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People Do Read Large Ads: The Law of Advertising from Outer Space

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People Do Read Large Ads: The Law of Advertising from Outer Space

Don E. Tomlinson*
Rob L. Wiley**

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INTRODUCTION

There are no billboards—and virtually no outdoor advertising—in Hawaii.¹ Why not? Imagine this. You and your significant other have

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1. HAW. REV. STAT. § 264-71(3) (1985) defines “outdoor advertising” as “any device which is”:

worked hard for two years to save enough money to take a two-week vacation on Maui. This is your first trip to the Hawaiian islands. After the long flight, you are quite tired. You arrive at night and are whisked by cab to your rented condo on a small rise across the street from a gorgeous bay. Gazing east from your condo, you should have a stellar view of breathtaking Hawaiian sunrises. The pictures in the brochure showing the view were incredible. Your level of anticipation is high. Arising before dawn the next morning, the two of you step onto your lanai only to discover that a large billboard hawking scuba-diving lessons or offshore coral reef excursions almost totally obscures your view.

You are furious and want to move to another spot on the island. You discover, though, that billboards obscure the view of almost all the living accommodations across the street from the beaches. Living accommodations

(A) A writing, picture, painting, light, model, display, emblem, sign, billboard, or similar device situated outdoors, which is so designed that it draws the attention of persons on any federal-aid or state highway, to any property, services, entertainment, or amusement, bought, sold, rented, hired, offered, or otherwise traded in by any person, or to the place or person where or by whom such buying, selling, renting, hiring, offering or other trading is carried on;

(B) A sign, billboard, poster, notice, bill, or word or words in writing situated outdoors and so designed that it draws the attention of and is read by persons on any federal-aid or state highway; or

(C) A sign, billboard, writing, symbol or emblem made of lights, or a device or design made of lights so designed that its primary function is not giving light, which is situated outdoors and draws the attention of persons on any federal-aid or state highway.

In the succeeding section, the law controls outdoor advertising by stating that:

No person shall erect or maintain any outdoor advertising outside of the right of way boundary and visible from the main-traveled way of any federal-aid or state highway within the State, except the following:

(1) Directional or other official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historic attractions as authorized or required by law.

(2) Signs, displays, and devices advertising the sale or lease of the property upon which they are located.

(3) Signs, displays, and devices advertising activities conducted on the property upon which they are located.

(4) Signs lawfully in existence on October 22, 1965, determined by the [D]irector [of the Hawaii Department of Transportation] to be landmark signs, including signs on farm structures or natural surfaces of historic or artistic significance the preservation of which would be consistent with the purpose of this section.

§ 264-72. In other statutory sections, the Hawaii legislature provided for a grace period for such advertising lawfully in existence at the time of passage, for the removal of nonconforming advertising at the appropriate time, and for compensation. §§ 264-72, -74, -75. In addition to the civil remedies, the Act made such advertising a public nuisance and prescribed the penalty for its violation as a \$25 to \$500 fine and/or a month in jail. § 264-77.

not separated from the view by streets are prohibitively expensive, but you took the bait and now you will switch. While you may have salvaged this trip, Hawaii's tourist bureau should not expect a return visit. No one, of course, is more acutely aware of this potential tourism nightmare than the members of the Hawaii legislature, who long ago banned almost all outdoor advertising.²

Enjoying your view and believing your problems are now over, you look forward to seeing another of Maui's most impressive sights, sunrise over the clouds from atop Haleakala, a 12,000-foot inactive volcano. Tourists gather every morning of the year on the 10,000-foot summit to marvel at the majesty of the sun as it escapes the night. You have brought your best camera, intending to snap the shutter once every thirty seconds. The brochures, and friends who preceded you, claim this spot makes for a marvelous set of pictures. The first shots seem great, but just as the sun has made its way almost out of the clouds, another image creeps into your lens just to the left of the sun. This cannot be, you think, but sure enough, there it is—a "billboard" coming to you from outer space, this one containing a soft drink logo. As the sun gets higher, you see another. Tennis shoes. Beer. An information superhighway service. Cigarettes. Automobiles. Laxatives. What can the Hawaii legislature do about space billboards?³

2. The law was passed in 1966. See Kirk Caldwell, Note, *Metromedia, Inc. v. City of San Diego: The Conflict Between Aesthetic Zoning and Commercial Speech Protection; Hawaii's Billboard Law under Fire*, 5 U. HAW. L. REV. 79 (1983). See *infra* notes 45-120 and accompanying text for a discussion of the First Amendment implications of governmentally imposed limits on commercial expression.

3. Or advertising-laden blimps perpetually flying high over Maui? As an island with a laid-back, carefree reputation, perhaps it should not be surprising that Maui is the home of a satirical publication entitled *Maui's Going Bananas*. And given the seriousness with which any kind of billboard advertising is viewed in Hawaii (there is a move afoot in Kihei, Maui, to use Hawaii's billboard law to ban the small signs that adorn the *inside* of the fence of the *little league* baseball field there), perhaps it should come as no surprise that the lead article on page one in the May 13, 1994, edition of *Maui's Going Bananas* concerns (tongue-in-cheek, remember) a local businessman who has purchased a "big, gigantic, colossal blimp" with "6.4 million candlepower lights which will be visible from all the islands at night." Keoni Wiliki, *Maui to be Home of Big Gigantic Colossal Blimp*, MAUI'S GOING BANANAS, May 13, 1994, at 1. The "owner" of the blimp was quoted as saying: "Just imagine, banners, lights, signs, and all of it flying so high it'll be outside the jurisdiction of the County [the island of Maui is a county]!" *Id.* As an illustration of his disdain for "regulators," the businessman said: "[W]e can still look at rainbows in awe, and Maui's certainly got more of them than anywhere else on Earth, but only because our local lawmakers haven't figured out a way to regulate them." *Id.*

For an interesting historical and regulatory review of outdoor advertising predating the development of the Supreme Court's commercial speech doctrine, see OUTDOOR ADVERTISING: HISTORY AND REGULATION (John W. Houck ed., 1969).

[S]ome commercial firms have suggested the possibility of advertising goods and services from outer space. Miles long, constructed of mylar, and given form through a latticework of inflatable tubing, these immense billboards would orbit the Earth at relatively low altitudes. The ads would appear from the Earth's surface to be as large as a full moon. Although unsuitable for complex messages, proponents of the concept envision the possibility that corporate trademarks would be clearly visible.⁴

This Article explores the extent to which legislative action to regulate advertising from space could withstand constitutional scrutiny. Part I traces the commercial speech framework as it has been developed and applied by the Supreme Court. Part II considers an application of this analysis to advertising in space. Considering that regulation of space as a medium of communication might affect noncommercial as well as commercial speech, Part III analyzes the possible impact of such regulation on noncommercial speech. Finally, the Coauthors offer different conclusions about the propriety of regulation of space advertising.

A. *The Technological Capability*

Space billboards could take one of two forms: 1) a single-entity billboard spacecraft, programmed, powered, and launched to achieve and maintain a particular orbit and orientation;⁵ or 2) the payload of a separate spacecraft, which would, as orbiting space shuttles so often have done in the case of communication satellites,⁶ deposit the payload into space and then fire rockets in the payload to achieve and maintain a particular orbit and orientation.⁷ All the technologies for achieving advertising from outer space exist⁸—and not just in the United States. Launch capability exists through the European Space Agency and through the Russian and Chinese governments, and it is cheaper there than in the United States.

4. Lawrence Roberts, *Proposed Bill to Ban Space Advertising*, 88 A.B.A. SEC. L. & POL'Y COMM. BULL. OF L., SCI. & TECH. 4 (1994). Mr. Roberts is chair of the U.S. Aerospace Law & Policy Committee of the Aerospace Law Division of the A.B.A. Section.

While the introduction to this Article uses "aesthetics" to illustrate one perceived problem with space billboards, aesthetic considerations could pale in comparison to the effects some words on space billboards might have, a problem addressed *infra* notes 155-61 and accompanying text, in commenting on the unique magnitude of this new medium of expression.

5. *Id.*

6. JOHN R. BITTNER, *BROADCASTING AND TELECOMMUNICATION* 121 (3d ed. 1991).

7. Roberts, *supra* note 4, at 4.

8. *Id.*

B. *Space Marketing Concepts, Inc.*

In April 1993, Michael Lawson, chief executive officer of Space Marketing Concepts, Inc., a privately held company in Roswell, Georgia, proposed to launch an "environmental billboard."⁹ Apparently, Lawson's idea was for half the billboard to contain scientific instruments, e.g., ozone measuring devices, with the other half containing a sponsor's logo.¹⁰ Depending on the source of information, space billboards would range from about half the size of the moon to the full size of the moon; would be visible all the time or only during daylight hours (mainly adjacent to sunrise and sunset); could last from two weeks to one year to forever; would be less than one-tenth as bright to 2,000 times brighter than the full moon; would range from one kilometer to one mile long, from 400 meters to three quarters of a mile wide and circle the planet in an orbit 140 nautical miles to 300 kilometers high.¹¹ Apparently, they would operate in a low-Earth and sun-synchronous orbit with corporate sponsors having the final say as to their "exact" locations.¹²

The total cost of such space billboards would be \$15 to \$30 million.¹³ Lawson said he hoped "the marriage of marketing and environmentalism would appeal to companies with global identities, the kind that already have multimillion-dollar advertising budgets."¹⁴ By November 1993, Space Marketing had "received more than a dozen inquiries from prospective clients."¹⁵ One of Lawson's original ideas "was to loft the five-ring symbol of the Olympic games."¹⁶ An April 12, 1993, news release issued by Space Marketing quoted Lawson as saying:

A tremendous opportunity [exists] for a global-oriented company to have [its] logo and message seen by billions of people on a history making, high profile vehicle. Imagine attending the [1996 Summer

9. *Orbiting-Billboard Proposal Gets Astronomers' Attention*, SKY & TELESCOPE, Nov. 1993, at 10, 10 [hereinafter *Orbiting-Billboard*].

