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A Sign of the Times: Billboard Regulation and the First Amendment Symposium - Selected Topics on Land Use Law - Comment.

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I. INTRODUCTION

Early attempts at commercial sign control were pursued under a theory of public nuisance.[1] These rather piecemeal city efforts became streamlined in 1926, when the United States Supreme Court held that local governments could constitutionally regulate the use of private property by means of comprehensive zoning ordinances.[2] The governmental authority to enact these restrictions on land use, like the public nuisance laws before them, was deemed by the Court to flow from a state's police powers.[3]

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1. *See, e.g.,* St. Louis Gunning Advertisement Co. v. City of St. Louis, 137 S.W. 929, 938 (Mo. 1911) (billboards allegedly served as "hide-outs" for criminals and shielded immoral acts); City of Passiac v. Paterson Bill Posting, Advertising & Sign Painting Co., 62 A. 267, 268 (N.J. 1905) (city claimed that severe storms and natural decay caused billboards to become threat to public safety); Cain v. State, 105 Tex. Crim. 204, 206-07, 287 S.W. 262, 263-64 (1926) (unsuccessful attempt to uphold validity of city ordinance excluding signs from certain areas by proving billboards were public nuisance).

2. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390-95 (1926).

3. *See id.* at 387-88 (by analogy, law of nuisance aids courts in determining permissible range of police power action); *see also* City of Corpus Christi v. Jones, 144 S.W.2d 388, 398

In the ensuing years, billboard regulations as to size, height, construction, maintenance, and placement were almost routinely sustained by courts throughout the country.[4] This near national phenomenon resulted in large part from the presumption of validity which attaches to all legislative acts, consequently prompting great judicial deference upon review.[5] Further, the respect which the judiciary accords these enactments has in turn led the courts to broadly construe the permissible range of police power objectives.[6] This essentially progressive view of a state's police powers has recently caused more and more courts to conclude, contrary to prior decisions, that aesthetics alone is a sufficient justification for billboard control.[7] In so holding, a major limitation on the power of local

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(Tex. Civ. App.—San Antonio 1940, writ dism'd judgmt cor.) (scope of police power extends beyond nuisance regulation to include comprehensive zoning ordinances).

4. *See, e.g.,* St. Louis Poster Advertising Co. v. City of St. Louis, 249 U.S. 269, 273-74 (1919) (height and area limitations on billboards approved); Sun Oil Co. v. City of Madison Heights, 199 N.W.2d 525, 528-30 (Mich. Ct. App. 1972) (restrictions on height and size of billboards upheld); State v. Wong Hing, 222 N.W. 639, 640-41 (Minn. 1929) (city ordinance regulating height and construction of electric signs validated).

5. *See, e.g.,* Royal Crest, Inc. v. City of San Antonio, 520 S.W.2d 858, 868 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (courts cannot review city action unless proved to be abuse of discretion); Westworth Village v. Mitchell, 414 S.W.2d 59, 60 (Tex. Civ. App.—Fort Worth 1967, no writ) (challenger of ordinance must establish by conclusive evidence that restriction "bore no substantial relation to the health, safety, morals or general welfare of the community and was thus arbitrary or unreasonable"); Frost v. Village of Hilshire Village, 403 S.W.2d 836, 841-43 (Tex. Civ. App.—Houston 1966, no writ) (courts will not interfere unless challenger conclusively proves facts making city's refusal to rezone unreasonable, arbitrary, and capricious). Some of the reasons why courts generally defer to local judgment as to the necessity of certain land-use restrictions include: the separation of powers doctrine; the judiciary's lack of any specialized knowledge in the land-use area; and the courts' desire to afford local governments a maximum degree of flexibility in responding to changed conditions within the community. *See* Kolis, *Citadels of Privilege: Exclusionary Land Use Regulations And The Presumption of Constitutional Validity,* 8 HASTINGS CONST. L.Q. 585, 588-89 (1981). *But see* State v. Lotze, 593 P.2d 811, 813 (Wash. 1979) (when police power regulation challenged on free speech grounds it is presumed unconstitutional infringement on first amendment rights), *appeal dism'd,* 444 U.S. 921 (1979); *cf.* Freedman v. Maryland, 380 U.S. 51, 57 (1965) (any statutory regulation of first amendment rights presumed unconstitutional).

6. *See* Railway Express Agency v. New York, 336 U.S. 106, 109 (1949) (court refused to "trespass" on local judgment that prohibition on truck panel advertising reasonably promotes traffic safety without evidence showing that judgment "to be palpably false").

7. *Compare* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510 (1981) ("billboards by their very nature, wherever located and however constructed can be perceived an 'esthetic harm' ") *and* Berman v. Parker, 348 U.S. 26, 33 (1954) (term "public welfare" is broad in scope, encompassing physical, spiritual, economic, and aesthetic values, thus aesthetics is proper police power objective) *and* State v. Diamond Motors, Inc., 429 P.2d 825, 827 (Hawaii 1967) (aesthetics alone is sufficient basis for exercise of police power) *with* Varney & Green v. Williams, 100 P. 867, 868 (Cal. 1909) (aesthetics alone not enough to justify city-wide billboard prohibition) *and* City of Passaic v. Paterson Bill Posting, Adver-

government to validly restrict signs, pursuant to their police power, has been eliminated.[8]

Despite the courts' generally expansive attitude toward the police power concept, these powers, which are frequently delegated by the state to the local government to facilitate city planning, are not unlimited.[9] They are subordinate to the constitutional and statutory provisions of both the federal and the state governments.[10]

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tising & Sign Painting Co., 62 A. 267, 268 (N.J. 1905) ("Aesthetic considerations . . . matter of luxury and indulgence rather than of necessity, . . . necessity alone . . . justifies the exercise of the police power"). *See generally* De Maria v. Enfield Planning & Zoning Comm'n, 271 A.2d 105, 108-09 (Conn. 1970) (ordinance which failed to specify particularized aesthetic aims found to be insufficient basis for exercise of police power); Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation,* 62 MINN. L. REV. 1, 29-34 (1977) (judicial acceptance of aesthetics as basis for police power regulation of architecture implicates first amendment content suppression and vagueness problems).

8. *See* C. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS § 19.18, at 465 (1980).

9. *See, e.g.,* Tysco Oil Co. v. Railroad Comm'n, 12 F. Supp. 202, 203 (S.D. Tex. 1935) (state may delegate police power to city); Cain v. State, 105 Tex. Crim. 204, 206, 287 S.W. 262, 263 (1926) (where manner of exercising police powers detailed or direct, state action has foreclosed any local option; extent of city's authority to regulate limited by express terms of enabling act); City of Coleman v. Rhone, 222 S.W.2d 646, 648 (Tex. Civ. App.—Eastland 1949, writ ref'd) (since police power inherent in state sovereignty, municipality's authority to regulate pursuant to police power limited by state's grant); *see also* White v. City of Dallas, 517 S.W.2d 344, 347 (Tex. Civ. App.—Dallas 1974, no writ) (home-rule cities' police powers limited by state legislative enactments); Swain v. Board of Adjustment, 433 S.W.2d 727, 735 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.) ("public service business" exception in article 1011c restricts Texas home-rule cities' general authority to zone), *cert. denied,* 396 U.S. 277 (1970) (per curiam); TEX. REV. CIV. STAT. ANN. art. 1011c (Vernon 1963) (limitations imposed on Texas home-rule cities' zoning power); *cf.* City of San Angelo v. Sitas, 143 Tex. 154, 159-60, 183 S.W.2d 417, 419-20 (1944) (Texas home-rule city, empowered by state statute to "control" sign placement and to define and prohibit nuisances, is thus authorized to classify signs maintained contrary to city ordinance provisions as "nuisances"); TEX. REV. CIV. STAT. ANN. art. 1015(11) (Vernon 1963) (local governing body given authority "to define and declare what shall be nuisances . . . and to abate all nuisances" deemed detrimental to "public health or comfort"). *See generally* TEX. REV. CIV. STAT. ANN. art. 1011 (Vernon 1963) (general grant of police powers to local governing body); *id.* art. 1011a (grant of power for zoning); *id.* art. 1175(19) (Vernon Supp. 1982-1983) (home-rule cities given power to define and prohibit nuisances within their boundaries); *id.* art. 1175(24) (Vernon 1963) (authority to regulate billboards legislatively conferred upon home-rule cities); *id.* art. 1175(34) (home-rule cities granted police powers). A city, endowed by its charter with the power to enact ordinances in furtherance of the public health, safety and welfare, is expressly authorized to regulate bill posting, and the size, placement, and construction of billboards and may constitutionally regulate the location and maintenance of billboards. It may not, however, create without an *express* legislative grant the office of bill poster, nor may it assign to him the right to post all advertisements. *See* Ex parte Savage, 63 Tex. Crim. 285, 295-97, 141 S.W. 244, 250-51 (1911).

10. *See, e.g.,* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633-34 (1973) (municipal aircraft noise control ordinance held invalid in face of prior federal gov-

Challengers questioning the constitutional validity of local sign ordinances have traditionally focused on the property-interest aspect of billboards[11] rather than their expressive components because commercial speech was only recently afforded a measure of first amendment protection in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* .[12] In that case the United States Supreme Court found that the public's interest in the free flow of prescription drug pricing information outweighed the state's asserted interests in public health,[13] and the maintenance of high professional standards among its licensed pharmacists.[14] As a result of this holding, a number of other state commercial speech regulations began to be similarly attacked on first amendment grounds.[15]

In spite of all this recent litigation,[16] the Court's ad hoc balancing approach in the free speech area allows for few carryover generalizations

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ernment legislation); National Food Stores, Inc. v. Cefalu, 280 So. 2d 903, 907-08 (La. 1973) (ordinance enacted by municipality pursuant to its police power must conform to state's statutes and constitution); Quaker Oats Co. v. City of New York, 68 N.E.2d 593, 595 (N.Y. 1946) (city ordinance invalid if "conflicts with the Federal law or infringes on its policy"); *see also* Spann v. City of Dallas, 111 Tex. 350, 356, 235 S.W. 513, 515 (1921) (ordinance enacted pursuant to police power subject to fundamental liberties embodied in Bill of Rights); City of Beaumont v. Bond, 546 S.W.2d 407, 409-11 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.) (home-rule city empowered to enact any ordinance not inconsistent with state or federal law).

