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Metromedia, Inc. v. City of San Diego

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COMMENT

METROMEDIA, INC. V. CITY OF SAN DIEGO

CONSTITUTIONAL LAW—Billboards carrying commercial messages can be regulated based on governmental interests in traffic safety and aesthetics; when regulating noncommercial billboards a city cannot distinguish between the content of the messages. 453 U.S. 490 (1981).

INTRODUCTION

Although billboards have become a fixture of modern day life, they are not always openly accepted by the communities in which they exist. Since the beginning of the century,1 they have been regulated under the scope of the police power.2 Attempts to extend first amendment protection3 to billboards as a medium of communication were rejected4 until 1976, when the Supreme Court, in Virginia

3. The first amendment of the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. Const. amend. I.
4. Prior to the recognition that commercial speech is entitled to first amendment protection, all the cases in which the courts examined billboard regulations in light of the first amendment held that regulation of commercial speech did not infringe on free speech. See, e.g., Howard v. State Dep't of Highways of Colo., 478 F.2d 581 (10th Cir. 1973); United Advertising Corp. v. Borough of Raritan, 11 N.J. 144, 93 A.2d 362 (1952); Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 200 N.E.2d 328 (1964); Markham Advertising Co. v.
Board of Pharmacy v. Virginia Consumers Citizens Council, held commercial speech to be protected by the first amendment. For the first time, courts were forced to closely examine the type of speech regulated by billboard ordinances. Some courts vehemently struck down billboard regulations because of their infringement of noncommercial speech. Others upheld widespread billboard prohibitions or commercial speech regulations of outdoor advertising. One court went so far as to approve a regulation of noncommercial billboards


5. 425 U.S. 748 (1976). In Virginia Board, the Court held a statute which prohibited commercial advertisement of prescription drug prices to be unconstitutional. Id. at 770. The groundwork for this decision was laid the year before in Bigelow v. Virginia, 421 U.S. 809 (1975), when the Court invalidated a statute prohibiting any advertisement, encouragement or procurement of an abortion. The Court stated that speech is not stripped of first amendment protection merely because it appears in the form of a paid commercial advertisement. Id. at 818.

These decisions overturned the long standing precedent that commercial speech was not entitled to first amendment protection. See, e.g., Valentine v. Chrestensen, 316 U.S. 52 (1942).

6. See, e.g., John Donnelly & Sons v. Campbell, 369 F.2d 6 (1st Cir. 1980), aff'd, 453 U.S. 916 (1981) (invalidating a state-wide ban of billboards due to its infringement on non-commercial speech); State v. Pile, 603 P.2d 337 (Okla. 1979), cert. denied, 453 U.S. 922 (1981) (construing a state-wide prohibition of billboards upon rural roads of state as not covering noncommercial speech to avoid constitutional problems). Regulations directed only at non-commercial speech have also been found to be unconstitutional. Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), cert. denied, 431 U.S. 913 (1977) (invalidating an ordinance that prohibited campaign signs); Aiona v. Pai, 516 F.2d 892 (9th Cir. 1975) (invalidating an ordinance that regulated campaign signs).


that left some commercial billboards unregulated.\(^9\)

In *Metromedia, Inc. v. City of San Diego*,\(^10\) the Supreme Court attempted to clarify the first amendment protection afforded billboards, but accomplished only a further muddying of the waters.\(^11\) The Court considered the constitutionality of a San Diego ordinance designed to eliminate alleged traffic hazards and to improve the city’s appearance. The suit was initiated by several outdoor advertising companies that owned signs in San Diego\(^12\) to enjoin enforcement of the ordinance that prohibited almost all outdoor advertising in the city.\(^13\) The Court mustered a majority to invalidate the ordi-

\(^9\) State v. Lotze, 92 Wash. 2d 52, 593 P.2d 811, appeal dismissed, 444 U.S. 921 (1979) (statute prohibited all signs visible from interstate, primary or scenic highway systems with exceptions for some commercial speech signs).


\(^11\) Early Supreme Court decisions upheld city ordinances that regulated billboards as a reasonable exercise of the police power. See *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269 (1919); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917). In *Packer Corp. v. Utah*, 285 U.S. 105 (1932), the Court upheld a state statute which forbade the advertising of cigarettes and other tobacco products on billboards, streetcar signs and placards. None of these Supreme Court decisions adjudicated the billboard regulation as a first amendment violation.


12. On cross motions for summary judgment, the California Superior Court held the ordinance unconstitutional as an unreasonable exercise of the police power and a violation of first amendment guarantees of freedom of speech. *Metromedia, Inc. v. City of San Diego*, 67 Cal. App. 3d 84, 136 Cal. Rptr. 453, (Ct. App. 1977). After the superior court issued an injunction enjoining enforcement of the ordinance, the city appealed. The court of appeals affirmed on the ground that the ordinance constituted an unreasonable and arbitrary exercise of the police power, but did not address the first amendment issue. *Id.* Upon appeal to the California Supreme Court, the decision was reversed. *Metromedia, Inc. v. City of San Diego*, 23 Cal. 3d 762, 154 Cal. Rptr. 212, 592 P.2d 728 (1979), modified, 26 Cal. 3d 848, 164 Cal. Rptr. 510, 610 P.2d 407 (1980). The California Supreme Court upheld the ordinance as a reasonable exercise of the police power and a valid time, place or manner regulation.

13. The ordinance excluded from its coverage on-premise signs and twelve other categories of signs: Signs in discharge of a governmental function; bench signs at public bus stops; signs manufactured, transported or stored in the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs enclosed in a shopping mall; "for sale" or "for rent" signs; signs depicting time, temperature, or news; signs on public transpor-
nance, but as Justice Rehnquist stated in his dissent, "the Court's treatment of the subject [is] . . . a virtual Tower of Babel, from which no definitive principles can be clearly drawn." The sharp division among the Justices is evidenced in the five separate opinions written, which demonstrate that the issues are far from resolved and portend a disturbing erosion in the fundamental right to free speech.

A plurality of four Justices concluded that although the ordinance was a valid regulation of commercial speech, it unconstitutionally infringed upon noncommercial speech. Justice White, writing for the plurality, deferred to the legislative judgment rather than analyze the commercial speech infringement before the Court. The resulting low standard of scrutiny jeopardizes the protection afforded to commercial speech. In evaluating the constitutionality of the ordinance's regulation of noncommercial speech, the plurality compared the regulation of commercial speech with that of noncommercial speech, injecting a new, and perhaps unnecessary, form of balancing into the plethora of first amendment standards.

The other five Justices envisioned the San Diego ordinance as requiring a different type of analysis than the commercial/noncommercial speech dichotomy. Justices Brennan and Blackmun, in a concurrence, and Justice Stevens, in a dissent, asserted that the case presented the issue of a total ban of billboards, yet their different approaches to evaluate the ordinance led to contrary results. In short, Justices Brennan and Blackmun performed a more stringent analysis, while Justice Stevens employed what amounted to a time, place or manner analysis.

The Chief Justice's dissenting opinion attempted an eclectic

15. 453 U.S. at 493 (White, J. joined by Stewart, Marshall & Powell JJ.); id. at 521 (Brennan, J., concurring, joined by Blackmun, J.); id. at 540 (Stevens, J., dissenting in part); id. at 555 (Burger, C.J., dissenting); id. at 569 (Rehnquist, J., dissenting).
16. 453 U.S. at 493 (White, J., joined by Stewart, Marshall & Powell, JJ.). The plurality essentially followed the analysis of the first circuit in John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980), aff'd, 453 U.S. 916 (1981). A Maine state-wide statute had banned billboards except for on-site advertising and several noncommercial exemptions. The Donnelly court held the statute to be a valid time, place or manner regulation of commercial speech, but unconstitutional with respect to its infringement on noncommercial speech.

approach to the problem, but, as was true with Justice Stevens, performed no more than a time, place or manner analysis. Justice Rehnquist added his views that the exceptions to the ordinance did not render it unconstitutional and that the government interest in aesthetics was sufficient to sustain a total prohibition of billboards. Rehnquist refrained, however, from proposing yet another method of analyzing the San Diego ordinance.

In the past, a total ban of a medium of communication has not received widespread attention from the Court. Justices Brennan and Stevens and Chief Justice Burger proposed standards in Metromedia that have ramifications for the future of billboards and, more significantly, for the whole range of media protected by the first amendment. On the whole, the Justices were satisfied with a middle level of scrutiny, which could allow a total ban of a communication medium or seriously impair its use. These standards of review, however, are clearly insufficient in light of the first amendment interests at issue.

Part I of this article critically examines the plurality opinion and its bifurcated approach. Part II then evaluates the remaining Justices' opinions, their respective standards, and the proposition of a total ban. Finally, part III proposes a more stringent standard for a total ban of billboards.

I. THE PLURALITY OPINION

Commercial Speech

In evaluating the constitutionality of the commercial speech aspects of the ordinance, the plurality applied the four part test developed in Central Hudson Gas & Electric Corp. v. Public Service Commission, which states: (1) The first amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no farther than necessary to accomplish the given objective. The plurality systematically analyzed the San Diego ordinance under each step of

21. Id. at 569-70 (Rehnquist, J., dissenting).
22. See supra notes 77-78 and accompanying text.
23. 453 U.S. at 507.
25. Id. at 563-64.
To satisfy the first criteria, the plurality asserted that the activity being regulated was lawful and not misleading,26 and proceeded to consider whether there existed a substantial governmental interest to justify the regulation. The plurality declared that substantial governmental interests existed in traffic safety and aesthetics.27 Although previous Supreme Court cases were relied on as authority for the proposition,28 none had made the determination in a first amendment context. The applicability of those decisions to the present case is questionable because the level of scrutiny employed was much lower than that required in a first amendment analysis.29 While traffic safety and aesthetics have been recognized as legitimate governmental concerns under the police power (where only the reasonableness of the regulation must be proved)30 none of these cases held that traffic safety and aesthetics are substantial governmental interests. In Metromedia, the plurality failed to demonstrate how those governmental interests outweigh first amendment rights.31

26. 453 U.S. at 507.
27. Id. at 507-08. For a discussion of the effects of billboards on aesthetics and traffic safety, see Aronovsky, supra note 2, at 301-15; Lucking, The Regulation of Outdoor Advertising: Past, Present and Future, 6 ENVTL. AFF. 179 (1977); Williams, Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation, 62 MINN. L. REV. 1 (1977).
29. The standard of review employed in those cases was the Court's most deferential "rational relation" scrutiny used in due process analysis but is not applicable in first amendment analysis. One commentator observed:

On several occasions, but always in a commercial context, the Court has held that absolute, or at least highly restrictive, prohibitions on the use of billboards and advertising vehicles do not constitute a deprivation of property in violation of the Due Process Clause. None of those decisions addressed the First Amendment issue, however, and they are therefore inapposite to the question under consideration.

