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CONSTITUTIONAL LAW—THE CONFLICT BETWEEN MUNICIPAL BILLBOARD ORDINANCES AND THE FIRST AMENDMENT RIGHT TO FREE SPEECH—Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)

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NOTES

CONSTITUTIONAL LAW—THE CONFLICT BETWEEN MUNICIPAL BILLBOARD ORDINANCES AND THE FIRST AMENDMENT RIGHT TO FREE SPEECH—*Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

I. INTRODUCTION

The first amendment of the United States Constitution states in part that "Congress shall make no law . . . abridging the freedom of speech. . . ."[1] City ordinances declare that municipalities have the power to zone through the police power of the state.[2] When zoning ordinances attempt to limit billboard advertising, however, these two rights conflict, and the power to zone will sometimes infringe upon a person's freedom of speech. This note examines the conflict between municipal zoning ordinances that regulate billboards and the first amendment right to free speech, using *Metromedia, Inc. v. City of San Diego*[3] as the leading example of judicial response to the issues encompassed by the conflict.

Metromedia is important because it was the first occasion that the Supreme Court squarely addressed the constitutionality of billboard regulation by local governments. In the past, the Court has summarily upheld[4] billboard prohibitions against first amendment challenges. More recently, however, as exemplified by *Metromedia*, the Court has held that summarily dismissed cases do not have the same degree of authority as do decisions given plenary consideration.[5] The Court's decision in *Metromedia*, therefore, did not rest upon past holdings, but rather upon an independent examination of the facts presented.[6]

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1. U.S. CONST. amend. I.

2. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 442 (1978) [hereinafter cited as J. NOWAK].

3. 453 U.S. 490 (1981).

4. Lotze v. Washington, 444 U.S. 921 (1979); Newman Signs, Inc. v. Hjelle, 440 U.S. 901 (1979); Suffolk Outdoor Advertising Co. v. Hulse, 439 U.S. 808 (1978).

5. 453 U.S. at 498.

6. *Id.*

In *Metromedia*, the Supreme Court considered the validity of the billboard ordinance of the city of San Diego.[7] The Court considered separately the effect of the ordinance on commercial and noncommercial speech and used different criteria to deal with the validity of each restriction.[8] The Court held that insofar as it regulated commercial speech, the ordinance directly served the goals of the state and was within constitutional limits.[9] Despite this finding, the entire ordinance was invalidated because it unreasonably infringed upon an individual's right to free speech by interfering with the use of noncommercial billboards.[10]

On the issue of noncommercial speech, the Court concluded that San Diego's general ban on billboards carrying noncommercial advertising was invalid under the first and fourteenth amendments[11]

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7. The general prohibition in San Diego, Cal., Ordinance 10795 (New Series), enacted March 14, 1972, reads as follows:

> B. OFF-PREMISE OUTDOOR ADVERTISING DISPLAY SIGNS PROHIBITED
>
> Only those outdoor advertising display signs, hereinafter referred to as signs in this Division, which are either signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed shall be permitted. The following signs shall be prohibited:
>
> 1. Any sign identifying a use, facility or service which is not located on the premises.
>
> 2. Any sign identifying a product which is not produced, sold or manufactured on the premises.
>
> 3. Any sign which advertises or otherwise directs attention to a product, service or activity, event, person, institution or business which may or may not be identified by a brand name and which occurs or is generally conducted, sold, manufactured, produced or offered elsewhere than on the premises where such sign is located.

453 U.S. at 493.

8. *Id.* at 504-05 n.1 (quoting San Diego, Cal., Ordinance 10795 (New Series) (March 14, 1972)). In dealing with commercial speech and the use of billboards, the Court applied a balancing test to determine if the ordinance was directly related to a permissible state objective. Absent a direct relationship, the ordinance must fall. *See* J. NOWAK, *supra* note 2, at 675-76. In dealing with noncommercial speech, a strict scrutiny test was applied where the Court required more than a direct relationship between a zoning measure and its objective. As freedom of speech is a fundamental right, an ordinance will be struck down unless the state meets the burden of showing that it has a compelling interest in the objective in question. *Id.* A greater degree of protection is accorded noncommercial speech as it includes political, social and personal ideas. On the other hand, commercial speech includes (for purposes of this discussion) "speech of any form that advertises a product or service for profit or for business purposes." *Id.* at 767.

9. 453 U.S. at 503-12.

10. *Id.* at 512-20.

11. *Id.* at 521.

because it prohibited individuals from displaying, on rented billboard space, their own political viewpoints and social beliefs.[12] Secondly, the Court determined that a prohibition of all billboard messages could not be upheld merely because the prohibition was rationally related to a nonspeech interest.[13] The Court reasoned instead that noncommercial speech is a fundamental right under the first amendment and cannot be infringed upon unless a compelling state interest is demonstrated.[14] In *Metromedia*, San Diego demonstrated no compelling interest, and consequently, the ordinance was held invalid on its face as an unconstitutional restriction of noncommercial speech.[15]

In considering the city's ban on commercial, off-site advertising, the Court stated that while the first and fourteenth amendments protect the communicative aspects of billboards, the government retains the authority to care for the safety of its citizens and the beauty of its city.[16] The state's power extends to improvement of the safety and aesthetics of its cities. These governmental goals were served directly by the commercial speech restriction in the San Diego ordinance which did not allow for off-site commercial advertising.[17]

In dealing with the distinction between off-site and on-site commercial advertising, the Court gave deference to the San Diego city council and concluded that San Diego could decide to value commercial speech through on-site advertising, more than commercial speech through off-site advertising, and that the San Diego city council had acted within the scope of its power.[18]

This note will analyze the rationale used by the Court to permit municipalities to ban certain types of commercial speech as a function of the police power interests in traffic safety and aesthetics. The issue of first amendment protections afforded noncommercial speech will also be discussed.

