Denver Law Review

Volume 60 | Issue 1 Article 7

February 2021

Metromedia, Inc. v. City of San Diego: A First Amendment Analysis of Governmental Suppression of Speech

Eugene Burton Elliot

Follow this and additional works at: https://digitalcommons.du.edu/dlr

Recommended Citation
Eugene Burton Elliot, Metromedia, Inc. v. City of San Diego: A First Amendment Analysis of Governmental Suppression of Speech, 60 Denv. L.J. 105 (1982).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

METROMEDIA, INC. V. CITY OF SAN DIEGO: A FIRST AMENDMENT ANALYSIS OF GOVERNMENTAL SUPPRESSION OF SPEECH

INTRODUCTION

On March 14, 1972, the San Diego City Council adopted an ordinance which substantially prohibited the erection of off-site "outdoor advertising display signs" within the city.[1] In addition to on-site[2] commercial signs the ordinance permitted government signs, bench signs, commemorative plaques, religious symbols, signs within shopping centers not visible beyond the premises, real estate signs, public service signs depicting time, temperature or news, signs on vehicles, and temporary off-premises subdivision directional signs.[3] The city council later amended the ordinance to exempt "temporary political campaign signs."[4] The declared purposes of the ordinance included the intent "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and to "preserve and improve the appearance of the city."[5]

In *Metromedia, Inc. v. City of San Diego*,[6] the plaintiffs were engaged in the outdoor advertising business in San Diego. They challenged the constitutionality of the ordinance and sued to enjoin its enforcement. The trial court granted the plaintiffs' motion for summary judgment.[7] The Court of Appeals, Fourth Appellate District, affirmed the trial court.[8] The California Supreme Court reversed, holding that the ordinance did not violate first amendment guarantees.[9]

The United States Supreme Court reversed[10] in a decision that was unable to muster a majority in support of a single rationale. The ordinance was declared unconstitutional on its face due to its impermissible restrictions on noncommercial speech.

This comment will examine the different approaches the Supreme Court has developed to assess the constitutionality of governmental suppression of both commercial and noncommercial speech. An analysis of the ways in which these approaches were applied in *Metromedia* will follow. The com-

1. SAN DIEGO, CAL., CODE § 101.0700(B) (1972). Off-site signs are those that do not identify a use, facility, or service located on the premises or a product that is produced, sold, or manufactured on the premises. San Diego, Cal., Ordinance 10,795 (Mar. 14, 1972).

2. On-site signs are defined as those "designating the name of the owner or occupant of the premises upon which signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed." SAN DIEGO, CAL., CODE § 101.0700 (1972).

3. San Diego, Cal., Ordinance 10,795 (Mar. 14, 1972).

4. San Diego, Cal., Ordinance 12,189 (Oct. 19, 1977).

5. SAN DIEGO, CAL., CODE § 101.0700(A) (1972).

6. 453 U.S. 490 (1981).

7. *Id.* at 497.

8. *Id.*

9. 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), *rev'd*, 453 U.S. 490 (1981).

10. 453 U.S. at 521.

ment will conclude with an examination of the inherent difficulties in these approaches and a look at the way the Court would analyze a case in which a total prohibition of billboard advertising is presented.

I. CLASSIFICATIONS OF GOVERNMENTAL SUPPRESSION OF SPEECH

A. *Regulation Based on the Time, Place, or Manner of Speech*

The first amendment does not guarantee the right to communicate at all times, places, or in any manner.[11] The Supreme Court has held that the first amendment allows reasonable regulations of constitutionally protected speech where necessary to further significant governmental interests.[12] The essence of these regulations lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate government goals.[13] "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[14]

The Court established three criteria for reviewing such regulations in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[15] Restrictions on the time, place, and manner of speech are permissible provided that the ordinance is content-neutral, serves a significant government interest, and leaves open adequate alternative channels of communication.[16] In *Consolidated Edison Co. v. Public Service Commission*[17] the Court allowed a public utility company to include inserts discussing controversial issues of public policy in its monthly bills. The Court reaffirmed its position that a valid time, place, and manner restriction "may not be based either upon the content or subject matter of the speech."[18]

The most recent application of the time, place, and manner restriction occurred in *Heffron v. International Society for Krishna Consciousness, Inc.*[19] The Court determined that a state may require a religious organization desiring to distribute religious literature at a state fair to conduct those activities only at an assigned location, even though this limited the religious practices of the organization.

