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First Amendment Aspects of Control of Outdoor Advertising*

A report prepared under ongoing NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs", for which the Transportation Research Board is the Agency conducting the Research. The report was prepared by Jules B. Gerard. Larry W. Thomas, formerly TRB Counsel for Legal Research, was principal investigator, serving under the Special Technical Activities Division of the Board at the time this report was prepared.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems in highway law. This report deals with the significance of a recent court decision, Metromedia, Inc. vs. City of San Diego, regarding the First Amendment guarantee of free speech when applied to control of outdoor advertising.

This paper will be included in a future addendum to a text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and updates of eight existing papers, was issued during 1979, a second addendum, consisting of two new papers and 15 supplements, was distributed early in 1981, and a third addendum consisting of eight new

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papers, seven supplements, and an expandable binder for Volume 4 was distributed in 1983. The text now totals more than 2,200 pages comprising 56 papers. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB pulications office at a cost of $90.00 per set.

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First Amendment Aspects of Control of Outdoor Advertising

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INTRODUCTION

Aggressive outdoor advertising has been a feature of the United States since before the turn of the century. With the increasing use of the automobile during the 1920s, it began a period of explosive growth which continues today.

From the start there were those who believed that billboards and related forms of outdoor advertising impaired the enjoyment of the natural environment, created traffic and other kinds of safety hazards, and interfered with intelligent land-use planning. They attempted to regulate such advertising by imposing land-use controls, usually zoning ordinances, on property, a pattern which also survives today.

Many of their early efforts were frustrated by courts. Substantive due process barriers, in one guise or another, had to be overcome. Under the *laissez-faire* constitutional notions then in vogue, these barriers were thought to arise any time government attempted to regulate either property or business. These barriers began falling with the eventual repudiation of the constitutional theory on which they were based.[1]

The problem of aesthetics remained. Courts expressed doubt that any regulation based "merely" on aesthetics could be constitutional. In 1954, however, the United States Supreme Court unequivocally held that aesthetics was as legitimate a foundation for the regulation of land use as more narrowly conceived concepts of the "public welfare." [2] This obstacle began to crumble too, although it did not disappear entirely.[3]

By 1980, the proponents of regulation had every reason to believe that the long struggle to justify limitations on outdoor advertising had finally succeeded. Regulation had become nationwide with Congress' passage of The Bonus Act in 1958 [4] and of The Highway Beautification Act of 1965.[5] In its prior two terms, the Supreme Court three times had rejected efforts to erect the first amendment as yet another constitutional hurdle to be jumped. All three cases were appeals from state supreme court decisions which had upheld outdoor advertising regulations over claims that they violated the free speech guarantee of the first amendment. All three appeals were "dismissed for want of a substantial federal question," [6] which means, translated from jargon, that the Court held the first amendment claims to be without merit.[7]

But that optimistic outlook was quickly shattered. In July 1981, the Supreme Court suddenly reversed directions and imposed stringent first amendment limitations on the power of government to regulate outdoor advertising. In *Metromedia, Inc. v. City of San Diego,*[8] the Court overturned a complex billboard ordinance that had been crafted over a period of years. The result was a setback for advocates of regulation that is destined to prolong their dispute with outdoor advertisers for the foreseeable future.

Before *Metromedia,* regulating outdoor advertising was primarily a land-use or zoning problem. Having overcome the substantive due process and aesthetics obstacles of earlier years, planners now confronted a whole new range of problems. These problems were new in at least two respects.

First, the imposition of first amendment doctrine on what previously had been a problem of regulating land use is new. Land-use regulations typically enjoy a presumption of constitutionality. The effect of the presumption is to cast a heavy burden of persuasion on the challenger to demonstrate the invalidity of the regulation.[9] No such presumption of constitutionality attends regulations of speech under traditional first amendment doctrine. Indeed, much of that doctrine has been interpreted to mean precisely the contrary—that the burden is upon the government to justify the regulation.[10] Since allocating the burden of persuasion frequently determines the outcome of litigation, applying traditional first amendment doctrine could bring about a sea of change in the regulation of outdoor advertising.

Second, the particular aspects of first amendment doctrine on which the Court relied in striking down the billboard ordinance in *Metromedia* are new. Only recently did the Court extend first amendment protection to commercial advertising, and the nature of that protection remains uncertain in important respects. Moreover, the Court also based its decision on the requirement of content neutrality—the prohibition against regulations that distinguish one communication from another on the basis of their contents. Although the requirement of content neutrality is not new, this application of it was.[11]

This paper attempts to assess, as far as is possible at this early stage, the effects of *Metromedia*'s application of first amendment doctrine to the regulation of outdoor advertising. The sections that follow begin by reviewing the recent first amendment developments on which the Court relied. Against that background, an analysis and critique of the *Metromedia* decision is given. This discussion is followed by the responses of lower courts to that decision. The paper concludes with an appraisal of the prospects for control of outdoor advertising in light of *Metromedia* and its progeny.

FIRST AMENDMENT BACKGROUND

As courts increasingly approved regulations of outdoor advertising, the United States Supreme Court, in a seemingly unrelated development, was restructuring first amendment doctrine. The result was to accord speech greater protection than it had been receiving. This was achieved in a number of ways. The Court created new tests which any regulation of speech had to satisfy in order to survive constitutional scrutiny. One such test is the requirement of content neutrality. The Court also expanded the scope of the first amendment to cover activities that previously had been thought to be unprotected. One such activity is commercial advertising. Finally, in first amendment cases the Court gradually abandoned the rule that statutes are presumed to be constitutional and the

burden rests on the challenger to prove the contrary. All of these developments contributed, explicitly or implicitly, to the Court's decision in *Metromedia*.

The Requirement of Content Neutrality

A central purpose of the first amendment was to deny to government the power to censor speech. The requirement of content neutrality directly advances that fundamental purpose. If government has the power to regulate speech because of its content, government officials may have the power to suppress the publication of information they would rather conceal and of points of view with which they disagree. The real danger would be the creation of a system of governmental censorship in direct violation of the core intent of the first amendment.

Yet, all of the classical examples of constitutionally permissible restrictions on speech—libel, obscenity, advocacy of unlawful conduct—are expressly defined in terms of content. No law forbidding obscenity, for example, could stand if there were a blanket requirement that all regulations of speech had to be content neutral. For the very thing that distinguishes obscenity from constitutionally protected speech is the content of the obscene publication. Despite its direct relationship to the fundamental purpose of the first amendment, therefore, the requirement of content neutrality cannot be applicable to all regulations of speech.

The requirement of content neutrality initially was devised for, and still has its greatest utility in, the "public forum" cases. The seminal cases dealt with various kinds of government property, such as parks and streets, which the Supreme Court held must be made available to the public for speech-related activities (hence "public forum").[12] Regulations of activities in such places almost always profess to be disinterested in the content of the planned speech. Instead, they purport to be concerned about other matters, such as the safe and free flow of traffic along the streets, etc. Governmental interests of these kinds would be interfered with no matter what the speaker says. The interest in the safe and free flow of traffic, for example, would be affected by any street parade no matter who sponsors it. Inevitably, a rule soon was formulated that such regulations could not distinguish between applicants for use of the public forum on the basis of the content of their planned speech.[13] For if government had the power to select the speakers who were entitled to use its property for communicative purposes, it could easily suppress certain points of view simply by denying access to the public forum to speakers who would express those views.

In an early case, the Supreme Court used the phrase "time, place and manner" as a generic characterization of the various kinds of regulations of the public forum that profess to protect governmental interests that are unrelated to speech content.[14] The phrase stuck, and restrictions of this kind now are commonly referred to as "time, place and manner regulations." [15]

In classical constitutional jurisprudence, then, regulations of speech traditionally are divided into the two categories just described for purposes of analysis: (1) regulations that impose restrictions on speech because of its content, such as laws prohibiting obscenity, libel, and so on; and (2) time, place and manner regulations that are intended to protect other governmental interests unrelated to speech, such as traffic regulations, but that are applied to speech-related activities, such as parades. Although some overlapping inevitably occurs, it is generally true that each category has special rules that govern the constitutionality of the regulations within that category.

Applying the content neutrality requirement to the first category is impossible because it would be an obvious contradiction in terms. In the category of regulation-because-of-content, the Supreme Court has devised other safeguards against government censorship of constitutionally protected speech. The most important of these safeguards, of course, are the rules that narrowly circumscribe the kinds of speech that lawfully may be prohibited,[16] such as those that determine what utterances may be deemed to be obscene. A second safeguard is the Court's insistence on clear and precise definitions of the prohibited speech.[17] A third is the requirement that the procedures used to implement the prohibition must ensure prompt judicial review of the initial administrative determination that the particular speech falls within the prohibited class.[18] These safeguards in the category of regulation-because-of-content serve to prevent officials from suppressing constitutionally protected ideas and information. They are the functional equivalent, in other words, of the content neutrality requirement.

The requirement of content neutrality grew from the second category, the time, place and manner regulations of the public forum, where it has real merit as a device to prevent government suppression of the merely unorthodox or unpopular view. Even so, however, the requirement was not universally applied to *all* regulations of the public forum.

Although most of the litigated regulations of the public forum were designed to protect governmental interests that were unrelated to speech, some of them were speech-related. The clearest examples are from the cases in which speakers in the public forum were charged with breach of the peace (or some similar offense) for provoking their audiences to violence.[19] Even a casual perusal of these decisions will disclose that they were not, and could not have been, decided under a standard that prohibits government from distinguishing one speech from another on the basis of their contents. "The most stringent protection of free speech," Justice Holmes once said in a famous and oft-repeated aphorism, "would not protect a man in falsely shouting fire in a theatre and causing a panic." [20] As a matter of plain historical fact, therefore, the public forum cases themselves do not support the proposition that all regulations of the public forum must be content neutral.

Recently, however, the Court sometimes has ignored this history in what appears to be a determined effort on its part to expand the reach of the content neutrality requirement. The Court's performance in this recent effort has been unsatisfactory for a number of reasons to lawyers who must look to its opinions for guidance in the advice they give their clients.

First, the Court's performance has been both erratic and inconsistent. Sometimes it imposes the requirement of content neutrality and sometimes it does not.[21] Except for cases that fit the classical public forum pattern,[22] it has become virtually impossible to predict when it will impose the requirement and when it will not. The confusion is made worse because the Court sometimes relies on cases that approved regulations discriminating on the basis of content as authority for the proposition that content discrimination is forbidden.[23]

Second, the Court has begun to impose the requirement on laws that have little, if anything, to do with regulating the public forum. The pertinent example is the *Metromedia* decision, the central concern of this paper. Whatever else may be said of billboards and other forms of outdoor advertising, they manifestly are not government property to which the public at large is guaranteed access, the classical definition of the public forum.

Moreover, many of the cases that have reached the Court in recent years have involved complex regulations that defy classification by the simple, traditional, two-part scheme.[24] On the one hand, the regulations restricted, either in terms or as applied, the content of speech. In that respect they resembled the regulations-because-of-content in the first category of traditional restrictions on speech. On the other hand, the regulations professed to be concerned mainly with protecting governmental interests unrelated to speech. In that respect they resembled the time, place and manner regulations in the second traditional category. Perhaps the most famous case of this kind is *Young v. American Mini Theatres, Inc.*,[25] which concerned a zoning ordinance that prohibited locating "adult theaters" within 500 feet of a residential area or closer than 1,000 feet from each other and from other specified businesses. "Adult theaters" were defined in terms of the kinds of movies they showed, an obvious classification based on content. But the purpose of the ordinance was to prevent the blighting of neighborhoods by the congregation of certain kinds of businesses, a purpose that was utterly unrelated to the suppression of speech. A narrowly divided Court (the decision was 4–1–4) upheld the ordinance, but did not offer an agreed rationale for handling complex regulations of this kind.

The third difficulty with the Court's expansion of the content neutrality requirement cuts across the first two and has special relevance to the control of outdoor advertising. That difficulty is the absence of an explanation of *why* the particular regulation at issue *should have to be* content neutral.