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12. *Id.* at 520.
13. *See* note 8 *supra*.
14. 453 U.S. at 520-21.
15. *Id.*
16. *See id.* at 511-12.
17. *Id.*
18. *Id.* The ordinance reflects a decision by the city of San Diego that the right to use on-site advertising is stronger than the city's interest in traffic safety and aesthetics. *Id.* The Court, however, rejected the appellants' contention that the city could not ban all off-site commercial advertising because a commercial enterprise has a strong interest in identifying its place of business and in advertising the goods and services available. Other commercial enterprises that had previously used off-site advertising could just as easily use other advertising means such as television, radio and magazines, which would not impair traffic safety nor contribute to the ugliness of the city.

II. FACTS OF *METROMEDIA*

The City of San Diego, California, enacted an ordinance that imposed prohibitions on the erection of outdoor advertising display signs.[19] The ordinance provided two exceptions to these general prohibitions: on-site commercial signs and signs falling within twelve categories.[20] On-site signs are defined as those naming the business and occupant of the premises upon which signs are structured, or those advertising goods or services rendered on the premises upon which the signs are placed.[21] The ordinance, therefore, allowed on-site commercial advertising, while it prohibited off-site commercial advertising and all noncommercial advertising. The stated purpose of this ordinance was to maintain the city's appearance and to eliminate the dangers to pedestrians and motorists brought about by the large and distracting displays.[22] Appellants, companies engaged in the outdoor advertising business,[23] brought suit in state court to enjoin enforcement of the ban on outdoor advertising displays within the city.

The trial court held that the ordinance was an unconstitutional exercise of the city's police power and that it abridged appellants' first amendment rights.[24] The California Court of Appeals affirmed[25] on the question of the police power and did not reach the first amendment argument. The California Supreme Court in *Me-*

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19. The Supreme Court of California defined the term "outdoor advertising display sign" as "a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public." Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 856 n.2, 164 Cal. Rptr. 510, 513 n.2, 610 P.2d 407, 410 n.2 (1980) (citing Revenue and Taxation Code section 18090.2), *rev'd*, 453 U.S. 490 (1981).

20. 453 U.S. at 495 n.3. The signs falling within any of the following twelve specified categories were not barred by the ordinance: government signs; signs located at public bus stops; signs manufactured, transported or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; "for sale" and "for lease" signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and "temporary political signs." San Diego, Cal., Ordinance 10795 (New Series) (March 14, 1972).

21. 453 U.S. at 494.

22. *Id.* at 493.

23. *Id.* at 496. Each company owned anywhere from 500 to 800 outdoor advertising displays within the city. These signs were located in areas zoned for commercial and industrial purposes, most of them on property leased by the appellants for the purpose of maintaining billboards. Space on the signs was made available to interested advertisers, and the advertisement on each sign was usually changed every month. *Id.* at 496.

24. *Id.* at 497.

25. *Id.*

tromedia, Inc. v. City of San Diego,[26] reversed holding that the two purposes of the ordinance were within the city's legitimate interests because the ordinance zoned billboards in a manner beneficial to the public safety and welfare.[27] The United States Supreme Court granted certiorari.[28] Appellants argued that the ordinance was invalid on its face under the first amendment.[29] The United States Supreme Court reversed the Supreme Court of California,[30] and held that the ordinance was unconstitutional on its face because it prohibited all noncommercial advertising.[31]

III. BILLBOARD REGULATION

Billboards are a unique medium of communication used to convey messages ranging in scope from political and social comments to commercial advertising. While billboards serve to furnish people with information, they can simultaneously be viewed as an obstacle to traffic safety and to the beauty of a city.

Billboards present a unique problem because they encompass both communicative and noncommunicative aspects.[32] The communicative aspect is the message conveyed on the billboard whether it be an advertisement, traffic regulation, or political idea. The noncommunicative aspect encompasses the billboard structure itself. These large, immobile structures are not afforded any first amendment protections. Their communicative aspect, however, is protected by the first amendment. Thus, although the speech is protected by the first amendment,[33] the billboard itself, upon which the message is conveyed, is subject to regulation by the state's police power.

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26. 26 Cal. 3d 848, 164 Cal. Rptr. 510, 610 P.2d 407 (1980), *rev'd*, 453 U.S. 490 (1981).

27. *Id.* at 855, 164 Cal. Rptr. at 512, 610 P.2d at 409.

28. 453 U.S. at 498.

29. *Id.*

30. *Id.* at 490. *Metromedia* was a plurality decision. Justice White's holding and rationale were joined by only three other Justices. *See* notes 145-56 *infra* and accompanying text.

31. *Id.* Noncommercial speech is a fundamental right which is fully protected by the first amendment. *See* J. NOWAK, *supra* note 2, at 675.

32. 453 U.S. at 501-02.

33. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 581 (1978) [hereinafter cited as L. TRIBE].

