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Scylla or Charybdis: Navigating the Jurisprudence of Visual Clutter

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NOTE

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TABLE OF CONTENTS

INTRODUCTION 1877
I. A HELLER OF A TRY: THE POPULAR ONSITE/OFFSITE DISTINCTION RUNS AFOUL OF THE FIRST AMENDMENT 1885
II. IF THE GREATER CULPRIT: THE COMMERCIAL/NONCOMMERCIAL DISTINCTION REMAINS VIABLE AFTER *DISCOVERY NETWORK* 1889
III. CERBERUS: PROTECTING THE MARKETPLACE OF IDEAS 1894
CONCLUSION 1898

INTRODUCTION

In the early 1980s, outdoor advertising was a one-billion dollar industry.[1] Within the last twenty years, it has grown five-fold.[2] Today's billboards both can talk[3] and they can listen.[4] Spokespersons for the industry praise its advancements and proliferation with their own brand of poetry: "Things are happening up there: moving parts, eye-

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1. *See* Outdoor Adver. Ass'n of America, Inc., U.S. Outdoor Industry Spending over the Past Ten Years, *at* http://www.oaaa.org/outdoor (displaying table charting outdoor advertising by spending since 1993) (last visited Dec. 1, 2004).

2. *Id.*

3. *See* Clear Channel Outdoor, Why Outdoor?, *at* http://www.clearchanneloutdoor.com/product/WhyOutdoor.asp (advertising the following: "Didn't know billboards could talk back? Tie your message to a toll free cellular number or ask your audience to tune into a low band radio frequency for more information on the ad displayed.") (last visited Dec. 1, 2004).

4. *See, e.g.*, Lindsay Martell, *Drive-By Advertising* (ABCNews television broadcast, Dec. 27, 2002) (on file with author) (describing billboards that monitor the radio frequencies to which passing cars are tuned and alter their content according to the predominant frequency).

catching devices, video projection."[5] Many local municipalities, however, are less than thrilled. Aside from the obvious visual blight,[6] outdoor advertising can compromise the safety of travelers.[7] Federal attempts to regulate the sea of highway billboards have backfired,[8] and local governments are left to sink or swim alone.

Meanwhile, the waters are treacherous. The jurisprudence of visual clutter is in a state of disarray. The Chief Justice of the Supreme Court has famously lamented the "genuine misfortune [that] the Court's treatment of the subject [is a] virtual Tower of Babel, from which no definitive principles can be clearly drawn."[9] As this Note explains, state and local government actors must negotiate two obstacles of First Amendment law to arrive at a constitutionally permissible regulation.[10] The first obstacle is the Supreme Court's decision in *Metromedia, Inc. v. City of San Diego*.[11] Following *Metromedia*, regulators can neither select among noncommercial messages nor privilege commercial messages over noncommercial ones. The Court has previously defined "commercial speech" to mean, alternately, "expression related solely to the economic interests of the speaker and

5. Clear Channel Outdoor, *supra* note 3. This website, which belongs to an industry giant, also refers to the "explosion of out of home media." *Id.*

6. The Supreme Court has acknowledged "visual blight," i.e. aesthetically harmful objects or conditions, as a "substantive evil" in the context of outdoor advertising. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984).

7. OFFICE OF SAFETY RESEARCH AND DEV., FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., RESEARCH REVIEW OF POTENTIAL SAFETY EFFECTS OF ELECTRONIC BILLBOARDS ON DRIVER ATTENTION AND DISTRACTION, FINAL REPORT (2001), *available at* http://www.fhwa.dot.gov/realestate/elecbbrd/elecbbrd.pdf (last visited Dec. 1, 2004) (reporting on the dangers that inhere to billboards, especially electronic, such as the "distraction of drivers").

8. *See generally* Craig J. Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification*, 48 U. KAN. L. REV. 463 (2000) (exploring early federal attempts to regulate billboards that culminated in the Highway Beautification Act, and detailing the respective failures of these regulations to significantly reduce highway billboards).

9. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 569 (1981) (Rehnquist, J., dissenting).

10. Billboard regulations generally implicate the First Amendment and are challenged on that basis. *See, e.g.*, Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999) (First Amendment challenge to a sign regulation); Ackerley Communications of Mass., Inc. v. City of Cambridge, 88 F.3d 33 (1st Cir. 1996) (same); Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992) (same); Nat'l Adver. Co. v. City & County of Denver, 912 F.2d 405 (10th Cir. 1990) (same); Wheeler v. Comm'r of Highways, 822 F.2d 586 (6th Cir. 1987) (same). *Cf.* Dwight H. Merriam & Brian R. Smith, *The First Amendment in Land Use Law*, *in* RECENT DEVELOPMENTS IN LAND USE LAW, Q203 A.L.I.-A.B.A. VIDEO L. REV. 161, 163 (Jan. 24, 1991) (sign regulation, unlike other land use regulation, "require[s] the consideration of one common issue — the protections afforded by the first amendment"). Challenges involving the Takings Clause do occur, *see, e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), but are not explored in this Note.

11. 453 U.S. 490 (1981).

its [sic] audience,"[12] and, more recently, expression that "propose[s] a commercial transaction."[13] Noncommercial speech consists of all other protected expression.[14]

After *Metromedia*, regulators who did not want to effectuate a total ban on signs took the one avenue that appeared available to them: they targeted only commercial speech. The Court's decision in *City of Cincinnati v. Discovery Network*,[15] however, presented a second obstacle. Following *Discovery Network*, regulators had to account for why they were privileging noncommercial over commercial speech when neither was intrinsically more harmful to the public.[16] A growing billboard industry, meanwhile, is happy to capitalize on the resulting catch-22.[17]

Metromedia, though splintered[18] and at times criticized,[19] lays out the basic analytic framework for assessing the constitutionality of a

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12. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980).

13. Bd. of Trs. v. Fox, 492 U.S. 469, 473-74 (1989).

14. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (characterizing noncommercial speech as all "other varieties of speech" other than commercial).

15. 507 U.S. 410 (1993).

16. *See infra* notes 39-48 and accompanying text.

17. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 556 (1981) (Burger, C.J., dissenting) (referring to the "real and growing problems every municipality faces in protecting safety and preserving the environment in an urban area" by regulations that the "billboard industry attempts to escape"); *infra* notes 122-123 and accompanying text. *See also supra* note 10 (providing a list of recent challenges to billboard regulations). The term "catch-22" is derived from a book by that title. *See* JOSEPH HELLER, CATCH-22 (1955).

18. Daniel R. Mandelker, *Sign Regulation and Free Speech: Spooking the Doppelganger, reprinted as Free Speech Issues in Sign Regulation*, *in* 1 LAND USE INSTITUTE, SH018 A.L.I.-A.B.A. 159, 163 (Aug. 22-24, 2002) (describing *Metromedia* as "badly divided"). Justice White wrote for four in invalidating the ordinance. *Metromedia*, 453 U.S. at 493. Justices Brennan and Blackmun concurred in the judgment. *Id.* at 521. Justice Stevens concurred in part and dissented in part. *Id.* at 540. Chief Justice Burger and Justice Rehnquist each dissented on separate grounds. *Id.* at 555, 569.

