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Making Sense of Billboard Law: Justifying Prohibitions and Exemptions

R. Douglass Bond
University of Michigan Law School

NOTE

Making Sense of Billboard Law: Justifying Prohibitions and Exemptions

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

These four lines from humorist Ogden Nash reflect what is probably a widespread aesthetic judgment about billboards.[2] The title is, of course, highly ironic: There is nothing "open" about a road so cluttered with billboards that country scenery is obscured. Actually, Nash put the matter gently. He did not say that billboards are ugly, only that they are out of place — at least where the aesthetic properties of natural objects would otherwise be enjoyed.[3] In fact, the word "think" in line one leaves open the theoretical possibility (slim to be sure) of encountering a billboard which, due to its own beauty, would not arouse in the viewer a distinct preference to gaze at something else. But the posing of this possibility accentuates its remoteness.

The final two lines convey a certain illogic. Unless joined together to create a barricade, billboards along an "open road" would not literally conceal *every* tree. But a multitude of billboards (or just one placed precisely) — due to their function as eye-catching devices — can prevent a person from noticing a single tree though there may be many within view.[4]

When the aesthetic concern captured by "Song of the Open Road" becomes widespread, a law prohibiting billboards often results. Wide disagreement exists as to whether a city or state may, consistently with the first amendment, drastically reduce or even eliminate outdoor signs for aesthetic reasons. Isolating the issues dividing those who

1. O. NASH, I WOULDN'T HAVE MISSED IT: SELECTED POEMS OF OGDEN NASH 31 (1975) (quoted in Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 886, 610 P.2d 407, 429, 164 Cal. Rptr. 510, 532 (1980)). The poem is a tongue-in-cheek allusion to Joyce Kilmer's "Trees," which begins "I think that I shall never see/ A poem as lovely as a tree." 1 J. KILMER, POEMS, ESSAYS AND LETTERS IN TWO VOLUMES 180 (1918).

2. This Note uses the term "billboard" not in its customary and generic sense as a synonym for a permanent outdoor sign, but in its technical sense, meaning "offsite sign." This technical use of the term is in keeping with the court opinions cited in this Note. See *infra* note 9 for this Note's definition of "offsite sign."

3. See Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355 (1982), for an argument that a perception of beauty or ugliness is merely a perception of something being either in or out of place.

4. *See infra* notes 216-17 and accompanying text.

generally would defer to local aesthetic interests from those who generally would not, this Note traces the difficulties the courts have had in locating and justifying a standard for deciding these cases. The Note argues for a standard sympathetic with local desires to ban billboards. According to this standard, only signs that identify the premises on which they are located may not be prohibited.[5] While this standard has occasionally been advocated, it has never been fully defended.[6] That defense is ultimately the task of this Note.

In *Metromedia, Inc. v. City of San Diego*[7] the Supreme Court wrestled with the first amendment questions raised by sign prohibitions for the first time, but left many of them unresolved. The Court produced five separate opinions and no majority. Then-Justice Rehnquist referred to the Court's effort as a "virtual Tower of Babel, from which no definitive principles can be clearly drawn."[8]

In *Metromedia* the Court struck down a San Diego ordinance that prohibited all offsite signs[9] but permitted onsite signs[10] for commercial purposes.[11] However, the ordinance also exempted signs within

5. This standard would also permit a state or city to protect additional signs if this protection has a reasonable relation to the aesthetic objectives of the sign regulation and does not indicate an intent to control public debate by prohibiting or exempting controversial subject matter. *See infra* notes 257-63 and accompanying text.

6. Stephen Williams has pointed out that ordinances that "protect a class of signs that relate . . . closely to their locations" cannot be considered "antiexpression" measures, for they merely acknowledge the unique relation between sign and land in such cases. Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation,* 62 MINN. L. REV. 1, 43 (1977). Similarly, John Lucking has argued that signs that identify the products and services available where the sign is located deserve favored status over other signs. Lucking, *The Regulation of Outdoor Advertising: Past, Present, and Future,* 6 ENVTL. AFF. 179, 193 (1977). However, both Williams and Lucking wrote four years prior to the Supreme Court decision now controlling billboard disputes, whose plurality held that a court must inquire whether an affected sign is commercial or noncommercial, not identifying or nonidentifying. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). *See infra* notes 48-49 and accompanying text.

7. 453 U.S. 490 (1981).

8. 453 U.S. at 569 (Rehnquist, J., dissenting).

9. For purposes of this Note, an offsite sign is a sign, either commercial or noncommercial, which advertises activities not conducted, services not provided, or products not dispensed or sold on the premises where the sign is located. This definition is in keeping with the court opinions cited in this Note. Moreover, a billboard is an offsite sign. *See supra* note 2.

10. The term "onsite sign" refers to signs, commercial or noncommercial, that refer to or identify activities conducted, services provided, or products sold or dispensed on the premises where the sign is located. This definition of "onsite sign" is consistent with court opinions cited in this Note that employ the onsite/offsite distinction.

11. The ordinance stated:

> Only those outdoor advertising display signs . . . 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.

453 U.S. at 493 n.1. Justice Brennan disputed the plurality's contention that this provision did not apply equally to commercial and noncommercial signs. 453 U.S. at 535 (Brennan, J., concurring).

The ordinance exempts identifying signs generally in addition to "onsite signs." None of the *Metromedia* opinions makes anything of this fact, nor observes that an onsite sign is merely one type of identifying sign. *See infra* note 244 and accompanying text. See also Part IV for argu-

twelve specific categories, both commercial and noncommercial. Justice White, writing for the plurality, found the ordinance unconstitutional for two reasons. First, in exempting commercial onsite signs but not noncommercial onsite signs, the ordinance favored commercial over noncommercial speech. Second, the ordinance favored certain noncommercial signs over other noncommercial signs. White thus indicated two defects either of which would invalidate an ordinance.

Ambiguities within the plurality opinion have spawned two contradictory interpretations of *Metromedia*. One view permits the prohibition of commercial signs but protects all noncommercial signs (the "commercial/noncommercial distinction"). The other view permits prohibition of noncommercial signs as long as the ordinance affords equal protection to commercial and noncommercial signs; this view allows governments to exempt all onsite signs while prohibiting all offsite signs (the "onsite/offsite distinction").

These distinctions rely on divergent conceptions of "content-neutrality." The commercial/noncommercial distinction forbids restrictions on noncommercial signs that in any way depend on what a sign says or what function the sign serves. The onsite/offsite distinction requires only that the restriction not discriminate according to point of view or subject matter. For instance, the former distinction would not permit an exemption for any class of sign, even if potentially the class includes any point of view, because a sign's content must be assessed in order to determine its class. Conversely, the latter distinction would allow an exemption for a class of signs — onsite signs — as long as every sign within that class was exempt.

The onsite/offsite distinction clearly gives greater leeway to local aesthetic interests than does the commercial/noncommercial distinction. The latter distinction removes aesthetic considerations from the equation: it protects each noncommercial sign regardless of whether it is more offensive or intrusive than a commercial sign. This Note argues that while the onsite/offsite distinction is superior to the commercial/noncommercial distinction, it fails to include other signs that should be protected under the rationale needed to protect onsite signs. Onsite signs should be protected because, as they identify the premises on which they are located, they cannot be replaced by an alternative means of communication.[12] Therefore, all identifying signs — not just onsite signs — must be protected. Hence, the most appropriate distinction to employ in evaluating sign prohibitions is the "identifying/nonidentifying distinction."

Part I of this Note surveys the trends in the aesthetic regulation of

ments as to why the identifying/nonidentifying distinction should be the critical distinction in determining what signs must be protected.

12. *See infra* note 244 and accompanying text.

billboards, culminating in the Supreme Court of California's decision in *Metromedia, Inc. v. City of San Diego,*[13] and the Supreme Court's review of that decision. Part II analyzes the five *Metromedia* opinions in order to present properly the contemporary debate over billboard law. It inquires whether a sign prohibition should hinge on the commercial or noncommercial status of the targeted signs. Part III indicates how ambiguities in the *Metromedia* plurality opinion have produced the conflict in lower courts between the commercial/noncommercial distinction and the onsite/offsite distinction, and examines some of the problems created by the application of these distinctions. Part IV argues that the Constitution should protect only those signs that cannot be replaced by alternative means of communication. It repudiates the commercial/noncommercial distinction for failing to protect signs according to this standard, and criticizes the onsite/offsite distinction for affording special protection to only one type of sign for which alternative means are lacking. Part IV then argues that the identifying/nonidentifying distinction would serve as an appropriate check on the wide discretion governments need to address the aesthetic problems posed by billboards.

I. REGULATING AESTHETICS BY BANNING BILLBOARDS

During the early part of the twentieth century, local regulators in various states reacted to the sudden proliferation of billboards by passing laws restricting them.[14] The courts invalidated most of these laws for being motivated solely by aesthetic concerns and therefore beyond the scope of the police power.[15] Consequently, cities began to cite other reasons for prohibiting or restricting billboards, reasons safely within the traditional scope of the police power: protecting property values, protecting the tourist industry, or promoting traffic safety.[16] To uphold billboard laws, courts developed what has been called the "aesthetics-plus doctrine," which approved a billboard law if it merely furthered a customary police power goal in addition to addressing aesthetic concerns.[17]

Courts have held aesthetic objectives suspect because they seem unavoidably subjective.[18] Courts fear the ever-changing nature of aesthetic judgment,[19] and the fact that the majority, in pursuing aesthetic

13. 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980).

14. Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal,* 20 LAW & CONTEMP. PROBS. 218, 219 (1955).

15. *Id.*

16. Aronovsky, Metromedia, Inc. v. City of San Diego: *Aesthetics, the First Amendment, and the Realities of Billboard Control,* 9 ECOLOGY L.Q. 295, 295 (1981); *see also* Costonis, *supra* note 3, at 374.

17. Aronovsky, *supra* note 16, at 303.

18. Costonis, *supra* note 3, at 396-409; Dukeminier, *supra* note 14, at 225.

19. *See, e.g.,* City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 662, 148 N.E.

objectives, could trample basic individual rights by imposing its arbitrary tastes on the minority.[20] And Justice Brennan has recently argued that when the state justifies a restriction of individual rights on aesthetic grounds, the "inherent subjectivity" of the justification "impairs the ability of a reviewing court" to conduct a meaningful review.[21]

Despite its dangers, aesthetic policymaking cannot be entirely abandoned, for it undergirds ordinances such as zoning laws, for which political support will likely increase.[22] However, the aesthetics-plus doctrine fails to provide a dependable standard for policymaking, as it allows a court to validate aesthetically motivated legislation without saying it is doing so.[23] Courts have generally deferred to legislative decisions that billboards affect a legitimate police power concern, for it is difficult to prove that they do not.[24] But, "it is unclear why aesthetics are a proper justification when in combination with another police-power objective and yet not when standing alone."[25] If the subjectivity of aesthetic judgments renders these judgments invalid foundations for law, then legislation motivated by such judgments should be struck down regardless of the fact that a secondary justification has been offered as well.

Following the current trend, the California Supreme Court, in 1980, repudiated the aesthetics-plus doctrine as "unworkable" in *Metromedia, Inc. v. City of San Diego,*[26] the case later reviewed by the Supreme Court.[27] Writing for the court, Justice Tobriner argued that the aesthetics-plus doctrine was "discordant with modern thought as to the scope of the police power."[28] He noted that economic and aesthetic considerations cannot be distinguished in a state that relies on aesthetic values to attract tourists.[29] Moreover, Justice Tobriner ar-

842, 844 (1925) ("The world would be at continual seesaw if aesthetic considerations were permitted to govern the use of the police power.").

20. *See, e.g.,* City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co., 72 N.J.L. 285, 287, 62 A. 267, 268 (1905) ("a man may [not] be deprived of his property because his tastes are not those of his neighbors").

21. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 822 (1984) (Brennan, J., dissenting).

22. Costonis, *supra* note 3, at 459.

23. Aronovsky, *supra* note 16, at 302; Dukeminier, *supra* note 14, at 220-23.

24. *See, e.g.,* Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 859, 610 P.2d 407, 412, 164 Cal. Rptr. 510, 515 (1980). A police-power justification puts the burden of proof on the law's opponent, who must prove there exists no rational connection between restricting billboards and the stated police power goal — usually traffic safety. Aronovsky, *supra* note 16, at 306.

25. Aronovsky, *supra* note 16, at 307.

26. 26 Cal. 3d at 848, 610 P.2d at 413, 164 Cal. Rptr. at 516 (1980).

27. 453 U.S. 490 (1981); *see infra* Part II.

28. 26 Cal. 3d at 861, 610 P.2d at 413, 164 Cal. Rptr. at 516.

29. 26 Cal. 3d at 861, 610 P.2d at 413, 164 Cal. Rptr. at 516.

gued that modern urban planning "would be virtually impossible" if aesthetic objectives were invalid.[30] A city could not pass basic zoning ordinances designed to improve appearances.[31] And Tobriner observed that most jurisdictions had accepted the Supreme Court's recognition of a state's general right to regulate aesthetics in *Berman v. Parker:*

> The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the Legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[32]

Berman raised no first amendment issues. It upheld a municipal plan to remove unsightly slum housing.[33] But relying on a New York case validating a city-wide ban on billboards,[34] Justice Tobriner argued that such an ordinance should be upheld unless its method for achieving aesthetic goals is arbitrary or irrational.[35]

When the Supreme Court reversed Tobriner's opinion, five justices nevertheless agreed that a city's aesthetic interest in removing visual clutter justified a ban on billboards.[36] Thus, no longer could a court strike down a billboard law simply by observing that aesthetic interests produced the law.[37] However, four of those seven justices restricted the ban to commercial billboards. These four justices rejected the rational basis test proposed by Tobriner where noncommercial signs were affected.[38] That decision left only three justices who, following Tobriner, would have upheld a ban on all billboards, commercial or noncommercial. The next Part begins the inquiry into whether commercial and noncommercial signs should be distinguished, by analyzing the *Metromedia* opinions.

