Content Neutrality and the Intermediate Scrutiny Test in *Wag More Dogs, LLC v. Cozart*: A Missed Opportunity to Clarify the Rules in the Fourth Circuit?

*Geri Marie Rossano**

Introduction

In June of 2012, Fairfax County issued a local sign ordinance violation to a church located in Vienna, Virginia.[1] The violation occurred as a result of the church's postings on its electronic sign. On the day of the violation, the church posted three messages, but according to the Fairfax ordinance, electronic sign owners may only change their electronic sign display a maximum of two times in a twenty-four hour period.[2] Ultimately, the county fined the church and required it to either limit its posts to two per day or remove the sign altogether.

At first glance, the Fairfax ordinance seems arbitrary. The messages Fairfax found to be in violation of the ordinance included one offering refuge from a recent summer storm that left many without power.[3] Another promoted the Vienna church's website, and the final message advertised the time for a group prayer session.[4] Additionally, there is a threat of potential constitutional implications as a restriction of free speech under the First Amendment.[5] In fact, the church felt the same way and filed a federal lawsuit against Fairfax County two months later.[6]

---

* George Mason University School of Law, J.D. Candidate, May 2014; University of Maryland, B.S. 2010.

[1] The facts of this event are based on a recent newspaper article. *See* Corinne Reilly, *Church Sign Runs Afoul of Fairfax County Limits*, Wash. Post, Aug. 30, 2012, at A1.

[2] Fairfax, Va., Fairfax Cnty. Zoning Ordinance art. XII, § 104-6 (2012). According to the violation notice sent to the Vienna church, its sign was a prohibited moving sign because it had been changed more than twice in a twenty-four hour period. *See* Reilly, *supra* note 1.

[3] *See id*.

[4] *See id*.

[5] *See* U.S. Const. amend. I.

[6] *See* Complaint at 2, Church of the Good Shepherd - United Methodist v. Bd. of Supervisors of Fairfax Cnty., No. 12-925 (E.D. Va. Aug. 20, 2012); *But see* Corinne Reilly, *Fairfax County to Revisit Sign Regulation,* Wash. Post, Aug. 31, 2012, at B1 (stating that after the

Although the violation was ultimately dismissed after the complaint was filed,[7] the situation presents a unique factual situation to analyze the free speech concerns of electronic sign regulation. Upon examining the purpose of the sign, the court might find against the church if it applies Fourth Circuit precedent. It is likely that the electronic sign ordinance was established with a police power purpose in mind, and like most state regulations, police power purposes help determine whether local sign ordinances violate the constitutional right to free speech.[8] The church is located on a wooded, winding road designated as a Virginia scenic byway. Considering this fact, the ordinance may serve the aesthetic purpose of preserving the scenic nature of the area. The ordinance might also promote the health and safety of the public considering the road is windy and the sign might distract travelers if it is constantly changing.

As the case involves a constitutional question, the Vienna church filed suit in a federal district court within the Fourth Circuit, and therefore, the district court is bound by Fourth Circuit precedent.[9] In the Fourth Circuit, sign ordinances are afforded different levels of scrutiny depending on whether the ordinance is content-neutral or content-based.[10] A sign ordinance is content-neutral if:

> (1) the regulation "is not a regulation of speech," but rather "a regulation of the places where some speech may occur;" (2) the regulation "was not adopted because of disagreement with the message [the speech] conveys;" or (3) the government's interests in the regulation "are unrelated to the content of the [affected] speech."[11]

Because Fairfax County will likely be able to justify the ordinance with a police power purpose and because that purpose is unrelated to

---

church filed suit, Fairfax County dismissed the code violation, and "the county zoning administrator had recommended that the message limit for all electronic signs be reevaluated").

7 *See* Corinne Reilly, *Fairfax County to Revisit Sign Regulation,* WASH. POST, Aug. 31, 2012, at B1.

8 *See* Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 369 (4th Cir. 2012); *see also infra* Part I.A, B.

9 U.S. Const. art. III, § 2, cl. 1.

10 Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 432 (4th Cir. 2007); *See Wag More Dogs*, 680 F.3d at 369 (applying the intermediate scrutiny standard to a content-neutral sign ordinance).

11 *Covenant Media*, 493 F.3d at 432-33 (quoting Hill v. Colorado, 530 U.S. 703, 719-20 (2000) (internal quotation marks omitted).

the content of the speech, the third prong of the content-neutral test will be satisfied.

Courts afford content-neutral sign ordinances a lower level of scrutiny than content-based ordinances when establishing their constitutionality.[12] If a sign ordinance is deemed content-neutral, courts apply an intermediate scrutiny test to evaluate its constitutionality.[13] An ordinance passes constitutional muster "if it furthers a substantial government interest, is narrowly tailored to further that interest, and leaves open ample alternative channels of communication."[14] Again, the existence of a police power purpose is a vital component in this evaluation.

Considering Fourth Circuit precedent and the rules the court has established for determining whether a local ordinance violates the constitutional right to free speech, the conclusion that the Fairfax electronic sign ordinance passes constitutional muster is not difficult to reach.[15] Ultimately, this result is due to the lax standard for finding a sign ordinance content-neutral and the bright-line rule for determining the level of judicial review to apply.[16] The potential result in the Vienna church case is alarming, and it is easy to see how other seemingly arbitrary and unconstitutional ordinances would pass current tests for determining constitutionality. As a result, there is a need for reform in this area of law to adequately protect the constitutional right to free speech.

This Comment proposes a change to the current test used in the Fourth Circuit for establishing when a sign ordinance is content-neutral. Part I of this Comment will evaluate the Supreme Court precedents and the Fourth Circuit's interpretation of those precedents, including the court's continued adherence to the Fourth Circuit's test in the recent case, *Wag More Dogs, LLC v. Cozart*.[17] Part I will then evaluate the evolution of the police power.

Part II will analyze how the police power and its use in the Fourth Circuit's three-prong test for determining content-neutrality can lead

---

12 DAVID L. HUDSON, JR., THE FIRST AMENDMENT: FREEDOM OF SPEECH § 2:2, at 30-31 (2012); *see also Wag More Dogs*, 680 F.3d at 369 (applying the intermediate scrutiny standard to a content-neutral sign ordinance).

13 HUDSON, *supra* note 12, § 2:2, at 31; *see also* Am. Legion Post 7 v. City of Durham, 239 F.3d 601, 609 (4th Cir. 2001).

14 *Am. Legion Post 7*, 239 F.3d at 609.

15 *See infra* Part I.B.

16 *See* HUDSON, *supra* note 12, § 2:2, at 31.

17 680 F.3d 359 (4th Cir. 2012).

to abuses when determining the constitutionality of local sign ordinances. Additionally, Part II will look at the inherent problems in the content-based and content-neutral distinction generally and the impact this distinction has on First Amendment rights.

Finally, Part II will propose solutions to the problems associated with the Fourth Circuit's content-neutral test, concluding that a police power purpose should not be independently sufficient for establishing that an ordinance is content-neutral. In addition, the courts should utilize a cost-benefit analysis in determining the appropriate level of judicial scrutiny to apply rather than follow a bright-line rule.

