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Environmental Aesthetics and Free Speech: Toward a Consistent Content Neutrality Standard for Outdoor Sign Regulation

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NOTE

ENVIRONMENTAL AESTHETICS AND FREE SPEECH: TOWARD A CONSISTENT CONTENT NEUTRALITY STANDARD FOR OUTDOOR SIGN REGULATION

*Brian J. Connolly**

First Amendment challenges by billboard companies and other sign owners to local sign regulations have become a frequent occurrence in the past thirty years. The stakes are high for both commercial sign owners and local governments. Sign control has emerged as an important front in the environmental protection movement, as it focuses on the visual or scenic quality of the environment. Courts have begun to recognize and accept local governments' interest in controlling the proliferation of signage as part of their efforts to improve environmental quality, but courts have applied First Amendment doctrine in an inconsistent manner. The courts' inconsistent treatment of the constitutional requirement of content neutrality has undermined state and local efforts to maintain aesthetic environments free from noxious signage. One of the consequences of this inconsistency is a false sense of security among sign regulators that their content-based regulations are somehow consistent with the First Amendment.

This Note argues in favor of a strict approach to content neutrality, placing a greater burden on sign regulators to develop the most content-neutral ordinances possible. The proposed approach would beat billboard companies and sign owners at their own litigation game, limiting governments' exposure to litigation and lessening the risk of sign regulations being invalidated, which in turn denigrates aesthetic quality. Furthermore, the recommended approach would reaffirm the First Amendment rights of sign owners while ensuring that regulatory bodies have sufficient guidance and encounter less risk in ensuring aesthetic environmental protection.

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INTRODUCTION

A familiar pattern has repeated itself in many communities throughout the United States in the past thirty years. A commercial advertiser or billboard company seeks a permit from a local government to erect a sign along a principal entry route into the community. Recognizing that such a billboard might pose a danger to the aesthetic character of the community by blocking scenic views or by creating a garish landscape rife with commercial advertising, the local government denies the permit, relying on its sign regulations—often contained within the zoning ordinance—to support the denial. In response to the denial of the permit, the billboard company sues the local government, claiming an infringement upon the company's First Amendment right to free speech. Finding a violation of the First Amendment rights of the billboard plaintiff, a federal judge declares the local sign ordinance invalid, leaving a regulatory vacuum that gives sign owners free reign to place signs throughout the community.

The vast proliferation of billboards and other types of signage throughout the United States is striking. In 2010, over 400,000 advertising

billboards were estimated to exist along the highways and throughout the cities of the nation.[1] The billboard industry earned $4.8 billion in revenue in the first three quarters of 2011,[2] and it is not uncommon for a billboard lease to cost an advertiser more than $2,500 per month.[3] Billboards are used most commonly for commercial advertisements, but are also frequently used for public announcements and advertising by nonprofit organizations and government agencies.[4] Billboards are typically more common in areas where there is vacant land or where signage revenues bring benefits to a property owner, such as rural areas or urban spaces that have experienced significant poverty. In 1989, there were over 4,000 billboards in Detroit, Michigan, alone, with a disproportionate percentage of the billboards located in lower-income neighborhoods of the city.[5]

While billboards bring significant revenue to advertisers, sign owners, and property owners, they generally detract from the character of nearby communities and have been shown to decrease values of surrounding properties.[6] Today, approximately 700 municipalities nationwide have either banned or severely curtailed billboard construction, and many communities have shown increasing desire to regulate outdoor signage to limit the aesthetic impact such signs have on neighborhoods, business districts, and rural areas.[7]

First Amendment challenges by billboard companies and other sign owners to local sign regulations have become a frequent occurrence since the Supreme Court first addressed the First Amendment rights of commercial sign owners in *Metromedia, Inc. v. City of San Diego* in 1981.[8] The

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1. Ken Leiser, *Digital Billboards: Bright or Blight?*, ST. LOUIS POST-DISPATCH, Dec. 26, 2010, at D1.

2. *Out of Home Advertising Continues to Grow*, OUTDOOR ADVERTISING ASS'N AM. (Dec. 1, 2011), http://www.oaaa.org/press/pressreleases/news.aspx?NewsId=1332.

3. BRIAN J. CONNOLLY & MARK A. WYCKOFF, MICHIGAN SIGN GUIDEBOOK: THE LOCAL PLANNING & REGULATION OF SIGNS 3-2 (2011), *available at* http://scenicmichigan.org/guidebook_2011.html.

4. *Id*. at 3-2 to 3-3.

5. *Id*. at 15-4.

6. *Billboards Hamper Economic Growth*, SCENIC AM., http://www.scenic.org/billboards-a-sign-control/the-truth-about-billboards/104-billboards-hamper-economic-growth (last visited Feb. 12, 2012).

7. *Billboard Control is Good for Business*, SCENIC AM., http://www.scenic.org/billboards-a-sign-control/the-truth-about-billboards/100-billboard-control-is-good-for-business (last visited Feb. 12, 2012).

8. 453 U.S. 490 (1981) (finding the City of San Diego's sign ordinance unconstitutional on the grounds that it improperly distinguished among signs based on the content of the messages displayed); *see also* John M. Baker & Robin M. Wolpert, *The Modern Tower of Babel: Defending the New Wave of First Amendment Challenges to Municipal Billboard and Sign Regulations*, PLAN. & ENVTL. L., Oct. 2006, at 3, 3–4 (discussing the number of First Amendment challenges to local sign regulations).

stakes are high for both commercial sign owners and local governments. The high value of outdoor advertising gives the commercial sign industry significant incentive—and a great deal of money—to hire lawyers and challenge sign regulations. Between 2001 and 2006, over 100 cases were filed against municipalities by outdoor advertisers around the nation,[9] and these challenges have continued unabated since that time. On the other hand, governments have a myriad of regulatory interests in reducing the number and size of outdoor signs.[10] Local sign controls have frequently been justified on the basis of signs' detrimental impact on traffic safety along highways and streets.[11] Furthermore, sign and billboard control has become an important part of the environmental protection movement—in addition to traditional issues, such as wildlife protection and land conservation—as it focuses on the *visual* or *scenic* quality of the environment.[12] Sign regulation is a key piece of the regulatory puzzle for states and local governments to protect an important public good—the aesthetic quality of the natural and built environments—from noxious intrusions by garish sign displays.[13]

Courts have begun to recognize and accept local governments' interest in controlling the proliferation of signage as part of their efforts to improve environmental quality.[14] In *Metromedia*, the Supreme Court officially endorsed aesthetic considerations as an acceptable rationale for regulating outdoor signage, opening the door for federal courts—and many state courts as well—to recognize aesthetic quality as an acceptable governmental interest for sign regulation.[15] In his dissenting opinion in *Metromedia*, Chief Justice Burger wrote, "a legislative body reasonably can conclude that every large billboard adversely affects the environment, for each destroys a unique perspective on the landscape and adds to the visual pollution of the

9. Baker & Wolpert, *supra* note 8, at 4.

10. *See, e.g.*, CONNOLLY & WYCKOFF, *supra* note 3, at 4-4 to 4-6.

11. *See, e.g.*, Jerry Wachtel, *Digital Billboards, Distracted Drivers*, PLANNING, Mar. 2011, at 25.

12. *See, e.g.*, CHRISTOPHER J. DUERKSEN & R. MATTHEW GOEBEL, AESTHETICS, COMMUNITY CHARACTER AND THE LAW (Am. Planning Ass'n, Planning Advisory Service Report No. 489/490, 1999); *see also Billboards Degrade the Natural Environment*, SCENIC AM., http://www.scenic.org/billboards-a-sign-control/the-truth-about-billboards/101-billboards-degrade-the-natural-environment (last visited Sept. 16, 2012); 10 VT. STAT. ANN. §§ 421-25 (2012) (protecting scenic views as part of state environmental law).

13. *See* CONNOLLY & WYCKOFF, *supra* note 3, at 4-2.

14. Historically, courts required justifications for sign regulation based on community health and safety, and did not accept aesthetics or environmental quality as sufficiently closely related to community health and safety. *See* DANIEL MANDELKER ET AL., STREET GRAPHICS AND THE LAW 78 (Am. Planning Ass'n, Planning Advisory Service Report No. 527, 2004).

15. 453 U.S. 490, 507–08 (1981) (plurality opinion). Aesthetic interests were endorsed as sufficient rationale for land use regulations in the Supreme Court's *Berman v. Parker* decision twenty-seven years earlier. 348 U.S. 26, 33 (1954).

city. Pollution is not limited to the air we breath [sic] and the water we drink; it can equally offend the eye and the ear."[16]

Therefore, two competing interests are at stake in sign litigation: the ability of sign owners to exercise their First Amendment right to speak, and the right of the public to a physical environment of high aesthetic integrity. This Note explores the First Amendment requirement of content neutrality as it applies to outdoor signs. Content neutrality is the constitutional requirement that government not regulate any aspect of the message of speech and instead regulate only the physical—size, height, brightness, etc.—aspects of speech.[17] Content neutrality is frequently implicated in First Amendment litigation over outdoor signage, but the courts' inconsistent treatment of the doctrine has undermined state and local efforts to maintain aesthetic environments free from noxious signage. This Note argues in favor of a stricter approach to content neutrality, as opposed to a functional content neutrality standard that allows regulation of signs based on broad subject matter categories or locational context.[18] This argument places a greater burden on sign regulators to develop the most content-neutral ordinances possible. Although the proposed approach may appear backward in light of the environmental interest in sign regulation and regulators' desire to have sign regulations upheld, the proposed approach would beat billboard companies and sign owners at their own game while limiting governments' exposure to litigation and lessening the risk of sign regulations being struck down, to the detriment of aesthetic quality. The recommended approach would reaffirm the First Amendment rights of sign owners while ensuring that regulatory bodies have sufficient guidance and encounter less risk in ensuring aesthetic environmental protection.

Part I of this Note provides a historical overview of the concurrent developments of aesthetic regulation rooted in the state police power and the content neutrality principle that developed within First Amendment law, giving specific attention to *Metromedia*, the complicated Supreme Court case where these two doctrines collided. Part II goes on to discuss the confusing aftermath of *Metromedia* and the growth of two distinct judicial responses in the federal district and appellate courts to the content neutrality principle. There has been a divergence in the judicial treatment of sign regulations, with some courts applying strict prohibitions against regulations that distinguish among signs based on content, and other courts using a more relaxed standard. Parts III and IV argue that courts should adopt a more uniform and strict content neutrality standard when reviewing sign regulations. Part III looks at the judicial precedents that dictate such a strict

16. 453 U.S. at 560–61 (Burger, C.J., dissenting).
17. *See infra* Section I.B.
18. *See infra* Part II.

standard, while analyzing and rejecting arguments used by courts and commentators in favor of more relaxed neutrality standards. Part IV addresses the practical rationales for a stricter content neutrality standard, maintaining that a stricter standard would provide more predictability to regulators and would limit the pattern of judicial strike-downs of sign ordinances that has occurred in recent years.

I. SIGN REGULATION AND THE CONSTITUTION: A BRIEF HISTORY

This Part explores two twentieth-century developments in constitutional law, the rise of aesthetic regulation, and the clarification of the First Amendment requirement of content neutrality, which have a significant impact on governments' ability to regulate outdoor signage. This Part briefly reviews the legal history of aesthetic regulation and explores the development of the First Amendment doctrine of content neutrality. In addition, this Part discusses the collision of these two constitutional concepts in the landmark sign regulation case, *Metromedia*.