A. *Police Power Regulation of the Noncommunicative Aspects of Billboards*

The exercise of a city's police power[34] is constitutional[35] when it bears a substantial relationship to the public health, safety, morals or general welfare of its citizens.[36] Legislative motives or declarations of intent do not determine the ultimate validity of a police power ordinance.[37] Rather, the regulation must bear a rational relation to a permissible police power purpose while providing for an impartially administered, reasonable means to accomplish its police objectives.[38]

Under the police power of a state, a municipality has a legitimate interest in controlling the noncommunicative aspects of billboards.[39] Yet the individual's interest in the communicative aspects of billboards must be protected under the first and fourteenth amendments.[40] When restrictions on the noncommunicative aspects infringe upon the communicative aspects, it is necessary to reconcile the state interest in the public welfare with the individual's right to free speech.[41] In other words, the billboard structure cannot be regulated at the expense of freedom of speech.

B. *Regulating the Communicative Aspects of Commercial Billboards*

Commercial speech has been granted some first amendment protection in recent years,[42] although there remains a distinction between speech proposing a commercial transaction and ideological

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34. *See* notes 35-40 *infra* and accompanying text.

35. The Court held that in order to be unconstitutional an ordinance must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395 (1926) (citations omitted).

36. *Id.* While the concept of "general welfare" is elastic and responds to the changing needs of society, a number of courts have held that the general welfare does not include aesthetic considerations unaccompanied by other public welfare considerations. *See, e.g.*, City of Euclid v. Fitzhum, 48 Ohio App. 2d 297, 357 N.E.2d 402 (1976) (ordinance that proscribed parking or storage of trailers outside of garage held unconstitutional as aesthetic zoning).

37. Moore v. Ward, 377 S.W.2d 881, 883 (Ky. 1964).

38. *Id.* at 887.

39. *See* Kovac v. Cooper, 336 U.S. 77, 96-97 (1949) (Frankfurter, J., concurring).

40. *See* J. NOWAK, *supra* note 2, at 676.

41. The task of reconciliation falls upon the courts. " '[A] court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.' " 453 U.S. at 502 (quoting Bigelow v. Virginia, 421 U.S. 809, 826 (1975)).

42. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1978); Bigelow v. Virginia, 421 U.S. 809 (1975).

speech. In *Ohralik v. Ohio Bar Association*,[43] the Supreme Court stated: "[W]e instead 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."[44]

In regulating the use of billboards, the government directs its efforts at the noncommunicative impact of the structure, and must balance the competing interests involved.[45] Regulatory choices aimed at harms not caused by ideas or information are acceptable as long as the regulations do not unnecessarily interfere with the flow of communication.[46] A regulation, therefore, will be balanced between the value of freedom of expression and the state's interest in regulation.

In *Metromedia*, the Supreme Court recognized that the communicative aspect of commercial advertising is to be afforded a limited measure of protection.[47] In affirming that commercial speech is to be given a lesser degree of constitutional protection than noncommercial speech, the Court, in effect, used a balancing approach to decide whether the billboard ordinance of San Diego unreasonably conflicted with commercial advertising.[48] In doing so, the Court balanced the state's interest in traffic safety and aesthetics against the communicative value of banned commercial messages.[49]

Local governments traditionally could not regulate private property under the police power solely for aesthetic purposes.[50] The Supreme Court of California in *Metromedia*[51] overruled the seventy-one year old California case, *Varney & Green v. Williams*.[52] *Varney* followed the traditional approach towards aesthetics by not allowing local municipalities to regulate private property purely for aesthetic purposes.[53]

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43. 436 U.S. 447 (1978). In *Ohralik*, the Supreme Court upheld a lawyer's suspension from practice for face-to-face solicitation of business and did not recognize his first amendment right. *Id.* at 467-68.

44. *Id.* at 456.

45. L. TRIBE, *supra* note 33, at 581.

46. *See* Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

47. 453 U.S. at 505-07.

48. *Id.* at 509-12.

49. *Id.* at 507-08.

50. *See* note 36 *supra* and accompanying text; *see, e.g.*, Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909).

51. 26 Cal. 3d at 860-61, 164 Cal. Rptr. at 516, 610 P.2d at 413.

52. 155 Cal. 318, 100 P. 867 (1909).

53. 155 Cal. at 320, 100 P. at 868. The Supreme Court of California in *Metromedia*

Throughout the twentieth century, cities have sought to avoid characterizing restrictive billboard legislation as aesthetic regulation. Cities instead declared billboards to be public nuisances or characterized ordinances regulating billboards as serving standard police power purposes.[54] Most courts sustained billboard controls by resorting to legal fiction. Courts ruled that, while aesthetics alone could not support a billboard ordinance, aesthetic considerations might be a legitimate police power objective if the ordinance also served more traditional police power objectives.[55]

The Supreme Court of California in *Metromedia* "abandoned the legal fiction of prior decisions"[56] and held that aesthetic considerations alone, such as improving the appearance of an urban environment to benefit the general welfare, may justify a city's exercise of its police power.[57] The Supreme Court of the United States and the California lower court recognized that a municipality has an interest in eliminating billboards designed to be viewed from the streets and highways if the billboards unreasonably interfere with the aesthetics of the city.[58] In addition, the Supreme Court reaf-

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held that the two purposes of the ordinance were within the city's legitimate interests and that the ordinance was a "proper application of municipal authority over zoning and land use for the purpose of promoting the public safety and welfare." 26 Cal. 3d at 858, 164 Cal. Rptr. at 514, 610 P.2d at 411. The California Supreme Court rejected the appellants' argument that the ordinance was facially invalid under the first amendment.

54. Such police power purposes include preserving property values, protecting tourism, or promoting traffic safety.

55. Aronovsky, Metromedia, Inc. v. City of San Diego: *Aesthetics, the First Amendment, and the Realities of Billboard Control*, 9 ECOLOGY L.Q. 295, 296 (1981) [hereinafter cited as Aronovsky].