30. See 453 U.S. at 528 n.7 (Brennan, J., concurring); infra note 44.
31. Cf. Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 893-94, 164 Cal. Rptr. 510, 537, 610 P.2d 407, 434 (1980) (Clark, J., dissenting), rev'd, 453 U.S. 490 (1981), where precisely this objection was advanced by Justice Clark concerning the majority opinion of the California Supreme Court, which upheld the ban of billboards by summarily classifying the governmental interest in traffic safety and aesthetics as substantial without weighing them
There are important commercial speech interests at issue that were not discussed by the plurality. Commercial speech has been recognized by the Court as deserving first amendment protection because of consumer and societal interests in the free flow of information. The underlying rationale was that the need for information to enable commercial decisionmaking may be as crucial to society as the exchange of political ideas. Billboards are perhaps best known for their role in the dissemination of commercial information and are indispensable for effectively reaching travelers in a manner which could not be duplicated by other media. Even though the Court in Metromedia believed that the governmental interest outweighed the first amendment interests, it deserved more than a summary determination.

Furthermore, any claim that substantial government interests existed in traffic safety and aesthetics is undermined by the exceptions to the ordinance. Most notably, the exception permitting on-

33. The court in Virginia Board noted, when justifying the protection of commercial speech, that:

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.

... [S]o long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. ... And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.


The notion that there is a sound rationale for extending first amendment protection to commercial speech is disputed. See, e.g., Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 VA. L. REV. 1 (1979).
34. See John Donnelly & Sons v. Campbell, 639 F.2d 6, 22-23 & n.7 (1st Cir. 1980) (Pettinge, J., concurring), aff'd, 453 U.S. 916 (1981) (discussing the importance of billboards to those displaying commercial messages because of their capacity for timely appeals to travelers and their importance to the travelers themselves).
35. See supra note 13.
36. See John Donnelly & Sons v. Campbell, 639 F.2d at 11 (governmental interest in traffic safety for state-wide ban of billboards diminished in overall importance because excep-
site\textsuperscript{37} signs would present the same traffic safety hazards and aesthetic problems as do off-site signs.\textsuperscript{38} Although the plurality stated that "[t]he exceptions to the general prohibition are of great significance in addressing the strength of the city's interest in prohibiting billboards,"\textsuperscript{39} the Justices assembled their own justifications for the exceptions. They pointed out that the prohibition of off-site signs related to the city's objectives, even if the prohibition was underinclusive in that it permitted on-site advertising to exist.\textsuperscript{40} Moreover, the plurality speculated that the differential treatment by the city was based on a belief that off-site signs presented more of a problem than on-site signs.\textsuperscript{41} However, there was no evidence submitted by the city to support the plurality's speculations. As a final possibility, the plurality suggested that San Diego had simply decided that on-site signs were more important than off-site signs.\textsuperscript{42} On each of these points, the plurality fashioned arguments to justify the city's position rather than putting the burden on the city to prove their case.

The crucial weakness of the plurality opinion lies in its deference to the legislative determinations that fostered the regulations. The Justices declined to require substantive evidence from San Diego or to make an independent determination concerning the existence of a substantial governmental interest and the reasons for the exceptions to the ordinance. This is true in other important areas of the plurality's analysis as well. Even though the plurality mentioned the California Supreme Court's statement in \textit{Metromedia}, that there was a "meager record" proving a direct connection between billboards and traffic safety,\textsuperscript{43} the plurality followed the California court's lead to recognize the connection and stated that it "hesitate[d] to disagree with many reviewing courts that billboards are

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\item \textsuperscript{37} On-premise or on-site signs are defined as "signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed. . . ." \textit{Metromedia}, Inc. v. City of San Diego, 453 U.S. at 493 n.1 (quoting \textit{SAN DIEGO, CAL., MUNICIPAL CODE § 101.0700 (B)} (1972)).
\item \textsuperscript{38} Off-premise or off-site signs are defined as a "sign identifying a use, facility or service which is not located on the premises," or a "sign identifying a product which is not produced, sold or manufactured on the premises." \textit{Id.}
\item \textsuperscript{39} \textit{Metromedia}, 453 U.S. at 520.
\item \textsuperscript{40} \textit{Id.} at 511.
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} \textit{Id.} at 512.
\item \textsuperscript{43} \textit{Id.} at 508 citing \textit{Metromedia}, Inc. v. City of San Diego, 26 Cal. 3d 848, 858-59, 164 Cal. Rptr. 510, 515, 610 P.2d 407, 412 (1980).
\end{itemize}
real and substantial hazards to traffic safety."\(^4\) Regarding the asserted governmental interest in aesthetics, the plurality contended that it was "not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as ‘esthetic harm’.\(^4\)

As justification for these statements, the plurality quoted language from *Railway Express Agency, Inc. v. New York*,\(^4\) which called for reliance on local government's judgment regarding the legitimacy of municipal problems. While it may be proper to defer to legislative judgments on questions of the police power as in *Railway Express*, the same is not true when a court is confronted with a first amendment challenge.\(^7\) In fact, there is precedent that requires the Court to make an independent inquiry and judgment:

In every case . . . where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. 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. And so . . . the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.\(^8\)

\(^4\) 453 U.S. at 509. Both Justice Brennan, in his concurring opinion, id. at 528 n.7, and Justice Clark, dissenting in the California Supreme Court decision, 26 Cal. 3d at 890-91, 164 Cal. Rptr. at 534-36, 610 P.2d at 431-32, criticized their respective courts for basing the purported connection between traffic safety hazards and billboards on cases that predate recognition of commercial speech. In those cases, Justice Brennan noted that the courts utilized minimal "rational relation" scrutiny which is insufficient to sustain the regulation in the face of a first amendment challenge. 453 U.S. at 528 n.7 (Brennan, J., concurring).

\(^5\) 453 U.S. at 510. This rationale would seem to jeopardize the first amendment protections extended to other aesthetically displeasing media such as sound trucks and leaflets.

\(^6\) Id. at 509 (quoting *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109 (1949)). *Railway Express* involved an ordinance that prohibited commercial advertising on motor vehicles. Any possible violation of the first amendment was not considered by the Court because the case predated recognition of constitutional protection of commercial speech.

\(^7\) Professor Thomas Emerson has severely criticized the Burger Court for displaying "a preference for legislative judgment over first amendment values." Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 442 (1980).

\(^8\) Schneider v. State, 308 U.S. 147, 161 (1939) (quoted in Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 69-70 (1981)). Ironically, the plurality in *Metromedia* quoted this same language to criticize Chief Justice Burger for giving too much weight to legislative preference in his dissenting opinion. *Metromedia*, 453 U.S. at 519-20. See also Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 844 (1978) (stating it is a legislative and not a judicial function to declare the reasons compelling legislative action because "[w]here it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition
By their deference, the plurality undermined the protection afforded commercial speech, granting it the lowest level of court scrutiny. Yet, in other first amendment cases, the Court has not shirked its obligation to closely scrutinize evidence presented or to note its complete absence. In *Metromedia*, the Court had a responsibility to be especially scrupulous in its considerations of available evidence because of disparate lower court billboard regulation decisions. Those decisions dispute the relation between traffic safety and billboards, the sufficiency of aesthetics to outweigh first amendment interests, and the constitutionality of a distinction between on- and off-site signs.

and the function of the First Amendment as a check on legislative power would be nullified”); *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 8 (1st Cir. 1980), *aff'd*, 453 U.S. 916 (1981) (“when First Amendment freedoms are on one side of the scale, the balance must be struck by the courts, not by the legislators”).

49. For example, in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), the Court refused to accept the justifications asserted by the borough for totally banning live entertainment in that community. The borough asserted that the ban was part of a plan to develop a commercial area to service only immediate needs. Justice White, writing the majority opinion, noted that no evidence was introduced to support this plan. *Id.* at 72-73 (White, J., majority opinion). The borough also contended that a community could selectively prohibit live entertainment to avoid problems such as parking, trash collection, and police protection. In response, Justice White stated that “[t]he Borough has presented no evidence, and it is not immediately apparent as a matter of experience, that live entertainment poses problems of this nature more significant than those associated with various permitted uses.” *Id.* at 73.


If the plurality had not been so solicitous of legislative judgment, it might have reached a different conclusion regarding the final step of the *Central Hudson* test—whether the San Diego ordinance was drawn narrowly enough to survive a first amendment challenge. There should have been careful consideration of whether the regulation was more inclusive or more burdensome than necessary to further a legitimate government purpose and whether the least restrictive means available were used. The plurality apparently assumed that San Diego's interest in regulating billboards was the same throughout the city. It seems disingenuous to state that billboards are a traffic hazard at every location in the city considering the variation of speed limits on any stretch of road. It has also been disputed whether billboards are aesthetically inconsistent with commercial and industrial areas. Assuming that the potential hazards of billboards justify a governmental response of some kind, the plurality should have explored the possibility that regulating the number, location, size, appearance or lighting of billboards might have accomplished the same result without so seriously infringing on first amendment freedoms.

**Noncommercial Speech**

After the plurality decided that San Diego's regulation of commercial speech was constitutional, the Justices turned their attention to its effect on noncommercial speech. The plurality first observed that the ordinance permitted on-site signs with commercial messages while not allowing on-site noncommercial signs to exist. The Justices viewed this limited exception as an improper ranking of commercial speech above the more cherished noncommercial speech. Due to the inversion of first amendment values, the plurality concluded that the ordinance was unconstitutional.

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53. See *infra* notes 212-14 and accompanying text. One court has vividly stated that "public officials may not wield an axe when a scalpel is required." *King v. Jones*, 319 F. Supp. 653, 661 (N.D. Ohio 1970).


