th Cir. 1988); Rzadkowolski v. Village of Lake Orion, 845 F.2d 653, 654–55 (6th Cir. 1988); *see also* ZONING AND PLANNING, *supra* note 59, § 17:11.

197. *See, e.g.*, *supra* notes 188–190 and accompanying text.

198. *See, e.g.*, Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994); Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992); Wheeler v. Comm'r of Highways, 822 F.2d 586 (6th Cir. 1987).

the commercial/noncommercial distinction to the actual, physical location of the sign.

The decision that contains the most extensive analysis of this *Metromedia* interpretation is *Rappa v. New Castle County*. *Rappa* involved a challenge of comprehensive state and city sign regulations that regulated, among other things, the posting of campaign signs along roadsides throughout Delaware.[199] The key to the *Rappa* holding is the court's determination that certain signs are more important than others not because their substantive content is more important than that of other signs, but because this content is more closely related to the particular location of the sign than that of other signs.[200] The court in *Rappa* analyzed the concurring and dissenting opinions in *Metromedia* that considered the content-based exceptions in the San Diego ordinance *de minimis* in that they did not raise traditional concerns about content-based regulation of speech.[201] The *de minimis* argument was an effort to avoid the all-or-nothing problem inherent in time, manner, or place regulations.[202] Persuaded by language in Justice Brennan's concurrence,[203] the *Rappa* court stressed that "when government has a significant interest in limiting speech that is unrelated to the content of that speech, government should not be left with a choice of enacting a

199. 18 F.3d at 1048–49.

200. *Id*. at 1064.

201. *Rappa*, 18 F.3d at 1063–64.

202. Justice Stevens and Justice Brennan argued, in slightly different ways, that a city should be allowed to make such content-specific time, manner, and place restrictions if the impact of such restrictions were *de minimis*. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 553 (1981) (Stevens, J., dissenting in part); *id*. at 532 (Brennen, J., concurring in the judgment). Justice Stevens argued that "[t]he essential concern embodied in the First Amendment is that government not impose its viewpoint on the public or select topics on which public debate is permissible." *Id*. at 553 (Stevens, J., dissenting in part). If the content-based discrimination in a time, manner, or place regulation does not result in government selecting the topics of public debate or imposing its own view, Justice Stevens would argue that the regulation's content-based effect on speech is likely *de minimis* and, therefore, permissible. Justice Brennan similarly felt that the binary choice between banning all speech or none is poor policy in evaluating time, manner, and place regulations; consequently, he likewise felt that *de minimis* regulations should be allowed. *Id*. at 532 (Brennan, J., concurring in the judgment). Although five Justices agreed that *de minimis* content-based regulations are perhaps allowable, the five did not agree on the analysis and the decision was not based on this rationale. Thus, the *de minimis* rationale carries no force of law. See *Rappa*, 18 F.3d at 1057–60, for a detailed explanation of why the opinions do not add up to a rule of law from the majority of the Court.

203. *See Metromedia*, 453 U.S. at 532 n.10 (Brennan, J., concurring in the judgment).

regulation banning all signs in a particular geographic location or none."[204]

However, rather than adopting a *de minimis* test, which the *Metromedia* Court had not done, the *Rappa* court went on to hold that

> when there is a significant relationship between the content of particular speech and a specific location or its use, the state can exempt from a general ban speech having that content so long as the state did not make the distinction in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate.[205]

By allowing location-specific exceptions to general bans so long as the exception is viewpoint neutral and does not determine the content of public debate, the court avoided the concerns that underlie the prohibition on content-based restrictions of speech, namely, that a government not determine the content or discourse of public debate.[206] The court explained that allowing location-specific exemptions to general bans "is not discriminating in favor of the content of these signs; rather, it is accommodating the special nature of such signs so that the messages they contain have an equal chance to be communicated."[207]

This holding is consistent with the *Metromedia* mandate to treat commercial speech no better than noncommercial speech. The *Rappa* decision would allow a complete ban of offsite signs with exceptions for onsite signs irrespective of their commercial or noncommercial content. Such a regulation does not prefer commercial to noncommercial speech because *all* speech that occurs offsite is prohibited. Thus, *Rappa* interprets *Metromedia* as requiring only that noncommercial speech be allowed in the same circumstances in which commercial speech is allowed.[208]

204. *Rappa*, 18 F.3d at 1064.

205. *Id.* at 1065.

206. *See supra* Part II.A.1. Justice Stevens, dissenting in part in *Metromedia*, explained that "[t]he essential concern embodied in the First Amendment is that government not impose its viewpoint on the public or select the topics on which public debate is permissible." *Metromedia*, 453 U.S. at 553 (Stevens, J., dissenting in part).

207. *Rappa*, 18 F.3d at 1064.