B. *Regulation of Speech Based on Content*

A regulation of the time, place, or manner of speech may be imposed so

11. Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981). *See infra* text accompanying note 19.

12. Young v. American Mini Theatres, Inc., 427 U.S. 50, 64 n.18. *See infra* text accompanying notes 32-34.

13. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980). *See also* Erzonoznik v. City of Jacksonville, 422 U.S. 205 (1975), where the Court stated that in order to survive a constitutional attack such regulations must be narrowly tailored.

14. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

15. 425 U.S. 748 (1976).

16. *Id.* at 771. *See also* Grayned v. City of Rockford, 408 U.S. 104 (1972), where an anti-noise ordinance survived constitutional attack because it was sufficiently tailored and did not unduly interfere with first amendment rights.

17. 447 U.S. 530 (1980).

18. *Id.* at 536.

19. 452 U.S. 640 (1981).

long as it is reasonable.[20] However, when the regulation is based on the content of speech, the governmental action must be more carefully scrutinized to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views."[21] Governmental action that regulates speech on the basis of its subject matter "slip[s] from the neutrality of time, place, and circumstance into a concern about content."[22]

In *Erznoznik v. City of Jacksonville*,[23] the Court invalidated an ordinance prohibiting the exhibition of motion pictures displaying nudity at drive-in theatres with screens visible from a public street because that the ordinance regulated expression on the basis of content.[24] In *Linmark Associates, Inc. v. Township of Willingboro*,[25] the Court struck down an ordinance prohibiting the placement of "for sale" and "sold" signs in front of residential dwellings. The Court reasoned that the ordinance banned only signs carrying a specific message rather than all signs of a certain size, shape, or location and, therefore, related to the content of speech.[26]

As a general rule "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[27] However, government regulations based on subject matter have been approved in narrow circumstances. In *Greer v. Spock*[28] the Court upheld the prohibition of partisan political speech on a military base even though civilian speakers had been allowed to lecture on other subjects.[29] In *Lehman v. City of Shaker Heights*[30] the plurality permitted a city transit system that rented space in its vehicles for commercial advertising to refuse to accept partisan political advertising.[31] These are narrow exceptions because both cases involved regulation of speech in government-created forums.

C. *Prohibition of a Particular Medium of Communication*

The distinction between regulation and total prohibition of speech was recognized in *Young v. American Mini Theatres, Inc.*[32] The Court held that a zoning ordinance banning adult book stores, movies, and bars did not constitute an invalid prior restraint violative of the first amendment or the equal protection clause of the fourteenth amendment.[33] The Court noted that the ordinance was not a flat prohibition on the operation of adult movie theatres

20. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980).
21. Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring).
22. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1972) (quoting Kalven, *The Concept of the Public Forum*: Cox v. Louisiana, 1965 SUP. CT. REV. 29).
23. 422 U.S. 205 (1975).
24. *Id.* at 211-12.
25. 431 U.S. 85 (1977).
26. *Id.* at 93-94.
27. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).
28. 424 U.S. 828 (1976).
29. *Id.* at 838.
30. 418 U.S. 298 (1974).
31. *Id.* at 302.
32. 427 U.S. 50 (1976).
33. *Id.* at 60.

within the city and cautioned that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech."[34]

In *Schneider v. Arizona*[35] absolute bans on handbill distribution were held unconstitutional notwithstanding claims of municipalities that the aim of the legislation was the prevention of littering. In *Jamison v. Texas*[36] the Court declared that "[t]he right to distribute handbills concerning religious subjects on the streets may not be prohibited at all times, at all places, and under all circumstances."[37] In *Martin v. City of Struthers*[38] a flat prohibition of door-to-door solicitation was held unconstitutional. In *Kovacs v. Cooper*,[39] although no opinion commanded a majority of the Court, three members of the plurality observed that an "[a]bsolute prohibition" on sound trucks was "probably unconstitutional."[40] Three others concluded their dissent on grounds that the statute in fact constituted just such "an absolute and unqualified prohibition" of sound trucks.[41]