10. *Id.* It appears that Mr. Lawson may have taken a cue from *Valentine v. Chrestensen*, 316 U.S. 52 (1942), where an entrepreneur, prohibited by the sanitation code from distributing purely commercial handbills on New York City's streets, put a political message on the other side of the handbills to take advantage of an exception to the ordinance allowing distribution of handbills containing political messages.

11. See Joseph B. Allen, *New Heights (?) For Advertising*, ASTRONOMY, Sept. 1993, at 13; Gary Stix, *Advertising Space*, SCI. AM., Apr. 1993, at 114; *Commercial Space: Your Ad in this Orbit*, POPULAR MECHANICS, Aug. 1993, at 13; *Orbiting-Billboard*, *supra* note 9, at 10.

12. Allen, *supra* note 11, at 15.

13. *Orbiting-Billboard*, *supra* note 9, at 10.

14. *Id.*

15. *Id.*

16. *Id.*; see also Stix, *supra* note 11, at 114.

Olympics] in Atlanta and in the sky floats the logo and message of your favorite soft drink, not on a blimp, not towed by an airplane, but actually orbiting in space, miles above Earth, and visible throughout the world with the naked eye.¹⁷

Somewhere along the way, the marketing director for the city of Atlanta suggested to then-Atlanta Mayor Maynard Jackson that the city sell advertising on Lawson's billboard in connection with Atlanta's hosting of the 1996 Olympics.¹⁸ Jackson, however, called space billboards "environmental pollution," adding that he did not want to see a billboard marring the sky.¹⁹ Jackson was not the only one who felt that way.

A Washington advocacy group, the Center for the Study of Commercialism, created a coalition of scientific, consumer, and environmental organizations to fight the space billboard. Cornell University astronomer Carl Sagan labeled it "an abomination." Statements opposing the idea were released by the American Astronomical Society and the executive committee of the International Astronomical Union.²⁰

Robert Park, speaking for the American Physical Society, "called the orbiting billboard [idea] horrifying and absurd. 'It's pollution to the Nth degree.'"²¹ Astronomers were among the first to object, but Lawson said they had nothing to worry about because the billboard would be visible only during daylight hours so that "[n]o astronomer would have the night sky obstructed by the Space Marketing Concepts orbital platform."²² The Commercialism group doubted that the principal thrust of the billboard was to be scientific research, especially considering that the Space Marketing news release told would-be clients that the space billboard could "reach a potential audience three-to-five times greater than the television audience for the Super Bowl."²³

Members of Congress also reacted by introducing legislation to ban the fledgling industry.²⁴ Lawson said his company "knew ahead of time there'd be reaction to doing something this blatant."²⁵ Within a few months, Space Marketing Concepts had backed off the orbiting satellite

17. Allen, *supra* note 11, at 13, 15 (second alteration in original).

18. *Id.* at 15.

19. *Id.*

20. *Orbiting-Billboard*, *supra* note 9, at 10.

21. Allen, *supra* note 11, at 15.

22. *Id.* at 13.

23. *Id.*

24. *Orbiting-Billboard*, *supra* note 9, at 10. Basically, the companion bills, H.R. 2599, 103d Cong., 1st Sess. (1993) and S. 1145, 103d Cong., 1st Sess. (1993), would impose a complete ban on advertising from outer space. Neither bill has been re-introduced in the 104th Congress. As of March 1995, neither house of Congress had taken significant action on either bill.

25. *Orbiting-Billboard*, *supra* note 9, at 10.

plan,²⁶ at least for the time being, but is still in the space advertising business, selling space on commercial rockets.²⁷

[During the summer of 1993], millions of Americans saw a Conestoga rocket sitting on its launch pad waiting to blast off into space with its precious cargo, the Commercial Experiment Transporter (COMET). They also saw four words emblazoned on the side of the rocket: *Schwarzenegger* and *Last Action Hero*. The rocket carrying the first private commercial space mission also carried the first advertisement. . . [sent into] space [by American technology], making local space safe for sales pitches and sparking a vigorous debate over whether advertisements belong in space at all.

[However,] . . . the *Last Action Hero* ad wasn't the first advertisement [ever] in space: In an effort to raise foreign currency, for the past four years the Russians have sold space on their Soyuz rockets to hawk merchandise ranging from Sony electronics to Unicharm feminine hygiene products.²⁸

The National Aeronautics and Space Administration (NASA) does not quite know what to think. NASA spokesperson Charles Redmond said, "One of our goals was to encourage space commercialization, [but] [w]e had not anticipated it in this area."²⁹ John Logsdon, director of the Space Policy Institute at George Washington University, said it was a bit like advertisements placed just under the ice at hockey games—aesthetically displeasing—but he warned that because of the economics of the private-sector space industry, it may not be avoidable.³⁰ With respect to orbiting billboards, John Pike, director of space policy at the Federation of American Scientists, said he hoped he never looked into the sky to see the equivalent of the Goodyear Blimp in orbit.³¹ "I think space is about the proposition that [humankind] does not live by bread alone—that there are values in life other than commercial values."³²

Since the interpretation of the First Amendment ultimately will determine whether American launch vehicles place advertising into outer space, it is important to note that an analogous activity, newsgathering from outer space by remote sensing,³³ likely enjoys only secondary First

26. *Id.*

27. See Devera Pine, *Selling America on Orbiting Ads*, OMNI, Feb. 1994, at 27, 27.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. See Don Sneed & Kyu Ho Youm, *First Amendment Rights in Space: An "Emerging" Constitutional Issue*, COMM. & L., Dec. 1989, at 45, 45-50.

Amendment protection.³⁴ Assuming, *arguendo*, that the First Amendment will not allow a complete ban on advertising from outer space, are there any other legal theories that could render space billboards actionable by private parties?

The initial public response to the idea of space advertising makes clear that some groups and individuals will raise a hue and cry. Absent congressional action banning the practice, private persons might bring actions based on such long-standing legal theories as nuisance,³⁵ interference with real property airspace rights,³⁶ inverse condemnation,³⁷ visual environmental pollution,³⁸ and privacy invasion.³⁹

Regardless of how the United States deals with advertising from outer space, the American response will not likely resolve the question. Space billboards launched from other nations would be "visible throughout the world with the naked eye,"⁴⁰ including the United States. America has

34. See Rita A. Reimer, *Newsgathering from Space: Land Remote-Sensing and the First Amendment*, 40 FED. COMM. L.J. 321 (1988).

35.

The general rule that no one has absolute freedom in the use of his property, but is restrained by the co-existence of equal rights in his neighbor to the use of his property, so that each, in exercising his right, must do no act which causes injury to his neighbor, is so well understood, is so universally recognized, and stands so impregnably in the necessities of the social state, that its vindication by argument would be superfluous. . . . The [functional] meaning of the rule is that one may not use his own property to the injury of any legal right of another.

Booth v. Rome, W. & O. T. R.R., 35 N.E. 592, 594 (N.Y. 1893).

36. The Model Airspace Act was promulgated in the early 1970s by a committee of the Section of Real Property, Probate, and Trust Law of the ABA. It defines airspace as: "[R]eal property, and until title thereto or rights, interests or estates therein are separately transferred, airspace is the property of the person or persons holding title to the land surface beneath it." MODEL AIRSPACE ACT § 3 (Final Draft 1972). The Act also defines airspace "as that space which extends from the surface of the earth upward" and "which lies within the vertical upward extension of [the] surface boundaries." *Id.* § 2.

37. This legal theory has been used by owners of agricultural land being partially subdivided for residential building purposes who suddenly discover that the property's airspace has become the final approach to an airport. See, e.g., *Roark v. City of Caldwell*, 394 P.2d 641 (Idaho 1964); see also *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487 (1965); *Martin v. Port of Seattle*, 391 P.2d 540 (Wash. 1964).

38. Terrestrial billboard ordinances and case law are grounded mostly on aesthetic considerations, but the distinction between aesthetics and visual environmental pollution may be only semantic. The pollution argument might carry more weight because aesthetics-based decisions are criticized for involving far too much subjectivity (i.e., beauty is in the eye of the beholder). The most direct analogies to visual environmental pollution are noise and sound pollution. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

39. Do private citizens have the right to be left alone by advertising? One can turn off the radio or the television set, one can close the newspaper or the magazine, but can one avoid space billboards? Is it enough to say that someone who objects to space billboards should simply never gaze at the sky?

40. Allen, *supra* note 11, at 15.

always favored the "free flow" of ideas across national frontiers.⁴¹ As a result, America has felt free not only to transmit information without regard to the sovereign boundaries of others, but to actually aim specific information inside such borders as well.⁴² Many countries have indicated their distaste for this policy: some western nations in terms of the effect of America's entertainment programming on their culture,⁴³ and all the former Soviet-bloc states in terms of America's persistence in transmitting news and other information inside their borders.⁴⁴ In the technologically brave new world, trans-border expression will be quite difficult to control, even where a nation desires to respect the sovereign borders of others. In the context of space billboards, America, ironically, could soon find itself on the receiving end of "unwanted" trans-border data flow for the first time.

I. THE COMMERCIAL SPEECH FRAMEWORK⁴⁵

The Supreme Court initially refused to extend any First Amendment protection to commercial speech. In *Valentine v. Chrestensen*,⁴⁶ the Court, in what Justice Douglas would later call a "casual, almost offhand" ruling that "has not survived reflection,"⁴⁷ concluded that "purely commercial" advertising on public thoroughfares (and presumably anywhere else) merited no First Amendment protection.⁴⁸ Reexamination of this approach to commercial speech did not begin until the 1970s.