A. Aesthetic Regulation

Sign regulation cases in the early part of the twentieth century focused primarily on property rights issues associated with the display of signs on private property,[19] as opposed to the free speech concerns that dominate today's sign cases. The earliest sign regulation cases were rooted in municipal police power authority, with many state courts recognizing governments' authority to regulate the display of signs and other structures on privately-owned land, as long as the regulations were passed for a legitimate governmental purpose such as health, safety, morals, or public welfare.[20] Sign regulation authority was impliedly affirmed by the U.S. Supreme Court in 1926, in *Village of Euclid v. Ambler Realty Co.*, when it

19. *See, e.g.*, Packer Corp. v. Utah, 285 U.S. 105 (1932); St. Louis Poster Adver. Co. v. St. Louis, 249 U.S. 269 (1919); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); St. Louis Gunning Adver. Co. v. City of St. Louis, 137 S.W. 929 (Mo. 1911).

20. *See, e.g.*, City of Chicago v. Gunning System, 73 N.E. 1035, 1039 (Ill. 1905); *St. Louis Gunning Adver. Co.*, 137 S.W. at 947–49; Cream City Bill Posting v. City of Milwaukee, 147 N.W. 25, 28 (Wis. 1914). In *Commonwealth v. Boston Advertising Co.*, the court recognized that public health concerns were a valid basis for regulation, but explained that the sign ordinance in question did not further that interest. 74 N.E. 601 (Mass. 1905). These cases rejected earlier decisions holding that regulation of sign displays on private property necessarily effected an unconstitutional taking of property without due process of law. *See, e.g.*, City of Passaic v. Paterson Bill Posting, Adver. & Sign Painting Co., 62 A. 267, 268 (N.J. 1905) (finding that the regulation in question was impermissible because it was not within the police power of the state).

held that land use regulations could be a valid exercise of state police power furthering the public welfare.[21]

Early land use and signage cases did not contemplate aesthetics as sufficiently within the realm of public welfare to provide the sole rationale for local land use regulations,[22] even though aesthetic concerns were permitted as a supplementary consideration for land use and sign regulations in some states.[23] In 1954, however, in *Berman v. Parker*, the Supreme Court endorsed aesthetic quality as a valid rationale for land use regulation,[24] and many states began to follow suit.[25] The Supreme Court's recognition of an aesthetic rationale for land use regulations effectively opened the door for consideration of environmental concerns in developing zoning and sign regulations.[26]

B. First Amendment and Content Neutrality

The Supreme Court's First Amendment jurisprudence largely neglected the free speech implications of regulating permanent outdoor signage before the late 1970s.[27] The Court's First Amendment jurisprudence had long required viewpoint neutrality, meaning that a regulation could not

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21. 272 U.S. 365, 395 (1926).

22. *See, e.g.*, *Paterson Bill Posting*, 62 A. at 268 ("Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power . . . .").

23. *See, e.g.*, Wolverine Sign Works v. City of Bloomfield Hills, 271 N.W. 823, 825 (Mich. 1937).

24. Berman v. Parker, 348 U.S. 26, 33 (1954).

25. *See, e.g.*, Opinion of the Justices to the Senate, 128 N.E.2d 557, 561–62 (Mass. 1955); Gannett Outdoor Co. of Mich. v. City of Troy, 409 N.W.2d 719, 722–23 (Mich. Ct. App. 1986); State v. Miller, 416 A.2d 821, 824 (N.J. 1980); Pierro v. Baxendale, 118 A.2d 401, 408 (N.J. 1955); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 69 N.W.2d 217, 222–23 (Wis. 1955).

26. *See, e.g.*, *Berman*, 348 U.S. at 33 ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean."). Courts and the public now generally recognize aesthetic regulation—sign regulation included—as a crucial part of creating a healthy visual, natural, and ecological environment. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 555–57 (1981) (Burger, C.J., dissenting) (discussing "the authority of local government to protect its citizens' legitimate interests in traffic safety and the environment by eliminating distracting and ugly structures from its buildings and roadways"). Furthermore, Congress's broad understanding of what constitutes the environment for regulatory purposes supports an understanding of aesthetic regulation as an environmental aim; the National Environmental Policy Act requires federal agencies to use "all practicable means" to "preserve important historic, cultural, and natural aspects of our national heritage." 42 U.S.C. § 4331(b) (2012).

27. *See* Randal R. Morrison, *Sign Regulation*, in PROTECTING FREE SPEECH AND EXPRESSION: THE FIRST AMENDMENT AND LAND USE LAW 109 (Daniel R. Mandelker & Rebecca L. Rubin eds., 2001).

control the display of messages containing a particular political viewpoint.[28] However, in 1972, the Court expressly prohibited government regulation of the content or subject matter of protected speech,[29] such that the government may not impose differential burdens on speech based on its general subject matter.[30] The content neutrality principle grew out of a concern that government action regulating speech based on its subject overcomes an individual's right to decide the ideas and beliefs deserving of expression or consideration,[31] and that government selection of subject matter offers the significant potential for untrammeled discretion by government officials, leading to the suppression of certain ideas.[32] A content-neutral regulation is deemed to be a "time, place, and manner" regulation, which regulates to some extent the temporal, locational, and other non-speech aspects of protected speech.[33] In the context of a sign, a time, place, and manner regulation would focus on the sign's placement, size, height, area, and brightness, for example, instead of regulating the types of words or images on the sign.

The development of the commercial speech doctrine was also critical in bringing outdoor signage under First Amendment protection. Before 1976, the Court did not afford First Amendment protection to commercial

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28. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

29. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (emphasis omitted)). The distinction between viewpoint neutrality and content neutrality was perhaps best articulated in *Boos v. Barry*, where the Supreme Court struck down a Washington, D.C., ordinance that prohibited the display of signs or other communicative devices critical of foreign governments within 500 feet of a property used or occupied by any foreign government. 485 U.S. 312, 316 (1988) (plurality opinion). The Court stated that "a regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic.' Here the government has determined that an entire category of speech—signs or displays critical of foreign governments—is not to be permitted." *Id.* at 319 (emphasis and internal citation omitted) (quoting Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537 (1980)).

30. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47–48 (1987).

31. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (plurality opinion).

32. *Id.* ("Laws [that are content-based] pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."); *see also* Stone, *supra* note 30, at 55–57.

33. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569, 576 (1941); *see also* Daniel R. Mandelker, *Sign Regulation and Free Speech: Spooking the Doppelganger*, in TRENDS IN LAND USE LAW FROM A TO Z: ADULT USES TO ZONING 70–71 (Patricia E. Salkin ed., 2001) ("A time, place, and manner regulation is a law that regulates activities to protect governmental interests unrelated to speech. An example is an ordinance that contains limitations on the size, number, and height of signs.").

speech.[34] That notion was discarded, however, in the 1976 Supreme Court case *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[35] on the grounds that a democratic society has an interest in the "free flow of commercial information."[36] The Court later clarified however, that commercial speech enjoyed a lesser protection than other speech,[37] and adopted a four-part intermediate scrutiny test to deal with government restrictions on commercial speech.[38] Therefore, regulation of signs containing a commercial message will be reviewed under the intermediate scrutiny test.

The first application of the commercial speech doctrine to outdoor signage came in *Linmark Associates, Inc. v. Township of Willingboro*, decided in 1977.[39] The Court invalidated an ordinance banning the display of outdoor real estate signs that was enacted out of local concern that a proliferation of such signs would destabilize the local housing market and encourage "white flight."[40] In invalidating the ordinance, the Court found that the ordinance failed to offer ample alternative channels for communicating information on homes for sale,[41] and that the ordinance was enacted for the purpose of suppressing information.[42] The Court held that the township improperly restricted the free flow of truthful commercial information and had failed to show that the restriction was necessary to achieve its goal of encouraging stable, racially-integrated housing.[43] Although the Court intimated some concern about the content neutrality of the ordinance in question, *Linmark* was decided based on the suppressive character of the ordinance in question;[44] the Court saved for another day the question of whether a prohibition against real estate signs violated the requirement of content neutrality.

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34. *See* Breard v. City of Alexandria, 341 U.S. 622, 641–45 (1951); Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

35. 425 U.S. 748 (1976).

36. *Id.* at 765.

37. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980).

38. *Id.* at 563–64. The four-part *Central Hudson* test requires that the speech being restricted be lawful and non-misleading, the regulations must be supported by a substantial governmental interest, that the regulation directly further that interest, and that the regulation be no broader than necessary.

39. 431 U.S. 85 (1977).

40. *Id.* at 87–91.

41. *Id.* at 93.

42. *Id.* at 93–94. In the Supreme Court's eyes, the township's declared purpose for enacting the ban was that it feared that the signs' " 'primary' effect [is] that they will cause those receiving the information to act upon it." *Id.* at 94.

43. *Id.* at 95–96.

44. *Id.* at 95–97.

C. Collision of Aesthetics and the First Amendment: Metromedia

The Supreme Court's recognition of the First Amendment rights of commercial advertisers and its application of First Amendment doctrine to outdoor signs in *Linmark* was a turning point.[45] In one fell swoop, the Court handed billboard companies and commercial sign owners a new, First Amendment-based litigation strategy to challenge municipal sign regulations.[46] Decided just four years after *Linmark*, *Metromedia* was the first case in which the Supreme Court considered First Amendment claims by billboard owners.[47] In *Metromedia*, a billboard company successfully challenged the City of San Diego's sign ordinance, which prohibited the display of off-premises signs, with some exceptions.[48] Despite the case's importance as a guidepost for sign regulation, the outcome of *Metromedia* was a confusing and fractured[49] five-part opinion, described by Justice Rehnquist as "a virtual Tower of Babel, from which no definitive principles can be clearly drawn."[50]

To the extent that conclusions can be found in *Metromedia*, a majority of the justices agreed on three critical points.[51] First, a majority found that the city's aesthetic concerns, which led to the enactment of the ordinance,[52] served a substantial governmental purpose supporting regulations concern-

45. *See* Morrison, *supra* note 27, at 109.

46. *See* Baker & Wolpert, *supra* note 8, at 3.

47. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). *Metromedia* is universally recognized as the foundational case on sign law. *See, e.g.*, DANIEL R. MANDELKER, LAND USE LAW § 11.13 (5th ed., 2003); Morrison, *supra* note 27, at 110.

48. 453 U.S. at 493–96 (plurality opinion). "Off-premises" is a classification that applies to signs whose messages relate to an activity that is not conducted on the property where the sign is displayed. Conversely, an "on-premises" sign has a message that relates in some manner to the activities being conducted on the property where the sign is displayed. *Id*. at 494.

49. Morrison, *supra* note 27, at 106 (describing *Metromedia* as "an archetype of the cloudiness that permeates the law of signs"); *see also* M. Ryan Calo, *Scylla or Charybdis: Navigating the Jurisprudence of Visual Clutter*, 103 MICH. L. REV. 1877, 1879 n.18 (2005) (discussing the Supreme Court's divisions in *Metromedia*).

50. *Metromedia*, 453 U.S. at 569 (Rehnquist, J., dissenting).

51. CONNOLLY & WYCKOFF, *supra* note 3, at 6-3.

52. The San Diego ordinance acknowledged that the city's aesthetic concerns were part of a set of broader environmental goals. The ordinance stated, "It is the intent of these regulations to protect an important aspect of the economic base of the City by preventing the destruction of the natural beauty and environment of the City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conventions; to safeguard and enhance property values; to protect public and private investment in buildings and open spaces; and to protect the public health, safety and general welfare." Metromedia, Inc. v. City of San Diego, 136 Cal. Rptr. 453, 455 (Ct. App. 1977) (quoting SAN DIEGO, CAL., ORDINANCE 10,795 (Mar. 14, 1972)).

ing speech,[53] thereby endorsing aesthetics as a proper governmental rationale for commercial speech regulations.[54] Because the environmental and aesthetic regulatory interests parallel one another,[55] this *Metromedia* holding was critically important for the regulation of signage on environmental grounds. Second, a majority held that sign regulations must be content-neutral "time, place, and manner" restrictions,[56] applying the content neutrality requirement to government regulations of outdoor signage.[57] Third, a majority agreed that a sign regulation may not favor commercial speech over noncommercial speech either directly or indirectly,[58] as this type of regulation would constitute an impermissible content-based distinction.[59] Thus, San Diego's ban on off-premises signage violated the First Amendment because the ban prohibited commercial property owners from displaying noncommercial signage unrelated to the activity on the property, thereby effecting a content-based regulation favoring commercial speech over noncommercial speech.[60]

One of the primary areas of post-*Metromedia* confusion surrounds the type and degree of content neutrality required by the First Amendment in the context of sign regulation.[61] Although it restated the basic principle of

53. *Metromedia*, 453 U.S. at 507–08 ("[T]he twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals.").