Most recently, the total prohibition question was addressed in *Schad v. Borough of Mount Ephraim*.[42] In striking down a total ban on live entertainment the Court assessed "the substantiality of the governmental interests asserted" and "whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment."[43]

D. *Regulation of Commercial and Noncommercial Speech*

The Supreme Court first confronted the problem of determining the first amendment status of commercial speech in *Valentine v. Chrestensen*.[44] The Court held that the first amendment does not protect purely commercial speech.[45] Purely commercial advertisement of goods or services remained outside of first amendment protection until *Bigelow v. Virginia*.[46] The Court concluded that an advertisement which contained factual information pertaining to an issue of public concern outweighed a state's interest

34. *Id.* at 71 n.35.
35. 308 U.S. 147 (1939).
36. 318 U.S. 413 (1943).
37. *Id.* at 416.
38. 319 U.S. 141 (1943).
39. 336 U.S. 77 (1949).
40. *Id.* at 81-82.
41. *Id.* at 101 (Black, J., dissenting).
42. 452 U.S. 61 (1981).
43. *Id.* at 68-70.
44. 316 U.S. 52 (1942). The defendant was convicted of distributing commercial advertising handbills in violation of a local anti-litter ordinance prohibiting commercial leafletting in the streets. *Id.* at 53 n.1.
45. The Court determined that the primary purpose of the speech was commercial and held that addition of a political message on the back of the leaflet would not elevate it to a constitutionally protected status. *Id.* at 55. The Court later abandoned the primary purpose test in favor of a content analysis. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
46. 421 U.S. 809 (1975). The Court reversed the conviction of a Virginia newspaper that had published an advertisement for a New York abortion referral service in violation of a Virginia statute which prohibited ads that encouraged abortion.

in suppressing speech.[47]

Although the Court recognized that the first amendment protects commercial speech, it was quick to point out that commercial speech does not merit the same degree of protection as noncommercial speech. Speech which proposed no more than a commercial transaction was entitled to first amendment protection in *Virginia Pharmacy Board*. A Virginia statute prohibiting price advertising by pharmacists was held unconstitutional. The Court recognized, however, that "common-sense differences" between commercial and other forms of speech "suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired."[48]

In *Bates v. State Bar of Arizona*[49] the Court relied on the teachings of *Virginia Pharmacy Board* to prevent Arizona from prohibiting truthful and legitimate price advertisements of legal services and again recognized the "common-sense differences" between commercial and noncommercial speech.[50] One year later in *Ohralik v. Ohio State Bar Association*,[51] the Court upheld the suspension from practice of an attorney for face-to-face solicitation of business for pecuniary gain.[52] Justice Powell, writing for the Court, stated that commercial speech was afforded "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."[53]

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[54] a New York State Public Service Commission regulation which prevented electric utilities from advertising the use of electricity was held invalid. The Court reaffirmed the conclusion reached in *Ohralik*,[55] stating that the Constitution accords "a lesser protection to commercial speech than to other constitutionally guaranteed expression" and added that "[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."[56]

The Court then adopted a four-part test for determining the validity of government restrictions based on the content of commercial speech.[57] The first amendment protects only commercial speech which concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it seeks to implement a substantial governmental interest, directly advances that interest, and reaches no further than necessary to accomplish the given objective. The Commission's regulation was

47. The existence of the New York referral service was considered "not unnewsworthy." *Id.* at 822.

48. 425 U.S. at 771 n.24. *See supra* notes 15-16 and accompanying text.

49. 433 U.S. 350 (1977).

50. *Id.* at 380-81.

51. 436 U.S. 447 (1978).

52. These activities were referred to as "classic examples of 'ambulance chasing.'" 436 U.S. at 469 (Marshall, J., concurring).