41. See DONALD R. BROWNE, *INTERNATIONAL RADIO BROADCASTING: THE LIMITS OF THE LIMITLESS MEDIUM* 25 (1982).

42. *Id.*

43. See LOY A. SINGLETON, *TELECOMMUNICATIONS IN THE INFORMATION AGE* 88-89, 98 (1986).

44. BROWNE, *supra* note 41, at 23-24.

45. Even though the Supreme Court has developed a comprehensive scheme for evaluating regulations on commercial speech, that framework enjoys substantial commonality with the approach that the Court takes to noncommercial speech. For example, the time, place, and manner analysis applied in noncommercial speech cases incorporates the same concept of balancing First Amendment interests against asserted governmental interests that the Court uses in the commercial speech cases. *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987). The Court recently recognized the "difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1511 (1993). The hallmark of First Amendment jurisprudence, applied to both commercial and noncommercial expression, is that regulations do not discriminate on the basis of speech content. See David F. Sherwood, *In Defense of the Golden Arches: Constitutionality of Municipal Regulation of Commercial Architecture*, 60 CONN. B.J. 271, 290-91 (1986).

46. *Chrestensen*, 316 U.S. 52 (1942).

47. *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

48. *Chrestensen*, 316 U.S. at 54.

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations marked the beginning of the process.⁴⁹ The case involved a city ordinance that prevented newspapers from carrying help-wanted advertising in sex-designated columns "except where the employer or advertiser is free to make hiring or employment referral decisions on the basis of sex."⁵⁰ Under the ordinance, employers could discriminate on the basis of sex only upon showing a bona fide occupational basis for treating males and females differently. The city, therefore, ordered a newspaper to stop running sex-designated help-wanted advertising.⁵¹

The Supreme Court rejected the newspaper's First Amendment attack.⁵² More significantly, however, it also rejected the city's argument that it could enforce its regulation because the speech was commercial and, therefore, constitutionally unprotected.⁵³ Recognizing that "speech is not rendered commercial by the mere fact that it relates to an advertisement," the Court decided *Pittsburgh Press* not on the basis of the speech at issue being "commercial," but instead on the illegality—impermissible sex-based hiring—of the subject matter that the speech concerned.⁵⁴ Governmental interests in combating illegal activity, therefore, outweighed any First Amendment interest that the newspaper could assert.⁵⁵

As it examined the nature of the transaction that the speech concerned, the Supreme Court thus began establishing a test for deciding when commercial speech would receive protection and when it would not. The label "advertising" on "commercial" speech no longer automatically prevented a communication from receiving constitutional protection. The

49. *Pittsburgh Press*, 413 U.S. 376 (1973). One commentator has suggested that *Bigelow v. Virginia*, 421 U.S. 809 (1975), represented the "first real step toward the deregulation of commercial speech and the acknowledgement by the Court of real constitutional protection for commercial speech." B. Mack, *Commercial Speech: A Historical Overview of its First Amendment Protections and an Analysis of its Future Constitutional Safeguards*, 38 *DRAKE L. REV.* 59, 61 (1988). This observation notwithstanding, the *Bigelow* Court itself recognized *Pittsburgh Press*'s significance. See *infra* note 56.

50. *Pittsburgh Press*, 413 U.S. at 378.

51. *Id.* at 380.

52. *Id.* at 391.

53. *Id.* at 384.

54. The newspaper, the Court observed, "would have us abrogate the distinction between commercial and other speech." *Id.* at 388. The Court declined because "[w]hatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the ordinance." *Id.* (emphasis in original).

55. *Id.* at 389. ("Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal")

Court instead began its inquiry by looking at the purpose of the speech. By considering the legality of the activity that the speech concerned, *Pittsburgh Press* set the Court's direction toward the first prong of the test that it would eventually establish for determining commercial speech protection.⁵⁶

Bigelow v. Virginia represented the Court's next major step toward giving commercial speech clearly defined First Amendment protection and toward the establishment of a framework for applying that protection.⁵⁷ *Bigelow* involved newspaper ads that ran in Virginia for abortion services in New York.⁵⁸ At the time abortion was illegal in Virginia, and, in fact, the state had a statute making criminal the publication of ads about abortion services.⁵⁹ The Supreme Court invalidated the statute and, in so doing, put in place another piece of what would become the commercial speech framework.⁶⁰

Aside from clearly affirming that placement of the communication in an advertisement did not bar First Amendment protection, *Bigelow* also recognized a consumer information rationale for protecting commercial speech.⁶¹ Since it was not illegal for Virginia residents to go to New York for abortion services, the ad implicated First Amendment rights of readers to receive important information of public interest.⁶² In such cases, the speaker's "First Amendment interests coincided with the constitutional interests of the general public."⁶³

Most importantly, *Bigelow* balanced the First Amendment interests of the speaker and audience against Virginia's asserted governmental interests

56. *Bigelow v. Virginia*, 421 U.S. 809 (1975), recognized the significance of *Pittsburgh Press*. In *Bigelow*, Justice Blackmun's majority opinion observed that *Pittsburgh Press* made clear that commercial advertising enjoys a degree of First Amendment protection since the advertisements at issue "would have received some degree of First Amendment protection if the commercial proposal had been legal." *Id.* at 821.

57. *Id.* at 809.

58. *Id.* at 811-12.

59. *Id.* at 812-13.

60. *Id.* at 829.

61. *Id.* at 818. *Chrestensen*, the *Bigelow* Court said, did not mean that "all statutes regulating commercial advertising are immune from constitutional challenge." *Id.* at 819-20. *Pittsburgh Press* and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), provided support for the proposition that advertising had already been given a measure of First Amendment protection. *Bigelow*, 421 U.S. at 821.

62. *Bigelow*, 421 U.S. at 822. Noting that the ad "did more than simply propose a commercial transaction," the Court held that the portion of the ads communicating the fact that getting an abortion in New York did not require residence there meant that the ad "involve[d] the exercise of the freedom of communicating information and disseminating opinion." *Id.*

63. *Id.*

in promulgating the regulation.⁶⁴ Virginia justified the ad ban as part of its process of regulating the quality of medical care in the state.⁶⁵ The ad in question, however, was not related to state regulation of medical care since Virginia certainly could not regulate medical services in New York, where the advertised services were actually rendered.⁶⁶ The Court concluded that Virginia really was seeking to regulate what its residents could hear or read about abortion services.⁶⁷ Allowing a regulation to stand on such a premise, the Court reasoned, would permit states to regulate a potentially infinite number of national publications on similar grounds.⁶⁸ *Bigelow* explicitly ratified what the Court had done in *Pittsburgh Press* by balancing the asserted governmental interests in regulating the speech with the First Amendment interests of speaker and audience.⁶⁹ The Court found Virginia's claimed governmental interests not substantial enough to override First Amendment rights to express and receive speech.⁷⁰

With its decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁷¹ the Court definitively stated that commercial speech encompasses significant First Amendment interests, and requires careful judicial scrutiny of the regulations' actual effects. In *Virginia Pharmacy*, the Court invalidated a state law prohibiting the advertising of prescription drug prices.⁷² The Court again focused on consumer interests in the free flow of information, something it found of greater interest to many individuals than political debate.⁷³ Also, it

64. *Id.* at 826. Regardless, the Court said, of how a state labeled the speech, "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Id.* at 822.

65. *Id.* at 827.

66. *Id.* at 824.

67. *Id.* at 827.

68. *Id.* at 828-29. Presumably, for example, a state could bar magazines from carrying gun ads if the state's gun laws imposed certain kinds of restrictions on gun sales. Taken to its logical conclusion, the rationale that Virginia offered would also have permitted dry counties in individual states to ban liquor and beer ads in locally circulated national magazines.

69. *Id.* at 826-29.

70. *Id.* at 829. Justice Rehnquist joined by Justice White dissented in *Bigelow*, finding that the Court should have vindicated Virginia's legitimate interest in "preventing commercial exploitation of the health needs of its citizens." *Id.* at 836 (Rehnquist, J., dissenting).

71. *Virginia Pharmacy*, 425 U.S. 748 (1976).

72. *Id.* at 773. The law subjected pharmacists to discipline if they "publish[ed], advertise[d], or promote[d] directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription." *Id.* at 750.

73. *Id.* at 763.

balanced the First Amendment interests in transmission and receipt of consumer information against the government's asserted regulatory interests.⁷⁴ The Court looked more closely at how well the regulation achieved the asserted governmental interests.

Virginia claimed that its interest in prohibiting advertising of prescription drug prices was a need to promote high professional standards among pharmacists.⁷⁵ While acknowledging the obvious merit in such a governmental interest, the Court emphasized that Virginia had other means of achieving that objective.⁷⁶ The case concerned the pharmacists' retail sales and not really their professional standards. "[A]ny pharmacist guilty of professional dereliction that actually endangers his customer will promptly lose his license."⁷⁷ *Virginia Pharmacy* stressed that the asserted state interests amounted to "protectiveness" of citizens resting "in large measure on the advantages of their being kept in ignorance," something that did not "directly affect professional standards one way or the other."⁷⁸ Having recognized the consumer interests in the free flow of commercial information, and having required a balancing of First Amendment and governmental interests, the Court had nearly formulated its framework for evaluating commercial speech.⁷⁹

The Court tied together its structure for evaluating the regulation of commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁸⁰ The case required that the Court squarely face the

74. *Id.* at 761-70. The Court concluded that "the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is." *Id.* at 770.

75. *Id.* at 766.

76. *Id.*

77. *Id.* at 768-69.

78. *Id.* at 769.

79. *Virginia Pharmacy* recognized another important element in the evaluation of burdens imposed on commercial speech. Virginia had not claimed that it could bar prescription drug price advertisements because "they are false or misleading in any way." *Id.* at 771 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) and *Konigsberg v. State Bar*, 366 U.S. 36, 49, 51 n.10 (1961)). The Court noted that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." *Id.* at 771. The opinion went on to note that much commercial speech, though not provably false, is "deceptive or misleading" and that the First Amendment permits regulation of such speech. *Id.* at 771-72.