When the Supreme Court issues an opinion with no majority, the opinion with the most votes is not automatically the holding of the Court. *See* Marks v. United States, 430 U.S. 188, 193 (1977). In a so-called splintered case, on those issues that have not garnered a majority, "the holding of the Court may be viewed as that position taken by those [Justices] who concurred in the judgments on the narrowest grounds." *Id.* It may be that no grounds for the decision to strike down the San Diego ordinance at issue in *Metromedia* were the narrowest. *See* Rappa v. New Castle County, 18 F.3d 1043, 1060 (3d Cir. 1994) ("Since the opinions in *Metromedia* share no common denominator, they do not establish a governing standard for future cases."). In the absence of obviously narrowest grounds, it is difficult to know exactly what precedential value the plurality opinion has. *Cf.* Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 322 (2000) ("[T]he Court is freer to disregard a plurality decision as a matter of stare decisis than it is to disregard a majority opinion."). The lower courts, however, have by and large followed the plurality holding in *Metromedia*. *See* Mandelker, *supra* note 18, at 163; *infra* note 35 and accompanying text.

19. *See, e.g.*, *Rappa*, 18 F.3d at 1054-61 (noting the difficulty in "divin[ing] what, if any, principles from *Metromedia* became the governing standard for future cases").

billboard regulation against a First Amendment challenge. *Metromedia* involved San Diego's attempt to prohibit all advertising except for a narrow series of enumerated exceptions.[20] Those exceptions included signs that relate to the property to which they are attached[21] and twelve other categories of signs such as "government signs," "signs depicting time, temperature and news," and "for sale and for lease signs."[22] The Court struck down the San Diego ordinance insofar as it privileged "commercial" over "noncommercial" speech, by allowing the former to be communicated where the latter could not be,[23] and because the ordinance impermissibly drew distinctions within noncommercial speech.[24]

Commentators and courts have devoted significant effort to unpacking *Metromedia*'s intricate holding.[25] The following several propositions, however, commanded a majority of the Court. First, aesthetics and traffic safety are valid rationales for billboard regulation.[26] Second, the constitutionality of the effects of a regulation on commercial speech and noncommercial speech are to be analyzed separately.[27] Third, regulators may distinguish between types of

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20. *Metromedia*, 453 U.S. at 494-95.

21. Signs that relate to the property to which they are attached are "onsite" signs while "offsite" signs bear no such relation. *See Metromedia*, 453 U.S. at 512 (providing a definition of onsite and offsite billboards).

22. *Id.* at 494-95. The other exceptions were signs located at public bus stops, commemorative plaques, religious symbols, signs within shopping malls, signs on vehicles, temporary political signs, and un-displayed signs. *Id.*

23. *See id.* at 512-13 (plurality opinion).

24. *See id.* at 514-15 (plurality opinion).

25. *See, e.g.*, Rappa v. New Castle County, 18 F.3d 1043, 1054-61 (3d Cir. 1994); Katherine D. Parsons, Comment, *Billboard Regulation After* Metromedia *and* Lucas, 31 HOUS. L. REV. 1555, 1573-81 (1995); R. Douglas Bond, Note, *Making Sense of Billboard Law: Justifying Prohibitions and Exemptions*, 88 MICH. L. REV. 2482, 2488-2500 (1990).

26. *Metromedia*, 453 U.S. at 507-08 (plurality opinion) ("Nor can there be substantial doubt that the twin goals [of] traffic safety and the appearance of the city . . . are substantial governmental goals."); *id.* at 528, 533-34 (Brennan & Blackmun, JJ., concurring) (reiterating this point); *id.* at 557 (Burger, C.J., dissenting) (same).

27. *Id.* at 505 (plurality opinion) ("Because our cases have constantly distinguished between the constitutional protection afforded commercial as opposed to noncommercial speech . . . we consider separately the effect of [an] ordinance on commercial and noncommercial speech."); *id.* at 527-28 (Brennan & Blackmun, JJ., concurring) (agreeing with this framework). The Court affords greater protection to noncommercial speech because "[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Id.* at 506 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)). Commercial speech is also considered more robust than noncommercial speech in that it is motivated by self-interest. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976).

commercial speech, such that one type or category of commercial speech may be prohibited while another is allowed.[28]

Similar distinctions cannot be made, however, within noncommercial speech because this would allow the government to "choose the appropriate subjects for public discourse."[29] The Court held that by limiting the range of ideas that can be expressed to those that relate to their site of display, regulators impermissibly barred property owners from discussing topics irrelevant to their property.[30] Thus regulators cannot limit noncommercial messages to only those related to the facility to which they are attached.[31] Finally, noncommercial speech may not be prohibited where commercial speech is allowed.[32] If the owner of a given location can communicate a commercial message of any kind on her property, she must also be

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28. *Metromedia*, 453 U.S. at 512 (plurality opinion) ("It does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising."); *id.* at 541 (Stevens, J., dissenting in part) (joining Parts I through IV of the plurality opinion). Thus the Court held that the city could allow signs "identifying [a] place of business and advertising the products or services available there" — which the Court called "onsite commercial billboards" — while simultaneously banning billboards leased "for the purpose of advertising commercial enterprises located elsewhere" — or "offsite commercial billboards." *Id.* at 512 (plurality opinion).

29. *Id.* at 515 (plurality opinion); *id.* at 533 n.10 (Brennan & Blackmun, JJ., concurring) (agreeing with this point); *id.* at 541 (Stevens, J., dissenting in part) (same).

30. *Id.* at 514 (plurality opinion) ("Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests.").

31. Determining which messages are onsite necessarily entails looking to the content of the billboard to see if it relates to the location. *See Metromedia*, 453 U.S. at 516 (plurality opinion) (finding San Diego ordinance at issue content-based because it "distinguishes in several ways between permissible and impermissible signs at a particular location by reference to their content"); *see supra* note 21 and accompanying text (defining "onsite" and "offsite"). Content discrimination in general is problematic in that it "'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992) (quoting Simon & Schuster v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

32. The effect of the San Diego ordinance was to allow onsite commercial speech where noncommercial speech, if not listed among the twelve exceptions, was entirely prohibited. The plurality found this practice unconstitutional. *Metromedia*, 453 U.S. at 512-13 (plurality opinion). Chief Justice Burger disagreed. *See id.* at 569 (Burger, C.J., dissenting) ("The plurality gravely misconstrues the commercial-noncommercial distinction of earlier cases when it holds that the preferred position of noncommercial speech compels a city to impose the same or greater limits on commercial as on noncommercial speech."). The lower courts, however, followed the plurality. *See, e.g.*, Arlington County Republican Comm. v. Arlington County, 983 F.2d 587, 591 (4th Cir. 1993); Nat'l Adver. Co. v. Town of Niagara, 942 F.2d 145, 147 (2d Cir. 1991); Ackerley Communications of Mass., Inc. v. City of Somerville, 878 F.2d 513, 516 (1st Cir. 1989).

able to communicate any noncommercial message that is entitled protection under the First Amendment.[33]

Although commercial speech could not be privileged over noncommercial speech, the *Metromedia* plurality suggested that noncommercial speech could be placed in a privileged position vis-à-vis commercial speech. Justice White, writing for four, maintained that "the California courts may sustain the ordinance by limiting its reach to commercial speech" because "our judgment is based essentially on the inclusion of noncommercial speech within the prohibitions of the ordinance."[34] Lower courts took the plurality at its word: in addition to dutifully striking down ordinances that privileged commercial over noncommercial speech, they have upheld regulations that completely exempted noncommercial speech from their regulatory scheme.[35] Justice Brennan's concurrence in *Metromedia*, which questioned the wisdom of distinguishing between noncommercial and commercial speech for purposes of exemption,[36] might have been a lonely voice of protest were it not for the 1993 decision of *City of Cincinnati v. Discovery Network, Inc.*[37] This case called into question whether noncommercial speech, no less offensive than commercial speech in terms of safety or aesthetics, could be privileged over commercial speech after all.[38]

Discovery Network involved a municipal effort to reduce visual clutter caused by freestanding newsracks.[39] A city ordinance banned only those newsracks that distributed commercial handbills on the theory that commercial speech "has only a low value" and the city's "[a]esthetic and safety interests are stronger than the interest in allowing commercial speakers to have similar access to the reading public."[40] Six Justices voted to strike down the regulation, noting that it "seriously underestimate[d] the value of commercial speech."[41]

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33. *Metromedia*, 453 U.S. at 513 (plurality opinion) ("[T]he city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.").