I. BACKGROUND

Although municipal regulation of signs began before comprehensive zoning, it has been long recognized as a component of zoning law.[18] Because sign regulation usually restricts the content of the sign or the manner in which that content may be displayed, many sign regulations have come under judicial review to determine whether they violate the First Amendment.[19]

The Supreme Court has held that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."[20] As a result of this interpretation, the first step in determining a local sign ordinance's constitutionality is to determine whether the ordinance restricts speech based on content.[21] In making this determination "[l]aws that restrict speech based on content are treated differently—as more suspect—than laws that do not."[22] Therefore, a content-based regulation discriminates against speech based on content while a content-neutral law "serves purposes unrelated to the content of expression."[23] For this reason, sign ordinances are labeled either "content-based" or "content-neutral."[24]

The crucial content-based or content-neutral determination establishes the level of scrutiny the courts will apply in evaluating

---

18 3 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 26.1 (5th ed. 2013).

19 *Id.*

20 Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

21 HUDSON, *supra* note 12, § 2:2, at 30-31.

22 *Id.* at 30.

23 16B C.J.S. *Constitutional Law* § 827 (2005 & Supp. 2013)

24 HUDSON, *supra* note 12, § 2:2, at 30.

whether the regulation is constitutional[25] so that in "very limited exceptions, . . . regulation of speech cannot be based on its content without violating the guaranty of freedom of speech."[26] This situation results from courts evaluating content-based regulations according to the strict scrutiny standard, and these regulations do not meet this standard unless they further a compelling government interest.[27] On the other hand, content-neutral sign ordinances only need to overcome intermediate scrutiny, and courts uphold them so long as they further a substantial government interest.[28]

Part I first explores the constitutionality of local sign ordinances in Section A by discussing the Supreme Court cases which have shaped judicial review of sign ordinances and the First Amendment in the Fourth Circuit. Then, a look at the recent Fourth Circuit cases in Section B will reveal that, while the Supreme Court has undeniably influenced tests utilized by the Fourth Circuit, the Fourth Circuit has promulgated a more formulistic approach. The emphasis will be on those cases that had the most impact on a recent—and seminal—Fourth Circuit case on the subject, *Wag More Dogs, LLC*.[29] Finally, Section C concludes by analyzing the evolution of the police power purpose and its impact on zoning jurisprudence.

A. *The Supreme Court Evaluates Local Ordinance Constitutionality*

In early case law, courts reviewed constitutional challenges to local regulations under property rights theories and the Fourteenth Amendment.[30] The Supreme Court did not take into account First Amendment concerns when considering the constitutionality of local sign ordinances until 1977.[31] Before *Linmark Associates v. Township of Willingboro*, the Court had "summarily disposed of appeals from

---

[25] *Id.* at 31.

[26] 16B C.J.S. *Constitutional Law* § 827 (2005 & Supp. 2013)

[27] HUDSON, *supra* note 12, § 2:2 at 31.

[28] *Id.*

[29] Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012).

[30] *See* Darrel C. Menthe, *Aesthetic Regulation and the Development of First Amendment Jurisprudence*, 19 B.U. PUB. INT. L.J. 225, 239-40 (2010) (citing Newman F. Baker, *Aesthetic Zoning Regulations*, 25 MICH. L. REV. 124, 126 (1927)) ("Until 1911, billboard regulations were generally struck down as a straight property-rights theory."); *see also infra* Part I.C.

[31] *See* Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 86 (1977). However, the Supreme Court considered other state regulations regarding free speech restrictions before this time. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809 (1975) (evaluating the constitutionality of a state regulation on advertising).

state-court decisions upholding state restrictions on [signs]" when the claims rested on First Amendment grounds.[32]

The *Linmark* decision recognized that, like other areas of state regulation, state sign regulations may place reasonable restrictions on speech if the regulation promotes important non-speech interests.[33] Specifically, sign regulations may regulate the time, place, or manner of speech without infringing First Amendment rights.[34] Despite this allowance, the Court in *Linmark* struck down a New Jersey ordinance that banned "for sale" and "sold" signs on residential property.[35] The Court reasoned that the ordinance did not leave open ample alternative forms of communication and that only particular signs were banned.[36] As a result, the Court held that the New Jersey ordinance was not a time, place, or manner restriction, and to be constitutional, the ordinance needed to be necessary to achieve its important governmental objective.[37]

While the *Linmark* decision played a substantial role in the development of sign regulation free speech doctrine, the Supreme Court's later decision in *Metromedia, Inc. v. City of San Diego* is better known. In that case, the Court evaluated the constitutionality of a San Diego ordinance that imposed "substantial prohibitions on the erection of outdoor advertising displays within the city."[38]

Following the standard set in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[39] the *Metromedia* Court determined that, although billboards were afforded First Amendment protection, the level of protection was less than that afforded to noncommercial speech.[40] According to the *Central Hudson* standard, only commercial speech that involves lawful activity and is not misleading is afforded First Amendment protection.[41] Additionally, to uphold regulations on valid commercial speech, the restriction must serve a substantial governmental interest, directly advance that inter-

---

32 Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 499 (1981) (plurality opinion).

33 *Linmark*, 431 U.S. at 93 (citations omitted).

34 *Id.*

35 *Id.*

36 *Id.* at 93-94.

37 *Id.* at 94-96.

38 Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 493 (1981) (plurality opinion).

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

40 *Metromedia*, 453 U.S. at 507, 513 (plurality opinion).

41 *Id.* at 507.

est, and reach "no further than necessary to accomplish the given objective."[42]

The Court found that the traffic safety and aesthetic goals of the ordinance qualified as substantial governmental goals.[43] The Court also deferred to the legislature's determination that billboards pose a substantial hazard to traffic safety and aesthetic interests.[44] Nonetheless, the Court deemed the ordinance unconstitutional as an unnecessary restriction on free speech due to its restrictions on noncommercial advertising.[45] Although the ordinance generally restricted billboards, it also contained some important exceptions. First, commercial speech billboards were allowed so long as they were located on-site of the commercial establishment, but billboards promoting noncommercial speech were not given a similar exception.[46] According to the plurality opinion, this aspect of the ordinance was invalid because it improperly "afford[s] a greater degree of protection to commercial [rather] than to noncommercial speech."[47] Additionally, the ordinance contained various exceptions for noncommercial speech signs carrying specific messages.[48] Ultimately, the Court found these exceptions unconstitutional as well.[49]

The Court's decision in *Metromedia* created confusion and uncertainty, likely because it was a plurality decision in part and a majority of the justices did not agree on a holding rationale regarding the noncommercial speech restrictions.[50] Although the Court attempted to supplement its holding in subsequent cases, these cases did little to clarify the questions raised by *Metromedia*.[51] It was not until three

---

[42] *Id.* (citing *Central Hudson*, 447 U.S. at 563-66).

[43] *Id.* at 507-08 (citations omitted) ("It is far too late to contend otherwise with respect to either traffic safety . . . or esthetics.").

[44] *Id.* at 509 (citations omitted).

[45] *Id.* at 521 (citations omitted).

[46] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981) (plurality opinion).

[47] *Id.*

[48] *Id.* at 514.