80. *Central Hudson*, 447 U.S. 557 (1980). Between *Bigelow* and *Central Hudson*, the Court decided four other significant commercial speech cases: *Friedman v. Rogers*, 440 U.S. 1 (1979); *Bates v. State Bar*, 433 U.S. 350 (1977); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); and *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85 (1977). None of them alone added conceptually to the developing commercial speech framework. Together they made clear the Court's commitment to protection for commercial speech.

question of whether a state could simply bar a kind of commercial expression as part of an overall regulatory scheme. Following the fuel shortage of the early 1970s, the New York Public Service Commission promulgated regulations prohibiting electric utilities from running ads promoting the use of electricity.⁸¹ When the fuel shortage eased, Central Hudson Gas & Electric sought to run such promotional ads. The New York Public Service Commission's efforts to stop them brought the issue to the Supreme Court.

The Court used the case to set out a four-part test for deciding the validity of restrictions on commercial speech. The Court carefully noted that it had already decided that commercial speech falls within the First Amendment's ambit, though such speech does not receive the same measure of protection as noncommercial speech.⁸² The Court synthesized

Linmark relied on *Bigelow* and *Virginia Pharmacy* in emphasizing a First Amendment interest in consumer information displayed on real estate "For Sale" signs. *Linmark*, 431 U.S. at 91-92. That interest, the Court held, outweighed a town's interest in banning such signs as a way of discouraging "white flight" from neighborhoods, particularly since the record did not "confirm the township's assumption that proscribing such signs will reduce public awareness of realty sales and thereby decrease public concern over selling." *Id.* at 95-96.

Carey overturned a New York statute that made advertising contraceptives a crime. Justice Brennan's majority opinion again relied on *Bigelow* and *Virginia Pharmacy* and, by analogy, to *Pittsburgh Press*, for the proposition that since New York's law did not regulate an unlawful product, the state could regulate speech about the product only if it could show some other compelling governmental interest. *Carey*, 431 U.S. at 700-01. The Court easily dismissed the interest that New York offered—that ads for contraceptive products would offend and embarrass those exposed to them. *Id.* at 701. Relying on *Cohen v. California*, 403 U.S. 15 (1971) (a case involving a young man who wore into a courthouse a jacket adorned with the words "Fuck the Draft"), the *Carey* majority reiterated the Court's long-standing position that, absent obscenity, offensiveness of speech does not justify its suppression. *Carey*, 431 U.S. at 701.

Bates relied largely on the *Bigelow/Virginia Pharmacy* emphasis on consumer information as a protectible First Amendment interest, and prohibited a total ban on attorney advertising. *Bates*, 433 U.S. at 363-65. Two other attorney advertising cases, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), and *In re Primus*, 436 U.S. 412 (1978), bear mentioning. Both applied the *Bigelow/Virginia Pharmacy* principles to in-person attorney solicitation (an issue that *Bates* did not address).

Friedman sustained Texas's prohibition on the use of trade names by optometrists. *Friedman*, 440 U.S. at 19. Trade names, the Court concluded, constituted "a form of commercial speech that has no intrinsic meaning." *Id.* at 12. The Court, therefore, could not find the same consumer information interests it recognized in *Bigelow*, *Virginia Pharmacy*, and *Bates*. As important to the outcome, the Court found "a significant possibility" that trade names used by professionals could mislead the public because they free professionals from dependence on personal reputation, and allow assumption of "a new trade name if negligence or misconduct casts a shadow over the old one." *Id.* at 13.

81. *Central Hudson*, 447 U.S. at 558-59.

82. *Id.* at 562-63.

its commercial speech jurisprudence in holding that, assuming the speech does not mislead or concern unlawful activity, the protection available to commercial speech depends on the nature of the expression, the governmental interests asserted in support of the regulation, and the effectiveness of the regulation in advancing the governmental interest asserted.⁸³

This analysis produced the four-part test that, with some refinement, the Court now uses to analyze commercial speech cases.⁸⁴ The *Central Hudson* test asks: (1) whether the speech concerns lawful activity and is not misleading; (2) whether the asserted governmental interest in regulating the speech is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is more extensive than necessary to serve the asserted governmental interests.⁸⁵

Nine years after *Central Hudson*, the Supreme Court modified the fourth prong of the *Central Hudson* test by requiring only a “fit” between the legislature’s ends and the means used to accomplish them.⁸⁶ Justice Scalia’s opinion rejected the notion that the “no more extensive than reasonably necessary” element required the government to employ the “least-restrictive-means standard” to regulate commercial speech.⁸⁷ While the *Fox* modification of the *Central Hudson* test represents a standard more deferential to legislative mandates, it still requires balancing of the means used to achieve the asserted governmental interest against the important free expression interests at stake.⁸⁸

83. *Id.* at 564.

84. *See* Board of Trustees v. Fox, 492 U.S. 469, 475-80 (1989); *see infra* notes 89-120 and accompanying text.

85. *Central Hudson*, 447 U.S. at 566. The Court in *Central Hudson* concluded that New York’s total utility advertising ban did not pass the test because “[t]he commission has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant’s commercial expression.” *Id.* at 570. While the regulation concerned speech that was not misleading, the government could demonstrate a substantial interest—energy conservation—that would justify regulations. *Id.* at 568. New York also had chosen a regulation that had “a direct link” with the governmental interest asserted. *Id.* at 569. The Court found, however, that a regulation less than a total ban could also have advanced the state’s conservation interests since ads providing information about the relative efficiency and expense of utility service could also promote energy conservation. *Id.* at 570-71.

86. *Fox*, 492 U.S. at 480.

87. *Id.* at 477.

88. *See, e.g.,* City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1510 (1993).

II. SPACE ADVERTISING AND THE COMMERCIAL SPEECH DOCTRINE

Viewed from a commercial speech perspective, a challenge to a measure like House Bill 2599⁸⁹ would first require consideration of whether space advertising misled those exposed to it or concerned illegal activity.⁹⁰ Regulators, of course, have available to them the same tools for dealing with misleading space ads that they have for controlling misleading commercial speech that appears in any other medium.⁹¹ Space advertising, in the absence of technological characteristics that would make it inherently more misleading than advertising in other media, should produce no special concerns about misleading communication. The validity of space advertising regulations will not turn on the first *Central Hudson/Fox* prong.

The second *Central Hudson/Fox* prong requires that the Court "ask whether the asserted governmental interest is substantial."⁹² House Bill 2599 does not explicitly state a governmental interest; presumably, however, the sponsors of such legislation will develop a legislative history that will permit, during the litigation process, the assertion of significant governmental interests.⁹³ Aesthetics, and perhaps traffic safety, seem the

89. By its terms, H.R. 2599 directs the Secretary of Commerce to prohibit "advertising in outer space, including the placement of images or objects in outer space that are visible from earth, for purposes of marketing or otherwise promoting the sale or use of goods or services." H.R. 2599, 103d Cong., 1st Sess. § 2 (1993). The Court, therefore, would evaluate a challenge to an enacted H.R. 2599 by reference to the commercial speech doctrine. As discussed, *infra* notes 121-54 and accompanying text, noncommercial messages appearing from space through the same technology should generate objections based on the same considerations as the objections to commercial advertising from space.

90. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980).

91. The Federal Trade Commission Act, which would certainly apply to space ads, makes unlawful, for example, the dissemination of false advertising in "commerce, by any means" designed to directly or indirectly induce "the purchase of food, drugs, devices, or cosmetics." 15 U.S.C. § 52(a)(1) (1988). Courts, of course, would also presumably uphold regulations aimed at speech about illegal activity. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973).

92. *Central Hudson*, 447 U.S. at 566.

93. Failure of the legislature to actually consider a governmental interest can prove fatal to laws that infringe on "a protected liberty." *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981). The Court must assess "the substantiality of the justification offered for a regulation that significantly impinge[s] on freedom of speech." *Id.* at 69; *see also Adams Outdoor Advertising of Atlanta, Inc. v. Fulton County, Ga.*, 738 F. Supp. 1431, 1433 (N.D. Ga. 1990) (billboard ban held invalid where the ordinance itself gave no indication of the governmental interest it sought to advance and where governmental agency presented no summary judgment evidence showing that the legislative body, in passing the ordinance, actually considered the claimed interest in aesthetics). The *Central Hudson/Fox* test does not permit a reviewing court to "supplant the precise interests put forward by the state with

most likely candidates.⁹⁴ Most of the expressed opposition to plans for space-based billboard platforms stems from aesthetic considerations.

Assertion of aesthetics as the governmental interest invites examination of aesthetics as a concept. Courts have found aesthetics an appropriate governmental concern. For example, the Supreme Court recognized that:

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.⁹⁵

Billboard regulations, for example, usually arise from legislative concerns about the harm they do to the visual landscape, an effect one court termed "obvious."⁹⁶ Courts frequently find that billboard control measures encourage "appreciation for the visual environment."⁹⁷ An aesthetic rationale also often underlies legislative initiatives like the National Environmental Policy Act of 1969⁹⁸ and similar state statutes.⁹⁹

The traditional objection to aesthetic justifications for governmental action resides in an uneasiness about the subjectivity of such a construct. Beauty, as everyone knows, lies in the eye of the beholder. Aesthetic judgments "are necessarily subjective, defying objective evaluation, and for

other suppositions." *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993).

94. Traffic safety may not offer a particularly compelling basis for banning space ads. Safety has not always fared well as a rationale for limits on other kinds of expression visible to the driving public. One court, for example, found highway safety an insufficient governmental interest for banning billboards because billboard proponents presented "an exceptionally strong array of uncontradicted recitals that billboards do not cause accidents." *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 11 (1st Cir. 1980), *aff'd*, 453 U.S. 916 (1981). *But see Burns v. Barrett*, 561 A.2d 1378, 1382 (Conn.), *cert. denied*, 493 U.S. 1003 (1989) (citing numerous cases in support of its conclusion that "a governmental judgment that highway billboards are traffic hazards is not manifestly unreasonable"). *Campbell*, however, still reinforces the point that a governmental body must prove the merit in an asserted governmental interest, particularly since some, like safety, do not easily suggest themselves as matters of judicial notice. *Campbell*, 639 F.2d at 11. Congress may have real difficulty in proving a connection between space ad platforms and accidents, especially since it will have no statistics or other actual experience on which to draw.