56. Aronovsky, *supra* note 55, at 296.

57. 26 Cal. 3d at 859, 164 Cal. Rptr. at 515, 610 P.2d at 412. State courts only recently have upheld billboard prohibitions based solely upon aesthetic considerations. In Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967), the New York Court of Appeals upheld, on aesthetic grounds alone, a municipal ordinance banning off-site billboards from a small residential community. The court stated, "realistically, the primary objective of any anti-billboard ordinance is an esthetic one. . . ." *Id.* at 269, 225 N.E.2d at 753, 279 N.Y.S.2d at 27. *See also* John Donnally & Sons v. Outdoor Advertising Bd., 369 Mass. 206, 339 N.E.2d 709 (1975). In *John Donnally & Sons*, the Supreme Judicial Court of Massachusetts upheld enactments that prohibited off-premise signs within Brookline, Massachusetts. The court held that a constitutional amendment relating to the billboards, MASS. CONST. amend. art. 50 (1918), would justify the prohibitions, as would the municipality's inherent police power. The court held that aesthetics alone would justify a total prohibition of billboards under the police power. *Id.* at 223-24, 339 N.E.2d at 720.

58. 453 U.S. at 510-11. Noting that "[b]illboards are intended to, and undoubtedly do, divert a driver's attention from the roadway," 26 Cal. 3d at 859, 164 Cal. Rptr. at 515, 610 P.2d at 412, the Supreme Court of California agreed with other courts that a legislative judgment declaring that billboards are traffic hazards is not unreasonable. *See* New-

firmed its determination that aesthetic considerations, coupled with those of traffic safety, create a legitimate reason for permitting on-site commercial billboards while banning them off-site.[59]

C. *Commercial Speech and its First Amendment Protections*

Courts have generally treated billboards as commercial speech by focusing on the medium of expression rather than on the content of the message.[60] Using these means, municipalities have traditionally used their zoning powers to regulate the commercial speech element of billboards.[61] Commercial speech, defined as speech of any form that advertises a product or service for profit or for business purposes,[62] has recently been vested with more first amendment protection than ever before.[63] Today, the fact that an advertiser seeks a profit cannot justify stripping his communication of all first amendment protection.[64]

In *Valentine v. Chrestensen*,[65] the Supreme Court concluded that the entrepreneur in New York City, by distributing his leaflet, was attempting to "pursue a gainful occupation in the streets . . ."[66] and his right to do so was purely a matter for "legislative judgment."[67] The Court inferred that New York City's code,[68] prohibiting the distribution of advertising matter in the streets,[69] did not have to be justified by an overriding or compelling state interest,[70] nor did it have to be judged against any inherent right to employ advertising as

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man Signs, Inc. v. Hjelle, 268 N.W.2d 741 (N.D. 1978); State v. Lotze, 92 Wash. 2d 52, 593 P.2d 811 (1979).

59. 453 U.S. at 510-12.

60. Aronovsky, *supra* note 55, at 315.

61. *Id.* Zoning powers are derived from the police power of the states. Besides regulation of billboards, zoning powers have been used to confront many local problems: The prevention of hazardous conditions, Railway Express Agency v. City of New York, 336 U.S. 106 (1949); the control of obscenity, Note, *Colorado Municipal Government Authority To Regulate Obscene Materials*, 51 DEN. L.J. 75 (1974); and the protection of the aesthetic environment of the community, State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825 (1967).

62. J. NOWAK, *supra* note 2, at 767.

63. *See* note 73 *infra* and accompanying text; *see also* Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

64. L. TRIBE, *supra* note 33, at 652.

65. 316 U.S. 52 (1942).

66. *Id.* at 54.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

a business technique.[71] The Court reasoned that if speech were purely commercial, it would be subject to regulation to the same extent and for the same reasons as other forms of commercial activity.[72] Commentators have argued that the *Chrestensen* Court did not view commercial speech as worthy of first amendment protection.[73] The Court in *Breard v. Alexandria*[74] subsequently extended *Chrestensen* and held that door-to-door salesmen could not claim the protection of the first amendment. *Chrestensen* and *Breard* were later interpreted to deny first amendment protection to all commercial speech.[75]

Notwithstanding *Chrestensen*, decided in 1942, and the traditional exclusion of commercial speech from first amendment protections, recent Supreme Court decisions have begun to afford commercial speech some protection under the first amendment.[76] The extension of first amendment protections to purely commercial speech is a development in first amendment jurisprudence which began in three 1970's cases.

In *Bigelow v. Virginia*,[77] the managing editor of a weekly newspaper in Virginia accepted an advertisement from a New York organization that provided abortion counseling and made referrals to New York hospitals and clinics that performed abortions. The editor subsequently was convicted of violating a Virginia statute[78] mak-

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71. *Id.*

72. *See generally* J. NOWAK, *supra* note 2, at 769; *see also* Aronovsky, *supra* note 55, at 318-19.

73. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 450 (1971). The Court in *Chrestensen* never defined commercial speech. Instead *Chrestensen* appeared to focus on commercial motivation as the critical factor in defining commercial speech. 316 U.S. at 55. Later cases, however, made it clear that speech otherwise protected was not to be denied protection on the basis of the speaker's commercial motivation. New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964) (paid political advertising); Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) (advertising the sale of literature by Jehovah's Witnesses).

74. 341 U.S. 622 (1951).