Some members of the Court seem to believe that any regulation that restricts speech, whether or not that was its purpose, must be content neutral unless it falls within one of the previously approved types of regulation-because-of-content. They would, in other words, treat the types of speech in the first traditional category of restrictions as a closed class not subject to open.[26] But this approach simply is not helpful in understanding the reasons underlying the drive to expand the reach of the content neutrality requirement.

The traditional category of permissible regulation-because-of-content contains five types of speech: advocacy of unlawful conduct;[27] obscenity;[28] threatening language and "fighting words";[29] invasions of reputation (libel) or privacy;[30] and (interestingly, about which more will be said later) commercial speech.[31] The Court has devised special rules to govern the constitutionality of regulations of each of these types of speech. With the possible exception of obscenity,[32] these rules were formulated only after the Court engaged in a meticulous balancing process in which it counterpoised the government's interests in seeking to restrict the speech against the value of the speech to a democratic society and the danger that the restriction would permit the government to censor speech that was merely unpopular or unorthodox. This balancing process, with its careful assignment of weights to the governmental interests sought to be protected on the one side, and to the value of the particular speech on the other, is missing from many of the recent decisions. In the absence of a careful weighing of competing values, it is difficult to assess the merit of imposing a requirement of content neutrality in a novel setting.

In the first place, to the extent the imposition relies on the proposition that all regulations of speech in the public forum must be content neutral, it is based on a false premise. The earlier discussion noted that all of the cases involving provocative speakers in the public forum proceeded on a contrary premise.[33] No member of the Court has suggested that those decisions employed an improper theory for their resolution. So the requirement of content neutrality is not universally applicable even in the public forum cases from which it was derived and in which its justification is most readily apparent. Under these circumstances, imposing the requirement universally, especially to regulations having little or nothing to do with the public forum, would seem to require at least a minimal effort at justification.

In the second place, treating the previously approved types of regulation-because-of-content as a closed class explains nothing. On the one hand, it does not explain why the existing regulations are permissible. From what dangers does the prohibition against obscenity protect society? No one has persuasively demonstrated that obscenity causes antisocial behavior, just as no one has yet proved that billboards are traffic hazards. Why should the absence of proof be irrelevant in the former case but important in the latter?[34] Nor, on the other hand, does this closed class approach explain why society should be disabled from imposing other kinds of content control in carefully selected instances where the governmental interests are substantial and the burden on first amendment values is slight. Surely it is unreasonable to suppose that the interests protected by the dispersion zoning of adult theaters sustained in *Young v. American Mini Theatres* are the only governmental interests in intelligent land planning that can justify some minimal kind of content-based regulation.[35] Is further content regulation impermissible because the governmental interests protected by the previously approved regulations are more important than the interests sought to be protected

by the recently overturned regulations? Is it because the speech restricted by the overturned regulations has greater value to a democratic society than that restricted by the approved regulations? Is it a combination of the two? In the absence of a careful evaluation and balancing, it is difficult to say.

Interestingly, the same Justices who are the staunchest advocates of the proposition that the previously approved types of regulation-by-content are a closed class also are the strongest supporters of commercial speech doctrine. Commercial speech is a brand new addition to the five permissible classes of regulation-by-content, and one that the Court itself created. These Justices apparently see no incongruity in allowing the Court to create new classes of permissible regulation-by-content while simultaneously denying that authority to legislative bodies.[36]

This criticism of recent decisions expanding the reach of the content neutrality requirement is intended neither to denigrate the importance of the concept nor to suggest that it has no role to play in determining the constitutionality of outdoor advertising regulations. It is included here because the scope and relevance of the requirement was a major bone of contention among the Justices in *Metromedia*. Some understanding of its source, its strengths, and its weaknesses is thus essential to a critical evaluation of that decision.

The "Commercial Speech" Doctrine[37]

In 1942 the Supreme Court held that commercial advertising could be regulated like any other business activity, without raising first amendment problems.[38] There the matter rested for more than 20 years.

Short of this extreme hands-off deference, the Court could have decided that the regulation of advertising raised no first amendment issues with respect to the publisher, whose interests are entirely commercial, but might raise free speech issues with respect to the advertiser, whose interests might or might not be economic. Had it been adopted, this argument could have played a central role in the resolution of problems concerning the regulation of outdoor advertising.

But the Court rejected the argument in *New York Times v. Sullivan*,[39] decided in 1964. There the Court overturned a libel judgment against the newspaper for publishing an ad which contained false statements about the handling of racial unrest in the south by some state officials. *New York Times* thus made it clear that advertising was not necessarily outside the protection of the first amendment, and that the constitutional protection extended to those whose only interest in the advertising was economic.

After a couple of interim false starts,[40] the Court firmly announced that "commercial speech" was entitled to first amendment protection in the mid-1970s. It overturned one regulation that prohibited the advertising of prescription drug prices[41] and another that prohibited the advertising of lawyers' fees.[42] These cases were the springboard from which commercial speech doctrine was subsequently extended into other areas.

Commercial speech is defined as "speech that proposes a commercial transaction."[43] The Court justified extending first amendment protection to such speech on the ground that the free flow of commercial information promotes intelligent market choices by consumers, often carries information that is relevant to significant issues of the day, and ensures informed and reliable decision-making in a democratic society.[44]

Nevertheless, the Court recognized that there are "common-sense differences" between speech that merely proposes a commercial transaction and the kinds of speech traditionally protected by the first amendment. Hence commercial speech would be accorded less protection than traditional speech.[45] The Court explained:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.[46]

The Court eventually devised a four-part test for determining the constitutionality of regulations of commercial speech:

> (1) The speech subjected to the regulation must be constitutionally protected. That is, (a) it must concern lawful activity, and (b) it must be neither false nor misleading.
>
> (2) If the speech is protected, the regulation must serve a substantial governmental interest; and
>
> (3) The regulation must directly advance the asserted substantial governmental interest; and
>
> (4) The regulation must be no more extensive than necessary to serve that interest.[47]

This was the test the Court applied to the San Diego billboard ordinance in *Metromedia*. Although the Court continues to describe the test as having four parts, the first part obviously is a threshold qualification the speech must satisfy in order to warrant protection rather than a standard to determine the constitutionality of a regulation of the speech. Three features of the test deserve additional comment.

First, the last three parts of the test all must be satisfied. If a regulation fails any one of them, it will be invalid.[48]

Second, the test applies equally to regulations restricting the *content* of commercial speech as well as to regulations restricting the *means* by which commercial speech is disseminated.[49] The first part of the test (lawful activity and neither false nor misleading) clearly is a reference to content. But the content of commercial speech, even though it meets this threshold requirement, still may be regulated if the regulation satisfies the remaining three parts of the test. That, at least, seems to be the import of the decision in which the Court first articulated the test.[50] The few cases so far decided on the issue of content regulation of com-

mercial speech all have included a detailed inquiry into whether the information sought to be suppressed was of value to the public generally or to consumers specifically.[51] These inquiries derive, of course, from the fundamental justification the Court offered for extending constitutional protection to commercial speech in the first place.[52]

Finally, the second part of the test requires that a regulation of commercial speech must serve a *substantial* governmental interest. By contrast, any restriction of traditional speech must serve a *compelling* governmental interest.[53] This is one of the ways in which commercial speech is accorded less protection than traditional speech. The upshot is that the governmental interests served by a restriction on commercial speech theoretically need not be as strong as they would have to be to restrict traditional speech. But since the "compelling" standard is virtually impossible to meet, the "substantial" interest required by the test is a significant one indeed. How substantial that interest must be was one of the points of dispute between the Justices in *Metromedia*.

Presumptions and Overbreadth

The traditional rule in constitutional cases is that statutes are presumed to be constitutional and the burden of proving the contrary is on the challenger. The Court has abandoned this rule in first amendment cases. Where the regulation clearly is intended to restrict speech, the government bears the burden of demonstrating that its regulation serves a compelling interest. Regulations of commercial speech are an exception, as the preceding paragraphs pointed out; they need only directly advance a substantial interest.

With respect to time, place and manner regulations that were not intended to restrict speech but were applied to speech-related activities, it perhaps goes too far to say that the government always bears the burden of justification. The cases demonstrate, nevertheless, that any regulation applied so as to restrict speech will be required to survive a rigorous scrutiny by the Court.[54] At a minimum, the Court will insist that the government offer some justification for the contested application of its regulation. Whether this amounts to shifting the burden of proof is problematic. But it certainly means that such a regulation lacks a presumption of constitutionality. The same is necessarily true, of course, of the newer hybrid regulations that restrict speech content but for purposes that are claimed to be unrelated to the suppression of speech.

One manifestation of the lost presumption of constitutionality in first amendment cases is the Court's concern with the problem of overbreadth. Overbreadth is a concern that is not unique to the first amendment, but that finds especially vigorous application in speech cases.

The focus of overbreadth is on the possibility that the regulation may be drafted in such a way as to sweep within its provisions not only speech that legitimately may be restricted but speech that may not be restricted as well. The focus, in other words, is on the regulation's potential for restricting speech that may not be restricted. And the Court's concern is that the overbroad regulation will discourage people from speaking because of their fear of being punished.[55]

An illustration of overbreadth principles in operation was given by the California Supreme Court in its decision in *Metromedia*.[56] The San Diego ordinance regulated "outdoor advertising display signs," but did not define that term. The city council had intended the ordinance to apply only to commercial billboards, but had failed to incorporate that intention in the operative terms of the ordinance. The California Supreme Court observed that "the ordinance might be construed to apply to signs of a character very different from commercial billboards—for example, to a picket sign announcing a labor dispute or a small sign placed in one's front yard proclaiming a political or religious message."[57] The ordinance was therefore overbroad. In order to preserve its constitutionality, the California Court gave the term a limited definition.[58]

The only unusual feature of this illustration is the court-supplied limiting definition. State courts have the power to give limiting constructions to laws of their own states. Federal courts, including the Supreme Court, have no power to limit the meaning of state statutes. Thus, if a state law that is overbroad on its face under the first amendment and has not been given a limiting construction by a state court is challenged in a federal court, that court must declare it unconstitutional.[59]

The consequences of the absence of a presumption of constitutionality and concerns about overbreadth both were involved, explicitly or implicitly, in the Supreme Court's handling of *Metromedia*.

THE METROMEDIA CASE

This review of the *Metromedia* case begins with a description of the San Diego ordinance that was the subject of the litigation. It then sketches the course of that litigation through the California state courts. Next, it recounts in some detail how the Supreme Court resolved the dispute. An analysis and critique of the Supreme Court's performance follows. The review finishes with a summary of the conclusions about regulating outdoor advertising that can be drawn with some assurance from the five opinions the Court delivered in *Metromedia*.

The San Diego Ordinance[60]

In 1972, San Diego enacted an ordinance which generally prohibited "outdoor advertising display signs."[61] The ordinance exempted two categories of signs from this general prohibition. The first exempted category was onsite signs "designating the name of the owner or occupant of the premises upon which such 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."[62] The second exempted category comprised twelve specifically defined types of signs: (1) signs erected in discharge of governmental functions or required by law; (2) bench signs at bus stops; (3) signs manufactured in the city, provided they were not used for advertising at the place of manufacture; (4) "commemorative plaques of recognized historical societies and organizations"; (5) "religious symbols, legal holiday deco-

rations and identification emblems of religious orders or historical societies"; (6) signs within malls, arcades, etc., "where such signs are not visible from any point on the boundary of the premises"; (7) signs designating the premises for sale, lease, or rent; (8) "public service signs limited to the depiction of time, temperature or news"; (9) signs on public transportation vehicles; (10) signs on licensed commercial vehicles; (11) temporary off-premise subdivision directional signs; and (12) temporary (90 days or less) political signs that are removed within 10 days of the election.[63]

Of the twelve exemptions in the second category, five are content neutral.[64] The reasons behind three of the remaining seven content-related exemptions (governmental signs; commemorative plaques; religious symbols and holiday decorations) are obvious and hardly merit discussion.