The assertion that noncommercial speech is entitled to greater protection than commercial speech is beyond dispute.\textsuperscript{58} But to hold a regulation of noncommercial speech invalid because it affords commercial speech less protection belies logic. The error of the plurality rests on the assumption that the San Diego ordinance regulates commercial speech to the full extent permitted by the first amendment. If this assumption were correct, a more restrictive regulation of noncommercial speech would be unconstitutional, since noncommercial speech is subject to lesser regulation than commercial speech.

But what if the city's regulation of commercial speech did not go to the constitutional limit and regulated commercial speech to only a minor extent? In that case, a regulation of noncommercial speech that was stricter than the commercial regulation might well be constitutional so long as it did not exceed what would be the constitutional limit of the commercial speech regulation.

A more important consideration is that this type of comparison between commercial speech and noncommercial speech to determine the constitutionality of noncommercial speech, muddles the protection afforded noncommercial speech. It adds a new form of balancing to what some commentators believe is an already confusing array of first amendment standards.\textsuperscript{60} Regulations of noncommercial speech traditionally are evaluated in terms of whether the regulation addresses the content or the subject matter of speech.\textsuperscript{58} For that reason, the second part of the plurality's analysis holds more

\textsuperscript{58} In Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), the Court stated: 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 expression.

\textsuperscript{59} See, e.g., Emerson, supra note 47, at 440-54; infra note 207.

\textsuperscript{60} See infra note 63.
significance.

As an alternative approach, the plurality examined the noncommercial signs that were permitted, such as temporary campaign signs and religious symbols.\textsuperscript{61} Strictly applying the precedent prohibiting any discrimination based on the content of the message, the Justices concluded that San Diego had attempted to distinguish between permissible and impermissible speech based on its subject matter, and thus found the statute unconstitutional.\textsuperscript{62} In other words, it held that if some noncommercial messages are allowed, all must be permitted.

Attempts at regulating the content or the subject matter of speech are ordinarily subject to strict scrutiny.\textsuperscript{63} Several cases, however, have held that a government regulation can discriminate among speech-related activities if it is finely tailored to serve substantial state interests.\textsuperscript{64} To be complete in its analysis, it seems that the plurality should have considered whether San Diego had a substantial government interest justifying its distinction among noncommercial signs. Some of the limited exceptions allowing signs, such as that for directional signs, might be justified by public necessity. The exception for political campaign signs could not, however, be sustained on that assumption. Both Chief Justice Burger and Justice Stevens suggested that this exception was justified based on a governmental interest in the dissemination of information of special public concern.\textsuperscript{65} This rationale, however, would grant government the ability to select the messages for signs, and consequently for pub-

\begin{itemize}
  \item \textsuperscript{61} Metromedia, 453 U.S. at 514.
  \item \textsuperscript{62} Id. at 514-15.
  \item \textsuperscript{64} See Carey v. Brown, 447 U.S. 455, 461-62 (1980); Police Dep’t v. Mosley, 408 U.S. 92, 98-99 (1972). Neither decision found substantial governmental interests justifying discrimination between labor picketing and other peaceful picketing. These cases are injecting an equal protection notion into first amendment protection. See generally Stone, \textit{supra} note 63; Karst, \textit{supra} note 63.
  \item \textsuperscript{65} Metromedia, Inc. v. City of San Diego, 453 U.S. at 564-65 (Burger, C.J., dissenting); id. at 554-55 (Stevens, J., dissenting in part).
\end{itemize}
lic debate. For these reasons, the plurality properly refused to find San Diego's distinction between different types of speech a constitutional one.

By recognizing that the exceptions to the ban on billboards were content oriented, the plurality substantially refined the first amendment analysis of billboard regulations. In similar situations, other courts have myopically continued to characterize regulations as content neutral rather than rigorously analyzing them under content standards. Those courts upheld billboard regulations under the content-neutral time, place or manner standard, thereby decreasing the protection of first amendment rights.

In its totality, the plurality's opinion leaves municipalities in a difficult position when they legitimately desire to regulate billboards. The decision would allow the eradication of billboards that carry commercial messages, and would invalidate any regulations of non-commercial billboards if the ordinance discriminated among billboards based on the content or subject matter of the messages. Yet, the plurality left unanswered the important question of whether an ordinance prohibiting all noncommercial speech, as well as all commercial speech, would be unconstitutional. A municipality's natural inclination may be to regulate solely commercial billboards. This solution raises serious implementation problems because of the difficulty of distinguishing between commercial and noncommercial speech.

Furthermore, assuming the distinction can be made, questions arise concerning the propriety of trusting the decision to a city official on a case-by-case basis. And as Justice Brennan pointed out in


67. 453 U.S. at 515 n.20.

68. While the Court has stated that there are "commonsense differences" between commercial and noncommercial speech, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976), the distinction in some cases is particularly difficult. For example, in Bigelow v. Virginia, 421 U.S. 809 (1975), an advertisement for abortion services concerned a commercial transaction but also "conveyed information of potential interest and value to a diverse audience" which could be classified as noncommercial speech. Id. at 822. See Aronovsky, supra note 2, at 330-31.

69. Justice Brennan goes so far as to suggest that resting such discretion in the hands of the city will create an unconstitutional prior restraint. 453 U.S. at 537-38 (Brennan, J., concurring).
his concurrence, it would create havoc as users of billboards attempted to evade the commercial speech regulation by fashioning their messages in noncommercial speech terms.\textsuperscript{70} By narrowly focusing on the independent effect of the ordinance upon commercial and noncommercial speech, the plurality has created an unmanageable standard to guide legislatures.

An obvious alternative would be for municipalities to run the risk of suit and ban all billboards—commercial, noncommercial, on-site, and off-site. Three concurring and dissenting Justices, in \textit{Metromedia}, proposed standards that will effect the possibility of a total ban of billboards.

\section*{II. The Remaining Justices}

While the plurality claimed that the prospect of a total prohibition of outdoor advertising was not before the Court,\textsuperscript{71} the perception of the ordinance as a total ban received much attention from some of the other Justices. Justice Brennan contended "that the \textit{practical effect} of the San Diego ordinance is to eliminate the billboard as an effective medium of communication for the speaker . . . and that the exceptions do not alter the overall character of the ban."\textsuperscript{72} On this point Justice Stevens, in his dissent, was in agreement.\textsuperscript{73} The significance of characterizing the ordinance as a total ban of outdoor advertising is, as depicted by Justice Brennan, a "First Amendment analysis quite different from the plurality's."\textsuperscript{74} The distinction between commercial and noncommercial speech, with their separate standards, evaporates, and the overall practical effect of the ordinance becomes the focus of the analysis. These Justices disputed precisely what the total ban analysis entails and, as a result, applied two different formulations. Chief Justice Burger also became involved in creating a standard for a San Diego-type ordinance, using a total ban case as a basis for his standard.\textsuperscript{75} The underlying assumption of the three analytical frameworks is that a total ban of a medium of communication under certain circumstances, not necessarily those presented in \textit{Metromedia}, is constitutional. The case law, however, is not so clear. In order to scrutinize these decisions adequately, one

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  \item[70.] \textit{Id.} at 538-40 (Brennan, J., concurring).
  \item[71.] \textit{Id.} at 515 n.20.
  \item[72.] \textit{Id.} at 525-26 (Brennan, J., concurring) (emphasis in original).
  \item[73.] \textit{Id.} at 540 (Stevens, J., dissenting in part).
  \item[74.] \textit{Id.} at 526 (Brennan, J., concurring).
  \item[75.] \textit{Id.} at 559 (Burger, C.J., dissenting).
\end{itemize}
must understand how the Court has treated a total prohibition of a medium of communication prior to the Metromedia decision.

The Total Ban of A Medium: An Evolution

Through a long series of decisions the Court has established that time, place or manner regulations are permitted and has developed a method of analysis for such cases. Historically, the issue of a total ban of a medium of communication has not been the subject of constitutional commentators' or scholars' debate, nor has the Court frequently dealt with such a prospect. In fact, the substance of the Court's stance on a total ban must be gleaned from just a handful of cases. Significantly, it was not until the Court's decision in Schad v. Borough of Mount Ephraim, decided three weeks before Metromedia, that the term "total ban" was recognized as representing a specific form of analysis in first amendment litigation. This closed a gap of thirty-one years since the last case that had

76. Time, place or manner regulations are permitted by the Court because the regulations are not aimed at the ideas or information being conveyed and a legitimate interest exists in other aspects of the speech. See Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (upholding statute restricting solicitation to a fixed location at a state fair); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (invalidating ordinance that banned commercial advertising of prescription prices); Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding ordinance that prohibited disturbing noises in vicinity of school while in session); Adderley v. Florida, 385 U.S. 39, 47-48 (1966) (upholding local trespass ordinance that prohibited demonstrations on grounds of local jail); Cox v. Louisiana, 379 U.S. 536, 554 (1965) (invalidating unlimited discretion in local official to grant parade license but stating that state or municipality could regulate the use of city facilities or assure public safety or convenience); Kovacs v. Cooper, 336 U.S. 77, 85, 88 (1949) (upholding regulation of "loud and raucous" noise from sound trucks); Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding parade license regulation enacted to regulate traffic, secure public order and prevent simultaneous parades); See generally J. BARRON & C.T. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS 93-110 (1979); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 580-82 (1978); Kaufman, The Medium, The Message and the First Amendment, 45 N.Y.U. L. REV. 761 (1970).


78. The Supreme Court has struck down a total ban of several types of media. See Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (live entertainment); Kovacs v. Cooper, 336 U.S. 77 (1949) (sound trucks); Jamison v. Texas, 318 U.S. 413 (1943) (leaflets); Martin v. City of Struthers, 319 U.S. 141 (1943) (door-to-door canvassing); Schneider v. State, 308 U.S. 147 (1939) (leaflets). Several cases, decided on other grounds, have referred to an absolute ban of a media as impermissible. See, e.g., Talley v. California, 362 U.S. 60 (1960) (leaflets); Lovell v. City of Griffin, 303 U.S. 444 (1938) (leaflets).

discussed an absolute prohibition of a medium. This section will explore the Court's treatment of a total ban of a medium in relation to three media: leaflets, door-to-door soliciting and sound trucks.

a. Leaflets.—In Lovell v. City of Griffin, the Court invalidated an ordinance that prohibited all unlicensed distribution of literature at any time or place within the city limits. Besides objecting to placing such wide discretion in the hands of a municipal official, the Court, in dicta, expressed its uneasiness with the broad sweep of the ordinance: "The ordinance embraces 'literature' in the widest sense. The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place."82

The following year, the Court considered the constitutionality of several similar ordinances. In Schneider v. State, three of the four defendant municipalities absolutely forbade the distribution of handbills or circulars in the streets or public places of their communities. In each instance the stated governmental objective was to prevent littering and preserve the good appearance of the city, but the Court explicitly held this governmental interest insufficient to sustain such a broad limitation on first amendment rights. Additionally, the Court observed that the objective could be achieved in a manner less restrictive of freedom of expression, such as through a law directly punishing littering.