11. *Cf.* Note, *The Media Win The Billboard Battle, But Metro Wins The War: Metromedia, Inc. v. City of San Diego,* 15 U.C.D. L. REV. 493, 499 (1981) (first amendment challenge to billboard regulations recent phenomenon).

12. 425 U.S. 748, 779 (1976) (Stewart, J., concurring) (commercial speech found not " 'wholly outside the protection of' the First Amendment").

13. *See id.* at 767-70.

14. *See id.* at 766-70; *see also* Bates v. State Bar, 433 U.S. 350, 368-72 (1977) (advertising regarding availability and cost of routine services found not to undermine legal professionalism).

15. *See, e.g.,* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 532 (1980) (content-based regulation of utility bill inserts claimed to violate first amendment); Bates v. State Bar, 433 U.S. 350, 356 (1977) (bar placed on attorney advertising attacked on free speech grounds); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 86 (1977) (ban on posting of real estate signs within township challenged on first amendment grounds).

16. *See, e.g.,* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512-13 (1981) (noncommercial billboard speech afforded higher constitutional protection than commercial billboard speech); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 569-72 (1980) (total ban on public utility's ads promoting consumer use of electricity overturned); Friedman v. Rogers, 440 U.S. 1, 13-16 (1979) (Texas statute which prevented optometrists from practicing under trade name upheld). *See generally* Riggs, *The Burger Court And Individual Rights: Commercial Speech As A Case Study,* 21 SANTA CLARA L. REV. 957, 957-93 (1981) (survey of commercial speech decisions).

concerning the precise protection afforded commercial billboard speech.[17] Even the Court's recent discussion of "the law of billboards"[18] in *Metromedia, Inc v. City of San Diego*[19] has given city planners little practical guidance in formulating constitutionally valid sign ordinances.[20] This comment will thus separately explore the origins, nature, and development of land use restrictions and general first amendment values. It will then combine these two competing concepts in the context of billboard advertising in an attempt to provide a viable framework for drafting billboard restrictions that are constitutionally harmonious with free speech protection.

II. LAND USE REGULATIONS

A. *History and Development*

The right to acquire, own, use, and dispose of property has always been perceived as an innate right.[21] Despite this viewpoint, land ownership in the United States is not considered to be a fundamental right which requires the strictest measure of constitutional protection; rather, it is re-

17. *See* A. COX, FREEDOM OF EXPRESSION 32 (1980) (United States Supreme Court's "particularistic and pragmatic" balancing detrimental to development of coherent first amendment approach).

18. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981).

19. 453 U.S. 490 (1981).

20. *See id.* at 569 (Rehnquist, J., dissenting) (describing *Metromedia* decision as "a virtual Tower of Babel"); Young, *Billboard Advertising Decision Is Indecisive,* 67 A.B.A. J. 1350, 1350 (1981) (*Metromedia* decision termed indecisive). *But see* Crawford, *Control of Signs and Billboards After Metromedia,* 1982 ZONING AND PLANNING LAW HANDBOOK 129, 140 (F. Strom ed. 1982) (*Metromedia,* unlike other recent land-use decisions, provided more answers than questions).

21. *See* Spann v. City of Dallas, 111 Tex. 350, 355, 235 S.W. 513, 514-15 (1921). Property, of which one cannot be dispossessed without due process of law, is more than actual ownership of land or other tangible items. *See id.* at 355, 235 S.W. at 514. The term "property" also encompasses acquired interests in the uninterrupted receipt of government benefits. *See, e.g.,* Goss v. Lopez, 419 U.S. 565, 572-73 (1975) (property interest in public education); Bell v. Burson, 402 U.S. 535, 541-43 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970) (continued receipt of welfare payments). These "new" property interests are not acquired by unilateral expectation, rather an individual reliance upon entitlement must be legitimately induced by clear governmental policy statements. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (property interests protected by fourteenth amendment's due process clause originate from and are defined by constitutionally independent sources, such as state laws); *see also* Perry v. Sindermann, 408 U.S. 593, 601 (1972) (state university professor's property interest in continued employment may be evidenced by tenure provision in written employment contract); Stone v. Kendall, 268 S.W. 759, 761 (Tex. Civ. App.—Waco 1925, no writ) (property right secured by Texas Constitution's "due process of law" clause, section 19 of article 1, subordinate only to police power).

garded as a property interest subject to reasonable limitation.[22] Accordingly, a landowner's use of his property must not be harmful to others.[23]

At common law, when a particular land use was found to interfere substantially with the use or enjoyment of another's private property, it was held to be a civil wrong, and the law of private nuisance was applied.[24] Alternatively, when an owner's conduct on his land was found to affect detrimentally an interest of the crown or one common to the general populace, it was a criminal offense governed by public nuisance law.[25] It was this public nuisance concept which formed the basis of local governments' initial attempts to regulate private land usage.[26] Their success, however, was often stymied by courts, which, in their reluctance to order the abatement of a property use which was not a nuisance per se,[27] frequently ques-

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22. *See* Marsh v. Alabama, 326 U.S. 501, 506 (1946) (land ownership not absolute dominion); General Outdoor Advertising Co. v. Department of Pub. Works, 193 N.E. 799, 815 (Mass. 1935) (constitutional right to own land and determine its use exists; but this individual right may be regulated for common good).

23. *See, e.g.,* Spann v. City of Dallas, 111 Tex. 350, 356, 235 S.W. 513, 515 (1921) (one's use of property must not cause others harm); Rogers v. Scaling, 298 S.W.2d 877, 879 (Tex. Civ. App.—Fort Worth 1957, writ ref'd n.r.e.) (right to use and enjoy own land exists in law, but that usage must not injure others); Iford v. Nickel, 1 S.W.2d 751, 752 (Tex. Civ. App.—San Antonio 1928, no writ) (citizen has right to use own property as he wishes provided such use does not impair corresponding rights of neighboring property owners).

24. *See* Rogers v. Scaling, 298 S.W.2d 877, 880 (Tex. Civ. App.—Fort Worth 1957, writ ref'd n.r.e.) (size and location of on-premise sign on common party wall constituted unreasonable interference with neighbor's commercial rent property).

25. *See, e.g.,* Commonwealth v. South Covington & Cinn. St. Ry., 205 S.W. 581, 583 (Ky. Ct. App. 1918) (concept of "common nuisance" defined); Cain v. State, 105 Tex. Crim. 204, 207, 287 S.W. 262, 263-64 (1926) (ordinance excluding signs from certain areas of city on common nuisance theory found invalid); Stone v. Kendall, 268 S.W. 759, 761 (Tex. Civ. App.—Waco 1925, no writ) (city ordinance which sought to prohibit gravel pit operation within city limits on theory of public nuisance invalidated since no probable harm to public was found); *see also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 86, at 573 n.16 (4th ed. 1971). "Public nuisances may be considered as offenses against the public by either doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires." *Id.* (quoting RUSSELL, CRIMES AND MISDEMEANORS 1691 (8th ed. 1923)).

26. *See, e.g.,* Northwestern Laundry v. City of Des Moines, 239 U.S. 486, 494-95 (1916) (dense smoke emanating from factory declared nuisance); Hadacheck v. Sebastian, 239 U.S. 394, 408-14 (1915) (operation of brickyard curtailed because injurious to public health); Reinman v. City of Little Rock, 237 U.S. 171, 178-80 (1915) (livery stable deemed nuisance to public health was banned).

27. *See, e.g.,* Lawton v. Steele, 152 U.S. 133, 140-41 (1894) (destruction and removal of illegally set fishing nets approved but court reluctant to allow items of greater value to be summarily abated by state as nuisances); Yates v. Milwaukee, 77 U.S. (10 Wall.) 497, 505 (1870) (city council nuisance denomination not conclusive; courts must determine what constitutes public nuisance); Crossman v. City of Galveston, 112 Tex. 303, 314-16, 247 S.W. 810,

tioned the municipality's authority to define such activities as nuisances in fact.[28]

In marked contrast to these earlier rulings, the United States Supreme Court, in 1926, gave general approval to a comprehensive zoning ordinance enacted by the Village Council of Euclid pursuant to the municipality's police power.[29] In reaching its decision the Court first announced that the authority of a municipality to zone, if it existed at all, must stem from its police powers.[30] Next, the Court balanced the landowner's right to continue using his property for its most profitable purpose against the public's interest in homes situated apart from business and industrial buildings.[31] The Court reasoned that limitations on private land use options, such as those advanced in Euclid's comprehensive plan, were warranted by the early twentieth century influx of people into the industrial urban centers and the resulting complexities of congested city life.[32] This analysis led the Court to conclude that: (1) the village had the authority to affirmatively determine how private property may be used irrespective of nuisance and without landowner compensation;[33] (2) this authority stemmed from its

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812 (1923) (city ordinance characterizing all dilapidated buildings as "nuisances" and authorizing their removal did not render buildings nuisances in fact). The burden rested on the city in *Crossman* to plead and prove that a building erected prior to the ordinance's enactment was harmful to the public's safety or welfare. *See id.* at 315, 247 S.W. at 815.

28. *See* Stockwell v. State, 110 Tex. 550, 556, 221 S.W. 932, 934-35 (1921) (state legislature could not properly delegate to agricultural commissioner power to determine whether diseased fruit trees not statutorily defined as "public nuisances" were nuisances in fact).

29. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-89 (1926). The Court noted that the adoption of this particular comprehensive zoning plan was the product of much careful research into the desirability of excluding commercial buildings from residential districts. *See id.* at 393-94.

