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Metromedia, Inc. City of San Diego

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Metromedia, Inc. v. City of San Diego

INTRODUCTION

Hundreds of cities have enacted ordinances that impose controls on the number, size, or locations of billboards within their boundaries.¹ Many such restrictions have withstood first amendment challenges in state courts.² Metromedia, Inc. v. City of San Diego³ was an appeal from a California Supreme Court decision upholding a San Diego city-wide ban on off-site billboards. The United States Supreme Court, in a divided decision, struck down the San Diego ordinance on the grounds that it abridged first amendment guarantees of freedom of speech and unfairly favored “commercial” over “noncommercial” speech.⁴

I

HISTORY OF THE CASE

The San Diego ordinance, enacted in 1972, prohibited all off-site “outdoor advertising display signs” except a few specified types.⁵ Exempted from the ordinance’s proscription were real estate “for sale” or similar signs; signs displaying time, temperature or news; religious symbols; government signs; signs on buses, taxis, or benches; commemorative plaques; holiday decorations; and signs inside shopping malls.⁶ A 1977 amendment permitted temporary political campaign signs, if removed within ten days of an election.⁷ The ordinance also set forth a timetable for the removal of existing, nonconforming signs.⁸

Two billboard advertising companies, both of which owned sev-
eral hundred billboards in commercial and industrial areas of San Diego, brought suit to enjoin enforcement of the ordinance. They charged that the destruction of the San Diego outdoor advertising business, a medium of communication, exceeded the limits of the city's police power and violated the first amendment. The trial court granted summary judgment in favor of the plaintiffs and enjoined enforcement of the ordinance. It held that the ordinance was invalid both as an unreasonable exercise of police power and as an abridgment of first amendment rights. The California Court of Appeals affirmed on the first ground and did not reach the constitutional question.

The California Supreme Court reversed the lower courts' rulings and held that the city's stated goals of promoting traffic safety and improving San Diego's aesthetic appeal justified the exercise of police power. Further, the court held that the ordinance bore a reasonable relation to these permissible goals, and that the ordinance did not violate federal or state constitutional guarantees of freedom of speech. The California Supreme Court's opinion drew support from summary dispositions by the United States Supreme Court in three earlier appeals by advertisers protesting bans on off-site billboards, all of which were dismissed for lack of a substantial federal question. The

11. 26 Cal. 3d at 858, 610 P.2d at 409, 164 Cal. Rptr. at 512.
12. Id.
14. 26 Cal. 3d at 865, 610 P.2d at 416, 164 Cal. Rptr. at 519 (1980).
15. 101 S. Ct. at 2887. The California Supreme Court expressly overruled the precedent established in Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909), by holding that aesthetic purposes alone could justify a municipality's assertion of police power in regulating billboard advertising. 26 Cal. 3d at 865 n.12, 610 P.2d at 416 n.12, 164 Cal. Rptr. at 519 n.12. In Varney, a city prohibition against all billboard advertising, which was based solely on aesthetics, was held unconstitutional. Id. Other states have also repudiated old decisions that held aesthetic considerations insufficient to justify laws banning billboards. See, e.g., People v. Stover, 12 N.Y.2d 462, 465-67, 240 N.Y.S.2d 734, 736-37, 191 N.E.2d 272, 274-75 (1963).

The plaintiffs in Metromedia also asserted that municipal police power could not be used to prohibit a lawful business (i.e., outdoor advertising) not found to be a public nuisance, regardless of the reasonableness of the law in relation to the public welfare. The court, however, dismissed the distinction between "regulation" and "prohibition" as semantic rather than substantive, and reiterated "the general principle that a community may exclude any or all commercial uses if such exclusion reasonably relates to the public health, safety, morals or general welfare." 26 Cal. 3d at 864, 610 P.2d at 415, 164 Cal. Rptr. at 518.
16. 26 Cal. 3d at 866-71, 610 P.2d at 416-20, 164 Cal. Rptr. at 519-23. For a discussion of police power and constitutional objections to billboard regulation and the California Supreme Court decision in Metromedia in particular, see Comment, Metromedia, Inc. v. City of San Diego: Aesthetics, the First Amendment, and the Realities of Billboard Control, 9 Ecol. L. Q. 295 (1981).
California Supreme Court concluded that the Supreme Court had resolved that prohibiting off-site billboards did not violate the first amendment.