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30. 26 Cal. 3d at 862, 610 P.2d at 414, 164 Cal. Rptr. at 517.

31. 26 Cal. 3d at 862, 610 P.2d at 414, 164 Cal. Rptr. at 517.

32. 26 Cal. 3d at 861, 610 P.2d at 413, 164 Cal. Rptr. at 516 (quoting Berman v. Parker, 348 U.S. 26, 33 (1954)).

33. *Berman*, 348 U.S. 26 (1954).

34. 26 Cal. 3d at 862, 610 P.2d at 414, 164 Cal. Rptr. at 517 (citing Suffolk Outdoor Adv. Co. v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977)).

35. 26 Cal. 3d at 863, 610 P.2d at 414, 164 Cal. Rptr. at 517.

36. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508 (1981).

37. The argument that the subjectivity of aesthetic judgments renders them insufficient to outweigh free speech claims has not vanished. *See* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 823 (1984) (Brennan, J., dissenting).

38. In 1984 the Court validated a city ordinance prohibiting the posting of signs on public property, ruling that the city could protect its citizens from the "visual assault" created by the accumulation of such signs. *Taxpayers for Vincent,* 466 U.S. at 807. The ban included noncommercial signs. Writing for the Court, Justice Stevens explained why both commercial and noncommercial signs could be banned under *Taxpayers for Vincent* even though only commercial billboards could be banned under *Metromedia:* in *Metromedia* "[t]he private citizen's interest in controlling the use of his own property justifies the disparate treatment." 466 U.S. at 811.

II. THE *METROMEDIA* OPINIONS

Metromedia settled very little in the law of billboards. Lower court decisions since *Metromedia* have been anything but uniform. On the one hand, ordinances less intrusive to first amendment concerns than the *Metromedia* ordinance have been found unconstitutional;[39] but on the other hand, courts have merely applied a rational basis test in validating ordinances that arguably present greater facial challenges to the first amendment than did the *Metromedia* ordinance.[40] The two lines of cases that have emerged since *Metromedia,* and that now comprise the central debate over billboard law, have recognizable roots in the *Metromedia* opinions.[41] Therefore, these opinions must be analyzed in order to understand the contemporary debate.

The *Metromedia* Court considered a San Diego ordinance that prohibited all offsite signs but permitted commercial onsite signs. The ordinance also permitted signs within twelve specific categories such as governmental signs, bench signs at public bus stops, commemorative historical plaques, religious symbols, for sale and for lease signs, signs on public and commercial vehicles, signs displaying the time, temperature, or news, and temporary political campaign signs.[42] The *Metromedia* plurality protected noncommercial signs but not commercial signs, the concurring justices would have protected both commercial and noncommercial signs, and the three dissenting justices would have protected neither.

A. *The Plurality Opinion*

Writing for the plurality, Justice White stated that a city may prohibit offsite commercial signs while permitting onsite commercial signs. Applying the test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[43] for determining the validity of commercial speech restrictions, Justice White observed that there could be little doubt that the San Diego ordinance passed three of the four criteria: that is, the regulated activity was neither unlawful nor misleading; the city had a substantial interest in both safety and aesthetics; and the city had gone no further than necessary in trying to meet its safety and aesthetic goals because it had not prohibited all

39. *See* Jackson v. City Council of Charlottesville, 659 F. Supp. 470 (W.D. Va. 1987); Metromedia, Inc. v. Mayor of Baltimore, 538 F. Supp. 1183 (D. Md. 1982). These two cases are discussed in Part III *infra.*

40. *See, e.g.,* Department of Transp. v. Shiflett, 251 Ga. 873, 310 S.E.2d 509 (1984).

41. *See* section III.A.

42. 453 U.S. 490, 494-96 (1981) (citing San Diego, Cal., Ordinance 10795 (New Series) (Mar. 14, 1972)).

43. 447 U.S. 557, 566 (1980). *Central Hudson*'s four-part test indicates that government may regulate commercial speech with wider discretion than it may regulate noncommercial speech. 447 U.S. at 562-63.

outdoor signs.[44] As to the fourth criterion — whether the ordinance directly advances the governmental interests — White argued:

> [T]he city could reasonably conclude 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.[45]

However, the plurality found the ordinance unconstitutional for two reasons. First, by exempting onsite commercial signs from the general prohibition, the ordinance favored commercial speech over noncommercial speech, thereby inverting the Court's presumption that the first amendment affords greater protection to noncommercial speech.[46] Noting the purposes of the ordinance — to promote safety by eliminating signs that distract motorists and pedestrians and to preserve and improve the city's appearance — Justice White pointed out that the city had not explained how a noncommercial sign would be any more threatening to safety or detrimental to aesthetic concerns than would a commercial sign.[47]

Second, the ordinance protected certain kinds of noncommercial speech — those that fell within its twelve exemptions — but not other kinds.[48] Justice White contended that while a city may treat different categories of commercial speech differently (as long as there is a rational basis for doing so and no impermissible regulatory motive), it may not distinguish among categories of noncommercial speech.[49] A city "may not choose the appropriate subjects for public discourse"[50] and thereby "control . . . the search for political truth."[51]

To explain further why the San Diego ordinance was unconstitutional, White argued that the ordinance did not meet the test for "time, place, and manner" restrictions.[52] A time, place, or manner restriction must (1) be justified without reference to the content of the regulated speech, (2) be narrowly tailored to serve a substantial government interest, and (3) leave open ample alternative means for communicating the restricted information.[53] Because such restrictions fall

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44. 453 U.S. at 507.

45. 453 U.S. at 512.

46. 453 U.S. at 513.

47. 453 U.S. at 513; *see also* John Donnelly & Sons v. Campbell, 639 F.2d 6, 15 (1st Cir. 1980).

48. For instance, religious symbols and historical plaques would be permitted, but a sign bearing the message "Abortion is Murder" would not be.

49. 453 U.S. at 514; *see also* John Donnelly & Sons v. Campbell, 639 F.2d 6, 15 (1980).

50. 453 U.S. at 515.

51. 453 U.S. at 515 (quoting Consolidated Edison Co. v. Public Serv. Commn., 447 U.S. 530, 538 (1980)).

52. 453 U.S. at 515-16.

53. 453 U.S. at 516 (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)). The Supreme Court has reaffirmed this standard in Clark v.

short of prohibitions and do not restrict according to content, they generally receive a deferential level of judicial scrutiny.[54]

According to Justice White, the San Diego ordinance failed requirements one and two for time, place, and manner restrictions. He argued that the ordinance was obviously not content-neutral because it distinguished signs as permissible or impermissible at given locations depending upon the sign message.[55] He also argued that ample alternative means were not available to the users of San Diego billboards based on the fact that the parties had stipulated that advertisers use billboards because other forms of advertising are "insufficient, inappropriate and prohibitively expensive."[56] Despite these two failed requirements, Justice White upheld the ordinance's restrictions on commercial speech. Thus, according to White, billboard laws may discriminate against commercial signs regardless of whether adequate alternative means of communication exist.[57]

The standard for time, place, and manner restrictions has become the test by which many billboard laws stand or fall. This has occurred primarily because the San Diego ordinance's primary defects — favoring commercial speech over noncommercial speech and favoring some kinds of noncommercial speech over others — are easily corrected, at least facially. That is, these defects are apparently cured by an ordinance that simply permits noncommercial as well as commercial on-site signs. A number of cases involve laws framed in this way.[58] A court asked to rule on an ordinance apparently without the primary

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Community For Creative Non-Violence, 468 U.S. 288, 293 (1984), Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984), and in Heffron v. International Socy. for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981).

54. *See* Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 52 (1987). Indeed, the label "time, place, or manner restriction" indicates a legal conclusion by a court that the restriction is valid. *Id.* at 52 n.23.

55. 453 U.S. at 516.

56. 453 U.S. at 516 (quoting Joint Stipulation of Facts). White also relied on Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977), which struck down a prohibition of "for sale" signs on private residential property. *Linmark* deemed alternatives to "for sale" signs "far from satisfactory" because they involved "more cost and less autonomy." 453 U.S. at 516 (quoting *Linmark*, 431 U.S. at 93). Chief Justice Burger took issue with White, claiming that just because billboards may cost less than other media does not mean that adequate alternative means of communication do not exist. *See infra* notes 85-89 and accompanying text. This Note expands upon Burger's position. *See infra* notes 239-42 and accompanying text.

57. A number of subsequent decisions assume that an ordinance is valid by *Metromedia* standards if it does not facially discriminate against noncommercial speech nor favor any type of noncommercial speech. Such decisions do not apply White's standard regarding the lack of alternative means of communication. *See, e.g.*, Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987); Rzadkowolski v. Village of Lake Orion, 845 F.2d 653 (6th Cir. 1988); *see also infra* notes 138-59, 180-85 and accompanying text.

58. *See e.g.*, Rzadkowolski v. Village of Lake Orion, 845 F.2d 653 (6th Cir. 1988); Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986); Jackson v. City Council of Charlottesville, 659 F.Supp. 470 (W.D. Va. 1987); Metromedia, Inc. v. Mayor of Baltimore, 538 F. Supp. 1183 (D. Md. 1982).

defects of the San Diego ordinance will necessarily decide the case based on whether the ordinance is content-neutral regarding noncommercial speech and whether ample alternative means of communication exist. Thus, the court will utilize two prongs of the standard for time, place, and manner restrictions. However, wide disagreement exists as to what these prongs mean and when they should apply.

Justice Brennan's concurrence rejected the plurality's refusal to protect commercial billboards, especially because noncommercial billboards would disappear also. Conversely, Chief Justice Burger and Justice Stevens objected to the plurality's interpretations of content-neutrality and adequate alternative means, believing them unduly burdensome to local governments. Then-Justice Rehnquist, agreeing substantially with Justices Stevens and Burger, wrote separately to emphasize a city's right to use its discretion in regulating aesthetics and to attack specifically Brennan's desire to restrict this discretion. These opinions have influenced the current debate over billboard laws.

B. *The Brennan Concurrence*

Justice Brennan, joined by Justice Blackmun, concurred in the finding of unconstitutionality but disagreed with the plurality in two fundamental ways. First, Brennan viewed the ordinance as a total ban of billboards, the exemptions notwithstanding. He claimed that the practical effect of the ordinance was "to eliminate the billboard as an effective medium of communication."[59] Consequently, Brennan would have struck down the ordinance because it failed a stricter standard of review, not because it granted invalid exceptions from a general ban. A city would have to show "that a sufficiently substantial governmental interest is directly furthered by the total ban, and that any more narrowly drawn restriction, *i.e.,* anything less than a total ban, would promote less well the achievement of that goal."[60] Brennan would have invalidated the ordinance because San Diego did not prove "that billboards actually impair traffic safety."[61] Moreover, Brennan argued that San Diego did not show that its aesthetic interest was "sufficiently substantial in the commercial and industrial areas" of the city.[62] In Brennan's view, a city must show that billboards are "necessarily inconsistent" with the area in which they would be banned.[63] Prohibiting billboards would be unconstitutional except where it is part of a comprehensive effort to improve given areas of the city.[64]

59. 453 U.S. at 525 (Brennan, J., concurring).

60. 453 U.S. at 528 (Brennan, J., concurring).

61. 453 U.S. at 528 (Brennan, J., concurring).

62. 453 U.S. at 530 (Brennan, J., concurring).

63. 453 U.S. at 531 (Brennan, J., concurring).

64. 453 U.S. at 531-32 (Brennan, J., concurring). Brennan observed that a community such

Second, Brennan rejected the plurality's separate treatment of commercial and noncommercial speech. He argued that *Central Hudson* demands stronger protection for commercial speech than the rational basis test applied by the plurality.[65] Brennan pointed out that, under a ban on commercial billboards, a government official must sometimes determine whether a billboard is commercial or noncommercial, a difficult task for which no bright lines are available. Giving an official such discretion "presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech."[66] Brennan argued further that commercial advertisers would be able to convey commercial messages free from regulation simply by dressing them up with ideology.[67]

Justice Brennan viewed the San Diego ordinance as a total ban on a communication medium because he viewed the offsite sign as a medium distinct from the onsite sign: "Unlike the on-premises sign, the off-premises billboard 'is, generally speaking, made available to 'allcomers,' in a fashion similar to newspaper or broadcasting advertising.' "[68] If the offsite sign and the onsite sign are considered media distinct from one another, then an ordinance eliminating offsite signs could not be viewed as a time, place, or manner restriction. According to Brennan, even an ordinance banning only offsite commercial signs would be suspect because offsite noncommercial advertisers could not sustain the billboard businesses.[69] The practical effect of such an ordinance would be to ban offsite signs.[70]

C. *The Stevens Dissent*

Justice Stevens agreed with Justice Brennan that the San Diego ordinance presented the issue of whether a total ban of billboards would be valid.[71] Like Brennan, Stevens viewed onsite signs and billboards as two different media.[72] However, Stevens noted that while the ordinance would eliminate the billboard industry in San Diego (as well as the public's opportunity to advertise via billboards), there was

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as Williamsburg, Virginia, which cultivates a historic "look," could easily prove an aesthetic interest in removing billboards. Similarly, billboards are clearly inconsistent with the environment of a national park. 453 U.S. at 533-34.