95. *Berman v. Parker*, 348 U.S. 26, 33 (1954) (citation omitted).

96. *Campbell*, 639 F.2d at 11.

97. *National Advertising Co. v. Village of Downers Grove*, 561 N.E.2d 1300, 1306 (Ill. App. Ct. 1990), *cert. denied*, 567 N.E.2d 333 (Ill.), and *cert. denied*, 111 S. Ct. 2917 (1991).

98. 42 U.S.C. § 4321 (1988).

99. See John J. Costonis, *Law and Aesthetics: A Critique and a Reformation of the Dilemmas*, 80 MICH. L. REV. 355, 362 (1982).

that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose."¹⁰⁰

Subjectivity complaints, however, do not constitute the only, or necessarily the most compelling, objection to visual beauty as a rationale for limiting constitutionally protected freedoms. Professor Costonis, for example, observed that poorly conceived or drafted visual beauty-based aesthetic controls are often of dubious constitutionality because their authors have not thoughtfully attempted to accommodate them with substantive and procedural values like those in the First and Fourteenth Amendments.¹⁰¹ For one thing, "[s]tandards of visual beauty cannot be 'narrowly drawn'" to serve their claimed interest;¹⁰² precision about visual beauty is seldom possible or even desirable. For another, in many industrial and commercial areas "countless types of intrusion on the natural landscape" already exist,¹⁰³ making it difficult, without arbitrariness, to single out some for regulation.

Despite the objections, the Court will likely find aesthetics acceptable as a substantial governmental interest in the space advertising context. Painting an unpleasant picture of orbiting ad platforms is not difficult. The account of the despoiled Hawaiian vacation at the beginning of this Article illustrates the assumption that our unhappy vacationers might return home and implore their senators and representatives to support House Bill 2599 or something like it. "Preservation or creation of a visually beautiful environment" has for a long time served as a social interest underpinning aesthetic controls in the United States.¹⁰⁴ In *Metromedia*, the Supreme Court's leading billboard regulation case, the plurality, in only two sentences, sustained the validity of both aesthetics and safety as substantial governmental interests.¹⁰⁵ Congresspersons may easily accept imperfect vacations and other complaints as sufficient evidence of the need to elevate such an interest above Nike's desire for another place to hawk sneakers. Courts have so often recognized aesthetics as a legitimate governmental concern that, whatever other problems the Supreme Court may have with space ad regulations, it is not likely to find the claimed interest insubstantial.

100. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (White, J., plurality opinion).

101. Costonis, *supra* note 99, at 361.

102. *Id.* at 446.

103. Sherwood, *supra* note 45, at 298-99.

104. Costonis, *supra* note 99, at 357.

105. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, at 507-08 (1981).

Prong three of the *Central Hudson/Fox* test asks whether the regulation actually advances the government's claimed interest.¹⁰⁶ A space ad ban certainly prevents any further distress to our disillusioned vacationers; upon enactment of House Bill 2599 or a similar measure, they need never fear another odyssey fouled by a Big Mac ad beamed from space. A regulation that reduces the amount of speech when speech supposedly treads on aesthetics should advance, in some way, an aesthetic interest. House Bill 2599 and any other space ad restriction will satisfy prong three.¹⁰⁷

The real balancing of governmental interests and First Amendment interests usually occurs on prong four of the *Central Hudson/Fox* test. A court must analyze under prong four how well the regulation fits with the governmental interest and must do so in light of constitutional limits on government incursion into free expression.¹⁰⁸ A court must examine the degree to which the regulation intrudes upon the First Amendment rights of both speaker and audience. In commercial speech cases, the audience's interest receives significant scrutiny because a large part of the rationale for protecting commercial expression lies in consumer interests in information.¹⁰⁹ In evaluating the intrusion of a regulation on expression rights, courts should also investigate the availability of alternative means of communication.¹¹⁰ Commercial speech jurisprudence places greater

106. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

107. Space ad regulation will not implicate the third prong concerns discussed in *Metromedia*. Insofar as commercial speech doctrine was at issue, that Court realized that San Diego's ordinance banning some commercial signs (those off an advertiser's property) while allowing others (those on the advertiser's property) potentially compromised the claimed aesthetic and safety interests. See *Metromedia*, 453 U.S. at 508-12. The *Metromedia* plurality ultimately rejected that argument, holding that the city could legitimately conclude that some commercial interests, like on-site business identification, could outweigh its aesthetic concerns without destroying the aesthetics-based rationale for banning off-site signs. *Id.* at 512. Space ad regulation, however, should not invoke the *Metromedia* on-site/off-site debate. The commercial/noncommercial speech concerns in *Metromedia* do, however, apply in the space ad regulation context.

108. *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993) (stating courts must decide "whether the extent of the restriction on protected speech is in reasonable proportion to the interests served"); *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

109. See, e.g., *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983). There, the regulation against mailing unsolicited contraceptive ads prevented recipients of the ads from receiving information about the important social issues of family planning and disease control. *Id.* at 74-75.

110. *Compare Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (pointing out the inadequacy of alternatives to on-site real estate "For Sale" signs) with *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (rejecting in-person solicitation in attorney advertising). Cases like *Ohralik* rest on the sometimes unstated proposition that

emphasis on the rights of listeners to receive information than of speakers to communicate information. Nearly all of the Supreme Court's major commercial speech decisions that protect speech do so on the basis of advancing consumer interests in receiving information. *Bigelow*, *Virginia Pharmacy*, *Linmark*, *Carey*, and *Bates*, the major precursors to *Central Hudson*, emphasized the benefit that consumers receive from knowing about things like abortion services, prescription drug prices, available real estate, contraceptives, and legal services. In finally tying together the *Central Hudson* test, the Court stressed that consumers would receive useful information in the advertising that the state wanted to ban.¹¹¹ In post-*Central Hudson* cases, like *Bolger*, the Court retained its focus on the value of commercial speech to persons who hear or see it, holding that "advertising for contraceptives . . . implicates 'substantial individual and societal interests' in the free-flow of commercial information."¹¹²

When the Court has not found that commercial speech advances consumer information interests, it has declined protection. *Friedman*, for example, held that trade names have "no intrinsic meaning."¹¹³ The use of trade names by optometrists did nothing to provide consumer information. Whether or not optometrists used trade names had "only the most incidental effect on the content of the commercial speech of Texas optometrists."¹¹⁴ In other cases rejecting protection for commercial speech, the Court simply has not found a consumer information interest that would override governmental interests in regulation. Even though the Court has not cast its holdings in such terms, the lack of clearly compelling consumer information interests has plainly permitted approval of regulations.¹¹⁵

attorneys can exercise their First Amendment rights and those of the consuming public without the evil of in-person solicitation.

111. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 570-71 (1980). The utility ads actually served the state interest of energy conservation, and also served consumers, because some ads provided information about energy efficiency.

112. *Bolger*, 463 U.S. at 69 (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700-01 (1977)).

113. *Friedman v. Rogers*, 440 U.S. 1, 12 (1979).

114. *Id.* at 16.

115. See *United States v. Edge Brdcast. Co.*, 113 S. Ct. 2696, 2705 (1993) (validating a federal statute forbidding radio stations in states without lotteries from running ads for lotteries in other states); *Posadas de P.R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 344 (1986) (upholding a ban on gambling ads directed to residents of Puerto Rico though casinos could advertise to tourists). In neither case did the Court find a significant enough consumer information interest that would override the second prong governmental interests. Both courts emphasized the strength of the governmental interests. *But see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975) (both finding superior consumer information

An additional measure of the intrusiveness of a regulation is whether alternative means of communication exist that permit the speaker and audience to exercise their First Amendment rights. Despite the Court's admonition that "[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place,"¹¹⁶ proponents of expression demonstrate a weaker First Amendment interest if a regulation leaves other means of communications available.¹¹⁷

Space ad regulation clearly will benefit from inquiries into consumer information interests and availability of alternative communication channels. First, since space ad regulations will aim at a medium, not specific messages, space ad proponents may have trouble arguing that without space ads, consumers simply will not have information. There are, of course, other media. Nike, Coca-Cola, IBM, and other potential purchasers of orbiting platform advertisements do not lack other adequate venues for conveying their messages. Similarly, persons who would benefit from seeing messages displayed on orbiting platforms have plenty of other places to receive them.¹¹⁸ The Court likely will conclude, therefore, that space ad regulations will not significantly intrude on the First Amendment interests of speakers or consumers. The government's aesthetic interests will outweigh the limited First Amendment interests at stake.

Posadas, *Friedman*, and *Edge* provide examples of the limits on commercial speech that the Court will accept when proponents of speech cannot present a strong consumer information interest for receivers of the speech, particularly where alternative communication methods exist. Space ad platforms will likely carry the same messages that appear on television, in newspapers, on billboards, and countless other places. They will not

interests).

116. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981) (citing *Schneider v. State*, 308 U.S. 147, 163 (1939)).

117. In *Edge*, for example, preventing a North Carolina radio station from advertising the Virginia lottery did not keep either Virginia or North Carolina residents from receiving information about the Virginia lottery, since, under the statute, "Virginia could advertise its lottery through radio and television stations licensed to Virginia locations, even if their signals reached deep into North Carolina." *Edge*, 113 S. Ct. at 2704.