[49] *Id.* at 515 ("With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse . . . .").

[50] Mark Cordes, *Sign Regulation After Ladue: Examining the Evolving Limits of First Amendment Protection*, 74 NEB. L. REV. 36, 53 (1995) (arguing that although *Metromedia* established a groundwork for First Amendment analysis as it related to local ordinances, "the Court's decision in Metromedia left mostly unanswered questions.").

[51] *See, e.g.*, Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (reaffirming that traffic safety and aesthetics are substantial government interests warranting state restriction on speech).

years later that the Court presented a workable, synthesized standard for evaluating the constitutionality of local ordinances in relation to free speech.[52]

In *Ward v. Rock Against Racism*, the Supreme Court evaluated the constitutionality of a noise ordinance requiring band shell performers to use sound-amplification equipment and a sound technician provided by the city.[53] As the *Ward* Court established, time, place, or manner restrictions of protected speech are reasonable "provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[54]

Perhaps more notably, the Supreme Court in *Ward* also articulated a standard for determining whether a time, place, or manner restriction on speech is content-neutral, the first requirement for establishing the constitutionality of these restrictions.[55] According to the Court:

> The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys . . . . The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.[56]

The *Ward* standard serves as the basis for determining content-neutrality and the constitutionality of local ordinances in the Supreme Court.[57] When an ordinance serves police power purposes unrelated

---

[52] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[53] *Id.* at 784.

[54] *Id.* at 791 (quoting Clark v. Cmty for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[55] *Id.*

[56] *Id.* (citations omitted).

[57] *See, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000) (applying the *Ward* test for determining content-neutrality). The Supreme Court briefly digressed from this line of analysis in the outlier case of *City of Ladue v. Gilleo* 512 U.S. 43, 51-57 (1994) (determining that a local sign ordinance failed to meet the requirements of time, place, or manner regulation because it restricted "too much" speech and did not leave open ample alternative avenues for communication). In her concurring opinion, Justice O'Connor found fault with the majority's analysis because the Court did not first determine whether the regulation was content-based or content-neutral. *Id.* at 59

to the content of the speech, it is content-neutral, and the Court will uphold it so long as it is "narrowly tailored" to serve a substantial government interest and it leaves open alternative channels of communication.[58] If an ordinance does not meet the requirements of content-neutrality established by *Ward*, the Court deems the ordinance content-based, and content-based restrictions must serve a compelling government interest to be constitutional.[59] Additionally, the ordinance must be the least-restrictive means of accomplishing that goal.[60] Although *Ward* and *Hill* questioned the First Amendment constitutionality of ordinances other than sign ordinances, the following Section will demonstrate that these cases played a large role in the evaluation of local sign ordinances in the Fourth Circuit.

B. *Local Ordinance Law and Free Speech in the Fourth Circuit*

Applying Supreme Court precedent, recent Fourth Circuit cases evaluating local ordinance constitutionality have taken a more formulistic approach. The Fourth Circuit has determined three situations in which a local ordinance is content-neutral, when: (1) the ordinance regulates where speech may occur; (2) the ordinance was not adopted as a result of disagreement with the message the speech conveys; or (3) the ordinance serves a government interest unrelated to the content of the speech.[61] Once the ordinance is deemed content-based or content-neutral, the court applies the same standard of review utilized by the Supreme Court.

This Section will begin with an analysis of the most influential cases that shaped and articulated this formulaic standard for deeming an ordinance content-neutral. It will conclude by analyzing a recent Fourth Circuit case to evaluate local sign ordinance constitutionality, *Wag More Dogs*.

(O'Connor, J., concurring). However, the 2000 Supreme Court case, *Hill v. Colorado*, reaffirmed the content-neutral, content-based distinction as the primary objective in determining the constitutionality of local regulations. 530 U.S. at 726.

58 *Id.*

59 HUDSON, *supra* note 12, § 2:2, at 31.

60 *Id.*

61 *See* Covenant Media, LLC v. City of N. Charleston, 493 F.3d 421, 432 (4th Cir. 2007) (quoting *Hill*, 530 U.S. at 719-20).

1. The Fourth Circuit Interprets Supreme Court Precedent in Challenges to Local Sign Ordinances

Although the Fourth Circuit did not evaluate a local sign ordinance in *American Legion Post 7 v. City of Durham*, the decision laid the foundation for the current test used to establish content-neutrality in local ordinance cases.[62] In *American Legion*, the Fourth Circuit evaluated the constitutionality of a flag ordinance limiting the size of flags put on public display and the height of the pole from which such flags could be flown.[63] Because the plaintiff argued this ordinance violated the First Amendment's protection of free speech, the court determined whether the ordinance was content-based or content-neutral.[64] The court concluded that the ordinance was content-neutral "because it [did] not facially distinguish between noncommercial messages based on content and because there [was] no evidence of a content-based purpose."[65]

After determining that the ordinance was content-neutral, the court applied the time, place, and manner test for evaluating its constitutionality.[66] The court held that "a content-neutral regulation of the time, place, and manner of speech is generally valid if it furthers a substantial government interest, is narrowly tailored to further that interest, and leaves open ample alternative channels of communication."[67] The court found that the ordinance furthered a substantial government interest because it promoted the city's interest in "maintaining and improving the community's appearance, eliminating visual clutter, ensuring traffic safety, preserving property values, and attracting sources of economic development."[68]

Additionally, the ordinance was narrowly tailored.[69] According to the court, the narrowly tailored requirement "is not a least intrusive means requirement; this prong . . . merely asks whether 'the . . . regulation promotes a substantial government interest that would be

---

62 239 F.3d 601 (4th Cir. 2001).

63 *Id.* at 603.

64 Am. Legion Post 7 v. City of Durham, 239 F.3d 601, 607 (4th Cir. 2001).

65 *Id.* at 609.

66 *Id.*

67 *Id.*

68 *Id.* (citations omitted).

69 *Id.* at 610.

achieved less effectively absent the regulation.'"[70] The court found the ordinance in this case was narrowly tailored because the aesthetic goals of the ordinance would be undermined if it exempted either flags or noncommercial entities.[71] Finally, the court held that the ordinance left open ample alternative means of communication because it was short of a total ban.[72] Since the ordinance met each requirement of the time, place, and manner test, the court upheld the ordinance as constitutional.[73]

In 2007, the Fourth Circuit was presented with another opportunity to evaluate the constitutionality of a local ordinance in *Covenant Media, LLC v. City of North Charleston*.[74] With the *American Legion* court's rationale for finding the flag ordinance to be content-neutral as its foundation, the Fourth Circuit officially established a formulaic test for content-neutrality.[75] In determining whether a local ordinance limiting the size of billboard signs and establishing a permit application process was content-neutral, the court expanded on the Supreme Court's decision in *Ward* and held that

> a regulation is not a content based regulation of speech if (1) the regulation "is not a regulation of speech," but rather "a regulation of the places where some speech may occur;" (2) the regulation "was not adopted because of disagreement with the message [the speech] conveys;" or (3) the government's interests in the regulation "are unrelated to the content of the affected speech."[76]

Reasoning that the locality's interests were to "eliminate confusing, distracting and unsafe signs, assure the efficient transfer of information; and enhance the visual environment of the city of North Charleston," the court determined that the ordinance met the expanded *Ward* test for content-neutrality.[77] Although each component of the test was individually sufficient for establishing content-

---

[70] Am. Legion Post 7 v. City of Durham, 239 F.3d 601, 609 (4th Cir. 2001) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 798-99 (1989) (alteration in original)).