The California Supreme Court held that the ordinance did not infringe upon freedom of speech under the California constitution because it was justified without reference to the content of the regulated speech, served a significant government interest, and left open ample alternative channels for communication of the information. It was thus a lawful regulation of the time, place and manner of commercial speech. The court concluded that the city had asserted a strong interest in removing commercial off-site billboards and had legislated a reasonable, constitutional solution to the problem. The court did not consider the impact of the ordinance on noncommercial speech displayed on billboards. Justice Clark, the sole dissenter, protested that the issue before the court was “not the scope of permissible regulation of commercial thought,” but whether the ordinance met the stricter constitutional tests required of laws regulating political and social expression.

II
THE SUPREME COURT DECISION

The appellant’s main contention before the Supreme Court was that enforcement of the San Diego ordinance would unconstitutionally eliminate outdoor advertising as a medium of communication in the city. The Court, however, focused on the separate effects of the ordinance on commercial and noncommercial speech. It examined the balancing of interests by the city in great detail, even reconstructing the city’s decisionmaking process and evaluating each decision individually. Chief Justice Burger, in his dissent, charged that by doing so the Court was intruding on local authority. The plurality, however, was firm with respect to the need for a “particularized inquiry into the na-

18. 26 Cal. 3d at 870-71, 610 P.2d at 419, 164 Cal. Rptr. at 521.
19. Art. 1, § 9 of the California constitution states:
Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or the press. . . .
20. 26 Cal. 3d at 867-71, 610 P.2d at 417-20, 164 Cal. Rptr. at 520-23.
21. Id. at 871, 610 P.2d at 420, 164 Cal. Rptr. at 523.
22. Id. at 889, 610 P.2d at 431, 162 Cal. Rptr. at 534 (Clark, J., dissenting).
23. 101 S. Ct. at 2890.
24. Id. at 2891-93.
25. Id. at 2918.
ture of the conflicting interests at stake."\textsuperscript{26} The plurality stated that courts must play a protective role when first amendment rights are threatened by legislative intrusion, rather than defer to "merely rational legislative judgments in this area."\textsuperscript{27}

\textbf{A. Effect on Commercial Speech}

The Supreme Court agreed with the California Supreme Court's characterization of the San Diego ordinance as a valid regulation of commercial speech.\textsuperscript{28} The Supreme Court's reversal of the California court's decision was based on that court's failure to assess the impact of the billboard prohibition on noncommercial speech.\textsuperscript{29}

The Supreme Court had historically granted purely commercial speech—generally, advertisements of goods or services for sale—less first amendment protection than that afforded noncommercial speech.\textsuperscript{30} In \textit{Metromedia}, the Court reiterated its position that the protection available for commercial speech depends on the nature of "the expression and of the governmental interests served by its regulation."\textsuperscript{31} The rationale of the distinction between commercial and noncommercial speech, as articulated by Justice Stewart in \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council},\textsuperscript{32} is that the Constitution protects commercial speech only because it contains information of potential interest and value, not because of any ideas it contributes.\textsuperscript{33} A lesser degree of protection would thus seem appropriate for the lesser government interest in the information communicated by commercial speech. The Supreme Court has further defended its reluctance to extend full protection to commercial speech by stating that the common sense differences between commercial and noncommercial speech reduce the danger of crushing commercial speech with overbroad regulation.\textsuperscript{34}