208. The *Rappa* court stated this principle thus:

> [I]f the *Metromedia* plurality meant to indicate that a statute that allowed *any* commercial speech could not prohibit *any* non-commercial speech, then the statute at

B. Weaknesses in the Current Approach to Sign Regulation

A final point necessary to establish the necessity and workability of the proposal of this Comment is the weaknesses inherent in an application of the uncertain principles of *Metromedia*. Specifically, this Section will mention the shortcomings of the current onsite/offsite distinction and the heavy reliance on the commercial/noncommercial distinction.

1. The current onsite/offsite distinction

The most obvious weakness of the current onsite/offsite distinction as explained in *Metromedia*[209] is that it fails to take into account individual property owners' interest in posting signs on their own property. As discussed above,[210] the Court has twice struck down ordinances that restricted homeowners' ability to post both commercial[211] and noncommercial[212] signs on their property.

> issue here would fail the test. But we interpret the *Metromedia* plurality to be concerned with the fact that the San Diego ordinance allowed a broad type of commercial speech (onsite speech) while not allowing non-commercial speech even of the same type.

Id. at 1056; *see also* Messer v. City of Douglasville, 975 F.2d 1505, 1509–10 (11th Cir. 1992) (holding that an offsite prohibition is viewpoint neutral because it "regulates signs not based on the viewpoint of the speaker, but based on the location of the signs"); Wheeler v. Comm'r of Highways, 822 F.2d 586, 590 (6th Cir. 1987) (holding that the offsite prohibition of signs is "content neutral. They are not directed at the content of the messages, but at their secondary effects").

A final point worth mentioning about *Rappa* is that Justice Alito joined in the majority opinion while sitting as a circuit judge on the Third Circuit. *See Rappa*, 18 F.3d at 1079–80 (Alito, J., concurring). Then-Judge Alito stressed that although he would use a slightly different, and more simplified, means of analysis if he were sitting alone, he joined in both the judgment and the reasoning of the majority opinion. *Id*. at 1079 (Alito, J., concurring). Importantly, Judge Alito was quite unsure about whether the limited exceptions in the statute rendered the statute content-based and stated that "[u]ntil the Supreme Court provides further guidance concerning the constitutionality of sign laws," he joined in the majority opinion. *Id*. at 1080 (Alito, J., concurring). Thus, whether Justice Alito, now sitting on the Supreme Court, is willing to employ the full *Rappa* analysis regarding the limited exceptions to an otherwise constitutional ban is unclear, although this Comment argues that he should. *See infra* Part V.

209. *See Metromedia*, 453 U.S. at 511 (plurality opinion); Mandelker, *supra* note 18, at 167.

210. *See supra* Part III.A, D.

211. Recall that in *Linmark*, at issue was an ordinance that prohibited "for sale" signs on individual's property. Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85 (1977).

212. In *Gilleo*, at issue was an ordinance that prohibited all types of "lawn signs" with a few exceptions. City of Ladue v. Gilleo, 512 U.S. 43 (1994).

The rationale of these decisions is that a homeowner has a unique interest that comes from "[a] special respect for individual liberty in the home [that] has long been part of our culture and our law."[213] When a government seeks to restrict a homeowner's ability to speak on her own property, including speech in the form of a commercial or noncommercial sign, this "special respect for individual liberty in the home" has "special resonance."[214]

The Court in *Metromedia* focused solely on commercial signs when it held that "a commercial enterprise—as well as the interested public—has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere."[215] Restricting the onsite/offsite distinction, however, to only commercial speech fails to consider the implications of *Taxpayers for Vincent* and *Gilleo*.

Recall that while *Taxpayers for Vincent* upheld an ordinance prohibiting the posting of political signs on public property,[216] the Court in *Gilleo* had found unconstitutional a restriction of most types of signs on private property.[217] In *Gilleo*, the Court distinguished the two holdings by explaining that whereas the prohibition of political signs on public property had left open ample alternative means of communicating in *Taxpayers for Vincent*,[218] the prohibition on lawn signs in *Gilleo* "almost completely foreclosed a venerable means of communication that is both unique and important."[219] The Court concluded that no suitable substitute exists for the *unique communicative interest of property owners* in displaying signs on their own property, an interest that is not present on public property or anywhere else off of the property owner's property.[220] In contrast, the Court in

213. *Id*. at 58.

214. *Id*.

215. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512 (1981) (plurality opinion); *see also supra* notes 113–116 and accompanying text.

216. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); *see also supra* Part III.C.

217. *Gilleo*, 512 U.S. at 47.

218. 466 U.S. at 812.

219. *Gilleo*, 512 U.S. at 54.

220. *Id*. at 57; *see also supra* Part III.D.