75. Redish, *supra* note 73, at 458. *Contra*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), where the Supreme Court rejected the argument that motion pictures are unprotected because they are made and exhibited for profit. The Court indicated that books, newspapers and magazines are published and sold for profit, but that fact does not prevent them from being a form of expression whose liberty is safeguarded by the first amendment. *Id.* at 501-02.

76. Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

77. 421 U.S. 809 (1975).

78. *Id.*

ing it a misdemeanor to encourage or to promote abortions in print media.[79] The Court, for the first time, expressed its dissatisfaction with the prevalent approach of resolving a class of first amendment claims simply categorizing the speech as commercial.[80] The Court found that the advertisement conveyed newsworthy information to a wide variety of readers.[81] The Supreme Court stated that the Virginia court erred in assuming that advertising, as such, is not entitled to first amendment protection.[82] The Court added that speech is not stripped of first amendment protection merely because it appears in the form of a paid commercial advertisement.[83] Thus, according to *Bigelow*, the fact that the abortion advertisement had commercial aspects or reflected the advertiser's commercial interests does not negate all first amendment guarantees.

One year later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[84] the Court gave first amendment protection to advertisers seeking to disseminate price information for prescription drugs.[85] The Court acknowledged that an advertisement communicating prescription drug prices constitutes speech that transmits information to consumers.[86] In holding the Virginia statute invalid,[87] the Court said that commercial speech is not wholly outside the protection of the first and fourteenth amendments. Advertising is intended to increase the number of sales of a particular item or service, but that does not mean that this form of speech loses all its first amendment protection.[88] The Court concluded, however, that although commercial speech merits protection, some forms of

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79. *Id.* at 813.

80. *Id.* at 826.

81. *Id.* at 822.

82. *Id.*

83. *Id.* at 818; *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (stating that expression does not lose constitutional protection because it appears in the form of a paid advertisement).

84. 425 U.S. 748 (1976).

85. *Id.* at 770. Appellees, as consumers of prescription drugs, brought suit against the Virginia State Board of Pharmacy and its individual members, challenging the validity under the first amendment, of a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. *Id.* at 748.

86. *Id.* at 765. *Cf.* Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) (Supreme Court acknowledged a first amendment right to receive information and ideas, and declared that freedom of speech necessarily protects the right to receive information).

87. 425 U.S. at 770.

88. *Id.* at 761; *see* Bates v. State Bar of Arizona, 433 U.S. 580 (1973). The Court in *Bates* held that a total ban on price advertising by private attorneys, as enforced by an integrated state bar and the state's highest court, violates the first and fourteenth amendments. *Id.* at 384.

regulation are permissible.[89] Thus *Virginia Pharmacy*, while recognizing that commercial speech is entitled to first amendment protections, also recognized that such speech can be regulated in certain situations.[90]

The third case which recognized first amendment protection for commercial speech is *Linmark Associates, Inc. v. Township of Willingboro*.[91] A township ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs, designed to prevent "white flight" from a racially integrated community, was held to violate the first amendment.[92] The Court stated that the constitutional defect in the Willingboro ordinance, was that it "acted to prevent its residents from obtaining certain information."[93] The Court concluded that Willingboro's concern was not with the commercial aspect of "For Sale" signs, but with the substance of the information communicated to the citizens of the town.[94]

The *Bigelow* line of cases gave commercial speech first amendment protection when such speech furnished the populace with truthful information. That the advertisement was intended to bring in money for the advertiser was no longer controlling[95] because commercial speech, in the form of advertisements, was given protection in order to inform the public of available goods and services.[96]

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89. 425 U.S. at 770-72. Permissible regulations of commercial speech would include a time, place and manner restriction, provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest and that in so doing, they leave open ample alternative channels for communication of the information. *Id.* at 771; *see also* Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); U.S. v. O'Brien, 391 U.S. 367, 377 (1968).

90. 425 U.S. at 770.

91. 431 U.S. 85 (1977).

92. *Id.* at 97. The Court in *Linmark* used a three part test for determining the validity of a restriction on commercial speech: (1) the restriction on speech must not relate to the content of the regulated expression; (2) the ordinance must serve a compelling state interest unrelated to the suppression of speech; and (3) the legislation must leave open ample alternative channels of communication. *Id.* at 93-97.

93. *Id.* at 96. The Court reasoned "that information which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families." *Id.*

94. *Id.*

95. *See* Bigelow, 421 U.S. at 809. "[S]peech is not stripped of first amendment protection merely because it appears in the form of a paid advertisement." *Id.* at 818.

96. *See* Virginia State Bd. of Pharmacy, 425 U.S. at 748; *see also* Linmark, 431 U.S. at 85.

IV. THE VALIDITY OF COMMERCIAL SPEECH REGULATION

The protection afforded commercial speech continued in *Central Hudson Gas v. Public Service*[97] in which a four part test was used to measure the validity of commercial speech regulation. In *Metromedia* the Supreme Court used the *Central Hudson Gas* test to determine the validity of a governmental restriction[98] on commercial speech. In *Central Hudson Gas*, the Supreme Court held invalid a regulation by the New York Public Service Commission which prohibited a utility company from advertising to promote the use of electricity.[99] The Court reasoned that although the Constitution accords less protection to commercial speech than to other constitutionally guaranteed expression, the first amendment protects commercial speech from unwarranted governmental regulation.[100] The Court then created a four part test to determine when a governmental restriction on commercial speech would be valid:

1) The first amendment protects commercial speech only if that speech concerns lawful activity and is not misleading;
2) A restriction on otherwise protected commercial speech is valid only if it seeks to implement a substantial governmental interest;
3) The restriction must directly advance that interest; and
4) The restriction must reach no farther than necessary to accomplish the given objective.[101]

In applying this test, the Court in *Metromedia* concluded that the San Diego billboard ordinance, as applied to commercial speech was constitutional.[102] The Court stated that the ordinance clearly conformed to the first, second, and fourth criteria.[103]

The Court gave more serious attention to the third element of the test which deals with whether an ordinance directly advances the substantial governmental interest in traffic safety and aesthetics. The Court concluded that since "billboards are intended to, and un-

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97. 447 U.S. 557 (1980).