Judicial recognition of constitutional protection for commercial

\begin{itemize}
  \item \textsuperscript{26} \textit{Id.} at 2890.
  \item \textsuperscript{27} \textit{Id.} at 2898.
  \item \textsuperscript{28} \textit{Id.} at 2893.
  \item \textsuperscript{29} \textit{Id.} at 2899.
  \item \textsuperscript{30} \textit{Id.} at 2892.
  \item \textsuperscript{31} \textit{Id.} (quoting \textit{Central Hudson v. Public Service Comm'n}, 447 U.S. 557, 562-63 (1980)).
  \item \textsuperscript{32} 425 U.S. 748 (1976).
  \item \textsuperscript{33} \textit{Id.} at 779-80 (Steward, J. concurring). In \textit{Virginia Board of Pharmacy}, the Court held a Virginia statute that prohibited pharmacists from advertising drug prices unconstitutional. The Court reasoned that interests in this commercial information may be as important as interests in political information that have been stringently protected by the Court, and that the free flow of commercial information was crucial to "the proper allocation of resources in a free enterprise system." \textit{Id.} at 763-65.
  \item \textsuperscript{34} \textit{Bates v. State Bar of Arizona}, 433 U.S. 350, 381 (1977) (State Bar Association's disciplinary rule against price advertising by attorneys held violative of the first amendment).
\end{itemize}
speech is a recent development; early cases had considered advertising outside the realm of the first amendment.\textsuperscript{35} The first explicit protection of commercial speech came in 1975 when the Court struck down a state statute that had prohibited dissemination of information about abortions.\textsuperscript{36} The Court ruled that competing interests—those of the first amendment and of regulation—must be weighed "[r]egardless of the particular label" given the speech.\textsuperscript{37} In 1976, the Court elaborated on this new doctrine in \textit{Virginia Board of Pharmacy}.\textsuperscript{38} While preserving the distinction between commercial and noncommercial speech, the Court ruled that because of the importance of the flow of information in the marketplace and society, speech proposing a commercial transaction did enjoy substantial protection.\textsuperscript{39} A year later, the Court reaffirmed the classification and enumerated the ways in which commercial speech could be regulated more stringently than noncommercial speech.\textsuperscript{40}

In \textit{Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York},\textsuperscript{41} the Court detailed a four-part test for evaluating the constitutionality of commercial speech regulations. First, the first amendment protects speech only if it is neither misleading nor related to unlawful activity.\textsuperscript{42} Second, a restriction on such constitutionally protected commercial speech is valid only if the government has asserted a substantial interest to be served by the restriction.\textsuperscript{43} Third, this interest must be directly advanced by the restriction.\textsuperscript{44} Finally, the regulation must be no more extensive than is necessary to serve the interest.\textsuperscript{45}

Applying the \textit{Central Hudson} analysis in \textit{Metromedia}, the Court ruled with only a brief discussion that the San Diego ordinance satisfied the first, second and fourth criteria.\textsuperscript{46} The Court examined in greater detail whether or not the ordinance directly advanced the city's interests in traffic safety, but deferred to "the accumulated, commonsense judgments of local lawmakers" that the distracting effect of bill-

\begin{itemize}
\item \textsuperscript{35} See, e.g. \textit{Valentine v. Chrestensen}, 316 U.S. 52 (1942).
\item \textsuperscript{36} \textit{Bigelow v. Virginia}, 421 U.S. 809 (1975).
\item \textsuperscript{37} \textit{Id.} at 826.
\item \textsuperscript{38} 425 U.S. 748 (1976).
\item \textsuperscript{39} \textit{Id.} at 763-765.
\item \textsuperscript{40} \textit{Bates v. State Bar of Arizona}, 433 U.S. 350, 383-84 (1977).
\item \textsuperscript{41} 447 U.S. 557 (1980). The case arose because the New York Public Service Commission had forbidden public utilities to advertise to promote the use of electricity. \textit{Id.} at 558-60. The Court struck down the Commission's ban on all promotional advertising on the ground that the restriction was broader than necessary to serve the state's interest in energy conservation. \textit{Id.} at 571-72.
\item \textsuperscript{42} \textit{Id.} at 563-64.
\item \textsuperscript{43} \textit{Id.} at 564.
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} 101 S. Ct. at 2892-93.
\end{itemize}
boards contributes to traffic accidents, and that regulation of billboards would reduce the hazard. The Court also held that the ordinance advanced the goal of improving aesthetics in the city. It saw no possible doubt that billboards could be perceived as aesthetically harmful; the only question was whether the city, by allowing on-site billboards, had negated the aesthetic impact of the ordinance's ban on off-site signs. The Court concluded that the city had "obviously" decided that the value of on-site billboard advertising outweighed the city's interest in aesthetics, but that the value of the off-site billboards did not. The Court accepted this reasoning, and held that the ordinance did advance the goal of improving the aesthetics of San Diego.