30. *See id.* at 387; *see also* Mugler v. Kansas, 123 U.S. 623, 660-61 (1887) (legislature has power to determine what action appropriate or necessary to promote general welfare); Munn v. Illinois, 94 U.S. 113, 125 (1876) ("under these [police] powers the government regulates the conduct of its citizens . . ., and the manner in which each shall use his own property"); Stone v. Kendall, 268 S.W. 759, 761 (Tex. Civ. App.—Waco 1925, no writ) (police power grant of authority from people to their elected representatives for purpose of protecting public health, safety, comfort, and welfare).

31. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384-85, 389-95 (1926).

32. *See id.* at 386-88, 392-94; *see also* Gorieb v. Fox, 274 U.S. 603, 608 (1927) (building set-back requirements necessitated by recent influx of people into city); F. ALLEN, ONLY YESTERDAY 5 (Perennial Library ed. 1964) (housing shortage in 1919 caused Americans to vilify landlord); S. LEWIS, BABBITT 151 (Signet Classic ed. 1950) (in 1920, population of at least 68 cities in United States exceeded 100,000). In his fictional portrayal of American life, originally published in 1922, Lewis's title character describes New York, Chicago, and Philadelphia as "three cities, which are notoriously so overgrown that no decent white man, nobody who loves his wife and kiddies and God's good out-o'-doors and likes to shake the hand of his neighbor in greeting, would want to live in them. . . ." *Id.* at 149.

33. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-90 (1926). The challenger in *Euclid* owned a commercial lot which was subsequently zoned residential. As an

police power;[34] and, (3) the enactment of these zoning restrictions was in reasonable furtherance of the general welfare and therefore a valid police power exercise.[35]

In cases decided since *Euclid,* local governments' general authority to regulate land usage pursuant to its police power has not been at issue.[36] Certain provisions of validly enacted ordinances, however, have been found to be unconstitutional either on their face[37] or in their application to a particular set of circumstances.[38]

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unrestricted commercial lot the value of the land was $150 per front foot; after it was zoned exclusively for residential use, the land was worth at best $50 per front foot. *See id.* at 384. This loss in value was not compensible, however, because the regulation of land use pursuant to the police power is not considered to be a deprivation of property without due process of law. *See id.* at 386-87. The fifth amendment states that "[n]o person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V; *see also* Chicago, B. & Q.R.R. v. City of Chicago, 166 U.S. 226, 239 (1897) (fifth amendment made applicable to states through adoption of fourteenth amendment); Munn v. Illinois, 94 U.S. 113, 125 (1876) (fifth amendment due process clause applicable to state action after passage of fourteenth amendment). While both the power of eminent domain and the police power are premised on the principle that private rights are subordinate to the general welfare, eminent domain usually involves a transfer of title to the federal government; by contrast, the police power merely regulates land use with actual land ownership remaining in private hands. *See* C. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS § 19.4, at 449-50 (1980); *see also* Fort Worth & D.C. Ry. v. Ammons, 215 S.W.2d 407, 410-11 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.) (police power subject to stricter limitations than eminent domain due to lack of landowner compensation). All private property is held subject to the government's right of eminent domain. *See* United States v. Lynah, 188 U.S. 445, 465 (1903); *see also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 123-24 (1978) ("taking" of private property for public use is within meaning of fifth amendment; therefore, property owner must be justly compensated for his loss); United States v. Jones, 109 U.S. 513, 518 (1883) (fifth amendment's "just compensation" provision limits government's sovereign right of eminent domain).

34. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926); *cf.* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 437 n.2 (1978) (since only delegated powers granted to United States Congress, national government possesses police powers only within jurisdictional limits of federal property, such as District of Columbia).

35. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 391-95. (1926).

36. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 595-98 (1962) (effective suspension of 30 year sand and gravel business found not to be unreasonable exercise of police power). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 442-43 (1978) (since *Euclid,* extreme deference accorded to zoning power).

37. *See* Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 76-77 (1981) (zoning ordinance which prohibited all live entertainment in city's commercial district found to be impermissible regulation of speech in violation of first amendment).

38. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 502-06 (1977) (zoning ordinance restricting number of related individuals in one household found to be invalid as applied to particular family); Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928) (zoning classifica-

B. *The Presumption of Validity and the Standards of Review*

The validity of a particular land use restriction is usually challenged on both due process[39] and equal protection grounds.[40] As the ordinance is a legislative act, it is presumed to be proper,[41] unless it is found to affect adversely a suspect class[42] or to impinge upon a fundamental right.[43]

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tion determined to be unreasonable as applied to challenger's land after review conducted of individualized circumstances).

39. *See* City of Austin v. Nelson, 45 S.W.2d 692, 696-97 (Tex. Civ. App.—Austin 1931, no writ) (due process is met if police power exercised in furtherance of legitimate purpose within its scope).

40. *See* McLaughlin v. Florida, 379 U.S. 184, 191 (1964). The Court in *McLaughlin* stated that "[j]udicial inquiry under Equal Protection Clause, . . . does not end with a showing of equal application among members of the class. . . . The court must . . . [also] determine . . . whether the classifications drawn in a statute are reasonable in light of its purpose." *Id.* at 191; *see also* Thomas Cusak Co. v. City of Chicago, 242 U.S. 526, 529-30 (1917) (distinctions in classifying billboards apart from buildings and fences reasonable in interest of health and safety).

41. *See* Barrington v. Cokinos, 161 Tex. 136, 147, 338 S.W.2d 133, 141 (1960) (power to initially determine whether ordinance necessary to promote public welfare resides in law-making body); *cf.* Trewitt v. City of Dallas, 242 S.W. 1073, 1079 (Tex. Civ. App.—Dallas 1922, writ dism'd) (recital in preamble of legislation sufficient to establish necessity for ordinance creating plumbers' licensing board).

42. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) ("Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny' ") (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)); Yick Wo v. Hopkins, 118 U.S. 356, 368-70 (1886) (alienage a suspect class). Fourteenth amendment due process and equal protection challenges directed at state regulations which affect a suspect class or a fundamental right are strictly scrutinized by the Court. In such a case, the government has the burden of proving that their classification scheme is *necessary* to promote a *compelling* state interest and that there is no less restrictive alternative. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944); *see also* McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (racial classification must be "necessary and not merely rationally related to the accomplishment of a permissible state policy."); *cf.* Williamson v. Lee Optical, 348 U.S. 483, 489-91 (1955). Where no fundamental right or suspect class is involved, the Court will use a rational basis analysis when presented with a fourteenth amendment challenge. This is a more deferential standard of review, wherein the regulation is presumed constitutional, and the burden is on the challenger to demonstrate that the restriction is not reasonably related to a legitimate governmental interest rendering it arbitrary and capricious and thus unconstitutional. *See id.* at 489-91.

43. *See, e.g.,* Roe v. Wade, 410 U.S. 113, 153-54 (1973) (woman's right to abortion held "fundamental", but not unqualified right); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (right of marital privacy recognized as fundamental); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) ("right of sufferage . . . fundamental matter in a free and democractic society . . . [thus] any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized"). In determining which rights are fundamental, the Court looks to the "traditions and conscience of our people." Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)); *see also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (fundamental right is right either implicitly or explicitly guaranteed by Constitution).

Therefore, the burden is on the person attacking the regulation to establish that the restriction as it affects his property is unreasonable and arbitrary.[44] A challenger must conclusively prove that, at the time such regulation was enacted,[45] no facts tending to support the action of the local government existed.[46] The court then determines whether the challenger has presented sufficient evidence[47] to show no reasonable basis for the ordinance could have existed at the time of enactment.[48]

C. *Permissible Police Power Purposes*

The police power by definition encompasses all governmental action in furtherance of the common good.[49] As the public welfare is not a static concept, these powers to legislate in the public interest are necessarily

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44. *See* Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928); Trombetta v. Mayor of Atlantic City, 436 A.2d 1349, 1360 (N.J. Super. Ct. Law Div. 1981) (all police power legislation limited by fourteenth amendment requirement that regulation not be unreasonable, arbitrary, or capricious; and means selected must have real and substantial relation to identified objectives).

45. *See* City of Corpus Christi v. Jones, 144 S.W.2d 388, 399 (Tex. Civ. App.—San Antonio 1940, writ dism'd judgmt cor.) (court looks at conditions as they existed on date of adoption when determining reasonableness of ordinance).

46. *See* Bernard v. City of Bedford, 593 S.W.2d 809, 811 (Tex. Civ. App.—Fort Worth 1980, no writ) (burden on challenger to show no issuable facts justifying the city's exercise of discretion); Swain v. Board of Adjustment, 433 S.W.2d 727, 730 (Tex. Civ. App.—Dallas 1968, no writ). The court in *Swain* held that "[i]f the evidence before the court, as a whole, is such that reasonable minds could have reached the conclusion that the board must have reached in order to justify its action, then the order must be sustained." *See id.* at 730; *cf.* Connor v. City of Univ. Park, 142 S.W.2d 706, 711 (Tex. Civ. App.—Dallas 1940, writ dism'd) (police power must be construed broadly due to complexity of urban life).

47. *See* City of Waxahachie v. Watkins, 154 Tex. 206, 212-13, 275 S.W.2d 477, 481 (1955) (where law, not facts, at issue, court must look to sufficiency of challenger's complaint); Albert v. City of Addison, 561 S.W.2d 576, 577 (Tex. Civ. App.—Dallas) (court must determine if challenger is entitled to prevail as "a matter of law"), *rev'd and remanded on other grounds,* 566 S.W.2d 298 (1978).

48. *See, e.g.,* City of Univ. Park v. Benners, 485 S.W.2d 773, 778-79 (Tex. 1972) (challenger must present conclusive evidence that ordinance is arbitrary enactment), *appeal dismissed,* 411 U.S. 901 (1973); City of Houston v. Johnny Frank's Auto Parts, 480 S.W.2d 774, 779 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.) (challenger must show ordinance is wholly unreasonable); City of Dallas v. Meserole Bros., 164 S.W.2d 564, 569 (Tex. Civ. App.—Dallas 1942, writ ref'd) (ordinance's challenger must prove no rational relationship between ordinance and permissible police power purpose existed at time of enactment).