54. Aesthetic concerns are also a valid regulatory purpose for regulation of noncommercial speech, which requires a regulation to be narrowly tailored to serve a significant governmental interest, in which aesthetic considerations are included. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). Note that, in reviewing content-based regulations, the Court applies strict scrutiny, which requires that the regulation be narrowly tailored to serve a compelling governmental interest. *See, e.g.*, Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 821 (1984) (Brennan, J., dissenting).

55. *Metromedia*, 453 U.S. at 560–61 (Burger, C.J., dissenting).

56. *Id.* at 516.

57. The *Metromedia* plurality opinion suggested that ordinances could distinguish among broad categories of commercial speech, *id.* at 512, but the concurrence strongly rejected that notion. *See id.* at 536. The plurality's observation seems to be at odds with the Supreme Court's earlier opinion demanding content neutrality in government regulations of commercial speech in *Virginia Pharmacy v. Virginia Citizens Consumer Council, Inc*. *See Virginia Pharmacy Board*, 425 U.S. 748, 771 (1976).

58. *Metromedia*, 453 U.S. at 513.

59. *Id.*

60. *Id.* The reason that a ban on off-premises signage inherently favors commercial speech was summed up well in *Vono v. Lewis*, in which the court, discussing a similar ban on off-premises signage, stated, "The owner of a music store, to take one example, could not replace her 'Drums For Sale' sign with a 'Cut Property Taxes Now!' message unless she conducted some tax-related activity in the music store. So, while the drum seller . . . could not advertise cars she also would be prohibited from expressing her strongly held views to limit taxes, to stop the war, support a candidate, or root for the Red Sox." 594 F. Supp. 2d 189, 203–04 (D.R.I. 2009).

61. R. Douglass Bond, Note, *Making Sense of Billboard Law: Justifying Prohibitions and Exceptions*, 88 MICH. L. REV. 2482, 2507 (1990).

content neutrality, the *Metromedia* plurality opinion endorsed two potentially content-based distinctions: the distinction between commercial and noncommercial speech, and the distinction between on-premises and off-premises signage.[62] By resting its First Amendment analysis on San Diego's failure to accommodate noncommercial speech in places where commercial speech was allowed, the plurality approved a bifurcated approach to sign regulation based on whether the message of the sign is commercial or noncommercial in nature.[63] Furthermore, by upholding an ordinance that distinguished between on-premises and off-premises signs, the Court appeared to suggest that some degree of message-based regulation was permissible under the First Amendment.[64] Instead of requiring that sign regulations be truly content neutral so as to reject *any* regulation of a sign's message, portions of the *Metromedia* opinion affirmed distinctions that carry message-related implications for regulation.[65] *Metromedia*'s effect, then, was to call into question the Court's prior content neutrality requirements—entering into murky territory where government officials could potentially censor speech in the sign permit review process—and to create confusion among courts, government regulators, and attorneys.

Metromedia stands as the foundational case in First Amendment sign law, because it served as the intersection of the Supreme Court's recognition of local governments' land use authority premised on aesthetic grounds, and the Court's demands that regulations of speech contain no reference to content. However, the confusing nature of the case's outcome

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62. Calo, *supra* note 49, at 1881–82.

63. *See Metromedia*, 453 U.S. at 536 (Brennan, J., concurring in the judgment) (noting the obvious problem with this approach, saying "an ordinance . . . banning commercial billboards but allowing noncommercial billboards . . . raises First Amendment problems at least as serious as those raised by a total ban, for it gives city officials the right—before approving a billboard—to determine whether the proposed message is 'commercial' or 'noncommercial.' "). Despite the Supreme Court's dedication to delineating the commercial-noncommercial distinction, the Court has not articulated a precise delineation between commercial and noncommercial speech.

64. *See Metromedia*, 453 U.S. at 512. Courts since *Metromedia* have noted the inherent content neutrality problem with the on-premises/off-premises distinction. *See, e.g.*, *Vono*, 594 F. Supp. 2d at 200–01 (finding the distinction between on- and off-premises signage to be a message-based distinction because the government must determine whether or not the message relates to the premises); Outdoor Media Dimensions, Inc. v. Dep't of Transp., 132 P.3d 5, 16 (Or. 2006) (finding that the on-premises/off-premises distinction violates the Oregon constitution's free speech guarantee). At least one court has found that the on-premises/off-premises distinction does not violate the prohibition on content-based regulation because regulations containing such a distinction are regulating speech based on its *location*, not its content; this is not widely followed. *See generally*, Mandelker, *supra* note 33, at 76–77.

65. *See, e.g.*, *Vono*, 594 F. Supp. 2d at 200–01 (discussing the message-based distinctions in *Metromedia*).

has plagued courts and commentators. The next Part explores a key division on the content neutrality requirement that has taken place since *Metromedia*.

II. CRACKS IN THE CONTENT NEUTRALITY DOCTRINE

Because none of the opinions in *Metromedia* gained majority support in the decision, the precedential value of the case as it pertains to sign regulation and the First Amendment is somewhat murky. Under the rule articulated in *Marks v. United States*, lower courts are not bound by any particular line of reasoning in plurality opinions such as *Metromedia*.[66] Lower courts are, however, required to comply with the "position taken by those Members who concurred in the judgments on the narrowest grounds."[67] Largely due to the confusion that resulted from the five *Metromedia* opinions, federal appeals courts have taken two decidedly different directions in the degree of content neutrality required of sign regulations.[68] One on hand, some courts have taken a "literal-minded"[69] approach that approximates complete neutrality, disallowing any regulation based on a sign's overarching subject matter,[70] and some have even disallowed distinctions such as that between on-premises and off-premises signage.[71] On the other hand, some courts have taken a more relaxed—or functional—approach, allowing regulations to distinguish between broad categories of signage,[72] and in some cases, allowing regulations to differentiate between signs based on their relevance to the site at which they are located.[73] This division has widened dramatically over the past twenty years, with at least two circuits subscribing to the stricter approach,[74] and three circuits sub-

66. *See* Marks v. United States, 430 U.S. 188, 193 (1977).

67. Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976); *see also* Calo, *supra* note 49, at 1880–81.

68. Susan L. Trevarthen, *Best Practices in First Amendment Land Use Regulations*, PLAN. & ENVTL. L., June 2009, at 3, 8.

69. *Id*.

70. *See, e.g.*, Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728, 736 (8th Cir. 2011) *reh'g en banc denied*; Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1266 (11th Cir. 2005). The regulations struck down in *Solantic* included broad category-based distinctions, such as "identification" signs or "religious displays." *Solantic*, 410 F.3d at 1257.

71. *See, e.g.*, Outdoor Media Dimensions v. Dep't of Transp., 132 P.3d 5, 16 (Or. 2006).

72. *See, e.g.*, H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609, 622 (6th Cir. 2009) (upholding regulation containing differing regulations for "business" signs, "advertising" signs, and "political" signs).

73. *See, e.g.*, Rappa v. New Castle Cnty., 18 F.3d 1043, 1064–65 (3d Cir. 1994); Wheeler v. Comm'r. of Highways, 822 F.2d 586, 591 (6th Cir. 1987).

74. The Eighth, *see Neighborhood Enters.*, 644 F.3d at 736, and Eleventh, *see Solantic*, 410 F.3d at 1266, Circuit Courts have led the charge toward a stricter approach. The First Circuit generally follows this approach as well. *See* Naser Jewelers, Inc. v. City of Concord, N.H., 513 F.3d 27, 32–33 (1st Cir. 2008).

scribing to the more flexible approaches.[75] This Part explores the context-sensitive and category-based approaches (collectively, the "functional approach"), and contrasts these approaches to the strict content neutrality approach.

A. The Functional Approach

The functional approach for determining the content neutrality of sign regulations has two strands: one allows broad "category-based" determinations, and the other allows "context-sensitive"[76] distinctions. The category-based line of cases generally accepts that governments can regulate signs according to broad, potentially subject-based categories of signs.[77] Under a category-based approach, a sign ordinance could potentially differentiate between "political," "real estate," "construction," "identification," or "directional" signs, and such a differentiation would not run afoul of the First Amendment.[78] Chief Justice Burger's *Metromedia* dissent supported this model, as he would have upheld the San Diego ordinance on the grounds that the broad categories of signs excepted from the ordinance were seemingly noncontroversial and had some rational relationship to the public's need for their regulation.[79] Further support is found in the Supreme Court's decision in *Ward v. Rock Against Racism*, where the Court appeared to suggest that the content neutrality requirement was met simply when the government's regulatory interest was *justified* without reference to content.[80]

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75. The Sixth, *see H.D.V.-Greektown*, 568 F.3d at 622, and Seventh, *see* Lavey v. City of Two Rivers, 171 F.3d 1110, 1116 (7th Cir. 1999), Circuit Courts have allowed category-based regulations. The Ninth Circuit has generally adhered to a stricter approach to determining content neutrality, although it has allowed some category-based restrictions in certain cases. *See* G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1076 (9th Cir. 2006). The Third Circuit has also permitted signs in certain places based on their relevance to the site at which they are displayed. *See* Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380, 389–90 (3d Cir. 2010).

76. The term context-sensitive was coined in *Rappa*, 18 F.3d at 1064, but this approach has also been titled the "site relevance theory." Morrison, *supra* note 27, at 115.

77. *See, e.g.*, Reed v. Town of Gilbert, Ariz., 587 F.3d 966, 977 (9th Cir. 2009); *H.D.V.-Greektown*, 568 F.3d at 622; S. Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 896–97 (7th Cir. 1991); *Wheeler*, 822 F.2d at 591.

78. *See Reed*, 587 F.3d at 977; *H.D.V.-Greektown*, 568 F.3d at 622; *Lavey*, 171 F.3d at 1112 n.5; *Wheeler*, 822 F.2d at 591.

79. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 564–65 (1981) (Burger, C.J., dissenting) ("Where the [San Diego] ordinance does differentiate among topics, it simply allows such noncontroversial things as conventional signs identifying a business enterprise, time-and-temperature signs, historical markers, and for sale signs . . . [It may be] frivolous to suggest that, by allowing such signs but forbidding noncommercial billboards, the city has infringed freedom of speech.").

80. 491 U.S. 781, 791 (1989). This statement has been the subject of significant hand-wringing by the Supreme Court and lower courts. Compare the Court's statement in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (noting that Cincinnati's "*mens*

The Court was silent as to whether the regulation was *actually* content neutral.

Alternatively, courts following the context-sensitive approach to determining the validity of sign regulations acknowledge that some messages are more important than others at certain locations[81] in order to justify content-based exceptions to the general rule.[82] This approach has roots in both Justice Brennan's concurrence[83] and Chief Justice Burger's dissent[84] in *Metromedia*, both of which noted that the communicative value of having some signs at certain locations may outweigh the government's interest in aesthetics or traffic safety. A context-sensitive ordinance, in other words, would "constitutionally contain content-based exceptions as long as the content exempted from restriction is significantly related to the particular area in which the sign is viewed—for example, a sign identifying the property on which it sits as a restaurant, or a sign alongside a highway which tells drivers how to reach a nearby city."[85] The context-sensitive approach certainly tolerates the on-premises/off-premises distinction[86] and is openly forgiving toward broad subject matter-based exceptions to general bans on certain types of signage.[87]

Rappa v. New Castle County is a foundational application of both the category-based and context-sensitive approaches.[88] The case dealt with a

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rea" in choosing between messages based on content was irrelevant), with its reaffirmation of the *Ward* standard in *Hill v. Colorado*, 530 U.S. 703, 720 (2000) (plurality opinion).