That leaves four content-related exemptions (numbers 7, 8, 11, and 12) that might be thought to require some sort of explanation, a matter to be dealt with later. Interestingly, in view of the Supreme Court's subsequent handling of the case, the exemption for temporary political signs originally was not a part of the ordinance. It was added in 1977 after a California federal court had overturned a different ordinance[65] on the ground that it unconstitutionally restricted political speech.[66]

California Courts

The ordinance required the removal of signs that did not conform to its restrictions. Two advertising companies who owned signs that would have to be removed challenged the ordinance. All of their signs were located in areas of San Diego that were zoned either commercial or industrial.[67]

The parties entered into a joint stipulation of facts. Among other things, the city stipulated that the ordinance would "eliminate the outdoor advertising business" in San Diego;[68] that "valuable commercial, political and social information is communicated to the public" through outdoor advertising;[69] and that "many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive."[70] These stipulations proved to be damaging to the city in the Supreme Court, as will be seen.

Both sides moved for summary judgment. The trial court declared the ordinance invalid on two grounds. First, relying on an early decision of the California Supreme Court,[71] the court held that the ordinance exceeded the city's police power because it was based primarily on aesthetic concerns. Second, the court held it to be a violation of the first amendment.

The California Supreme Court reversed.[72] As to the first ground, it overruled the decision on which the trial court had relied,[73] declaring "the holding . . . that aesthetic purposes alone cannot justify assertion of the police power to ban billboards is unworkable, discordant with modern thought as to the scope of the police power, and therefore compels forthright repudiation."[74] The court also noted that aesthetic considerations assume economic value.[75]

The first amendment ground gave the court more trouble. In order to avoid what it perceived to be a potential problem of overbreadth, the court began by supplying a definition for the words "outdoor advertising display signs," the key term of the ordinance's prohibition which the city council had left undefined.[76] It adopted a definition from a state statute: "a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public."[77] This definition made five of the twelve specific exemptions in the second category of the ordinance redundant because the signs to which they applied would not be covered by the basic prohibition.[78] Under the court's analysis, however, this consequence of the limiting definition was unimportant.

The court then proceeded by saying, "When first presented to us, plaintiffs' First Amendment contention presented an arguable issue."[79] While this case was pending before the California Supreme Court, however, the United States Supreme Court dismissed three similar cases for want of a substantial federal question.[80] The state court considered this to be compelling evidence that the first amendment claim lacked merit.[81]

Turning to the question whether the ordinance violated the free speech guarantees of the state constitution,[82] the court employed an analysis similar in many respects to that which later was used by the United States Supreme Court, but with a different outcome. First, the court held that the ordinance was not intended to suppress the content of speech, but was only an effort to ban "a particularly unsightly and intrusive mode of communication."[83] Second, the ordinance served significant governmental interests.[84] Finally, plenty of alternative channels of communication were left open to convey the messages displayed on billboards.[85]

With respect to the last point, the court had to maneuver around the stipulation in which San Diego had agreed that "many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive."[86] It did so by drawing a distinction between the plaintiff billboard owners and the advertisers.[87] The court observed that advertisers were not parties to the litigation. It also noted that the ordinance was being challenged as unconstitutional on its face, not merely as applied to these plaintiffs. (A law is unconstitutional "on its face" when its invalidity is obvious merely from reading its terms and without reference to the factual setting in which it is being used.[88]) The court sustained the ordinance on its face, but left open the possibility that an *advertiser* could challenge its *application* to a particular message.[89]

One judge dissented on the first amendment issue.[90] Two other judges reluctantly concurred, indicating that they agreed with the dissent but felt constrained by the actions of the United States Supreme Court.[91]

Supreme Court

Powerful *amici* supported each side before the Supreme Court. Among others arrayed on the side of Metromedia were the American Civil Lib-

erties Union, the American Newspaper Publishers Association, and a group of nineteen organizations, including the Knights of Columbus, the First Church of God, and the Southern California Broadcasters Association (150 radio and 21 television stations), that use billboard advertising.[92] Supporting San Diego were, among others, the United States and the states of Hawaii, Maine and Vermont, all three of whom have statewide bans on billboards.[93]

In their briefs to the Court, Metromedia and its *amici* hammered away at the concessions San Diego had made in the joint stipulation.[94] On the other side, San Diego and its *amici* felt obliged to offer constructions of, or rationalizations for, the stipulation that attempted, not very successfully, to diminish its force.

A splintered Court held the ordinance unconstitutional by a vote of 6–3. The nine Justices divided into three unequal groups (4–2–3) and wrote five opinions. A plurality of four, in an opinion by Justice White, seemed to[95] invalidate the ordinance because it gave a preference to commercial speech over traditional speech.[96] Justice Brennan, joined by Justice Blackmun, agreed with the result reached by the plurality but disagreed with virtually everything else in their opinion. Three Justices dissented. Each wrote an opinion, although Justices Rehnquist and Stevens both approved Chief Justice Burger's dissent.

The Plurality Opinion

After reviewing the facts and explaining why the Court was not required to treat its three recent dismissals of billboard cases as controlling,[97] the plurality began by rejecting the suggestion of the California Supreme Court that the billboard owners lacked standing to raise the issue of whether the ordinance interfered with the protected speech of the advertisers.[98] This was a routine application of overbreadth doctrine. If a restriction is capable of being applied to protected speech (i.e., is overbroad), its constitutionality may be challenged by a person whose own conduct is unprotected and could have been penalized under a narrower and more precise statute.[99]

In Part IV of their opinion, the plurality upheld the ordinance as applied to the commercial advertising on outdoor signs and billboards. The ordinance satisfied all four of the requirements for a valid regulation of commercial speech.[100] The commercial speech affected by the ordinance was neither unlawful nor deceptive, thus qualifying for protection under the first prong of the test. San Diego's interests in safety and aesthetics clearly were substantial, which satisfied the second prong. And the ordinance's ban went no further than necessary to protect those interests, meeting the final requirement.[101]

> If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach . . . is to prohibit them.[102]

The only real issue, according to the plurality, was whether the ordinance satisfied the third requirement, that it "directly advance" the city's interests in safety and aesthetics. The plurality resolved this issue by silently placing the burden of persuasion on the plaintiff owners. As to safety, the plurality recognized that a dispute rages over whether billboards are traffic hazards, but "hesitate[d] to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts" that they are.[103] As to aesthetics, the plurality began by observing "that billboards by their very nature, wherever located and however constructed, can be perceived" to be a harm.[104] While agreeing that aesthetic regulations must be "carefully scrutinized" to ensure that the concern for beauty is not simply used as a mask to conceal an improper regulatory motive, the plurality found that the owners had made no such claim.[105]

Finally, the plurality rejected the argument that the ordinance was unconstitutional because it permitted commercial advertising onsite but not offsite. Even if this difference suggested that the city's interests in safety and aesthetics were less substantial than it claimed, the prohibition of offsite advertising still directly advanced those interests. Moreover the city council was entitled to conclude that offsite advertisements were a greater problem because they were changed more often. And San Diego's interests were substantial enough to outweigh whatever constitutional values were implicated in preferring one kind of commercial speech over another.[106]

In Part V of their opinion, however, the plurality turned their attention to the effect of the ordinance on traditional speech, and ruled it unconstitutional. The burden of proof was suddenly—and (again) silently—shifted to the city. San Diego failed to justify either of two distinctions drawn by the ordinance: (1) occupants were allowed to display commercial, but not traditional, messages on their buildings; and (2) the twelve exemptions permitted some forms of traditional speech (e.g., news displays) but not others (e.g., "support your local sheriff").

As to the first distinction, the plurality scored the ordinance for "affording a greater degree of protection to commercial than to noncommercial speech." [107]

> Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.[108]

As to the second distinction, the plurality's reasoning is contained in the following paragraph:

> Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests [citing two public forum cases]. With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse. . . . Because some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones.[109]

In the course of dealing with this aspect of the case, the plurality refused to view the ordinance as a total ban on billboards, and refused to decide whether such a ban would be constitutional.[110]

The plurality concluded this part of their opinion by rejecting the city's claim that its ordinance was merely a time, place and manner regulation. The plurality made three points. The manner was not banned entirely since some billboards were permitted. Relying on San Diego's concessions in the stipulation of facts,[111] they held that no alternative means of communication was available. Finally, they ruled that because the ordinance was not entirely content neutral it was not a legitimate time, place and manner restriction.[112]

Part VI obviously was tacked on to the plurality opinion after all six of the opinions had been circulated among members of the Court and solely for the purpose of responding to Chief Justice Burger's caustic dissent. But in the process of disputing Chief Justice Burger's criticisms, the plurality created some major uncertainties about what their basic reasons were for overturning the ordinance.

The Chief Justice was especially vigorous in denouncing the plurality's apparent holding that the ordinance's exemptions invalidated it. The plurality responded that the Chief Justice misunderstood their argument. The exemptions were significant, they said, in assessing the strength of the city's interests. By allowing some commercial billboards, "the city necessarily has conceded that some communicative interests, *e.g.*, onsite commercial advertising, are stronger than its competing interests" in safety and aesthetics.[113]

What the plurality meant by this is anything but clear. In Part V of their opinion they seemed to say that no governmental interests would ever be strong enough to support either a preference for commercial over traditional speech, or a preference for one kind of traditional speech over another. But Part VI suggests exactly the opposite: that such exemptions would be permissible if they were supported by a substantial enough justification. In either event, one searches Part V of the plurality opinion in vain for any weighing—or, indeed, any mention—of the city's possible interests in the exemptions.

One interest was identified by the California Supreme Court, which pointed out that the exemption for temporary political signs was added for fear that a failure to exclude them would invalidate the ordinance under a recent California federal court decision.[114] So the plurality seemingly could not have meant that no plausible reasons existed for the exemption: the state court had offered them one, a substantial one at that. It certainly would be a peculiar piece of "Catch-22" jurisprudence to hold that a billboard ban that *does not* exempt political advertisements is unconstitutional because it restricts protected speech, while a ban that explicitly *does* exempt political signs is unconstitutional because it discriminates between different kinds of protected speech.

Perhaps the plurality meant that San Diego, having the burden of proof with respect to the ordinance's effects on traditional speech, had failed to carry that burden. But in upholding the ordinance with respect to commercial speech (Part IV of their opinion), the plurality had recognized that decisive evidence that billboards create traffic hazards is, presently at least, impossible to obtain, and that aesthetics always involves a subjective judgment, incapable of demonstration.[115] It therefore would seem to follow that imposing the burden of proof on the city is the same as ruling that exemptions are *per se* unconstitutional because the burden cannot be carried successfully.

Hence the crucial holding of the *Metromedia* plurality is subject to major uncertainties. Are preferences for commercial over traditional speech, or for some kinds of traditional speech over others, in a billboard prohibition unconstitutional *per se*? Or are they unconstitutional if the government fails to *prove* that they advance substantial, or very substantial, or compelling governmental interests? Or are they unconstitutional only if the government fails to *offer* some *plausibly* substantial, or very substantial, or compelling justification for them?

The Concurring Opinion

Justice Brennan's opinion concurring in the result, joined by Justice Blackmun, made two major points. (1) Contrary to the view of the plurality, the ordinance was a total ban on billboards and, as such, was unconstitutional. (2) The bifurcated decision of the plurality—that the ordinance was constitutional as applied to billboards carrying commercial messages but unconstitutional as to those with traditional messages—would result in the unlawful restriction of protected speech.

One of the stipulations of fact recited that billboards had in the past been used, inter alia, "to propose marriage, to seek employment, to encourage the use of seat belts, to denounce the United Nations" etc.[116] Relying on this stipulation, and on a collection of photographs of such billboards submitted by *Metromedia*,[117] Justice Brennan concluded that the ordinance should be treated as a total ban on messages of these kinds because the advertisers had no other practical way of communicating them.[118] Although Justice Brennan thus began by arguing that the ordinance was a total ban only of certain kinds of messages carried on billboards, he immediately transformed it into a total ban on a "particular media [*sic*] of communication," [119] and based the remainder of his opinion on this exaggerated characterization. The two types of bans are theoretically quite different. Totally banning "indecent" speech from radio,[120] for example, can hardly be viewed persuasively as a total ban on radio.