65. 453 U.S. at 534 n.12 (Brennan, J., concurring).

66. 453 U.S. at 536-37 (Brennan, J., concurring).

67. 453 U.S. at 540 (Brennan, J., concurring).

68. 453 U.S. at 526 (Brennan, J., concurring) (quoting Joint Stipulation of Facts).

69. *See* 453 U.S. at 536 n.13 (Brennan, J., concurring); 453 U.S. at 541 n.4 (Stevens, J., dissenting in part); *see also infra* Section III.C.

70. 453 U.S. at 525 (Brennan, J., concurring). Brennan's willingness to look at the results of billboard laws anticipated a lower court decision that struck down an ordinance for a lack of content-neutrality due to its practical effects, not its facial construction. *See* notes 189-99 and accompanying text.

71. 453 U.S. at 542 (Stevens, J., dissenting in part).

72. 453 U.S. at 542-44 (Stevens, J., dissenting in part).

no evidence to suggest that the ordinance would have any effect on a property owner's use of onsite signs.[73] Stevens argued, therefore, that the Court should have ruled on the billboard ban but denied standing to the appellant billboard leasing companies to raise the "hypothetical claims of onsite advertisers."[74] Hence, Stevens did not reach the issue of whether or not the San Diego ordinance favored commercial speech over noncommercial speech. Nevertheless, his understanding of first amendment neutrality, as expressed in his *Metromedia* opinion, has had a considerable impact on this debate.

Stevens agreed with the plurality that a city has a legitimate interest in regulating billboards for aesthetic purposes.[75] But Stevens would have applied a different, two-pronged test:

> First, is there any reason to believe that the regulation is biased in favor of one point of view or another, or that it is a subtle method of regulating the controversial subjects that may be placed on the agenda for public debate? Second, is it fair to conclude that the market which remains open for the communication of both popular and unpopular ideas is ample and not threatened with gradually increasing restraints?[76]

The Stevens test differs from the plurality's test in that (1) it asks whether the ordinance restricts viewpoint, not content, and (2) in assessing the adequacy of alternative means, it seems to focus primarily on the health of the communications market as a whole and not on the specific attributes of billboard advertising as compared with the attributes of other advertising media. Unlike Justice White, Stevens considered the relative cost of billboard advertising immaterial. Stevens concluded that the ordinance should be upheld because there was no hint of city bias or censorship,[77] nor a basis for finding that San Diego's communications market could not provide adequate alternatives for messages formerly on billboards.[78]

For Stevens, first amendment neutrality means that government does not "impose its viewpoint on the public or select the topics on which public debate is permissible."[79] His use of the words "view-

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73. 453 U.S. at 543-44 (Stevens, J., dissenting in part).

74. 453 U.S. at 548 (Stevens, J., dissenting in part).

75. Taking issue with Brennan, Stevens argued that just as a city may ban billboards from residential areas, so it may ban them from industrial or commercial areas.

> [T]he interests served by the ban are equally legitimate and substantial in all parts of the city. . . . The character of the environment affects property values and the quality of life not only for the suburban resident but equally so for the individual who toils in a factory or invests his capital in industrial properties.

453 U.S. at 552 (Stevens, J., dissenting in part).

76. 453 U.S. at 552 (Stevens, J., dissenting in part).

77. The billboard companies did not allege that San Diego was trying to suppress speech. *See* 453 U.S. at 566 (Burger, C.J., dissenting). Nor did any justice in *Metromedia* allege this motive.

78. 453 U.S. at 552-53 (Stevens, J., dissenting in part).

79. 453 U.S. at 553-54 (Stevens, J., dissenting in part).

point" and "topics" — as opposed to "content" — suggests an inquiry more concerned with determining governmental motive than with determining the category of speech to which the regulated speech belongs. In fact, the plurality's commercial/noncommercial distinction becomes irrelevant under the Stevens test, as does reliance on the word "content."

Indeed, "content" may refer to viewpoint, categories of speech, or subject matter. For the plurality, an ordinance which restricts any of these three areas would not be "content-neutral." In objecting to the San Diego exemption for onsite commercial speech, the plurality objected to the favoring of one *category of speech* over another. However, the plurality objected to the noncommercial speech exemptions because a city may not determine the permissible *subject matter* for public debate. Under Stevens' test, neither type of exemption threatens first amendment values because while each may restrict "content," neither restricts "viewpoint."[80]

Regarding the noncommercial exemptions, Stevens pointed out that only four of the twelve pertain to subject matter: signs displaying the time, temperature or news; historical plaques; religious symbols; and temporary political campaign signs. Stevens argued that none of these exemptions suggested that the city was choosing permissible topics for public discourse. For instance, *all* religious symbols were permitted. Moreover, according to Stevens, the city could reasonably have determined that these exempted signs were either typically smaller and hence less damaging to the appearance of the city than the typical billboard (time or temperature signs, religious symbols, historical plaques) or more central to the core first amendment value of enhancing self-government (temporary political campaign signs).[81]

With his broad interpretations of content-neutrality and adequate alternative means, Stevens questioned why the San Diego ordinance should be invalidated because of what it exempted, when by virtue of these exemptions it would have had "a less serious effect on the communications market than would a total ban."[82] Thus, Stevens chided the plurality for invalidating an ordinance not because it abridged speech, but "because it [did] not abridge enough speech."[83]

80. Early in his opinion, Stevens used the phrase "content-neutral exceptions" to refer to the two types of exemptions provided by the ordinance. 453 U.S. at 542 (Stevens, J., dissenting in part). His use of this phrase suggests that although the exemptions were based at least in part on content in a certain sense, in Stevens' view they were not "content-based" in a constitutional sense because they were not based on viewpoint.

81. 453 U.S. at 554 (Stevens, J., dissenting in part).

82. 453 U.S. at 555 (Stevens, J., dissenting in part).

83. 453 U.S. at 540 (Stevens, J., dissenting in part).

D. *The Burger Dissent*

Chief Justice Burger would have applied a test virtually identical to that proposed by Justice Stevens. Given its legitimate interests in aesthetics and traffic safety, a city may restrict billboards if the restriction (1) is neutral with respect to viewpoint and topics for public debate, and (2) leaves open alternative means of communication.[84] For Burger, the question of adequate alternatives hinged on whether messages carried by billboards "can reach an equally large audience" through other media.[85] He concluded that they could, partly because messages carried by billboards "are not inseparable from the billboards that carry them," *i.e.,* the messages on billboards may be conveyed in other ways.[86] While billboards may catch one's eye more readily and may cost less than other media, such factors do not prove that adequate alternatives do not exist.[87] Rather, those who oppose the restriction must show that messages conveyed by billboards are "*relatively* disadvantaged" compared to the messages presented by other means.[88] Burger pointed out that the appellants in *Metromedia* did not even suggest that billboards promote certain viewpoints or issues disproportionately to other media.[89]

Burger's discussion of the neutrality criterion was the primary thrust of his opinion. He attacked the plurality's argument that the exemptions in the San Diego ordinance violated first amendment neutrality. Because there was no hint of an attempt by the city to suppress viewpoints or to favor one side of a public debate, Burger viewed the exemptions as rational legislative choices "to permit a narrow class of signs that serve special needs."[90] He argued that "in each instance, the city reasonably could conclude that the balance between safety and aesthetic concerns on the one hand and the need to communicate on the other has tipped the opposite way."[91]

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84. 453 U.S. at 560-63 (Burger, C.J., dissenting). Burger would apply the same test regardless of whether the regulation is characterized as a time, place, or manner restriction or a total ban with some exceptions depending in part on content. 453 U.S. at 557 (Burger, C.J., dissenting).

85. 453 U.S. at 563 (Burger, C.J., dissenting).

86. 453 U.S. 562-63 (Burger, C.J., dissenting).

87. Given the variety of media available — "newspapers, television, radio, magazines, direct mail, pamphlets, etc." — Burger presumes that the party opposed to the restriction has the burden of proving the inadequacy of these alternatives. 453 U.S. at 563 (Burger, C.J., dissenting).

88. 453 U.S. at 563 (Burger, C.J., dissenting). Billboards are not like pamphlets, whose characteristics make them particularly suitable for disseminating unpopular or less influential views. *See* Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place and Manner Regulations of Expression,* 54 GEO. WASH. L. REV. 757 (1986); *see also* Ackerley Communications, Inc. v. Somerville, 692 F. Supp. 1, 21 (D. Mass. 1988), *revd. on other grounds,* 878 F.2d 513 (1st Cir. 1989).

89. 453 U.S. at 563 (Burger, C.J., dissenting).

90. 453 U.S. at 555 (Burger, C.J., dissenting).

91. 453 U.S. at 565 (Burger, C.J., dissenting). This is the type of balancing that Brennan

Burger indicated that exemptions for certain signs have justification apart from the general right of governments to exercise their police-power: "For each exception, the city is either acknowledging the unique connection between the medium and the message conveyed . . . or promoting a legitimate public interest in information."[92] Burger cited the argument in *Linmark Associates, Inc. v. Township of Willingboro* that a "for sale" sign derives its meaning and efficacy from the site on which it is located.[93] Burger's reasoning can also be applied to historical plaques, which give a particular designation to a given site, and to onsite signs, which identify a premises or advertise products or services available on a premises. An exception for such signs would be justified because such signs are arguably the only means of conveying a given message. For example, a sign identifying a given site cannot be replaced by a television advertisement telling the viewer how to get to the site. An identifying sign tells one that one has arrived at a given site, not how to get there.[94] Therefore, the exemption for onsite signs rests on a difference in kind between billboards and onsite signs.[95]

By contrast, exempted signs that merely promote a legitimate public interest in information cannot be distinguished from billboards in a material way. These signs do not convey messages that cannot be conveyed by other media. Moreover, presumably the public would have an equal interest in the information provided by signs in this category

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would leave to the courts, 453 U.S. at 538 (Brennan, J., concurring), and White would permit only where the regulator is choosing between types of commercial speech. 453 U.S. at 514 (plurality opinion). Burger's emphasis on "special needs" differs from Stevens' rationale for most of the noncommercial exemptions based on subject matter. Stevens asserted that a city could reasonably conclude that signs such as religious symbols, historical plaques, and time, temperature, or news signs were usually smaller than a billboard and therefore were usually less damaging to the environment and less distracting to motorists. 453 U.S. at 554 (Stevens, J., dissenting in part). Hence, Stevens justified these three noncommercial exemptions in terms of the stated purposes of the ordinance.

92. 453 U.S. at 565 (Burger, C.J., dissenting).

93. 453 U.S. at 565 (Burger, C.J., dissenting) (citing Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977)).

94. Lucking, *supra* note 6, at 194. Any additional information on an identifying sign that advertises goods and services available on the site, of course, could be replaced more easily by a television advertisement. But it may be difficult to prove that such additional information creates an aesthetic or safety concern greater than that posed by the sign itself. *See* H & H Operations, Inc. v. City of Peachtree City, 248 Ga. 500, 283 S.E.2d 867 (1981). Moreover, an ordinance that allowed advertising of names but not of products and services would be disproportionately burdensome to smaller and less well-known establishments whose names do not conjure up in the minds of prospective consumers the products and services provided by these establishments. *See* John Donnelly & Sons v. Campbell, 639 F.2d 6, 23 (1st Cir. 1980) (Pettine, J., concurring). However, under the analysis of either Stevens or Burger, a city or state could conceivably offer reasonable justifications for allowing information that identifies a premises while prohibiting information that advertises goods and services.

95. Both Brennan and Stevens seem to support the view that onsite and offsite signs are two different media. *See* 453 U.S. at 526 (Brennan, J., concurring); 453 U.S. at 542-44 (Stevens, J., dissenting in part). However, they do not emphasize that the identifying nature of onsite signs makes them impossible to replace by alternative means.

and by billboards.[96] Therefore, Burger's defense of the noncommercial exemptions provided by the San Diego ordinance must ultimately rest on the discretionary right of the city. Indeed, Burger did not argue that the exempted signs were inherently more valuable than billboards. Rather, his characterization of the exempted signs — that they pertain merely to factual information and to subject matter about which there can be no rational debate[97] — was designed to show that there could be no threat to the first amendment in permitting the city to exempt such signs.[98]

Without discretionary exemption power, according to Burger, a city cannot effectively combat the problems presented by billboards. Burger claimed that the plurality, in denying the constitutionality of narrowly defined exceptions, left the city with a choice between two equally unsatisfactory alternatives: (1) banning all signs, or (2) prohibiting certain commercial signs but permitting all noncommercial signs, no matter what their effect on the environment.[99] Moreover, Burger noted that the plurality seemed to indicate that it would invalidate a complete ban of billboards.[100] Hence, a city actually would have only the one choice of permitting all noncommercial signs.[101] For Burger, to leave a city with such limited options is to be "insensitiv[e] to the impact of . . . billboards on those who must live with them and the delicacy of the legislative judgments involved in regulating them."[102]

Burger attacked the plurality's application of the principle that noncommercial speech receives greater constitutional protection than does commercial speech. Unlike the plurality, Burger distinguished statutory protection from constitutional protection. Once an ordinance passes the more rigid constitutional test for restricting noncom-

96. Indeed, under various theories of the first amendment, there is arguably a public interest in all information. The larger the pool of information, the greater chance there is that true or useful information has not been suppressed. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764 (1976) (asserting society's strong interest in "the free flow of commercial information"); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").