81. *See, e.g.*, *Rappa*, 18 F.3d at 1064–65; *see also* Jason R. Burt, Note, *Speech Interests Inherent in the Location of Billboards and Signs: A Method for Unweaving the Tangled Web of* Metromedia, Inc. v. City of San Diego, 2006 BYU L. REV. 473, 518–19 (2006) (advocating the adoption of a context-sensitive approach in determining whether local ordinances meet the content neutrality requirement of the First Amendment).

82. Morrison, *supra* note 27, at 115.

83. *See Metromedia*, 453 U.S. at 532 n.10 (Brennan, J., concurring in the judgment) ("I would allow an exception only if it directly furthers an interest that is at least as important as the interest underlying the total ban . . . .").

84. *See id.* at 565 (Burger, C.J., dissenting) ("[T]he city reasonably could conclude that the balance between safety and aesthetic concerns on the one hand and the need to communicate on the other has tipped the opposite way.").

85. *Rappa*, 18 F.3d at 1047.

86. *See* Wheeler v. Comm'r of Highways, 822 F.2d 586, 591 (1987) ("[T]he on-premises/off-premises distinction does not constitute an impermissible regulation of content just because the determination of whether a sign is permitted at a given location is a function of the sign's message.").

87. *See Rappa*, 18 F.3d at 1063–64. Exceptions to general bans on signs pose particular problems when they are content-based; for example, a city that bans all temporary signage but then allows an exception for "political" signs has made an exception based on the content—the political nature—of the sign's message.

88. *Id.* at 1043. *Rappa* has been followed and expanded upon by the Third Circuit in at least two more-recent cases. *See* Melrose v. City of Pittsburgh, 613 F.3d 380, 389–90 (3d Cir. 2010); Riel v. City of Bradford, 485 F.3d 736, 747–48 (3d Cir. 2007).

Delaware law generally prohibiting signage within twenty-five feet of highway rights-of-way.[89] The law contained a number of exemptions from the prohibition, including exemptions for "signs advertising the sale or lease of the real property on which they are located" and signs advertising the activities conducted on the property on which the sign is located.[90] In reviewing the exemptions from the Delaware law's prohibition, the court relied upon Justice Brennan's *Metromedia* concurrence, articulating a test whereby an exemption from a total ban would need to directly further a governmental "interest that is at least as important as the interest underlying the total ban," in a way that was narrowly drawn and not more broad than is necessary.[91] The court then went on to determine that the government's regulatory interest in allowing the communication of certain information at certain places was at least as important as the government's regulatory interests in aesthetics and traffic safety, thus justifying the exceptions to the ban.[92] The court noted, for example, that a speed limit sign along a highway or an advertisement of a commercial establishment on the property where the establishment is located are signs for which the governmental interest in allowing access to important information is sufficiently important to overcome a general ban on roadside signage.[93]

B. The Strict Content-Neutral Approach

On the opposite end of the spectrum are courts that require sign regulations to be entirely content neutral, and which have invalidated any sign regulation that deals with the subject matter or message of the sign.[94] Un-

89. *Rappa*, 18 F.3d at 1051.

90. *Id.*

91. *Id.* at 1064 (quoting *Metromedia*, 453 U.S. 490, 532 n.10 (1981) (Brennan, J., concurring in the judgment)). While exemptions from total bans attract significant attention from courts because they are commonly content-based, total bans without exemptions may also carry First Amendment problems if they may fail the narrow tailoring requirement of the intermediate scrutiny test or may not leave open ample alternative channels of communication. *See generally* City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994); Cent. Hudson Gas and Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 569–70 (1980); Lusk v. Vill. of Cold Spring, 475 F.3d 480, 483 (2d Cir. 2007); Cleveland Area Bd. of Realtors v. City of Euclid, 88 F.3d 382, 388–90 (6th Cir. 1996).

92. *Rappa*, 18 F.3d at 1064 ("Some signs are more important than others not because of a determination that they are generally more important than other signs, but because they are more related to the particular location than are other signs.").

93. *Id.* The *Rappa* court struck down a portion of the Delaware law that exempted signs advertising local cities and industries from the general ban, finding that the interest in communicating such off-premises commercial advertisements was not more important than the aesthetic and traffic safety interests that justified the underlying ban. *Id.* at 1068.

94. *See, e.g.*, Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1266 (2005); Dimmitt v. City of Clearwater, 985 F.2d 1565, 1569 (11th Cir. 1993) ("[O]nly the most

der this approach, sign regulations that purport to regulate in any way based on the subject matter of the sign, even if such regulations are based on seemingly benign broad categories of subjects,[95] are found to violate the First Amendment. Courts following this stricter approach place a heavy reliance on plain understandings of the Supreme Court's blanket statements on the content neutrality requirement,[96] first in *Police Department of Chicago v. Mosley*,[97] and later in *Turner Broadcasting Systems, Inc. v. FCC*.[98] In addition, some commentators and litigators, particularly billboard company plaintiffs, have advocated an extreme approach—often termed the "need to read" approach—that would invalidate a sign ordinance solely on the grounds that a government enforcement official would need to read the sign's message to enforce the ordinance.[99] Such an absolutist model has been specifically rejected by the Supreme Court,[100] and creates a near-absurdity for practical regulatory purposes.[101]

The strict content-neutral approach was articulated in the Eighth Circuit's decision in *Neighborhood Enterprises, Inc. v. City of St. Louis*,[102] in which the court invalidated a city ordinance based on its definition of "sign." The city code's "sign" definition contained two exclusions from its scope, including an exclusion for the symbols or crests of civic organizations and an exclusion for art works.[103] The owner of a wall mural, which contained a political message in addition to artwork, challenged the city's enforcement of its sign code against the mural, arguing that the ordinance was content-based because it required city officials to review the sign's content to determine whether the ordinance applied.[104] The Court of Appeals agreed with the sign owner, noting that the sign's content was the determining

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extraordinary circumstances will justify regulation of protected expression based upon its content.").

95. *See, e.g.*, Whitton v. City of Gladstone, Mo., 54 F.3d 1400, 1404 (8th Cir. 1995) (striking down an ordinance that created special restrictions for political signs).

96. *E.g.*, *Solantic*, 410 F.3d at 1258–59.

97. 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

98. 512 U.S. 622, 641–42 (1994) (plurality opinion); *see also* Morrison, *supra* note 27, at 108 (discussing the strict content-neutral approach articulated in *Turner Broad. Sys.*).

99. Baker & Wolpert, *supra* note 8, at 8.

100. *See* Hill v. Colorado, 530 U.S. 703, 719–21 (2000) (plurality opinion).

101. The impossibility of such an approach is exemplified by the fact that an enforcement official must at least look at an object to determine if the object falls under the regulatory ambit of the sign regulation; definitions contained within the law would undoubtedly need to refer to some communicative elements within the borders of the sign. *See id.*

102. 644 F.3d 728 (8th Cir. 2011).

103. Neighborhood Enters., Inc. v. City of St. Louis, Mo., 718 F. Supp. 2d 1025, 1031 (E.D. Mo. 2010).

104. *See Neighborhood Enters.*, 644 F.3d at 735–36.

factor as to whether the sign was subject to the ordinance restriction, since an enforcement officer was required to review the mural to determine whether it was subject to the ordinance.[105] Other courts following the strict approach have invalidated sign ordinances that distinguish among "governmental" flags,[106] "decorative flags," "memorial signs," "signs . . . directing and guiding traffic," and various other signs categorized based on the message of the sign.[107] In some cases, courts applying the more literal interpretation of content neutrality have noted that the on-premises/off-premises distinction is content-based because it is, in fact, a regulation of the message of the sign.[108]

The more relaxed approach to content neutrality necessarily (and courts applying this approach admit as much)[109] affords the government the opportunity to evaluate the content of a sign when enforcing a sign regulation, which is precisely the type of action that the First Amendment was designed to prevent.[110] Thus, the context-sensitive and category-based approaches, which require less than complete content neutrality, offer courts and governments a clear opportunity to derogate the content neutrality rule articulated by the Supreme Court. As long as courts and governments continue to disagree over the degree of content neutrality required by the First Amendment, billboard companies and other sign owners will continue to have viable opportunities to challenge regulations designed to improve the aesthetic integrity of communities. As this Note discusses in the following sections, requiring governments to adhere to the strictest form of content neutrality in developing sign regulations and reinforcing the rigorous demands of the First Amendment is necessitated by the Supreme Court's unqualified statements on content neutrality, the particular character of sign regulations as distinguished from other forms of speech regulation, and by the practical effects of sign litigation.

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105. *Id*. at 736.

106. *See* Dimmitt v. City of Clearwater, 985 F.2d 1565, 1569 (11th Cir. 1993).

107. *See* Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1257, 1264 (11th Cir. 2005).

108. *See, e.g.*, Ackerley Commc'ns of Mass., Inc. v. City of Cambridge, 88 F.3d 33, 36 n.7 (1st Cir. 1996) ("In 'commonsense' terms, the [on-premises/off-premises] distinction surely is content-based because determining whether a sign may stay up or must come down requires consideration of the message it carries."). The stricter content neutrality approach is also less forgiving to exceptions from general bans on signage, tolerating only those exceptions that are not based on the content of the message. *See* G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1076–79 (9th Cir. 2006) (permitting content-neutral exceptions from general sign ban).

109. *See* Rappa v. New Castle Cnty., 18 F.3d 1043, 1047 (3d Cir. 1994) (noting that content-based regulation may be constitutionally permissible in some situations).

110. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 640–41 (1994) (plurality opinion).

III. Doctrinal Demands for the Strict Content-Neutral Approach

Although the strict content-neutral approach places a great burden on the governmental entities responsible for sign regulation, this approach is the proper legal standard for judicial review of sign regulations. This Part discusses relevant Supreme Court precedent demanding strict content neutrality and the broadening of the content neutrality principle since its inception in First Amendment jurisprudence. The uniqueness of sign regulation, and why its uniqueness reinforces the applicability of the approach, is also addressed. Finally, this Part describes how the relaxed approaches leave significant opportunity for erosion of the content neutrality principle and thus a derogation of individual sign owners' First Amendment rights.

A. Precedent and the Broadening Scope of Content Neutrality

Lower federal courts and state courts dealing with First Amendment sign regulation challenges almost uniformly turn to the confusing Supreme Court opinions in *Metromedia* for direction and precedent on sign regulation.[111] However, the Court has issued more coherent articulations of the content neutrality principle with more precedential value in defining a content neutrality standard for sign regulations.[112] Majority statements in other Supreme Court cases[113] preclude the application of the context-sensitive or category-specific approaches to content neutrality.[114] Although the Supreme Court has struck down decidedly content-based sign regulations since *Metromedia*,[115] it has not upset any of its pre- or post-*Metromedia* blanket statements holding that the First Amendment requires complete content neutrality in the form of avoiding any message- or subject-based regulation.[116]

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111. *See* Mandelker, *supra* note 33, at 69.

112. *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

113. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784–85 (1978); *Mosley*, 408 U.S. at 96.

114. The Court's statements on the demands of content neutrality have not generally contained exceptions to the general rule that speech regulations should not regulate any part of the message of the speech. *See, e.g.*, *Turner Broad. Sys.*, 512 U.S. at 641–42 (discussing the general rule, but noting the fact that narrow exceptions to the rule are recognized); *Mosley*, 408 U.S. at 95; Cohen v. California, 403 U.S. 15, 24 (1971) (expressing the general rule, but noting limited exceptions).

115. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring) (discussing the demands of content neutrality as reflecting "important insights into the meaning of the free speech principle—for instance, that content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate").

116. *See, e.g.*, *City of Ladue*, 512 U.S. at 60 (O'Connor, J., concurring); *Turner Broad. Sys.*, 512 U.S. at 641–42.