34. *Id.* at 522 n.26 (plurality opinion).

35. *See, e.g.*, Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992) (upholding citywide exemption from permit requirements for noncommercial speech); Major Media v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986) (upholding blanket regulatory exemption for noncommercial speech).

36. *See Metromedia*, 453 U.S. at 536-40 (Brennan, J., concurring).

37. 507 U.S. 410 (1993).

38. *See infra* notes 47-48 and accompanying text.

39. *Discovery Network*, 507 U.S. at 412.

40. *Id.* at 418-19.

41. *Id.* at 419. Of the six, however, Justice Blackmun alone would afford indistinguishable protection to commercial and noncommercial speech. *Id.* at 431

Analyzing the regulation under *Central Hudson Gas & Electricity Corp. v. Public Service Commission of New York*[42] and *Board of Trustees of the State University of New York v. Fox*,[43] the Court found an "[un]reasonable fit" between the city's ends and its means.[44] The Court accepted that "every decrease in the number of [newsracks] necessarily effects an increase in safety and an improvement in the attractiveness . . . [such that] the prohibition is thus entirely related to [the city's] legitimate interests."[45] The commercial/noncommercial distinction, however, "bears no relationship whatsoever to the particular interests that the city has asserted"[46] because commercial newsracks "are no more harmful than the permitted newsracks."[47] In short, the *Discovery Network* Court was unwilling to allow the city to single out commercial newsracks — newsracks that were no more ugly or dangerous than noncommercial newsracks — for regulation, without furnishing any justification beyond that commercial speech enjoys less First Amendment protection than noncommercial speech.[48]

Despite the implication of *Discovery Network* for billboard regulation,[49] varying interpretations of the case have resulted in a circuit split. Some lower courts have attempted to circumvent *Discovery Network*, sometimes in problematic ways. The Ninth Circuit, for instance, offered a 1984 Supreme Court case as proof of continued reliance on *Metromedia* in the face of *Discovery Network*, which was decided almost a decade later.[50] The Eleventh Circuit, in

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(Blackmun, J., concurring) ("The present case demonstrates that there is no reason to treat truthful commercial speech as a class that is less 'valuable' than noncommercial speech.").

42. 447 U.S. 557 (1980). *Central Hudson* provides a three-part test for analyzing the constitutionality of a regulation of non-misleading commercial speech involving a lawful activity: the government, (1) in advancing a substantial interest, may promulgate regulations that (2) directly advance the asserted interest, and (3) are no more extensive than is necessary to further that interest. *Id.* at 564-66.

43. 492 U.S. 469 (1989). *Fox* clarifies that a "reasonable fit" is required between the city's ends and its means, not that the city must employ the least restrictive means available. *Id.* at 480.

44. *Discovery Network*, 507 U.S. at 426. The Court essentially adopted the lower court's *Central Hudson/Fox* analysis. *See id.* at 416 (citing as "proper" the Sixth Circuit's analysis, 946 F.2d 464 (6th Cir. 1991)).

45. *Discovery Network*, 507 U.S. at 418 (emphasis omitted).

46. *Id.* at 424 (emphasis omitted).

47. *Id.* at 418.

48. *Id.* at 428.

49. As with newsracks, there is no indication that noncommercial billboards are uglier or more unsafe than commercial ones. *See infra* note 78 and accompanying text.

50. Ackerley Communications of the N.W. Inc. v. Krochalis, 108 F.3d 1095, 1099 (9th Cir. 1997) (citing Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), for the proposition that *Metromedia* remains vital in the face of *Discovery Network*).

upholding a noncommercial exception to a commercial speech regulation, relegated *Discovery Network* to an unelaborated "but see" cite at the end of a long footnote.[51] Other lower courts, however, have recognized, and sometimes expanded, the scope of *Discovery Network*.[52]

Like Odysseus, would-be regulators face a dangerous path between two monsters.[53] If a regulator plans to reduce visual clutter by privileging commercial over noncommercial speech or by drawing distinctions among noncommercial messages, she finds herself menaced by one monster: *Metromedia*. *Metromedia* means that if an advertisement for soda can be erected on a given plot of land, a neighboring plot must be able to display a sign in support of the local Congressman. Further, *Metromedia* means that if any property owner can show support for a Congressman, a sign bearing the time of day must also be allowed. An ordinance allowing commercial speech must allow noncommercial speech, and an ordinance allowing some noncommercial speech must allow all noncommercial speech.[54] If, wary of *Metromedia*, a regulator decides instead to reduce visual clutter by regulating only commercial speech, she soon finds herself menaced by a second monster: *Discovery Network*. After *Discovery Network*, an ordinance is also in jeopardy if it exempts noncommercial speech merely because of the greater relative protection for this type of speech.[55] Thus, if signage is to be reduced without being totally eliminated, very careful distinctions must be made.[56] A monster guards each side of the regulator's path.

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51. Southlake Prop. Assocs. v. City of Morrow, 112 F.3d 1114, 1116 n.2 (11th Cir. 1992).

52. *See, e.g.*, Lavey v. City of Two Rivers, 171 F.3d 1110, 1115 n.16 (7th Cir. 1999) (noting that the *Discovery Network* majority opinion had denigrated the plurality opinion in *Metromedia* in a footnote); Whitton v. City of Gladstone, 54 F.3d 1400, 1403 (8th Cir. 1995) (invalidating regulation dealing with political signs); Rappa v. New Castle County, 18 F.3d 1043, 1056 n.20 (3d Cir. 1994). At least one court attempted to extend *Discovery Network* to non-aesthetic regulation. *See* Mainstream Mktg. Servs., Inc. v. FTC, 284 F. Supp. 2d 1266 (D. Colo. 2003) (upholding an injunction against the "Do Not Call List" on the grounds that noncommercial speech was unreasonably exempted).

53. In Greek mythology, Scylla was a sea monster that lived on one side of a narrow pass called the Strait of Messia. The other side was guarded by a sentient whirlpool, Charybdis. In THE ODYSSEY, Odysseus, who was forced to travel the strait in order to reach his home of Ithaca, lost six men to a surprise attack by Scylla while he was looking out for Charybdis. *See* HOMER, THE ODYSSEY, bk. 12, ll. 135-94 (George Chapman trans., J.R. Smith 1857) (800 B.C.).