Taxpayers for Vincent said, "[N]othing in the findings indicates that the posting of political posters on *public* property is a uniquely valuable or important mode of communication . . . ."[221] According to *Gilleo*, just the opposite is true with signs on homeowners' property.

Thus, not only do business owners have a stronger interest in identifying their place of business through onsite signs than offsite signs, but individual property owners generally have a stronger interest in portraying both commercial and noncommercial messages on their own property—onsite—than they do in portraying similar message on other's property—offsite. The current *Metromedia* analysis fails to take this distinction into account.

2. The current commercial/noncommercial distinction

The most obvious weakness of the commercial/noncommercial distinction as applied to billboard and sign regulation in *Metromedia*[222] is that it is confusing for lower courts to apply this distinction.[223] The Court's holding in *Metromedia*, that the Speech Clause is violated whenever commercial speech is allowed in a context where noncommercial speech is not allowed, creates a dilemma as to its meaning: Does it mean that all noncommercial speech must be allowed whenever any commercial speech is allowed? Or does it mean that commercial speech simply cannot be preferred to noncommercial speech?[224]

The first interpretation—that all noncommercial speech must be allowed whenever any commercial speech is allowed—has proven to be the more popular option, despite the fact that it perpetuates the all-or-nothing problem inherent in the ban on content-based discrimination.[225] Thus, even when a government has a significant interest in regulating signs in a given area, independent of the content of the sign, that government is often forced to either ban all signs in the area or ban none.[226] Further, a

221. *Taxpayers for Vincent*, 466 U.S. at 812 (emphasis added).

222. *See supra* notes 117–122 and accompanying text.

223. *See supra* Part IV.A.1.

224. *See supra* notes 125–126 and accompanying text.

225. *See supra* Part IV.A.1.

226. *See* Rappa v. New Castle County, 18 F.3d 1043, 1064 (3d Cir. 1994).

government cannot enact limited noncommercial sign exceptions to a general ban on signs in a particular area where any commercial sign exceptions exist; rather, a government must allow all noncommercial signs in the area, even if they go against the substantial government interest in aesthetics and traffic safety.[227] Therein lies the major weakness of placing heavy emphasis on the commercial/noncommercial speech distinction: it fails to adequately take into account government's regulatory interests.

V. PROPOSED MODIFICATION OF *METROMEDIA*

While sitting as a circuit judge in *Rappa*,[228] then-Judge Alito queried whether "exceptions for 'for sale' signs and signs relating to onsite activities render" an otherwise general ban of signs content-based.[229] Poignantly summing up the state of billboard and sign law, Judge Alito stated that "[t]here is no easy answer to this question."[230] The following proposal puts forth an answer to this question that ties together the loose strands of First Amendment jurisprudence as applied against government's regulatory interest in zoning for billboards and signs. The proposal is as follows: rather than scrapping *Metromedia* and beginning anew, *Metromedia* should be modified by redefining what is meant by onsite and offsite, thereby allowing primary emphasis in the billboard regulation analysis to be placed on the onsite/offsite distinction. Specifically, the meaning of onsite should be broadened from including only signs that "advertise goods and services sold on the premises"[231] to also include signs on individual property owners' property and *Rappa* location-specific signs. The unifying element of these three sign types is that their utility—their expressive value—is derived from location: by restricting any of these signs, government forecloses the speech interest of the property owner

227. Recall that the Court in *Metromedia* clearly held that government's interest in aesthetics and traffic safety is a substantial interest. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507–08 (1981) (plurality opinion); *see also supra* notes 109–112 and accompanying text.

228. Justice Alito concurred in both the outcome and reasoning of the *Rappa* decision while sitting on the Third Circuit. *Rappa*, 18 F.3d at 1079–80 (Alito, J., concurring); *see also supra* note 208 (explaining Judge Alito's concurring opinion and what it could portend for future billboard cases).

229. *Rappa*, 18 F.3d at 1080 (Alito, J., concurring).

230. *Id.*

231. Mandelker, *supra* note 18, at 167.

because the owner lacks suitable alternatives. Therefore, government should be required to overcome strict scrutiny to restrict signs falling within this broadened category of onsite.

This proposal defines offsite signs simply as everything else, or, more descriptively, offsite signs are signs whose utility is not dependent upon their location, from which it follows that suitable alternatives to such signs are necessarily available. Because of the availability of suitable alternatives, the speech interest in offsite signs is much less than the speech interest in onsite signs; consequently, the First Amendment does not restrict government's zoning power nearly as much as in the case of onsite signs. Government therefore need only satisfy a rational basis scrutiny to restrict this newly defined category of offsite signs—even a total restriction need only satisfy rational basis scrutiny because the purveyor of the speech on the offsite signs has suitable alternatives of expression.