Even before *Mosley*, the Court declared that "governmental bodies may not prescribe the form or content of individual expression."[117] The Court's first full-fledged discussion of the content neutrality concept in *Mosley* left no room for error in condemning the speech regulation in question:

> The central problem with [the] ordinance is that it describes permissible picketing in terms of its subject matter . . . . The operative distinction is the message on a . . . sign. But, above all else, the First Amendment means that government has no power to restrict expression because of *its message, its ideas, its subject matter, or its content*.[118]

The Court then added,

> [O]ur people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[119]

Thus, in the Court's first full statement on content neutrality, it did not envision the relaxations and carve-outs that the functional approaches have established.[120]

Since its initial recognition of the principle, the Court's dedication to content neutrality has been reaffirmed in subsequent cases.[121] In *Consolidated Edison v. Public Service Commission*, the Court wrote, "a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech."[122] The Court's carefully-chosen use of the term "subject matter," distinguishable from its use of the term "viewpoint," is perhaps the most clear suggestion that the Court envisioned a broadly sweeping standard when reviewing speech regulations for content neutrality;[123] the holding reinforces the notion that the government has no business regulating the message, or differentiating between messages and categories, of constitutionally protected speech.[124] The Supreme Court's

117. *Cohen*, 403 U.S. at 24.
118. *Mosley*, 408 U.S. at 95 (emphasis added).
119. *Id.* at 96 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
120. *See id.* at 95.
121. *See, e.g.*, Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2663–64 (2011); Hill v. Colorado, 530 U.S. 703, 721 (2000) (plurality opinion); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 424 (1993); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 536 (1980).
122. *Consol. Edison*, 447 U.S. at 536.
123. *See supra* note 29.
124. *See Consol. Edison*, 447 U.S. at 536.

broad statements on the absolute requirements of content neutrality thus do not appear to line up with more lax applications of the content neutrality doctrine in some courts' treatment of sign regulations following *Metromedia*.

The Court's recent handling of some previously acceptable content-based distinctions points to a broadening scope of the content neutrality principle. In particular, the Court's recent First Amendment jurisprudence has called into question the commercial-noncommercial distinction upheld in *Metromedia*.[125] The *Metromedia* majority found that the commercial-noncommercial distinction was acceptable in the context of sign regulation[126] over the cautious concurrence of Justice Brennan.[127] In the context of sign regulation, post-*Metromedia* courts dealing with the commercial-noncommercial distinction began to require that local sign regulations contain "substitution clauses,"[128] ordinance clauses which allow the substitution of noncommercial copy on any sign allowed in the jurisdiction.[129] Courts continue to forbid any favoring of commercial over noncommercial speech, and they almost always approve of ordinance provisions which offer greater protection for noncommercial speech; thus, the substitution clause is a modern requirement for sign regulations.[130]

The Supreme Court has, however, shown a recent willingness to grant greater protection to commercial speech,[131] and in at least one case has required that commercial speech be regulated on par with noncommercial

125. Morrison, *supra* note 27, at 110.

126. *See id.* at 111–12. The *Metromedia* Court relied on its prior holdings relating to the then-newly-articulated commercial speech doctrine to support the suggestion that a ban on commercial signage that exempted noncommercial signage would be acceptable under the First Amendment. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507 (1981) (noting that the regulation in question passes the test set out in *Central Hudson*).

127. *See Metromedia*, 453 U.S. at 521–22 (Brennan, J., concurring) (suggesting that the commercial-noncommercial distinction was a violation of the Court's aforesaid commitment to content neutrality).

128. *See, e.g.*, Nat'l Adver. Co. v. City of Orange, 861 F.2d 246, 247–48 (9th Cir. 1988) (striking down ordinance which failed to contain a clause permitting the display of noncommercial copy on any sign permitted in the city); Matthews v. Town of Needham, 764 F.2d 58, 61 (1st Cir. 1985) (striking down ordinance which clearly favored commercial speech over noncommercial speech); *cf.* Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 611 (9th Cir. 1993) (noting that ordinances contained substitution clause as required to be constitutionally permissible); Georgia Outdoor Adver., Inc. v. City of Waynesville, 833 F.2d 43, 46 (4th Cir. 1987) (noting that the inclusion of a substitution clause ensured that the ordinance did not favor commercial speech); Major Media of the Se., Inc. v. City of Raleigh, 792 F.2d 1269, 1271–72 (4th Cir. 1986) (endorsing city ordinance provision which permitted the display of a noncommercial message on any sign permitted in the city).

129. Morrison, *supra* note 27, at 114.

130. Trevarthen, *supra* note 68, at 9.

131. *See* Morrison, *supra* note 27, at 110.

speech.[132] In *Discovery Network*, the Court dealt with a local ordinance in Cincinnati that, in the interest of protecting and enhancing community aesthetics, banned the on-street dissemination of commercial handbills while concurrently allowing the dissemination of noncommercial handbills.[133] After receiving notice from the municipal government that they were in violation of the ordinance, commercial newsrack companies brought suit on First Amendment grounds, and the Supreme Court ultimately struck down the ordinance.[134] Applying the *Central Hudson* commercial speech test, the Court found that the ban on commercial newsracks did not directly advance the city's interest in aesthetics, in that noncommercial newsracks were just as damaging to community aesthetics as commercial newsracks.[135] Furthermore, the Court found that the ordinance was clearly content-based, because the determination as to whether a newsrack was permitted was based on the content of the newspapers being distributed from it.[136] *Discovery Network* was the first time that the Court placed an apparent limit on the distinction that could be drawn between commercial and noncommercial speech,[137] although it is presently unclear how far the limit extends.[138]

Despite the Court's suggestion that its holding in *Discovery Network* is narrow,[139] the holding is representative of an expansion of the content neutrality doctrine from the *Metromedia* days.[140] Whereas the *Metromedia* plurality determined that San Diego's ban on offsite commercial billboards—a partial ban on advertising signage in the city—was not impermissibly underinclusive because the ban furthered the city's aesthetic

132. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).

133. *Id.* at 413, n.3.

134. *Id.* at 431.

135. *Id.* at 418 ("We accept the validity of the city's proposition, but consider [safety and community aesthetics] an insufficient justification for the discrimination against respondents' use of [commercial] newsracks that are no more harmful than the permitted [noncommercial] newsracks, and have only a minimal impact on the overall number of newsracks on the city's sidewalks.").

136. *Id.* at 429 ("Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is 'content based.' ").

137. *See id.* at 419 ("[T]he city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.").

138. Mandelker, *supra* note 33, at 78 (noting that the Court intended for its *Discovery Network* holding to be narrow, as a municipality may be able to justify differential regulation of commercial and noncommercial newsracks).

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

140. *See* Morrison, *supra* note 27, at 116.

and traffic safety goals,[141] *Discovery Network* represents a clear departure from *Metromedia*'s endorsement of a partial ban.[142] By finding Cincinnati's favoring of noncommercial newsracks over commercial newsracks to be content-based, the *Discovery Network* Court appeared to backtrack from the *Metromedia* plurality's endorsement of the distinction as a legitimate basis for regulation.[143] Furthermore, the commercial speech doctrine may be undergoing further sterilization, given the Supreme Court's decision in *Sorrell v. IMS Health*, in which the Court reviewed a commercial speech regulation under the standards typically applied to noncommercial speech.[144] Thus, by eliminating the distinction between commercial and noncommercial speech and finding it to be content-based, *Discovery Network* dramatically expanded the scope of the content neutrality requirement for speech regulation.[145]

The Court has continued to broaden the content neutrality doctrine since *Discovery Network*,[146] further intimating a desire for a stricter content

141. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 511 (1981) (plurality opinion).

142. *See* Mandelker, *supra* note 33, at 78.

143. *Metromedia*, 453 U.S. at 514–15.

144. 131 S. Ct. 2653 (2011) (addressing a Vermont statute restricting "detailing," the process by which pharmaceutical companies collect information on individual doctors' prescription practices).

145. Many courts and authors have refused to recognize *Discovery Network* as eliminating the distinction between commercial and noncommercial speech. *See generally* Morrison, *supra* note 27, at 116–17. Furthermore, a number of cases have declined to extend the *Discovery Network* tailoring analysis to outdoor sign regulation, finding that partial sign bans (i.e. on commercial billboards) have a noticeable impact furthering municipalities' aesthetic goals. *See, e.g.*, Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94, 108–09 (2d Cir. 2010) ("[T]he City has a 'sufficient basis' to believe that the impact of the zoning regulations [banning commercial billboards along city highways] will substantially advance its proffered [aesthetic] interests."); RTM Media, LLC v. City of Houston, 584 F.3d 220, 227 (5th Cir. 2009) ("Houston has demonstrated that its approach to ameliorating the billboard problem is 'carefully calculated' and that, because of their number, commercial billboards pose a greater nuisance than do noncommercial ones."); *see also* Metro Lights, LLC v. City of Los Angeles, 551 F.3d 898, 911 (9th Cir. 2009) ("[U]nlike, for instance, the distinction between commercial and noncommercial newsracks in *Discovery Network*, here there is 'some basis for distinguishing' offsite commercial signage concentrated and controlled at transit stops and uncontrolled, private, offsite commercial signage 'that is relevant to an interest asserted by the city' . . . ."). Some commentators and courts have suggested that the commercial speech doctrine should be abolished, and commercial speech granted full First Amendment protection, on the grounds that commercial speech is difficult to categorize and that there is no rationale for offering limited protection to truthful commercial information. *See* Morrison, *supra* note 27, at 110.

146. *See* Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from* Greater New Orleans Broadcasting, 37 AM. BUS. L.J. 587, 589–91 (2000) (citing Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995)).

neutrality standard. In *Sorrell*, the Court addressed a Vermont statute that prohibited the sale, disclosure, and use of physician-identifying information by pharmacies and pharmaceutical manufacturers in their marketing activities.[147] The Court found the statute in question, a regulation of commercial speech, to be content-based, because it would require an enforcement officer to determine whether the protected information was being used for marketing or for some other use.[148] *Sorrell* is notable, however, because the Court stated explicitly—and did so multiple times throughout the opinion—that speaker-based commercial speech regulations were essentially a form of content-based regulation,[149] another departure from earlier holdings, which seemingly endorsed some element of speaker-based regulation in the context of commercial speech.[150] While some forms of speaker-based regulation were always constitutionally suspect,[151] courts had also tolerated some degree of speaker-based regulation when the regulation was unrelated to the content of the message being conveyed.[152]

147. *Sorrell*, 131 S. Ct. at 2660. The Vermont statute in question was designed to cut down on "detailing," the process by which pharmacies sell information about doctors to pharmaceutical companies, who in turn use such information to gain advantage in their marketing tactics directed toward specific doctors. *See id.* at 2659–60.

148. *See id.* at 2663 ("[T]hose who wish to engage in certain 'educational communications' . . . may purchase the information. The measure then bars any disclosure when recipient speakers will use the information for marketing.").

149. *See, e.g.*, *id.* at 2665 ("Both on its face and in its practical operation, Vermont's law imposes a burden based on the content of speech and the identity of the speaker."). The Court explains the speaker-based problem with the Vermont law by showing that a certain group was singled out as being unable to obtain and use information about doctors, while other groups (i.e. non-detailers) could obtain and use the information. *Id.* at 2667. Although the Court was concerned about speaker-based regulation, the problem could have also easily been analyzed as an under-inclusivity problem.

150. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 658–59 (1994) (plurality opinion). Speech regulations that were effectively speaker-based have been upheld in the context of outdoor sign regulations where the regulation imposed different speech regulations based on the land use of the property where a particular business was located, *see, e.g.*, Paradigm Media Grp., Inc. v. City of Irving, 65 F. App'x 509, at *3 (5th Cir. 2003), or even where the regulation differentiated among different industrial sectors' ability to post outdoor signage, *see* G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1076–77 (9th Cir. 2006).

151. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 899 (2010) (plurality opinion) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content.").