54. *See* Metromedia Inc. v. City of San Diego, 453 U.S. 490, 564 (1981) (Burger, C.J., dissenting) (noting that the plurality's opinion forces regulators to choose between a total ban on signage or allowing all noncommercial speech).

55. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 418, 428 (1993). *See also infra* note 89 and accompanying text.

56. *Cf.* Mandelker, *supra* note 18, at 168 (noting that a court might hold an ordinance invalid both if it exempts noncommercial speech from a total ban on billboards and if it does not). In addition to being arguably impracticable, a total ban on speech in a public area

This Note argues that passing close to *Discovery Network* is the safest route — municipalities can still drastically reduce visual clutter by regulating commercial speech alone without violating the First Amendment. Part I looks at the onsite/offsite distinction, a singularly popular method of sign regulation, and concludes that this distinction runs squarely afoul of *Metromedia*. Part II looks at the once-accepted alternative route — the commercial/noncommercial distinction — and argues that this distinction does not run afoul of *Discovery Network*. Rather, a close reading of *Discovery Network* permits the regulation of exclusively commercial billboards where, as typically, they outnumber noncommercial billboards. Part III acknowledges that other constitutional methods of regulation exist but suggests that the commercial/noncommercial distinction is superior for policy reasons. Specifically, jealous protection of commercial speech dilutes the protection afforded ideas. Part III concludes that the government has a responsibility to offset the dilution of the "marketplace of ideas" that results from excessive commercial speech.

I. A HELLER OF A TRY: THE POPULAR ONSITE/OFFSITE DISTINCTION RUNS AFOUL OF THE FIRST AMENDMENT

The synergy of *Metromedia* and *Discovery Network* yields a dangerous path for any government actor seeking to reduce, but not completely eliminate, outdoor signs.[57] Nearly any distinction between types of protected speech implicates one or both of these influential cases.[58] In the face of this constitutional catch-22, the onsite/offsite distinction has proved a singularly popular means to reduce visual clutter.[59] Under this method of regulation, signs which are "onsite," i.e., that relate to the property to which they are attached, are

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elicits a high level of scrutiny, such that it is likely to be found unconstitutional. *See* United States v. Kokinda, 497 U.S. 720, 726-27 (1990).

57. *But see infra* note 112 and accompanying text (discussing other methods of sign regulation not based on distinction drawing).

58. *See supra* notes 54-57 and accompanying text.

59. *See* Mandelker, *supra* note 18, at 167 ("The distinction between off-premise and on-premise signs is common in sign regulation."). Indeed, the *Metromedia* ordinance itself drew an onsite/offsite distinction with respect to commercial speech, permitting a ban on offsite commercial speech. 453 U.S. at 493 n.1. The distinction appears frequently among the lower courts. *See, e.g.*, Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999) (upholding onsite/offsite distinction); Ackerley Communications of Mass., Inc. v. City of Cambridge, 88 F.3d 33 (1st Cir. 1996) (striking down onsite/offsite distinction); Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992) (upholding onsite/offsite distinction); Nat'l Adver. Co. v. City & County of Denver, 912 F.2d 405 (10th Cir. 1990) (same); Wheeler v. Comm'r of Highways, 822 F.2d 586 (6th Cir. 1987) (same); *see also* Bond, *supra* note 25, at 2520-22 (arguing for the viability of a modified onsite/offsite distinction, i.e., the "identifying/nonidentifying" distinction).

permitted; signs that bear no such relation are prohibited.[60] Despite the popularity of this distinction and its purported advantages, this Part argues that the onsite/offsite distinction has regulatory repercussions specifically held unconstitutional by the Supreme Court.

The onsite/offsite distinction may be attractive to regulators because it comports with the following intuition: certain messages, in that they are site-specific, can only be communicated effectively at a certain location. Therefore, proponents of the onsite/offsite distinction argue, onsite messages ought to be privileged above messages that can be communicated elsewhere. Indeed, regulators who favor the onsite/offsite distinction sometimes formulate versions of the distinction that are premised on whether alternative means of communication exist.[61] The "identifying/non-identifying" distinction, for instance, would regulate only those signs that do not "identify the premises on which they are displayed."[62] Similarly, the "locality test" would regulate only those signs with no "significant relationship between the content of particular speech and a specific location or its use."[63] Only signs bearing these essential relations to their location of display cannot effectively communicate their message elsewhere. Therefore, the argument runs, onsite messages are the only messages that, if removed from the road, would be totally silenced.[64]

Despite its advantages, the onsite/offsite distinction runs afoul of the First Amendment. For instance, *Metromedia* does not allow commercial speech to exist where noncommercial messages are

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60. *See* Mandelker, *supra* note 18, at 167; *supra* note 21 and accompanying text.

61. Alternative means of communication are typically associated with — indeed required by — time, place, or manner regulations. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Under the onsite/offsite distinction, in contrast, regulators must exempt a sign when no alternative means exist by which to communicate the sign's message. *See* Rappa v. New Castle County, 18 F.3d 1043, 1065 n.36 (3d Cir. 1994). This use of "alternative means" may be more like that considered by Chief Justice Burger in *Metromedia* where "the availability of alternative means of communication" was a factor in determining what First Amendment standards should be applied to the regulation of a given medium. 453 U.S. 490, 557-58 (1981) (Burger, C.J., dissenting).

62. Bond, *supra* note 25, at 2520.

63. *Rappa*, 18 F.3d at 1065. The *Rappa* court elaborated on the test at follows:

> The requirement that a sign be significantly related to the property can be met in either of two ways. First, the state can show that a sign is particularly important to travelers on the nearby road. . . . Second, the state can show that a sign better conveys its information in its particular location than it could anywhere else.

Id. The court arrived at the locality test after it concluded that it was "unable to derive a governing standard from the splintered opinions in *Metromedia*." *Id.* at 1061.

64. *See id.* at 1064 ("A sign that says 'Speed Limit 55' or 'Rest Stop' is more important *on a highway* than is a sign that says 'Rappa for Congress' . . . [because] there is no other means of communication that can provide equivalent information [in the case of the former]."); Bond, *supra* note 25, at 2520 ("Onsite signs deserve protection from sign bans because, as they identify the premises on which they are displayed, they cannot be replaced by an alternative means of communication.").

banned.[65] An onsite/offsite distinction would permit a nail factory to advertise nails but not to articulate the factory owner's support for prisoners of war, or any other opinion unrelated to nail production. Although a nail factory owner still might display the narrow band of noncommercial ideas that relate to nail manufacture, *Metromedia* also prohibits selecting among noncommercial messages.[66]

Similarly, the onsite/offsite distinction leaves too much discretion to individual officials.[67] In invalidating a set list of noncommercial speech categories that were exempt from the ordinance, the *Metromedia* Court warned that regulators "may not choose the appropriate subjects for public discourse."[68] The onsite/offsite distinction allows an official to do just that. Presumably, a campaign headquarters located along the highway could display political advertisements that relate to the on-premise activity of gaining an election to office. It would be up to local officials, however, whether that same facility could display an "Elect Democrats" sign, or whether a "Pro-Choice" sign relates sufficiently to the activities of an all-purpose medical clinic to be displayed there. Such power allows local officials to suppress certain topics of conversation because of the purported lack of "relatedness" to the site of its display.[69] An official might "drive certain ideas or viewpoints from the marketplace" by

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65. *See supra* notes 32-33 and accompanying text. As Judge Garth noted in dissent in *Rappa*:

> *Metromedia* holds that if the government interest in regulating speech is not so great as to outweigh the placement of signs with certain commercial messages, then First Amendment principles dictate that such an interest is not great enough to outweigh an individual's right to communicate non-commercial messages in the same spot and by the same means.