[71] *Id.* at 610.

[72] *Id.* at 610-11 (citations omitted).

[73] *Id.*

[74] Covenant Media, LLC v. City of N. Charleston, 493 F.3d 421 (4th Cir. 2007).

[75] *Id.* at 432.

[76] *Id.* (citing *Hill v. Colorado*, 530 U.S. 703, 719-20 (2000)).

[77] *Id.* at 434 (citations omitted).

neutrality, the court nonetheless determined that all the components were met.[78]

Although *Covenant Media*'s content-neutral test implied that there were three scenarios which *independently* satisfied a finding that a local ordinance was content-neutral, the Fourth Circuit continued to establish each component before labeling a sign ordinance content-neutral in its recent case, *Wag More Dogs*.[79]

2. Upholding *American Legion* and *Covenant Media*: The Fourth Circuit's Decision in *Wag More Dogs*

Expanding upon its previous holdings in *American Legion* and *Covenant Media* in July 2012, the Fourth Circuit decided *Wag More Dogs*.[80] This case came about as a result of an Arlington ordinance that limited the size of business signs in the community.[81] According to the city of Arlington, the sign ordinance was enacted "to regulate the construction, placement and display of signs in order to maintain the health, safety, convenience and welfare of residents and businesses throughout the County."[82] The owner of a canine daycare, boarding, and grooming facility received an ordinance violation because of a dog mural painted on the exterior wall of her building.[83] As a result of the violation, Arlington gave the business owner two options: She could cover the mural completely or keep a portion of the mural that complied with the Arlington ordinance's size requirements.[84]

Because the business was unable to display its mural, it filed suit against the city and various city officials, challenging the ordinance's constitutionality on its face.[85] The district court "initially held that the Sign Ordinance was a content-neutral restriction on speech that easily

---

78 According to the court, North Charleston was not concerned with the message of a particular billboard. Instead, the city enacted the ordinance as a result of concern over where these signs were located. Additionally, the ordinance was adopted as a way to regulate land use, not as a result of disagreement with the messages conveyed by the billboards. *Id.* at 433-34.

79 680 F.3d 359 (4th Cir. 2012).

80 *Id.* at 359.

81 *Id.* at 362-63 (citing ARLINGTON, VA., ARLINGTON CNTY. ZONING ORDINANCE § 34(G) (2012).

82 *Id.* at 362 (citing ARLINGTON, VA., ARLINGTON CNTY. ZONING ORDINANCE § 34(G) (2012).

83 *Id.* at 363.

84 *Id.* at 363-64.

85 Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 364 (4th Cir. 2012).

satisfied intermediate scrutiny."[86] Accordingly, the court granted the city's motion to dismiss, and the business owner appealed.[87]

The Fourth Circuit reviewed the district court's grant of a motion to dismiss de novo, accepting as true the facts alleged in the complaint.[88] While the business owner argued that the ordinance was a content-based restriction on speech because it imposed different requirements on different types of speech, the court dismissed this argument because accepting it would have the court "hew to a Euclidean commitment to wooden logic, where the law instead demands a more pragmatic judgment."[89] Instead, the court applied precedent and "a practical analysis of content neutrality, requiring that a regulation do more than merely differentiate on content to qualify as content-based."[90] In doing so, the court upheld and applied the three-pronged test for evaluating content neutrality from *Covenant Media*.[91] Applying this standard, the court held that the Arlington ordinance was content-neutral even though the ordinance differentiated between types of speech.[92] The court reasoned that "Arlington enacted the ordinance to, among other aims, promote traffic safety and the County's aesthetics, interests unrelated to messages displayed."[93] Furthermore, like the city in *Covenant Media*, Arlington enacted the ordinance to regulate land use, "not to stymie a particular disfavored message," and the ordinance was a regulation "applying only time, place, and manner restrictions."[94]

Deeming the Arlington ordinance content-neutral, the court applied intermediate scrutiny in determining its constitutionality.[95] The court applied the time, place, and manner test previously adopted by the Fourth Circuit in *American Legion* to evaluate whether the ordinance met the intermediate scrutiny standard.[96] Under this test,

---

86 *Id.*

87 *Id.*

88 *Id.* at 364-65 (citations omitted).

89 *Id.* at 365.

90 *Id.*

91 Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 366 (4th Cir. 2012).

92 *Id.* at 368.

93 *Id.* at 368.

94 *Id.* (quoting Covenant Media, LLC v. City of N. Charleston, 493 F.3d 421, 433 n.9 (4th Cir. 2007)).

95 *Id.* at 369.

96 *Id.*

the court found that the ordinance passed "constitutional muster."[97] First, the Arlington ordinance furthered a substantial government interest because it was enacted to "promote traffic safety and enhance the County's aesthetics."[98] Second, the ordinance was narrowly tailored to further these interests "as its size and location restrictions '[d]o no more than eliminate the exact source of the evil it sought to remedy.'"[99] Finally, the ordinance left open ample alternative channels of communication "by generally permitting the display of all types of signs, subject only to size and location restrictions."[100] As a result, the ordinance was held constitutionally valid and not in violation of the First Amendment right to free speech.[101]

As *Wag More Dogs* demonstrates, the Fourth Circuit remains committed to *Covenant Media*'s test for determining whether a local sign ordinance is content-neutral.[102] But despite the literal requirements of the test, the Fourth Circuit has consistently evaluated each component when labeling a local ordinance content-neutral.[103]

The next Section will analyze the evolution of the state's police power. As Sections A and B demonstrate, a police power purpose not only serves an essential role in determining whether or not a local ordinance is content-neutral, but it also determines whether the ordinance will pass constitutional muster.

C. *The Evolution of the Police Power and Its Use as a Justification for Local Zoning Laws*

The term "police power" has generally been associated with state sovereignty and state regulatory power.[104] Although federalism cases introduced the term, it "came into widespread use in legal actions

---

97 Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 369 (4th Cir. 2012) (quoting Am. Legion Post 7 v. City of Durham, 239 F.3d 601, 609 (4th Cir. 2001)).

98 *Id.*

99 *Id.* (alteration in original) (quoting Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984)).

100 *Id.* (citing Am. Legion Post 7 v. City of Durham, 239 F.3d 601, 609 (4th Cir. 2001)).

101 *Id.* at 374.

102 *See id.* at 366.

103 *See* Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 366 (4th Cir. 2012); *see also* Covenant Media, LLC v. City of N. Charleston, 493 F.3d 421, 433-34 (4th Cir. 2007).