97. 453 U.S. at 564-66 (Burger, C.J., dissenting).

98. Of course, one can argue that the threat to the first amendment is not in permitting such signs but in prohibiting others.

99. 453 U.S. at 556, 564 (Burger, C.J., dissenting).

100. 453 U.S. at 564 (Burger, C.J., dissenting).

101. Subsequent cases seem to indicate that this choice would not be ineffective. Though a city may have to permit all noncommercial signs, such permission is not necessarily protection, for noncommercial messages cannot support the billboard industry. *See infra* note 194 and accompanying text and *supra* notes 69-70 and accompanying text. Still, while most noncommercial billboards would be eliminated simply by the elimination of commercial billboards, where noncommercial billboards are protected per se, individual cases involving particularly intrusive noncommercial billboards could not be addressed by the state. *See infra* note 213 and accompanying text.

102. 453 U.S. at 556 (Burger, C.J., dissenting).

mercial speech, the regulating body may reasonably decide to provide greater statutory protection to certain commercial speech.[103] This decision would not necessarily mean that a city had placed a greater value on commercial speech generally.[104] Indeed, a city could have independent grounds for granting an exemption for commercial speech. Moreover, Burger turned to his own advantage the plurality's argument that while a city may distinguish between various types of commercial speech, it may not do so with respect to noncommercial speech.[105] "[W]hen adequate alternative channels of communication are readily available . . . a city arguably is more faithful to the Constitution by treating all noncommercial speech the same than by attempting to impose the same classifications in noncommercial as it has in commercial areas."[106] Burger went on to anticipate a first amendment challenge raised in subsequent cases: namely, that to extend the onsite exemption to noncommercial signs would be to favor the views of those who own noncommercial property in commercial districts.[107] Burger concluded that "a city should be commended, not condemned, for treating all noncommercial speech the same."[108]

Burger's argument assumes that the San Diego ordinance passes constitutional muster regarding noncommercial speech. But the plurality did not reach the issue of whether a total ban of outdoor advertising signs is constitutional.[109] However, the plurality opinion *does* suggest that (absent the noncommercial exemptions) the ordinance might have been valid had it extended the onsite exemption to noncommercial signs: "Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages . . . ."[110] Burger pointed out that by the plurality's own assertion — that a city may not balance noncommercial communicative interests within the same communications medium — onsite noncommercial signs may not be favored over offsite noncommercial signs.[111]

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103. 453 U.S. at 567 (Burger, C.J., dissenting).

104. 453 U.S. at 568 (Burger, C.J., dissenting).

105. 453 U.S. at 568-69 (Burger, C.J., dissenting) (citing 453 U.S. at 514).

106. 453 U.S. at 568 (Burger, C.J., dissenting).

107. 453 U.S. at 568 n.9 (Burger, C.J., dissenting). *But see infra* notes 195, 208 and accompanying text.

108. 453 U.S. at 569 (Burger, C.J., dissenting). Burger does not explain how the San Diego ordinance can be said to treat all noncommercial speech the same when it grants exemptions to certain types of noncommercial signs.

109. 453 U.S. at 515 n.20.

110. 453 U.S. at 513. Subsequent cases have interpreted *Metromedia* to mean that an ordinance would be valid if the onsite exemption were extended to noncommercial signs. *See e.g.*, Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986); Metromedia, Inc. v. Mayor of Baltimore, 538 F.Supp. 1183 (D. Md. 1982); *see also infra* notes 138-59, 180-85, 187-96 and accompanying text.

111. Arguably, one does not favor one type of noncommercial speech over another when one exempts onsite signs because theoretically an onsite sign could convey an infinite number of

E. *The Rehnquist Dissent*

Justice Rehnquist agreed "substantially" with the Stevens and Burger dissents but wrote separately to stress that in his view a city's aesthetic interest alone is strong enough to justify a ban on billboards, and that none of the exemptions granted by San Diego rendered the ordinance invalid.[112] In response to Justice Brennan, he argued that all communities, whether already beautified (Williamsburg) or still unsightly (older parts of major cities) "should not be prevented from taking steps to correct, as best they may, mistakes of their predecessors."[113] Additionally, Rehnquist asserted that no real alternative exists to granting a local government the freedom to enforce aesthetic judgments:

> Nothing in my experience on the bench has led me to believe that a judge is in any better position than a city or county commission to make decisions in an area such as aesthetics. Therefore, little can be gained in the area of constitutional law, and much lost in the process of democratic decisionmaking, by allowing individual judges in city after city to second-guess such legislative or administrative determinations.[114]

Brennan's position was that neither judge nor local government may enforce aesthetic judgments except where the government has demonstrated a comprehensive plan to improve appearances.[115] But Rehnquist's response implies that Brennan's position *is* an aesthetic judgment imposed upon local government: the judgment that in the case of billboards local aesthetic interests fail to outweigh first amendment values except in atypical communities.

F. *Summary of* Metromedia

To summarize *Metromedia:* First, the plurality held that commercial signs could be prohibited and that onsite commercial signs could be exempted from this prohibition. Second, as to whether noncom-

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messages depending on the occupant of the land on which the sign is placed. *See infra* notes 144-45 and accompanying text. Additionally, an ordinance that permits onsite noncommercial signs but not offsite noncommercial signs could be justified, despite the plurality's rule against balancing noncommercial speech interests within a given medium, by viewing onsite signs as comprising a distinct medium from offsite signs. This is something the plurality was unwilling to do. But see *supra* notes 68 and 72 and accompanying texts for arguments by Justice Brennan and Justice Stevens to the contrary.

Moreover, an ordinance that balances different noncommercial communicative interests might also be justified under the theory espoused by Chief Justice Burger and Justice Stevens: namely, that noncommercial speech may be excepted if the exception does not favor one side of a public debate. *See infra* note 153 and accompanying text.

112. 453 U.S. at 570 (Rehnquist, J., dissenting).

113. 453 U.S. at 570 (Rehnquist, J., dissenting). Indeed, Brennan's emphasis on whether billboards are "inconsistent" with a particular environment ignores the source of aesthetic motivation, which is a vision of what something ought to look like, not a mere acceptance of the way it presently appears.

114. 453 U.S. at 570 (Rehnquist, J., dissenting).

115. 453 U.S. at 530 (Brennan, J., concurring).

mercial signs could be prohibited along with commercial signs, the three dissenting justices said yes, the two concurring justices said no, and the four plurality justices took no position. However, six justices — four in the plurality and two concurring — held that noncommercial signs could not be prohibited when an exception was made either for certain kinds of noncommercial signs or for onsite commercial signs. Hence, a city may neither weigh the merits of different noncommercial communicative interests nor grant statutory "preference" to commercial signs over noncommercial signs.

III. THE AFTERMATH OF *METROMEDIA*

A. *The Ambiguity of* Metromedia: *Two Views of Content-Neutrality*

The primary question facing the lower courts after *Metromedia* is whether an ordinance is constitutional if it neither prefers one type of noncommercial sign over any other type of noncommercial sign nor reserves an onsite sign exemption only for commercial signs. Courts have decided both ways. One side argues that such an ordinance is constitutional because it lacks the defects of the San Diego ordinance. The other side counters that despite improvements over the San Diego ordinance, such an ordinance would still favor commercial over noncommercial speech. *Metromedia, Inc. v. Mayor of Baltimore* [116] and *Wheeler v. Commissioner of Highways* [117] represent the two sides of this debate. An analysis of these two opinions will demonstrate that their divergence stems from an ambiguity in the plurality opinion of *Metromedia.*

1. *The Baltimore Ordinance*

The ordinance in *Baltimore* extended an onsite exemption to both commercial and noncommercial signs: "No signs other than those identifying the property where they are installed or identifying the use conducted therein shall be permitted. Advertising by material or product manufacturers shall not be permitted except as primary identification of an establishment."[118] The district court acknowledged that the ordinance was content-neutral in the sense that noncommercial owners or occupants could "identify their premises to the same extent" as could commercial parties.[119] But the court determined that the ordinance discriminated against noncommercial speech generally because while an owner could use a sign to identify his premises,

116. 538 F. Supp. 1183 (D. Md. 1982). The plaintiff here is the same billboard company which brought suit against San Diego in *Metromedia, Inc. v. City of San Diego.*

117. 822 F.2d 586 (6th Cir. 1987).

118. 538 F. Supp. at 1185.

119. 538 F. Supp. at 1187.

he could not affix a sign to his premises in order to display "his ideas or those of others."[120] The court concluded that the Baltimore ordinance was "facially invalid" because, like the San Diego ordinance, it favored commercial over noncommercial speech.[121]

The court's reasoning is faulty. The basis for the finding of discrimination against noncommercial messages in *Metromedia* was the fact that an onsite sign exemption was apparently granted only to commercial owners.[122] The district court acknowledged that the Baltimore ordinance did not create this inequity. The onsite exemption granted by the Baltimore ordinance restricted commercial and noncommercial owners equally. Both commercial and noncommercial sign messages were restricted to the extent that they could only be justified as a means of identifying a given premises or an activity conducted there.

The district court recognized that the Baltimore ordinance regulated signs according to their content but misunderstood the impact of this regulation. The court also misunderstood the plurality opinion in *Metromedia,* on which it based its opinion.[123] The Baltimore ordinance discriminated against speech that had no connection to the activity conducted on a given premises. *Metromedia* permits such discrimination with respect to commercial speech: onsite commercial signs may be exempted from a general ban on commercial signs.[124] Hence, the *Metromedia* plurality permitted a certain kind of content-based regulation. Nevertheless, the *Baltimore* court concluded that the Baltimore ordinance was not drawn narrowly enough because it regulated content: "The City has advanced no arguments, and there appear to be none, why its interests in traffic safety and esthetics could not be served by a more narrowly drawn ordinance, regulating size and appearance . . . [but not] content."[125] The *Baltimore* court failed to recognize the different treatment afforded to commercial and noncommercial signs by the *Metromedia* plurality. The requirement that a regulation of commercial speech be narrowly drawn is the fourth prong of the *Central Hudson* test.[126] According to the *Metromedia* plurality, this prong of the test is easily passed by a city ordinance

120. 538 F. Supp. at 1187.

121. 538 F. Supp. at 1187.

122. The San Diego ordinance permitted *any* sign, commercial or noncommercial, which identified the premises or owner of the premises where the sign was located. However, the ordinance appeared to permit onsite advertising only on commercial property. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 493 n.1 (1981). Justice Brennan took issue with the plurality's finding that this particular provision favored commercial over noncommercial speech. 453 U.S. at 534-36 (Brennan, J., concurring).

123. 538 F. Supp. at 1187.

124. 453 U.S. at 512.

125. 538 F. Supp. at 1187.

126. *See supra* note 45 and accompanying text.

designed to prohibit billboards: "If [a] city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them."[127]

The *Baltimore* court's contention that a regulation of size and appearance alone would sufficiently serve the city's interests reflects the position taken by Brennan in his *Metromedia* concurrence,[128] not the *Metromedia* plurality position. The primary object of both the Baltimore and San Diego ordinances was to reduce the number of billboards, not merely to regulate their appearance. Applying a rational basis test, the *Metromedia* plurality concluded that a city could determine that permitting onsite but banning offsite commercial signs was a reasonable means of reducing the number of signs.[129]

The Baltimore ordinance did contain an implied discrepancy. While it explicitly allowed a commercial owner to display a sign advertising his products to the extent that such advertising would be part of the "primary identification" of his establishment, the ordinance made no similar reference to noncommercial advertising.[130] However, the ordinance could certainly be interpreted as granting the same limited advertising privilege to noncommercial owners. Just as a restaurant could post a sign reading "Joe's Place: Hamburgers and Fries," a campaign headquarters could display a sign reading "Campaign to Reelect Jones" (or even "Reelect Jones").[131] In any event, the district court did not base its finding of discrimination on this discrepancy in the ordinance. To be sure, a noncommercial owner could not display a sign communicating the ideas of others, but neither could a commercial owner; nor could either owner affix a sign advertising the products or services of others.

The question remains whether the Baltimore ordinance should have been struck down based on *Metromedia.* While the ordinance need not be read to favor commercial over noncommercial messages, it may restrict noncommercial speech to a degree permissible only for commercial speech. The *Metromedia* plurality emphasized that Supreme Court decisions prior to *Metromedia* had consistently given greater protection to noncommercial speech than to commercial speech.[132] This emphasis suggests that an ordinance treating them equally would be unconstitutional. Indeed, the opinion states that city

127. 453 U.S. at 508.

128. *See supra* notes 59-64 and accompanying text.

129. 453 U.S. at 507-12.

130. *See supra* note 118 and accompanying text.

131. *See* 453 U.S. at 536 (Brennan, J., concurring). Moreover, the language explicitly limiting manufacturers could be taken to mean that those with noncommercial interests are to be given greater latitude in identifying themselves.