53. 436 U.S. at 456.

54. 447 U.S. 557 (1980).

55. *See supra* text accompanying notes 51-53; *see also* Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

56. 447 U.S. at 563.

57. *Id.* at 563-66.

overturned, therefore, because the suppression of speech was more extensive than necessary to further New York's interest in energy conservation.

Finally, *Metromedia, Inc. v. City of San Diego*[58] presented the Court with a situation in which a billboard regulation distinguished between commercial and noncommercial speech. The ordinance was invalidated because commercial speech was afforded greater protection than noncommercial speech.

II. *METROMEDIA, INC. V. CITY OF SAN DIEGO*

A. *Procedural History*

The trial court found the San Diego ordinance to be an unconstitutional exercise of the city's police power and an abridgment of Metromedia's first amendment rights.[59] The California Court of Appeal affirmed on the first ground without reaching the first amendment issue.[60]

The California Supreme Court reversed on the ground that a city's interest in either traffic safety or aesthetics justifies exercise of the police power.[61] The ordinance, however, was analyzed only in terms of its effect on commercial speech. In dismissing the first amendment challenge, the court relied on the United States Supreme Court's summary dismissals of appeals in three cases upholding billboard regulation ordinances.[62]

The United States Supreme Court noted probable jurisdiction to hear Metromedia's appeal.[63] The Court was thus presented with its first opportunity to provide guidance for assessing the relation between the first amendment interest of billboard advertisements and a city's interest in traffic safety and aesthetics.

B. *Metromedia's Position*

Metromedia argued that the ordinance was invalid on first and fourteenth amendment grounds because it would result in the total ban of outdoor advertising in San Diego.[64] Metromedia pointed out that San Diego agreed that "many businesses, politicians, and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive."[65] The ordinance, Metromedia urged, would effectively eliminate an entire medium of communication.

---

58. 453 U.S. 490 (1981).

59. Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), *rev'd*, 453 U.S. 490 (1981).

60. *Id.*

61. *Id.*

62. *See* Newman Signs, Inc. v. Hielle, 440 U.S. 901 (1979); Suffolk Outdoor Advertising Co. v. Hulse, 439 U.S. 808 (1978); Markham Advertising Co. v. Washington, 393 U.S. 316 (1969). These cases were dismissed for want of a substantial federal question.

63. 449 U.S. 897 (1980).

64. Brief for Appellants at 18-33, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

65. *Id.* at 33-45.

C. *The Holding*

Five separate opinions were written. Justice White wrote the plurality opinion in which Justices Stewart, Marshall, and Powell joined. The plurality applied the four-part test in *Central Hudson* and found the ordinance to be valid insofar as it regulated commercial speech.[66] The ordinance, however, was declared unconstitutional under the first and fourteenth amendments.[67] Stating that noncommercial speech deserves greater protection than commercial speech, the Court held that the ordinance inverts this rule by affording a greater degree of protection to commercial than to noncommercial speech.[68]

Justice Brennan, writing a concurring opinion in which Justice Blackmun joined, took the position that the practical effect of the ordinance was to eliminate billboards as an effective medium of communication in San Diego.[69] By applying the *Schad* test, Justice Brennan found that the city failed to establish adequate traffic safety and aesthetic justification for a total prohibition of speech.[70] The concurring justices concluded that a city could totally ban billboards if it showed the ban would further a "sufficiently substantial governmental interest."[71]

The dissenting justices held that an absolute ban on billboard advertising, whether limited to commercial advertising or extending to all messages, was within the legitimate authority of local governments. However, each felt the need to write a separate opinion. Chief Justice Burger, citing *Heffron*, argued that nothing in the first amendment prevents such a ban.[72] Justice Stevens relied on *Kovacs* to reach the same conclusion.[73] Justice Rehnquist agreed substantially with the views of the Chief Justice and Justice Stevens,[74] adding that aesthetic justification alone was sufficient to sustain a total billboard ban.[75]