104 D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 473 (2004).

challenging the scope of police regulations."[105] As zoning enabling acts demonstrated, municipalities were permitted to enact ordinances in accordance with their police power to promote the "health, safety, morals, or general welfare of the community."[106] If a local ordinance did not promote at least one of the locality's police power interests, the ordinance was deemed unconstitutional.[107]

As zoning evolved and became more common throughout the twentieth century, courts were required to determine what constituted a valid use of police powers.[108] Initially, the courts defined health, safety, morals, and welfare very narrowly.[109] When it came to defining "general welfare," many courts disagreed on the definition but decided that it seemed to relate to the convenience and prosperity of society.[110] Despite this early disagreement, there was a general consensus that aesthetic concerns alone did not qualify as a valid police power purpose.[111]

Courts were hesitant to allow aesthetic concerns to independently justify state regulation "due to the notion that beauty is subjective."[112] But as early as 1927, Newman Baker observed that "there was a developing public consciousness about the importance of beauty."[113] Such notions led progressive era courts to deem aesthetic concerns a valid exercise of a state's police power so long as the regulation promoted other goals such as health, safety, and morals.[114] Finally, in 1954, the Supreme Court decided *Berman v. Parker*.[115] The case "provided the doctrinal foundation for aesthetics as a sole purpose for reg-

---

105 *Id.* at 477. The term "police power" was first used in 1827 in *Brown v. Maryland*. *Id.* at 474 (citing Brown v. Maryland, 25 U.S. 419 (1827)).

106 Meg Stevenson, *Aesthetic Regulation: A History*, 35 REAL EST. L.J. 519, 521-22 (2007) (quoting 1 ANDERSON, AMERICAN LAW OF ZONING § 7.01, at 730-31 (Kenneth H. Young ed., 4th ed. 1996)).

107 *Id.* at 522 (citations omitted).

108 *Id.* (citing 2 ZONING AND LAND USE CONTROLS §§ 16.03-05 (Patrick J. Rohan & Eric D. Kelly eds., 1998)).

109 *Id.* (citation omitted).

110 *Id.* at 524 (citing Wulfsohn v. Burden, 150 N.E. 120, 123 (N.Y. 1925); ANDERSON, *supra* note 106, § 7.13, at 754-55).

111 *Id.*

112 Stevenson, *supra* note 106, at 525 (citing Perlmutter v. Greene, 182 N.E.5, 6 (N.Y. 1932)).

113 Menthe, *supra* note 30, at 245 (citing Newman F. Baker, *Aesthetic Zoning Regulations*, 25 MICH. L. REV. 124, 129 (1927)).

114 *See id.* at 246 (citing J.J. Dukeminier, Jr., *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROBLS. 218, 218-20 (1955)).

115 348 U.S. 26 (1954).

ulation by allowing the District of Columbia to use aesthetics as the basis for the police power in an eminent domain case."[116] According to the Court, aesthetic concerns were just as important to the general welfare as spiritual, physical, and monetary concerns.[117] With aesthetic concerns independently justifying regulations, concerns about the implications on freedom of speech and expression emerged.[118] Although regulations had typically been "waterproof to any First Amendment concerns," courts began considering these concerns in the 1960s.[119] In 1977, the Supreme Court first considered free speech implications as related to local sign ordinances.[120]

Even before the inclusion of aesthetics as a valid police power purpose, legal scholars and commentators were skeptical of the police power generally.[121] However, courts continue to give great deference to legislatures in their determination that a local ordinance or regulation satisfies a police power purpose.[122] With these realities in mind, Part II of this Comment will analyze the problems with the police power purpose independently satisfying the test for content-neutrality in the Fourth Circuit. Part II will conclude by proposing solutions to the current test and by recognizing the missed opportunity to adopt these proposals in *Wag More Dogs*.

II. ANALYSIS

Supreme Court precedent, and the Fourth Circuit's interpretation of Supreme Court cases, has created a practice in the Fourth Circuit where the court labels almost every sign ordinance coming under con-

116 Kenneth Pearlman, Elizabeth Linville, Andrea Phillips & Erin Prosser, *Beyond the Eye of the Beholder Once Again*, 38 URB. LAW. 1119, 1147 (2006) (citing Berman v. Parker, 348 U.S. 26, 33 (1954)).

117 Berman v. Parker, 348 U.S. at 33 ("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.").

118 *See* Menthe, *supra* note 30, at 248-50 (citations omitted).

119 *Id.* at 248.

120 *See supra* Part I.A.

121 Barros, *supra* note 104, at 503-04 (noting that throughout his career, Justice Holmes expressed concerns that the police power was simply a way for legislatures "to justify restrictions on property that were constitutionally suspect.").

122 *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981) (plurality opinion).

stitutional review as content-neutral.[123] Often, the court will then uphold these content-neutral sign ordinances.[124] Two reasons explain this situation. First, according to a literal reading of the rule, if an ordinance can be justified as a valid exercise of the state's police power, the court will label it content-neutral, regardless of whether the ordinance is on its face content-based or promulgated as a result of disagreement with the affected speech.[125] Second, whether an ordinance is content-based or content-neutral determines which level of scrutiny the court will apply when evaluating the ordinances' constitutionality.[126] Courts only uphold content-based ordinances if they serve a *compelling* governmental interest while content-neutral ordinances only need to serve a *substantial* governmental interest.[127] As a result, the content-neutral, content-based determination is a crucial factor in determining the ordinance's fate and whether the court will uphold it or strike it down as unconstitutional.

Ultimately, the content-based, content-neutral distinction—and the test used for determining that distinction—have the potential to result in an unnecessary restriction on free speech. Section A of this analysis will evaluate the police power purpose and its effect on First Amendment jurisprudence as an independent prong for determining content-neutrality in the Fourth Circuit. The next Section will evaluate the content-based, content-neutral distinction. Finally, this analysis will conclude with solutions to these problems and an analysis of

---

123 *See* Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 365 (4th Cir. 2012) (determining that an Arlington sign ordinance limiting the size of business signs was content-neutral); *see also* Covenant Media, LLC v. City of N. Charleston, 493 F.3d 421, 435 (4th Cir. 2007) (holding that an ordinance limiting the size of billboard was content-neutral); Am. Legion Post 7 v. City of Durham, 239 F.3d 601, 609 (4th Cir. 2001) (finding that a North Charleston ordinance limiting the size of flags and the height of the pole from which they were to be flown was content-neutral).

124 *See Wag More Dogs*, 680 F.3d 359 (upholding an Arlington sign ordinance); *see also Covenant Media*, 493 F.3d 421 (upholding an ordinance limiting the size of billboard); *American Legion*, 239 F.3d 601 (upholding a North Charleston ordinance limiting the size of flags and the height of the pole from which they were to be flown).

125 *See Wag More Dogs*, 680 F.3d at 366 (finding a sign ordinance to be content-neutral if: "(1) the regulation is not a regulation of speech, but rather a regulation of the places where some speech may occur; (2) the regulation was not adopted because of disagreement with the message the speech conveys; or (3) the government's interests in the regulation are unrelated to the content of the affected speech.").