Importantly, this modification of *Metromedia* moves away from the problematic commercial/noncommercial distinction that plays so large a role in the current analysis.[232] However, because the Supreme Court has expressed its intention to continue to apply the commercial/noncommercial distinction,[233] the modified onsite/offsite analysis still takes into account the commercial/noncommercial distinction; it simply does not place primary emphasis on that distinction. This proposal further argues that *Metromedia* should be understood as mandating that commercial speech be treated no better than noncommercial speech as opposed to allowing all noncommercial speech whenever any commercial speech is allowed.

A. Defining Onsite Signs

The definition of onsite signs should be broadened from its current definition of signs that "advertise goods and services sold on the premises"[234] to include signs on individual property owners' property and location-specific signs.[235] The unifying factor among these types of signs is that their utility is dependent upon their

232. *See supra* Parts III.B, IV.A.

233. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554–55 (2001); *supra* Part III.E.

234. Mandelker, *supra* note 18, at 167.

235. *See* discussion *supra* Part IV.A.2.

location—in any other location the communicative value of the speech is greatly reduced and, therefore, the speech interest of the speaker is greatly diminished, if not extinguished.[236] Because of the risk of extinguishing one's speech interest in cases of onsite signs, the First Amendment poses a substantial barrier to government zoning power. The definition of suitability under this proposal is borrowed from the Court's suitability standard put forth in *Linmark*—namely, that the alternative must be in practice a suitable form of communication that does not affect the ability of the speaker to communicate the message.[237] To illustrate, consider the following language from *Linmark* discussing alternatives to "for sale" signs on individual property owner's property:

> Although in theory sellers remain free to employ a number of different alternatives, in *practice* realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers *realistically* are relegated—primarily newspaper advertising and listing with real estate agents—involve more cost and less autonomy than "For Sale" signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold. The alternatives, then, are far from satisfactory.[238]

Thus, factors such as cost, autonomy of the purveyor of the speech, effectiveness at reaching the intended audience, and effectiveness at communicating the message are all relevant factors in determining the suitability of an alternative. As in the case of the "for sale" signs at issue in *Linmark*, in the case of the three categories of onsite signs under this proposal, there exists no suitable alternative. Consider each category.

First, the decision in *Metromedia* recognized that there is a greater speech interest in communication via a sign or billboard

236. This rationale functions pari passu with the Court's reasoning in *Linmark Associates, Inc. v. Township of Willingboro*, where the Court held that although some alternatives might be available, if they were not suitable the regulation was invalid. 431 U.S. 85, 93 (1977). Thus, hypothetical availability is *not* the standard whereby to judge alternative methods of communication; the standard, rather, is one of practical availability.

237. *Id.*; *see also* discussion *supra* accompanying notes 98–100.

238. *Linmark Assoc.*, 431 U.S. at 93 (emphases added) (citations omitted); *see also supra* Part II.A.2.b; discussion *supra* accompanying notes 98–100.

when it identifies a place of business[239] than when it is an advertisement on another's property. A sign on a business's property identifying that property as the place of business has no suitable alternative because a sign on any other location is clearly less effective at identifying the location of the business. Further, the cost of using signs on other's property would far exceed the cost of using a sign on the business's property. Finally, signs on another's property likely would be less effective at reaching the intended audience—potential customers—because the potential customers will likely not be searching for the business when they see the signs. Thus, a business has a stronger speech interest in erecting a sign advertising the goods or services offered on its premises than in communicating the same interest on another's property. This Comment's proposal agrees with *Metromedia's* reasoning and continues this traditional definition of onsite.

Second, the definition of onsite should take into account the same interest inherent in individual property owners,[240] namely that they have a unique speech interest in speaking as they wish on their own property. Including individual property owners' signs in a definition of onsite takes into account the decisions in *Linmark* and *Gilleo*, which held that there is a heightened speech interest when one is speaking or displaying a sign on one's own property because no suitable alternative is available. By including individual property owners in the definition of onsite, this proposal cures the defect in the current onsite/offsite distinction—namely that it does not include individual property owners, whose speech interest in portraying signs on their own property is equivalent to the speech interest of businesses in portraying signs on their property.[241]

Finally, the *Rappa* location-specific test should be included in a definition of onsite because the speech interest in these signs

239. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512 (1981) (plurality opinion); *see also supra* notes 113–116 and accompanying text.

240. This Comment uses the term "property owner" to signify locations of residence or business, regardless of whether the residence is rented or owned outright, or if the business location is leased or owned outright. Signs at the place of residence and the place of business are onsite because there are no suitable alternatives for the person occupying the property, be it an owner or a renter, to convey the information on the sign. Thus, both the actual owner of the property and the renter have heightened speech protection to place signs on the property. However, if one were to lease a sign on property that is not the place of residence or business, this proposal would classify the sign, by definition, as an offsite sign.