Several years later, in Jamison v. Texas the Court followed Lovell and Schneider to strike down a statute that prohibited distribution of all handbills on the streets of Dallas, Texas. The issue came before the Court when two Jehovah's Witnesses were convicted for distributing handbills on the street. The Court rejected the city's argument that its power over the streets went beyond regulation for the control of traffic and maintenance of order. The city had argued that it had absolute power to prohibit the use of its streets for the communication of ideas. According to the Court, one who is rightfully on a public street has a right to express his or her views in an

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80. The last total ban case was Kovacs v. Cooper, 336 U.S. 77 (1949).
81. 303 U.S. 444 (1938).
82. Id. at 451.
83. 308 U.S. 147 (1939).
84. Id. at 162.
85. Id.
86. 318 U.S. 413 (1943).
87. Id. at 415-16.
orderly fashion by spoken words, handbills and literature.\textsuperscript{88} While a city might constitutionally regulate the distribution of handbills to control traffic and maintain order, the Court concluded, "[t]he right to distribute handbills concerning religious subjects on the streets may not be prohibited at all times, at all places and under all circumstances."\textsuperscript{89}

\textit{b. Door-to-door soliciting and canvassing.}—The cases concerning door-to-door soliciting and canvassing went a step beyond communication in the streets, reaching into the privacy of the home. In \textit{Martin v. City of Struthers},\textsuperscript{90} a city ordinance outlawed all door-to-door distribution of handbills or other advertisements that involved summoning occupants to the door. A Jehovah's Witness was convicted of violating the ordinance after she had knocked on a door to deliver a religious pamphlet. The Court perceived its duty to involve the balancing of the conflicting interests of privacy in one's home, protection of residents from burglars and the speaker's right to use this traditional method of communicating ideas.\textsuperscript{91} In the course of invalidating the ordinance, the Court observed that: "While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best traditions of free discussion."\textsuperscript{92} As a result, the choice was left to the householder to decide whether he or she wanted to receive the information at the doorstep.\textsuperscript{93}

\begin{itemize}
  \item \textsuperscript{88} Id. at 416.
  \item \textsuperscript{89} Id. See \textit{Talley v. California}, 362 U.S. 60 (1960) (city-wide ban of handbills not spared from unconstitutionality by qualification permitting distribution where handbills carried the names and addresses of persons who prepared them). \textit{See also Van Nuys Publishing Co., Inc. v. City of Thousand Oaks}, 5 Cal. 3d 817, 97 Cal. Rptr. 777, 489 P.2d 809 (1971) (invalidating ordinance that prohibited all distribution of handbills without prior permission of owner, resident or occupant).
  \item \textsuperscript{90} 319 U.S. 141 (1943). Prior to \textit{Martin}, the Court invalidated another prohibition on door-to-door solicitation. One of the defendant municipalities in \textit{Schneider v. State}, 308 U.S. 147 (1939), prohibited all door-to-door canvassing in the city without a permit from the chief of police. As in \textit{Lovell v. City of Griffin}, 303 U.S. 444 (1938), the Court invalidated the ordinance because of the potential for censorship. The Court suggested, however, that regulation of the hours or other such features of canvassing might be permissible. \textit{Schneider}, 308 U.S. at 165.
  \item \textsuperscript{91} 319 U.S. at 143.
  \item \textsuperscript{92} Id. at 145.
  \item \textsuperscript{93} Id. at 147. In \textit{Breard v. City of Alexandria}, 341 U.S. 622 (1951), the Court upheld an ordinance that prohibited door-to-door commercial solicitation. Its validity, however, is uncertain since commercial speech now receives some first amendment protection. \textit{But see May v. People}, 636 P.2d 672, 677 (Colo. 1981) (upholding applicability of \textit{Breard} to a prohibition of door-to-door commercial solicitation).
\end{itemize}
c. Sound trucks.—In Kovacs v. Cooper, a person was convicted under a city statute for using a sound truck on a public street to broadcast a speech and music. The Justices disputed the scope of the statute and the permissibility of a total ban with such division that no single opinion managed to marshall a majority of the Court.

Three Justices voted to uphold the legislation, narrowly construing it as a prohibition of only those sound trucks that emitted “loud and raucous” noises. A prime factor motivating the decision was the way sound trucks infringed on the right of privacy of the intended audience who was helpless to escape the noise without the municipality’s protection. Although affirming the conviction, they explicitly stated that an “[a]bsolute prohibition within municipal limits of all sound amplification . . . is undesirable and probably unconstitutional as an unreasonable interference with normal activities.”

In two concurring opinions, the same ordinance was interpreted as creating a total ban of sound trucks. Both opinions considered it within the power of a municipality to prohibit the use of a medium of communication.

Justice Black, in a persuasive dissent, agreed that the ordinance was in fact a total ban of sound trucks, but argued that it unconstitutionally restricted first amendment rights. He stated that the regulation would discourage the widespread dissemination of information and make it difficult for certain groups to communicate. Justice Rutledge, in a separate dissent, asserted that the abuses of sound trucks should be regulated by more narrowly drawn statutes.

On the surface, the Court upheld an ordinance which a majority of its members characterized as a total ban of sound trucks. Upon closer inspection, though, a different majority of the Court espoused

94. 336 U.S. 77 (1949). The year prior to Kovacs the Court, in Saia v. New York, 334 U.S. 558 (1948), declared unconstitutional a statute that required a permit to use a loudspeaker in public places. As in prior cases, the Court was concerned with the lack of standards to confine the discretion of enforcement officials. The statute, in addition, was criticized for failing to be drawn narrowly enough to regulate only the hours or places of use or the volume of sound. Saia, 334 U.S. at 560.
95. Kovacs v. Cooper, 336 U.S. at 85.
96. Id. at 87.
97. Id. at 81-82 (emphasis added).
98. Id. at 89 (Frankfurter, J., concurring); id. at 97 (Jackson, J., concurring).
99. Id. at 98 (Black, J., dissenting, joined by Douglas, J., & Rutledge, J.). Justice Murphy dissented without opinion.
100. Id. at 102 (Black, J., dissenting).
101. Id. at 104 (Rutledge, J., dissenting).
that an absolute ban of sound trucks was not constitutionally permissible. 102

In summary, these decisions struck down a broad prohibition of a medium in the face of government interests in littering, privacy and crime prevention, and instead required that the regulation be narrowly drawn to regulate only the time, place or manner of speech. 103 This distinction was recently reiterated by the Court when it upheld a zoning ordinance that restricts the location of adult theaters, partially on the ground that it did not completely ban the theaters from the city. 104

The Court has sought to protect a diversity of media from total prohibition in order to ensure meaningful access to effective channels of communication. 105 According to some commentators 106 and vari-


103. This effectively refutes Judge Tobriner's assertion that "the distinction between prohibition and regulation . . . is one of words and not substance." Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 863, 164 Cal. Rptr. 510, 518, 610 P.2d 407, 415 (1980), rev'd, 453 U.S. 490 (1981).

104. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). The Court noted that the ordinance was only a place limitation and stated "The situation would be quite different if the ordinance had the effect of suppressing or greatly restricting access to, lawful speech." Id. at 71 n.35. See Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 894-95, 164 Cal. Rptr. 510, 538, 610 P.2d 407, 435 (1980) (Clark, J., dissenting), rev'd, 453 U.S. 490 (1981).

105. The Court stated in dicta in Kovacs v. Cooper, 336 U.S. 77, 87 (1949), that "the right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be an opportunity to win their attention." (quoted in Heffron v. International Soc'y of Krishna Consciousness, Inc., 452 U.S. 640, 655 (1981)).

A diversity of media is essential to this goal. Justice Powell observed that "the primary concern of the free speech guarantee is that there be full opportunity for expression in all of its varied forms to convey a desired message." Young v. American Mini Theatres, Inc., 427 U.S. 50, 76 (1976) (Powell, J., concurring). See Stone, supra note 29, at 233-34, 256 (right to freedom of expression necessarily encompasses right to utilize effective means of communication).

The court in Wolin v. Port of New York Authority, 392 F.2d 83, 93 (1968), in finding a bus terminal to be an appropriate place to distribute leaflets, noted that "the methods adopted may be unsophisticated or crude and even ineffectual when compared with other means, but they are no less robust and no less intended to air the speaker's views as effectively as his resources and energy permit." Id.

106. Professor Thomas Emerson identified four values as underlying the first amend-
ous courts, the survival of democracy depends upon the widest possible dissemination of information and opinion from diverse and antagonistic sources. It has often been recognized that open, robust debate will educate the citizenry and, more importantly, lead to political truth. Implicit in these first amendment values is an acknowledgement that the media of communication must be protected in order to protect the message sought to be conveyed and that the medium may be part of the self-fulfillment component of speech, such as in the case of symbolic speech.

In the cases considered above, each medium was noted for its importance to communication. Leaflets were recognized as "historic weapons in the defense of liberty," and door-to-door canvassing was considered a centuries old tradition and their distribution "perhaps the most effective way of bringing [opinion] to the notice of individuals." Recognition of the value of more modern communication technologies arrived with the advent of loudspeakers and sound trucks, which the Court called "indispensable instruments of
effective public speech." Two other factors commonly considered by the Court are the widespread use of the communication channels by diverse groups and the availability of a medium to groups lacking access to more traditional channels. These factors recognize that unconventional media have been employed by unpopular dissenters and poorly financed groups; closing these channels of communication, while content neutral and apparently nondiscriminatory, would effectively silence those who could not afford or did not control the more expensive media of television, newspapers and radio. This would result in a monopoly over communications media for the more orthodox viewpoints and a de facto limit on free speech.

While protecting a medium, the Court has not been totally insensitive to competing interests. The Court has been solicitous of privacy in the home, yet has not found it to outweigh the first amendment rights of door-to-door canvassers. Similarly, the Court has been sensitive, under the "captive audience" doctrine, to the right of unwilling listeners to be free from intrusion by loudspeakers. At the same time, it has not allowed this doctrine to expand to include every instance in which an individual is confronted with a medium he or she finds disturbing or distasteful.