152. *See id.* ("The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions."). The Supreme Court had previously suggested that speaker-based regulation was only suspect where the government had some preference or aversion to the message that the speaker was communicating. *See Turner Broad. Sys.*, 512 U.S. at 658.

Thus, since *Metromedia*, there has been a gradual increase in the degree of content neutrality required of governmental regulations of speech. This gradual increase suggests that, to comply with the Supreme Court's recent statements on content neutrality, the content neutrality requirement in sign regulation should be more stringent, instead of less stringent as desired by the context-sensitive and category-based schools. These pushes toward increased content neutrality and further sterilization of the government's ability to pick and choose between different forms of speech suggest that the context-sensitive model for outdoor sign regulation has a limited future.

B. Carve-outs from the Content Neutrality Doctrine: False Alarms

Although the Supreme Court has firmly established the content neutrality requirement in its First Amendment jurisprudence, the Court has relented on some aspects of content review in speech regulation. This Part will discuss some of these aspects of content review, and will endorse the idea that, where the Court has permitted some degree of content review, it is inapplicable to sign regulation, and therefore sign regulation requires a strict degree of neutrality. Three "exceptions" to the rule on content neutrality, which have been used on occasion to support a context-sensitive or category-based approach to the principle, are discussed herein.

1. Unprotected Speech: Obscenity and Fighting Words

The Court has recognized that a limited number of cases and categories of speech fall *outside* the protection of the First Amendment, thus allowing the government to regulate such speech based on its content.[153] These exceptions have been very limited and have been reserved for fighting words[154] or obscene forms of speech.[155] Furthermore, a lesser degree of First Amendment protection is afforded to speech that may have potentially

153. *See, e.g.*, R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382–83 (1992).

154. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

155. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (plurality opinion) ("[W]e recognize that the First Amendment will not tolerate the total suppression of erotic materials that some arguably artistic value, [but] it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude . . . . Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."); Miller v. California, 413 U.S. 15, 24 (1973) (finding speech to be obscene based on: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" (citations omitted)).

damaging secondary effects on nearby people and communities.[156] The Court's analysis of these exceptions is not an undermining or carving-out of the content neutrality principle, but rather recognizes a limitation on the constitutional protection offered to certain forms of speech, based either on its content or the consequences of certain forms of content.[157] In other words, if speech has the full protection of the First Amendment, it must be regulated in a content-neutral way. Furthermore, the Court has carefully noted that governments' ability to engage in content review has become more limited, not more expansive over time,[158] and forms of speech traditionally offered less constitutional protection have gained greater protection over time.[159] While the Court recognized that the content of speech must at times be examined in order to determine whether speech is constitutionally protected,[160] it has otherwise remained committed to its statements that reviewing content is off-limits.

2. *Metromedia* Distinctions

Courts that have adopted the context-sensitive or category-based approaches to sign regulation have done so on the grounds that *Metromedia*, by endorsing the on-premises/off-premises distinction,[161] offers leeway for the creation of a more relaxed content neutrality standard.[162] However, despite the confusion in *Metromedia* arising from the application of the content neutrality doctrine to the on-premises/off-premises distinction,[163]

156. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49 (1986) ("[A]t least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations.").

157. *See Young*, 427 U.S. at 70.

158. *See R.A.V.*, 505 U.S. at 383.

159. The offering of greater constitutional protection to types of speech that traditionally were afforded less protection is not limited only to obscene or explicit speech. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

160. *See Young*, 427 U.S. at 71–72. *Young* touches on the obvious limit to an absolutist application of the content neutrality doctrine described in footnote 101: the determination of whether an object constitutes speech of the type and nature protected by the First Amendment may require at least a cursory examination of the object's content. *See id.*

161. *See Metromedia*, 453 U.S. 490, 512 (1981) (plurality opinion).

162. *See, e.g.*, Rappa v. New Castle Cnty., 18 F.3d 1043, 1063 (1994). The *Rappa* court makes the further observation that the content-based exceptions in the law in question "are quite small," and that "they are not for particular subjects likely to generate much debate and so are not likely to focus debate on that subject matter at the expense of other subject matter; and they do not discriminate by viewpoint." *Id.* The Supreme Court has never suggested that the likelihood that the speech would be the subject of debate was of concern in determining the constitutionality of a speech regulation, and the Supreme Court has explicitly held that content neutrality is required in addition to viewpoint neutrality. *See* Boos v. Barry, 485 U.S. 312, 319 (1988) (plurality opinion).

163. *See* Mandelker, *supra* note 33, at 75.

the *Metromedia* opinions remained clear on the Court's continued commitment to an exacting degree of content neutrality.[164] Even though the opinions were divided on whether the on-premises/off-premises (and commercial/noncommercial) distinction contained in the San Diego ordinance in question violated the content neutrality doctrine,[165] the Court did not hold in favor of a context-sensitive approach that would reject the foundational doctrine of content neutrality.[166] In fact, the plurality opinion does not suggest[167] that the Court understood the on-premises/off-premises distinction to be a time, place, and manner distinction, as opposed to having any bearing on content.[168]

C. Signs as a Unique Mode of Expression

The Supreme Court has repeatedly suggested that different modes of expression warrant different applications of First Amendment doctrine.[169] Supporters of the more relaxed content neutrality standard discussed above place heavy reliance on cases dealing with forms of expression outside of sign law, relying principally on *Hill v. Colorado*[170] to support this position. Signs' uniqueness as a mode of expression and the impracticality of reliance on *Hill* are discussed herein.

Hill, which is one of the Supreme Court's most recent articulations of the content neutrality standard, dealt with a Colorado statute that prohibited, in areas near the entrance to a health care facility, a person to approach within eight feet of another person without the consent of the other person for the purpose of engaging in oral protest, education, or counseling.[171] One of the challenges brought against the statute was that it was unconstitutionally content-based, on the grounds that an officer enforcing the statute

164. *Metromedia*, 453 U.S. at 515 (quoting Consol. Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 538 (1980)) ("[T]he city may not choose the appropriate *subjects* for public discourse: 'To allow a government the choice of permissible *subjects* for public debate would be to allow that government control over the search for political truth.' " (emphasis added)).

165. *Compare Metromedia*, 453 U.S. at 511–13 (plurality opinion), *with id.* at 536 (Brennan, J., concurring); *id.* at 540–41 (Stevens, J., dissenting in part); *and id.* at 559–61 (Burger, C.J., dissenting).

166. Only Justice Brennan's concurrence, *id.* at 528, and Chief Justice Burger's dissent, *id.* at 565, suggested the possibility of a context-sensitive approach to sign regulation; this was not a majority of the Court.

167. *See id.* at 510–12; *see also* Mandelker, *supra* note 33, at 76–77.

168. *Id.*

169. *See infra* discussion in note 179.

170. 530 U.S. 703 (2000).

171. *Id.* at 707 (plurality opinion). The plaintiffs in the case were a group of anti-abortion protesters; the statute would have banned the protesters from approaching within eight feet of individuals receiving medical treatment, including abortions, outside abortion clinics. *See id.* at 708 (plurality opinion).

would sometimes be required to listen to the content of a person's language in order to determine whether the person was engaging in oral protest.[172] The Court found that the statute was content neutral.[173]

In determining that the regulation in *Hill* fit within the bounds of content neutrality required by the First Amendment, the Court observed—somewhat oddly—that enforcing the statute in question would not necessarily require the enforcing officer to listen to the words spoken to determine whether a speaker was approaching a listener for the purpose of engaging in oral protest.[174] In addressing the issue of determining a speaker's purpose in approaching a listener, however, the Court noted that it might be necessary for the enforcing officer to make a cursory review of the content of the speech, if only to determine that the speaker's approach of the listener is regulated under the statute.[175] This suggestion—that some review of content is permissible—motivates much of the context-sensitive and category-based approaches.[176]

The more functional approaches to content neutrality misplace their reliance on *Hill* for a variety of reasons. Foremost among these reasons is the fact that application of the Supreme Court's reasoning in *Hill*, a case that dealt with oral communication,[177] is inappropriate in the context of determining whether a municipal sign regulation is content based.[178] While it would be inappropriate to suggest that courts determining the constitutionality of a sign regulation should *not* consider First Amendment law as applied to other modes of communication, the concern over an oral speaker's constitutional rights in *Hill* and the potential constitutional issues that

172. *See id*. at 720.

173. *Id*. at 723–24 (observing that the statute "places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker . . . . Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries. Each can attempt to educate unwilling listeners on any subject, but without consent may not approach within eight feet to do so.").

174. *Id*. at 721 ("With respect to the conduct that is the focus of the Colorado statute, it is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether 'sidewalk counselors' are engaging in 'oral protest, education, or counseling' rather than pure social or random conversation.").

175. *Id*. at 721–22.

176. *See, e.g.*, H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609, 622–23 (6th Cir. 2009) (upholding a city sign ordinance that distinguished among "advertising," "business," and "political" signs based in large part on the subject matter of the signs); Covenant Media of S.C. v. City of N. Charleston, 493 F.3d 421, 432–33 (4th Cir. 2007); *see also* Burt, *supra* note 81, at 523.

177. *Hill*, 530 U.S. at 707.

178. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 500–01 (1981) (plurality opinion).

would arise from a municipal sign regulation are of a completely different nature.[179]

The purpose of the statute at issue in *Hill* was to protect the privacy interests of individuals receiving medical treatment; the concern was that such individuals would become "unwilling listeners" mobbed by protesters while entering or exiting a health care facility.[180] In the case of a speaker and listener, as in *Hill*, two distinct individual rights are at odds with one another: the right of the speaker to express his or her views, and the right of the unwilling listener to maintain his or her privacy.[181] The statute was, in essence, concerned with the speaker's conduct or intent, because in order to fall under the auspices of the statute, the speaker would need to *knowingly* approach within eight feet of the listener *for the purpose of oral protest, education or counseling*.[182] The determination of the speaker's purpose was thus critical to application of the statute in question: if the speaker were prohibited from speaking at all, he or she would be deprived of a First Amendment right, while if the speaker were authorized to speak with impunity, the listener's right of privacy would be violated.[183] As the Court noted, it could be possible to determine an oral speaker's purpose in speaking to another person based on such factors as the intonation of the speaker's voice or the speaker's manner of approaching the other person, but at times, it may also be necessary to undertake a cursory review of the speaker's words to determine whether or not the statute applies to the speaker.[184]

Signs are a different matter. There is almost no conceivable situation in which a sign affixed to the ground and regulated by a municipal sign ordinance could possibly infringe upon an individual's *privacy* interest in a fashion similar to that of an oral protester who knowingly approaches within close range of another person. To protect the privacy interests of an individual while balancing an oral speaker's countervailing interest in free

179. In its First Amendment jurisprudence, the Supreme Court has acknowledged that different modes of communication warrant different legal treatment, given the vast differences that exist between the modes and the implications of such differences for the potential deprivation of a speaker's constitutional rights. *See Metromedia*, 453 U.S. at 501 ("Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method.") (quoting Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring); *see also* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." (emphasis omitted)); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952) ("Each method [of expression] tends to present its own peculiar problems.").

180. *See Hill*, 530 U.S. at 718.

181. *Id.* at 714–16.

182. *Id.* at 707.

183. *See id.* at 718.

184. *Id.* at 721–22.

speech, the speaker's *purpose* is a critical determination that may at times require a cursory review of the content of the speech, but this analysis is dramatically different in the context of sign regulation.[185] First, the interest being protected counter to the sign owner's First Amendment right is a *public* interest in traffic safety and environmental aesthetics, not an individual right of privacy. The *purpose* of a sign, as opposed to its physical characteristics, is largely irrelevant when the placement of the sign is being considered in light of its impact on the aesthetic character of a community.[186] For example, a sign can be regulated based on its face area, height, setback from street frontage, placement on the property where it is located, brightness of its lighting, or the materials used in the sign's construction, all of which further the public's aesthetic regulatory interest.[187] No matter what the sign's message, a large, bright sign could offend community aesthetics; on the other hand, a small, pleasantly-designed sign could further the aesthetic interest, despite a message that might be objectionable to some community members.[188] None of the physical characteristics described above, which form the central problem in aesthetic concerns, have anything to do with the message or subject matter of the speech. Furthermore, physical characteristics offer a much more definite and content-neutral basis on which an enforcement official can enforce the sign ordinance, as compared to regulating the manner in which an individual whose protesting activities may harm another individual.