241. *See supra* Part IV.B.1.

likewise depends on their location. Specifically, "when there is a significant relationship between the content of particular speech and a specific location or its use,"[242] the sign conveying that content should be considered onsite. As described earlier, the underlying rationale of this rule is that such signs' utility is derived from the location; in another location, the signs' utility is greatly reduced.[243] An example given by the *Rappa* court illustrates this principle:

> A sign that says "Speed Limit 55" or "Rest Stop" is more important *on a highway* than is a sign that says "Rappa for Congress." A sign identifying a commercial establishment is more important on its premises than is a sign advertising an unrelated product. If the former signs are banned from the highway or the place of business, there is no other means of communication that can provide equivalent information. In contrast, placing a sign that says "Rappa for Congress" or "Drink Pepsi" on a highway, while it may be an important means of communication because of the number of travelers on the highway, has no relationship to the property on which it is placed or to the fact that it is next to a highway. Banning these signs potentially leaves many alternative means of communicating the same information.[244]

The *Rappa* court stated that government can demonstrate that a sign's utility is dependent on its location in one of two ways. First, directional signs along a road are useful only if allowed along the road.[245] An exit sign does a driver no good unless it directs the driver to the actual exit. Second, and more broadly, if government can show "that a sign better conveys its information in its particular location than it could anywhere else," the sign is dependent upon its location.[246] This method of showing location dependence could theoretically consume the current view of onsite, which is that businesses have an interest in advertising on their own property because the sign's utility is derived from the fact that it is advertising the location of the business.

To restate, the commonality of all three types of onsite signs under this proposal is that no suitable and practical alternative form

242. Rappa v. New Castle County, 18 F.3d 1043, 1065 (3d Cir. 1994).

243. *See supra* Part IV.B; *see also Rappa*, 18 F.3d at 1064–65.

244. *Rappa*, 18 F.3d at 1064.

245. *Id.* at 1065.

246. *Id.*

of communication exists for each of these signs.[247] As explained by the Court in *Linmark*,[248] *Taxpayers for Vincent*,[249] and *Gilleo*,[250] if there is no suitable alternative available when a government seeks to enact a time, manner, and place restriction, the restriction is invalid. This proposal takes this rationale to its logical conclusion: if there is no suitable alternative for a type of sign, that sign should be granted strict scrutiny protection. The speech interest in the particular sign outweighs the government's regulatory interest in zoning in all but the most limited of circumstances because each of the three categories in the proposed onsite category is a type of sign that has no practical substitute; a government restriction of the sign would likely extinguish the speech interest of the sign owner.

An important consideration here concerns content neutrality. Although the proposal appears, at first blush, to favor certain types of signs based on their content (i.e., identifying place of business, speech of property owners), the proposal in fact does not favor signs based on content. As the *Rappa* court explained,

> Some signs are more important than others not because of a determination that they are generally more important than other signs, but because they are more related to the particular location than are other signs. Allowing such "context-sensitive" signs

247. First, a sign that is located on the actual property of the business cannot be replaced with a sign located elsewhere advertising the location of the business without losing utility. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512 (1981) (plurality opinion). Second, an individual property owner's lawn sign cannot be replaced with a newspaper advertisement or leaflet without losing utility. *See* City of Ladue v. Gilleo, 512 U.S. 43, 54–56 (1994); Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 93 (1977). Finally, a location-specific sign, such as a speed-limit sign or an exit sign, cannot be relocated without losing utility. *See Rappa*, 18 F.3d at 1064. Included within such location-specific signs would be logo signs and so-called tourist-oriented directional signs (TODS). *See* Scenic America, Billboard Control is Good for Business!, http://www.scenic.org/Portals/0/Fact%20Sheet%20%20Billboard%20Control%20is%20Good%20for%20Business.pdf (last visited Feb. 4, 2006) [hereinafter Billboard Control]. Logo signs include advertisements for "gas, food, camping, and lodging at nearby highway exits." *Id.* "TODS appear on non-interstate highways to supply information about local tourist attractions, such as distances and directions." *Id.* These would be included within the *Rappa* location-specific category because there are no other suitable means of advertising the information on the signs. For example, the only way to know a gas station is at the next exit on a highway before passing the exit is with a sign announcing the presence of the gas station at that exit. Naturally, the gas station's sign on its premises would likewise fall within the onsite category and would be protected.

248. *See supra* Part III.A.

249. *See supra* Part III.C.

250. *See supra* Part III.D.