132. 453 U.S. at 513.

officials with discretion to favor onsite over offsite commercial signs may not exercise similar discretion regarding noncommercial signs.[133] The fact that regulators enjoy such discretion regarding commercial signs "does not justify prohibiting an occupant from displaying its own ideas or those of others."[134] This language seems to put noncommercial signs beyond the reach of regulators.[135] Therefore, ordinances that prohibit signs according to the onsite/offsite distinction or the identifying/nonidentifying distinction must be invalid because they restrict the noncommercial use of signs by all owners or occupants. The commercial occupant presumably may only display signs with commercial content, and even the noncommercial occupant may only display signs containing certain of his own ideas. Neither type of occupant may display the ideas of others. The *Baltimore* court, defending the right of an occupant to display its "[own] ideas or those of others,"[136] appears to have been faithful to the *Metromedia* plurality opinion after all.[137]

2. *The Kentucky Billboard Act*

However, courts faced with billboard laws virtually identical to the Baltimore ordinance have had no difficulty finding language in the *Metromedia* plurality opinion to justify upholding these ordinances. In *Wheeler v. Commissioner of Highways*[138] the Sixth Circuit validated the Kentucky Billboard Act, which prohibits all signs within 660 feet of highways except those signs "that contain a message relating to an activity or the sale of a product on the property on which they are located."[139] The court quoted much of the following passage from Justice White's opinion, culling the principle that billboard laws must treat noncommercial and commercial signs equally:

> There is a broad exception for onsite commercial advertisements, but there is no *similar* exception for noncommercial speech. . . . The city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city. Insofar as the city tolerates billboards at all, it cannot choose to *limit* their content to commercial messages; the city may not conclude that [commercial messages are] of *greater value* than . . . noncommercial

133. 453 U.S. at 513.

134. 453 U.S. at 513.

135. In the alternative, noncommercial signs would have to be restricted under a different rationale.

136. 538 F. Supp. 1183, 1187 (D. Md. 1982).

137. For a case following *Baltimore*'s interpretation of *Metromedia,* see Matthews v. Needham, 764 F.2d 58 (1st Cir. 1985).

138. 822 F.2d 586 (6th Cir. 1987).

139. 822 F.2d at 588 (quoting 603 Ky. Admin. Regs. 3:010, § 2(3) (1975)).

messages.[140]

An ordinance that prohibits signs based on the onsite/offsite distinction does not suffer from these flaws. It provides the same exception for noncommercial signs as for commercial signs; nor does it "limit" sign content to commercial messages or give "greater value" to commercial signs. Moreover, the Sixth Circuit pointed out that the San Diego ordinance was invalidated for two specific reasons: (1) it favored onsite commercial messages over noncommercial messages, and (2) it favored certain noncommercial messages over other noncommercial messages.[141] *Wheeler* upheld the Kentucky Billboard Act because it possessed neither defect: "The restrictions [imposed by the Act] permit any non-commercial signs as long as they relate to an activity on the premises."[142]

It could be argued, however, that a billboard law which grants exemptions for onsite signs possesses the second defect of the San Diego ordinance. In permitting only signs with content related to an activity conducted on the premises, a billboard law seems to favor one category of noncommercial signs over all other noncommercial signs.[143] This position finds support in the *Metromedia* plurality opinion, which noted that one of the unconstitutional noncommercial exemptions granted by the San Diego ordinance was an exemption for signs that "identify any piece of property and its owner."[144] But there is a difficulty in treating onsite noncommercial signs as a category of noncommercial signs which may not be favored over others. After all, the content of onsite noncommercial signs would be as varied as the noncommercial establishments on whose premises they would be found. Furthermore, while it may be said that an ordinance that grants onsite exemptions favors those who own land within the purview of the ordinance, a landowner under this ordinance has less power by virtue of owning land than he would where he could freely choose to display any sign. True, he might decide to lease space to a billboard company which in turn would make it available for messages of third parties, but he might also reserve to himself the privilege of displaying a sign carrying his ideas only. To assert that a billboard law ought not to favor landowners over nonlandowners is nonsensical, for a billboard must be located on someone's land. Therefore, the argument that an exemption for noncommercial onsite signs unduly favors one kind of noncommercial speech over others must be made at the level of the

140. 822 F.2d at 593 (quoting Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981) (plurality opinion) (emphasis added)).

141. 822 F.2d at 592-93.

142. 822 F.2d at 593.

143. *See supra* note 111 and accompanying text, where Chief Justice Burger raised this argument.

144. 453 U.S. at 514.

individual landowner, for it is his use of noncommercial signs that is restricted by such an exemption.

The resolution of this problem depends on one's interpretation of the nebulous term "content-neutral." On the one hand, an exemption for onsite signs certainly evaluates signs with regard to their content. On the other hand, theoretically the exemption does not preclude any given message; it simply must be displayed in the appropriate place.

Taking the latter view of content-neutrality, the Sixth Circuit in *Wheeler* argued that the Kentucky Billboard Act was not directed at the content of signs, but at their "secondary effects."[145] Therefore, it deemed the regulations "valid place and manner restrictions."[146] The court derived the doctrine of secondary effects from *City of Renton v. Playtime Theatres, Inc.*,[147] where the Supreme Court upheld a zoning ordinance that prohibited "adult" theaters from locating within 1000 feet of any residential area, church, park, or school. The ordinance had the effect of restricting adult theaters to locations within an area constituting approximately five percent of the city's territory.[148] Despite the fact that the ordinance treated adult theaters differently from other theaters, the Court upheld the ordinance because it was aimed at the secondary effects of the theaters on residential neighborhoods[149] and not at the content of the films shown.[150] Writing for the *Renton* majority, then-Justice Rehnquist acknowledged that the ordinance did not "appear to fit neatly into either the 'content-based' or the 'content-neutral' category."[151] But the majority concluded that the ordinance was "completely consistent" with the Court's definition of content-neutral regulations as those that "are *justified* without reference to the content of the regulated speech."[152] By italicizing the word "justified," Rehnquist indicated that in his view a content-neutral regulation is a regulation free of an impermissible regulatory motive. In this way Rehnquist echoed the discussions of content-neutrality by Justice Stevens and Chief Justice Burger in their dissents in *Metromedia:* a regulation is content-neutral if it does not suppress a particular

145. 822 F.2d at 590.

146. 822 F.2d at 589-90.

147. 475 U.S. 41 (1986).

148. 475 U.S. at 53.

149. The avowed purpose of the ordinance was to protect the city against the deleterious effects of adult theaters on their surroundings. These alleged effects included crime, a decline in retail trade and property values, and a general lessening of the quality of urban life. 475 U.S. at 48.

150. 475 U.S. at 47.

151. 475 U.S. at 47.

152. 475 U.S. at 48 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)); *see also* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); Heffron v. International Socy. for Krishna Consciousness, Inc., 452 U.S., 640, 648 (1981).

viewpoint.[153] The Sixth Circuit followed suit in *Wheeler,* stressing that the purpose of the billboard act was to reduce the number of signs,[154] not to suppress speech content: "[The] regulations apply evenhandedly to commercial and noncommercial speech; they discriminate against no viewpoint or subject matter."[155]

The *Renton* Court emphasized secondary effects since the Renton ordinance discriminated on its face against certain types of theaters. The *Wheeler* court argued that as the billboard act did not discriminate facially or otherwise, the court had no reason to invoke the secondary effects doctrine. A more appropriate use of the doctrine would have been to argue that even if the billboard ordinance favors one category of noncommercial speech over another, the ordinance is constitutional nevertheless because it is aimed not at sign content but at the effects of signs on the environment. The secondary effects argument is nothing more than a means for focusing on regulatory motive; hence, it can be used as a way of defending regulatory choices that appear indefensible under a strict interpretation of "content-neutral." The argument reflects a broader interpretation of content-neutrality.

Another argument for a broad reading of content-neutrality is the defense of exemptions on the basis of countervailing interests. The *Wheeler* court follows Burger's dissent in *Metromedia* in defending the onsite/offsite distinction as a legislative recognition of a right "inherent" in land ownership to advertise an activity conducted on the premises.[156] The right to display an onsite sign is claimed to be inherent in land ownership (but the right to display an offsite sign is not) because an onsite sign is confined to its location for its efficacy.[157] Because an onsite sign identifies the premises, its message cannot be replaced by a sign elsewhere or by a message through a different medium.[158] Therefore, it seems that onsite signs should be constitutionally protected.[159] *Wheeler* argued that a prohibition of all offsite signs should not be

153. 475 U.S. at 48-49; 453 U.S. at 552-54 (Stevens, J., dissenting in part); 453 U.S. at 555 (Burger, C.J., dissenting). *See supra* notes 79, 84 and accompanying text.

154. 822 F.2d 586, 595 (6th Cir. 1987).

155. 822 F.2d at 590.

156. 822 F.2d at 591. *See supra* notes 93-95 and accompanying text.

157. State v. Lotze, 92 Wash. 2d 52, 593 P.2d 811 (1979).

158. *See supra* note 94 and accompanying text and *infra* note 244 and accompanying text.

159. Numerous cases support a landowner's right to post a political message on his premises, regardless of whether this sign relates to an activity conducted on the premises. *See, e.g.,* State v. Miller, 83 N.J. 402, 416 A.2d 821 (1980). The same widespread support cannot be found for onsite commercial messages. But Justice Brennan, when he wrote for the New Jersey Supreme Court, recognized the uniqueness of the onsite commercial sign: "The business sign is in actuality a part of the business itself . . . and the authority to conduct the business in a district carries with it the right to maintain a business sign on the premises subject to reasonable regulations. . . ." United Advertising Corp. v. Borough of Raritan, 11 N.J. 144, 150, 93 A.2d 362, 365 (1952). Other cases protect onsite signs, commercial or noncommercial. *See, e.g.,* State v. Lotze, 92 Wash. 2d at 59, 593 P.2d at 815.

precluded by the fact that constitutionally a regulating body probably cannot prohibit onsite signs.

The *Wheeler* and *Baltimore* courts exhibit contrasting views as to the meaning of content-neutrality in the context of signs, both claiming to be faithful to *Metromedia. Baltimore* held that all noncommercial signs must be exempted from prohibition, whereas *Wheeler* permitted prohibition of noncommercial signs if the prohibition affords noncommercial signs as much protection as it affords to commercial signs. Discussion as to which interpretation comports more fully with *Metromedia* will be put off until Part IV; however, the following section reveals a possible difficulty with the *Wheeler* rationale.

B. *The Rights of Occupants To Display Signs*

Metromedia did not determine the extent of occupant rights to display signs. The Court did indicate that the government can limit an occupant's right to display a sign where the government has a legitimate interest in aesthetics and safety. In indicating that a city could ban offsite commercial signs while allowing onsite commercial signs, *Metromedia* permits a city to deny occupants the right to display offsite commercial signs. This holding permits a city to deny a billboard leasing company its primary source of income. Beyond this, the Court did not indicate how else, if at all, an occupant's right to display signs may be restricted. The Court did say that the rationale enabling a city to favor onsite over offsite commercial signs did not permit the city to prohibit "an occupant from displaying its own ideas or those of others."[160] While this assertion suggests that a different rationale might enable a city to restrict noncommercial signs,[161] *Baltimore* interprets this language as establishing a constitutional right to display noncommercial signs on one's property.[162]

The holding in *Baltimore* appears to be consistent with the fact that ordinances that prohibit political signs from residential areas "have uniformly been held unconstitutional."[163] The uniformity of these cases appears to be based on a conviction that occupants who are prohibited from displaying political signs on their residential premises do not have adequate alternative channels for communicating the messages on these signs.[164] In *Baldwin v. Redwood City,* which dealt with political campaign signs, the following rationale was given:

> [M]eans of political communication are not entirely fungible; political

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

161. *See supra* section III.A.2.

162. 538 F. Supp. 1183, 1187 (D. Md. 1982).

163. State v. Miller, 83 N.J. 402, 413, 416 A.2d 821, 827 (1980); *see also* Matthews v. Town of Needham, 764 F.2d 58 (1st Cir. 1985); Baldwin v. Redwood City, 540 F.2d 1360, 1373 (9th Cir. 1976).

164. *Miller,* 83 N.J. at 413, 416 A.2d at 827.

> posters have unique advantages. Their use may be localized to a degree that radio and newspaper advertising may not. With exception of handbills, they are the least expensive means by which a candidate may achieve name recognition among voters in a local election.[165]

The ordinance at issue in *State v. Miller* prohibited in residential areas all signs except those identifying the occupants or the address of a given site, those advertising the sale or rental of a given site, and those identifying firms at work on a given site.[166] The defendant in *Miller* displayed a sign reading as follows:

> WELCOME!! PROSPECTIVE RESIDENTS OF LAWRENCE BROOK GLEN[:] THIS RESIDENT AND OTHERS OF RIVA AVE. WANT TO WELCOME YOU TO THIS FLOOD HAZARD AREA. GOOD LUCK!! INFORMATION AVAILABLE.[167]

Identifying the sign as political speech, the New Jersey Supreme Court agreed with the defendant that the sign was the only "realistic alternative for reaching prospective purchasers of homes in the affected area."[168] The court went on to assert that unless a regulation withstands strict scrutiny, political speech "is and must be permitted everywhere."[169]

It must be emphasized that a noncommercial sign placed by an occupant on the land he occupies is not an "onsite sign" as defined in this Note (and by the court decisions addressed in this Note that use the term) unless the sign refers to products, services, or activities related to the premises.[170] Hence, the typical political campaign sign on a front lawn would not be an onsite sign. Consequently, court decisions such as *Wheeler* which permit the prohibition of signs according to a distinction between onsite and offsite signs deny to an occupant the right to post a noncommercial sign on his or her property. Indeed, the appellees in *Wheeler* wanted to display a religious or political sign on their property within the protected area along a state highway, but were denied a permit.[171]

An important question is whether *Wheeler* can be reconciled with cases like *Miller* and *Baldwin.* The denial of an occupant's right to post a political sign by the *Wheeler* court can be explained perhaps by the fact that the occupant wanted to post a sign facing a highway, not a municipal street. The *Baldwin* court emphasized the "local" effect a municipal sign achieves.[172] The *Miller* court argued persuasively that the residential sign at issue was the only effective means of reaching

165. 540 F.2d at 1368.