Justice Brennan then stated the test he would apply to determine the constitutionality of a total ban on billboards:

> I would hold that a city may totally ban them *if it can show* [1] that a sufficiently substantial governmental interest is directly furthered by the total ban, and [2] that any more narrowly drawn restriction, *i.e.*, anything less than a total ban, would promote less well the achievement of that goal.[121] (Emphasis added.)

He concluded that the ordinance was unconstitutional under this test, which explicitly imposes the burden of persuasion on the city.

As to the first requirement, Justice Brennan agreed that safety was a sufficiently substantial interest. But "the city has failed to come forward with evidence demonstrating that billboards actually impair traffic safety."[122] He relied in part on the stipulation of facts to support this conclusion, noting that the stipulation was "completely silent on this issue."[123] So the city's interest in traffic safety failed because of a lack of evidence that it was "directly furthered" by the ordinance. Aesthetics, however, were a different matter; here the city had failed to show that its interest was substantial enough to ban billboards *in the commercial and industrial areas* of San Diego.[124] Once again the joint stipulation proved useful. One of its provisions recited in part that "some sections of the City of San Diego are scenic, some blighted," etc.[125] Justice Brennan argued that governments should be required to prove that they had taken other steps, in addition to banning billboards, to improve their environments, and that an absence of such evidence would cast doubt on their commitment to aesthetics. He conceded that large urban areas would have difficulty sustaining billboard bans under his test.[126]

The San Diego ordinance also failed the second part of Justice Brennan's test. It was not narrowly drawn to accomplish the traffic safety goal. This was the example he gave:

> Although [the ordinance] contains an exception for signs [in malls, arcades, etc.] 'not visible from any point on the boundary of the premises,' . . . billboards not visible from the street but nevertheless visible from the 'boundary of the premises' are not exempted from the regulation's prohibition.[127]

It is no exaggeration to say that that is requiring punctilio with a vengeance in the drafting of ordinances.

The second major point of the concurring Justices was their disagreement with the plurality's decision upholding a total ban on signs with commercial messages. They argued that the line between commercial and traditional speech sometimes is hard to draw. The plurality's decision therefore was wrong because it gave discretion to draw that line to "governmental units" rather than to courts, and because it created the risk that too much traditional speech would be restricted in the guise of regulating commercial speech.[128]

The Dissents

Chief Justice Burger's dissent was suffused with outrage.[129] He began his analysis by criticizing the six Justices in the majority for paying only lip service to two established lines of first amendment cases. The first holds that every medium of expression is unique and must be assessed for first amendment purposes by standards suited especially to it. The second holds that when speech and nonspeech elements are combined in the same course of conduct, the nonspeech element may be regulated if the regulation supports substantial governmental interests that are unrelated to the suppression of speech and if it does not impinge unnecessarily on first amendment values.

The standard to be derived from these lines of cases for testing the constitutionality of an ordinance regulating billboards, he insisted, should balance the following considerations. Billboards present unique problems because they have two separate features: the message, and the structure on which it is displayed. The structure itself, which is the element being regulated, is a nonspeech element. Therefore the crucial inquiry is whether regulating the structure burdens first amendment values, and, if so, whether the governmental interests being protected outweigh those values. An important factor in weighing the burden on speech is the extent to which alternative channels are left open to communicate whatever messages are being restricted.[130]

Applying that test, the Chief Justice had no trouble concluding that the city's interests were substantial and that the means chosen to implement them were "sensible and do not exceed what is necessary."[131] On the other side of the balance, he found that the ordinance's intrusions on speech were minimal: "San Diego has not attempted to suppress any particular point of view or any category of messages; it has not censored any information; it has not banned any thought."[132] There were, moreover, plenty of alternatives. Other methods might not be as cheap or as eye-catching. But there was no evidence that any particular idea or issue was disproportionately carried on billboards.

> Thus, the ideas billboard advertisers have been presenting are not *relatively* disadvantaged vis-a-vis the messages of those who heretofore have chosen other methods of spreading their views. . . . It borders on the frivolous to suggest that the San Diego ordinance infringes on freedom of expression, given the wide range of alternative means available.[133]

The Chief Justice then turned his attention to the plurality's reasoning that the exemptions invalidated the ordinance. It was "a bizzare twist of logic," he said, to overturn the ordinance just because the city had recognized that it imposed hardships on "certain special needs of citizens," and had inserted exemptions to alleviate them.[134] He maintained that every exemption was justified by one or more of three considerations: (a) acknowledging "a unique connection between the medium and the message,"[135] as in the case of for sale signs; (b) promoting legitimate public interest in information; or (c) deciding that the communication of information may, in these particular instances, outweigh the governmental interests.[136] "The danger of San Diego setting the agenda for public discussion," as the plurality had implied was the case,[137] "is not simply *de minimis;* it is nonexistent."[138]

Chief Justice Burger concluded by disputing the plurality's claim that the ordinance granted greater protection to commercial than to traditional speech. The critical issue was whether the traditional speech could be regulated. If it could be, the fact that the city had failed to restrict similar commercial speech proved only that it had failed to exercise its powers to the fullest extent possible.[139]

Justice Stevens began by concurring in the first four parts of the plurality opinion,[140] which included the part sustaining the ordinance as applied to commercial messages; thus a clear majority of five Justices joined that holding. He also agreed that the ordinance should be treated as a total ban on billboards, as the concurring Justices had argued.[141]

The remainder of his opinion was a dissent. In it he addressed three issues. (1) As to the plurality's decision overturning the ordinance because it permitted commercial but not traditional messages onsite, Justice Stevens argued that the question of what messages may be displayed by property owners on their own property was not properly raised in this case. (2) He maintained that a total ban on all billboards, an issue left open by the plurality,[142] would be constitutional, contrary to the conclusion of the two concurring Justices. (3) He disagreed with the ruling that the ordinance's exceptions made it unconstitutional.

1. The possible effect of the ordinance on the kinds of signs that might be displayed by a property owner onsite, Justice Stevens argued, was a matter not properly before the Court because the plaintiff billboard owners had no standing to raise it.[143] The record contained no evidence that onsite signs ever had been used to communicate traditional messages, or that enforcement of the ordinance would have any effect on any property owners subject to it, or that the use of onsite signs would have any effect either on the plaintiffs' businesses of providing offsite signs or on any consumers of offsite signs.[144] "It is conceivable," he admitted, "that some public spirited or eccentric businessman might want to use a permanent sign on his commercial property to display a noncommercial message."[145] But the record disclosed no such use in the past, and it was improper to "speculate about hypothetical cases that may be presented by property owners not now before the Court."[146]

2. Prior cases upholding time, place and manner regulations had assumed that the "net effect of the regulation on free expression would not be adverse."[147] The parties had stipulated the contrary in this case, however, and so it could not be assumed "that the remaining channels of communication will be just as effective for all persons as a communications marketplace which includes a thousand or more large billboards available for hire."[148] Nevertheless, Justice Stevens believed, the ordinance was constitutional even if it were viewed as a total ban on this manner of communication. Many of the reasons offered for extending first amendment protection to billboards were equally applicable to graffiti—that also is an ancient and inexpensive mode of communication. Yet, he maintained, a community has the right to decide that interests in property and beauty are substantial enough to forbid graffiti.[149] In addition, he pointed out that the plurality and concurring opinions both seemed to assume that billboards could be totally banned in residential areas. If that were true, he argued, it should be equally permissible to ban them in industrial and commercial areas.[150] "Reasonable men may assign different weights to the conflicting interests, but in constitutional terms I believe the essential inquiry is the same throughout the city."[151]

Justice Stevens then set out the test he would apply to a total ban on outdoor advertising:

> First, is there any reason to believe that the regulation is biased in favor of one point of view or another, or that it is a subtle method of regulating the controversial subjects that may be placed on the agenda for public debate? Second, is it fair to conclude that the market which remains open for the communication of both popular and unpopular ideas is ample and not threatened with gradually increasing restraints?[152]

Answering both questions no, Justice Stevens agreed with Chief Justice Burger that nothing in the record suggested that the ordinance posed a threat to first amendment values.

3. If a total ban is permissible, the exemptions in the ordinance made no difference. The essential concern of the first amendment is that government not impose its views on the public or select the topics on which debate is allowed. The San Diego ordinance simply did not implicate that concern.[153]

Except for political signs, none of the exemptions concerned anything controversial. Taken as a whole, they allowed more communication than a total prohibition. Many of them (such as historical plaques and religious symbols), moreover, relate to signs that the city could reasonably conclude have a lesser negative effect on the city's appearance. And the exemption for political signs was consistent, rather than inconsistent, with the interests the first amendment was designed to protect.[154] On this issue, too, he agreed with the Chief Justice.

"It is a genuine misfortune," Justice Rehnquist said in his brief dissent, "to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn."[155] In his view, aesthetics alone were a sufficient justification to sustain a total prohibition against billboards. He emphasized his disagreement with the test set forth in Justice Brennan's concurring opinion for measuring the constitutionality of restrictions based on aesthetics.[156]

Critique

The San Diego Ordinance was a perfect illustration of the kind of hybrid regulation that has been appearing before the Supreme Court with increasing frequency in recent years. It regulated the manner and the place at which signs with certain content could be displayed, all for the purpose of promoting aesthetics and safety. Since it drew distinctions based on the content of the signs, it resembled the typical regulation-because-of-content. Since its purpose was to promote aesthetics and safety rather than to suppress speech, it resembled the typical time, place and manner regulation. But whether or not that was its purpose, the ordinance inevitably did restrict speech because it regulated billboards, whose only function is to communicate. *Metromedia* thus was a case that might have offered considerable guidance in how to reconcile conflicting values in an increasingly crowded and complex world.

When the Court performs as it should in first amendment cases, it makes a diligent effort to perceive every free speech interest in a given situation, to scrutinize every justification for a restriction, and, after isolating the crucial conflicts of values, it strives to articulate unifying principles that might guide future decisions.[157] The Court failed to measure up to this standard in *Metromedia*.

In his dissenting opinion, Chief Justice Burger bitingly accused the six Justices who subscribed to either the plurality or the concurring opinion of "superficial sloganeering," of "mechanically applying [without analysis] doctrines developed in other contexts" to this quite different context.[158] It is hard to disagree with that assessment.

Both plurality and concurring opinions paid only lip service to the rule that each medium of communication is unique; both failed to analyze the bearing that the singular features of billboards should have on the outcome of the case. Both ignored, as though they did not exist, decisions that approved content-based regulations of certain modes of expression, as well as decisions on other pertinent issues that reached contrary results. Both gave only perfunctory consideration to the governmental interests the San Diego ordinance was seeking to protect.

A long line of Supreme Court decisions establish the rule that each medium of communication is unique and that the constitutionality of a regulation of any medium must take account of its uniqueness.[159] A city may forbid a movie to be shown unless it has a license,[160] a requirement it almost certainly could not impose on newspapers or books.[161] "Indecent speech" may be banned from radio,[162] but certainly not from books.[163] Radio and television stations may,[164] but newspapers may not,[165] be required to give a "right of reply" to people they attack. These are a few of the more conspicuous examples of the rule in operation.

Metromedia was the first plenary consideration the Court had ever given to a claim that a regulation of outdoor advertising violated the first amendment. Hence no previous decisions were exactly on point except those counseling that the singular first amendment aspects of billboards be identified and carefully weighed against the governmental interests the San Diego ordinance sought to protect.

Billboards are a unique medium of communication in a number of ways. They have two inseparable features: the message and the structure on which it is displayed. Moreover, only a few kinds of traditional messages are susceptible of being communicated by billboard. Finally, billboards take advantage, without cost, of enormous public expenditures for streets and highways. Their audience is provided by the government, in other words.[166] Some of these statements are less true of outdoor signs other than billboards, but they form a useful framework to analyze the first amendment problems.