18 F.3d at 1081 (Garth, J., dissenting in part and concurring in part); *see also* Ackerley Communications of Mass., Inc. v. City of Cambridge, 88 F.3d 33, 37 (1st Cir. 1996) (striking down an onsite/offsite distinction because "the First Amendment does not permit [cities] to value certain types of noncommercial speech more highly than others").

66. *See supra* note 29 and accompanying text.

67. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969) (requiring that official discretion be guided by "narrow, objective, and definite standards" to withstand a First Amendment challenge); *Rappa*, 18 F.3d at 1085 (Garth, J., dissenting in part and concurring in part) (the onsite/offsite distinction "vests enforcement officials with unbridled discretion to decide which activities are site-specific and which are not"). The potential for abuse is a criticism that can admittedly be levied at any distinction. Officials may have more guidance, however, under one distinction regime than under another. *See infra* notes 109-110 and accompanying text.

68. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 515 (1981) (plurality opinion).

69. *Cf.* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423-24 n.19 (1993) ("[T]he responsibility for distinguishing between [types of speech] carries with it the potential for invidious discrimination of disfavored subjects.").

systematically labeling as onsite those messages with which he agrees and labeling others as offsite.[70]

Finally, the onsite/offsite distinction forces regulators to either ban signs from residences — since signs generally do not relate to domestic existence — or to exempt residences from regulation altogether.[71] The first option violates *City of Ladue v. Gilleo*,[72] wherein the Court noted that "residential signs have long been an important and distinct medium of expression" and cannot be completely eliminated even by content-neutral means.[73] The second option might allow a homeowner to undermine the city's goals by populating his yard with ugly and distraction billboards.

Couching the onsite/offsite distinction, as some proponents do, in terms of what cannot be communicated elsewhere does little to obviate the worries catalogued above. Regardless of whether alternative channels are available, the onsite/offsite distinction still confers excessive discretion upon officials[74] and risks offending various Supreme Court precedents, such as *Metromedia* and *Gilleo*.[75] Moreover, the Court has specifically held that certain noncommercial speech, although not related to the site upon which it is communicated, nevertheless cannot be effectively communicated elsewhere.[76] Thus, relatedness to the location of communication cannot be constitutionally dispositive; the onsite/offsite distinction remains deeply problematic.

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70. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992); *see also Ackerley Communications*, 88 F.3d at 37.

71. *See* Bond, *supra* note 25, at 2520.

72. 512 U.S. 43 (1994).

73. *Id.* at 55.

74. *See* Rappa v. New Castle County, 18 F.3d 1043, 1084-86 (3d Cir. 1994) (Garth, J., dissenting in part and concurring in part) (criticizing the majority's "locality test" because it fosters "unbridled discretion to decide which activities are site-specific").

75. *Cf.* Bond, *supra* note 25, at 2520 (admitting that the "onsite/offsite" distinction "would [not] protect political signs").

76. The Court has specifically rejected the argument, for instance, that a person always has adequate alternatives for communicating ideas beyond her residence. *See City of Ladue*, 512 U.S. at 57 ("Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute."). Nor did the Court limit its statements to ideas "substantially related to" the home. *See id.*

II. IF THE GREATER CULPRIT: THE COMMERCIAL/NONCOMMERCIAL DISTINCTION REMAINS VIABLE AFTER *DISCOVERY NETWORK*

Despite its popularity and advantages, then, *Metromedia* and other Supreme Court precedent have foreclosed the onsite/offsite distinction as a constitutional way to regulate signs. To be a viable replacement, a regulation that targets commercial speech must still safely traverse the waters guarded by *Discovery Network*. *Discovery Network* stands for the proposition that regulators may not single out commercial speech merely because it enjoys less constitutional protection.[77] Just as commercial newsracks are no more aesthetically harmful or dangerous than noncommercial ones, commercial billboards are not intrinsically more harmful than billboards containing noncommercial messages.[78] Yet this Part argues that the logic behind *Discovery Network* does not extend to contexts where, as in billboard regulation, reducing commercial speech could further the municipality's goals to a greater degree than reducing noncommercial speech.[79]

In *Discovery Network*, the City of Cincinnati sought to reduce visual clutter by eliminating only commercial newsracks.[80] The city offered no justification for the distinction apart from the contention that commercial speech has low value.[81] The Court found the "low value" justification arbitrary and therefore violative of the requirement that regulations of commercial speech evince a "reasonable fit" between their means and ends.[82] Falling somewhere between the "least restrictive means" and "rational basis" tests,[83] the reasonable fit test requires that the State indicate "that it has . . . 'carefully calculated' the costs and benefits associated with the burden

77. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993).

78. *See Rappa*, 18 F.3d at 1070.

79. To reduce commercial speech without completely eliminating it, municipalities have a variety of options. For instance, a city might create commercial speech-free zones or put a cap on the total amount of commercial speech. A city might even resuscitate the onsite/offsite distinction by exempting noncommercial billboards. The problems with the onsite/offsite distinction, enumerated in Part I, deal primarily with the effect of the distinction on noncommercial speech. The exact degree to which commercial speech might be limited, however, is beyond the scope of this Note.

80. 507 U.S. at 413.

81. *Id.* at 418-19 ("The major premise supporting the city's argument is the proposition that commercial speech has only a low value.").

82. *Id.* at 416-17 (citing Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989)).

83. *Id.* at 417 n.13.

on speech imposed by its prohibition."[84] Further, according to the test there cannot exist "numerous and obvious less-burdensome alternatives to the restriction" for the regulation to be constitutional.[85]

The *Discovery Network* Court "share[d] [the lower court's] evaluation of the 'fit' between the city's goal and its method of achieving it."[86] The lower court's analysis characterized the elimination of sixty-two commercial newsracks as "minute" and "paltry" when between 1500 and 2000 noncommercial newsracks would remain.[87] Although "the prohibition [was] entirely related to [the city's] legitimate interests in safety and [a]esthetics," the elimination of commercial newsracks would "have [had] only a minimal impact on the overall number of newsracks."[88] The difference in constitutionally mandated protection between commercial and noncommercial speech does not justify drawing a distinction between them that bears "no relationship whatsoever to the particular interests that the city has asserted."[89]

The logic of *Discovery Network*, however, does not apply to billboard regulation. In contrast to the commercial newsstands at issue, the limitation of commercial billboards would have an enormous impact on visual clutter overall. Unlike the newsracks in *Discovery Network*, the vast majority of billboards are commercial.[90] Thus if "every decrease in the number of [billboards] necessarily effects an increase in safety and [aesthetics],"[91] the regulation of a vast majority of billboards, unlike the elimination of but a few newsracks, substantially accomplishes the government's proffered goals.

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84. *Id.* at 417.

85. *Id.* at 417 n.13.

86. *Id.* at 418.

87. *Id.* (emphasis omitted).

88. *Id.*

89. *Id.* at 424.