118. Cases like *Bolger* do not contradict this conclusion. Since media like radio, television, and billboards frequently decline contraceptive ads, direct mail may constitute the most effective way to advertise such products. Consumers, therefore, have a strong informational interest in receiving contraceptive ads in the mail and the advertiser has fewer effective alternative means of communication than advertisers of other products. The Court could have overturned the *Bolger* regulation on that basis even without recognizing, as it did, that the statute was content-based because it applied only to mailed contraceptive ads and, therefore, not subject to time, place, or manner analysis. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 n.18 (1983).

provide consumers with information that they cannot easily obtain elsewhere. Congress, in passing a measure like House Bill 2599, will have decided that space ads are ugly. The Court would likely conclude that the governmental interest in stopping ugliness constitutes a substantial enough concern to permit regulation, probably to the point of prohibition.

Theoretically, consumers in remote areas underserved by other media might assert a strong enough First Amendment interest that the Court would uphold only specific limits short of a ban. Such limits, for example, might restrict space ad platforms to visibility in certain geographic areas, limit them as to size or time of illumination, or impose other restrictions.¹¹⁹ That the Supreme Court would likely sustain, under its commercial speech doctrine, regulations banning or at least significantly restricting space ads would not greatly upset many people. The objections to space ads lie in an aversion to the assault on aesthetics by an offensive technology. Space ad platforms will likely have only a small, not particularly popular constituency—advertising agencies, large corporations, and free speech devotees. Even the disgruntled vacationers, however, might pause at the words of Justice Black who, in dissenting from restrictions imposed on a then-new technology—loud speakers—forty-five years ago, warned:

The basic premise of the First Amendment is that all present instruments of communication, *as well as others that inventive genius may bring into being*, shall be free from governmental censorship or prohibition. Laws which hamper the free use of some instruments of communication thereby favor competing channels.¹²⁰

III. NONCOMMERCIAL SPACE MESSAGES AND THE FIRST AMENDMENT

As the analysis offered above indicates, the commercial speech doctrine will not likely offer protection for space-based messages promoting commercially available goods and services. Suppose, however, that the same space ad company that provides Burger King with the means to advertise “Whoppers with Cheese” from the heavens sells time and space on an orbiting message platform to the National Abortion Rights Action League (NARAL) for an ad that reads:

PROTECT ABORTION PROVIDERS NOW!

119. Such regulations, of course, resemble time, place, and manner restrictions frequently applied to noncommercial speech. *See Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989). The Court adheres to this approach, declining the “least restrictive means possible” approach because it would be “incompatible with the subordinate position of commercial speech in the scale of First Amendment values to apply a more rigid standard to commercial speech than is applied to fully protected speech.” *Edge*, 113 S. Ct. at 2705.

120. *Kovacs v. Cooper*, 336 U.S. 77, 102 (1949) (Black, J., dissenting) (emphasis added).

The commercial speech doctrine that will probably sustain strict regulations on Burger King's ads does not apply to NARAL's ad. That ad contains speech about a significant political issue which receives greater First Amendment protection than commercial speech.¹²¹ Expression on public matters rests "on the highest rung of the hierarchy of First Amendment values"¹²² and "is the essence of self-government."¹²³ While government may regulate even this kind of speech, it can usually only do so without respect to the content of the speech and only with narrowly tailored measures that advance a significant governmental interest.¹²⁴ Moreover, the restriction on free expression must be no more than is essential to further the asserted interest.¹²⁵

The Supreme Court usually considers regulations directed at a general mode of communication or a manner of expression to be content-neutral, but finds regulations directed at specific messages to be content-based.¹²⁶ "Determining whether a particular restriction on speech actually is content-neutral requires inquiry into the governmental purpose behind the restriction and the nature of the message that the speaker wishes to express."¹²⁷ Political speech delivered through an aesthetically offensive medium presents a difficult dilemma.¹²⁸ The government frequently has a signifi-

121. See *Edge*, 113 S. Ct. at 2703.

122. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

123. *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)).

124. *Grayned v. City of Rockford*, 408 U.S. 104, 115-17 (1972); *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

125. *Grayned*, 408 U.S. at 115-17; *O'Brien*, 391 U.S. at 377.

126. *Sherwood*, *supra* note 45, at 290.

127. *Id.* at 291.

128. Analysis of how the Court should approach restrictions that ban or limit a medium of communication, not just particular messages, frequently occurs in the context of whether a regulation constitutes a content-neutral time, place, or manner restriction. In *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court noted that "the substantive evil—visual blight—is not merely a possible byproduct of the activity, but is created by the medium of expression itself." *Id.* at 810. This is surely the case with space message platforms. The *Vincent* outcome, sustaining regulations barring campaign signs from public property, turned on the textual neutrality of the ordinance, the strength of the governmental interest in aesthetics, and the fact that the ordinance, by banning only public, not private, signs, curtailed "no more speech than is necessary to accomplish its purpose." *Id.* The Court, therefore, could conclude that it was dealing with a narrowly tailored time, place, or manner restriction on speech that had nothing to do with content. See *id.* at 808.

The *Vincent* dissenters, however, cautioned that banning an entire medium of communication should require that the government show whether it "has committed itself to addressing the identified aesthetic problem." *Id.* at 828 (Brennan, J., dissenting). Such vigilance would permit restrictions "only if the government demonstrates that it is pursuing an identified objective seriously and comprehensively and in ways that are unrelated to the restriction of speech." *Id.* In the space context, such a requirement would eliminate concerns

cant interest that its restrictions legitimately seek to advance, but the means of achieving the objective may easily obliterate the strong expressive interests that accompany what the Supreme Court calls "core" speech about political matters.¹²⁹

In evaluating government's power to regulate noncommercial speech from space, courts would first look at the governmental interests asserted, much like the second prong of the commercial speech analysis. Again, a court must evaluate the strength of aesthetics as a governmental interest. Again, it likely would find aesthetics a significant governmental interest.¹³⁰ In a political speech case, however, courts should more vigorously scrutinize the governmental interest in aesthetics. The potential for diminishing core political speech rights merits a more stringent review. Professor Costonis's reservations about aesthetics as a basis for intrusions on First Amendment interests carry even greater force in the political speech context. The fact that something is "ugly, in the eyes of some members of the community" is not enough to justify limiting speech because a "state ban on expression solely on the basis of its offensiveness is censorship pure and simple."¹³¹

Practical judicial review problems also attach to aesthetic rationales. As Justice Brennan once pointed out, "the inherent subjectivity of aesthetic judgments makes it all too easy for the government to fashion its justification for a law in a manner that impairs the ability of a reviewing court meaningfully to make the required inquiries."¹³² A court should, for example, require the government to show *how* space message platforms will harm the visual landscape in comparison with other permitted forms of expression, thereby testing the government's real commitment to aesthetics. Given the Supreme Court's frequently stated view that it accords political speech greater protection than commercial speech,¹³³ it should more carefully and critically examine the asserted governmental interest when a regulatory scheme would limit political speech.

about arbitrariness that result from singling out the space message medium when other permitted media do as much or more aesthetic harm.

129. Board of Trustees v. Fox, 492 U.S. 469, 477 (1989).

130. See *supra* notes 89-105 and accompanying text.

131. Costonis, *supra* note 99, at 378.

132. *Vincent*, 466 U.S. at 822 (Brennan, J., dissenting).

133. See, e.g., *United States v. Edge Brdcast. Co.*, 113 S. Ct. 2696, 2703 (1993); *Fox*, 492 U.S. at 477. Justice Blackmun recently criticized the lesser protection offered commercial speech, writing that "there is no reason to treat truthful commercial speech as a class that is less 'valuable' than noncommercial speech." *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1518 (1993) (Blackmun, J., concurring).

Assuming, however, that the Court sustains aesthetics as a valid governmental interest, it still must scrutinize whatever regulations the government imposes in light of the harm they would do to First Amendment interests. Several considerations counsel against sustaining a ban like House Bill 2599 or broad-based limits that significantly restrict political speech from space. These considerations recognize the difficulty in meeting the “narrowly drawn” requirement in the Court’s noncommercial speech jurisprudence.¹³⁴

Banning or severely restricting space-based political speech represents an exercise in arbitrary line drawing. If the principal objection to space message platforms resides in their “ugliness,” why are they uglier or more offensive than: on-site or off-site billboards; “creative” commercial architecture;¹³⁵ airplanes towing banners promoting weekend flea markets; or water towers adorned with commercial messages (Buy Pepsi!), noncommercial, but non-political messages (Go Hornets!), or political messages (Invade Haiti Now!)? Objective evidence that these messages constitute a greater harm simply does not exist.

The drive to bar speech in the name of combating ugliness does have limits. Governmental efforts to ban political signs placed in the yard of the sign-owner’s home partially on the ground that such signs “create ugliness, visual blight and clutter, [and] tarnish the natural beauty of the landscape” have been rejected by the Court.¹³⁶ Though the First Amendment “does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired,”¹³⁷ taking away any one place, but *not* others, based on a legislative determination of the relative ugliness of them, makes a mockery of the “narrowly drawn” requirement. That can occur only by elevating aesthetics above speech as a societal value.¹³⁸

134. Costonis, *supra* note 99, at 446.

135. *See* Sherwood, *supra* note 45, at 298-99.

136. *City of Ladue v. Gilles*, 114 S. Ct. 2038, 2041 (1994).

137. *Heffron v. International Soc’y for Krishna Consciousness*, 452 U.S. 640, 647 (1981).

138. The Court may consider the “captive audience” dilemma as another element of the state’s aesthetics-based interest in regulating speech. A captive audience situation exists when listeners or viewers cannot escape expression. Government, for example, has a “substantial interest in protecting its citizens from unwelcome noise.” *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989); *see also City of Beaufort v. Baker*, 432 S.E.2d 470, 473 (S.C. 1993) (upholding an ordinance banning street preachers partly because area merchants “are captive audience in their businesses, unable to transact business or escape from excessive noise”); *Eanes v. State*, 569 A.2d 604, 611-13 (Md. 1990) (relying on the “unwilling listener” concept in *Kovacs v. Cooper*, 366 U.S. 77, 86-87 (1949), to uphold conviction of anti-abortion protester who disturbed apartment dwellers and businesspeople with loud, unamplified preaching).