The billboard structure relates primarily to the governmental interest in aesthetics. A blank billboard that screens a gorgeous vista is as offensive as one that displays an advertisement. Gorgeous vistas, it may be assumed, are less numerous in large urban areas. Yet beauty can be artificial as well as natural. Arguably, at least, cities should be able to prevent the erection of signs that prevent sidewalk pedestrians and highway travelers from seeing the Gateway Arch in St. Louis, for example, or the Bay Bridge in San Francisco. Signs placed flat on the walls of buildings (but not those rising from the roofs) are different, of course, for the object blocking the view is already there.

It is possible also for the structure to impair the government's interest in safety, as, for example, one placed so as to block the view of an upcoming railroad grade crossing. But this seems to be rare.

The message displayed relates primarily to the government's interest in safety because the traffic hazard is created by the distraction the message presents. This is not to say that some—perhaps many—signs are not aesthetically offensive. But how does one draft an ordinance to prohibit only signs that are ugly?

Many traditional messages are not suitable for communication by billboard. Only those that are capable of being comprehended in a glance or two—those contained in a few words, or in a picture, or in a brief combination—are candidates. The more glances required to decipher the message, the greater the traffic hazard. Assuming a constant message, the larger the sign the fewer the glances needed. The size of the sign feeds back into the element of structure (it must be large), an aesthetic consideration.

Although it is possible to construct a theoretical framework in which the features of billboards are separated, and the interests in aesthetics and safety are distinguished, these elements cannot be individually decanted as a practical matter. That is why the first amendment problems raised by regulations of outdoor advertising are difficult.

Justices Brennan and Blackmun, concurring in *Metromedia*, argued that a total ban on billboards would be unconstitutional, at least on the evidence in that record.[167] Justices Stevens[168] and Rehnquist,[169] dissenting, argued the contrary. The four Justices in the plurality purported to leave the question open, but gave a strong signal that they had grave doubts about the validity of a total ban.[170] Why a total ban should be unconstitutional is not clear as a matter either of principle or of precedent.

As a matter of principle, such a ban would result in the suppression of very little traditional speech because, as noted previously, so few traditional messages are susceptible of being communicated by billboard. Even those that are susceptible of presentation on outdoor signs rarely are transmitted in that fashion. It is doubtless true, as the parties stipulated, that billboards have been used to propose marriage.[171] But the number of proposals communicated that way has to be infinitesimal, even in California. That a few traditional messages *can* be communicated by billboard therefore is no indication at all that a total ban on billboards would significantly impair the quality, the quantity, or the effectiveness of the traditional speech that lies at the heart of the first amendment.

The only kind of traditional message characteristically carried on billboards is political advertising. Whether banning billboards would have any significant effect on the nature of political campaigns, and whether the effect would be positive or negative, is impossible to say. But even if a total prohibition of billboards is unconstitutional solely because it eliminates political signs (is overbroad in that respect), the San Diego ordinance would not have succumbed on that basis because it exempted such signs.

One still might claim that the governmental interests are not weighty enough to justify even this minimal intrusion into first amendment values. One might argue, for example, that the same reasoning which leads to the conclusion that banning billboards would be permissible—so few traditional messages are susceptible of being transmitted that way that

the effect is negligible—also would justify banning placards.[172] The answer, of course, is that the governmental interests are quite different. The weights to be assigned to the interests in aesthetics and safety are difficult to quantify or to articulate precisely. But that they are substantially greater than whatever the interests might be in banning placards is self-evident. The point is that when the governmental interests are substantial, as they were conceded to be in *Metromedia*, the fact that banning billboards would have only a minimal effect on traditional first amendment values is a consideration that should have been taken into account.

With respect to precedent, Justice Stevens forcefully argued in his dissenting opinion that the loudspeaker cases foreclosed "any claim that a prohibition of billboards must fall simply because it has some limited effect on the communications market."[173] The loudspeaker cases are two decisions rendered a year apart in the late 1940s. In *Saia v. New York*,[174] the Court overturned an ordinance which prohibited the use of sound amplification devices without the permission of the police chief. This was a classical example of the unconstitutionally overbroad regulation. The ordinance set no standards to guide the chief's discretion; he had absolute power to grant or withhold permission, creating the danger that permission would depend on the nature of the message to be amplified. The decision was 5–4. In *Kovacs v. Cooper*[175] a year later, the Court upheld an ordinance which prohibited loudspeakers that emitted "loud and raucous noises," but, unlike the regulation in *Saia*, did not require a permit. Again the decision was 5–4, with the majority split into three opinions. Two of the majority Justices, and all four of the dissenters, viewed the ordinance as a total ban on loudspeakers.

Loudspeakers bear some remarkable similarities to billboards in terms of first amendment analysis.

First, the sole function of both is to communicate. Any regulation of either one therefore raises the possibility of a first amendment violation.

Second, the governmental interests involved—privacy for loudspeakers, safety and aesthetics for billboards—are all substantial. An argument might be made, however, that the interest in privacy is weightier than that in aesthetics vis-a-vis free speech claims; whether it also would outweigh safety is doubtful.

Third, both are capable of interfering with the governmental interest whether or not they transmit an intelligible message. A loudspeaker intrudes upon privacy whether it emits a voice or static. Similarly a billboard that screens a vista interferes with aesthetics (but perhaps not safety) whether or not it displays a message.

Finally, both make use of the streets and highways in order to reach their audiences. But some differences arise at this point.

The volume of loudspeakers can be regulated. The closest analogy to volume in billboards is a size or spacing requirement. But volume arguably relates more directly to the interest in privacy than size or spacing relates to either safety or aesthetics, although the point is clearly debatable. In addition, loudspeakers make physical use of the streets while billboards do not. It has always been assumed that government may regulate the physical use of the streets despite the Court's commitment to the idea that streets are the preeminent public forum. It has been assumed, for example, that government may absolutely prohibit the physical use of freeways, and of heavily traveled arteries during rush hours, for speech activities even though the only interest being served is the free and convenient use of the streets.[176] Perhaps this is because the interference with the governmental interest created by physical use is so obvious, even though the interest itself may not be entitled to much weight if viewed in the abstract. The interference is less obvious when, as in the case of billboards, only a beneficial use is being made of the streets.

But another possibility is that considerations of the "captive audience" crept silently into the balancing process. It may be that when a speaker demands to occupy the street, not simply to have a forum, but rather to attract the attention of people who otherwise would not listen, the governmental interest need not be as great to outweigh the first amendment interests of the speaker. The first amendment gives speakers the right to reach willing listeners, not the right to thrust their messages on a government-conscripted audience.[177] The speaker has alternative ways of transmitting the message; the audience must work, live, and drive on the streets the government provides.

In recent first amendment cases, the Supreme Court has severely limited the use of the captive audience concept as a device to restrict speech. Current doctrine holds that its use is "dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[178] Moreover it seems that its use will be restricted to invasions of privacy that occur in the home.[179] Standing alone, therefore, the captive audience concept may not be decisive of any issue with respect to billboard regulation.

Nevertheless, that their audience is in some respects captive is another aspect of the unique nature of billboards.[180] The whole point of a billboard is to display a message that attracts attention. Instructing people that they can "avert their eyes"[181] from the billboard is like telling them they do not have to watch Lady Godiva if they do not want to see a naked woman on horseback. Of course they *can*, but who *will*? People theoretically could "tune out" the blare of the loudspeaker too if they were determined enough. But the question should be: Is either mode of communication so important that the first amendment must be read to preclude the legislature from taking account of human frailties that are a matter of common knowledge, given the substantial interests the government is seeking to protect?

This issue bears on the interests in both safety and aesthetics. A major reason students "wash out" of pilot training is their inability to master instrument flying. Flying on instruments requires the pilot to check *all* of the cockpit instruments *constantly* in order to detect instantly any deviation of the aircraft from the desired flight path. This requirement that the pilot read each instrument as his eyes pass over it, instead of fixing his gaze on each instrument consecutively, apparently surpasses the ability of many people; they "fix" on one instrument long enough to allow the aircraft to assume an attitude that requires major correction,

which in turn requires that even more attention be given to every instrument.[182] A more mundane example might be clearer. How is it possible to run out of gas in an automobile if the fuel gauge is working properly? Is not every driver supposed to check it periodically? No one should ever run out of gas in a properly functioning car. But they do.

It should come as no surprise that some people fix their gaze on a billboard and allow their car to wander out of control. Of course they should read the billboard by glancing at it and returning their attention to the road. But it is common knowledge that people pay attention to things they should not (the billboard), and do not pay attention to things they should (the fuel gauge).

Finally, the "avert the eyes" argument simply does not respond to the interest in aesthetics that is impaired by a billboard that screens an attractive feature of the environment. In this situation, highway users are indubitably a captive audience.

Neither individually nor collectively may these considerations of the unique nature of billboards be substantial enough to tip the balance in favor of a total prohibition. But the Court might have explained why they were not even important enough to be discussed.

The irony is that the *Metromedia* plurality did, in fact, take account of the unique nature of billboards. But they did it covertly, invisibly, without openly and forthrightly confronting the issue.

The plurality held that billboards carrying commercial speech could be banned. The only reason they offered was that commercial speech is entitled to less protection than traditional speech. But that reason is totally inadequate as an explanation of why it can be banned *on billboards.* If that reason were adequate, then any and all methods of communicating commercial speech (including, for example, newspaper ads) could be banned; each prohibition could be justified on the ground that commercial speech is entitled to less protection. That the Court would never approve bans on certain methods of communicating commercial speech is perfectly obvious from a number of its decisions,[183] including the one explaining why commercial speech is entitled to any protection at all under the first amendment.[184]

So lurking somewhere in the plurality's balance is the implicit recognition that billboards *are* different from other methods of transmitting ideas, and that this method is entitled to less consideration than others. But since they did not confront the issue openly, the plurality did not have to take account of it when they considered the significance of the content-based exemptions in the San Diego ordinance.

The plurality's three reasons for overturning the ordinance all centered around the principle of content neutrality.[185] The ordinance impermissibly allowed commercial but not traditional messages to be displayed onsite. Some of its twelve exemptions were content-related. And the ordinance was not a time, place and manner regulation because it was not content neutral.

The first reason was summarized in this language:

> *The city does not explain* how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city. Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages. . . .[186] (Emphasis added.)

This ruling has a certain superficial plausibility.[187] Indeed, if it is based, as it appears to be, on San Diego's failure to *explain* the distinction (as opposed to its failure to *prove* that the distinction serves its interests), it very well may be compelling. But reasons for the distinction are not hard to find.

To the extent the distinction permits businesses that depend on large volumes of customers to identify themselves so that drivers can locate them easily, it promotes the interest in safety, as anyone who has ever tried to find an establishment in an unfamiliar area of a city can testify. Chief Justice Burger made this point in dissent.[188] It certainly does not prove, as the plurality claimed, that the city "has conceded that some communicative interests . . . are stronger than its competing interests in . . . traffic safety."[189]

In addition, the distinction gives those businesses that do not depend on large volumes of customers the choice of advertising their own wares or not displaying a sign at all. To the extent some businesses choose the latter alternative, the total number of signs will be reduced, thereby promoting both safety and aesthetics.

Even less persuasive is the plurality's offhand remark that the value of commercial signs "does not justify prohibiting an occupant from displaying its own ideas *or those of others.*"[190] The reason for limiting signs to those of the occupants themselves becomes apparent upon just a moment's reflection. Businesses that do not depend on large numbers of customers may decide that the expense of a commercial sign is not financially justified. And any business might come to the same conclusion with respect to signs displaying "its own ideas." But if occupants can sell the space to others, without sacrificing their own interests, they will have a distinct financial incentive to do so. And the number of signs will then increase.

This is one of the few issues in *Metromedia* which had been the subject of a prior Supreme Court decision squarely on point.[191] And that decision contradicts the plurality's dictum.