III. ANALYSIS OF THE COURT'S RATIONALE

Metromedia presented the Supreme Court with its first opportunity to assess the relationship between the first amendment interest in billboard advertising and a municipality's interest in traffic safety and aesthetics.[76] The case also presented the Court with the opportunity to provide some much needed clarification of the different first amendment protections afforded to commercial and noncommercial speech. The plurality focused on the latter question while the rest of the Court focused on the former. The result was

66. 453 U.S. at 512. *See supra* text accompanying notes 54-57.
67. *Id.* at 521.
68. *Id.*
69. *Id.* at 525-26 (Brennan, J., concurring).
70. *Id.* at 528. *See supra* text accompanying notes 42-43.
71. *Id.*
72. *Id.* at 566 (Burger, C.J., dissenting). *See supra* text accompanying note 19.
73. *Id.* at. 550-51 (Stevens, J., dissenting). *See supra* text accompanying notes 39-41.
74. *Id.* at 569 (Rehnquist, J., dissenting).
75. *Id.* at 570. *See also* Berman v. Parker, 348 U.S. 26 (1954).
76. *See* Aronovsky, Metromedia, Inc. v. City of San Diego: *Aesthetics, the First Amendment, and the Realities of Billboard Control*, 9 ECOLOGY L. Q. 295-339 (1981).

that neither issue received consideration by the entire Court. As Justice Rehnquist concluded, "it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definite principles can be clearly drawn. . . ."[77]

It was anticipated that the Court in *Metromedia* would provide guidance for municipalities contemplating the constitutionality of various billboard ordinances. Four of the five opinions provided some guidance. Unexpectedly, the case was resolved through an analysis of commercial and noncommercial speech. The precedential holding of *Metromedia* is that commercial speech must not be afforded greater first amendment protection than noncommercial speech. This concept is not novel and fits neatly into the line of commercial speech cases. It is significant, however, that the Court is still unprepared either to define what speech is "commercial" or "noncommercial" or simply to declare that all truthful speech should be afforded equal first amendment protection.

The more important aspect of this case is that it presents a good illustration of the difficulties and inconsistencies which have resulted from the evolution of four different methods of analyzing the single issue of governmental suppression of speech. This discussion examines the way these approaches were applied in *Metromedia*. While it agrees with the plurality's analysis and with its determination that the constitutionality of a total ban on billboards was not presented in this case, it looks at the way in which the entire Court might analyze such a case if it arises.

A. *Analysis of the Ordinance as a Distinction Between Commercial and Noncommercial Speech*

The plurality noted that the Court has "consistently distinguished between the constitutional protection afforded commercial as opposed to noncommercial speech,"[78] and separately considered the impact of the ordinance on both types of speech. The ordinance was found to be valid insofar as it regulated commercial speech. However, the ordinance was declared invalid under this analysis because commercial speech was permitted in situations where noncommercial speech was prohibited.

The *Central Hudson* test was applied to determine the constitutionality of the regulation on commercial speech.[79] The plurality recognized that traffic safety and the appearance of the city are "substantial governmental goals"[80] and agreed with the "accumulated, common-sense judgments of local lawmakers and of the many reviewing courts"[81] that elimination of billboards reasonably relates to traffic safety. The ordinance was found to go no further than necessary to accomplish the city's objectives. The regulation of commercial speech was thus held to satisfy the requirements of *Central*

77. 453 U.S. at 569 (Rehnquist, J., dissenting).
78. 453 U.S. at 504-05.
79. *Id.* at 507. *See supra* text accompanying notes 54-57.
80. *Id.* at 507-08.
81. *Id.* at 509.