166. 83 N.J. at 406, 416 A.2d at 823.

167. 83 N.J. at 406, 416 A.2d at 823.

168. 83 N.J. at 414, 416 A.2d at 827.

169. 83 N.J. at 416, 416 A.2d at 828.

170. *See supra* note 10 and accompanying text.

171. 822 F.2d 586, 588 (6th Cir. 1987).

172. 540 F.2d 1360, 1368 (9th Cir. 1976).

the defendant's intended local audience: prospective purchasers of houses nearby.[173] In *Wheeler,* it could be argued, the appellees wished merely to take advantage of a captive audience: motorists on a highway adjacent to the plaintiffs' property. Moreover, as the *Wheeler* court argued, alternative means of communication were available; because the restrictions applied only to protected areas along certain highways, political signs could be displayed elsewhere in the vicinity. Therefore, the court found that the regulation did not deny the appellees a "reasonable opportunity" to display a political sign.[174]

Wheeler cannot be reconciled with the cases concerning residential political signs unless one can justify providing greater protection to political signs along residential streets than to signs along certain highways. As indicated above, this added protection has been justified when the residential sign has a "local" thrust such that other means of communication cannot target people in the limited area. But not all residential signs have this local thrust. Moreover, a political sign along a highway could have greater significance to a given locale than a particular residential sign. Therefore, there appears to be no reason why residential political signs as a class should be favored over political signs along a highway.[175]

The operative criterion in determining whether a government may prohibit a sign is whether alternative means of communication exist. If alternative means are generally less available for residential signs, it would be because residential signs tend to depend for their efficacy on the particular premises on which they are situated. This is the primary characteristic of the onsite sign.[176] Therefore, a strong argument could be made for exempting those residential signs with this characteristic from a general prohibition of offsite signs. Of course, to make such distinctions requires a consideration of "content" in order to assess the relationship between the message and the land on which it is located.[177] *Metromedia* appears to have prohibited such an assessment where noncommercial speech is concerned.[178] But to exempt only res-

173. 83 N.J. at 413-14, 416 A.2d at 827.

174. 822 F.2d at 596 (quoting City of Renton v. Playtime Theatres, 475 U.S. 41, 54 (1986)).

175. The First Circuit has argued that "deprivation of highway opportunities [for communication] is not as legally objectionable as some other curtailments," for highways were created with taxpayers' money to enhance travel, not to enhance advertising. John Donnelly & Sons v. Campbell, 639 F.2d 6, 14 (1st Cir. 1980). However, the argument applies equally to curtailments along residential streets. Moreover, the First Circuit utilized this argument only in connection with curtailments of commercial speech. 639 F.2d at 14.

176. *See supra* notes 10, 158 and accompanying text. It is also the primary characteristic of a larger category of signs: identifying signs. *See infra* notes 244-45 and accompanying text.

177. The word "content" is in quotation marks because whether or not an assessment of content is content-neutral is the heart of the conflict between Justice White and the dissenters in *Metromedia* (*see supra* Part II) and between the *Baltimore* and *Wheeler* courts (*see supra* section III.A).

178. The four plurality justices and the two concurring justices probably would have agreed on this point.

idential political signs from a general ban on offsite signs is even less defensible by *Metromedia* standards.[179] Thus, *Metromedia* allows no compromise between *Wheeler* and a case such as *Miller.*

The Sixth Circuit has also applied the *Wheeler* rationale to a city ordinance. *Rzadkowolski v. Village of Lake Orion*[180] upheld an ordinance based on the onsite/offsite distinction. The ordinance permitted onsite and offsite signs in the industrial district of Lake Orion but allowed only onsite signs, commercial and noncommercial, in the retail district.[181] The ordinance also created an exemption for temporary political signs throughout the village.[182] This exemption may prevent conflict between *Rzadkowolski* and *Miller. Miller* asserted merely that political signs may not be excluded from residential districts.[183] To allow these signs at certain times is to avoid the charge of total exclusion. However, six *Metromedia* justices held that twelve exemptions (including one for temporary political campaign signs) invalidated the San Diego ordinance because they indicated a preference for one type of noncommercial speech over others. Hence, the exemption in *Rzadkowolski* should have rendered the Lake Orion ordinance invalid. Inexplicably, the Sixth Circuit merely mentions this exemption but does nothing to justify it.[184]

Moreover, a defense of *Rzadkowolski* must explain why offsite political signs are only permitted on a temporary basis while onsite commercial signs may be permanent. By *Metromedia* standards, this defense cannot be made: commercial speech may not be favored over noncommercial speech. The exemption in *Rzadkowolski* undercuts the purpose of the onsite/offsite distinction: that is, to treat commercial and noncommercial signs equally.[185] This principle of equal treatment precludes exemptions. Therefore, the onsite/offsite rationale of *Rzadkowolski* and *Wheeler* cannot protect the right of an occupant to display a residential political sign.

If regulators want to protect the rights defended in *Miller* and *Baldwin* (and they may be required by the Constitution to do so), it seems they must, under the dictates of *Metromedia,* exempt all non-

179. The four plurality justices and the two concurring justices definitely agreed on this point.

180. 845 F.2d 653 (6th Cir. 1988).

181. 845 F.2d at 654.

182. 845 F.2d at 654.

183. 83 N.J. 402, 413, 416 A.2d 821, 827 (N.J. 1980).

184. 845 F.2d at 654. The court might have argued that unlike the exemptions in *Metromedia,* an exemption for any temporary political sign does not favor one type of noncommercial sign over any other, for all noncommercial signs contain some "political" content for first amendment purposes. The similar exemption in *Metromedia* specified that the temporary sign had to be connected with a political campaign. 453 U.S. 490, 495 n.3 (1981). The *Rzadkowolski* exemption applies to any political sign and hence does not discriminate between types of noncommercial signs.

185. Wheeler v. Commissioner of Highways, 822 F.2d 586, 593 (6th Cir. 1987).

commercial signs from sign prohibitions. Indeed, Chief Justice Burger argued that the plurality opinion in *Metromedia* left regulators with a choice between banning all signs or exempting noncommercial signs from any prohibition of signs regardless of their impact on safety or the environment.[186] But, as the next section shows, even when an ordinance exempts all noncommercial signs from a billboard ban, problems remain.

C. *Discriminatory Effect on Noncommercial Signs*

In *Major Media of the Southeast, Inc. v. City of Raleigh*[187] the Fourth Circuit upheld a city ordinance that prohibited offsite commercial signs from certain zones within the city. The ordinance exempted noncommercial signs from regulation in order "to eliminate any potential constitutionality problems."[188] Indeed, the exemption for noncommercial signs allowed the city to avoid the controversies analyzed in section III.A and section III.B of this Note, controversies stemming from the difficulty of determining at what point noncommercial speech has been properly protected when commercial exemptions have been granted. Consequently, the plaintiff billboard company in *Raleigh* was compelled to argue atypically, advancing one old argument and one new one.

The old argument had been the heart of Justice Brennan's concurrence in *Metromedia:* the danger of allowing a government official to determine whether a sign is commercial or noncommercial.[189] The plaintiff in *Raleigh* argued that the regulation did not provide enough guidance to officials because it did not define "commercial" and "noncommercial."[190] The *Raleigh* court contended that definitions were unnecessary because the Supreme Court had already supplied them,[191] and it maintained that the "occasional marginal case" where uncertainty existed should not invalidate the regulation for vagueness.[192] The court might have added that only two *Metromedia* justices, Brennan and Blackmun, were concerned with this problem.

The new argument advanced by the plaintiff in *Raleigh* was that the ordinance preferred commercial speech over noncommercial speech because the ordinance would lead to the virtual disappearance

186. 453 U.S. at 556, 564 (Burger, C.J., dissenting). *See supra* note 99 and accompanying text.

187. 792 F.2d 1269 (4th Cir. 1986).

188. 792 F.2d at 1271 n.2 (quoting Major Media of the Southeast, Inc. v. City of Raleigh, 621 F. Supp. 1446, 1448 (E.D. N.C. 1985)).

189. 453 U.S. 490, 536-37 (1981) (Brennan, J., concurring).

190. 792 F.2d at 1272.

191. The Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." Central Hudson Gas & Elec. v. Public Serv. Commn., 447 U.S. 557, 561 (1980).

192. 792 F.2d at 1272-73.

of noncommercial signs.[193] The ordinance would destroy the billboard industry, and billboards often provide the only means of displaying noncommercial signs. Thus, though the ordinance exempted noncommercial signs from direct regulation, the ordinance indirectly burdened noncommercial signs more than commercial signs.[194]

The *Raleigh* court stated that even if this discriminatory effect occurred, it would have derived "from decisions of the individual property owners" and not from the ordinance itself which "by its very terms does not affect non-commercial signs."[195] Therefore, the court argued that the city may not be held responsible for such results.[196]

This discriminatory effect argument (despite no facial discrimination) was urged by Justice Brennan in his *Metromedia* concurring opinion. Brennan disagreed with the plurality's view that an ordinance, such as the one in *Raleigh,* which bans offsite commercial signs but permits all noncommercial signs would be constitutional.[197] Despite the noncommercial sign exemption, Brennan would treat the ordinance as a total ban of offsite signs if the ban on commercial signs resulted in a virtual ban on noncommercial signs.[198]

Only one court has struck down a billboard law due to its discriminatory effect on noncommercial speech. This decision, *Jackson v. City Council of Charlottesville,*[199] invalidated an ordinance that exempted all onsite signs, both commercial and noncommercial, but did not exempt offsite noncommercial signs.[200] The *Jackson* court argued that "[w]hile the ordinance in *Metromedia* differs somewhat in *form* from the local ordinance challenged in this case, a careful analysis of the two ordinances shows that each reaches the same *result,* i.e., the virtual prohibition of noncommercial advertising . . . ."[201] While the court admitted that the language of the ordinance permits onsite noncommercial signs, it asserted: "[C]learly the general scheme of the sign ordinance is to prohibit all but on-premises commercial advertising."[202] The court claimed, illogically, that the ordinance, despite its facial neutrality, was unconstitutional "on its face."[203]

193. 792 F.2d at 1271-73.

194. 792 F.2d at 1273.

195. 792 F.2d at 1273.

196. 792 F.2d at 1273.

197. 453 U.S. 490, 536 (1981) (Brennan, J., concurring).

198. 453 U.S. at 536 n.13 (Brennan, J., concurring).

199. 659 F. Supp. 470 (W.D. Va. 1987), *modified on other grounds,* 840 F.2d 10 (4th Cir. 1988).

200. The *Jackson* rationale, because it looks only to the result of an ordinance and not to what it says, also could be applied to an ordinance like that in *Raleigh* which exempts all noncommercial signs.

201. 659 F. Supp. at 473 n.3 (emphasis added).

202. 659 F. Supp. at 472 n.1. The word "scheme" suggests that the court suspected the city of intending to rid itself indirectly of noncommercial signs.

203. 659 F. Supp. at 474.

The defendant city council in *Jackson* argued that *Metromedia* did not apply because the Charlottesville ordinance was content-neutral.[204] The court did not attempt to determine the extent to which content-neutrality might be a function of what an ordinance says as opposed to what it effects. Rather, the court noted the defendant's reliance on *Members of the City Council v. Taxpayers for Vincent,* a Supreme Court decision which upheld a city's ban of posters on public property as a content-neutral restriction,[205] but found this reliance wanting: "[The] defendant's reliance on *Vincent* is misplaced because the sign ordinance at issue here is not the kind of absolute prohibition permitted by *Vincent.*"[206] The *Jackson* court thus implied that an ordinance can only be content-neutral if it constitutes an absolute prohibition. The reasoning of *Vincent* suggests nothing of the kind: "The text of the ordinance is neutral — indeed it is silent — concerning any speaker's point of view, and . . . it has been applied . . . in an even-handed manner."[207] The above passage makes clear that content-neutrality depends upon the "text" of an ordinance and its enforcement, not upon its indirect effects.[208] Hence, the *Jackson* ordinance was content-neutral.

Therefore, the discriminatory effect argument cannot disturb the essence of the *Raleigh* holding: a billboard law is valid if it exempts all noncommercial signs. The *Jackson* court might have pointed out that, strictly speaking, the holding in *Metromedia* depended not on the San Diego ordinance's lack of content-neutrality, but rather on its preference for commercial over noncommercial signs.[209] It would then have been possible to assert that impermissible favoring of commercial speech can occur despite content-neutrality due to the impact of an ordinance. Indeed, something is amiss when a court can accept both a fundamental principle — noncommercial speech deserves greater protection than commercial speech — and results inconsistent with the principle. *Metromedia* forced this result by simultaneously adhering to the principle and asserting a city's right to reduce the number of outdoor signs. As *Jackson* demonstrates, and as Brennan's *Metromedia* argument implied, if one seriously intends to protect noncommercial signs, one must protect commercial billboards. But, by the same logic, if governments have the right to prohibit some billboards for aesthetic purposes, then the principle of affording greater

204. 659 F. Supp. at 473.