The Court, however, contributed nothing toward a workable definition of commercial speech. In Virginia Board of Pharmacy, Justice Stewart attempted to define commercial speech by noting that noncommercial speech is "integrally related to the exposition of thought," while commercial speech is "confined to the promotion of specific goods or services." Justice Stewart, however, has merely described a facet of commercial speech by contrasting it with noncommercial speech. Cities do not have a definition of commercial speech upon which to base regulations of commercial speech. The plurality, however, did not even address the problem of defining commercial speech. Justice Brennan, in his concurring opinion, commented on the ability of city governments to legislate on the basis of Justice Stewart's distinction between commercial and noncommercial speech, and Justice Brennan pointed out that "[c]ities are equipped to make traditional police power decisions . . . , not decisions based on the content of speech."

B. Effect on Noncommercial Speech

The Supreme Court's reversal of the California Supreme Court's decision hinged upon the ordinance's treatment of noncommercial speech. Although the ordinance was held to be a permissible restric-

47. Id. at 2893.
48. Id. at 2893-94.
49. Id. at 2894-95.
50. Id. at 2895.
51. 425 U.S. at 779-80 (Stewart, J., concurring). See also Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980) (commercial speech is "related solely to the economic interests of the speaker and its audience." Id. at 561. Commercial speech is also "speech proposing a commercial transaction." Id. at 562).
52. The slow common law process of developing a standard through repeated cases has proven tedious in the past for the Supreme Court. See, e.g., Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it.").
53. 101 S. Ct. at 2907-08. (Brennan, J., concurring).
54. Id. at 2908.
55. 101 S. Ct. at 2899.
tion on commercial speech under *Central Hudson*, the Court held that the ordinance did not satisfy the more stringent constitutional tests required of regulations applying to noncommercial speech.\(^5\) The Court found that the ordinance: (1) unconstitutionally favored commercial speech over noncommercial speech; (2) unconstitutionally discriminated among types of noncommercial messages; and (3) failed to satisfy established criteria for a constitutional restriction on the time, place and manner of speech.\(^5\) The distinction between commercial and noncommercial speech was also crucial in distinguishing the three recent cases, relied on by the California Supreme Court, in which the Supreme Court had summarily dismissed appeals by advertisers contesting the constitutionality of billboard restrictions similar to the San Diego ordinance.\(^5\)

The Court found several aspects of the ordinance's restrictions on noncommercial speech facially unconstitutional.\(^5\) The Court ruled that to be consistent with prior decisions according noncommercial speech a greater degree of protection than commercial speech, the protection afforded commercial speech must not exceed that given non-

\(^{56}\) Id. at 2892-97.

\(^{57}\) Id.

\(^{58}\) The Supreme Court approved of the state court's use of the summary decisions "[i]nsofar as our holdings were pertinent," *id.* at 2888, but noted that the precedential value of summary decisions is limited to "the precise issues presented and necessarily decided" in the action. *Id.* (quoting Mandel v. Bradley, 432 U.S. 173, 176 (1977)). The restrictions involved in the cases the Supreme Court had refused to hear were not as broad in scope as the San Diego ordinance, and did not have the same effect on noncommercial speech.

In Suffolk Outdoor Advertising Co. v. Hulse, 439 U.S. 808 (1978), the lower court judgment had sustained a municipal ordinance that prohibited off-site billboards but allowed on-site ones. The important difference in that case, according to the *Metromedia* opinion, was the *Suffolk* ordinance's definition of billboard, which encompassed only off-site signs that directed "attention to a business, commodity, service, entertainment or attraction," and did not include non-commercial speech. 101 S. Ct. at 2888.