Hudson.[82]

The San Diego ordinance permitted an owner of a commercial establishment to erect a billboard only on his own property and only if that billboard advertised goods or services available on that property. The plurality observed that the effect of this ordinance was to permit commercial speech while prohibiting noncommercial speech. The plurality recalled the development of the law establishing that while commercial speech deserves first amendment protection, it does not merit the same degree of protection as that afforded noncommercial speech.[83] The plurality argued that the ordinance results in an inversion of this law by providing greater protection for commercial speech than for noncommercial speech.[84] The plurality thus determined that the ordinance was unconstitutional, stating "that by allowing commercial establishments to use billboards to advertise the products and services they offer, the city necessarily has conceded that some communicative interests, e.g., onsite commercial advertising, are stronger than its competing interests in aesthetics and traffic safety."[85]

It appears, therefore, that the plurality would uphold the constitutionality of an ordinance which bans commercial speech while allowing noncommercal speech. Justice Brennan, however, recognized that such an ordinance will continue to raise significant first amendment problems. An unacceptable amount of discretion would be left in the hands of city officials to determine whether a proposed message should be labeled commercial or noncommercial. Justice Brennan posed the question, "[m]ay the city decide that a United Automobile Workers billboard with the message 'Be a patriot—do not buy Japanese-manufactured cars' is 'commercial' and therefore forbid it? What if the same sign is placed by Chrysler?"[86]

Although Justice Brennan raised good questions, he did not offer any guidance in distinguishing between commercial and noncommercial speech. Neither did the plurality, even though it relied upon this distinction to invalidate the ordinance. *Metromedia* provided an opportunity to clarify the status of commercial speech within the hierarchy of first amendment values. The Court, however, avoided this issue. In *Central Hudson* Justice Rehnquist stated that "the Court unlocked a Pandora's Box"[87] when, in *Virginia Pharmacy Board*, it recognized different degrees of first amendment protection for commercial and noncommercial speech. Until the Court either defines its terms or declares all truthful communication, commercial and noncommercial, worthy of equal first amendment protection, "Pandora's Box" will remain open.

B. *Analysis of the Ordinance as a Content-Based Regulation*

The plurality recognized that the exceptions to the ordinance's general

82. *Id.* at 512.
83. *Id.* at 504-08.
84. *Id.* at 513-14.
85. *Id.* at 520.
86. *Id.* at 539 (Brennan, J., concurring).
87. 447 U.S. at 598 (Rehnquist, J., dissenting).

prohibition of billboards distinguishes between permissible and impermissible signs by reference to content.[88] The plurality, however, avoided performing a content analysis. Perhaps this is because it had already decided the case under a commercial/noncommercial speech analysis and wanted to ensure that its holding would not be clouded by a separate analysis. Or perhaps it was to avoid a discussion concerning whether the exceptions themselves are constitutional. The plurality did point out, however, that these content-based exceptions preclude the use of a time, place, and manner analysis.[89]

Justice Stevens stated that "the plurality focuses its attention on the exceptions from the total ban and, somewhat ironically, concludes that the ordinance is an unconstitutional abridgment of speech because it does not abridge enough speech."[90] This is simply an inaccurate account of the plurality's treatment of the case. The plurality did not focus its attention on these exceptions. It clearly performed an entirely different analysis.

C. *Analysis of the Ordinance as a Time, Place, or Manner Regulation*

Rather than participate in the plurality's discussion of the distinction between commercial and noncommercial speech, the remainder of the Court treated the case as a straightforward competition between the first amendment values of billboard advertising and a municipality's interest in traffic safety and aesthetics. In assessing this relationship, the justices were divided over whether the ordinance should be classified as a time, place, or manner regulation or as a total prohibition of a medium of communication. The classification is vital because it determines the analysis to be used.

Chief Justice Burger stated that "[i]t is not really relevant"[91] how the ordinance is classified. He argued that the Court should not simply select a classification and apply its corresponding analysis. However, as the plurality pointed out, "[t]hese 'labels' or 'categories' . . . have played an important role in this Court's analysis of First Amendment problems in the past. The standard THE CHIEF JUSTICE himself adopts appears to be based almost exclusively on prior discussions of time, place and manner restrictions."[92]

The Chief Justice addressed the basic question of whether a city may exercise its police power to eliminate billboards in the interests of traffic safety and aesthetics.[93] In answering in the affirmative, Chief Justice Burger relied on the time, place, and manner analysis in *Heffron*.[94] He concluded that traffic safety and aesthetics are legitimate governmental interests and that billboards frustrate those interests.[95] The Chief Justice contended that the exceptions to the general prohibition are content-neutral. He stated that the city "has not preferred any viewpoint and, aside from these limited ex-