Space-delivered messages are potentially susceptible to the captive audience complaint because of their widespread visibility at certain times and in certain places. Regulating

Relatedly, as David Sherwood pointed out in discussing commercial architecture and the First Amendment, modern society includes many "intrusions on the natural landscape" already, particularly in industrial and commercial areas.¹³⁹ Singling out space message platforms may do little to promote aesthetics anyway. In urban areas, for example, adding space message platforms may do no more harm than the presently permissible illuminated Goodyear Blimp. In deciding that a city could not ban "commercial" newsracks while permitting newspaper newsracks to remain in place, the Supreme Court noted that "all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault" as to the aesthetic damage they do.¹⁴⁰ The same principle applies when the aesthetic damage done by other "intrusive" messages is compared to space message platforms. All are at fault.

The availability of alternative communication channels arguably validates the governmental interest in regulating even core speech delivered through an ugly medium like orbiting message platforms. The Court used that principle in sustaining a city ordinance that prohibited placing political campaign signs on utility poles and other public property.¹⁴¹ Justice Stevens wrote:

The Los Angeles Ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited. To the extent that the posting of signs on public property has advantages over these forms of expression, there is no reason to believe that these same advantages cannot be obtained through other means. To the contrary, the findings of the District Court indicate that there are ample alternative modes of communication in Los Angeles.¹⁴²

All communication media, however, are not created equal. Unpopular speakers *generally* have difficulty gaining access to large numbers of listeners and viewers, making denial of any medium to them more offensive to free speech values.¹⁴³ Economic considerations sometimes make allegedly "alternative" communication methods no alternative at all.¹⁴⁴ As noted in the holding of the *Linmark* case, newspaper ads seldom substitute well for on-location real estate "For Sale" signs, since such "alternatives" frequently "involve more cost and less autonomy."¹⁴⁵ Presently, no one can say that

aspects of their operations, though not banning them, could potentially cure this concern.

139. See Sherwood, *supra* note 45, at 298-99.

140. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1515 (1993).

141. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

142. *Id.* at 812 (citation omitted).

143. See *id.* at 820 (Brennan, J., dissenting).

144. *Id.*

145. *Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977).

space message platforms will not become the most effective, efficient method for political speakers to communicate about war and peace, abortion, tax cuts or increases, campaigns for office, and a host of other public topics. In such an event, a good argument can be made that the First Amendment should not tolerate excessive intrusion on access to a medium.¹⁴⁶ The Court's admonition that the First Amendment should protect all methods of communication to avoid favoring any one method, rings even truer when the regulated speech concerns core political issues.¹⁴⁷ The price of banning or excessively limiting an entire medium of communication is high, requiring "the government to provide tangible proof of the legitimacy and substantiality of its aesthetic objective."¹⁴⁸

Courts may, of course, treat regulations on space-delivered political messages as time, place, or manner restrictions on expression.¹⁴⁹ Such restrictions "must be narrowly tailored to serve the government's legitimate, content-neutral interests but [they] need not be the least restrictive or least intrusive means" of regulation.¹⁵⁰ The Supreme Court clearly established that time, place, and manner restrictions on core speech need only incorporate means "not substantially broader than necessary to achieve the government's interest."¹⁵¹ The Court, therefore, could view limits on political messages delivered from space as simply curbs on the manner of expression.¹⁵²

Whether the regulations were broader than necessary to achieve the government's objective would depend on the exact scope of the regulations. An outright ban might survive scrutiny for the same reason the *Vincent* ban did—availability of alternative methods of communication. As demonstrated in the commercial speech analysis, space messengers will have alternative communication methods available. Political speakers will face the same argument as the commercial advertisers—there are plenty of other places to say the same thing. Less comprehensive limits, like restrictions on size, illumination, and time of visibility, remain subject to the alternative communication analysis. But, they may constitute the outer limit of

146. The Court has, at times, been quite concerned about the cost consequences of banning or limiting a particular medium of communication as *Linmark* forcefully demonstrates. At other times, it has exhibited much less solicitude for the problem. See *Vincent*, 466 U.S. at 812 n.30.

147. *Kovacs v. Cooper*, 336 U.S. 77, 102 (1949).

148. *Vincent*, 466 U.S. at 828 (Brennan, J., dissenting).

149. See *id.* at 808.

150. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

151. *Id.* at 800.

152. See *Vincent*, 466 U.S. at 810 ("With respect to signs . . . it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape.").

regulation only if speech proponents can demonstrate a lack of effective alternatives for reasons of geography or cost. Given the Court's current free speech jurisprudence, regulators can justify strict limits on even non-commercial political messages delivered from space. The Court likely will accept the substantiality of the aesthetic interest and conclude that no First Amendment interest outweighs it.¹⁵³

The Supreme Court will likely sustain significant regulations on both commercial and noncommercial messages delivered from space. The Court actually treats commercial and noncommercial speech very much alike when the regulation at issue can be sustained on a content-neutral basis. This similar treatment of content-neutral regulations, a balancing test applied in both the commercial and noncommercial contexts, measures governmental interests against First Amendment interests. The space message issue illustrates how this approach can denigrate First Amendment values at the expense of values, like aesthetics, that arguably have a weaker constitutional underpinning.¹⁵⁴

153. *Vincent* almost certainly compels this result. *Discovery Network* and *Metromedia*, which hinge on reservations about different treatment for different kinds of speech, support it. *Discovery Network* condemned different treatment of so-called commercial and other newsracks, emphasizing that Cincinnati had not shown that one did more harm than the other, and the Court was not willing to make the distinction based solely on assigning greater "value" to noncommercial newsracks. See *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1515-16 (1993). *Metromedia* refused to allow favoritism for certain kinds of noncommercial speech over others. See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514-15 (1981). A ban like H.R. 2599 will not discriminate between types of space-delivered messages; neither it nor a lesser restriction that applies to all space-delivered messages would offend *Discovery Network* or *Metromedia*. *Gilles*, though generally protective of expression rights, does not compel a different result. Nothing about space advertising, even of political messages, compares to the interest that citizens have in displaying messages from their homes as a means of providing information about themselves and their own identities. See *City of Ladue v. Gilles*, 114 S. Ct. 2038, 2046 (1994). The difficulty with this analysis lies in its insistence on so narrowly viewing space-delivered messages as a discrete manner of communication. Viewed simply as part of the overall message environment, what Justice Stevens said about commercial and noncommercial newsracks in *Discovery Network* applies to space-delivered ads and ads glittering on the Goodyear blimp—one is "no greater an eyesore" than the other. *Discovery Network*, 113 S. Ct. at 1514.

154. Aesthetics, unlike free speech, springs from no explicit constitutional foundation, though the "general Welfare" responsibility entrusted to Congress in U.S. CONST. art. I, § 8, cl. 1, undoubtedly encompasses it.

CONCLUSIONS

A. Tomlinson: Ban Without Reservation

Upholding the constitutionality of a federal law totally banning space billboards would be the proper course regardless of whether the expression contained on the medium of expression was purely commercial or purely political. Without doubt, this medium of expression is entirely novel and truly revolutionary. Space billboards, in fact, may be a little difficult to actually envision—not that one or more of them cannot be seen in the mind's eye, but coming to grips with the idea that they could *always* be there is not easy. At the least, they would create a captive audience, they would greatly change the world, and they would interfere with nature in a truly profound way.

The *unique magnitude* of this medium of expression deserves recognition and consideration. First, the medium could be literally ubiquitous, assuming enough examples were orbiting the earth so that at least one of them would be visible from any spot on the earth at any time. Second, the medium would be unavoidable. A vacationer might be able to “see the Pyramids along the Nile” without seeing a space billboard, but she could not “watch a sunrise from a tropic isle” without seeing one or more. Third, the medium would be omnipresent, having the capability of being visible all day, all night, forever. Fourth, the medium could fill the sky, there being no technological limit on how many space billboards could be in orbit at any one time other than the physical limitations of space itself.

Constitutionally permissible time, place, and manner restrictions provide all the justification needed to ban this medium of expression, the situation fitting neatly into the four-part test. First, banning the entire medium of expression would be content-neutral. Second, the ban would serve the governmental interest of preventing millions of people in this country from being a perpetual captive audience,¹⁵⁵ and it would prevent the despoiling of the aesthetically-pleasing (to most everyone) open sky,¹⁵⁶ both of which are easily demonstrable interests. Third, there are many alternative media of expression for any messages that might be placed on a space billboard. It seems clear that no other medium of expression is nearly as ubiquitous or involves nearly such magnitude. The

155. See *Lehman v. Shaker Heights*, 418 U.S. 298 (1974); see also *Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975) (“Captivity” occurs where “the degree of captivity makes it impractical for the unwilling viewer . . . to avoid exposure.”).

156. See *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

requirement of alternative means of expression, however, does not mandate an exactly comparable alternative. Fourth, there would be no problem with narrowly tailoring the law so that it prohibited only advertising from outer space by orbiting billboards, thereby doing no greater harm to First Amendment values than absolutely necessary to achieve the desired end.

This Article's Coauthor has written that even the unhappy Maui vacationers might pause at the Justice Black missive concerning new media of expression. Justice Black, one of only two First Amendment absolutists ever to serve on the Court, once wrote in a spirited dissent in a case involving loudspeakers that the First Amendment surely protected *future* media of expression as well as existing ones.¹⁵⁷ In theory, Justice Black's idea sounds great, but in practice may have spoken too loud.