49. *See* Spann v. City of Dallas, 111 Tex. 350, 355, 235 S.W. 513, 515 (1921) (police power is grant of authority from people to their agents to secure general welfare). Through use of its police powers a "government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good." Munn v. Illinois, 94 U.S. 113, 125 (1876).

broad in scope.[50]

While land use restrictions advancing the public health, safety, or morals have historically been upheld as valid exercises of the police power,[51] courts were at first reluctant to expand the concept of "general welfare" beyond these three traditional goals.[52] Gradually, however, they were persuaded to acknowledge that economic and aesthetic concerns were also important public interests.[53] Despite this judicial notice, land use restrictions based solely on aesthetic concerns have only recently gained the approval of a majority of the courts.[54]

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50. *See* Munn v. Illinois, 94 U.S. 113, 132-34 (1876) (elastic nature of police power to accommodate changed conditions); City of Corpus Christi v. Jones, 144 S.W.2d 388, 399 (Tex. Civ. App.—San Antonio 1940, writ dism'd judgmt cor.) (zoning power is prospective power; allows for future planning). *But see* Spann v. City of Dallas, 111 Tex. 350, 357, 235 S.W. 513, 515 (1921) (exercise of police power only justified by public necessity).

51. *See, e.g.,* Village of Belle Terre v. Boraas, 416 U.S. 1, 7-10 (1974) (ordinance which limited number of unrelated people who could live in one household found to affect no fundamental right of association; thus regulation presumed valid); Berman v. Parker, 348 U.S. 26, 32 (1954) (judiciary's role in reviewing legislative exercise of police power very limited); Gorieb v. Fox, 274 U.S. 603, 610 (1927) (building set-back restrictions upheld as not clearly unreasonable).

52. *See* 2 R. ANDERSON, AMERICAN LAW OF ZONING § 15.82, at 756-57 (2d ed. 1976); *see also* Welch v. Swasey, 214 U.S. 91, 107 (1909) (regulation limiting building height could not be sustained on aesthetic grounds alone); City of Texarkana v. Mabry, 94 S.W.2d 871, 874-75 (Tex. Civ. App.—Texarkana 1936, writ dism'd) (ordinance, justified solely by aesthetics, which prohibited erection of gas stations held invalid).

53. *See* Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation,* 48 UMKC L. REV. 125, 131-44 (1980) (listing of states which accept aesthetics alone as legitimate basis for police power action). *But see, e.g.,* Spann v. City of Dallas, 111 Tex. 350, 358, 235 S.W. 513, 516-17 (1921) (not Texas law "that a man may be deprived of the lawful use of his property because his tastes . . . not in accord with those of his neighbors"); Niday v. City of Bellaire, 251 S.W.2d 747, 750-51 (Tex. Civ. App.—Galveston 1952, writ ref'd n.r.e.) (aesthetics alone insufficient basis for exercise of police power); City of Texarkana v. Mabry, 94 S.W.2d 871, 875 (Tex. Civ. App.—Texarkana 1936, writ dism'd) (denial of permit to erect gas station found to be invalid where city's action motivated solely by aesthetic concerns).

54. *See, e.g.,* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510 (1981) (aesthetics alone recognized as substantial governmental interest); Housing & Redev. Auth. v. Schapiro, 210 N.W.2d 211, 213-14 (Minn. 1973) (slum clearance valid exercise of police power even though condemned housing not health hazard); Cromwell v. Ferrier, 225 N.E.2d 749, 753, 279 N.Y.S.2d 22, 27 (Ct. App. 1967) (aesthetics alone sufficient to sustain exercise of police power). The courts' general reluctance to recognize aesthetics alone as a permissible police power objective stems in part from the subjective nature of aesthetics: first, in terms of what is beauty; and then, in determining at what price beauty. *See* Note, *City-Wide Prohibition of Billboards: Police Power and the Freedom of Speech,* 30 HASTINGS L.J. 1597, 1602 (1979); *cf.* Crossman v. City of Galveston, 112 Tex. 303, 310, 247 S.W. 810, 812 (1923) (unsightliness alone does not make building nuisance).

III. FIRST AMENDMENT

A. *In General*

The free interchange of ideas, envisioned by the absolutist language of the first amendment,[55] lies at the core of western democratic theory.[56] This first amendment guarantee was initially enacted in order to shield the expression of unfavorable political opinions from federal government interference.[57] With the adoption of the fourteenth amendment in 1868,[58] state action was likewise limited in accordance with free speech values.[59]

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55. *See* U.S. CONST. amend. I. The first amendment states that "Congress shall make no law . . . abridging the freedom of speech. . . ." *Id.; see also* Konigsberg v. State Bar, 366 U.S. 36, 66 (1961) (Black, J., dissenting) (freedom of speech absolute if pure speech, except when pure speech in form of libel, obscenity, or "fighting words").

56. *See, e.g.,* Palko v. Connecticut, 302 U.S. 319, 327 (1937) (free speech described as "the matrix, the indispensible condition, of nearly every other form of freedom"); Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (freedom of speech is end in itself, safety valve for frustration, and means for finding truth through competition of ideas); Abrams v. United States, 205 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("marketplace of ideas" reveals the truth); *see also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970) (discussion of free speech functions in democratic society).

57. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 248-51 (1833) (first amendment rights only protected against federal government encroachment); *cf.* New York Times v. Sullivan, 376 U.S. 254, 273-76 (1964) (Alien and Sedition Act of 1798 which gave federal government authority to censor public criticism of officials' conduct, first focused nation's attention on free speech amendment's core concept of content neutrality). It is this doctrine of content neutrality which forms the basis of all first amendment review. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (government regulations should not produce "chilling" or "freezing" effects on free expression); *see also* BeVier, *The First Amendment and Political Speech: An Inquiry Into The Substance and Limits of Principle,* 30 STAN. L. REV. 299, 302 (1978) (doctrine of content neutrality which protects political speech "is derived from the constitutional structure of democratic government"); *cf.* Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 27-31 (1971) (first amendment protection should be limited to political speech).

58. *See* U.S. CONST. amend. XIV, § 1. The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

59. *See* Stromberg v. California, 283 U.S. 359, 368 (1931) ("It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech."); Fiske v. Kansas, 274 U.S. 380, 385-87 (1927) (state law which abridged first amendment speech rights in violation of fourteenth amendment's due process clause held invalid); Gitlow v. New York, 268 U.S. 652, 666 (1925) (first amendment free speech rights presumed applicable to states through fourteenth amendment's due process clause). Later decisions have similarly made the other rights, shielded from federal government abridgement by the first amendment, safe from state action by incorporating these rights into the fourteenth amendment due process clause. *See, e.g.,* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (freedom of religion); DeJonge v. Oregon, 299 U.S. 353, 365 (1937) (right of peaceful assembly); Near v. Minnesota, 283 U.S. 697, 707 (1931) (freedom of the press).

As the scope of the first amendment review has been expanded to embrace state, as well as federal regulation of speech, the topics of protected speech have similarly been extended beyond the subject of political debate.[60] Further, first amendment speech principles have been applied to various mediums of expression, apart from the spoken word.[61]

Despite its express language, evolution, expansion, and importance in a democratic society, the first amendment guarantee of freedom of expression is not an absolute.[62] Only a substantial governmental interest, however, will justify placing restraints on protected speech.[63] This requirement of substantiality is in accordance with the first amendment's primary concern that government should not be able to dictate which topics are suitable for public discussion.[64] Consequently, any governmental

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60. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (commercial speech granted first amendment protection).

61. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (billboards); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 66-67 (1981) (live nude dancing); Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (per curiam) (contribution of money is speech); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1975) (live drama); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969) (picketing as expressive conduct); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 514 (1969) (black armbands deemed form of expression); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (motion pictures are protected speech); Kovacs v. Cooper, 336 U.S. 77, 80-81 (1949) (soundtracks); Jamison v. Texas, 318 U.S. 413, 417 (1943) (distribution of handbills); Cox v. New Hampshire, 312 U.S. 569, 574-76 (1941) (parades).

62. *See* Dennis v. United States, 341 U.S. 494, 509-17 (1951) (clear and present danger may require infringement on first amendment speech guarantee); Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (function of free speech in democracy is to challenge and provoke, thus absent clear and present danger it is protected from censorship).

63. *Compare* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981) (traffic safety and aesthetics substantial state interests) *and* Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 94-95 (1977) (furtherance of racially integrated communities found to be "important governmental objective") *with* Carey v. Population Servs., Int'l, 431 U.S. 678, 701-02 (1977) (fear of legitimizing pre-marital sex held not to be substantial interest) *and* Schneider v. New Jersey, 308 U.S. 147, 162 (1939) (clean streets not sufficient governmental interest to justify anti-leafletting ordinance).

64. *See* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (primary meaning of first amendment is "that government has no power to restrict expression because of its content"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (purpose of first amendment is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail"); *cf.* Cox v. Louisiana, 379 U.S. 536, 552 (1965) (doctrine of content neutrality provides opportunity for vigorous political debate). *But cf.* Erzoznik v. City of Jacksonville, 422 U.S. 205, 209-10 (1975) (substantial invasion of privacy must be established by captive audience before government may constitutionally prohibit offensive speech); Dennis v. United States, 341 U.S. 494, 507-08 (1951) (clear and present danger will justify government's suppression of speech on basis of content); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (government censorship of ideas permitted in emergency).

regulation of expression is presumed to be unconstitutional.[65]

When a free speech violation is claimed, the court first determines whether the particular expression involved is "speech" within the meaning of the first amendment.[66] If protected speech is implicated, the court will then evaluate the strength of the asserted governmental interest,[67] balancing the necessity justifying the restriction against the first amendment right.[68] A determination will also be made as to whether this is a direct regulation of content,[69] or merely a time, place, or manner restriction;[70] and, whether the goal sought to be achieved through regulation could be accomplished by some less restrictive means.[71]

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65. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562-70 (1976); New York Times v. Sullivan, 376 U.S. 254, 269-71 (1964); *see also* Schneider v. New Jersey, 308 U.S. 147, 161 (1939). "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Id.* at 161. *Contra* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975) (prior restraint on speech not unconstitutional per se).