The Court distinguished Newman Signs v. Hjelle, 268 N.W.2d 741 (N.D. 1978), *appeal dismissed*, 440 U.S. 901 (1979), in which a North Dakota statute regulated only off-site billboards located outside areas zoned for commercial or industrial uses. 101 S. Ct. at 2888. Apparently the Court believed that a total ban on all billboards in certain areas, whether the billboards carried commercial or noncommercial speech, is allowable as a time, place, or manner restriction, while distinguishing between billboards on the basis of content was not an allowable restriction. The Court's rationale for distinguishing this case is unclear, however, because the statute in this case also distinguished between on-site and off-site billboards. *Id.* In State v. Lotze, 92 Wash.2d 52, 593 P.2d 811 (1979), *appeal dismissed*, 444 U.S. 901 (1979), the Washington Supreme Court upheld a state statute that prohibited off-site signs visible from certain highway systems. The Supreme Court apparently agreed with the Washington Supreme Court because it summarily dismissed the appeal. 444 U.S. 901 (1979). The plurality did not give a convincing rationale for this distinction either. The Court also mentioned, but failed to fully distinguish, another summary dismissal, Markham Advert. Co. v. Washington, 393 U.S. 316 (1969). In *Markham*, however, the case had been decided when there was substantially less protection afforded commercial speech.

\(^{59}\) 101 S. Ct. at 2895-96.
commercial speech. Because the San Diego ordinance allowed on-site advertising signs but did not allow the owner or occupant of property to display most noncommercial messages on identical billboards, the Court declared that the ordinance unconstitutionally favored commercial speech.

Thus, if the city allowed billboards at all, it could not limit their content to commercial messages related to on-site goods and services. The city could not decide that commercial information may be displayed where noncommercial information may not; the Court said that there had been no explanation as to why on-site commercial billboards would be more threatening to public safety or would detract more from the beauty of the city than would noncommercial billboards located in the same places. Finally, the ordinance did not qualify as a reasonable restriction on the time, place, or manner of speech because it distinguished between signs at the same location based on their content.

The ordinance defines permissible locations based on the relationship of the message to the premises on which the sign is displayed. As Justice Brennan pointed out in his concurring opinion, the San Diego ordinance could be read to allow noncommercial billboard messages if they are related to the property on which they are located. Since the ordinance allowed a commercial occupant of property to advertise its product or services, he reasoned, “a political campaign headquarters could advertise ‘Vote for Brown.’”

Chief Justice Burger accused the plurality of misconstruing previous Court decisions that discussed the “preferred position” of noncommercial speech. According to the Chief Justice, these previous cases limit the range of constitutionally permissible regulation of noncommercial speech, but they do not mean that a legislature is forbidden to give more statutory protection to commercial speech if the regulations of both commercial and noncommercial speech are otherwise constitutional “under the standards respectively applicable.” No Supreme Court case, Chief Justice Burger wrote, mandates that if one type of speech is legislatively protected, all others ranking higher with respect to degree of constitutional protection must be given similar legislative

60. Id. at 2895.
61. Id.
62. Id.
63. Id.
64. Id. at 2896-97.
66. Id. at 2907.
67. Id.
68. Id. at 2924 (Burger, C.J., dissenting).
69. Id. at 2923.
Another failure of the ordinance in the plurality's view was its regulation of the kinds of noncommercial speech allowed: namely, the exceptions allowed for religious symbols, campaign signs, historical plaques, and government signs. The Court held that although the city could distinguish between different categories of commercial speech, and permit only certain kinds, it could not do the same with noncommercial speech. This would allow the city "to choose the appropriate subjects for public discourse." The plurality's emphasis on the exceptions included in the San Diego ordinance prompted Justice Stevens to charge in his dissent that the Court had found the ordinance unconstitutional "because it does not abridge enough speech." Chief Justice Burger accused the plurality of trivializing first amendment values by suggesting that the "noncontroversial" and "purely factual" exceptions contained in the ordinance allowed the city to set the agenda for public discussion. Justice White, writing for the plurality, denied both of these accusations, but stated that the exceptions were of great significance in assessing the strength of the city's interest in prohibiting billboards. By allowing the exceptions, the Court said, the city "conceded" that its interest in the communication of some types of noncommercial information outweighed its interests in traffic safety and aesthetics. Since the city is not free to differentiate among different types of noncommercial speech, all types of noncommercial communication must therefore be considered to outweigh the city's asserted interests in aesthetics and safety, and the city's failure to permit them all was unconstitutional.