Railway Express Agency v. New York[192] unanimously upheld a traffic regulation which prohibited signs on delivery vehicles unless the signs were those of the vehicle owner. It prohibited, in other words, owners from selling advertising space on their vehicles to others. No speech claim was raised or decided in *Railway Express,*[193] which antedates by almost 30 years the Court's extension of first amendment protection to commercial speech. The plurality nevertheless cited the case with approval four times, once to support their conclusion that the ordinance's distinction between onsite and offsite *commercial* signs was valid.[194] But it is hard to understand why first amendment considerations should reverse *Railway Express's* basic conclusion that the hireling may be treated differently from the person acting in self-interest just because the content of the outdoor sign changes from a commercial to a traditional

message. If *Railway Express* is reversed on this point, one ramification alone would impose a restriction of traditional zoning and land use powers that is breathtaking to contemplate: homeowners could not be prevented from leasing space in their yards (and probably on their houses) to anyone wishing to display signs with traditional messages. That conclusion results from the following reasoning.

The first amendment protects corporations as well as individuals.[195] If a business has a right to display "its own ideas" on an outdoor sign, it may not be prohibited from displaying "those of others," according to the plurality in *Metromedia*. The same must be true for individuals, for a conclusion that the first amendment grants greater protection to businesses than to individuals would be absurd.

The Court has held that homeowners have a constitutional right to display for sale signs in their front yards.[196] It would seem to follow that they must be permitted to display signs with traditional messages. For if the Court were to decide that they may be prohibited from displaying traditional messages but not for sale signs, the Court itself would be guilty of granting a preference to commercial over traditional speech,[197] which is exactly what the plurality held San Diego could *not* do.[198] If homeowners have the right to display "their own ideas," then, like the businesses, they must have the right to display "those of others."

Did the plurality seriously intend to suggest that the first amendment precludes a city from prohibiting homeowners from leasing their front yards to those who wish to erect signs with traditional messages? That is where the plurality's doctrinaire logic inescapably leads.

The plurality's second reason for invalidating the ordinance was that some of its twelve exemptions were not content neutral, the premise being that they had to be. As a description of precedent, the premise is false. As a statement of first amendment principle of universal application, the premise is dubious.

Metromedia is not by any means the only case overturning a regulation of speech for a failure to be content neutral. But many Court decisions reasonably contemporaneous with *Metromedia* have approved content-based regulations that restricted speech. These decisions show that the requirement of content neutrality is not nearly as universal as the plurality pretended. The cases described in the next few paragraphs are a representative sampling, not a complete catalog, of such decisions. They reveal not only the falsity of the premise but its weaknesses as a principle.

In *Lehman v. City of Shaker Heights* (1974)[199] the Court sustained an ordinance that prohibited political, but not commercial, advertising on the city's buses. *In Young v. American Mini Theatres* (1976)[200] it upheld an ordinance that restricted the places in which theaters that showed "adult movies" could be located. That same year it held, in *Greer v. Spock*,[201] that the Armed Forces could prohibit political speakers from addressing troops on military reservations even though they permitted speakers with other kinds of messages. The following year the Court held that a school teacher could be fired for making a lewd gesture at a student.[202] *FCC v. Pacifica Foundation* (1978)[203] upheld the power of the FCC to punish a radio station for broadcasting "indecent [but not obscene] speech." Just four days before *Metromedia* the Court sustained the power of the government to revoke the passport of a person for revealing the names and locations of CIA agents.[204]

Heffron v. International Society for Krishna Consciousness[205] was decided eleven days before *Metromedia*. The Court upheld a statute which prohibited anyone from soliciting money from pedestrians on the walks of a state fairground. Members of the Krishna sect could discuss their religious views with people on the walks, but could not solicit them. The Court characterized the statute as content neutral. But if a law which prohibits commercial but not traditional speech is content neutral (*Heffron*), then so is a law which prohibits traditional but not commercial speech (*Metromedia*). In one sense, of course, both laws were content neutral because they did not distinguish *between the speakers* who wished to engage in the prohibited speech. They did not, that is, allow one group to solicit (or communicate) while denying that right to another group, the kind of discrimination that originally prompted the requirement of content neutrality.[206] Everyone who wished either to solicit (*Heffron*) or to display traditional signs (*Metromedia*) was subject to the same rules. This was one of the points that Chief Justice Burger[207] and Justice Stevens[208] argued in their *Metromedia* dissents.

Nor did *Metromedia* put an end to decisions approving content-based regulations of speech. In its most recent term, the Court approved a federal statute which denied tax exemptions to organizations engaged in lobbying, but granted them to organizations engaged in other kinds of speech activity,[209] as clear a case of content discrimination as there ever will be.

All of these cases are manifest departures from the plurality's supposed principle of content neutrality. They are distinguishable from *Metromedia* on their facts, of course. Distinguishing them, however, would have required the plurality to acknowledge their existence. And that would have undercut the plurality's conceit that content neutrality is required without regard to circumstances.

Essentially the plurality simply ignored them. *American Mini Theatres, Pacifica,* and *Heffron,* three of the more relevant cases, were not even mentioned, let alone discussed.[210] *Lehman* and *Greer,* the only cases the plurality did cite, were distinguished in a footnote: "both cases turned on unique fact situations involving government-created forums and have no application here."[211] As if the regulation of billboards is not a "unique fact situation"! As if the streets and highways are not, in a very real sense, a "government-created forum" with respect to billboards![212] The plurality's disingenuous handling of these inconsistent precedents is one reason their opinion is open to censure.

The other reason is the plurality's refusal to consider the unique nature of billboards and the extent to which the exemptions in the ordinance regulating them did or did not affect vital first amendment values.

The plurality lumped all of the exemptions together and refused to discuss them individually, even refusing to distinguish the few that were content-related from those that were not. One of the exemptions that was content-based excepted signs erected "in discharge of any govern-

mental function or required by any law."[213] If exempting governmental signs ipso facto makes a regulation of outdoor signs unconstitutional, then no regulation of outdoor signs, except one limited to commercial messages, will ever be possible. Because such an exemption is essential, and because it is difficult to comprehend how excepting governmental signs would impair first amendment values in any way, municipalities arguably were entitled to a discussion of at least this one exemption.

In addition, the Chief Justice[214] and Justice Stevens,[215] dissenting, both argued to no avail that some of the content-based exemptions, notably that for political signs, actually enhanced first amendment values. Their argument points up a curious inconsistency of the Court. One of the justifications for the Court-created doctrine of commercial speech is that the creation of this new category of regulation-because-of-content accords commercial speech more protection than it otherwise would receive, exactly the argument the dissenters made with respect to the San Diego ordinance. *Metromedia* seems to say that the power to create content-related regulations designed to enhance first amendment values is one the Court reserves to itself.[216]

Finally, the plurality rejected the city's argument that the ordinance was a constitutional time, place and manner regulation. They declared that it was not a time, place and manner regulation because it was not content neutral. Not, mind you, that it was an *unconstitutional* time, place and manner regulation; it was not a time, place and manner regulation at all.[217] It might be argued with equal merit that a coerced confession is not a confession at all (what is it, then, a proposal?). On this point the plurality opinion reads as though it had been written by the Caterpillar from *Alice in Wonderland* ("words mean what I say they mean").

Ironically, the plurality's summary of its effects was a conclusive demonstration that the ordinance certainly was a time, place and manner regulation:

> Thus, under the ordinance (1) a sign advertising goods or services available on the property where the sign is located [a place limitation] is allowed; (2) a sign on a building or other property advertising goods or services produced or offered elsewhere [a place limitation] is barred; (3) noncommercial advertising [by outdoor signs], unless within one of the specific exceptions, is everywhere prohibited [a manner limitation].[218]

The ordinance obviously was not a *content neutral* time, place and manner regulation. It regulated the places at which (onsite versus offsite), and the manner by which (outdoor signs), certain kinds of messages, defined by their content, could be communicated. So it was one of those hybrid regulations combining place and manner limitations with content restrictions that fits neither traditional analytical category easily.[219] But so were the regulations the Court had upheld in *Lehman* (no political ads on city buses), *American Mini Theatres* (dispersal zoning of adult movies), *Greer v. Spock* (no political speakers on military reservations) and *Heffron* (no soliciting on fairgrounds walks).

The reason for the plurality's extraordinary tour de force is easy to grasp. If they had conceded that the ordinance was an attempt by San Diego to protect substantial interests by restricting the places and manner in which certain messages could be communicated, they would have been required to make a careful evaluation of the governmental interests and the extent to which protecting those interests impaired first amendment values. With respect to the ordinance's exemptions, they adamantly refused to undertake this difficult task.

Two other issues need to be touched on briefly before closing this critique: the stipulation concerning alternatives to billboards, relied on by all six Justices in the majority; and the notion advanced by the two concurring Justices that a city's interest in aesthetics is suspect if it is applied to areas zoned commercial or industrial.

Stipulation 28 provided in part:

> Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitally [*sic*] expensive."[220]

It is hard to fault the Court for accepting that stipulation at face value. On the other hand, another case decided almost simultaneously with *Metromedia* suggests that there was no reason for the Court to give it conclusive effect either.

United States Postal Service v. Council of Greenburgh Civic Associations[221] was decided exactly one week before *Metromedia*. A civic organization had been depositing communications in mailboxes without affixing stamps, in violation of a federal statute. The organization claimed that paying postage was too expensive for its limited budget and that alternative means of distribution were substantially less effective,[222] the same claim in virtually the same language as that contained in the stipulation. The Court rejected the claim and upheld the statute.[223] An argument can be made that the claim was entitled to relatively more weight when it was asserted on behalf of the civic organization in *Postal Service* than when it was advanced on behalf of the parties to *Metromedia*. This argument is not undercut by the stipulation in *Metromedia*. The trial court in *Postal Service* had found that the civic organization's claim was true as a matter of fact,[224] a finding that is the practical equivalent of the stipulation's recitation.

Moreover, the Court had said in *Kovacs*, the second loudspeaker case,

> The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. . . . *That more people may be more easily and cheaply reached by sound trucks . . . is not enough* to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.[225] (Emphasis added.)

Although both the plurality[226] and concurring opinions[227] relied on *Kovacs* for various propositions, they ignored this one.

All of the billboards in *Metromedia* were in areas zoned either commercial or industrial. Justices Brennan and Blackmun, concurring, were especially skeptical of San Diego's interest in aesthetics in those areas.[228] But, as Justice Stevens argued in dissent,[229] some residential areas inev-

itably will be less attractive than others in any large city. A city should not be precluded from taking whatever measures it can to improve its environment. And many reasonable people view billboards themselves as a form of visual pollution.

Moreover, Justice Brennan's argument apparently proceeds on the implicit assumption that areas zoned commercial or industrial are almost always unattractive. I do not know whether that is true. I do know, however, that some commercial and industrial areas of St. Louis do not fit that description.[230] The argument that constitutional law requires there to be some correlation, either direct or inverse, between the zoning classification and the interest in aesthetics that is protected by a billboard regulation simply is not persuasive.[231] Local legislative bodies familiar with their environments can find such correlations, of course, and frequently do. But holding that the first amendment requires such a correlation is another matter entirely.

Summary

Despite the confusion caused by the 4–2–3 split among the Justices, the Court did provide firm answers to a number of important questions that arise from the regulation of outdoor advertising.[232] With somewhat less clarity it left a number of questions unresolved.

After *Metromedia* was decided, Justice Stewart, who joined the plurality opinion, retired and was replaced by Justice O'Connor. To the extent her views differ from his, the number of Justices who would subscribe to any of the following conclusions might change.

1. All signs carrying commercial messages may be banned, seven Justices agreed. Justice Stevens explicitly joined this ruling of the plurality, and Chief Justice Burger agreed by implication at least. Justice Rehnquist's view was that aesthetics alone were sufficient justification for a total prohibition, which puts him in the camp also. The two concurring Justices expressly disagreed.

2. Offsite commercial signs may be banned even though onsite signs are permitted. The Justices line up on this issue the same as they did in 1. above.