66. *Compare* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761-62 (1976) (commercial speech not wholly outside first amendment) *with* Roth v. United States, 354 U.S. 476, 481-85 (1957) (obscenity afforded no first amendment protection) *and* New Jersey v. Finance Am. Corp., 440 A.2d 28, 31-32 (N.J. Super. Ct. App. Div. 1981) (phone calls made with intent to harass enjoy no first amendment protection).

67. *See* NAACP v. Button, 371 U.S. 415, 439 (1963) (state's asserted interest in controlling "practices of barratry, maintenance and champerty" found not compelling).

68. *See* Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 91 (1977) (quoting Bigelow v. Virginia, 421 U.S. 809, 826 (1975)) ("[r]egardless of the particular label" put upon speech, when first amendment interests at stake Court must balance free speech interest against asserted governmental interest).

69. *See, e.g.,* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) (content-based restrictions have only been upheld "when the speaker intrudes on the privacy of the home" and when in "captive audience" situation); Police Dep't v. Mosley, 408 U.S. 92, 102 (1972) (content-based restriction on picketing near school struck down); Cantwell v. Connecticut, 310 U.S. 296, 307-11 (1940) (breach of peace conviction based on playing of recording of religious tracts on public street invalid content-based restriction on free speech).

70. *See* Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972) (three-step test articulated for determining if ordinance which restricts speech in public place is reasonable time, place, and manner regulation). In gauging the reasonableness of an asserted time, place, and manner restriction, the court first determines if the speech activity being regulated is compatible with the forum's customary use. The court then considers whether a legitimate governmental interest justifying the regulation has been advanced, and whether the ordinance has been narrowly drawn to advance that interest. *See id.* at 116-17; *see also* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647-55 (1981) (restriction on location of solicitors at state fair upheld as valid place and manner regulation); Kovacs v. Cooper, 336 U.S. 77, 85 (1949) (regulation of soundtracks' amplification upheld as manner restriction).

71. *See, e.g.,* Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633-34 (1980) (Court's task not only to assess substantiality of governmental interest asserted

B. *Evolution of the Commercial Speech Doctrine*

Purely commercial speech[72] was initially considered to be outside the scope of first amendment protection.[73] The United States Supreme Court's position in *Valentine v. Chrestensen,*[74] while not directly overruled for more than thirty years,[75] became qualified by later decisions which established protection for noncommercial speech elements arising in a commercial setting.[76]

These equivocations came to a halt in 1976, when the Court held that

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but also to determine if less restrictive regulation possible); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-18 (1975) (least restrictive means essential when regulation affects free speech); Police Dep't v. Mosley, 408 U.S. 92, 101 (1972) (Equal Protection Clause demands "that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives").

72. *See, e.g.,* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980) (commercial speech defined as "expression related solely to the economic interests of the speaker and its audience"); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)) ("speech which does 'no more than propose a commercial transaction' "); Scanlon, *Freedom of Expression And Categories of Expression,* 40 U. PITT. L. REV. 519, 540-41 (1979) (commercial speech is "expression by a participant in the market for the purpose of attracting buyers or sellers").

73. *Compare* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (purely commercial speech devoid of first amendment value) *with* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976) (commercial speech while not equated with noncommercial speech is within first amendment protection); *see also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) (basis of commercial speech's first amendment protection is its informational value).

74. 316 U.S. 52 (1942). The promotor in *Chrestensen* was convicted of distributing advertising leaflets in the streets, in contravention of a city sanitation ordinance. In upholding his conviction, the Court distinguished between protected speech which the city could regulate but not prohibit, and purely commercial speech which could be totally prohibited. *See id.* at 54; *cf.* Redish, *The First Amendment in The Marketplace: Commercial Speech and The Values of Free Expression,* 39 GEO. WASH. L. REV. 429, 450 (1971) (*Chrestensen* Court "without citing precedent, historical evidence, or policy considerations, . . . effectively read commercial speech out of the first amendment"). A political protest, which had been added onto the reverse side of defendant's handbill, in an attempt to circumvent the ordinance, had no effect on the Court's characterization of the leaflet as purely commercial speech, because the "primary purpose" in making the political statement had been commercial. *See* Valentine v. Chrestensen, 316 U.S. 52, 55 (1942) (primary purpose test).

75. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763, 773 (1976) (consumers held to have protected speech interest in prescription drug price advertising); *see also* Bigelow v. Virginia, 421 U.S. 809, 819-20 (1975) (*Chrestensen* limited to its facts).

76. *See, e.g.,* New York Times v. Sullivan, 376 U.S. 254, 266 (1964) (paid political ad in newspaper not commercial advertisement in *Chrestensen* sense); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (movies made to distribute for profit protected speech); Murdock v. Pennsylvania, 319 U.S. 105, 110-12 (1943) (sale of religious books incidental to right of Jehovah's Witness to disseminate beliefs); *cf.* Pittsburgh Press Co. v. Pittsburgh

truthful commercial speech[77] concerning lawful activities[78] was not outside the scope of first amendment protection.[79] As with other protected speech, the state retained its power to regulate the time, place, or manner of commercial speech.[80] Such restrictions, however, have to be neutral in content, advance a significant governmental interest, and leave open other avenues of communication.[81]

In *Linmark Associates v. Township of Willingboro,*[82] the Court continued to employ the same analysis for evaluating a governmental restriction on

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Comm'n on Human Relations, 413 U.S. 376, 388 (1973) ("exchange of information is as important in the commercial realm as in any other").

77. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-73 (1976); *see also* Bates v. State Bar, 433 U.S. 350, 383 (1977) (complete prohibition of truthful newspaper advertising invalid). *Compare* New York Times Co. v. Sullivan, 376 U.S. 254, 278-80 (1964) (higher standard of proof required for public official to show libel due to "chilling effect" tending to damage political expression) *with* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (false and misleading commercial speech excluded from all first amendment protection).

78. *See* Bigelow v. Virginia, 421 U.S. 809, 819-20 (1975) (advertising protected activity); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973) (commercial speech promoting unlawful activity not protected).

79. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976). *But see* Bates v. State Bar, 433 U.S. 350, 404-05 (1977) (Rehnquist, J., dissenting) (affording advertising free speech protection demeans first amendment); A. COX, FREEDOM OF EXPRESSION 33 (1980) ("philosophical and political foundations of first amendment doctrine scarcely extend to an offer to enter into a private commercial transaction"); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment,* 65 VA. L. REV. 1, 5-6 (1979) (since commercial speech does not advance first amendment values of "effective self-government" and "opportunity for self-fulfillment," *Virginia Pharmacy* wrongly decided). "[W]e have not held that [commercial speech] is undifferentiable from other [speech] forms. There are commonsense differences. . . ." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976); *see* Ohralik v. Ohio State Bar, 436 U.S. 447, 456 (1978) (commercial speech occupies "subordinate position in the scale of first amendment values").

80. *Compare* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647-55 (1981) (place and manner restriction on commercial speech affirmed) *and* Young v. American Mini Theatres, 427 U.S. 50, 79-84 (1976) (time, place, or manner restriction upheld in commercial speech setting) *with* Adderly v. Florida, 385 U.S. 39, 47-48 (1966) (application of time, place, or manner test in noncommercial context) *and* Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941) (municipality's parade licensing provisions upheld as time, place, and manner restriction on public's use of streets for religious rallies).

81. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

82. 431 U.S. 85 (1977). The ordinance in *Linmark* prohibited the posting of "For Sale" signs on front lawns in the township. The local government claimed this was merely a time, place, or manner restriction. *See id.* at 93-94. The Court, however, concluded that the regulation was content-based. Further, the Court determined that the township had failed to establish that this ordinance was necessary to insure that Willingboro remained a racially integrated community. *See id.* at 94-96.

commercial speech that it had used in previous noncommercial speech cases despite commercial speech's less favored status.[83] Finally, the fear of noncommercial speech dilution[84] forced the majority in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[85] to articulate a separate standard of review for commercial speech.[86] Conversely, two of the concurring justices in *Central Hudson* were convinced that all protected speech would be devalued if commercial speech became isolated from noncommercial speech analysis.[87]

IV. BILLBOARD REGULATIONS AND THE FIRST AMENDMENT

A. *Before Metromedia, Inc. v. City of San Diego*

Evaluation of any billboard ordinance is complicated by the unique properties of this form of expression.[88] Billboards possess a dual nature,

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83. *Compare id.* at 95 (record did not establish ban on posting of "For Sale" signs was necessary in attaining goal of racially integrated community) *with* Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (state must show compelling interest when it intrudes significantly upon fundamental liberty) *and* NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449, 466 (1958) (Alabama failed to demonstrate disclosure of association's membership records was necessary). The Court in *Linmark* seemingly suggests that commercial speech which is not misleading or false would be entitled to the same measure of constitutional protection as noncommercial speech. *See* Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 97 (1977); *see also* Riggs, *The Burger Court & Individual Rights: Commercial Speech As A Case Study,* 21 SANTA CLARA L. REV. 957, 977 (1981).

84. *See* Ohralik v. Ohio State Bar, 436 U.S. 447, 456 (1978).

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expresion.

Id. at 456.

85. 447 U.S. 557 (1980).

86. *See id.* at 563-66. To be protected commercial speech, the speech "must concern lawful activity and not be misleading." *Id.* at 566. Further, any regulation upon commercial speech content must be justified by a *substantial* governmental interest. *See id.* at 566. The regulation must *directly advance* the asserted governmental interest and be no more extensive than necessary to achieve that interest. *See id.* at 566.

87. *See id.* at 572 (Brennan, J., concurring). "No differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information." *Id.* at 578 (Blackmun, J., concurring).