Space billboards as a medium of expression are no more analogous to loudspeakers than they are to any other present medium. Loudspeakers, for example, have never had the potential to be literally ubiquitous, unavoidable, and omnipresent from any spot on earth. An analogy outside expression may be the development of nuclear weapons. Surely Justice Black would not have argued that no new military weapon should deserve more scrutiny by society than any of its predecessors just because it is new. Atomic weapons were not just bigger bombs. They were in a class all by themselves. Everything changed. Military and national security paradigms had to be re-thought. The order of magnitude of space billboards is, in context, comparable.

This Article's Coauthor is nervous, understandably, about denying abortion-rights advocates (or their opposites, no doubt) the opportunity to promulgate their message from a space billboard. Again, bearing in mind the unique magnitude of space billboards and fully realizing the paramount need not to regulate expression on the basis of its content, one could be at least equally nervous about the *lack* of a First Amendment exception which would allow a ban on space billboards. Just as one space billboard could proclaim that abortion providers should be protected, another space billboard could proclaim:

HOLOCAUST:
JUST A JEWISH LIE!

or

RACIST WHITES
WILL SOON DIE!

or

157. See *Kovacs v. Cooper*, 336 U.S. 77, 102 (1949) (Black, J., dissenting).

AFRICANS ARE
GENETICALLY INFERIOR!

It may be fortunate that time, place, and manner restrictions allow what content-based restrictions do not.

All of this discussion will be moot should space billboards become a reality from abroad. For this problem to be solved, the solution must be worldwide to be effective. That means a treaty. The organization which may be the most likely starting place is the United Nations; more specifically, the United Nations Committee on the Peaceful Uses of Outer Space. This committee is interested in such matters as land remote-sensing, nuclear power sources in outer space, space transportation systems, planetary exploration, astronomy, space debris, the geostationary orbit,¹⁵⁸ and communications and image and data interpretation.¹⁵⁹ With such an agenda already in place, adding space advertising to the list would seem appropriate.

Law—for whatever reason, and there are many—always lags behind technological development.¹⁶⁰ Given the global nature and high degree of importance of the issue of space advertising, lawmakers—indeed, international lawmakers—need to anticipate the best response to the issue *before* launch and deployment renders lawmaking an *ex post facto* exercise in futility.¹⁶¹

158. *Support Asked for Regional Education Centres*, UN CHRON., June 1993, at 69, 69.

159. *Environmental Monitoring, UNISPACE III Discussed*, UN CHRON., Sept. 1993, at 53, 53.

160. The law has rested on a perception of technology that is sometimes accurate, often inaccurate, and which changes slowly as technology changes fast. ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 7 (1983).

161.

Complex technology, far beyond lay competence to evaluate, is having enormous impact on society. This effect has increased so quickly that our traditional legal procedures and institutions are simply unable to keep pace in shaping our use of that technology. . . . Society has not yet learned how to control science and technology in a manner that maximizes benefit and minimizes harm. Society must catch up with science.

[Technological] [d]evelopments . . . today arrive so fast and [oftentimes] provide such obvious and enticing immediate benefits, that they are brought into wide use long before we realize that management of and limitations on that use may be essential. When society finally does appreciate what has happened, the systems are already in place and important options are lost forever.

. . . [T]he law and technology specialty entails two major functions. The first is "technology assessment." This is the task of identifying societal impact concerns soon enough that appropriate remedial actions may be taken before irreversibility sets in. The second function is the far more difficult task of analyzing and modifying our legal practices and institutions in a manner that deals satisfactorily with the concerns thus uncovered.

B. *Wiley: Regulate with Reservations*

In endorsing more limited restraints on space-delivered messages, this Author offers two major lines of argument. First, fidelity to the literal and "spiritual" command of the First Amendment requires some leeway for delivering messages from space in the contemporary message environment. Space message speakers and consumers have strong First Amendment interests that merit protection. Second, reasonable regulations that accommodate interests in both expression and aesthetics will meet most of the objections to space advertising, including those lodged by my Coauthor. Such limited regulations will not satisfy purists on either side of the debate; they will, however, accommodate those who care about both aesthetics and speech.

My Coauthor's analysis, taken as a whole, rests largely on the premise that neither speakers nor consumers of speech have a sufficient First Amendment interest in space-delivered messages to overcome aesthetic interests. The argument, while facially appealing, does not compel the complete space ad ban that my Coauthor seeks. Would-be space advertisers and consumers do have a protectable First Amendment interest—the interest in a truly vibrant, diverse marketplace of ideas:

It is the variety of the real marketplace that gives it its excitement and color and life and quality. It is all the different fruits and vegetables and fish and fowl [sic] piled up on iced carts in the farmers' markets of the plazas of the world's cities, all the different stocks traded on the stock exchanges, all the different compact disks and cassette tapes stacked in the giant record store, all the different books and magazines crowded into a great bookstore, and yes, all the microwave ovens, lawn mowers, athletic shoes, soft drink cans, sweatshirts, and bicycles hung and heaped willy-nilly in the Wal-Mart, that compose all of these individual markets, and the mass market that holds them all.¹⁶²

Though Professor Smolla referred more to kinds of messages than types of media, his observations apply in considering any limit on First Amendment freedoms. We depend, after all, upon the "marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless."¹⁶³ Taking a medium out of the market opens the possibility of making messages more difficult to deliver to the market where citizens, not government, can decide their utility. Consumers and speakers need

Milton R. Wessel, *What is "Law, Science and Technology" Anyway?* 29 JURIMETRICS J. 259, 260-61 (1989).

162. Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 785 (1993).

163. *Smith v. United States*, 431 U.S. 291, 321 (1977) (Stevens, J., dissenting).

access to media to make sure that the marketplace remains vibrant, even if not always attractive.

Economics provides a related, potential First Amendment interest in space advertising for speakers and message consumers. "The ability of a speaker to use resources to disseminate speech links the marketplace of ideas with the economic marketplace."¹⁶⁴ Clearly, the greater a speaker's wealth, the greater the speaker's ability to disseminate his or her ideas.¹⁶⁵ The *Vincent* dissenters explained how limits on a medium of communication may limit the ability of some to deliver messages efficiently, thereby giving advantages to persons who can afford other so-called alternative media that are burdened with less government regulation or none at all.

In deciding this First Amendment question, the critical importance of the posting of signs as a means of communication must not be overlooked. Use of this medium of communication is particularly valuable in part because it entails a relatively small expense in reaching a wide audience, allows flexibility in accommodating various formats, typographies, and graphics, and conveys its message in a manner that is easily read and understood by its reader or viewer. There may be alternative channels of communication, but the prevalence of a large number of signs in Los Angeles is a strong indication that, for many speakers, those alternatives are far less satisfactory.¹⁶⁶

No one knows exactly how much space ads will cost initially or, more importantly, at some time in the future. They may become quite cost effective in terms of delivering a message to a large audience at reasonable cost. If that occurs, banning the medium could have significant content repercussions by making it more difficult for underfunded speakers to gain meaningful access to the marketplace. If a space ad that reaches 100 million people costs \$10,000, telling the speaker to reach the same audience with a thirty second television spot for \$100,000 does not vindicate the marketplace interest of speaker or audience.¹⁶⁷

Finally, the "no law"¹⁶⁸ command of the First Amendment permits a restriction on speech only if government really has a serious interest that overrules the command.¹⁶⁹ That should mean that government really is pursuing its stated "objective seriously and comprehensively and in ways

164. Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1070 (1994).

165. *Id.*

166. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 819 (1984) (Brennan, J., dissenting) (footnote omitted).

167. See Note, *supra* note 164, at 1071 (noting that restrictions on the speech of some can enhance the speech of others).

168. U.S. CONST. amend. I.

169. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

that are unrelated to the restriction of speech.”¹⁷⁰ If government plans to use aesthetics as a reason for limiting free speech rights, does it really have a coordinated, consistent plan promoting aesthetics? Or is it singling out a particular communication medium that segments of the community do not like, while permitting other aesthetically unpleasant media to go unchallenged?

As Professor Smolla points out, “our society protects a great deal [of speech] that has little or no plausible social value in the eyes of many.”¹⁷¹ In other words, since we protect all kinds of speech, much of it in ugly media, why not this? The Goodyear Blimp sails overhead, airplanes fly by trailing banners, and searchlights scan the sky, all comfortably within the protective envelope of the First Amendment. In the absence of a comprehensive plan that takes aesthetics into consideration in the entire modern message environment, who can say that space-delivered messages are “more” offensive and, therefore, subject to elimination while others remain protected?

My Coauthor resorts to the tactic of trotting out a parade of horrors that will result from not banning ad delivery systems. Little need be said about most of his complaints except that regulation of aspects of the space ad industry will satisfy his concerns. These regulations could include: limiting the number of platforms, regulating their size and shape, limiting the use of illumination, dictating orbital paths, limiting hours of visibility, and perhaps regulating other aspects of their operation. Congress certainly has the power to keep them from becoming “ubiquitous” as my Coauthor fears. Such limits would also solve his “captive audience” problem.

The space ad issue does not have to become a zero sum game in which only promoters of aesthetics win by banning the medium, while free speech advocates lose a potentially valuable medium of expression. The time, place, and manner concept, if applied broadly in the context of the entire modern message environment, rather than narrowly to only the space message medium, provides a satisfactory analytical framework for accommodating the needs of both sides of the divide. Rather than viewing elimination of space ads as a manner (or place) restriction on a medium of speech, the Court should approve only limits on the operation of space message systems, mindful of the fact that other intrusive and offensive media have long received First Amendment protection. The Court can protect the public from the excesses of a medium like space message systems while letting some of us look at them some places, sometimes, and

170. *Vincent*, 466 U.S. at 828 (Brennan, J., dissenting).

171. Smolla, *supra* note 162, at 793.

under certain circumstances. Doing so does no more than recognize that, “[i]n public, speakers’ rights generally prevail” and “viewers and listeners are expected to protect their own privacy.”¹⁷²

172. See Note, *supra* note 164, at 1077.