As a practical matter, these two conclusions may be the most important aspect of *Metromedia*. At least one astute commentator thinks so.[233]

3. So long as a regulation is limited to commercial messages, the government need not prove by scientific evidence that either a total ban, or merely an offsite ban, furthers its interests in either safety or aesthetics. Again the lineup is the same.

4. Permitting commercial, but not traditional, messages onsite is unconstitutional. Although this ruling resulted from a doctrinaire application of first amendment principles, and was not explained satisfactorily, a clear majority of six Justices (those joining the plurality or concurring opinions) subscribed to it. On this issue the replacement of Justice Stewart by Justice O'Connor may make a difference. If she were to join the dissenters, the majority would be reduced to five. If another case were to arise in which the city was not handicapped by the San Diego stipulation of facts, and in which the city made a stronger effort to justify the distinction, one of the other Justices in the *Metromedia* plurality might change his mind.

Two important questions were left open.

5. The constitutionality of provisions of the federal Highway Beautification Act of 1965 which, like the San Diego ordinance, prohibits signs with traditional messages, was left open. Unlike the San Diego ordinance, the federal act permits such signs in areas that are zoned commercial or industrial[234] by the states. The plurality's language leaving the question open may be significant:

> Whether, in fact, the distinction [between areas zoned commercial or industrial and other areas with respect to the display of traditional messages] is constitutionally significant can only be determined on the basis of a record establishing the actual effect of the Act on billboards conveying noncommercial messages.[235]

This language can be read to suggest that the Court still may be willing to listen to arguments that traditional speech may be restricted by regulations of outdoor advertising if government can offer an adequate justification, considering all of the circumstances, for doing so. The Court may be willing, in other words, to abandon the formalistic application of abstract doctrine which is the outstanding feature of *Metromedia* and return to the careful balancing of conflicting values which is characteristic of the Court's best work.

6. The four Justices in the plurality purported to leave open the question whether a total ban on billboards would be constitutional. By means of a "but see" citation to a single case, they indicated some doubt about it. Five Justices addressed that issue. All five said that such a ban could be imposed constitutionally. The three dissenters declared that a ban would be constitutional. The two concurring Justices said that it *could* be constitutional, but proposed a test so stringent as to create doubts that it could ever be satisfied. A recent decision of the Court approaches the position of the concurring Justices in *Metromedia*.[236]

Three final details complete this description of the *Metromedia* saga.

First, after the Supreme Court remanded the case, the California Supreme Court declared itself unable to preserve the San Diego ordinance by severing its unconstitutional provisions. So it held the entire ordinance void.[237]

Second, on the same day it decided *Metromedia*, the Court summarily affirmed the First Circuit's decision in *John Donnelly & Sons v. Campbell*.[238] The lower court had overturned Maine's statewide ban on billboards because of its total prohibition of signs with traditional messages. Some of the lower court's reasoning anticipated that of the plurality in *Metromedia*.

Third, in *Metromedia* itself, the Court overruled[239] its prior decision in *Lotze v. Washington*.[240] The defendants in that case were landowners who displayed signs carrying their own political messages. The state sued to remove the signs as violations of a statute regulating billboards. The state court held the statute constitutional as applied to them.[241] The

Supreme Court earlier had dismissed their appeal, the effect of which was to affirm the state court.[242] That affirmance was overruled in *Metromedia.*

DECISIONS IN THE WAKE OF METROMEDIA

Nineteen lower court opinions ruling on challenges to outdoor sign regulations have been reported officially since *Metromedia.* The challenger in one of them failed to make a first amendment claim and the court accordingly refused to consider that issue.[243] The decision in a second case pivoted on an abuse of discretion by a zoning board rather than on the first amendment.[244] The only issue in three of the cases was the distinction between onsite and offsite commercial signs.[245] Since *Metromedia* had squarely held that distinction constitutional, the regulations were sustained. These five decisions are of no further interest. Of the remaining fourteen regulations, ten were declared invalid[246] while four were upheld.[247]

One lesson emerges with impressive clarity. *Metromedia's* major effect was its imposition of first amendment doctrine on the regulation of outdoor signs, the result of which is to abolish the presumption of constitutionality that long has attended other forms of land-use control. In all but one[248] of the ten cases overturning regulations, the decision was based on the government's failure either to meet the burden of proof required by the first amendment,[249] or to articulate some persuasive justification for its regulation,[250] or both.[251] Whether or not governments always bear the burden of proof, a matter to be discussed later, they must be prepared, at the very least, to offer an explanation for their regulations.

Because of *Metromedia's* emphasis on the difference between regulating commercial and traditional speech, it is worth emphasizing that first amendment problems are not avoided simply by confining a regulation to commercial signs.

First, a government's failure, or inability, to articulate a plausible justification for its ordinance can be just as lethal to regulations limited to commercial signs as to those impinging on traditional messages. A federal court of appeals refused to consider whether a regulation of portable signs could be upheld on the basis of aesthetics because the city had not included the protection of aesthetics in its recital of purposes.[252] A federal district court invalidated an ordinance which limited the number of portable signs and the maximum time periods for their display because the ordinance contained no recital explaining these restrictions and the city presented no evidence to justify them at trial.[253] And the Ohio Supreme Court struck down an ordinance that excepted signs on parking lots from its general onsite requirement because the city offered no explanation for the exception.[254]

Second, the Supreme Court's four-part test for measuring the constitutionality of regulations of commercial speech[255] has considerable bite, even though its standards are less stringent than those governing traditional speech.[256] The Colorado Supreme Court overturned a provision which prohibited the display of any information except that specified in the ordinance because the court could not perceive, under the third part of the test, any governmental interest that was "directly advanced" by the limitation.[257]

Third, the Supreme Court has been especially suspicious of limitations on commercial speech that restrict the communication of price information.[258] The Georgia Supreme Court relied on these cases in holding unconstitutional an ordinance (like that in the Colorado case) which, by specifying the allowable content of commercial signs, prohibited the display of gasoline prices.[259]

Sign restrictions that were applicable alike to commercial and traditional messages, one of the flaws that proved fatal to the San Diego ordinance, were involved in four cases. A routine application of *Metromedia* invalidated one of them.[260] The other three decisions deserve more attention.

City of Lakewood v. Colfax Unlimited Association[261] brought before the Colorado Supreme Court a complex sign regulation that was 32 pages long. In a patient and thoughtful opinion that is worth careful study, the court explored a multitude of issues besides the identical treatment of commercial and traditional signs. Provisions of the regulation that suffered from that defect were overturned.

The ordinance at issue in *Metromedia, Inc. v. Mayor and City Council*[262] governed a historic district of Baltimore that the city was trying to preserve. The area covered by the ordinance seemed to be the kind that even Justice Brennan's highly restrictive concurring opinion had suggested might justify a regulation limiting traditional speech.[263] In addition to restricting signs, the ordinance contained provisions regarding the preservation of architectural features, building maintenance, etc. Nevertheless, the federal district court held the ordinance unconstitutional because it prohibited the occupants from displaying their "ideas" on the exteriors of these historic buildings.

One ordinance survived constitutional attack. *Minnesota v. Hopf*[264] was a suit to condemn signs that were located closer than 100 feet to churches and schools, in violation of a state statute. The defense was that onsite commercial signs were permitted within those areas. The effect of the statute, defendants argued, was to permit commercial but not traditional signs within those areas, contrary to *Metromedia.* The Minnesota Supreme Court held that banning traditional signs only when they were located within 100 feet of schools and churches had a negligible effect on first amendment values and sustained the statute. This conclusion seems eminently sensible but also seems contrary to the mechanical logic of the *Metromedia* plurality.

Regulations of political signs raise particularly delicate problems[265] both because political speech lies at the very heart of the first amendment—it may be *the* core value of "freedom of speech"[266]—and because outdoor signs have been an inevitable part of political campaigns since, as the common law put it, "the memory of man runneth not to the contrary."

Four post-*Metromedia* cases concerned such regulations; two were aimed at posters,[267] the other two at signs generally.[268] Only one of them was sustained, and the opinion in that case is unpersuasive because it neither sets out the terms of the ordinance nor explains how it avoided the Supreme Court's decision.[269]

The other three opinions found differing grounds for declaring their regulations unconstitutional. *City of Antioch v. Candidates' Outdoor Graphic Service*[270] held that singling out political signs for special treatment was a per se violation of *Metromedia*. *City of Lakewood*[271] held that a restriction limiting the content of political signs to candidates and issues in upcoming elections similarly violated the Supreme Court's mandate. *Taxpayers for Vincent v. Members of City Council*[272] overturned restrictions on political posters for two reasons: (1) the city's *interest in safety was insufficient as a matter of law;* and (2) its interest in preventing "visual clutter" was not furthered since the city offered no evidence that it had undertaken other efforts to eliminate this kind of aesthetic affront.

Vincent relied on Justice Brennan's concurring opinion for both of its conclusions. That opinion, which advocated the most stringent constraints on the powers of local governments, represented the views of only two of the Court's nine members. When the Court renders decisions without a majority joining any single opinion, it opens the door for judges of lower courts to choose the opinion most congenial to them. If other courts follow *Vincent's* lead in treating Justice Brennan's opinion as authoritative,[273] the impact of *Metromedia* on outdoor sign control will be even more extensive than anyone has yet imagined.

The ordinance overturned in *Vincent* prohibited attaching posters to a wide variety of public (*e.g.*, lamp posts and fire hydrants) and private (*e.g.*, trees and shrubs) property. The court's opinion on this aspect of the ordinance is interesting for its discussion of whether some kinds of pubic property, notably lamp posts, have become part of the "public forum." That would suggest that governments may not prohibit attaching signs to these objects. The court concluded that prohibitions would be permissible with respect to some objects, such as police and fire callboxes and fire hydrants, but declared the ordinance unconstitutional because it encompassed too much.

Time limits were involved in three of the political sign cases. They were upheld only in the unsatisfactory opinion mentioned earlier.[274] *City of Lakewood* overturned a time limit applicable generally to all kinds of signs, but suggested in dictum that a time limit only on political signs might pass muster.[275] *City of Antioch,* on the contrary, held that any regulation that singles out political signs for special treatment is per se unconstitutional.

Both of the regulations imposing time limits on commercial signs were invalidated, one because the city offered no justification for it,[276] the other because it failed the four-part test of commercial speech restrictions.[277]

The validity of limiting the number of signs arose in three cases concerning commercial messages. One court overturned an ordinance limiting the number of portable signs to one per business on the ground that it failed to advance either safety or aesthetics.[278] Another court sustained an ordinance permitting only one offsite sign per subdivision under construction.[279] The third case upheld an ordinance limiting to one the number of signs on the facade of a commercial building.[280]

Size limitations were at issue in four cases. They were sustained when applied to commercial signs.[281] When applied to signs with traditional messages, the only opinion sustaining them is unsatisfactory.[282] The Colorado Supreme Court overturned them,[283] as did a California appellate court.[284]

Two restrictions on the placing of signs were challenged. The Minnesota Supreme Court upheld the statute prohibiting them within 100 feet of churches and schools,[285] while the Colorado Supreme Court invalidated a limitation with a broader scope.[286] Both of these regulations applied to traditional signs.

Finally, *City of Indio v. Arroyo*[287] dealt with a problem that is unusual but is bound to recur. The store owners in that case painted a large mural on the side of their building, which was a converted gasoline station. The mural depicted historic events important to Hispanics. It violated the size restrictions in the city's ordinance. Holding the mural to be expression protected by the first amendment, the court invalidated this application of the ordinance.

FUTURE PROSPECTS OF OUTDOOR SIGN CONTROL

Any appraisal of the prospects for outdoor sign control must attempt to disentangle many intersecting and overlapping concerns. This appraisal begins with an analysis of the problems resolved, and those created, by the Court's treatment of regulations of commercial signs. It then turns to a discussion of the limits the Court imposed on a government's power to regulate signs with traditional messages. That discussion leads naturally to the question of the extent to which the absence of a true majority opinion justifies regarding *Metromedia* as less than authoritative. The topic of the fourth section is an issue the Court did not even mention but one that inevitably accompanies the first amendment: the effect the stringent rules governing prior restraints will have on traditional methods of land-use control, which rely so heavily on permit requirements of one kind or another. A short conclusion attempts to draw some of these threads together.