88. *See, e.g.,* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501-02 (1981) (billboards are structures which communicate ideas); General Outdoor Advertising Co. v. Department of Pub. Works, 193 N.E. 799, 808 (Mass. 1935) (billboards in "class by themselves"); United Advertising Corp. v. Borough of Raritan, 93 A.2d 362, 365 (N.J. 1952)

the medium and the message.[89] The physical structure of the sign is not such expression as is protected by the first amendment and therefore the size, height, degree of illumination, and location of the billboard may be reasonably regulated by the state acting pursuant to its police powers.[90] The sign's message, on the other hand, is speech and thus is protected from government action by the first amendment.[91] Further, the precise degree of first amendment protection which is afforded a particular message is a function of the character of the speech involved.[92] If the sign's message concerns a political, cultural, social, or religious topic, maximum first amendment protection is provided.[93] If, however, the idea communicated relates "solely to the economic interests" of the speaker and his audience,[94] the expression is deemed to be commercial and as such is accorded a lesser measure of first amendment protection.[95] Additionally, the degree of pro-

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(billboard's unique nature and nuisance potential justify city's separate classification for regulatory purposes); *see also* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (each mode of communication raises special first amendment inquiries); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) (each mode of expression presents unique problems requiring first amendment assessment by standards particularly tailored to that mode of expression); *cf.* Cohen v. California, 403 U.S. 15, 25-26 (1971) (medium chosen by speaker is component of expression).

89. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502 (1981) (billboard is structure whose function is to display messages). *But see* John Donnelly & Sons v. Campbell, 639 F.2d 6, 16 (1st Cir. 1980) (Pettine, J., concurring) (practically speaking, billboards have no purpose or meaning beyond their "potential for speech"), *aff'd,* 453 U.S. 916 (1981).

90. *See, e.g.,* Sign Supplies, Inc. v. McConn, 517 F. Supp. 778, 785 (S.D. Tex. 1980) (advertising sign's structure subject to reasonable regulation); Berg Agency v. Township of Maplewood, 395 A.2d 261, 266 (N.J. Super. Ct. Law Div. 1978) (size limitations, set-back requirements, and provisions as to duration of display in municipal sign ordinance found reasonable); Westfield Motor Sales v. Town of Westfield, 324 A.2d 113, 123-24 (N.J. Super. Ct. Law Div. 1974) (ordinance regulating size of on-premise signs upheld).

91. *See, e.g.,* John Donnelly & Sons v. Campbell, 639 F.2d 6, 16 (1st Cir. 1980) (Pettine, J., concurring) ("billboards are expression incarnate"), *aff'd,* 453 U.S. 916 (1981); Williams v. City of Denver, 622 P.2d 542, 546 (Colo. 1981) (en banc) (billboard signs are mode of communication); Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs, 575 P.2d 835, 839 (Colo. 1978) (en banc) ("signs are by their very nature a means of expression"), *appeal dismissed,* 439 U.S. 809 (1978).

92. *See* State v. Miller, 416 A.2d 821, 828 (N.J. 1980) (restrictions on signs may distinguish between political and commercial speech).

93. *Accord* New York Times v. Sullivan, 376 U.S. 254, 269-70 (1964).

94. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980); *see also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) (first amendment protection afforded commercial speech due to advertising's informational value); *cf.* Bates v. State Bar, 433 U.S. 350, 374 (1977) (first amendment presumes that any accurate information is better than none at all); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) ("people will perceive their own best interests if only they are well enough informed").

95. *See* Ohralik v. Ohio State Bar, 436 U.S. 447, 456 (1978) (commercial speech

tection given a particular commercial speech message is dependent upon both the nature of the expression[96] and the relative strength of the governmental interest which prompted its regulation.[97]

Regardless of the degree of first amendment protection involved, reasonable time, place, and manner restrictions on billboard speech are permissible.[98] These ordinances, however, must be content-neutral, serve a significant governmental interest, and leave open alternative avenues for communication.[99] The power of the government to regulate signs on the basis of their messages or subject matter is more circumscribed.[100]

Regulations based on the content of noncommercial messages must be in direct furtherance of a compelling state interest with no less restrictive means available.[101] Alternately, content-based restrictions on commercial

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"subordinate" to noncommercial expression); New Jersey v. Miller, 416 A.2d 821, 826 n.5 (N.J. 1980) ("commonsense distinctions" between commercial and noncommercial speech require different levels of constitutional protection).

96. *See, e.g.,* Friedman v. Rogers, 440 U.S. 1, 13, 15-16 (1979) (misleading commercial information may be prohibited); Ohralik v. Ohio State Bar, 436 U.S. 447, 464-65 (1978) (ban on misleading advertising permissible); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973) (commercial message concerning illegal activity afforded no first amendment protection). The first amendment, however, does not generally permit content-based regulation. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537-40 (1980).

97. *See* Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980); *see also* John Donnelly & Sons v. Campbell, 639 F.2d 6, 12 (1st Cir. 1980) (statewide ban of off-premise commercial highway signs advances related governmental interests of aesthetics and tourism), *aff'd,* 453 U.S. 916 (1981).

98. *See* State v. Lotze, 593 P.2d 811, 814 (Wash.) (en banc), *appeal dismissed,* 444 U.S. 921 (1979).

99. *See, e.g.,* Sign Supplies, Inc. v. McConn, 517 F. Supp. 778, 785 (S.D. Tex. 1980) (restrictions pertaining to time, place, and manner of sign advertising found acceptable if for "valid purpose" and "if alternative channels of communication are left open"); Williams v. City of Denver, 622 P.2d 542, 546 (Colo. 1981) (en banc) (to protect citizen's privacy, city may enact reasonable time, place, and manner regulations "irrespective of content"); New Jersey v. Miller, 416 A.2d 821, 828-29 (N.J. 1980) (time, place, and manner restrictions must further significant governmental interest and must be in accordance with existing zoning ordinances).

100. *See* Police Dep't. v. Mosley, 408 U.S. 92, 95-96 (1972); Berg Agency v. Township of Maplewood, 395 A.2d 261, 266-67 (N.J. Super. Ct. Law Div. 1978) (content-based regulations of speech rarely upheld).

101. *Accord* Dennis v. United States, 341 U.S. 494, 507-08 (1951) (clear and present danger required to uphold content-based regulations); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (restriction on first amendment must be necessary "to prevent a grave and immediate danger to interests the State may lawfully protect"). Where no clear and present danger exists, the state's asserted interest in regulating the content of noncommercial speech is rarely found to be compelling. *See* Mitchell Family Planning, Inc. v. City of Royal Oak, 335 F. Supp. 738, 742 (E.D. Mich. 1972) (telephone numbers on billboard which provided public with access to abortion information did not create imminent danger

speech must meet the four-part test advanced in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[102]

Commercial speech which promotes an illegal activity or which is misleading receives no first amendment protection under the *Central Hudson* analysis.[103] Content-based restrictions on all other types of commercial speech must directly further a substantial governmental interest while reaching no farther than necessary to accomplish that purpose in order to be upheld.[104] Finally, the presumption of validity that traditionally attaches to a local government's exercise of its police power carries little if any weight where the regulation infringes on the rights of expression protected under the first amendment.[105]

Prior to 1981, the United States Supreme Court summarily affirmed four

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of illegal abortions); Farrell v. Township of Teaneck, 315 A.2d 424, 426-27 (N.J. Super. Ct. Law Div. 1974) (aesthetics alone found not to be compelling reason to justify residential prohibition on political signs). *But see* Greer v. Spock, 424 U.S. 824, 838-40 (1976) (regulation which prohibited political speech on military post found consistent with content neutrality doctrine); Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (ordinance prohibiting display of campaign signs on city buses upheld on theory law advanced concept of government content neutrality). Even where the state's interest is sufficiently strong, the ordinance will fail if the regulation has not been closely tailored to advance the interest asserted. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (quoting NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 307-08 (1964)). "[E]ven though the governmental purpose be legitimate and substantial that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 307-08 (1964); *see also* Shelton v. Tucker, 364 U.S. 479, 488 (1960) (where state seeks to regulate speech on basis of content, least drastic means of achieving asserted purpose must be used); *cf.* State *ex rel.* Dep't of Transp. v. Pile, 603 P.2d 337, 347 (Okla. 1979) (burden of persuasion on state to demonstrate ordinance narrowly drawn to advance compelling interest).

102. 447 U.S. 557, 564 (1980). This test is similiar to the test which determines whether a regulation of a particular course of conduct is constitutionally permissible. *Compare* United States v. O'Brien, 391 U.S. 367, 377 (1968) ("A government regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.") *with* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980) (ordinance which regulates on basis of commercial speech content must directly advance substantial governmental interest and be no more extensive than necessary to serve that interest).

103. *See* Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557, 563-64 (1980).

104. *See id.* at 564.

105. *See* Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 77 (1981) (Blackmun, J., concurring); Erznoznik v. City of Jacksonville, 422 U.S. 205, 212-15 (1975) (ordinance enacted pursuant to police power loses presumption of validity when regulation based on content of expression).

decisions upholding legislation restricting billboard speech.[106] It was not until *Metromedia, Inc. v. City of San Diego,*[107] however, that the Court directly addressed the problems posed by a police power regulation of billboard speech.[108]

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

In 1972, the City of San Diego enacted a sign ordinance whose stated purposes were to eliminate traffic distractions and to promote the city's appearance.[109] By its terms, this provision set up a city-wide ban on all outdoor advertising display signs[110] except those billboards which came under the ordinance's two general exceptions: on-site signs,[111] and signs which fell within one of twelve particularized categories.[112] Outdoor advertising companies that owned signs in San Diego brought suit in California superior court to enjoin the enforcement of the ordinance.[113]

The trial court found that the ordinance was an unconstitutional exercise of the city's police powers and impermissibly infringed on rights protected by the first amendment.[114] The California court of appeals determined that the ordinance was outside the city's police powers and did not discuss the first amendment issues.[115] The California Supreme Court reversed, holding that the enactment was proper and within the scope of San Diego's police powers.[116] This court also rejected the billboard companies' first amendment claims in reliance on certain summary judgments

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106. *See* Lotze v. Washington, 444 U.S. 921 (1979); Newman Signs, Inc. v. Hjelle, 440 U.S. 901 (1979); Suffolk Outdoor Advertising Co. v. Hulse, 439 U.S. 808 (1978); Markham Advertising Co. v. Washington, 393 U.S. 316 (1969); *cf.* Coastal States Mktg. v. Hunt, 694 F.2d 1358, 1371 (5th Cir. 1983) (summary affirmance implies approval of result alone); Anderson v. Celebrezze, 664 F.2d 554, 558 (6th Cir. 1981) (summary disposition reaches only precise issues presented).