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115. Sala v. New York, 334 U.S. 558, 561 (1948). A year later Justice Black observed that "[t]he basic premise of the First Amendment is that all present instruments of communication as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition." Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting).


118. Kovacs, 336 U.S. at 102, 103 (1949) (Black, J., dissenting); Martin v. City of Struthers, 319 U.S. 141, 146 (1943).


120. Kovacs, 336 U.S. at 102-04 (1949) (Black, J., dissenting). Professor Emerson noted that "[i]t has long been recognized that one of the chief deficiencies of our system of freedom of expression is the increasing concentration of ownership of the means of communication and the inability of diverse points of view to gain access to the marketplace of ideas." Emerson, supra note 47, at 461; accord Kaufman, supra note 76, at 773.


122. Under the captive audience doctrine, regulations of speech are allowed that might not otherwise be permitted because of the inability of the observer to avoid the communication. See L. Tribe, supra note 76, at 677-78; Aronovsky, supra note 2, at 329-32; Stone, supra note 29, at 262-80; Note, supra note 77, at 144-48; infra note 225.

123. Kovacs, 336 U.S. at 86-87.

124. See Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 542 (1980) (duty on recipient to throw out insert received in billing envelopes that inflamed his or her
Justice Brennan's Concurrence

In his concurrence, Justice Brennan severely criticized the plurality's superficial analysis of the San Diego ordinance and remained unconvinced that its holding was constitutional. He proposed instead that a city could totally ban billboards only where a sufficiently substantial governmental interest was directly furthered by the total ban, and that a more narrowly drawn restriction would not promote the achievement of that goal. Strictly applying this standard, Justice Brennan asserted that the San Diego ordinance was unconstitutional.

When analyzing the ordinance, Justice Brennan refused to defer to the legislature and questioned the applicability of cases decided under the police power to a first amendment context. Furthermore, he took issue with the purportedly direct connection between San Diego's goals and its ordinance, analyzing the city's ability to adopt equally effective measures that would place less of a restriction upon first amendment freedoms. In his view, San Diego failed to prove that billboards actually presented a traffic hazard or that the ordinance was narrowly drawn to further the goal of traffic safety. Nor was he satisfied that a substantial government interest in aesthetics was adequately evidenced for commercial and industrial areas.

Justice Brennan's perceptive analysis, however, is hampered by the fact that the origins of his asserted standard were not based on a firm foundation of total ban jurisprudence. Brennan cited as support for his standard the recently decided case of Schad v. Borough of Mount Ephraim. In evaluating a total ban of live entertainment throughout the borough, the Schad Court concluded that to pass constitutional muster the statute must further a sufficiently substantial governmental interest (invalidating regulation of content of films shown at drive-in movie theaters because passersby could avert their eyes).

2. Id. at 528 (Brennan, J., concurring). Although Justice Brennan gave no discussion of whether San Diego's ordinance was content neutral, he called the Schad test, which he would apply in Metromedia, a content neutral standard. Id. at 526 (Brennan, J., concurring).
3. Id. at 528 n.7 (Brennan, J., concurring).
4. Id. at 528-34 (Brennan, J., concurring).
5. Id. at 528-30 (Brennan, J., concurring).
6. Id. at 530-34 (Brennan, J., concurring).
7. Id. at 527 (Brennan, J., concurring) (citing Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981)).
tial governmental interest, and that the Court must determine whether the interest could be served by a less intrusive restriction. The Schad Court found that the borough's statute did not meet this standard and, hence, declared it unconstitutional.

Justice Brennan claimed the Schad decision was "merely articulating an analysis applied in previous cases concerning total bans of media of expression." This conclusion is inaccurate since only one case relied on by the Schad Court as support for its standard was a total ban case. Utilizing the Schneider v. State decision concerning a total ban of handbills, the Schad Court quoted language instructing the Court to weigh the conflicting interests and "appraise the substantiality of the reasons advanced" by the government. This language was understood by the Schad Court to require proof of a "sufficiently substantial government interest" in order to sustain a total ban of a medium of communication. The analysis in the Schneider case itself suggests a very high level of Court scrutiny.

133. Metromedia, 453 U.S. at 527 (Brennan, J., concurring).
134. In a footnote, the Schad Court cited U.S. v. O'Brien, 391 U.S. 367 (1968), concerning an incidental infringement of symbolic speech, and two land use cases. 452 U.S. at 68-69 n.7. In Moore v. City of E. Cleveland, 431 U.S. 494 (1977), a municipal ordinance defined "family" in a way that prohibited some blood relatives from living together. This was found to unconstitutionally infringe on liberty interests. The other land use case, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), held that a statute permitting only one-family dwellings did not burden fundamental rights. Lending further confusion to the meaning of the Schad standard, the Schad Court cited the dissent in Boraas, in which Justice Marshall argued that the ban at issue was an infringement on fundamental rights and required a "compelling and substantial governmental interest" for the statute to be valid. Id. at 18 (Marshall, J., dissenting). Moreover, he would have required that the statute be narrowly drawn.

In the text of the opinion, the Schad Court relied on Schaumburg v. Citizens for a Better Envt, 444 U.S. 620 (1980), which had invalidated a municipal ordinance that prohibited the solicitation of contributions by charitable organizations that did not use at least 75% of their receipts for charitable purposes. 452 U.S. at 70. Although the statute regulated a medium of expression, the Schaumburg Court did not consider the ordinance to be an absolute prohibition of door-to-door solicitation.

136. 308 U.S. 147 (1939).
138. Id. at 68.
139. The Schneider decision has in fact been interpreted as requiring a compelling state interest. See NAACP v. Button, 371 U.S. 415, 438 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). The term "substantial government interest" has come to have less value in more recent decisions. When discussing U.S. v. O'Brien, 391 U.S. 367 (1968), upholding a
that is not necessarily captured in the term "sufficiently substantial," which implies a middle level of scrutiny conducive to widely varying degrees of analysis. Though Justice Brennan, in *Metromedia*, and the *Schad* Court subjected the respective statutes to scrupulous analysis, there is no guarantee that a future court would follow suit when guided by this standard. Therein lies the weakness of the standard.

Additionally, the importance of the standard is diminished by evidence that Brennan applied the same standard to evaluate a time, place or manner restriction, a lesser infringement of speech. In *Hefron v. International Society of Krishna Consciousness, Inc.*, the Court upheld a statute that restricted solicitation on fairgrounds to appointed booths. Justice Brennan stated in a partially concurring and dissenting opinion:

> [T]he issue in this case is whether [the statute] constitutes a reasonable time, place, and manner restriction on respondents' exercise of protected First Amendment rights. In deciding this issue, the Court considers, *inter alia*, whether the regulation serves a significant governmental interest and whether that interest can be served by a less intrusive restriction.

There appears to be no decipherable difference between the two prohibition on draft card burning, based on a narrowly drawn substantial governmental interest test, one writer noted that "substantial" was no protection at all and that "earlier cases protecting more traditional forms of expression (such as the distribution of handbills) although they too purported to apply a sort of less restrictive alternative test, gave it a significantly stronger meaning." Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1485-86 (1975) (footnote omitted).

One writer, examining the value placed on effective communication of ideas, stated that "when several cities sought to keep their streets clean by prohibiting handbilling—a highly effective method of communication—the Court subjected their means to strict scrutiny and, finding that other means would serve as well, invalidated the ordinances." Note, *Of Interests Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U.L. REV. 462, 497 (1977) (footnote omitted).

140. See supra note 144.
142. *Id.* at 656 (Brennan, J., concurring in part, dissenting in part). Justice Brennan concurred in the result for some of the activities in question but dissented because he thought the analysis should have been applied separately to each first amendment activity restricted by the ordinance and not as a group.

143. *Id.* (Brennan, J., concurring in part, dissenting in part) (citations omitted). This standard resembles the analysis in *Grayned v. City of Rockford*, 408 U.S. 104, 114-21 (1972), upholding an anti-noise statute for the vicinity surrounding school buildings while school was in session as a reasonable time, place or manner regulation. The Court required proof that the regulation was necessary to further significant governmental interests and that the regulation was narrowly tailored to further that interest. *Id.* at 114-17.
standards, yet one is utilized by Brennan in the factual context of a total ban of a medium and the other when only the time, place or manner of speech is regulated. Both standards require a "sufficiently substantial" or "significant" government interest—terms used interchangeably by the Court—and that the regulation be narrowly drawn.

Moreover, further confusion arises because to support the standard he enunciated in *Heffron*, Justice Brennan cited both total ban and time, place or manner cases. It is well settled that the Court will utilize a relatively low level of scrutiny to evaluate a time, place or manner restriction. By using the same standard in the instance of a total prohibition and a time, place or manner regulation, Justice Brennan gave the impression that the total ban case should not receive severe scrutiny by the Court and weakened the weight attributed to a "sufficiently substantial" government interest.

**Justice Stevens' Dissent**

Justice Stevens was the only Justice who grappled with the question of the constitutionality of a total ban of a medium. At points in his analysis, he displayed remarkable insight into the magnitude of the threat to speech presented by a total ban. For example, he noted that there exists an inherent distinction between a total ban and a time, place or manner regulation because the latter, by its very nature, implies that "the net effect of the regulation on free expression would not be adverse." Although he admitted that a total ban has an adverse effect on speech, he concluded that a total ban in general, and the San Diego ordinance in particular, is constitutional. He reached this conclusion after asserting that the first amendment does not absolutely protect speech and that a municipality could curtail the effectiveness of a particular means of communication. The latter assertion was based on a reading of *Kovacs v. Cooper* as

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144. The Court apparently attaches the same meaning to the two terms. The plurality in *Schad*, which Justice Brennan relied on for his standard, said the government must prove its interest to be sufficiently substantial. 452 U.S. at 68. Then Justice Blackmun, concurring in the same decision, stated that the zoning authority must be prepared to articulate, and support, a reasoned and significant basis for its decision. *Id.* at 76-77 (Blackmun, J., concurring).


147. *Id.* at 549-50 (Stevens, J., dissenting in part). Justice Stevens expressed it in terms that there is no protection of the quantity of communication, for otherwise a municipality could not outlaw graffiti.
permitting a total ban of sound trucks. Justice Stevens cited Justice Black, the most vociferous dissenter in *Kovacs*, as support for this proposition.