Moreover, a sign's "conduct" is of a very different character than a speaker's conduct. An oral speaker may either speak or not speak. If the First Amendment protects the oral speaker's speech,[189] then a regulator

185. *See id*.

186. Of course, signs that contain content lying outside the boundaries First Amendment protection and offensive to community morals, such as obscene words and images, would be possible to remove on the basis of their obscenity. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973).

187. *See, e.g.*, CONNOLLY & WYCKOFF, *supra* note 3, at 6-9 tbl. 6-2.

188. While it is perfectly true that the message of a sign often lays the groundwork for community outrage and subsequent regulation, any arguments that would support sign regulation on the basis of community disagreement must fail under the First Amendment. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989). A line of cases has outlawed the "heckler's veto," whereby disagreement with a particular message is a proper basis for silencing it. *See, e.g.*, Brown v. Louisiana, 383 U.S. 131 (1966). The First Amendment itself was adopted out of the Framers' concern that an unrestrained majority could silence or coerce minority groups, cutting them out of pluralist debate. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

189. Some speech falls outside the boundaries of the First Amendment because its particularly offensive or condemnable content may lead to immediate adverse and potentially dangerous reactions by listeners or witnesses. *See, e.g.*, *Miller*, 413 U.S. at 34–35; Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Schenck v. United States, 249 U.S. 47 (1919).

must also have some means by which to protect the constitutional rights of the listener if those rights are so implicated. Thus, the speaker's intonation, physical actions, and purpose are the only constitutional bases upon which to regulate the speech without regulating based on content.[190] On the other hand, a sign's "conduct" can be far more easily described in terms of its physical characteristics, such as its size, height, placement, lighting and design.[191] Additionally, although an enforcement officer could determine that a speaker was engaged in oral protest on the basis of the speaker's intonation or manner of approach, none of the physical characteristics of signage, such as its size, height, placement, lighting or design, provide a similarly content-neutral opportunity to determine the sign's purpose. On the contrary, the *only* way to determine that a sign is placed for oral protest is by reading its message. One would be hard-pressed to regulate signage based on its purpose without engaging in the type of content-based, subject-matter regulation that the Supreme Court has repeatedly proscribed.[192]

The Supreme Court's pre- and post-*Metromedia* statements on speech regulations and content neutrality do not qualify or limit the First Amendment's demand for completely content-neutral sign regulations. The doctrine of content neutrality was developed without the suggestion that government would consistently need to make determinations on a message's legality based on readings and analysis of its content. *Metromedia* confused the principle of complete content neutrality by endorsing distinctions between on-premises and off-premises signage, and commercial and noncommercial signage, which may be characterized as inherently content-based distinctions. Although *Hill* endorsed an occasional cursory review of content to determine whether speech was covered by a particular regulation, the case confused the doctrine, and the holding cannot be extended to sign regulation because of the vast disparities between oral communication and fixed and written outdoor materials.

D. Erosion of the Content Neutrality Principle Under the Relaxed Approaches

Perhaps the greatest danger posed by the context-sensitive and category-based approaches is the possibility for erosion of the content neutrality doctrine itself, to the detriment of the First Amendment rights of individual sign owners and speakers generally. To illustrate the basis for this concern requires a brief review of the purposes behind the First Amendment and

190. *See, e.g.*, *Hill*, 530 U.S. at 721 (explaining that speech can constitutionally be regulated based on purpose).

191. *See* Mandelker, *supra* note 33, at 70–71.

192. *See Hill*, 530 U.S. at 723.

the content neutrality doctrine generally, as articulated throughout the history of the Supreme Court's First Amendment jurisprudence.

The Framers of the Constitution viewed the First Amendment and its guarantee of freedom of speech as fundamental to the functioning of a democratic government.[193] Indeed, the Court has consistently recognized that more speech, not less, is central to the creation of civil discourse[194] and that a society informed through speech has a greater likelihood of promoting a free democracy than a society in which speech and information are suppressed.[195] Therefore, the Supreme Court has taken pains to maintain that freedom, even while recognizing that some elements of speech and expression may be less worthy of constitutional protection since such elements are not integral to democratic government.[196] The Supreme Court has struck down laws that have the effects of coercing speech,[197] censoring speech,[198] and chilling speech,[199] as well as laws that allow administrative discretion as to the legality of speech[200] and that effect outright suppression of speech.[201]

To maintain the essential freedom guaranteed by the First Amendment, the Court has recognized that government regulation of content would open up a strong possibility that speech would be chilled, coerced, or suppressed.[202] In *Mosley*, the Court said:

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193. See Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

194. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("The First Amendment affords the broadest protection to . . . political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting Roth v. United States, 354 U.S. 476, 484 (1957)); Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring) ("[The Founding Fathers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile.").

195. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511–13 (1969).

196. *See, e.g.*, Miller v. California, 413 U.S. 15, 34–35 (1972) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (fighting words); Schenck v. United States, 249 U.S. 47 (1919) (incitements to violence).

197. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

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

199. *See, e.g.*, Thomas v. Collins, 323 U.S. 516 (1945); Speiser v. Randall, 357 U.S. 513 (1958); Lewis v. City of New Orleans, 415 U.S. 130 (1974)

200. *See, e.g.*, Kunz v. New York, 340 U.S. 290 (1951).

201. *See* City of Ladue v. Gilleo, 512 U.S. 43 (1994); Near v. Minnesota, 283 U.S. 697 (1931).

202. *See, e.g.*, *Johnson*, 491 U.S. at 412 ("[N]othing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it."); *Cohen*, 403 U.S. at 26 ("[W]e cannot indulge the facile assumption that one can forbid

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[203]

Thus, the Supreme Court recognizes that an exacting degree of content neutrality is a linchpin in the flourishing of open, democratic government.[204]

Given these motivations behind the content neutrality principle, it is clear that the functional approaches to sign regulation carry the significant likelihood of an erosion of the First Amendment rights of individual sign owners. By giving a government official or entity the opportunity to make a determination that some signs are more important than others at particular locations, the *Rappa* framework allows the content of a sign's message to be scrutinized to the extent that a speaker may be barred from the exercise of his or her constitutional rights on vague grounds.[205] Furthermore, a category-based approach offers further opportunity for government to censor speech based on its content; an ordinance that makes special provisions for political signs requires government officials to make determinations as to what constitutes political speech. It is precisely these examples of government discretion that the content neutrality principle, and by incorporation the First Amendment, have endeavored to avoid.[206]

While the environmental and aesthetic concerns that undergird much of outdoor sign regulation are valid concerns, the First Amendment rights guaranteed to individuals are central to the proper functioning of a democ-

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particular words without also running a substantial risk of suppressing ideas in the process."); *see also* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 217 (1983) (explaining the debate-distorting impact of content-based regulations).

203. Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

204. The Supreme Court has maintained its stance that any content bias in government regulations of speech carries the possibility of infringement upon core First Amendment rights, and thus may trample upon one of the hallmarks of the American democratic system. *See, e.g.*, Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 534–35 (1980).

205. *See* Melrose v. City of Pittsburgh, 613 F.3d 380, 384 (2010). An administrative official's determination between an advertising sign, business sign, or identification sign in *Melrose* could have made the difference in a business owner's being able to place a sign on her premises.

206. *See Mosley*, 408 U.S. at 95–96.

racy. The Constitution does not place environmental protection efforts through outdoor sign regulation above the guaranteed rights of individuals to self-expression; accommodation of the individual right to free expression must therefore be made if sign regulations are to be found constitutional.

This Part has thus demonstrated that the context-sensitive and category-based approaches to content neutrality are improper given the Supreme Court's precedent and the historical trajectory toward greater content neutrality. This conclusion is further dictated by the fact that the Supreme Court has reserved very limited carve-outs to the neutrality principle, largely saved for cases in which a regulator must determine whether the speech in question falls under the protection of the First Amendment. Finally, the context-sensitive and category-based approaches run the substantial risk of eroding the First Amendment rights of sign owners, which is intolerable even in light of the valid public interests implicated in aesthetic regulation.

IV. THE STRICT APPROACH TO CONTENT NEUTRALITY: DEMANDED BY PRACTICAL NECESSITY

Practical considerations for sign regulation, including improved environmental aesthetic integrity in the long run, demand a clearer neutrality standard, applied to outdoor sign regulation, that does not waver in its application of the content neutrality principle. The notion that a more vigorous content neutrality requirement in sign regulation would provide greater protection for the aesthetic quality of the environment is admittedly backward-seeming, given that the litigation strategy of the billboard companies is to routinely demand greater neutrality while local governments rely on relaxed interpretations of the content neutrality principle to deny sign permit applications.[207] The fact remains, however, that billboard companies and sign owners use content neutrality as the crux of their First Amendment claims because sign regulations are quite frequently not content neutral, creating an easy argument to block enforcement of a sign ordinance.[208] There exists a widespread mistaken belief that content-based sign regulations are the only means by which communities can accomplish their aesthetic goals. This belief exists because it is conceptually easier to identify and regulate problems with intuitive but content-based regula-

207. Baker & Wolpert, *supra* note 8, at 8.

208. Billboard plaintiffs generally argue in favor of a very stringent "need to read" approach to sign regulation, which goes beyond the approach being advocated in this Note. *Id.* It would be completely impossible to require a "need to read" approach, because it would then preclude governmental officials from even determining whether a sign is truly a sign; however, avoiding a "need to read" approach does not necessarily bring the content neutrality determination into a context-sensitive approach.

tions—such as a community with a political sign proliferation problem simply restricting the timeframe when political signs may be displayed[209]—instead of using a more content-neutral form of regulation. Governments are thus boxed into the corner of defending ordinances that regulate on the basis of subject matter, and must hide behind arguments in favor of the context-sensitive approach to the First Amendment in order to protect their laws from being struck down.[210]

The relaxed content neutrality approaches to reviewing outdoor sign regulations frequently benefit government regulators, since the common result of a context-sensitive or category-based review of a sign ordinance is the upholding of the ordinance.[211] Thus, governments and environmentalists have cheered on the courts taking a less hard-line approach to the content neutrality requirement of the First Amendment, under the mistaken impression that a more relaxed content neutrality analysis will benefit their cause. And in fact, a more relaxed content neutrality analysis has given immediate benefit to the cause of government and the pro-regulatory community. But these immediate benefits are pyrrhic victories; with them has come long-term uncertainty and a legacy of vague boundaries as to the degree of content that governments may regulate,[212] leaving open the distinct possibility for additional sign industry challenges to sign regulations further down the road. These victories have come at high litigation costs to local governments, and environmental advocacy organizations have committed significant resources in litigation to support the regulatory efforts of

209. *See, e.g.*, Whitton v. City of Gladstone, Mo., 54 F.3d 1400 (1995). There are numerous other examples of local governments employing "intuitive" but content-based approaches to sign problems. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion) (striking down a general ban on off-premises billboards that was intended address a billboard proliferation problem); Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005) (striking down sign regulations that created content-based exemptions); Dimmitt v. City of Clearwater, 985 F.2d 1565 (1993) (striking down an exemption for "governmental" flags in an ordinance that otherwise prohibited flags); State v. DeAngelo, 963 A.2d 1200 (N.J. 2009) (striking down an ordinance that prohibited inflatable and portable signs, with limited exceptions).