98. In *Metromedia*, the governmental restriction was the billboard ordinance. *See* note 7 *supra*.

99. 447 U.S. at 569-71.

100. *Id.* at 561.

101. *Id.* at 563-66.

102. 453 U.S. at 512. This test applies only to commercial speech because commercial speech is not given all first amendment protection; therefore, commercial speech must be balanced against other interests. *See* note 8 *supra* and accompanying text.

103. 453 U.S. at 507.

doubtedly do, divert a driver's attention from the roadway,"[104] other courts are correct in agreeing with a legislative judgment that billboards are traffic hazards.[105] With respect to the advancement of the aesthetic interests, the Supreme Court concluded that the large billboards easily can be perceived as "esthetic harms,"[106] and that San Diego could rightfully choose to minimize these structures as did other municipalities and states.[107]

Using the *Central Hudson Gas* test for its criteria, the Court concluded that insofar as it regulated commercial speech, the San Diego ordinance complied with the four requirements of the test.[108] The Court agreed with the Supreme Court of California that the ordinance could validly permit on-site commercial advertising while prohibiting it off-site under the requirements of the *Central Hudson Gas* test.[109] Thus, in concluding that the test of *Central Hudson Gas* allows a ban on billboards carrying commercial speech, the Court left open the question of whether the ordinance could have prohibited *all* commercial billboards whether on-site or off-site.

If the Court were concerned *only* with the aesthetics and traffic safety in the city, it could have banned all billboards, regardless of on-site or off-site status, while still conforming to the *Central Hudson Gas* test. Instead the Court balanced the governmental regulations against the individual's right to advertise his goods or services on his own property.[110]

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104. *Id.* at 508.

105. *Id. see, e.g.*, E.B. Elliott Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141, 1152 (5th Cir. 1970); Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741, 757 (N.D. 1978).

106. 453 U.S. at 510. San Diego is one of a growing number of cities that has enacted ordinances to minimize the number of billboards in a city.

> The federal Highway Beautification Act of 1965, Pub. L. 89-285, 79 Stat. 1028, 23 U.S.C. § 131, requires that states eliminate billboards from areas adjacent to certain highways constructed with federal funds. The Federal Government, also prohibits billboards on federal lands. 43 C.F.R. 2921.0-6(a). Three states have enacted state-wide bans on billboards. Maine, ME. REV. STAT. ANN. Tit. 23, § 1901 *et seq.* (1980); Hawaii, HAW. REV. STAT. § 264-71 *et seq.*; § 445-111 *et seq.* (1976); Vermont, VT. STAT. ANN. Tit. 10, § 488 *et seq.* (1973).

Id. at 510 n.16.

107. *Id.* at 510.

108. *Id.* at 503-12.

109. *Id.* at 512.

110. *Id.* The appellants, billboard advertisers, questioned whether the distinction between on-site and off-site advertising is justified in terms of aesthetics or traffic safety. *Id.* at 511. The Court answered that the ordinance permits the occupant of the property to use billboards located on that property to advertise goods and services offered at that location while prohibiting all other advertisers from using those same billboards to promote their goods and services. *Id.* at 512.

The *Metromedia* Court, while invalidating the entire ordinance on other grounds,[111] concluded that the San Diego ordinance, insofar as it regulated commercial speech, would have been valid within the state's police power because it related directly to the stated objectives of traffic safety and aesthetics.[112] The Court also stated that San Diego might legitimately believe that off-site advertising "presents a more acute problem than does on-site advertising."[113] Through the enactment of such an ordinance, the city demonstrated its belief that the first amendment right to use on-site advertising is stronger than the city's interest in traffic safety and aesthetics. The Supreme Court's decision did not reject the city's judgment. Instead, the Court concluded that the owner of a business has a stronger interest in identifying his place of business on those premises than he does in leasing its available space to another person who wants to advertise a business enterprise located elsewhere.[114]

V. NONCOMMERCIAL BILLBOARD SPEECH AND THE FIRST AMENDMENT

Although aesthetics and the preservation of property value may be deemed legitimate state interests properly furthered through police power regulation,[115] no municipal ordinance can oppressively infringe on fundamental rights protected by the Constitution.[116] Legitimate state interests must be weighed against fundamental individual interests.[117] Noncommercial speech is one of the fundamental rights expressly stated in the Constitution.[118]

The standard of review used by the Supreme Court for noncom-

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111. The ordinance was invalidated because the Court believed that it unreasonably infringed on an individual's right to free speech by interfering with the use of noncommercial billboards. *Id.* at 513.

112. *Id.* at 512. The Supreme Court stated that this is not altered by the fact that the ordinance is underinclusive because it permits on-site advertising. *Id.* at 511.

113. *Id.* at 511.

114. *Id.* at 511-12.

115. *See* note 57 *supra* and accompanying text.