Justice Stevens' reliance on *Kovacs*, and specifically on Justice Black's dissent, was misplaced. Both the plurality and the dissenters in *Kovacs* drew a distinction between the regulation of time, place or manner of the use of sound trucks and the total ban of that medium. Justice Stevens cited Justice Black's assertion that a city may restrict or absolutely ban the use of amplifiers on busy streets in the business area. Significantly, Justice Black had qualified that statement by contending that reasonable regulations of place (busy streets in the business area), manner (volume of sound), or time (hours) of use of sound trucks would be permitted, but an "absolute prohibition of all uses could not be permitted." Justice Black was also very sensitive to the argument that closing off one channel of communication favored and encouraged other media. Access to the remaining media may be more expensive and may rest in the control of a few hands. To ban one medium completely, then, might

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148. *Id.* at 550-51 (Stevens, J., dissenting in part). In a footnote, Justice Stevens tried to show how decisions invalidating a prohibition or regulation of leaflets and door-to-door canvassing were in line with his thesis, but there are problems with his analysis. *Id.* at 551 n.23 (Stevens, J., dissenting in part). First, he contended the decisions were invalidated because the regulation accomplished the state interest in an indirect manner. *Id.* (Stevens, J., dissenting in part). One of the cases though, as the basis for its decision, stated that the governmental interest did not outweigh the significant infringement of speech. Schneider v. State, 308 U.S. 147, 162 (1939). Second, he pointed out that some of the cases were invalidated because they were licensing statutes enabling officials to engage in censorship. 453 U.S. 551 n.23 (Stevens, J., dissenting in part). While correct, he ignored the significant dicta by the Court indicating displeasure with an absolute ban. See Talley v. California, 363 U.S. 60, (1960); Lovell v. Griffin, 303 U.S. 444, 451 (1938). Third, Justice Stevens noted that the decisions involved Jehovah's Witnesses, and consequently, the Court was more sensitive to the possibility the ordinance was used to suppress unpopular viewpoints. 453 U.S. at 551 n.23 (Stevens, J., dissenting in part). However, except for Jamison v. Texas, 318 U.S. 413 (1943), and Cantwell v. Connecticut, 310 U.S. 296 (1940), the Court did not focus on the fact that a religious group was involved. In Martin v. Struthers, 319 U.S. 141, 145-46 (1943), the Court discussed the importance of door-to-door canvassing to a wide variety of groups. Similarly, in Schneider, the Court noted that the leaflet ban would apply to anyone with views on "political, social or economic questions”. 308 U.S. 147, 163 (1939).


150. *See supra* notes 95-97, 99-102 and accompanying text.

151. *Metromedia*, 453 U.S. at 550 (Stevens, J., dissenting in part) (citing *Kovacs v. Cooper*, 336 U.S. at 104 (Black, J., dissenting)).

152. 336 U.S. at 104 (Black, J., dissenting). Justice Stevens quotes Justice Black's full language in a footnote but fails to account for it. 453 U.S. at 550-51 n.22 (Stevens, J., dissenting in part).

result in a denial of the practical ability to speak for some groups.\textsuperscript{154} While Justice Stevens correctly notes that no cases have held that the quantity of communication is protected per se, under Justice Black's analysis, a regulation could be invalidated because the reduction in communication represents a barrier to expression for certain groups or ideas.

Once satisfied that a total ban is constitutional, Justice Stevens evaluated the San Diego ordinance. Unlike the other Justices, Justice Stevens did not label a specific level of government interest that might outweigh the first amendment interests at hand. Nevertheless, he discussed San Diego's interest in "maintaining pleasant surroundings and enhancing property values"\textsuperscript{155} which, according to him, were "equally legitimate and substantial in all parts of the city."\textsuperscript{156} Stevens implicitly indicated, therefore, that no more than a substantial governmental interest need be proven to permit a total ban of billboards.\textsuperscript{157} As was the case with the plurality,\textsuperscript{158} he failed to explore the legitimacy of the interests supporting a total ban. Instead, he simply accepted their existence without proof. Since he believed that the sufficiency of the governmental interest was obvious, Justice Stevens focused his inquiry on (1) whether the regulation favored one viewpoint or limited the subjects of debate and (2) whether the total market for communication was "ample and not threatened [by] gradually increasing restraints."\textsuperscript{159} The first criterion is a requirement that the statute be content neutral,\textsuperscript{160} the second suggests a broad inquiry into whether alternative media are available. These two inquiries, along with the implicit consideration of the governmental interest in the regulation, closely resemble the traditional time, place or manner analysis.\textsuperscript{161} This result appears paradoxical in

\textsuperscript{154} Id. (Black, J., dissenting).
\textsuperscript{155} Metromedia, 453 U.S. at 552 (Stevens, J., dissenting in part).
\textsuperscript{156} Id. (Stevens, J., dissenting in part).
\textsuperscript{157} The plurality criticized Justice Stevens for not explicitly articulating a governmental interest that would outweigh the first amendment interests at stake. Id. at 517 n.22. There does not seem to be an intent by Stevens to neglect consideration of the governmental interest in the balance. On the contrary, he asserted that the substantiality of the interests involved in this case were "[b]eyond dispute" and thus he did not formally include it in his inquiry. Id. at 552 (Stevens, J., dissenting in part).
\textsuperscript{158} See supra notes 27-35 and accompanying text.
\textsuperscript{159} 453 U.S. at 552 (Stevens, J., dissenting in part).
\textsuperscript{160} The Court in Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980), stated, "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."
\textsuperscript{161} See infra note 188.
light of Stevens' earlier assertion that a total ban is unlike a time, place or manner regulation.

In another area of his analysis, Justice Stevens recognized the severe threat to speech posed by a total ban when he stated that "the remaining channels of communication will [not] be just as effective without billboards."

Yet, he concluded that there was no "reason to believe that the overall communications market in San Diego was inadequate." This seemingly inconsistent conclusion arose from Stevens' broad inquiry into the effect of the ordinance and his perception of the degree of first amendment protection afforded the quantity and quality of communication. Based on his examination of the "overall communications market," he concluded that the loss of one medium would have little impact on the market as a whole.

When the Court has considered the availability of other channels of communication in time, place or manner cases, it has usually analyzed whether the other available media were comparable in cost and effectiveness. Concerning the San Diego ordinance, Justice Stevens admitted that "[i]f the ban is enforced, some present users of billboards will not be able to communicate in the future as effectively as they do now." In effect, Justice Stevens would extend even less protection to a total ban of a medium than that extended to a time, place or manner regulation. It would seem, however, that the total closing of a channel of communication warrants greater judicial scrutiny.

Moreover, in the course of his consideration of the overall communications market in San Diego, Justice Stevens made an alarming revelation, stating that "it may well be true in San Diego as in other metropolitan areas that the volume of communication is excessive and that the public is presented with too many words and pictures to recognize those that are most worthy of attention." This statement is a total repudiation of the "marketplace of ideas" concept long recognized in first amendment jurisprudence and if generally ac-

162. 453 U.S. at 549 (Stevens, J., dissenting in part).
163. Id. at 552-53 (Stevens, J., dissenting in part).
164. Id. (Stevens, J., dissenting in part).
166. 453 U.S. at 549 (Stevens, J., dissenting in part).
167. Id. at 553 (Stevens, J., dissenting in part).
168. The phrase was first coined by Justice Holmes when he stated that "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
cepted by the Court would present a serious danger to free speech. Such "excessive" communication is precisely the price we must pay for our constitutional freedom.169

The last step of Justice Stevens' analysis—that the statute not favor one viewpoint or limit the subjects for debate—was satisfied because the statute was content neutral and contained no hint of bias or censorship.170 Among the ordinance's exceptions, he found no suggestion that San Diego was attempting to influence public opinion or limit public debate on particular issues. The only exception he saw as potentially violative of the first amendment was the provision permitting political campaign signs.171 Stevens considered this exception justified, however, by the special value placed on communication during a political campaign.172 On this point Justice Stevens erred. The Court has held in the past that there is an "equality of status in the field of ideas,"173 so that a government's justification for discriminating among the content of messages must go beyond valuing the content of one subject over another.

Chief Justice Burger's Dissent

Chief Justice Burger admonished the plurality and concurrence for mechanically applying first amendment doctrines to the San Diego statute.174 Rather than categorize the ordinance as a time, place or manner regulation or a total ban of a medium of communication, he described the issue in terms of the ability of a local government to protect its citizens from traffic hazards and unaesthetic structures and to determine whether the public's need for information out-

169. A unanimous Court in Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 97 (1979), quoted with approval the language of Justice Brandeis in Whitney v. California: "If there be time to expose through discussion the falsehood and falacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Furthermore, Justice Marshall, writing in Linmark, quoted the Court in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), decrying a paternalistic approach and asserting that "people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." 431 U.S. at 97 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. at 770).
171. Id. at 554 (Stevens, J., dissenting in part).
172. Id. at 555 (Stevens, J., dissenting in part).
weighed these dangers. As might be expected from his parochial characterization of the issues, he displayed little sensitivity to the first amendment interests at stake. Chief Justice Burger developed an eclectic analysis for the statute that relied on a potpourri of total ban and time, place or manner cases, and despite his opening statements abhorring categorization, essentially employed a time, place or manner analysis.

Before describing his formula to evaluate the ordinance, Chief Justice Burger reviewed some of the basic principles in first amendment jurisprudence. First, each medium of expression must be assessed by standards suited for it. Second, while some level of protection is afforded a medium, the right to speech is not absolute. Finally, he asserted that a total ban is permissible, according to his interpretation of Kovacs. It is with the last proposition that dispute is raised. According to Burger, the Kovacs Court upheld a total ban of sound trucks because the ordinance lacked the potential for censorship by public officials.

True, the plurality in Kovacs took pains to distinguish their situation from a preceding sound truck case that found an ordinance unconstitutional because of its potential for censorship by government officials. Of far greater importance, however, the plurality in Kovacs did not believe the ordinance to be a total ban of sound trucks, and, in fact, stated that an absolute prohibition would probably be unconstitutional. There is also strong language from the dissenting Justices that a total ban of a medium is unconstitutional. Upon close inspection only two Justices asserted that a total ban is impermissib...
tal ban of sound trucks was permissible.\(^{185}\) Thus, Burger's reliance on *Kovacs* seems a weak reed upon which to base his conclusion that a total ban is permissible.