Finally, the Court refused to accept the ordinance as a reasonable "time, place, or manner" restriction on freedom of speech. In this regard, the Court held that the ordinance distinguished between signs at the same location based on their content and thus could not be considered a neutral regulation merely of the time, place, or manner of

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70. Id.
71. 101 S. Ct. at 2896. Most of the exceptions may have been superfluous because the California Supreme Court construed the ordinance to limit its application to large, permanent billboards. 26 Cal. 3d at 870, 610 P.2d at 419, 164 Cal. Rptr. at 522. The exceptions are mostly for small signs that would not be distracting to motorists, and, in the case of traffic signs, would actually aid in traffic safety.
72. 101 S. Ct. at 2896.
73. Id. at 2909 (Stevens, J., dissenting).
74. Id. at 2922-23 (Burger, C.J., dissenting).
75. Id. at 2899.
76. Id.
77. Id. at 2896.
78. Id. at 2899.
Because the parties had jointly stipulated that other forms of advertising were "insufficient, inappropriate, and prohibitively expensive" for many businesses, politicians, and others who relied on outdoor advertising, the Court ruled that no satisfactory alternative means of communication were available to billboard users. The Court cited *Linmark Associates, Inc. v. Willingboro*, in which it had held that a city ordinance prohibiting real estate "for sale" signs left sellers with no satisfactory way to effectively communicate their messages. The Court, however, did not consider possible differences in the need for alternative methods of communication between persons or businesses wishing to display information on their property directly related to the property and those wishing to advertise on off-site billboards. A business that is not permitted to indicate where it is located may have no realistic alternate means of informing the public of its location, while an off-site advertiser may consider other methods of commercial communication even though another alternative may be more expensive.

III

IMPACT OF THE DECISION

The *Metromedia* decision, with its five separate opinions, was called a "Tower of Babel" by a dissenting justice. While this characterization may overstate the case, the opinion does not provide a clear constitutional standard to use in dealing with the blight of billboards. The Court made two parallel analyses of the ordinance: one for its effects on commercial speech, and one for its effects on noncommercial speech. Some state courts have sustained billboard prohibitions using a fundamentally different approach that may yield clearer guidelines. For example, in *State v. Lotze* the Washington Supreme Court, upholding a state statute that banned all signs visible from designated highways, based the decision on the distinction between on-site and off-site signs. Like the San Diego ordinance, the Washington statute delineated exceptions for certain on-site commercial signs such as real estate "for sale" signs. The court recognized that this meant commer-

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80. 101 S. Ct. at 2897.
81. Id.
82. Id.
84. Id. at 93.
85. 101 S. Ct. at 2924 (Rehnquist, J., dissenting).
87. Id. at 59-60, 593 P.2d at 814-15.
88. Id. at 59, 593 P.2d at 814.
cial speech was being favored to some degree, but concluded that "[t]he exceptions appear to be tied to necessity." For those wishing "to identify, rather than merely advertise" their businesses, no alternative channels of communication may be practical, but other commercial or noncommercial messages may be conveyed by many other communication media. Lotze was summarily affirmed by the Supreme Court in 1979, but in Metromedia the Court chastised the Washington court for failing to guarantee noncommercial speech a higher degree of protection than commercial speech, and overruled its affirmance to the extent the Washington decision was inconsistent with Metromedia.