116. *See* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (invalidating a city ordinance restricting extended families from living in the same home); Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974) (ordinance restricting occupation of dwelling violated no fundamental right guaranteed by the Constitution); Berman v. Parker, 348 U.S. 26, 32 (1954) (judicial deference to zoning legislation will end if the legislation infringes on constitutionally protected rights).

117. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977) (first amendment interests must be weighed against the importance of countervailing state interests).

118. U.S. CONST. amend. I. "Congress shall make no law . . . abridging the freedom of speech. . . ." *Id.*

mercial speech cases is strict scrutiny. This standard requires that a state interest be sufficiently compelling,[119] furthered by the least intrusive means possible,[120] with the means bearing a substantial relation to the compelling governmental interest.[121] Governmental restriction of noncommercial speech must be nondiscriminatory and justified by a state interest which is unrelated to the suppression of expression.[122] In commercial speech cases the Supreme Court applies a balancing test.[123] In noncommercial speech issues the Court places a heavy burden on the state to justify the infringement, and requires a sufficiently compelling state interest. The Court, under these standards of review, believed that because the San Diego ordinance prohibited noncommercial billboard advertising, the ordinance had to fall. The ordinance failed because it reached too far into the area of protected speech.[124]

In early cases, the Court sustained regulation of billboards, and claimed that regulation did not violate first amendment requirements.[125] The Court rejected these constitutional challenges,[126] holding that the regulation of billboards fell within the legitimate police power of local governments.[127]

Since those decisions, the Court has not given plenary consideration to cases involving first amendment challenges to statutes or ordinances limiting the use of billboards, preferring on several occasions to summarily affirm decisions sustaining state or local legislation directed at billboards.[128]

In *Suffolk Outdoor Advertising Co. v. Hulse*,[129] the Supreme Court summarily affirmed a judgment sustaining an ordinance which distinguished between off-site and on-site billboard advertising, prohibiting the former[130] and permitting the latter.[131] The Court rejected the claim that the ban on off-site billboard advertising violated the first amendment. For purposes of first amendment anal-

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119. Wooley v. Maynard, 430 U.S. 705, 716 (1977).
120. *See generally* L. TRIBE, *supra* note 33, at 581.
121. Buckley v. Valeo, 424 U.S. 1, 64 (1976).
122. 453 U.S. at 514-15.
123. *Id.* at 520-21.
124. *Id.* at 521.
125. 453 U.S. at 498.
126. *Id.* at 498 n.7.
127. *Id.*
128. *Id. See* note 4 *supra* and accompanying text.
129. 439 U.S. 808 (1978).
130. *Id.*
131. *Id.*

ysis in *Suffolk*, a billboard subject to the limiting ordinance was defined as one involving purely commercial messages.[132] The *Suffolk* definition of billboard, however, differed greatly from that in *Metromedia*,[133] because the ordinance in *Suffolk* did not include the broad range of noncommercial speech prohibited by the San Diego ordinance.[134] Thus, because the San Diego ordinance was challenged on the ground that it prohibited noncommercial speech, *Suffolk* was not controlling.[135]

In *Lotze v. Washington*,[136] on the other hand, the appellants erected, on their property, a billboard expressing their own political and ideological views.[137] The ordinance allowed on-site commercial advertising but banned all other speech and as such, the state ordered the appellants to remove their billboards.[138] The Supreme Court summarily affirmed the judgment and rejected the first amendment challenge to the ordinance.[139]

In *Metromedia*, the Supreme Court took a different stand on noncommercial speech and billboards. The Court recognized that a first amendment challenge to the ordinance created a legitimate issue.[140] Noncommercial speech did not lose its first amendment protection merely because of the means used to communicate the speech.[141] The fact that speech was communicated through billboards, instead of through television, radio, or magazines, did not make it any less worthy of protection under the first amendment.[142]

VI. IMPLICATION OF *METROMEDIA*

The Supreme Court has defined the limits of billboard regulation by local governments through its decision in *Metromedia*. Local governments may regulate commercial billboards located on private property in the name of traffic safety and aesthetics, although defini-

132. *Id.*
133. 453 U.S. at 499.
134. *Id.*
135. *Id.*
136. 444 U.S. 921 (1979).
137. *Id.* at 923.
138. *Id.*
139. *Id.* at 921.
140. 453 U.S. at 513.
141. *Id.*
142. *Id.* at 513-14. "Insofar 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." *Id.* at 513.

tion of the relationship between the competing interests can be difficult. The state has interests which extend to promoting municipal beautification while there simultaneously exists the danger of governmental intrusion upon individual property rights. The Court in *Metromedia* held that on-site commercial advertising should not be banned because the owner of property has an interest in advertising his products and services. This same interest, however, does not extend to those who want to advertise their goods and services on property which does not belong to them. Aesthetics and traffic safety outweigh the interests of off-site advertisers.

Metromedia is consistent with other decisions upholding billboard ordinances banning off-site commercial advertising. *Metromedia*, however, differs from other billboard cases because it does not limit its analysis to commercial speech. Instead, the Court recognized that noncommercial speech must be protected by the first amendment regardless of the medium of communication.

The Court held that noncommercial messages conveyed on billboards are to be afforded full first amendment protection. Police power objectives of aesthetics and traffic safety are not compelling state interests and, therefore, do not outweigh an individual's right to free speech even if the speech is communicated through rented billboard space.