90. *See id.* at 425 (noting the existence of evidence — albeit relatively "weak" — that commercial speech has a greater capacity to proliferate than noncommercial speech); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 536 n.13 (1981) (Brennan & Blackmun, JJ., concurring) ("[I]t would not be unreasonable to assume that the bulk of [billboard] customers advertise commercial messages."); Allison E. Gerencser, *Removal of Billboards: Some Alternatives for Local Governments*, 21 STETSON L. REV. 899, 905 (1992) (noting that billboards are mostly comprised of commercial speech). *Cf.* Nat'l Adver. Co. v. Town of Babylon, 900 F.2d 551, 553 (2d Cir. 1990) (noting that petitioner, which commands 20% of the national billboard market, rents to 98% commercial interests); Clear Channel Outdoor, *supra* note 3 (indicating percentages of outdoor advertising by category; approximately 80% is commercial).

91. *Discovery Network*, 507 U.S. at 418.

Regulators can still target commercial speech as the greater offender, if not as the least protected.[92]

Although one reason that commercial speech enjoys lesser protection in the first place is its greater capacity to proliferate,[93] this capacity is not the only reason for its lesser protection. For instance, the First Amendment is more concerned with protecting ideas than it is with protecting sales pitches.[94] Furthermore, commercial speech is part of commerce, which is an aspect of society "traditionally subject to government regulation."[95] The capacity to proliferate, moreover, does not make individual instances of commercial speech more dangerous: actual proliferation does. When the *Discovery Network* Court refused to recognize the "bare assertion that the 'low value' of commercial speech is a sufficient justification" for banning commercial newsracks, it did so only "[i]n the absence of some basis for distinguishing between 'newspapers' and 'commercial handbills' that is relevant to [the] interest asserted by the city."[96] The Court then acknowledged the relevance of actual proliferation.[97]

The Court itself may not have intended for *Discovery Network* to apply to billboard regulation. The Court was careful to limit its holding in *Discovery Network* to the facts, noting that "given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial [speech.]"[98] Billboard regulation probably presents one such set of circumstances. First, in finding the city's justification for its ban on newsracks "insufficient," the Court relied on the fact that commercial billboards were "no more harmful than the permitted newsracks, *and* [had] only a minimal impact on the overall number of newsracks on

92. In other words, a regulation that reached only commercial speech where commercial speech is the greatest threat to safety and aesthetics would not fail the *Fox* test as applied by the *Discovery Network* court.

93. *See Discovery Network*, 507 U.S. at 439 (Rehnquist, C.J., dissenting).

94. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985) (stating that commercial speech is "less central to the interests of the First Amendment").

95. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978).

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

97. *See id.* at 418, 426. This is not to say that every sort of speech that proliferates can be regulated. Seven Justices in *Metromedia* held that the government simply could not differentiate between otherwise protected, noncommercial speech. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 515 (1981) (plurality opinion); *id.* at 533 n.10 (Brennan, J., concurring); *id.* at 541 (Stevens, J., dissenting in part). Thus red political signs, for instance, could not be singled out for regulation, whereas red advertisements might be.

98. 507 U.S. at 428. Indeed, the Eleventh Circuit all but ignored *Discovery Network* in upholding a ban on offsite, commercial speech in the billboard context. *See* Southlake Prop. Assocs. v. City of Morrow, 112 F.3d 1114 (11th Cir. 1997).

the city's sidewalks."[99] The Court emphasized impact again when it noted that the noncommercial newsracks were "arguably the greater [aesthetic] culprit because of their superior number."[100] Noncommercial speech cannot be eliminated by virtue of its greater proliferation because of, among other things, the standing *Metromedia* ban on privileging commercial over noncommercial speech.[101] Yet neither *Metromedia*, nor *Discovery Network*, if properly read, stands in the way of reducing commercial speech where, as often, it is the "greater culprit."[102]

Second, the *Discovery Network* Court never formally called *Metromedia*, which dealt directly with billboard regulation, into doubt.[103] The *Discovery Network* Court distinguished *Metromedia* on the theory that the *Metromedia* Court never reached the question of whether noncommercial speech could be privileged over commercial speech.[104] Yet the *Discovery Network* Court also acknowledged that in *Metromedia*, seven Justices held San Diego's interest in aesthetics and safety sufficient to "completely ban offsite commercial billboards" but not noncommercial billboards.[105] Indeed, before being confronted with the unique facts of *Discovery Network*, the Court has never even

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99. *Discovery Network*, 507 U.S. at 418 (emphasis added).

100. *Id.* at 426.

101. *See supra* notes 32-33 and accompanying text.

102. *Discovery Network*, 507 U.S. at 426. "[T]he difference between commercial price and product advertising and ideological communication permits regulation of the former 'that the First Amendment would not tolerate with respect to the latter.'" *Metromedia*, 453 U.S. at 507 (plurality opinion) (quoting Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 69 n.32 (1976)). It should be noted that certain categories of commercial speech, e.g. "For Sale" signs, might have to be exempted from a ban on commercial speech, pursuant to the Court's decision in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (prohibiting total ban on such signs). Because *Metromedia* allows distinctions within commercial speech, this exemption will not prove constitutionally problematic. *See Metromedia*, 453 U.S. at 512 (plurality opinion); *id.* at 541 (Stevens, J., concurring in part and dissenting in part).

103. *See* Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 610 (9th Cir. 1993) (finding "no choice but to conclude that [the *Metromedia*] commercial-noncommercial analytical distinction still exists" in the face of *Discovery Network*). *But see* Rappa v. New Castle County, 18 F.3d 1043, 1056 n.20 (3d Cir. 1994) (noting that the preference for noncommercial speech articulated in *Metromedia* "has been significantly called into question by the Court's recent holding in *Discovery Network*").

104. *See Discovery Network*, 507 U.S. at 425 n.20. In *Lavey v. City of Two Rivers*, however, the Seventh Circuit disputed the *Discovery Network* Court's contention that *Metromedia* never reached the question of whether noncommercial speech could be privileged over commercial speech. 171 F.3d. 1110, 1115 n.16 (7th Cir. 1999). *Metromedia*, as the Seventh Circuit pointed out, instructed the California courts that they could uphold San Diego Ordinance No. 10795 — which banned all offsite signs except twelve kinds of noncommercial signs — by construing it to apply only to commercial signs. *See id.* (citing *Metromedia*, 453 U.S. at 521 n.26). The Seventh Circuit argued therefore that, following *Metromedia*, noncommercial speech could be privileged generally over commercial speech.

105. *Discovery Network*, 507 U.S. at 425 n.20.

implied that noncommercial speech could not be favored of commercial speech.[106] By confronting the *Metromedia* opinion and declining to derogate its conclusions about regulating commercial speech, the *Discovery Network* Court suggests that its reasoning does not extend to the billboard context.[107]

Nor does the commercial/noncommercial distinction suffer from the constitutional infirmities of the onsite/offsite distinction. Under the commercial/noncommercial distinction, property owners would be free to display their noncommercial thoughts, and officials would not be able to distinguish between ideas because *all ideas*, as opposed to commercial messages, would be exempted. These onsite/offsite distinction problems stemmed from the distinction's very ability to reach noncommercial speech.