88. 453 U.S. at 516.
89. *Id.* at 517.
90. *Id.* at 540 (Stevens, J., dissenting).
91. *Id.* at 556 (Burger, C.J., dissenting).
92. 453 U.S. at 518 n.23.
93. *Id.* at 557 (Burger, C.J., dissenting).
94. *Id.* at 566. *See supra* text accompanying note 19.
95. *Id.* at 565.

ceptions, has not allowed some subjects while forbidding others."[96]

There are two flaws with Chief Justice Burger's choice of the time, place, and manner analysis. First, while the intent of the legislators may not have been to favor certain subject matter over others, the result of the exceptions is such a discrimination. For example, certain religious symbols would be permitted while other symbols, not recognized as "religious" would be prohibited. The time, place, and manner cases hold that the effect of the legislation may determine whether a regulation is content-neutral.[97] The effect of the exception is discrimination based on content. This removes the ordinance from a time, place, and manner analysis.

The second flaw in the analysis is that it neglects the requirement of *Virginia Pharmacy Board* that alternative channels of communication remain open. As the parties stipulated, however, adequate alternate means of communication do not exist.[98] Whether or not Chief Justice Burger approves of the concept of these classifications, it is difficult to believe that *Heffron* may be legitimately applied in this case.

D. *Analysis of the Ordinance as a Total Prohibition of Speech*

Perhaps it is because "every regulation necessarily speaks as a prohibition,"[99] or that Justices Brennan, Blackmun, and Stevens were simply anxious to express their views on the subject, that they treated the case as presenting the total ban question. Justice Brennan argued that the exceptions to the ordinance do not alter the nature of the ban, the "practical effect" of which eliminates billboards as an effective medium of communication.[100] Despite their good intentions of wanting to provide guidance in these matters, it seems that these justices prematurely performed the total ban analysis. A genuine, as opposed to a practical, total ban situation is likely to arise eventually.

Classification of *Metromedia* as a total ban question is inappropriate for two reasons. First, the exceptions to the general ban are significant and substantial. By their very nature these exceptions should remove the ordinance from this analysis. Second, the justices who applied this analysis mistakenly equated the total elimination of a particular business with the total elimination of a particular medium of communication.[101] The fact that the outdoor advertising business in San Diego is eliminated does not necessarily mean that billboards are also eliminated. Billboards may exist independently of the advertising business.

Determining whether an ordinance is a prohibition or merely a regula-

---

96. *Id.* at 564.

97. *See supra* text accompanying notes 20-22.

98. Joint Stipulation of Facts § 28, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

99. Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962).

100. 453 U.S. at 525-26 (Brennan, J., concurring).

101. "If enforced as written, the ordinance at issue in this case will eliminate the outdoor advertising business in the City of San Diego. The principal question presented is, therefore, whether a city may prohibit this medium of communication." *Id.* at 540 (Stevens, J., dissenting).

tion is at least as difficult as determining whether an ordinance is content-based. In *Kovacs* the question presented was whether an ordinance which regulated the use of "loud and raucous" sound trucks was, in fact, a regulation or a total ban.[102] Sound trucks are, by their nature, "loud and raucous." In *Metromedia* Justice Stevens stated that whether the ordinance in *Kovacs* was a regulation or a prohibition, it at least permits a city to enforce a rule that "curtails the effectiveness of a particular means of communication."[103]

IV. CONCLUSION

Despite the plurality's determination in *Metromedia* that traffic safety and aesthetics are "substantial governmental goals,"[104] it cannot be concluded that the plurality justices would allow either of these interests to uphold a total prohibition of billboard advertising. Justice Brennan argued that under these circumstances *Schad* is the appropriate test to apply. The city would have to prove that "a sufficiently substantial governmental interest is directly furthered by the total ban and that any more narrowly drawn restriction . . . would promote less well the achievement of that goal."[105] This would impose a much more difficult burden of proof on the city than it faced under the *Central Hudson* test which was applied only to determine the validity of restrictions on commercial speech. The "common-sense judgment" of a legislature which satisfied *Central Hudson* will not satisfy *Schad*.