Once assured that there is no absolute right to speak and that a total ban is permissible, Chief Justice Burger proposed that San Diego could ban billboards if (1) a sufficiently substantial government interest existed, (2) the legislative approach was neutral to the message conveyed, and (3) alternate channels of communication were available.\(^{186}\) As was also true in Justice Stevens' proposed standard,\(^{187}\) the Chief Justice's standard mirrors the time, place or manner analysis.\(^{188}\)

In analyzing San Diego's ordinance under his proposed standard, the Chief Justice, without explanation, found a substantial governmental interest in traffic safety and aesthetics.\(^{189}\) He then found the statute to be content neutral because it did not prefer any particular viewpoint over another, and aside from the limited exceptions, had not allowed some subjects while forbidding others.\(^{190}\) The exceptions to the ordinance were perceived by Chief Justice Burger to be "essentially negligible" and justified by the special effectiveness of billboards to convey a political campaign message and by the public interest in the information permitted by the other exceptions.\(^{191}\) He failed, however, to show how the public interest in temporary political campaign signs is greater than the public interest in other noncommercial messages conveyed by billboards.\(^{192}\) Favoring one subject without a substantial government interest to sustain the preference has been fatal to a statute in the past.\(^{193}\) Furthermore, the magnitude of the speech category is not a factor in the determination of a regulation's constitutionality; even a relatively narrow restric-

\(^{185}\) See supra note 98 and accompanying text.

\(^{186}\) Metromedia, 453 U.S. at 561 (Burger, C.J., dissenting).

\(^{187}\) See supra note 161 and accompanying text.

\(^{188}\) His standard resembles the time, place or manner standard established in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976), which requires that restrictions be "justified without reference to the content of the regulated speech, that [it] serve a significant governmental interest, and that in so doing . . . leave open ample alternative channels for communication of the information." Chief Justice Burger's approach was appropriately criticized by the plurality as being no more than a time, place or manner analysis. 453 U.S. 517 n.23.

\(^{189}\) 453 U.S. at 560 (Burger, C.J., dissenting).

\(^{190}\) Id. at 562 (Burger, C.J., dissenting).

\(^{191}\) Id. at 564-66 (Burger, C.J., dissenting).

\(^{192}\) See supra notes 64-65, 172-73 and accompanying text.

\(^{193}\) See supra note 64 and accompanying text.
tion, such as prohibiting “for sale” signs on residences, has been held unconstitutional. 194

The Chief Justice, in his third step, found that adequate alternative channels of communication were available. 195 On this point he departed from all the other opinions 196 and the stipulated agreement of the parties. 197 Although he conceded that the other available media might not be so “eyecatching” or “cheap,” he considered them “adequate” nonetheless. 198

His discussion ignores the lesson of Linmark Associates, Inc. v. Township of Willingboro. 199 There the Court held an ordinance that prohibited the use of “for sale” and “sold” signs, enacted to prevent the flight of white homeowners from a racially integrated community, to be a violation of the first amendment. One of the reasons for the holding was that the available substitute channels—newspaper advertisements and real estate listings—were less effective media for communicating the message because they were less likely to reach the intended audience, more expensive, and less subject to the speaker’s control. 200 The lesson of Linmark is that possible alternative channels of communication must be feasible, the burden of proof of which is on the party restricting speech. Reliance on the theoretical availability of other media would present a grave threat to first amendment rights.

Billboards are an attractive means of communication because of their low cost in relation to other media and the great exposure that they provide to the speaker. 201 Both characteristics are important to

194. Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977). See infra notes 199-200 and accompanying text. The magnitude of the speech category found in an exception to an ordinance that bans a medium of communication would only be relevant to evaluate whether or not the ordinance is a total ban.

195. 453 U.S. at 563 (Burger, C.J., dissenting).

196. See id. at 516 (White, J., plurality opinion) (it cannot be assumed that there are alternate channels of communication based on the parties stipulation to the contrary); id. at 525 (Brennan, J., concurring) (while other channels of communication exist, they are unsatisfactory); id. at 549 (Stevens, J., dissenting in part) (the remaining channels of communication will not be as effective).

197. The stipulation of the parties stated that other forms of advertising were “insufficient, inappropriate and prohibitively expensive.” Id. at 516.

198. Id. at 563 (Burger, C.J., dissenting).


200. Id. at 93. Additional concerns of the Court were that the ordinance was not genuinely focused on the place or manner of speech and that it proscribed certain signs because of their content. Id. at 93-94.

201. See John Donnelly & Sons v. Campbell, 639 F.2d 6, 22-23 (1st Cir. 1980) (Pettine, J., concurring), aff’d, 453 U.S. 916 (1981) (discussing the particular advantages of billboards
the commercial advertiser who wants to entice the traveling consumer and to the speaker with a noncommercial message. Local businesses would have difficulty finding an alternative medium with the same capability for timely appeal to travelers. Billboards especially are effective for messages of local interest geared to a specific neighborhood or location, particularly where the speaker has limited financial resources. It seems that Chief Justice Burger was so taken by the "offensive and intrusive" qualities of billboards that he failed to recognize their unique value as a medium of communication.

III. AN ALTERNATIVE PROPOSAL

As the foregoing discussion reveals, the three Justices erroneously assumed that a total ban is constitutionally permissible. At least two of the standards are indistinguishable from the time, place or manner standard. Even in the application of this standard, there are problems in the reasoning of Chief Justice Burger and Justice Stevens. Justice Brennan also succumbed to a blurring of standards by applying his total ban standard to analyze a time, place or manner case.

Adopting such standards to review the total ban of a medium of communication ignores the fact that a total ban is qualitatively different from a time, place or manner regulation and as such ought to be more closely scrutinized. A time, place or manner restriction will usually present only a minimal burden on a speaker because the ability to communicate through the medium is preserved in certain circumstances. In contrast, an ordinance that totally eliminates a widely used medium, at all times and all places, goes beyond an incidental regulation of speech. The difference between the two types of statutes is greater than one of degree. By closing a channel of communication, speakers will find it more difficult, if not impossible, to reach observers or listeners. This violates a cardinal principle of

as a medium of communication). See supra note 34; see infra notes 222-24 and accompanying text.

202. Id.
204. See John Donnelly & Sons v. Campbell, 639 F.2d 6, 18 (1st Cir. 1980) (Pettine, J., concurring) (discussing the differences between a total ban and a time, place or manner restriction), aff'd, 453 U.S. 916 (1981).
205. See Id. at 16, 19 & n.3 (Pettine, J., concurring) (total ban is a greater infringement on first amendment interests than time, place or manner regulation); Stone, supra note 29, at 256-61 (absolute ban of billboards is severe burden on freedom of expression).
the first amendment that a government regulation cannot unduly re-
strict the flow of information or ideas.208

More importantly, the low standard of scrutiny employed by the
time, place or manner standard inadequately protects against the
evils of the total ban of a medium. It allows a balancing process that
would be dependent upon the sympathies of the Justices and conse-
quently might not protect the freedom of expression.207

A total ban of a medium of expression so substantially threatens
first amendment values that it should be reviewed stringently by the
Court.208 Recognizing the severe impact of a total ban of billboards,

206. See Cantwell v. Connecticut, 310 U.S. 296, 304 (1940); L. Tribe, supra note 76,
at 581-82 (government can regulate the noncommunicative aspects of speech but cannot un-
duly restrict the free flow of information and ideas).

207. Professor Lawrence Tribe has asserted that
categorical rules . . . tend to protect the system of free expression better because
they are more likely to work in spite of the defects in the human machinery on
which we must rely to preserve fundamental liberties. The balancing approach is
contrastingly a slippery slope; once an issue is a matter of degree, first amendment
protections become especially reliant on the sympathetic administration of the law.
L. Tribe, supra note 76, at 584. See also Emerson, supra note 47, at 440-54 (criticizing the
Burger Court's insensitivity to first amendment interests when balancing). Cf. Bogen, Balanc-
ing Freedom of Speech, 38 Md. L. Rev. 387 (1980) (arguing balancing has a proper role in
first amendment analysis).

208. Professor Thomas Emerson summarized the Court's treatment of this type of in-
fringement: "It has always been a basic tenet of first amendment doctrine that any substantial
abridgment of first amendment rights—any significant chilling effect—is sufficient to trigger
the protection of that constitutional guarantee." Emerson, supra note 47, at 453-54. See also
Elrod v. Burns, 427 U.S. 347, 362 (1976) (significant impairment of first amendment rights
must be subjected to "exactig scrutiny"); Buckley v. Valeo, 424 U.S. 1, 66 (1976) ("[t]he
strict test established in NAACP v. Alabama is necessary because compelled disclosure has
the potential for substantially infringing the exercise of first amendment rights").

Professor Lawrence Tribe proposed a two-track analysis which would permit strict scru-
tiny only in "track one" cases—those that involve a regulation of the content or subject mat-
ter. "Track two" cases characteristically have a noncommunicative impact on expression, such
as time, place or manner regulations, which he would subject only to a balancing of the gov-
ernmental interests and the first amendment rights on a case-by-case basis. L. Tribe, supra
note 76, at 581-82.

Professor Martin Redish, however, has criticized this approach:
Content-neutral restrictions like the prohibition of the distribution of all leaflets on
street corners or the requirement of disclosure of authorship on all handbills may
reduce the level and quality of contributions to the free exchange of ideas as signifi-
cantly as any content based regulation. . . . Content-neutral restrictions may sig-
ificantly undermine the value of free expression by imposing limitations on the
opportunity for individual expression. That the expression is regulated for reasons
other than its contents makes it no less an interference with expression.
[I]t is difficult to understand why content-neutral regulations should receive
any less scrutiny than other types of restriction.
Redish, The Content Distinction In First Amendment Analysis, 34 Stan. L. Rev. 113, 129-30
(1981). He proposed instead that courts subject all restrictions on expression to the same scru-
Justice Brennan characterized the San Diego ordinance as a "substantial restriction of protected activity."\(^{209}\) The Supreme Court has previously held that "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."\(^{210}\) By requiring a compelling government interest,\(^{211}\) the standard effectively creates a presumption that the total ban of a medium is unconstitutional.