Justice Brennan claimed that distinguishing between commercial and noncommercial types of speech "would [also] entail a substantial exercise of discretion by a city's official, [presenting] a real danger of curtailing noncommercial speech in the guise of regulating commercial speech."[108] Yet the Justice admitted that the discretion of officials in the commercial/noncommercial regime would not be unguided because case law has "consistently distinguished between the constitutional protection afforded commercial as opposed to noncommercial speech."[109] The very existence of a category of commercial speech, analytically distinct from noncommercial speech, implies that lines can be drawn by courts and regulators alike.[110] In

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106. *Discovery Network*, 507 U.S. at 443-44 (Rehnquist, C.J., dissenting) (citing *Metromedia*, 453 U.S. at 513) (noting that although the Court has "previously said that localities may not favor commercial over noncommercial speech in addressing [aesthetic] urban problems," the Court has "never even suggested that the converse holds true," i.e., that non-commercial speech could not be favored over commercial speech).

107. *Cf. Lavey*, 171 F.3d at 1116 (declining to hold *Discovery Network* applicable to billboard regulation because "[t]he distinction between commercial and noncommercial advertisements is . . . a great deal more obvious than the distinction between newspapers and commercial handbills").

108. *Metromedia*, 453 U.S. at 536-37 (Brennan, J., concurring). Related to the worry that officials will abuse their discretion, Justice Brennan believed that advertisers would sneak commercial messages into noncommercial billboards. *See id.* at 539-40 ("[T]hose who seek to convey commercial messages will engage in the most imaginative of exercises to place themselves within the safe haven of noncommercial speech.").

109. *Id.* at 536 (Brennan, J., concurring) (quoting the plurality opinion, 453 U.S. at 504-05).

110. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978) (characterizing the difference between commercial and noncommercial as "common-sense"); Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 613 (9th Cir. 1993) (noting that "city officials can and must rely on judicial precedent to determine what is commercial speech"); Nat'l Adver. Co. v. City & County of Denver, 912 F.2d 405, 410 (10th Cir. 1990) (referring to the "ample guidance" provided by the Court on the distinction of commercial from noncommercial speech). Presumably, judicial guidance will also aid officials in their efforts to differentiate between "real" noncommercial speech and commercial speech masquerading as such. *See*

sum, the commercial/noncommercial distinction is superior to the onsite/offsite distinction, if only because is does not suffer from constitutional defect.

III. CERBERUS: PROTECTING THE MARKETPLACE OF IDEAS

If our road signs
Catch your eye
Smile
But don't forget to buy. . .[111]

Though the commercial/noncommercial distinction is superior to the constitutionally flawed onsite/offsite distinction, regulations exist that make no use of either distinction and nevertheless pass constitutional muster. For instance, a municipality could regulate all signs, regardless of content, with respect to size.[112] This Part argues that, by reducing commercial speech overall, the commercial/noncommercial distinction has the added, salutary effect of curbing the dilution of core First Amendment expression that a relaxed attitude toward commercial speech perpetuates. Therefore, regulating only commercial speech is superior to other methods of reducing visual clutter for reasons of constitutional policy.[113]

Bolger v. Youngs Drug Prods. Co., 463 U.S. 60, 66-67 (1983) (discussing how to characterize speech with commercial and noncommercial elements). Arguably, however, the relationship between commercial and noncommercial speech is problematic in another way. For both Justices Brennan and Stevens "it seems unlikely that the outdoor advertising industry will be able to survive if its only customers are those persons and organizations who wish to use billboards to convey noncommercial messages." *Metromedia*, 453 U.S. at 541 n.4 (Stevens, J., dissenting); *id.* at 536 n.13 (Brennan, J., concurring). Thus a severe reduction of commercial speech might be tantamount to "a total ban on billboards." *Id.* at 541 (Stevens, J., dissenting). Apart from being completely speculative — and assuming, as it does, that the display of noncommercial billboards is predicated on the survival of the outdoor advertising industry — this alleged effect occurs as the result of private, not governmental, action. *Cf.* Major Media of the S.E., Inc. v. City of Raleigh, 792 F.2d 1269, 1273 (4th Cir. 1986) (noting that the decisions of individual property owners with respect to what messages to display "ha[ve] nothing to do with" the government's ordinance). *But see* 659 F. Supp. 470, 473 n.3 (W.D. Va. 1987), *aff'd in relevant part*, 840 F. 2d 10 (4th Cir. 1988) (striking down a facially non-discriminatory ordinance which nevertheless enacted a "virtual prohibition of noncommercial advertising").

111. 1963 Burma-Shave advertisement, *in* The Burma-Shave Jingles, *at* http://frogcircus.org/burmashave/1963/if_our_road.html (last visited Sept. 1, 2003) (cataloguing Burma-Shave, roadside advertisements).

112. *See* Mandelker, *supra* note 18, at 170. Alternatively, a city could effectuate total bans in select zones, such as historic districts, allowing speech to proliferate freely elsewhere. *See, e.g.*, Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992).

113. A possible policy rationale for favoring the onsite/offsite distinction is that under it, more total signs might be eliminated. *See* Bond, *supra* note 25, at 2520. Ignoring the questionable constitutionality of such a distinction, see Part I, this worry assumes a calculus giving equal value to commercial speech. As this Part details, the Court places a higher value on noncommercial speech and worries more about its regulation. *See* Bd. of Trs. v. Fox, 492

The phenomenon of dilution operates on two levels. On one level, jealous protection of commercial speech dilutes the protection courts afford ideas. On another level, core speech is diluted in a more pragmatic way as "the marketplace of ideas" becomes saturated with commercial messages. This first claim is firmly rooted in precedent. If over-protecting commercial speech dilutes the safeguards we afford ideas, exempting noncommercial speech from aesthetic regulations strengthens that safeguard. In his majority opinion in *Fox*, Justice Scalia wrote that "'[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech.'"[114] Other Justices have also specifically referred to the "inherent danger that conferring equal status upon commercial speech will erode the First Amendment protection accorded noncommercial speech."[115]

The second claim requires more development. The Supreme Court, in discussing the First Amendment, often employs the metaphor of a "marketplace of ideas."[116] The metaphor was first invoked by Justice Holmes in *Abrams v. United States*,[117] where he stated in his dissent that "the ultimate good desired is better reached by free trade in ideas[;] the best test of truth is the power of the thought to get itself accepted in the competition of the market."[118] The Court has repeatedly used and expanded this concept in its discussion of First Amendment issues.[119]

U.S. 469, 478 (1989) (referring to the "subordinate position [of commercial speech] in the scale of First Amendment values").

114. 492 U.S. at 481 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

115. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 439 (1993) (Rehnquist, C.J., dissenting). "'Rather than subject the First Amendment to such a devitalization,'" claimed Chief Justice Rehnquist, the Court "'instead ha[s] afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values...'" Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting) (quoting *Ohralik*, 436 U.S. at 456).

116. *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 968 (1978) ("The Supreme Court steadfastly relies upon a marketplace of ideas theory in determining what speech is protected.").

117. 250 U.S. 616 (1919).

118. *Id.* at 630 (Holmes, J., dissenting).

119. As of November 30, 2004, the Supreme Court has cited to *Abrams* fifty-five times. The overwhelming majority of these citations, including those of such seminal First Amendment decisions as *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964), and *Dennis v. United States*, 341 U.S. 494, 503 (1951), explicitly rely on the concept of the marketplace of ideas.