126 HUDSON, *supra* note 12, § 2:2, at 31.

127 *Id.* (emphasis added).

how the Fourth Circuit could have corrected these problems in *Wag More Dogs.*[128]

A. *Implications of the Police Power Purpose as Part of the Three-Prong Test for Establishing Content-Neutrality in the Fourth Circuit*

In its evaluation of local sign ordinance constitutionality, much of the problem in the Fourth Circuit stems from the fact that a police power purpose can independently satisfy the test for determining content-neutrality.[129] In the Fourth Circuit, a sign ordinance is found content-neutral if (1) the ordinance regulates where speech may occur; (2) the ordinance was not adopted as a result of disagreement with the message the speech conveys; *or* (3) the ordinance serves a government interest unrelated to the content of the speech.[130] The third prong of this test encompasses the police power purpose. An ordinance is a valid exercise of the police power if it promotes "the morals, the health or the safety of the people"[131] or the aesthetics of the community.[132] By utilizing the word "or," the test for content neutrality implies that an ordinance may be adopted because of disagreement with the speech's message; so long as the government's professed interests in the regulation are unrelated to the content of the affected speech, the court will uphold it.[133]

When viewed in the context of sign ordinances, specifically the Fairfax sign ordinance in the Vienna church example, it is not difficult to see how courts can consider the ordinance a valid exercise of the state's police power. For example, sign ordinances are likely promulgated in order to ensure the health and safety of the locality's citizens.[134] In the Vienna church case, the Fairfax County legislature would likely argue that electronic signs are distracting to drivers, espe-

---

128 680 F.3d 359.

129 *See* Covenant Media, LLC v. City of N. Charleston, 493 F.3d 421, 433 (4th Cir. 2007).

130 *Id.* at 432-33 (emphasis added) (quoting Hill v. Colorado, 530 U.S. 703, 719-20 (2000)).

131 Howard Gillman, The Constitution Beseiged: The Rise and Demise of Lochner Era Police Powers Jurisprudence 19 (1993) (quoting Lochner v. New York, 198 U.S. 45, 56 (1905)).

132 *See* Berman v. Parker, 348 U.S. 26, 33 (1954); *see also* Kelo v. City of New London, 545 U.S. 469, 481 (2005).

133 Despite the literal language of the test, many Fourth Circuit cases have evaluated each of the three scenarios establishing content-neutrality and have only labeled the sign ordinance content-neutral when each of the three scenarios have been met. *See supra* Part I.B.

134 *See Covenant Media*, 493 F.3d at 434 (determining a local sign ordinance limiting the size of billboards was enacted to eliminate unsafe and distracting signs in the area).

cially when they are located on windy roads, and, as a result, the two-post limitation was made to minimize this distraction. This justification would likely exist for other signs as well. Many signs are located on or near roads so legislatures would likely justify regulations for such signs as being within their power to promote the health and safety of drivers, their passengers, and potential pedestrians in the area.[135] However, there are some situations in which the relationship between a local sign regulation and the health and safety of the citizens is tenuous.[136] In such situations, courts are likely to justify the local sign ordinance as a valid exercise of the police power based on aesthetic concerns.[137] Therefore, if the court cannot realistically justify a sign ordinance as promoting the health and safety of the citizens, it can likely justify it as promoting the aesthetic quality of the community.

Considering that courts can justify almost any sign regulation as the exercise as a valid police power and that many legislatures advocate paternalistic values, the Fourth Circuit's test for determining content-neutrality is especially alarming. Undeniably, this is "an era of public, and certainly government, anxiety over security and safety."[138] As a result, legislatures justify much of their legislation as exercising a valid police power.[139] When evaluating the impact the police power purpose has on local sign ordinances, it is important to remember that whether a regulation is content-based or content-neutral determines the level of scrutiny the court applies in determining the ordinance's constitutionality.[140] Because courts can justify almost every sign ordinance as a valid exercise of the state's police power, and the police power purpose independently satisfies the content-neutrality test in the Fourth Circuit, many sign ordinances are labeled content-neu-

---

135 *But see* Menthe, *supra* note 30, at 233 (citations omitted) (arguing that it is surprising that the traffic safety rationale has survived First Amendment scrutiny).

136 *See* Am. Legion Post 7 v. City of Durham, 239 F.3d 601, 609 (4th Cir. 2001) (citation omitted) (finding that a local ordinance limiting the size of flags to be flown and the height of the poles from which they were to be flown was supported by a substantial government interest because the city enacted the statute to promote aesthetic concerns, increase property values, and eliminate visual clutter).

137 *See id.*

138 R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 347 (2006) (footnote omitted).

139 *See* Barros, *supra* note 104, at 478 (stating that "early America was 'well regulated' . . . and American courts were not strangers to police regulations").

140 *See* HUDSON, *supra* note 12, § 2:2, at 31.

tral.[141] This results in the court applying a lower level of scrutiny in determining the ordinance's constitutionality, and as a result, "free speech may be impaired by exaggerated concerns for safety and security."[142]

Finally, legislatures respond to judicial decision.[143] In that respect, some have even recognized that regulations can escape the strict scrutiny standard if they are characterized as content-neutral rather than content-based.[144] Legislatures want to avoid the strict scrutiny standard because if the courts apply this standard, the regulation will likely be struck down as unconstitutional.[145] As a result, legislatures formulate their regulations so that they are not literally content-based on their face and are supported with a police power purpose.[146] For these reasons, it has been increasingly common for the Fourth Circuit to label ordinances content-neutral and evaluate them according to the lower level of judicial scrutiny.[147] With the police power purpose independently satisfying the test for content-neutrality in the Fourth Circuit, it is even less difficult for regulations to escape the strict scrutiny standard and be upheld as constitutional.

The next Section of this Comment will expose some of the criticisms of the content-based, content-neutral distinction in general.

B. *Problems with the Content-Based, Content-Neutral Distinction*

Beyond the problems associated with allowing a police power purpose to independently establish that a local sign ordinance is con-

---

141 *See* Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 365 (4th Cir. 2012) (determining an Arlington sign ordinance limiting the size of business signs was content-neutral); *see also* Covenant Media, LLC v. City of N. Charleston, 493 F.3d 421, 435 (4th Cir. 2007) (an ordinance limiting the size of billboard was found to be content-neutral); Am. Legion Post 7 v. City of Durham, 239 F.3d 601, 609 (4th Cir. 2001) (finding a North Charleston ordinance limiting the size of flags and the height of the pole from which they were to be flown was content-neutral).

142 Wright, *supra* note 138, at 347.

143 Georg Vanberg, *Legislative-Judicial Relations: A Game Theoretic Approach to Constitutional Review*, 45 AM. J. POL. SCI. 346, 346 (2001).

144 Matthew D. Bunker, Clay Calvert & William C. Nelvin, *Strict in Theory, but Feeble in Fact? First Amendment Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 357-58 (2011).

145 *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455 (2002) (Souter, J., dissenting) (citations omitted) ("Strict scrutiny leaves few survivors.").

146 *See* Bunker, Calvert & Nelvin, *supra* note 144, at 357-58 ("One key way for a regulation to escape the application of the strict scrutiny standard is for it to be characterized as content-neutral rather than content-based.").