If the city's interest in the ordinance is either traffic safety or aesthetics, *Schad* would require the city to prove that billboards actually do adversely affect traffic safety or to demonstrate that its interest in the aesthetics of industrial areas is sufficiently substantial to justify a total ban. These standards of proof would be extremely difficult to meet.[106]

If a case arises in which the total ban is unquestionably presented, there is little reason to believe that all of the justices will analyze the ordinance within the *Schad* framework. Justice Brennan is correct in his belief that the *Schad* test should be applied. *Kovacs* should not apply because it was questionable whether that ordinance constituted a regulation or a prohibition. The justices clearly pointed out that if the ordinance resulted in an absolute

---

102. 338 U.S. at 78.

103. 453 U.S. at 550 (Stevens, J., dissenting). "If the First Amendment categorically protected the marketplace of ideas from any quantitative restraint, a municipality could not outlaw graffiti." *Id.*

104. 453 U.S. at 507-08.

105. *Id.* at 528 (Brennan, J., concurring).

106. The considerations of public safety and beauty as proffered by the state as a basis for prohibiting the speech signified by the [billboards] are mutually inconsistent. The argument is made that our residents are entitled to look at the beauty of the countryside, untrammeled by the blight of billboards, in the face of the statement that billboards can be banned because they constitute a distraction to the drivers of automobiles. Using this reasoning, one could argue the countryside should be covered with billboards to reduce the temptation to avert one's eyes from the road.

Brief for Appellants at 41, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (quoting Oklahoma *ex. rel* Dep't of Transp. v. Pile, 603 P.2d 337, 342-43 (Okla. 1979), *cert. denied*, 446 U.S. 980 (1982)).

ban they would have reached a different conclusion by applying a more strict set of requirements.

Even if Justice Stevens does not apply *Kovacs* he still seems willing to conclude that a city's interests in traffic safety and aesthetics are legitimate governmental goals which are sufficient to justify the ban.[107] Justice Rehnquist will uphold the total ban solely on the basis of the city's desire to enhance its own beauty.[108] Chief Justice Burger, believing that it makes no difference how the ordinance is classified, will continue to hold that the city has the right to impose a total ban.[109]

The plurality would not indicate whether it would uphold a total ban.[110] The element of uncertainty in assessing whether the Court would uphold the prohibition is in determining the approaches which these justices are likely to take. If three justices follow the *Schad* test, or any of the other cases within that total prohibition category, the ordinance would most likely be invalidated because the city would probably not be able to meet such a heavy burden of proof. If two justices choose not to be restrained by the classification and to apply some less strict standard of review such as those chosen by the Chief Justice and Justice Rehnquist, the ordinance would probably be upheld.

Ironically then, the element of uncertainty rests with the same justices who decided the Supreme Court's first billboard regulation case.[111] *Metromedia* is a good example of "the often unpredictable variety of response and lack of finality of resolution that the recurring tensions between speech and law in a free society are capable of producing."[112]

Eugene Burton Elliot

107. "[A] wholly impartial total ban on billboards would be permissible. . . ." 453 U.S. at 553 (Stevens, J., dissenting).

108. "[T]he aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community. . . ." 453 U.S. at 570 (Rehnquist, J., dissenting) (citing Berman v. Parker, 348 U.S. 26, 32-33 (1954)).

109. "San Diego simply is exercising its police power to provide an environment of tranquility, safety, and as much residual beauty as a modern metropolitan area can achieve." 453 U.S. at 566 (Burger, C.J., dissenting).

110. 453 U.S. at 515 n.20. Justice Stewart has since retired from the Court.

111. At the time of this writing the City of San Diego was in the process of re-evaluating its billboard regulation. The City was unable at that time to venture a guess as to whether a total billboard prohibition would be declared valid. Telephone interview with C. Alan Sumption, Deputy City Attorney for the City of San Diego (Jan. 8, 1982).

112. F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 480 (1981).