> while banning others is not discriminating in favor of the content of these signs; rather, it is accommodating the special nature of such signs so that the messages they contain have an equal chance to be communicated.[251]

A ban on the three categories of onsite signs included in this proposal would all but eliminate the possibility of communicating the information on the signs. Thus, the proposal is not suggesting that these signs should be favored because of their content, but is suggesting that these signs should be favored because otherwise the speech interest in the sign is abolished. It follows that a regulation that exempts these types of signs from an otherwise general ban on signs is *not* content-based, and, therefore, the all-or-nothing problem does not arise when creating exceptions from a ban for onsite signs.[252]

B. Defining Offsite Signs

Offsite signs by definition constitute signs that have suitable alternative forms of communication in the face of government regulation, as opposed to onsite signs, which have no such suitable alternative forms of communication. The utility of the offsite sign is not dependent upon its location, and, therefore, the speech interest in offsite signs is not as great as the speech interest in onsite signs: substitutes are interchangeable and generally just as effective as the offsite sign at communicating the information. This proposal is not arguing that there is no utility in the location of the offsite sign—billboards along a highway are clearly valuable commodities to businesses that purchase billboard space—rather, it is simply arguing that there is adequate utility for the message on the offsite sign via an alternative method of communication, and the speaker, therefore, is not reliant upon the sign to communicate the speaker's

251. *Rappa*, 18 F.3d at 1064.

252. *Rappa* explained this idea as follows: "when there is a significant relationship between the content of particular speech and a specific location or its use, the state can exempt from a general ban speech having that content so long as the state did not make the distinction in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate." *Id.* at 1065. In other words, when issues at the heart of the prohibition of free speech are at issue, such as the government choosing which topics are appropriate for public debate or deciding to regulate a particular viewpoint, *see supra* Part II.B.1, the exemption for onsite signs would become content-based, and, consequently, unconstitutional. See *infra* Part V.C for a fuller discussion of how government regulation would work under this proposal.

message. A business may very well value the billboard space along a busy highway for advertisement, but that business has many suitable and practical alternatives for advertisement such as radio, television, newspaper, and magazine advertisements that could be just as effective at reaching the target audience without necessarily incurring significant additional costs.[253] Consequently, under this proposal government may more easily regulate these signs than it can onsite signs. Government's regulatory interest in zoning outweighs the interest in communicating via the offsite sign because the speech interest of the speaker is not dependant on the sign; therefore, the First Amendment does not restrict the regulatory power nearly as much as is the case with onsite signs. Thus, government need only satisfy a rational basis standard to regulate offsite signs, even to regulate a total ban on offsite signs with exceptions for onsite signs, and the presumption is that the regulation is constitutional.

Specifically, because this proposal advocates that *Metromedia* requires only that noncommercial speech be permitted in the same circumstances as commercial speech, government could constitutionally prohibit all offsite signs. In such a restriction, government is not treating commercial speech any better than noncommercial speech: all speech relating to offsite activities is prohibited. Such a prohibition would also survive the requirement of suitable alternative forms of communication because the definition of offsite under this proposal is a sign with a suitable alternative. Governments could enact content-neutral measures less extreme than complete prohibition of offsite signs so long as the regulations did not favor commercial over noncommercial speech.

To illustrate what this proposal considers an offsite sign to be, consider the political campaign posters in *Taxpayers for Vincent*.[254] There, the Court held that political campaign posters on public

253. *See, e.g.*, Billboard Control, *supra* note 247 (explaining how logo-signs and TODS function as alternatives for more intrusive billboards and debunking the notion that restrictions on billboards, by necessity, hurt businesses that would otherwise advertise via billboards). This proposal leaves open the possibility that in a fact-finding situation, a court or a jury could find that what appears to be an offsite sign with suitable alternatives in reality lacks suitable alternatives and, therefore, is an onsite sign. If the sign, however, does not fall within one of the three categories of onsite signs described *supra* in Part V.A, the burden of proof is on the party utilizing the sign to portray a message to demonstrate that no suitable alternatives exist and, thus, that the speech interest is dependent upon the sign.

254. 466 U.S. 789 (1984); see *supra* Part III.C for the full explanation of the case.

property were not a unique form of communication.[255] According to the Court, the value of political posters on public property was easily replaced by other forms of communication.[256] Thus, the political posters on public property would be offsite signs for purposes of this proposal and government can validly prohibit them consistent with the decision in *Taxpayers for Vincent*.

Recall Project Billboard's national billboard campaign discussed in the Introduction.[257] The anti-war message of these billboards is clearly noncommercial speech. Nevertheless, under this proposal, these billboards would be classified as offsite signs because there are readily available alternatives for communicating the same message. The Project's stated goal is to increase national attention on their cause,[258] which they could do just as effectively by spending money on television and radio spots, national mailers, or other similar forms of communication. Thus, government could restrict these billboards so long as it likewise restricted similar commercial uses of billboards.