147 *See* Wright, *supra* note 138, at 347.

tent-neutral, there are also problems associated with the content-based and content-neutral distinction generally. First, there is discrepancy within the courts as to what judges should consider when determining whether a regulation is content-based or content-neutral.[148] While some courts look to the text of the regulation, others look to the "legislative intent, purpose, and justification of the regulation."[149] Because of this discrepancy, some courts even look to a combination of both text and legislative intent in determining whether a local ordinance is content-based or content-neutral.[150] Ultimately, the Fourth Circuit implements this hybrid approach in its three-prong test for determining content-neutrality because both the text of the regulation and the intent behind the legislation are independently sufficient for establishing that the regulation is content-neutral.[151]

By utilizing different approaches to determine whether a local sign ordinance is content-based or content-neutral, courts undeniably reach different results. For example, a court might consider a regulation content-based under a textual evaluation while it could find the same regulation content-neutral under a legislative intent evaluation.[152] Additionally, not all regulations neatly fit into one of the categories.[153] This becomes especially apparent when "courts have paused to consider the real magnitude of the free speech values at issue."[154] In some instances, the regulation might literally restrict some types of speech in order to preserve free speech generally.[155]

Because of these problems, "a sense of arbitrariness in the judicial application of the [content-based and content-neutral] distinction emerges."[156] The crucial distinction ultimately "will depend upon how circumstances are conceived and described, how legislative purposes and motives are characterized, and how willing courts are to probe beneath the formally recorded evidence of legislative intent."[157] This

148 *Id.* at 337.

149 *Id.*

150 *Id.* (citations omitted).

151 *See* Covenant Media, LLC v. City of N. Charleston, 493 F.3d 421, 432-33 (4th Cir. 2007) (citations omitted) (establishing the three-pronged test for content-neutrality).

152 *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986) (citations omitted).

153 Wright, *supra* note 138, at 354.

154 *Id.* at 348.

155 *Id.* at 354-55 (citations omitted).

156 *Id.* at 335.

157 *Id.* at 353-54.

is problematic because the distinction essentially determines whether a court will find the regulation constitutional. Because content-based sign ordinances "are subject to the highest form of judicial review known as 'strict scrutiny,'"[158] there are "few survivors."[159] In one decision, the Supreme Court even went so far as to say that content-based regulations are "presumptively invalid."[160] On the other hand, courts review content-neutral regulations under a standard of intermediate scrutiny.[161]

Section C of Part II will propose solutions to the Fourth Circuit problems discussed in Sections A and B.

C. *Solutions to the Problems in the Fourth Circuit*

The Fourth Circuit continues to distinguish between content-based and content-neutral ordinances for the purposes of First Amendment analysis. As a result, the problems associated with the distinction are also present. Additionally, it is likely that the court will label most regulations content-neutral rather than content-based in this jurisdiction because a police power purpose is one of the three factors considered sufficient to establish content-neutrality.[162] As a result, the Fourth Circuit affords an intermediate level of constitutional scrutiny to almost all of the regulations that come under judicial review.[163] The same police power purpose that qualified the regulation as content-neutral in the first place can satisfy the intermediate scrutiny standard, and consequently, the Fourth Circuit upholds almost every local sign ordinance as a valid exercise of state power.[164]

Applying the Fourth Circuit standards and precedents to the Vienna church example, it is not difficult to see how the regulation for a two-post limit on electronic signs would likely pass constitutional muster. First, the ordinance would likely be classified as content-neutral because in the Fourth Circuit, a sign ordinance is content-neutral

---

158 HUDSON, *supra* note 12, § 2:2, at 31.

159 City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

160 R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (citations omitted).

161 HUDSON, *supra* note 12, § 2:2, at 31.

162 *See* Covenant Media, LLC v. City of N. Charleston, 493 F.3d 421, 432-33 (4th Cir. 2007) (citing Hill v. Colorado, 530 U.S. 703, 719-20 (2000) (establishing the three-pronged test for content-neutrality)).

163 *See supra* Part I.B.

164 *See supra* Part I.B.

if: (1) the ordinance regulates where speech may occur; (2) the ordinance was not adopted as a result of disagreement with the message the speech conveys; or (3) the ordinance serves a government interest unrelated to the content of the speech.[165] Considering the nature of electronic signs as well as the location of the Church on a windy, scenic road, it is likely that Fairfax County will justify the two-post limit ordinance as for the safety of the community or to preserve the aesthetics of the area.[166] As a result, the ordinance will be afforded the lower level of judicial scrutiny. It is in this context that "imposing only mid-level scrutiny on what is 'merely' a [content-neutral] speech regulation seems increasingly . . . disturbing."[167] Because the court affords a lower level of scrutiny to content-neutral regulations, the Fairfax electronic sign ordinance causes an unnecessary restriction on the freedom of speech.

This Section will propose and evaluate solutions to the problems in the Fourth Circuit that the test for content-neutrality and the content-based, content-neutral distinction created. In addition to clarifying the rule, the Fourth Circuit should utilize a cost-benefit analysis when determining which standard of judicial review to apply. This Section will conclude by exposing the Fourth Circuit's missed opportunity to implement these reforms in Wag More Dogs, a recent case concerning local sign ordinances and the First Amendment.

1. Clarifying the Test for Content-Neutrality in the Fourth Circuit

The biggest obstacle for First Amendment challenges to local sign ordinances in the Fourth Circuit stems from the fact that a police power purpose independently satisfies the three-prong test for determining content-neutrality.[168] The test seems to suggest that even if a regulation was adopted as a result of disagreement with the message conveyed, it would be considered content-neutral so long as the legislature is able to show that the ordinance furthers the health, safety, welfare, or aesthetics of the community.[169] This situation results in an

---

165 *Covenant Media*, 493 F.3d at 432-33 (citing Hill v. Colorado, 530 U.S. 703, 719-20 (2000) (establishing the three-pronged test for content-neutrality)).

166 Reilly, *supra* note 1, at A1.

167 Wright, *supra* note 138, at 347.

168 *See Covenant Media*, 493 F.3d at 432-34.

169 *See id.* at 433-34.

increased number of local sign ordinances labeled as content-neutral, even if they seem to be content-based on their face or after an examination of the ordinance's legislative intent.[170]

To correct this problem, the Fourth Circuit test for determining content-neutrality should not be met unless the ordinance is (1) not a regulation of speech, but rather a regulation of the places where some speech may occur and (2) the regulation was not adopted because of disagreement with the message the speech conveys. In addition to satisfying these two prongs, the government's interest in the regulation must also be unrelated to the content of the affected speech, meaning that the state is actually enforcing the ordinance to exercise its police power. The difference between this test and the current test employed in the Fourth Circuit is that instead of allowing a police power purpose to independently satisfy the requirements of content-neutrality, it is an additional requirement. The police power purpose should be a necessary condition rather than a sufficient condition.[171]

2. In Favor of a Cost-Benefit Analysis: Eliminating the Bright-Line Rule Used to Determine Judicial Scrutiny

In addition to problems with the test for determining content-neutrality, some have even argued that there are so many problems with the content distinction that it would be best to essentially eliminate the distinction and evaluate each local ordinance by the same level of judicial scrutiny.[172] Under this approach, the courts would "subject all restrictions on expression to the same critical scrutiny traditionally reserved for regulations drawn in terms of content."[173] Opponents of this argument point out that this approach would eliminate the problems associated with content-neutral restrictions that are as destructive as content-based restrictions.[174] But it also creates problems in the context of content-neutral regulations that do not

---

170 *See id.* (determining that although the sign regulation distinguished between different types of sign and inevitably this distinction led to restrictions on where certain content could be located, the ordinance was content-neutral because it was implemented to serve a purpose unrelated to the content of the sign).