Metromedia holds that noncommercial billboards must be permitted wherever commercial signs are permitted. Therefore, if commercial signs are allowed on the basis of their relation to the premises on which they are displayed—i.e., if on-site advertising signs are permitted—then noncommercial billboards must be allowed anywhere a business could erect a billboard. In practice, this eliminates a partial ban in commercial and industrial areas, leaving cities with the choice of imposing a total ban on billboards or enacting a more traditional, limited restriction prohibiting all billboards in designated areas.

The plurality explicitly left undecided the constitutionality of a total ban on billboards, but Justice Brennan, who considered the San Diego ordinance to have the practical effect of an outright prohibition, stated that such a ban should be evaluated with reference to the test developed to analyze "content-neutral prohibitions of particular media of communication." A recent Supreme Court decision in this area was Schad v. Borough of Mt. Ephraim, where the Court struck down a city ban on live entertainment. Brennan wrote that a city could totally ban billboards, under Schad, if it could show that a "sufficiently substantial" government interest was furthered thereby and that any more narrowly-drawn restriction would "promote less well" achievement of that goal. Applying this test in Metromedia, Brennan concluded that San Diego had not justified its restriction because it had not proven that billboards impair traffic safety or that its interest in the aesthetics of commercial and industrial areas of the city was "sufficiently substantial."

89. Id.
90. Id.
92. 101 S. Ct. at 2895 n.18.
93. Id. at 2899.
94. Id. at 2896 n.20.
95. Id. at 2902 (Brennan, J., concurring).
97. 101 S. Ct. at 2903 (Brennan, J., concurring).
98. Id.
The Metromedia Court approved of a prohibition of only off-site commercial billboards,\textsuperscript{99} such as in the ordinance upheld in \textit{Suffolk Outdoor Advertising Co. v. Hulse}.\textsuperscript{100} The definition of billboard in the \textit{Suffolk} ordinance, however, only included off-site signs that directed attention to a “business, commodity, service, entertainment or attraction,”\textsuperscript{101} and thus did not prohibit noncommercial messages or some commercial messages. Justice Brennan, however, foresaw potential constitutional difficulties with such a restriction if city officials were allowed to determine, before a sign was erected, if its content were “commercial” or “noncommercial.”\textsuperscript{102} Reiterating his statement that “[t]he line between ideological and nonideological speech is impossible to draw with accuracy,”\textsuperscript{103} he expressed concern that such discretion in the hands of city officials could lead to the suppression of noncommercial speech.\textsuperscript{104}

\textbf{CONCLUSION}

The Metromedia decision indicates that the Supreme Court is sharply divided over the way potential legislative infringements on first amendment freedoms are approached. The dissenters were eager to defer to local legislative judgments, while Justice Brennan rejected even San Diego's asserted interests in aesthetics and traffic safety as justifications for regulating billboards. The plurality occupied a middle ground, holding that the city's balancing of interests was constitutional for both noncommercial and commercial speech, when each was considered separately, but not when this balancing resulted in a “preferred position” for commercial speech.

The difference in degree of constitutional protection given commercial and noncommercial speech was the determining factor in Metromedia. The Court did not broaden the protection accorded commercial speech, nor did it clarify exactly to what degree of protection commercial speech is entitled. Rather, the Court simply emphasized that commercial speech could not under any circumstances be favored over noncommercial speech.

\textit{Metromedia} did more than reject a sloppily-drafted city ordinance. A plurality, at least, of the Court was obviously very concerned with preventing the level of first amendment protection given noncommer-
cial speech from falling to that which is afforded advertising. The plurality did not base the decision on protecting commercial speech; it instead concentrated on preserving a high degree of protection for non-commercial speech.

While the Court's goal of ensuring preferential treatment for ideological speech is understandable, cities contemplating billboard regulation will not find many clear guidelines in *Metromedia*. The decision precludes attempts to alleviate a city-wide billboard problem by banning all off-site signs. Cities may still impose traditional limited restrictions, such as bans along scenic highways or in designated areas. The only more comprehensive alternatives would seem to be a total ban or a ban on all commercial billboards. After *Metromedia*, the constitutionality of the first two of these alternatives is not certain.

Mary C. Randolph

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