107. 453 U.S. 490 (1981).

108. *See id.* at 556 (Burger, C.J., dissenting).

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

110. *See id.* at 494.

111. *See id.* at 494. An on-site sign was defined as one which "directs attention to a product, service or activity, event, person, institution or business." *Id.* at 494.

112. *See id.* at 495 n.3. Signs exempted from the ordinance's off-premise ban included: bus stop bench signs; government signs; campaign signs; historical society markers; "For Sale" signs; and time, temperature and news signs. *See id.* at 495 n.3.

113. *See id.* at 497.

114. *See id.* at 497.

115. *See* Metromedia, Inc. v. City of San Diego, 136 Cal. Rptr. 453, 460-61 (Cal. Ct. App. 1977), *vacated and rev'd,* 592 P.2d 728, 154 Cal. Rptr. 212 (Cal. 1979) (en banc), *rev'd,* 610 P.2d 407, 164 Cal. Rptr. 510 (Cal. 1980), *rev'd and remanded,* 453 U.S. 490 (1981).

116. *See* Metromedia, Inc. v. City of San Diego, 610 P.2d 407, 416, 164 Cal. Rptr. 510, 519 (Cal. 1980) (en banc), *rev'd and remanded,* 453 U.S. 490 (1981).

handed down by the United States Supreme Court.[117]

Metromedia, Inc. v. City of San Diego[118] thus represented the United States Supreme Court's first occasion to address the constitutionality of a municipal billboard regulation.[119] After determining that billboard speech implicated certain free speech interests, the Court commented on the unique standard of first amendment review required by each mode of expression.[120] The plurality then characterized the ordinance as a regulation and not a complete prohibition of billboard speech and proceeded to separately consider the effect of the regulation on both commercial and noncommercial speech.[121]

The plurality, in their application of the *Central Hudson* test to their commercial speech analysis, however, presumed traffic safety and aesthetics were reasonably related to San Diego's off-premise sign ban rather than requiring the city to prove the relationship.[122] They also accepted without question the city's choice to value commercial on-premise signs over commercial off-premise signs; finally, the Court concluded that the ordinance was constitutional as to commercial speech.[123] The ordinance was deemed unconstitutional, however, when applied to noncommercial speech.[124]

The plurality's holding was founded on two different grounds.[125] First, the Court determined that by permitting signs which advertised the business conducted or the products sold on the premises, while prohibiting all other signs, the city was impermissibly valuing commercial speech over noncommercial messages.[126] Similarly, the plurality also concluded that San Diego in allowing the twelve noncommercial exceptions to its general off-premise ban was in effect violating the principle of government content-neutrality by favoring certain kinds of noncommercial messages over other noncommercial communications.[127]

Justices Brennan and Blackmun, who concurred in the judgment, agreed with the plurality that billboard speech was entitled to first amendment protection.[128] They found, however, despite the exceptions, that the San

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117. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 497-98 (1981).
118. 453 U.S. 490 (1981).
119. *See id.* at 556 (Burger, C.J., dissenting).
120. *See id.* at 500-01.
121. *See id.* at 503.
122. *See id.* at 507-10.
123. *See id.* at 512.
124. *See id.* at 513-17.
125. *See id.* at 541 (Stevens, J., dissenting in part).
126. *See id.* at 513.
127. *See id.* at 514-17.
128. *See id.* at 524 (Brennan, J., concurring in judgment).

Diego ordinance effectively banned billboards from the city.[129] Thus, they advocated the use of a total ban analysis rather than the bifurcated approach employed by the plurality.[130] Under this total ban approach, Justice Brennan suggested that a city ban on billboards might be upheld if the city could show that a "sufficiently substantial governmental interest is directly furthered by the total ban, and that any more narrowly drawn restriction . . . would promote less well the achievement of that goal."[131] He concluded, however, that San Diego had failed to present any evidence regarding the relationship between its substantial interest in traffic safety and the total ban,[132] nor had the city demonstrated that the ordinance was narrowly drawn to achieve that purpose.[133] Further, the concurrence, unlike the plurality, failed to recognize that the city's asserted interest in aesthetics was sufficiently substantial without some showing by the city that it was making a concerted effort to improve the attractiveness of its urban environment.[134]

Justice Stevens, writing in dissent, agreed with the plurality that the distinction between commercial on-premise and off-premise signs was constitutionally permissible.[135] He, however, further announced that he would allow a total prohibition on billboard speech if alternative means of communication remained open, if the regulation was not biased in favor of a particular viewpoint, and if it did not attempt to manipulate the topics of public debate.[136]

Chief Justice Burger agreed with the plurality that aesthetics and traffic safety are sufficiently substantial governmental interests to justify San Di-

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129. *See id.* at 522-26 (Brennan, J., concurring in judgment); *cf.* Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) ("every regulation necessarily speaks as a prohibition").

130. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 528 (1981) (Brennan, J., concurring in judgment). Brennan stressed that the plurality's bifurcated approach in evaluating a billboard ordinance presents a danger to the principle of content neutrality as it allows local officials a great deal of unsupervised discretion in determining what is and is not commercial speech. *See id.* at 536-40 (Brennan, J., concurring in judgment); *see also id.* at 566 n.7 (Burger, C.J., dissenting).

131. *See id.* at 528 (Brennan, J., concurring in judgment).

132. *See id.* at 534 (Brennan, J., concurring in judgment). Brennan declined to reach the question of whether the exceptions to the total ban also constituted a basis for invalidating the ordinance. *See id.* at 532 n.10. (Brennan, J., concurring in judgment).

133. *See id.* at 528-29 (Brennan, J., concurring in judgment).

134. *Compare id.* at 510 (plurality judicially recognizes substantiality of government's asserted interest in aesthetics) *with id.* at 530-33 (Brennan, J., concurring in judgment) (Brennan and Blackmun would require government to demonstrate substantiality of aesthetic interest with comprehensive plan).

135. *See id.* at 541 (Stevens, J., dissenting in part).

136. *See id.* at 552 (Stevens, J., dissenting in part).

ego's exercise of its police power.[137] Burger, unlike the plurality, employed the rational basis test and thus effectively ignored all first amendment interests.[138]

Justice Rehnquist also accepted the city's asserted interests in traffic safety and aesthetics as legitimate bases for San Diego's billboard ordinance.[139] Rehnquist further stated that aesthetics alone was a sufficient ground for a city-wide ban on billboard speech.[140]

C. *After Metromedia, Inc. v. City of San Diego*

While the United States Supreme Court has directly addressed the constitutionality of a San Diego ordinance regulating billboards under the first amendment,[141] the practical application of this plurality opinion's principles to other cities' sign ordinances remains limited.[142] *Metromedia,* however, has prompted lower courts to analyze a billboard regulation's impact on commercial speech apart from its effect on ideological speech.[143] Further, this decision has caused lower courts to consistently conclude that a city-wide ordinance which permits on-site commercial signs but which prohibits noncommercial signs is facially invalid.[144]

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137. *See id.* at 560 (Burger, C.J., dissenting).

138. *See id.* at 560 (Burger, C.J., dissenting).

139. *See id.* at 570 (Rehnquist, J., dissenting).

140. *See id.* at 570 (Rehnquist, J., dissenting).

141. *See id.* at 498-501.

142. *See* Metromedia, Inc. v. Mayor of Baltimore, 538 F. Supp. 1183, 1184 (D. Md. 1982) (lack of majority opinion and differences in sign ordinance provisions make blanket application of *Metromedia* difficult). The United States Supreme Court was aware of the problems presented to lower courts by their many opinions. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 569-70 (1981) (Rehnquist, J., dissenting) (decision likened to "Tower of Babel").

143. *See* R.O. Givens, Inc. v. Town of Nags Head, 294 S.E.2d 388, 391 (N.C. Ct. App. 1982); Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 433 N.E.2d 198, 200-01 (Ohio 1982); *cf.* Maurice Callahan & Sons, Inc. v. Outdoor Advertising Bd., 427 N.E.2d 25, 28 (Mass. App. Ct. 1981) (billboard company whose signs only conveyed commercial messages did not have standing to address noncommercial interests affected by off-premise ban). With its bifurcated analysis the *Metromedia* Court is using message content to distinguish between different levels of protected speech, in contrast to its previous first amendment opinions where content was used to separate protected speech from unprotected speech. *See* Note, *What Happened to the First Amendment: The Metromedia Case,* 13 LOY. U. CHI. L.J. 463, 480 (1982).

144. *Accord* Bates v. State Bar, 433 U.S. 350, 379-81 (1977) (distinctions between relative value placed on commercial as opposed to noncommercial speech allows for greater degree of regulation of commercial speech); *see* City of Antioch v. Candidates' Outdoor Graphic Serv., 557 F. Supp. 52, 58 (N.D. Cal. 1982) (sign ordinance which merely regulated commercial speech while banning political speech found unconstitutional); Metromedia, Inc. v. Mayor of Baltimore, 538 F. Supp. 1183, 1186-87 (D. Md. 1982) (ordinance which permits only signs identifying building's occupant unconstitutionally discriminates against

In contrast to this consensus of lower court opinion, the remainder of the *Metromedia* decision has generated mixed results. Relying on certain language in *Metromedia,* some courts have determined that regulatory distinctions between on-site and off-site signs are classifications between signs which are a part of a business, and signs which in and of themselves constitute a business.[145] Viewed as discriminations between signs, this categorization is constitutionally permissible if reasonably related to a legitimate governmental purpose.[146] Consequently, these regulations are generally upheld as content-neutral place and manner restrictions on speech.[147]

Alternately, since on-site and off-site signs are frequently defined in

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noncommercial speech). *But see* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 568-69 (1981) (Burger, C.J., dissenting) (preferred position of ideological speech does not require city to impose the same or greater restrictions on commercial speech as it has placed on noncommercial expression); State *ex rel.* Spannus v. Hopf, 323 N.W.2d 746, 755 (Minn. 1982) (regulation which prohibits off-premise signs from being located within 100 feet of church or school permissible even though it may impact more heavily on noncommercial speech); Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 433 N.E.2d 198, 203-04 (Ohio 1982) (Locher, J., dissenting) (on-site commercial advertising exception to general billboard prohibition not unconstitutional as government does not have to regulate to full extent of its authority in commercial speech area just because it has done so in noncommercial context).