171 *See infra* Part II.C.3.

172 *See* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 142 (1981).

173 *Id.*

174 Wright, *supra* note 138, at 360-61.

pose a substantial risk of repressing free speech.[175] In this situation, the content-neutral regulation is best evaluated with mid-level scrutiny because the regulation does not harm free speech and the entire community is better served by it.[176] The regulation serves a legitimate purpose, and the mid-level of scrutiny will most likely allow the courts to uphold it.[177] On the other hand, the regulation would almost certainly be struck down under a strict scrutiny standard.[178]

However, this counter-argument ignores that legislatures respond to judicial decisions.[179] Additionally, legislatures are known to "comply" with judicial decisions by implicitly evading them in order to avoid "public backlash."[180] Applying this reality to the judicial review of local sign ordinances and its effect on local legislation, it is not difficult to see how legislatures ensure that their local sign ordinances are not struck down as unconstitutional.[181] Ultimately, legislatures are aware that content-based regulations rarely meet the strict scrutiny standard, and courts invalidate these regulations. In order to avoid this strict scrutiny standard, a legislature only needs to structure its ordinance so that it meets the test for content-neutrality.[182] With the Fourth Circuit's allowance of a police power purpose to independently satisfy the test for content-neutrality, this is not a difficult task for Fourth Circuit municipalities. In fact, this practice appears to have caught on already in the Fourth Circuit, as many of the recent cases questioning the constitutionality of sign ordinances have determined that the ordinance at issue is content-neutral.[183] Furthermore, the police power purpose has been one of the major the reasons why these ordinances received the content-neutral label.[184]

Despite these realities, the opponents of eliminating the content distinction do suggest a valid solution to the problem that "[d]elusive

---

175 *Id*.

176 *Id.* (citations omitted).

177 *Id.* (citations omitted).

178 *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455 (2002) (Souter, J., dissenting) ("[S]trict scrutiny leaves few survivors.").

179 *See* Vanberg, *supra* note 143, at 346.

180 *Id.* at 347.

181 *See* Bunker, Calvert & Nelvin, *supra* note 144, at 357-58 (citations omitted).

182 *See id.*

183 *See supra* Part I.B.

184 *See supra* Part I.B.

exactness is a traditional pitfall in the design of legal doctrines."[185] This problem has especially been apparent when considering the various rules which have resulted from the content-based and content-neutral distinction.[186] To combat the problems that bright-line rules cause, opponents suggest that, rather than looking to the text and the legislative intent of the regulation, judges should consider the "realistic repressive potential of the speech restriction in question."[187] Once this potential has been determined, judges can apply the appropriate level of judicial scrutiny "regardless of whether the speech restriction would be characterized as [content-based] or [content-neutral] under current practice."[188] This solution would eliminate the "serious repressive dangers posed by restrictions that are assumed to be [content neutral]"[189] as well as the "social costs [that result] from needless application of a demanding strict scrutiny test."[190]

Although there are criticisms of this approach, they can be justified by the many benefits. The most compelling criticism to this approach is that this inquiry gives judges the freedom to decide cases the way they want without being controlled by precedent.[191] However, this argument presupposes that "categorical rules of constitutional law occasionally laid down by the Court constrain judicial discretion."[192] Additionally, reconstructing legislative purpose, as the current test requires, is likely more difficult and more likely to lead to abuses than comparing the costs and benefits of the speech restriction at issue.[193] So long as judges remain transparent in their evaluations,[194] this approach ensures that "the object of adjudication [remains] to help society to cope with its problems."[195]

---

185 Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 746 (2002).

186 *See* Wright, *supra* note 138, at 337-39 (citations omitted).

187 *Id.* at 335.

188 *Id.* at 336.

189 *Id.*

190 *Id.*

191 Posner, *supra* note 185, at 745.

192 *Id.*

193 *Id.* at 742.

194 Wright, *supra* note 138, at 364.

195 Posner, *supra* note 185, at 738.

3. A Missed Opportunity in *Wag More Dogs* and its Implications Going Forward

The Fourth Circuit had an opportunity to correct the deficiencies in local sign ordinance regulation with the recent case, *Wag More Dogs*.[196] But instead, the court applied the three-prong test to determine content-neutrality and found that the ordinance was content-neutral.[197] In doing so, the court did not weigh the costs and benefits of the ordinance to determine if a strict scrutiny standard or an intermediate standard was the most appropriate method in evaluating the ordinance's constitutionality.[198] Because the ordinance was labeled content-neutral, the court simply applied the intermediate scrutiny standard, and the ordinance was found to be constitutional.[199]

The court should have eliminated the police power purpose as an independent condition for satisfying content-neutrality and should have weighed the costs and benefits of the sign ordinance to determine which level of scrutiny was more appropriate. This approach would preserve the First Amendment's guarantee of protection of freedom of speech while still ensuring the police power to the states.[200] If the court had made these changes to the current standard, the Vienna church case would be easily decided. The court would likely find that the Fairfax ordinance would not be constitutional because a costs and benefits analysis would reveal that the ordinance ultimately restricts more speech than is necessary, and although it is on its face content-neutral, a strict scrutiny standard should be applied when evaluating its constitutionality. Because the "strict scrutiny leaves few survivors,"[201] the Fairfax two-post limit electronic sign ordinance would likely be struck down as unconstitutional, and the Fairfax County legislature would be required to amend the ordinance.

---

196 Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012).

197 *Id.* at 368.

198 *Id.* at 369 (citing Am. Legion Post 7 v. City of Durham, 239 F.3d 601 (4th Cir. 2001)).

199 *Id.*

200 This Comment does not argue that *Wag More Dogs* would have been decided differently if the Fourth Circuit had adopted the proposed reforms. Instead, it argues that the Fourth Circuit missed the opportunity to clarify and reform the rules for evaluating local sign ordinances to prevent unnecessary restrictions on speech in the future.

201 City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

CONCLUSION

The three-prong test for determining content neutrality in the Fourth Circuit opens the door to abuses in determining whether a local ordinance violates the First Amendment. A potential abuse stems from the notion that simply inserting a police power purpose into the legislation can establish that the ordinance is content-neutral. In order to correct the potential for this problem, the police power purpose should serve a supplemental, rather than sufficient, role in establishing content-neutrality.

Instead of utilizing a bright-line rule to determine which level of scrutiny the courts should apply in evaluating an ordinance's constitutionality, the court should weigh the costs and benefits of the regulation on free speech. By depending on this evaluation, the court can apply the level of scrutiny that is most appropriate in light of the cost-benefit analysis and regardless of whether the ordinance is content-based or content-neutral under current practice. If the Fourth Circuit had taken the opportunity to adjust current practices accordingly in the recent case of *Wag More Dogs*, the Fairfax ordinance in the Vienna church case and other ordinances unnecessarily impairing free speech would be struck down as unconstitutional, despite their content-neutral designation.