205. 466 U.S. 789, 804 (1984).

206. 659 F. Supp. at 473.

207. 466 U.S. at 804.

208. The ordinance in *City of Renton v. Playtime Theatres* was also deemed content-neutral despite the fact that, due to financial constraints, the adult theater in question would most likely be unable to relocate in the only section of the city left open to it. 475 U.S. 41, 54 (1986). *But see Renton,* 475 U.S. at 64-65 (Brennan, J., dissenting).

209. *See supra* note 46 and accompanying text.

protection to noncommercial speech should not apply to billboard laws. Part IV makes this argument.

IV. JUSTIFYING PROHIBITIONS AND EXEMPTIONS

We have seen that the *Metromedia* plurality did not draw a clear line between those signs that could be prohibited and those that could not be. *Metromedia* appears to support two divergent views on the matter. One view draws the line between commercial and noncommercial signs. The other permits prohibition of noncommercial signs if the ordinance affords noncommercial signs at least as much protection as it affords commercial signs. As shown above in section III.A, these two views rest on divergent notions of "content-neutrality." The commercial/noncommercial distinction disallows restrictions on noncommercial signs that in any way depend on what a sign says or what function the sign serves. The opposing view — reflected in both the onsite/offsite distinction and the identifying/nonidentifying distinction — requires only that the restriction not discriminate according to point of view or subject matter. For instance, the narrow view of content-neutrality would not permit an exemption for any class of sign, even if the class potentially includes any message from any point of view, because a sign's content would have to be assessed in order to determine its class. Conversely, the broader view of content-neutrality would allow an exemption for a class of signs — onsite signs (or identifying signs) — as long as every sign within that class was exempt. This Part, in evaluating the commercial/noncommercial distinction and the onsite/offsite distinction as principles by which to justify prohibitions of signs and exemptions from these prohibitions, argues that neither distinction proves adequate. This Part then advocates a third distinction as the most appropriate standard: a distinction between signs that identify the premises on which they are located and signs that do not.

A. *Inadequacies of the Commercial/Noncommercial Distinction*

The benefits in employing the commercial/noncommercial distinction are plain: (1) it stresses the principle that noncommercial speech should be afforded greater protection than commercial speech; (2) it avoids the inevitable constitutional disputes arising from favoring one kind of noncommercial speech over another; (3) it avoids the difficulty of justifying favoring one type of noncommercial speech over another; and (4) it does not thwart the government objective of limiting outdoor display signs, for noncommercial billboards are virtually eliminated indirectly when commercial billboards are prohibited.[210] Thus,

210. *See supra* notes 69, 194 and accompanying text. Of course, this fourth benefit is only considered such by someone who believes the aesthetic objectives of sign prohibitions outweigh the countervailing free speech claims.

the commercial/noncommercial distinction seems to yield the best of all possible solutions for a court hoping to strike a compromise: it maintains the principle that noncommercial (political) speech is especially valuable while allowing governments to eliminate virtually all offsite signs. But the principled protection for political speech rings hollow when courts rely conveniently on market forces to accomplish indirectly what they will not do directly.[211] Additionally, the commercial/noncommercial distinction may not even satisfy those who would prohibit signs on aesthetic grounds, for the exemption of all noncommercial signs from prohibition presents a host of potential regulatory problems.

A compromise that depends on something as changeable as market forces is precarious. If these forces change, allowing billboard companies to thrive on noncommercial messages, the governmental objective to improve appearances by prohibiting billboards will be utterly thwarted. Justice Brennan noted that if commercial entities want to utilize billboards where commercial signs have been prohibited, they will circumvent the commercial/noncommercial distinction with noncommercial messages designed to advertise their names and products.[212] However it may happen, noncommercial billboards could spring up in great numbers where governments had previously removed the perceived blight of commercial billboards. The subsequent blight will be no less perceptible by virtue of its noncommercial content. Governments and courts will then be restrained from acting by *Metromedia* (and one branch of its progeny), which failed to face directly the conflict between governmental interests and communicative interests presented by the billboard, commercial or noncommercial.

But even if noncommercial billboards never present a problem due to their numbers, the exemption for all noncommercial signs ensures that these signs cannot be prohibited no matter how intrusive they are to aesthetic interests and no matter what their location, message, or function.[213] Obviously, government cannot routinely protect citizens from unpleasant speech. The maintenance of free speech requires that offensive speech must often be tolerated.[214] But offensive speech need not be tolerated under all circumstances;[215] and a number of factors indicate that signs should receive less protection than other media.

The Supreme Court has observed that billboards "are constantly before the eyes of observers on the streets . . . to be seen without the

211. Despite assertions to the contrary, *Metromedia* did not protect noncommercial billboards. *See supra* section III.C.

212. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 540 (1981) (Brennan, J., concurring).

213. 453 U.S. at 556, 564 (Burger, C.J., dissenting).

214. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971).

215. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978).

exercise of choice or volition on their part," and that their messages are "thrust upon [observers] by all the arts and devices that skill can produce."[216] Unlike advertisements in magazines and newspapers, which are seen only after some effort by the reader to turn the pages, or on the radio, which can be turned off, billboard messages cannot be avoided.[217] Signs are intended to catch one's eye. When something new, offensive, large, or unusual comes into view, one simply looks. If one then chooses to look away, one does so knowing the sign is there. This presence compels its audience either to include it in its gaze or to forfeit the opportunity to look in that general direction.

Dissenting in *Erznoznik v. City of Jacksonville,*[218] Chief Justice Burger argued similarly that passers-by offended by nudity on a drive-in movie screen plainly visible from the street should not have the burden of having to look away.[219] But if this argument failed in *Erznoznik,* where the city ordinance clearly intended to control the content of the movies shown,[220] it should prevail where sign prohibitions target only the signs themselves and not their content. For this reason, Professor John Costonis has argued that first amendment values are not "seriously threatened" by billboard bans.[221] Noting that in *Metromedia* Justice White distinguished between a billboard's "communicative and noncommunicative aspects,"[222] and that no justice took issue with that distinction, Costonis argues that the justices should have denied first amendment protection to billboards by regarding them as "aesthetic entities" and not speech.[223] Costonis points out that no one disputed that San Diego opposed billboards because they "were perceived as associationally dissonant with San Diego's character," and not because of the messages they conveyed.[224]

In addition to producing the twin problems of exempting noncommercial signs regardless of their effects and failing to protect noncommercial signs despite the appearance of doing so, the commercial/noncommercial distinction fails to address the question whether adequate alternative means exist for a given sign. Thus, the commercial/noncommercial distinction produces legislation blind to the unique needs of particular individuals who want to display a sign.[225]

It matters a great deal where certain signs are placed. A stop sign

216. Packer Corp. v. Utah, 285 U.S. 105, 110 (1932).

217. 285 U.S. at 110.

218. 422 U.S. 205 (1975).

219. 422 U.S. at 218-24 (Burger, C.J., dissenting).

220. 422 U.S. at 206-07.

221. Costonis, *supra* note 3, at 449 n.336.

222. 453 U.S. 490, 502 (1981).

223. Costonis, *supra* note 3, at 447-48.

224. *Id.* at 448. However, emphasizing associational dissonance (or inconsistency) has its drawbacks. *See supra* notes 18-20 and accompanying text.

225. See *supra* notes 90-95 and accompanying text for Burger's discussion of "special needs."

is useless unless placed where the government requires cars to stop. The efficacy of other signs does not depend on their location, at least not in the same way. An offsite commercial sign along a highway that advertises services and goods available at a given exit must be placed prior to the exit but may be placed at any of a large number of such sites. A noncommercial sign asking for donations to a particular cause will naturally be most effective in a location where the most people will see it (or where the most people prone to making a donation will see it), but, again, such a sign need not be displayed at any particular place. It conveys its message regardless of its location. Conversely, like the stop sign, the onsite sign (or the identifying sign) must be displayed in a particular place because its function is to identify that place in some way, to tell its viewer that he has arrived at a given place.[226]

The commercial/noncommercial distinction implies that the right to display a noncommercial sign is a right concomitant with owning or occupying property.[227] But if there is a right to display a sign concomitant with owning or occupying property, this right should extend to commercial signs. The *Metromedia* plurality, in granting San Diego the discretion to value some commercial communicative interests over others,[228] theoretically granted the discretion to prohibit onsite commercial signs under certain circumstances. The storeowner denied the right to advertise his store with an onsite sign will receive little consolation in learning that he may substitute any noncommercial message he wishes for his ill-fated onsite sign. To assert in this case that noncommercial speech must receive greater protection than commercial speech under the first amendment[229] is to blind oneself to gross inequity. Although regulators may be unlikely to deny storeowners their onsite signs, the fact that they could reveals the inherent inadequacy of the commercial/noncommercial distinction to justify prohibitions in the case of signs: it takes no account of the function a sign performs.

Similarly, the commercial/noncommercial distinction cannot explain why a government may display traffic signs but not political signs. If "owning" or possessing land creates a right to display noncommercial signs thereon, a government should be able to display any noncommercial message where it displays traffic signs. But this is obviously not the case. Government may not "control . . . the search for political truth."[230] If a city challenged the state's right to display traffic signs within the city, a court undoubtedly would justify the traffic

226. *See supra* note 94 and accompanying text.

227. *See supra* note 134 and accompanying text.

228. 453 U.S. 490, 512 (1981).

229. *See Metromedia,* 453 U.S. at 513.

230. 453 U.S. at 515 (quoting Consolidated Edison Co. v. Public Serv. Commn., 447 U.S. 530, 538 (1980)).

signs in terms of the function they perform. The court would probably find both that the state had a compelling interest in directing motorists and that the state was not attempting to influence public debate.[231]

Moreover, when ownership or occupancy of property triggers the right to display noncommercial signs, it is impossible to distinguish between the rights of billboard companies and the rights of residents. A billboard company owns or leases the space on which it displays signs to the same degree as a resident owns or leases his property. However, cases such as *Baldwin* and *Miller*[232] support our intuitive sense that the homeowner has a greater speech right than the billboard company where signs are concerned. What explains this intuitive sense? First, the homeowner generally displays his own messages, not the messages of others. Second, the homeowner usually lives where he displays his sign; he must tolerate, along with his neighbors, any unpleasant side effects of his sign.[233] Third, and most important to *Baldwin* and *Miller,* the homeowner may have no means other than his sign to further his communicative interest.[234] Determinations made under the commercial/noncommercial distinction ignore these three factors.

As the foregoing examples indicate, the commercial/noncommercial distinction takes no account of whether ample alternative means of communication are available to someone wishing to display a sign. Indeed, the *Metromedia* plurality permitted San Diego to prohibit certain commercial signs despite admitting that alternative means appeared to be unavailable.[235] The storeowner's identifying sign is essentially irreplaceable,[236] yet in theory it is not protected. Conversely, the commercial/noncommercial distinction obliges governments to protect each noncommercial sign regardless of the fact that its message could be conveyed through another medium.

In justifying the commercial/noncommercial distinction, one might stress the difficulty in defining "ample alternative means." If *Metromedia* is any indication, the phrase represents a conclusion as to the validity or invalidity of an ordinance rather than a standard by which to judge that validity.[237] Justice White merely relied on a joint statement of the parties to the effect that people use billboards because they are relatively inexpensive and efficient.[238] But, presumably, cost

231. By contrast, the reasoning of the *Metromedia* plurality suggests that if the government chooses to erect directional signs, it cannot deny anyone else the right to erect any noncommercial sign. To conclude otherwise is to favor one type of noncommercial speech over any other.

232. *See supra* notes 163-68 and accompanying text.

233. Naturally, the neighbors are more likely than the sign displayer to find the side effects unpleasant or unjustifiable.

234. *See* section III.B.

235. 453 U.S. 490, 516 (1981).

236. *See supra* note 94 and accompanying text.

237. *See supra* note 54 and accompanying text.

238. 453 U.S. at 516.

and efficiency influence any choice of medium. We would hardly be surprised to find that people have practical reasons for selecting the medium they select. Therefore, accepting cost and efficiency as standards could easily result in a finding that ample alternative means never exist.

City of Renton v. Playtime Theatres held that only a "reasonable opportunity" to communicate in another way need be available and that financial limitations alone do not entitle one to utilize the preferred alternative.[239] However, financial limitations coupled with a general inability to reach an audience can be sufficient to protect a means of communicating "the poorly financed causes of little people."[240] Chief Justice Burger argued that inadequate alternatives exist only when a party can demonstrate that his message is relatively disadvantaged compared to the messages conveyed by other means.[241] At least in the case of signs, this standard seems too limited, for it would ignore the problem of the storeowner denied an onsite sign. Having the financial means to advertise does not solve his problem.

Neither the ample alternative means test nor the reasonable opportunity test provide assistance to a court unless they mean that a sign displayer, in order to qualify for the court's protection, must show that he has either (1) financial limitations coupled with a general inability to reach an audience, or (2) an identifying sign. Consequently, this test should be the test for whether ample alternative means of communication exist. In effect, a court should ask not whether *ample* alternatives exist, but whether *any* alternatives exist.