145. *See* Lamar-Orlando Outdoor Advertising v. City of Ormond Beach, 415 So. 2d 1312, 1316-19 (Fla. Dist. Ct. App. 1982) (practical distinctions exist between on-premise signs and off-premise signs); State *ex rel* Spannus v. Hopf, 323 N.W.2d 746, 753-54 (Minn. 1982) (discrimination between signs which identify activity conducted on the premises and signs which refer to activity conducted elsewhere permissible in recognition of unique properties of on-site business signs).

146. *See, e.g.,* Lamar-Orlando Outdoor Advertising v. City of Ormond Beach, 415 So. 2d 1312, 1316-19 (Fla. Dist. Ct. App. 1982) (classification is reasonable since on-site and off-site commercial signs are not "similarly circumstanced" and challenger has burden of proof to show regulation is arbitrary and capricious); State *ex rel.* Spannus v. Hopf, 323 N.W.2d 746, 753 n.11 (Minn. 1982) (legislative classification between on-premise and off-premise signs upheld, even in first amendment challenge, if reasonably related to legitimate government purpose); R.O. Givens, Inc. v. Town of Nags Head, 294 S.E.2d 388, 391 (N.C. Ct. App. 1982) (court found ordinance's classification scheme which permitted on-site commercial signs but excluded off-site commercial signs to be reasonable distinction); *accord* Railway Express Agency v. New York, 336 U.S. 106, 109 (1949) (ordinance which prohibited vehicles from displaying advertising messages except information identifying owner's business was presumed to be reasonably related to goal of traffic safety; challenger must demonstrate that no rational basis for law exists to prevail).

147. *Accord* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (time, place, and manner restriction must be justified without reference to content, serve significant governmental interests, and leave open ample alternative channels of communication); Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (time, place, and manner restriction is an attempt to make free speech rights compatible with particular forum's normal use); *see also* State *ex rel.* Spannus v. Hopf, 323 N.W.2d 746, 754 (Minn. 1982); R.O. Givens, Inc. v. Town of Nags Head, 294 S.E.2d 388, 391 (N.C. Ct. App. 1982).

terms of the subject which each may convey,[148] other courts have found these categories to be presumptively unconstitutional content-based restrictions on free speech.[149] Of these courts, some view this division as a discrimination between commercial and noncommercial messages and strike down ordinances which prefer commercial over noncommercial communication;[150] while others read the on-site and off-site designations as subcategories of commercial speech, and uphold the classification in that limited context.[151] Thus in order to avoid a possible content-based challenge, local governments should avoid using the on-site and off-site distinction when composing their billboard ordinances and should instead limit their regulation to the sign's physical attributes such as size, height, and illumination.[152]

The *Metromedia* decision has also produced a split in lower court opinions as to whether all billboard ordinances directly advance governmental interests in traffic safety and aesthetics.[153] Some courts, following Justice White's opinion, have taken judicial notice of the substantial relationship

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148. *Compare* Metromedia, Inc. v. Mayor of Baltimore, 538 F. Supp. 1183, 1185 (D. Md. 1982) (defining on-premise sign as signs "identifying the property where they are installed or identifying the use conducted [thereon]") *with* State *ex rel.* Spannus v. Hopf, 323 N.W.2d 746, 753 (Minn. 1982) (defining on-site sign as "[a]n advertising device located on the premises . . . of an individual, business or organization when the sale or lease of the premises or the identification, products or services of the individual, business or organization are the subject of the advertising device").

149. *See* Taxpayers for Vincent v. Members of City Council, 682 F.2d 847, 849 (9th Cir. 1982) (statute which regulates first amendment rights is presumptively unconstitutional and state must show law bears "substantial relation" to a "weighty" governmental concern), *prob. juris. noted,* __ U.S. __, 103 S. Ct. 1180, 75 L. Ed. 2d 429 (1983); City of Lakewood v. Colfax UnLtd. Ass'n, 634 P.2d 52, 65 (Colo. 1981) (en banc) (zoning ordinance which impinges on first amendment rights is presumed unconstitutional and city must advance substantial interest in order to justify regulation).

150. *See* Metromedia, Inc. v. Mayor of Baltimore, 538 F. Supp. 1183, 1187 (D. Md. 1982) *cf.* City of Antioch v. Candidates' Outdoor Graphic Serv., 557 F. Supp. 52, 58 (N.D. Cal. 1982) (sign ordinance which imposed virtual ban on political speech while merely regulating commercial speech found unconstitutional).

151. *Accord* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512 (1981) (different valuations placed on various categories of commercial speech subject to presumption of legislative validity and classifications drawn need only bear reasonable relationship to asserted interest). While the *Metromedia* Court here seems to suggest that a city may regulate the various subcategories within the general category of commercial speech and its judgment will be presumed to be reasonable, at least one lower court has viewed such subcategorization as a content-based distinction subject to review under the *Central Hudson* test. *See* City of Lakewood v. Colfax UnLtd. Ass'n, 634 P.2d 52, 68 (Colo. 1981) (en banc).

152. *See* Metromedia, Inc. v. Mayor of Baltimore, 538 F. Supp. 1183, 1187 (D. Md. 1982) (size and appearance of signs may be constitutionally regulated without reference to content).

153. *Compare id.* at 1187 (court noted substantial relationship existed between billboard ban, and interests in traffic safety and aesthetics) *with* Norton Outdoor Advertising,

between an asserted interest in traffic safety and aesthetics, and all billboard regulations.[154] Other courts, pursuant to Justice Brennan's concurrence, require the city to present evidence that concern for traffic safety and/or aesthetics *in fact* prompted the enactment of the challenged ordinance.[155] Moreover, at least one court has expressed reluctance to accept an asserted governmental interest in aesthetics alone as a substantial basis for restricting commercial speech.[156] Local governments, therefore, should not rely on a broad statement of purpose to provide the court with sufficient evidence that the provision directly furthers the interests asserted; rather, they should be prepared to present evidence demonstrating the extent to which the ordinance serves those interests. Further, even though aesthetics has been accepted as a valid basis for the exercise of the police power, an ordinance which restricts billboard speech should avoid using aesthetics alone as grounds for a particular enactment.

Finally, when presented with the possiblity that an off-premise commercial ban might be found constitutonal, some lower courts have questioned in dicta whether the bifurcated approach employed by the plurality in *Metromedia* provides local governments with too great an opportunity to censor unpopular noncommercial speech merely by classifying the communication as commercial in nature. These courts reason that although commercial speech is a lesser-valued form of communication, the first amendment protection afforded noncommercial speech will not sanction a constitutional analysis which would permit local officials to first categorize, and then ban speech on the basis of that classification.

Inc. v. Village of Arlington Heights, 433 N.E. 2d 198, 201 (Ohio 1982) (relationship between sign regulation and interests in aesthetics and traffic safety must be proved).

154. *See* Frumer v. Cheltenham Township, 709 F.2d 874, 877 (3d Cir. 1983) (courts defer to legislative judgment that goals of traffic safety and aesthetics are advanced by regulation unless ordinance appears facially unreasonable); Metromedia, Inc. v. Mayor of Baltimore, 538 F. Supp. 1183, 1187 (D. Md. 1982) (judicial notice taken of relationship between billboard ban and city's concern with traffic safety and aesthetics).

155. *See, e.g.,* Dills v. City of Marietta, 674 F.2d 1377, 1381 (11th Cir. 1982) (absent evidence that city officials found portable signs unattractive, court would not accept "mere incantation of aesthetics" as legitimate purpose), *cert. denied,* __ U.S. __, 103 S. Ct. 1873, 76 L. Ed. 2d 806 (1983); Rhodes v. Gwinnett County, 557 F. Supp. 30, 32-33 (N.D. Ga. 1982) (no evidence offered to support claim that county's interest in aesthetics and traffic safety prompted ordinance's enactment); Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 433 N.E. 2d 198, 201 (Ohio 1982) (if no proof offered, court will not speculate as to relationship between sign ordinance and city's announced goals of traffic safety and aesthetics).

156. *See* H & H Operations v. City of Peachtree City, 283 S.E.2d 867, 868-70 (Ga. 1981) (city ordinance which permitted signs identifying activity conducted and products available on premises but which prohibited dissemination of product pricing information found unconstitutional as numbers not aesthetically inferior to letters)

V. CONCLUSION

Unlike a billboard, *Metromedia's* message remains unclear. Cities, however, can no longer ignore the first amendment interests involved in billboard regulation. Cases decided after *Metromedia* have demonstrated that billboard ordinances should clearly set out the regulation's objective rather than relying on an all-inclusive statement of purpose. Further, the objectives of the ordinance should be a recognized police power objective. In addition, even though aesthetics alone has now been accepted in a majority of states as a permissible police power purpose, if aesthetics is the only stated reason for the enactment, the city should be prepared to prove that the ordinance is part of a comprehensive plan to improve the attractiveness of the community.

Having thus established the substantiality of its interest, the city should next be ready to present evidence demonstrating that it has designed its ordinance so as to directly further that substantial interest. The definition of "sign" in the ordinance should avoid distinctions between types of speech, thus eliminating local discretionary decisions categorizing speech. Finally, the regulation should not extend beyond the sign's physical attributes, thus avoiding the possibility of a content-based first amendment challenge. By following these guidelines, billboard restrictions can be drafted which are compatible with basic first amendment principles.