This proposal would allow government to restrict both commercial and noncommercial billboards along a highway, for example, because these billboards would have suitable alternatives at communicating the same information. However, government would not be allowed to completely restrict offsite political billboards while allowing offsite commercial billboards because such a restriction would favor commercial over noncommercial speech contrary to *Metromedia*'s prohibition. So long as offsite commercial signs are treated no better than offsite noncommercial signs, government could regulate the signs to any degree from no regulation to complete prohibition, subject only to a court's rational-basis inquiry.

C. Regulations of Signs and Billboards Under the Proposal

This proposal is not advocating that governments should be allowed willy-nilly to pick and choose which types of signs to regulate and which types of signs to leave unregulated; similarly, this proposal is not asserting that governments are free to restrict

255. *Taxpayers for Vincent*, 466 U.S. at 812.

256. *Id*.

257. *See supra* notes 1–3 and accompanying text.

258. *See* Project Billboard, *supra* note 1.

offsite billboards at will without any sort of constitutional scrutiny. At its core, this proposal focuses on distinguishing between speech interests that are irreplaceable with those that have suitable alternatives, and asserts concomitantly that while regulations restricting the former should be presumed unconstitutional, regulations restricting the latter should be presumed constitutional. Because the focus of the inquiry is on the dependency of the speech interest on the *location* of the sign rather than on the *content* of the speech, the proposal is not content-based. The proposal examines the content of the sign only for the limited purpose of determining whether it bears a relation to the location of the sign (the business's location, the individual's property, and a *Rappa*-type location) and allows for the exception of onsite signs from otherwise general bans of offsite signs. Thereby, this proposal cures the all-or-nothing problem that currently plagues courts seeking to apply *Metromedia*[259] because government may enact general bans of offsite signs, subject to rational-basis scrutiny, while allowing specific exceptions for onsite signs.

Consider now how government may regulate onsite signs. Because regulations restricting onsite signs are presumed unconstitutional, a strict scrutiny analysis is necessary when government seeks to regulate these signs. The only compelling governmental interests, as explained by *Metromedia*, that could outweigh the First Amendment speech interest in these onsite signs are government's interests in aesthetics and traffic safety.[260] Therefore, to enact a valid content-neutral time, manner, and place restriction of onsite signs, the government would have to show that its interest in aesthetics is compelling in the particular circumstance and that it is using means that are the least restrictive means to achieve that objective. Consequently, to survive strict scrutiny, a regulation of an onsite sign could not prohibit its existence. Rather, it could deal only with the size, onsite location, or potentially the

259. *See supra* Part IV.A.1.

260. *See Metromedia*, 453 U.S. at 511 (plurality opinion). Other compelling objectives could theoretically exist, but this analysis is limited to these objectives because they are the only ones the Court has identified as compelling. The Court has repeatedly held that these interests are sufficient to justify either the strict scrutiny test for regulation of noncommercial speech, *see id.* at 507–08; Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 805–07 (1984), or the *Central Hudson* test for regulation of commercial speech, *see* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554–55 (2001); *see also supra* Part III.E.

time in which the sign could be displayed. In this way, government's interest in aesthetics could still be considered.

Note that whether a sign is commercial or noncommercial plays no role in the analysis to this point: all onsite signs, both commercial and noncommercial, are granted strict scrutiny. However, because the Court still adheres to the commercial/noncommercial distinction,[261] this proposal does the same.[262] The distinction would come into play if government were to enact a regulation that restricted a noncommercial onsite sign while not restricting a commercial onsite sign. This proposal adopts the view of *Metromedia* that noncommercial speech must simply be allowed in the same circumstances and contexts as commercial speech.[263] For example, a regulation that mandated that political signs on one's lawn could be no larger than a certain size but allowed "for sale" signs to be any size would have difficulty surviving *Metromedia*'s prohibition on preferring commercial to noncommercial speech. Similarly, a regulation that limited the number of political signs on one's property while not limiting the number of "for sale" signs would be invalid as preferring commercial over noncommercial speech.

This proposal also resolves a problem with the traditional onsite/offsite distinction that has been explained elsewhere,[264] namely that it allows government to prefer commercial over noncommercial speech. For example, the traditional onsite/offsite distinction allows a business owner to advertise its business on its property, but the government may prohibit noncommercial signs on that property.[265] This proposal cures this defect by allowing all types of speech on onsite signs, subject to strict scrutiny. This recognizes that a business may wish to convey a political position, but might not have suitable alternatives of conveyance other than an onsite sign. For example, a steel mill's posting of a sign

261. *See Lorillard Tobacco Co.*, 533 U.S. at 554–55; *see also supra* Part III.E.

262. *See Metromedia*, 453 U.S. at 513 (plurality opinion) (discussing the commercial/noncommercial distinction in sign regulation); *see also supra* notes 115–20 and accompanying text.

263. *See supra* Part IV.A.2.