Just as with any market, the marketplace of ideas can be diluted, such that important messages are categorically devalued.[120] Commercial billboards make up the vast majority of the already enormous — yet ever-expanding — outdoor advertising industry.[121] Not only do billboards grow in number, they grow more aggressive. In 1932, long before billboards could listen along to your radio, the Supreme Court observed that billboards "are constantly before the eyes of observers . . . to be seen without the exercise of choice or volition on their part."[122] Indeed, travelers "have the message of the billboard thrust upon them by all the arts and devices that skill can produce."[123] In a commercial context, "dilution" is defined technically as "a decrease in the equity position of a share of stock because of the

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120. This is more than a fanciful objective correlative: Chief Justice Rehnquist has observed that "[t]here is no reason for believing that the marketplace of ideas is free from market imperfections any more than . . . the commercial market." *Central Hudson*, 447 U.S. at 592 (Rehnquist, J., dissenting); *see also* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 548 (1981) (Stevens, J., dissenting) ("Just as the regulation of an economic market may either enhance or curtail the free exchange of goods and services, so may regulation of the communications market sometimes facilitate and sometimes inhibit the exchange of information, ideas, and impressions."). Arguably, however, the role of the courts is to keep the market free from government, not private, intrusion. This sentiment is to some extent grounded in the First Amendment itself which provides that "*Congress* shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I (emphasis added). Yet the government already "corrects" the marketplace of ideas in certain, approved circumstances. The Supreme Court case of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 384-85 (1969), for instance, upheld the use of government-mandated blocks of radio time reserved for rebuttal or "set asides," in the interest of furthering public debate. Similarly, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994), upheld "must carry" provisions, i.e. regulations requiring cable companies to grant access to local and public broadcasters. Before it was overruled on Fourteenth Amendment grounds by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568 (1990), upheld a plan to enhance minority ownership of television and radio stations on a theory that "the diversity of views and information on the airwaves serves important First Amendment values." Nor are efforts limited to the broadcasting paradigm: the Court in *McConnell v. Federal Election Commission* expressly upheld the government's right to limit the ability of corporations to exert political influence as organizations through advertising. 540 U.S. 93, 203 (2003) ("Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law."). The occasional commentator argues that this trend in the law should be acknowledged and expanded. *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 19-20 (1993) (arguing that the First Amendment, properly understood, should promote diverse public discourse notwithstanding the cost to individual liberty); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987) ("The state [should] counteract the skew of public debate attributable to the market and thus preserve the essential conditions of democracy."). *But see* Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993) (criticizing the "collectivist theory" of the First Amendment, espoused by Sunstein and Fiss).

121. *See supra* note 90.

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

123. *Id.* More recently, Chief Justice Burger has referred to billboards as "ugly and dangerous eyesores thrust upon . . . citizens" and "large, eye-catching signs that divert the attention of motorists." *Metromedia*, 453 U.S. at 559-60 (Burger, C.J., dissenting).

issuance of additional shares."[124] Similarly, the "equity position" of a given noncommercial message — its impact on the traveler relative to other messages — can be said to decrease in proportion to the ever-increasing number of overall billboards.[125]

The argument that noncommercial speech is susceptible to dilution assumes that the world of human expression is finite — that there comes a point when some ideas can be crowded out. This is not a novel concept.[126] As certain voices are added to the marketplace, others can be drowned out and eliminated.[127] Pure competition between ideas cannot take place, moreover, when certain ideas are ubiquitous and others sporadic.[128] Intuitively, the only billboard you see on your drive from your house to your office is likely to have a substantially greater impact than the one billboard nestled among fifty. Infrequently-relayed messages cannot compete on their merits, short-circuiting market forces.[129] In this game of ideas, which may be zero sum, commercial advertising is clearly a major player.[130]

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124. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 508 (4th ed. 2000).

125. The idea is not that commercial speech has no value in the marketplace of ideas. Commercial speech adds value in that it "assists consumers and furthers the societal interest in the fullest possible dissemination of information." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561-62 (1980). The danger is that commercial speech, which is "less central to the interests of the First Amendment," *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985), will overwhelm speech that is manifestly closer to the core of First Amendment protection. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (describing the "subordinate position" of commercial speech relative to noncommercial ideas).

126. Nor is it without scientific support. *See* George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 PSYCHOL. REV. 81 (1956) (origin of popular theory that human beings can only keep seven items, plus or minus two, in short term memory at any given time), *available at* http://www.well.com/user/smalin/miller.html.

127. Patricia J. Williams, Metro Broadcasting, Inc. v. FCC*: Regrouping in Singular Terms*, 104 HARV. L. REV. 525, 537 (1990) ("We think of freedom of speech as something creative, innovative, each word like a birth of something new and different . . . . [B]ut it also *selectively silences* even as it creates.") (emphasis added).

128. Baker, *supra* note 116, at 967 (doubting "people's rational faculties . . . to sort through the form and *frequency* of message presentation") (emphasis added).

129. *Id.*

130. *See* Williams, *supra* note 127, at 535 ("The degree to which advertising alone purveys and *censors* information seriously threatens genuine freedom of information.") (emphasis added). This Note does not make the claim, rejected in *American Booksellers Ass'n, Inc. v. Hudnut*, that the content of particular speech, here commercial speech, is in some way damaging. *See* 771 F.2d 323, 327-32 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986) (striking down anti-pornography laws on the basis of content-discrimination). Rather, the mere proliferation of this speech, which happens to enjoy less protection corresponding to its lesser value, dampens our ability to convey legitimate ideas. Nor does this Note make the claim, rejected in *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), that certain speakers ought to be silenced to make room for others. This Note argues for rigid regulation of a category of speech, not a category of speaker.

The protection afforded speech is finite and hydraulic: the over-protection of one category of speech has consequences for other expression. Removing commercial speech from the easy reach of regulators dilutes noncommercial speech in a second, less figurative sense, by presenting more targets of public attention. The reduction of visual clutter by the constitutional means of reducing commercial speech, therefore, insofar as it reduces the competition to noncommercial speech, reinvigorates the debate over ideas.

CONCLUSION

As Odysseus's ship ventured by her, each of Scylla's six fearsome heads rose from the water and plucked a man from the exposed deck.[131] Modern visual clutter jurisprudence is also guarded, albeit less graphically, by dangerous monsters. Given that one must pass by one monster or another on the path to regulation, this Note has shown that the creature guarding commercial speech is more an Argus than a Scylla: he can be lulled to sleep.[132] Part I shows that the popular onsite/offsite distinction runs afoul of *Metromedia* and other Supreme Court decisions. Part II proves, in contrast, that privileging noncommercial signs over commercial ones remains a constitutional means by which to regulate visual clutter after *Discovery Network*, as long as the focus is the fact of commercial speech's greater proliferation. Part III indicates that the theory of dilution — already built into First Amendment jurisprudence — lends itself to practical, analytical extension. Aggressive regulation of commercial speech, therefore, serves an important policy goal by restoring the nobility of noncommercial ideas in the ever-competitive marketplace.

131. *See* HOMER, *supra* note 53, bk. 12, ll. 135-94.

132. Argus was a many-eyed monster whom the gods used to protect property. He was eventually slain by Hermes who lured him to sleep with music. *See* Jennifer Middlesworth, *Argus*, ENCYCLOPEDIA MYTHICA, *at* http://www.pantheon.org/articles/a/argus.html (last modified Jan. 31, 2004) (online encyclopedia of Greek and Roman mythology).