Metromedia divided the Court.[143] The plurality opinion, written by Justice White, was joined only by Justice Marshall, Justice Stewart, and Justice Powell. The other Justices filed separate opinions, either concurring in part or dissenting.[144] The controversy surrounding *Metromedia* indicated that it is not the last word on the issue of the regulation of billboards. One question yet to be answered is whether a city can *totally* ban commercial billboards as well as noncommercial billboards if the city can show that a substantial governmental interest is directly furthered by such a ban. Another unresolved issue is whether city officials have the discretion to determine whether a proposed message is commercial or noncommercial. Finally, if aesthetics are a substantial reason for banning off-site commercial billboards, it is unresolved whether aesthetics

143. The decision had five separate opinions, with the holding commanding a plurality of the Court. Justice Rehnquist described the Court's decision as a "virtual Tower of Babel." *Id.* at 569 (Rehnquist, J., dissenting).

144. Justice Brennan filed an opinion in which Justice Blackmun joined, concurring in the judgment. *Id.* at 521. Justice Stevens dissented in part and filed an opinion. *Id.* at 540. Chief Justice Burger dissented and filed an opinion. Justice Rehnquist dissented and filed an opinion. *Id.* at 555.

alone could be sufficiently substantial to ban on-site commercial billboards.

In a concurring opinion, Justices Brennan and Blackmun viewed the San Diego ordinance as a total ban on the use of billboards to communicate commercial or noncommercial messages and reasoned that the city did not show that substantial governmental interests would be served by its ban on an entire medium of communication.[145] The Justices found the ordinance to be invalid because there existed no evidence that the ban would improve traffic safety, the ordinance was not drafted narrowly enough to accomplish the traffic safety goal, nor was the ban a serious effort to make beautiful the commercial and industrial area of San Diego.[146]

Justice Stevens concurred in the plurality's statement that commercial billboards could be banned, but he dissented from its holding that noncommercial messages could not be prohibited.[147] He stated that the plurality addressed the issue of a property owner's right to exhibit noncommercial messages although the appellants had not raised the issue.[148] He stated, therefore, that this premise which led to the plurality's holding was merely a hypothetical issue, and not one asserted by the parties.

Chief Justice Burger, in dissent, reasoned that although the first amendment protects an individual's right to free speech, it does not mandate a similar right for an individual to communicate by the medium of his choice.[149] He further argued that as long as the city does not prevent the discussion of ideas,[150] or permit authorities to favor some speakers and not others,[151] the city may require speakers to use other, less intrusive mediums of communication.

The Chief Justice also differed with the plurality's holding that the San Diego ordinance was invalid because it showed a higher regard for commercial speech than for noncommercial speech.[152] He argued that the plurality denied "to every community the important

145. *Id.* at 527-28.

146. *Id.* at 528-34. The aesthetics argument is weak because in San Diego, billboards were only allowed in areas already zoned for industrial and commercial development. *Id.* at 531-32. The aesthetics argument perhaps would have been more effective if the city was trying to preserve areas that were pleasant to look at, as opposed to areas where little, except commercial and industrial buildings, existed.

147. *Id.* at 540-42 (Stevens, J., dissenting).

148. *Id.* at 544-45.

149. *Id.* at 557-58 (Burger, C.J., dissenting).

150. *Id.* at 561-62.

151. *Id.*

152. *Id.* at 557-58.

powers reserved to the people and the States by the Constitution," and that each locality must be allowed to decide for itself the proper limits to be placed upon speech.[153]

The plurality of the Court invalidated the San Diego ordinance and stated that the city impermissibly preferred commercial speech over noncommercial speech.[154] The categories of commercial and noncommercial speech, however, cannot always be separated clearly and distinguished, especially in the instance where commercial advertisers phrase their messages in ideological terms so as to obscure the dividing line. Advertisers of any service or product may compare the price, efficiency, safety and performance of their goods to those of competitors and call the message a consumer service. It is thus often difficult to separate the two classes of speech when the message being conveyed has characteristics of both. Local authorities may not want the burden of determining which messages are commercial and which are noncommercial because such efforts could be held to constitute a form of censorship.[155] The plurality of Justices held the San Diego ordinance unconstitutional because it prohibited individuals from displaying noncommercial ideas and viewpoints on billboards which were rented to convey the messages.[156]

VII. CONCLUSION

The Supreme Court in *Metromedia* attempted to resolve the conflict between the San Diego municipal billboard ordinance and the first amendment right to free speech. Managing only a plurality decision, the Court concluded that a municipality can permit billboards with commercial messages to be displayed on-site while prohibiting them off-site. The Court also concluded that billboards carrying noncommercial speech could not be banned on-site or off-site because a total ban violated the first amendment. *Metromedia* reaffirmed that commercial speech is accorded some first amendment protection, but it can be regulated under the state's police power for the good of traffic safety and aesthetics.

The Court declared the San Diego ordinance invalid not because of its ban on off-site commercial speech, but because it imper-

153. *Id.* at 567-69. "The fatal flaw in the plurality's logic comes when they conclude that San Diego by exempting on-site commercial signs, thereby has 'afford[ed] a greater degree of protection to commercial than to noncommercial speech.' " *Id.* at 567.

154. *Id.* at 513-14.

155. *Id.* at 537-40 (Brennan, J., concurring).

156. *Id.* at 521.

missibly restricted noncommercial speech. The Court mandated specifically that noncommercial speech on billboards is to be accorded full first amendment protection unless a compelling state interest in their prohibition is demonstrated. The city of San Diego failed to establish a compelling interest, therefore, the ordinance was held to be invalid on its face. The holding, however, was supported by only a plurality of the Justices, and the dissenting views indicate that *Metromedia* is not the Court's final pronouncement on the question of billboard regulation.

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