264. *See* M. Ryan Calo, Note, *Scylla or Charybdis: Navigating the Jurisprudence of Visual Clutter*, 103 MICH. L. REV. 1877, 1886–87 (2005).

265. *Id.* Note that government could still prohibit the business owner from advertising another business on its property because this proposal considers this type of sign offsite.

advertising the steel from the mill and the posting of a sign advocating higher tariffs on foreign steel would be equally protected. A small mill would likely have no suitable alternative to conveying its position on steel tariffs other than a sign on its property.

A final consideration of this proposal is that, with respect to onsite signs, government is completely foreclosed from determining the value of the onsite speech in its regulation, be it commercial or noncommercial.[266] Likewise, this proposal adheres to *Metromedia*'s prohibition of regulating among different types of noncommercial speech.[267] Government may enact measures for onsite signs only if they are content-neutral and regulate the specific size, location, or timing of onsite signs. To illustrate, a government time, manner, and place regulation that regulated only religious onsite signs would be prohibited for two reasons: first, it would favor commercial over noncommercial speech; second, the regulation would not be content-neutral.[268]

Government may regulate offsite signs so long as rational government interests exist, the regulation does not favor commercial over noncommercial speech, and the regulation is content-neutral.[269] The regulation that is envisioned by this Comment is one that restricts all offsite signs with exceptions being made for onsite signs.

Thus, this Comment answers in the negative to Judge Alito's query in *Rappa* as to whether exceptions to a general ban "for 'for sale' signs and signs relating to onsite activities"[270] render the statute unconstitutional: such exemptions are acceptable recognitions of the speech interest in onsite signs that are not

266. Allowing government to determine the value of speech is a major concern in First Amendment jurisprudence and sign/billboard regulation. *See supra* Part II.C; *see also* Rappa v. New Castle County, 18 F.3d 1043, 1063–64 (3d Cir. 1994).

267. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981) (plurality opinion).

268. *See* Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 93–94 (1977); Cordes, *supra* note 11, at 47.

269. Recall that this Comment argues that exceptions for onsite signs from an otherwise general ban of offsite signs is not content-based because the proposal looks at the content of the sign only to the extent necessary to determine location dependence. *See supra* text accompanying notes 251–252.

270. Rappa v. New Castle County, 18 F.3d 1043, 1080 (Alito, J., concurring); *see also supra* text accompanying notes 229–230.

content-based because the content matters only in determining the relationship between the sign and its location. Once this determination is made, the onsite/offsite distinction determines the constitutional scrutiny, and onsite signs are properly exempted from an otherwise general ban.

VI. CONCLUSION

In the tangled web of *Metromedia*, its progeny, and the lower court decisions seeking to interpret and apply the decision, only one thing is certain: there is no certainty with sign and billboard regulation. Within the badly fractured, "Tower of Babel"[271] decision with five separate justices voicing differing opinions, *Metromedia* has served as a poor guide to subsequent courts as they have sought to develop a consistent and coherent jurisprudence of billboard law that balances both First Amendment Free Speech and government regulatory interests.

This Comment has proposed that *Metromedia* be modified to place primary emphasis in billboard and sign analysis on the onsite/offsite distinction with a concomitant broadening of the definition of onsite. This expanded definition would incorporate the Court's decisions in *Linmark* and *Gilleo* and the *Rappa* court's location-specific test. Such a broadening recognizes that signs and billboards that have no suitable alternative have a speech interest that is dependent upon the sign; thus it should be all-but-impossible for government to regulate these types of signs and completely impossible for government to prohibit these signs.

The remaining signs within a community—termed offsite signs—are those signs that have readily available suitable alternatives. Owners of offsite signs lose no utility in their method of communication by using an alternative method. Because the speech can be readily communicated in alternative forms, the First Amendment does not pose nearly the barrier to regulation of offsite signs as it does to regulation of onsite signs, and, therefore, government's regulatory power should be allowed to completely prohibit offsite signs if government so chooses.

The workability of this proposal arises from its adoption and incorporation of the current Supreme Court precedents regarding

271. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 569 (1981) (Rehnquist, J., dissenting).

billboard/sign regulation and free speech. This proposal does not advocate overruling *Metromedia* and starting anew; rather, it advocates simply that *Metromedia* be rethought to increase simplicity and workability by more fully incorporating existing strands of speech clause doctrine, particularly the requirement of the necessity of available alternatives before prohibition of speech.

Jason R. Burt[*]

* The author wishes to express his most sincere thanks to Professor Fred Gedicks who suggested the topic and provided thoughtful comments throughout the development of the paper. Many thanks also are due Thomas Proctor and Richard Salgado for their insightful assistance. Most importantly, the author wishes to thank and acknowledge Ashlee and Jackson for their unending support and love.