To satisfy the standard, the regulation, in addition, must be drawn as narrowly as possible toward its intended goals.\(^{212}\) A total ban of a medium has such a widespread effect that it would be difficult to find that less restrictive means were not available. Earlier total ban cases invalidated ordinances where less restrictive means were available.\(^{213}\) The Court must carefully evaluate the means-ends fit and if another effective way exists to achieve the government's objectives which does not as seriously infringe on expression, the State must resort to it regardless of the added expense or inconvenience.\(^{214}\)

tiny used to evaluate content regulation.

\(^{209}\) Metromedia, 453 U.S. at 528 (Brennan, J., concurring). The Schad Court made the same statement regarding the total ban of live entertainment, 452 U.S. at 72, and, in addition, stated "the ordinance challenged in this case significantly limits communicative activity within the Borough." Id. at 71.


In Dunn v. Blumstein, 405 U.S. 330 (1972), the Court applied a similar test in a somewhat different context and stated: [T]he constitutional question may sound like a mathematical formula. But legal 'tests' do not have the precision of mathematical formulas. The key words emphasize a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes.

\(^{211}\) Id. at 342-43 (discussing application of strict scrutiny test of equal protection to duration of residence prerequisite to voting).

\(^{212}\) A compelling state interest has been defined as "a governmental interest so strong, so important, that a threat to it not only suggests, but actually compels governmental action. Only the interest of self-preservation can be so strong." Note, supra note 139, at 479 (emphasis in original).


\(^{214}\) See, e.g., Martin v. City of Struthers, 319 U.S. 141, 147-48 (1943) (city's interest in preventing criminal trespass can be controlled through general trespass statutes rather than by prohibition of all door-to-door canvassing and solicitation); Schneider v. State, 308 U.S. 147, 162 (1939) (prevention of littering better accomplished through punishment of those who litter than by full prohibition of leaflets).
While the availability of other media of communication may be an appropriate factor for the Court to consider when evaluating a time, place or manner regulation, it should not be considered when a total ban is at issue. In the frequently quoted dicta from Schneider, the Court stated that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other places.”215 The existence of other media should not foreclose a speaker from using a medium which he believes to be the most appropriate for his message. Choice of the channel of communication may be as important an act as the communication itself.216 In addition, a total ban is such an egregious infringement on the right to expression that the access to the medium elsewhere does not suffice to remedy the abridgment. This is particularly true in the case of the speaker with unorthodox views, whose access to alternative media may be limited.

Undoubtedly, no one would quarrel with applying this standard

215. Schneider v. State, 308 U.S. 147, 163 (1939), quoted in Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 76-77 (1981) (borough could not ban live entertainment on the basis it is available elsewhere); id. at 78 (Blackmun, J., concurring) (availability of theaters or bookstores in nearby communities does not justify a ban in the borough); Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 556 (1975) (whether “Hair” might have been performed as effectively in privately owned local theater was of no consequence). See also Emerson, supra note 47, at 454 (existence of other channels of communication cannot be justification for closing off the particular means of expression that speaker has chosen).

In a noteworthy concurrence from another decision, Justice Black stated:

I cannot accept my brother Harlan's view that the abridgment of speech and press here does not violate the First Amendment because other methods of communication are left open. This reason for abridgment strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continue to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop.


216. Justice Pettine, in considering a state-wide ban of billboards, noted:

When the state would outlaw a mode of expression—particularly a mode that has traditionally received society's approval or at least tolerance—more is involved than simply whether the speaker can adequately convey her message using means the state still permit her to employ.

[F]rom the speaker's perspective . . . the choice of medium is a component of the personal fulfillment fostered by the First Amendment . . . from the audience's perspective . . . each medium makes a unique sensory and psychological impact that cannot be precisely duplicated by any other, the speaker's autonomy in medium selection is a factor that should not be undervalued.

John Donnelly & Sons v. Campbell, 639 F.2d 6, 19 n.3 (1st Cir. 1980) (Pettine, J., concurring), aff'd, 453 U.S. 916 (1981) (citations omitted). See also, Kaufman, supra note 76 (some media are particularly effective for certain messages).
to a statute that threatened total prohibition of a major medium such as radio, television, or newspapers. One can easily perceive how such a broad prohibition would substantially infringe upon the right to free expression. Even the California Supreme Court, in an earlier stage of the *Metromedia* litigation, did not quarrel when the plaintiffs proposed that leaflets, sound trucks, newspapers, and maps can be "subjected only to narrowly drawn regulations serving a compelling governmental interest."  

It is not nearly so evident, however, that strict scrutiny should be applied to media such as signs trailed from airplanes, outdoor theaters, citizen band radios, bumper stickers or billboards.

Although a prohibition of any medium jeopardizes first amendment values, some media may not warrant the compelling state interest standard. In the past, the Court has considered various characteristics of the medium to determine what degree of protection it merited. These include the medium's traditional or historical bases, the widespread use of the medium, the ability of the medium to provide access for persons unlikely to use more traditional media, and the extent to which the use of a medium may clash with another fundamental right, such as privacy. Taken as a whole, these factors help to characterize the importance of the medium to society to determine if its elimination would be a substantial infringement of first amendment rights. It should be noted that the first criterion—whether a medium is traditional—is not necessarily dispositive because the Court has been receptive to recognizing changes in communication abilities due to developing technology.

Billboards should be analyzed by the Court in these terms. They are one of the oldest forms of mass communication. Although

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218. Some lower courts have applied this standard to other media. See, e.g., *Wright v. Chief of Transit Police*, 558 F.2d 67 (2d Cir. 1977) (prohibition of newspaper vending in subway system); *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319 (2d Cir. 1974) (prohibition of leaflets in county welfare center waiting rooms).

219. See supra notes 112-20 and accompanying text.

220. *Id.*

221. See supra note 115 and accompanying text.

largely relied upon by businesses, their low cost also makes them easily affordable for groups that do not have the resources to use other more expensive media.\footnote{223} Given this country's extreme dependence on the automobile, billboards particularly are effective for enabling the speaker to reach a large, diverse audience.\footnote{224} While a city or state might argue that billboards infringe on the fundamental right to privacy and that observers are a captive audience, the observer may be required to ignore a billboard that he or she finds offensive.\footnote{225}

Consequently, a total ban of billboards must require strict judicial review.\footnote{226} Under such an analysis, San Diego's entire statute

\footnote{223} Metromedia, Inc. provided figures comparing the cost of various media. For example, in 1978, the average cost per "rating point" in San Diego for 30-second commercials on prime-time television was $65.00; for 30-second commercials on radio was $28.00; for one page, black and white advertisements in weekly magazines was $83.00; for four color advertisements in monthly magazines was $93.00; for 600-line newspaper advertisements was $25.00; but was only $6.00 on a standard billboard for thirty days. Brief for Appellant at 25, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

\footnote{224} See supra notes 34, 202 and accompanying text.

\footnote{225} Fifty years ago, the Supreme Court used the captive audience doctrine as the rationale for regulating billboards because of their ability to thrust their message upon unwilling observers. Packer Corp. v. Utah, 285 U.S. 105, 110 (1932) (upholding criminal penalties for advertising cigarettes on billboards and streetcars) (quoted in Lehman v. City of Shaker Heights, 418 U.S. 298, 302-04 (1974)). But it is unlikely that the captive audience doctrine is useful when analyzing billboard regulations any longer. In Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), a case strikingly similar to the billboard cases, the Court struck down a regulation of the content of films shown at drive-in movie theaters because passersby could avert their eyes. The Court stated:

\begin{quote}
The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes"... the burden normally falls upon the viewer "to avoid further bombardment of [his or her] sensibilities simply by averting [his or her] eyes."
\end{quote}

\textit{Id.} at 210-11 (citations omitted). See also Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 542 (1980) (duty on recipient to throw out insert received in billing envelope that inflamed his or her sensibilities); Aronovsky, \textit{supra} note 2, at 328-30. \textit{Cf.} Rowan v. Post Office Dep't, 397 U.S. 729, 737 (1970) (unwanted mail is an invasion of the privacy of the home).

\footnote{226} When invalidating a statute essentially prohibiting all billboards upon rural byways, the court in State v. Pile, 603 P.2d 337, 342 n.3 (Okla. 1979), \textit{cert. denied}, 453 U.S. 922 (1981), stated:

\begin{quote}
[W]e cannot hold the prohibition imposed by our act is an incidental restriction on these freedoms. The act substantially encroaches upon the use of a recognized public forum, the streets. The existence of an alternative forum is not material to the question. Additionally, the notion that aesthetic principles, however they are de-
would be unconstitutional. The Court has not yet considered whether governmental interests in traffic safety and aesthetics are compelling interests, but the facts of *Metromedia* suggest that such a finding would be unlikely. Additionally, the ordinance was not narrowly drawn since the interests in traffic safety and aesthetics were not shown to be pervasive throughout the city. But cities or states are not forced to suffer with billboards that pose traffic or aesthetic problems. Through less restrictive measures, such as regulations of the location, size or lighting of signs, a government could remedy the problem without so seriously infringing on first amendment rights. Such regulation might also be extended to on-premise signs in order to more fully accomplish the objectives of the statute.

**CONCLUSION**

The *Metromedia* Court was presented with the difficult task of defining the scope of the first amendment protection extended to billboards. Many will applaud the outcome of this decision based on the notion that billboards are “offensive.” Billboards, however, are more than an eyesore on our highways—they are an important means of communication. The right to free speech depends upon effective communication for a speaker through a viable medium. If a medium is permitted to be totally eliminated, either through the plurality’s unworkable bifurcated approach, the more lenient time, place or manner analysis of Justice Stevens and Chief Justice Burger, or the total ban standard of Justice Brennan, a grave injustice is served upon our democratic society. We need a diversity of media to ensure access to channels of communication for unorthodox groups and

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227. In Lotze v. Washington, 92 Wash. 2d 52, 57-59, 593 P.2d 811, 814 (1979), the court found that governmental interests in traffic safety and aesthetics are “compelling state interests” which sustain a state-wide regulation of billboards. However, it is a watered down compelling interest standard because the court actually performed a time, place or manner analysis which does not require strict scrutiny.
viewpoints. It is not sufficient to rely upon the existence of mass media, such as television, newspapers or radio, to claim there is freedom of speech for all. And it is the less popular or nontraditional media that would more likely be banned under the Court's current panoply of standards. Statutes that attempt to prohibit a communication medium deserve strict scrutiny by the Court; any unpleasant aesthetic consequences are the price to be paid for rigorous enforcement of the first amendment.

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