Of course, it may also be quite unreasonable for a government to prohibit certain nonidentifying signs. But if the prohibition is unreasonable, it would be for reasons other than a lack of ample alternative means of communication. For instance, *Baldwin v. Redwood City* argued that residential political campaign signs have a local objective that cannot be accomplished readily by other means.[242] But *Baldwin* acknowledged that handbills also would have accomplished the sign displayer's objective.[243] For that matter, going door-to-door may be the most effective way to reach a local audience. What rendered these alternatives inadequate? Apparently, the court simply concluded that people should have the right to display such signs; that they should not have to hand out leaflets or walk door-to-door. One might argue that political lawn signs have long been used, or that such signs represent active participation in the democratic process. But a court cannot logically base this right on a lack of alternative means, for "ample"

239. 475 U.S. 41, 54 (1986).

240. Martin v. City of Struthers, 319 U.S. 141, 146 (1943).

241. 453 U.S. at 563 (Burger, C.J., dissenting).

242. *See supra* note 165 and accompanying text.

243. *Id.*

means nothing in this context. If alternatives exist, by definition they must be ample, for cost and efficiency cannot be considered (unless the inquiry is whether or not the complainant's sign furthered a poorly financed cause "of little people").

B. *The Superiority of the Identifying/Nonidentifying Distinction*

Section IV.A indicates that the commercial/noncommercial distinction is inappropriate because it does not consider a sign's function or its relationship to the land on which it is displayed. Thus, it ignores the only measure by which to determine whether alternative means of communication exist for someone who wants to display a sign. The onsite/offsite distinction is superior to the commercial/noncommercial distinction because, in protecting onsite signs, it takes a sign's function into account. Additionally, the onsite/offsite distinction gives greater leeway to local aesthetic interests, allowing governments to ban all offsite signs. In contrast, the commercial/noncommercial distinction removes aesthetic consideration from a court's determination: it protects each noncommercial sign regardless of whether it is more offensive or intrusive aesthetically (given its placement) than a commercial sign.

Although the onsite/offsite distinction is preferable to the commercial/noncommercial distinction, it fails to include other signs that should be protected under the rationale needed to protect onsite signs. Onsite signs deserve protection from sign bans because, as they identify the premises on which they are displayed, they cannot be replaced by an alternative means of communication.[244] Therefore, all identifying signs — not just onsite signs — should be protected.

Recall that an onsite sign is a sign that refers to or identifies the activities conducted, the services provided, or the products sold or dispensed on the premises.[245] Therefore, the onsite/offsite distinction would not protect "for sale" or "for lease" signs unless the property were considered a product sold on the premises.[246] Nor would it protect political signs such as the sign in *Miller* whose message required for its conveyance that the sign be displayed on a given premises.[247]

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244. *See supra* notes 93-94 and accompanying text.

245. *See supra* note 10 and accompanying text.

246. It might be argued that the definition for onsite signs could easily be amended so as to include "for sale" signs; hence, "for sale" signs as a class of signs do not demonstrate the need for the identifying/nonidentifying distinction. But "for sale" signs may be divided into two types: the signs placed on property in order to entice would-be purchasers to inquire on the premises and the signs that direct would-be purchasers to another location for information. The former might very well be deemed onsite signs, but not the latter. In either case the signs identify a piece of property for sale (or lease). Therefore, it would be impractical and inequitable for a regulation to permit one type but not the other, and yet this would be the result of the application of the onsite/offsite distinction.

247. *See supra* note 173 and accompanying text.

Signs that identify the occupant of the premises and not the premises itself create a separate problem. The onsite/offsite distinction would not protect a residential sign indicating the occupant's name. Nor would it protect a sign identifying the firm engaged in construction or other work on the premises on which it is located. One avoids this problem by recognizing the identifying sign as the category of sign requiring protection. Signs that identify the occupants of a premises also identify the premises.

By extension, it might then be argued that the political campaign sign on a front lawn should be protected because it identifies the occupants as being people who intend to vote for a particular candidate, and thereby identifies the premises. But two difficulties arise from this reasoning. First, the political campaign sign communicates information about the occupant that cannot be said in turn to indicate anything integral to the premises. By contrast, a sign that names an occupant or owner provides what might be termed "primary identification"[248] of the premises; it provides one of the basic pieces of information to be learned about a tract of land: who lives or works there or who owns it. Most importantly, the sign that names the occupant of the premises tells its viewer that he has arrived at a given place. It would be an unusual political sign, such as the sign in *Miller,* which would serve this function.

Second, to include political campaign signs among signs that identify premises would be to include any residential political sign in this group, for every residential political sign is intended to indicate an occupant's perspective on some issue. The distinction between signs that identify a given premises and signs that do not would lose significance if it were expanded to include every sign that indicates something about the occupant of the land on which the sign is located. If political signs are to be protected, they must be protected under a different rationale.[249]

The foregoing makes clear that the best justification for exempting signs from a general ban is the distinction between signs that identify premises and signs that do not.[250] At bottom, this distinction is a measure by which to determine whether ample alternative means of communication exist. The distinction stems from the fact that an identifying sign cannot be replaced by another medium. Like the on-

248. See discussion in section III.A of *Baltimore,* in which a city ordinance distinguished onsite signs from offsite signs by permitting only those signs which provided "primary identification" of a premises.

249. Because the identifying/nonidentifying distinction functions according to a broad view of content-neutrality, it is consistent with permitting governments to exempt certain nonidentifying signs from a general ban for independent reasons. *Infra* note 259 and accompanying text. *Metromedia,* 453 U.S. 490, 555 (1981) (Stevens, J., dissenting in part).

250. Essentially, this was the standard San Diego intended to employ. Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 858 n.6, 610 P.2d 407, 411 n.6, 164 Cal. Rptr. 510, 514 n.6.

site/offsite distinction, the identifying/nonidentifying distinction cannot be reconciled with a strict view of content-neutrality, for it necessarily favors identifying content over nonidentifying content. As has been shown, certain courts have reconciled the onsite/offsite distinction with the *Metromedia* holding, though not without difficulty.[251] These difficulties become more pronounced when the identifying/nonidentifying distinction is applied.

First, the identifying/nonidentifying distinction repudiates the *Metromedia* plurality's claim that it matters whether a sign's message is commercial or noncommercial. Second, while *Metromedia* arguably may not require an exemption for all noncommercial signs, it assuredly did not permit evaluating signs according to their functions. Indeed, the *Metromedia* plurality included signs "used to identify any piece of property and its owner" in a catalogue of invalid noncommercial exemptions.[252] Recognizing that *Metromedia* took no account of a sign's function, the First Circuit in *Matthews v. Town of Needham*[253] found the onsite/offsite distinction invalid precisely because it rests on a preference for signs based on the function they perform. The court argued that "preference for the 'functions' of certain signs over those of other (*e.g.*, political) signs is really nothing more than a preference based on content."[254] Despite language in the *Metromedia* plurality opinion suggesting the plausibility of an interpretation justifying the onsite/offsite distinction,[255] this interpretation ultimately breaks down. Therefore, the commercial/noncommercial distinction appears to be more consistent with *Metromedia* than the onsite/offsite distinction.[256]

C. *Implications of Accepting the Identifying/Nonidentifying Distinction*

This Note has argued that a city or state may not prohibit identifying signs because these signs are the only signs that cannot be replaced by alternative communicative means. No medium but an identifying sign can tell the viewer that he has arrived at a particular place or that the land or property he views has certain characteristics. However, this Note does *not* argue that if a government wants to ban signs, it must ban all but identifying signs in order to observe standards of equal protection.

The identifying/nonidentifying distinction functions according to the broad view of content-neutrality espoused by Stevens and Burger

251. *See supra* note 110 and accompanying text.

252. 453 U.S. at 514.

253. 764 F.2d 58 (1st Cir. 1985).

254. 764 F.2d at 60 (emphasis omitted).

255. 453 U.S. at 503, 508, 512-13.

256. *See supra* notes 134-37 and accompanying text.

in their *Metromedia* dissents. According to this view, a government may prohibit signs as long as the prohibition does not discriminate against viewpoint or against controversial subject matter, and as long as ample alternative means of communication are available.[257] The identifying/nonidentifying distinction regulates according to content, favoring identifying content over nonidentifying content. But this reliance on content does not reflect an attempt to control public debate by prohibiting or exempting signs conveying controversial subjects. Indeed, the identifying/nonidentifying distinction merely provides a standard for determining whether adequate alternative means exist,[258] the second prong of the Stevens/Burger test.

As both Stevens and Burger argued, a state or city may have independent reasons for exempting certain nonidentifying signs from a general ban.[259] For instance, a state might reasonably decide to ban billboards along highways generally but permit government signs conveying information especially useful to motorists, such as notice of food, gas, or lodging at upcoming exits. Or, for aesthetic reasons, a city might reasonably distinguish temporary signs from permanent signs, or signs in residential areas from signs in commercial areas. Or, a city might permit residential lawn signs of any kind, believing the usefulness of such signs to displayer and viewer in a local area outweighs the aesthetic interest in banning them.

Of course, there must exist a rational connection between the regulation and its purpose. A city that exempts commercial nonidentifying signs but does not exempt noncommercial nonidentifying signs could not give a reasonable justification in light of its goals to improve the city's appearance. If one type of noncommercial nonidentifying sign is exempted while another type of noncommercial nonidentifying sign is not, the ordinance is invalid if it suppresses a point of view or controversial subject matter or if there is no reasonable justification for favoring one type of sign.

The identifying/nonidentifying distinction would substantially reduce the dangers of granting discretion to billboard regulators. With the protection of identifying signs secured, the benefits to aesthetic interests from utilizing the Stevens/Burger test would easily compensate

257. The facial difference between Stevens' test and Burger's is that Burger disallows a restriction based on "topics for public debate" while Stevens disallows a restriction based on "controversial subject matter." This difference is merely facial, as both justices would allow "discrimination" according to subject matter when the government has no hidden motive of suppressing speech. Hence, both justices would permit an exemption for the "topic" or "subject matter" conveyed by "for sale" signs. *See supra* notes 80, 90 and accompanying text. Indeed, "for sale" signs would not be protected under a narrow view of content-neutrality which disallows restrictions based on subject matter.

258. While this Note argues to the contrary, *see supra* notes 238-42 and accompanying text, one could argue that alternative means might be inadequate for some nonidentifying signs. Even so, identifying signs have a special claim to first amendment protection.

259. *See supra* notes 81, 91 and accompanying text.

for whatever negligible discretionary dangers remain. For instance, the Stevens/Burger test would enable a city to exempt temporary (or permanent) political campaign signs, an impossible result if identifying signs constitute the only permissible exemptions. Freed from an unworkable notion of "content-neutrality," a city would be able to grant reasonable exemptions based on a determination that a given communicative interest outweighs the city's aesthetic interest,[260] but avoid the allegation that it acted unconstitutionally because it did not "abridge enough speech."[261] Within the limits imposed by viewpoint neutrality and the identifying/nonidentifying distinction, a city with discretion to make aesthetic judgments may approach the problem of billboard regulation with the flexibility or "delicacy" the problem requires.[262] As Rehnquist argued: "[L]ittle can be gained in the area of constitutional law, and much lost in the process of democratic decisionmaking, by allowing individual judges in city after city to second-guess . . . legislative or administrative determinations" to ban signs.[263] This Note argues that, in the case of sign prohibitions, the identifying/nonidentifying distinction puts an appropriate limit on "democratic decisionmaking" with respect to aesthetic judgments.

V. CONCLUSION

In *Metromedia* seven Supreme Court justices agreed that a city may regulate aesthetics under its police power and that generally a city may ban outdoor signs for aesthetic reasons alone. But four of these seven justices restricted such a ban to commercial signs, holding that the first amendment affords greater protection for noncommercial signs. These four criticized the San Diego ordinance for favoring certain types of noncommercial signs over others. They reasoned that, generally speaking, all noncommercial speech has equal value under the first amendment. But given their basic sympathy for local aesthetic interests, one suspects that had they been presented with a principled means by which to distinguish noncommercial signs that could be prohibited from noncommercial signs that could not be, some of them might have contributed to a different and more sensible precedent for sign prohibition cases. This Note has presented such a principled means, arguing that — as aesthetic considerations motivate sign bans — it should not matter whether a sign is commercial or noncommercial. Only signs that identify the premises on which they are located must be constitutionally protected. Additionally, the Note has argued that a government may ban nonidentifying signs at its discretion as long as it does not discriminate against viewpoint or against

260. 453 U.S. 490, 565 (1981) (Burger, C.J., dissenting).

261. 453 U.S. at 540 (Stevens, J., dissenting in part).

262. *See* 453 U.S. at 556 (Burger, C.J., dissenting).

263. 453 U.S. at 570 (Rehnquist, J., dissenting).

controversial subject matter, and as long as the effect of the regulation relates reasonably to its objective.

In defending the distinction between identifying and nonidentifying signs, the Note has demonstrated the inadequacy of protecting all noncommercial signs. Affording this protection ignores the fact that sign bans target the signs themselves, not their content; more importantly, it ignores whether or not a given sign can be replaced by an alternative means of communication. Identifying signs — whether commercial or noncommercial — deserve constitutional protection because no other medium can assume the sign's function of telling the viewer he has arrived at a given place. Nonidentifying signs — whether commercial or noncommercial — should not be constitutionally protected in general because where a sign prohibition does not target sign content in order to control public debate, local efforts to remove perceived unsightliness should be respected.

— *R. Douglass Bond*