210. *See, e.g.*, Foti v. City of Menlo Park, 146 F.3d 629, 636 (9th Cir. 1998); *Whitton*, 54 F.3d at 1403; Fehribach v. City of Troy, 341 F. Supp. 2d 727, 732 (E.D. Mich. 2004).

211. *See, e.g.*, Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380, 383, 389–90 (3d Cir. 2010); H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609, 622–25 (6th Cir. 2009); Riel v. City of Bradford, 485 F.3d 736, 753–54 (3d Cir. 2007); Wheeler v. Comm'r of Highways, 822 F.2d 586, 589–90 (6th Cir. 1987). Note that the approach taken in *Rappa* did not actually benefit the defendant state, since a portion of the regulation was struck down on other grounds. *See* Rappa v. New Castle Cnty., 18 F.3d 1043, 1068 (3d Cir. 1994).

212. *See* Trevarthen, *supra* note 68, at 8. The instability of the federal courts' treatment of content neutrality has contributed to the problem, providing little to no guidance on the actual degree of content neutrality required of local regulations. *Id.*

local governments that employ some obviously content-based distinctions in their sign ordinances.[213]

The practical argument for a clearer content neutrality requirement is thus straightforward: as long as governments believe they can get away with content-based distinctions in their ordinances, content-based sign regulations will continue to be challenged in the courts. The lack of certainty over the requirements of content neutrality will continue to result in many ordinances being struck down. A clearer content neutrality regime, even if it imposes more rigorous up-front requirements on ordinance drafters, will provide certainty to regulators, encourage governments to more carefully navigate their First Amendment duties, and will dramatically reduce the cost and quantity of litigation directed at governments—particularly municipalities—throughout the country. Furthermore, governments' regulatory goals can be accomplished under the stricter content neutrality regime; a context-sensitive approach is not required to achieve a desired community character.[214]

The need for more certain judicial direction to guide local sign regulators is illustrated by the direction given by courts that have advocated context-sensitive or category-based approaches. For example, the *Rappa* context-sensitive approach, by allowing government officials to determine the relative importance of signage at particular locations,[215] appears to grant significant administrative discretion over the subject matter of the sign. The decision does not provide any decipherable standard for determining the relative "importance" of a sign; determination of importance almost certainly requires an analysis of the sign's content. Who is to say, for example, that a political sign would be more important than an address sign in a residential area?[216] This argument parrots a First Amendment "vagueness"

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213. Scenic America has sided with municipal regulators on a significant amount of billboard litigation, including, most recently, *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728 (8th Cir. 2011); the organization has filed amicus curiae briefs in numerous other cases. *See generally* SCENIC AM., http://www.scenic.org (last visited on Sept. 6, 2012). Scenic America receives most of its litigation resources *pro bono*, but the organization's Executive Director estimates that it has spent a billable-hour equivalent of over $2 million in recent years, and that some of the organization's state-based affiliates have spent in excess of $1 million on litigation in recent years. E-mail from Mary Tracy, Executive Director, Scenic America, to author (Apr. 29, 2012, 10:46 EST) (on file with author).

214. *See generally* MANDELKER ET AL., *supra* note 14, at 48–75 (proposing a model ordinance which is entirely content neutral, yet accomplishes the regulatory goals of a model community).

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

216. A similar problem arose in *Melrose* where the city ordinance attempted to distinguish between "advertising," "business," and "identification" signs; an identification sign allowed the display of the name of an individual or organization located at the premises, while a business sign was one that "directs attention to a business, organization, profession

or "prior restraint" argument, but both of these concepts are inherently related to the problem of content neutrality; if the regulation is unconstitutionally vague, it almost certainly will authorize an administrative official to discriminate against certain messages based on content or viewpoint.[217] Thus, the *Rappa* model opens new questions that it does not answer, leaving local governments to engage in guesswork to determine whether their findings of the importance of certain subjects of speech sufficiently meet the standard.

A category-based approach to content neutrality raises similar uncertainties. A common local ordinance provision provides special regulations for "political signs," and courts that have accepted a category-based approach have upheld these special regulations.[218] Again, however, upholding such category-based regulations leaves open a variety of questions about how signs might be categorized. For example, it may be somewhat obvious that the category of political signs includes signage related to an individual's candidacy for elected office. But does a store window posting of a newspaper cartoon featuring a likeness of an elected official constitute political speech? Furthermore, to what level of abstraction in the broader taxonomy of sign types might such categories constitutionally go? Could regulations of political signs be broken out into "election" signs relating to a specific election and "advocacy" signs relating to a general political philosophy or theory? Does a political sign placed by a corporate entity even fall under the broader umbrella of "noncommercial" speech? The courts have not provided sufficient definition on any of these points, thus leaving local governments to feel their way toward a constitutional sign regulation under the category-based approach.

Meanwhile, an alternative framework that relies on a strict content neutrality standard leaves few questions; even if it does not completely resolve the uncertainty, such an approach can give local governments much greater confidence in their regulatory approaches.[219] Examples of government entities that enacted ordinances lacking in category-based or context-sensitive distinctions, and that had those ordinances treated favorably by

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or industry located upon the premises where the sign is displayed . . . ." *Melrose*, 613 F.3d at 384. The Court upheld the ordinance, following its earlier holding in *Rappa*. *Id.* at 383.

217. *See, e.g.*, Cohen v. California, 403 U.S. 15, 25 (1971) ("[I]t is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").

218. *See, e.g.*, H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609, 622 (6th Cir. 2009).

219. *See* ALAN C. WEINSTEIN, INC. & D.B. HARTT, INC., A FRAMEWORK FOR ON-PREMISE SIGN REGULATIONS 15 (2009) ("When local governments enact sign regulations that are entirely—or even predominantly—content-neutral, courts have little difficulty upholding the regulations against a legal challenge.").

courts, are numerous.[220] Courts in these cases have demanded a high degree of content neutrality that has a clear direction and comprehensible standards to municipal ordinance drafters, providing models for other municipalities to emulate in the ordinance drafting processes.[221] By requiring sign regulations to abide by the content-neutral "time, place, and manner" standards, little flexibility is left for government to regulate on the basis of content, thus deterring litigation.

Those courts and authors advocating a functional approach to content neutrality frequently do so under the guise that a municipality would be unable to achieve its aesthetic or other regulatory goals under a stricter content neutrality regime, or that a less stringent regime would be more "workable."[222] This suggestion is false, as demonstrated by the fact that a number of commentators,[223] and an increasing number of communities throughout the nation, have developed sign regulations that approach complete content neutrality.[224] There is hardly a sign regulation problem faced by a municipality today that cannot be addressed with a content-neutral solution.[225] This fact alone undercuts the argument that a local government would be unable to achieve its regulatory purposes without the added help

220. *See, e.g.*, Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94 (2d Cir. 2010); Maldonado v. Morales, 556 F.3d 1037 (9th Cir. 2009); Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421 (4th Cir. 2007); La Tour v. City of Fayetteville, Ark., 442 F.3d 1094 (8th Cir. 2006); Am. Legion Post 7 v. City of Durham, 239 F.3d 601 (4th Cir. 2001). Note that many of these cases still dealt with ordinances that contained the troubled commercial/noncommercial and on-/off-premises distinctions.

221. *See, e.g.*, *G.K. Ltd. Travel*, 436 F.3d at 1071, 1077–78 (upholding a municipal ordinance that, among other things, banned "pole signs" on the grounds that the "restriction [was] not a 'law[] that by [its] terms distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed.' " (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994))). The court also upheld a provision for "event signs" on the basis that an event sign regulation did not relate to the content of the sign, but rather to a temporal limitation on the display of signs during and around times of events. *G.K. Ltd. Travel*, 436 F.3d at 1077; *see also Am. Legion Post 7*, 239 F.3d at 608 (upholding a city ordinance that restricted the size of flags that could be displayed; the court specifically stated that regulation of size of a display is a content-neutral mode of regulation).

222. *See* ALAN C. WEINSTEIN, INC. & D.B. HARTT, INC., *supra* note 219, at 15–16.

223. *See, e.g.*, Mandelker, *supra* note 33, at 79 (discussing the way in which a sign regulation can avoid the on-premises/off-premises distinction); *see also* MANDELKER ET AL., *supra* note 14; ANDREW D. BERTUCCI & RICHARD B. CRAWFORD, U.S. SIGN COUNCIL, MODEL ON-PREMISE SIGN CODE 7 (2011), *available at* http://www.usscfoundation.org/USSCModelOn-PremiseSignCode.pdf.

224. A number of municipalities throughout the nation have adopted completely content-neutral ordinances, including Melbourne, Florida; Mesa, Arizona; and West Hollywood, California. *See* Daniel R. Mandelker, *Ordinances*, LAND USE L., http://law.wustl.edu/landuselaw/ordinances.html (last visited Sept. 6, 2012).

225. *See* MANDELKER ET AL., *supra* note 14, at 47–75 (providing a model sign ordinance); *see also* CONNOLLY & WYCKOFF, *supra* note 3, at 6-9 tbl. 6-2 (review of numerous content-neutral options for dealing with common local sign regulation issues).

of courts employing a less-stringent content neutrality standard[226] that would potentially infringe upon First Amendment rights and expose the municipality to litigation. For example, a municipality could easily have regulations limiting the height, size, materials, and lighting of signage—and still maintain an attractive character—with no mention of message in the ordinance.[227]

Thus, practical aspects of sign regulation—reduction of litigation risk and assurance of continued enforceability of sign ordinances—provide cause enough alone for more consistent application of the content neutrality principle by the courts. Regulatory certainty and the fact that content-based regulations are unnecessary to the achievement of aesthetic character goals provide sufficient grounds for a more rigorous content neutrality analysis. As long as courts are willing to provide flexibility in the content neutrality standard, governments—particularly municipalities—will be willing and able to forget the First Amendment requirements placed upon them in their regulatory capacity. There is significant opportunity for coexistence between the First Amendment rights of individual sign owners to post their desired messages and the protection of the aesthetic environmental interests of communities.

CONCLUSION

Governments—particularly at the local level—have relied heavily on context-sensitive and category-based regulations to accomplish their aesthetic regulatory goals under the assumption that creating a visual environment free of noxious signage would be impossible without some degree of content regulation. However, these regulations have fallen prey to sign owners and billboard companies seeking to exercise their First Amendment rights to post and display speech. The practice of employing context-sensitive or category-based regulations, which has been endorsed by some courts as sufficiently within the realm of constitutional regulation, continues to carry significant legal risk and attract costly litigation. Employing such risky strategies for regulating signage leaves open the possibility that local sign ordinances will be struck down, thus creating a regulatory vacuum in which signs and billboards could be placed with impunity; such an outcome would be destructive for the local visual environment. This Note offers support for a speech regulation jurisprudence that uniformly applies a strict standard of content neutrality without exception, because such an approach would create a more consistent regula-

226. *See* Rappa v. New Castle Cnty., 18 F.3d 1043, 1064 (3d Cir. 1994).
227. *See, e.g.*, CONNOLLY & WYCKOFF, *supra* note 3, at 6-9 tbl. 6-2.

tory environment that would leave governments less exposed to litigation and lessen the potential for aesthetic and environmental degradation.

Requiring governments to comply with the strictest demands of content neutrality instead of fishing for the proper level of content neutrality under the context-sensitive and category-based approaches would produce significantly greater predictability for regulators, which would lead to greater certainty in aesthetic protection efforts. Although governments have been forced to deal with challenges by sign plaintiffs who have taken on the more literal view of content neutrality in order to strike down sign regulations, municipal compliance with the more literal view provides the most sound answer to these challenges. The non-necessity of content-based distinctions to achieve almost any sign control goals undermines arguments that the content neutrality doctrine should be more flexible. Even though a more literal content neutrality jurisprudence would impose greater demands on municipal regulators to design truly content-neutral ordinances, it would provide a reliable standard for local regulators and sign owners. And in the long run, such an approach would clear up the confusion that has developed because of circuit splits and the courts' seemingly flexible approach to the First Amendment's content neutrality requirement.