Commercial Signs

Three matters were resolved decisively in *Metromedia:* (1) commercial billboards may be banned entirely; (2) offsite commercial signs may be banned even though onsite signs are permitted; and (3) the government need offer no scientific evidence that its interests in safety and aesthetics are furthered by either (1) or (2). It would be a serious mistake, however, to suppose that these rulings permit the unlimited regulation of commercial signs.

The holding that commercial *billboards* may be prohibited does not necessarily mean that all kinds of commercial signs may be banned. Posters, for example, are similar to billboards in the sense that the regulation of either raises first amendment problems because the only function of both is to communicate messages. But they differ in a significant respect. The billboard is both a structure and a message, while a poster is always affixed to an existing structure. Billboard bans are justified partly on the ground that what is being banned is the structure. That justification obviously has no application to posters.

The onsite-offsite distinction permitted by *Metromedia* similarly does not authorize random legislation. The distinction requires the regulation to be drafted in terms of a specific prohibition against offsite signs, rather than in terms of the allowable content of onsite signs. The latter regulation runs two risks of being declared unconstitutional: because it prohibits traditional messages, a clear violation of *Metromedia;* and because the line it draws between the permitted and the forbidden commercial messages cannot be justified.

Even regulations that are limited to commercial speech must be justified, it will be recalled, under the Court's four-part test:

> (1) The speech subjected to the regulation must be constitutionally protected. That is, (a) it must concern lawful activity, and (b) it must be neither false nor misleading.
>
> (2) If the speech is protected, the regulation must serve a substantial governmental interest; and
>
> (3) The regulation must directly advance the asserted substantial governmental interest; and
>
> (4) The regulation must be no more extensive than necessary to serve that interest.[288]

The very existence of that test makes it plain that no presumption of constitutionality attends outdoor sign controls. At a minimum the test requires the government to articulate some plausibly substantial interest that is being directly advanced by the regulation, and to articulate some plausible explanation of why less extensive regulation would not be satisfactory. Whether it requires the government to do more than that is unclear. But it is clear that *Metromedia* eliminated the presumption of validity, which the work of land-use planners enjoyed in the past, from the regulation of outdoor signs. Railing against that loss is futile.

Together, these considerations suggest a number of guidelines. First, any regulation of commercial signs that restricts the content (as, for example, by specifying the kinds of information that may be conveyed), or the placing, or the number of such signs, or imposes durational time limits on their display, will require the government to offer some justification for whatever line it has drawn. This is the "more restriction is better than less" irony that was a central feature of the *Metromedia* dissents of Chief Justice Burger [289] and Justice Stevens.[290] Both pointed out that if the exemptions in the San Diego ordinance were the cause of its unconstitutionality, the way to avoid the problem was to eliminate them, the effect of which would be to restrict more speech rather than less. The plurality disputed that characterization.[291] Whether or not the dissenters' characterization was fair, the point they made is valid. The fewer the distinctions drawn in a regulation, the less the government will have to justify.[292]

Second, every regulation should contain recitals of the interests the government is seeking to protect and how those interests are furthered by the classification contained in the regulation.[293] If a classification that would permit more signs is possible, some indication of why it would be less satisfactory should be given.[294]

Third, the government's attorney should be prepared to offer evidence beyond the recitals that would justify the classifications.[295] The evidence need not necessarily be scientifically reliable and valid; simple opinion testimony—of the police chief, for example—may be adequate. Hearsay evidence in the form of articles by experts also may suffice.

Fourth, the government's attorney should be prepared to offer evidence of other measures, if any, the government has undertaken to protect the interests the regulation purports to protect.[296] Evidence of other anti-blight measures, building rehabilitation programs and the like are prime candidates.

These guidelines are intended to alert planners to the pitfalls that may trap those who are overly optimistic about avoiding first amendment problems merely by confining regulations to commercial messages. For communities whose interests in safety and aesthetics can be satisfied by regulating only commercial signs, they should prove adequate, with one possible exception. The exception was suggested by Justice Brennan's concurring opinion.[297] The problem arises because *Metromedia* provides an obvious incentive to commercial enterprises to try to circumvent a legitimate regulation by adding a little traditional content to their otherwise commercial advertisements.[298]

Signs with Traditional Messages

The Court's action in overruling *Lotze* [299] clearly means that homeowners must be permitted to display their own political messages on their own land. The first amendment probably requires no less, although there is an obvious practical, if not theoretical, difference between an urban dweller who sticks a temporary political poster in his front yard and an owner of vacant land abutting a highway who erects permanent billboards to display his political theories, as was the case in *Lotze.*

Metromedia goes further, however. It squarely holds that traditional signs must be permitted wherever commercial signs are allowed. It also says that businesses are entitled to display the traditional messages of others as well as their own, a statement which by necessary implication extends to homeowners as well. These propositions increase the difficulties for effective sign control.

To the extent a commercial enterprise that would not display any sign can lease its otherwise available space to one who wishes to display a traditional message, the number of signs will increase. That homeowners will be tempted to lease space in their yards and on the sides of their houses is inevitable, resulting in another increase in signs. And that

commercial enterprises will have an incentive to add a little traditional content to their otherwise commercial advertisements in order to circumvent a legitimate ban on purely commercial messages is predictable.

Some of the arguments why *Metromedia's* conclusions do not necessarily follow from first amendment principles have been offered earlier,[300] and need not be repeated. To them should be added the observation that the public has an enormous investment in roads and highways.[301] That investment is important in at least two respects. First it suggests that the highway users who provide the forum ought to be entitled to some measure of control over those "free riders" who make beneficial use of it for their own economic advantage.[302] Second, to the extent that sign proliferation reduces the taxable value of the property within an area, the public is required to pay again by making up the lost revenues.[303]

Is Metromedia the Last Word

A number of arguments can be made that *Metromedia* should not be viewed as dispositive of all of the issues raised by outdoor sign regulations. First, none of its five opinions received the approval of a majority of the Justices.[304] Second, the plurality and the concurring opinions both relied on the San Diego stipulation as conclusive on a number of issues that are of vital significance to resolving first amendment claims. The most important of these issues was the availability of alternative ways of communicating. The stipulation may have been the main cause of the mechanical application of free speech principles that is the hallmark of much of the plurality opinion. Third, the plurality explicitly left open the constitutionality of a total ban on billboards. This is one indication that the three Justices still on the Court who joined the opinion may be willing to consider substantial justifications for restrictions on speech if they are supported by evidence in a record that is unencumbered by a debilitating stipulation.

Prior Restraints and Methods of Control

An important part of first amendment jurisprudence is the set of rules governing prior restraints. One result of imposing the first amendment is to import this additional set of complexities into the regulation of outdoor signs.

Fundamentally, a prior restraint is any device which requires official permission before a message can be communicated.[305] The classic example is the license requirement. Traditional land-use regulations are replete with licensing requirements of one kind or another, the non-conforming use permit, for example. Application of these traditional methods of control to sign regulations will have to be studied carefully.

The basic rule governing prior restraints is that they are presumptively unconstitutional; the presumption of constitutionality not only is lost, it is flatly reversed.[306] To overcome that presumption, the prior restraint must satisfy two sets of stringent requirements, one substantive and one procedural.

Substantively, the restraint must set clear standards guiding the discretion of the official who must approve.[307] Procedurally, the regulation must (1) impose the burden of initiating judicial review on the official rather than on the challenger; (2) require a final judicial determination of the constitutionality of the regulation within a *specified* and *brief* period; and (3) limit the preservation of the status quo to the shortest period compatible with sound judicial resolution.[308]

However, prior restraint doctrine in not applicable to commercial speech.[309] So regulations of outdoor signs that are confined to commercial messages should raise no prior restraint problems. In addition, the standards of a constitutional prior restraint were articulated in cases concerning books and movies, and it is not certain that they would be applied in undiluted form to outdoor signs.[310] On the other hand, the mechanical application of first amendment principles in *Metromedia* offers no reason to suppose they would not be. So regulations that restrict signs with traditional messages will have to be scrutinized meticulously to ensure that the enforcement procedures they establish do not run afoul of prior restraint doctrine.

Prior restraints were involved potentially in a number of the post-*Metromedia* cases,[311] but only one of them discussed the issue at length.[312]

Conclusion

Metromedia gave clear answers to a number of important questions. Whether what it permits will satisfy the felt need for regulation of outdoor signs is a question about which reasonable people can disagree.

As an explication of first amendment principles, the decision has many weaknesses. It failed to take account of the unique nature of billboards and the minimal effect on first amendment values their regulation entailed. It failed to take account of the enormous public expenditure in highways, and the extent to which outdoor advertisers take a free ride on this investment for private gain. And it ignored inconsistent precedent on the pivotal issue of content neutrality.

There is some reason to believe that a case presenting a better record on which to build the arguments that were either ignored or given inadequate consideration would be successful. Whether it is worthwhile to make the effort to do so must be left to the judgment of each local community, balancing the cost of certain litigation against the importance of the values it attaches to what it views as essential regulation.

APPENDIX A

THE SAN DIEGO ORDINANCE

[SOURCE: Jurisdictional Statement for Appellant, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), pp. 106a–113a.]

SEC. 101.0700 PROHIBITION AND ABATEMENT OF OUTDOOR ADVERTISING DISPLAY SIGNS

A. Purpose and Intent

It is the purpose of these regulations to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; to eliminate hazards to pedestrians and motorists brought about by distracting sign displays; to ensure that signing is used as identification and not as advertisement; and to preserve and improve the appearance of the City as a place in which to live and work.

It is the intent of these regulations to protect an important aspect of the economic base of the City by preventing the destruction of the natural beauty and environment of the City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conventions; to safeguard and enhance property values; to protect public and private investment in buildings and open spaces; and to protect the public health, safety and general welfare.

B. Off-Premise Outdoor Advertising Display Signs Prohibited

Only those outdoor advertising display signs, hereinafter referred to as signs in this Division, which are either signs designating the name of the owner or occupant of the premises upon which such 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 shall be permitted. The following signs shall be prohibited:

1. Any sign identifying a use, facility or service which is not located on the premises.
2. Any sign identifying a product which is not produced, sold or manufactured on the premises.
3. Any sign which advertises or otherwise directs attention to a product, service or activity, event, person, institution or business which may or may not be identified by a brand name and which occurs or is generally conducted, sold, manufactured, produced or offered elsewhere than on the premises where such sign is located.

C. Abatement of Nonconforming Signs

Any sign which is nonconforming in that it does not conform to the regulations embodied in this Division shall either be removed or brought into compliance with the Code requirements within the period of time prescribed herein dating from the effective date of these regulations.

D. Abatement Schedule

All nonconforming signs shall be removed or brought into compliance with the Code requirements in accordance with the abatement schedule set forth below. In order to utilize the abatement schedule, the owner of record, or his agent, shall make available the market value, as of April 1, 1972, of any sign or signs which have been deemed nonconforming by the provisions of these regulations. The market value of nonconforming signs shall be based on the original cost, including cost of installation, of said sign less ten percent of the original cost per year for each year said sign has been standing prior to the effective date of these regulations.

The date of erection of any nonconforming sign shall be established by the presentation by the owner of record of the sign, or his agent, of a certified copy of the corresponding building permit on file in the Department of Building Inspection of the City of San Diego. Any sign erected without the issuance of a valid building permit shall be deemed an illegal sign and shall be removed immediately.

All required documentation concerning the market value and erection date of any nonconforming sign shall be presented to the Zoning Administrator within ten days of reception of notice of nonconformance. The Zoning Administrator shall determine to his satisfaction the validity of all presented documentation. Any decision of the Zoning Administrator may be appealed in accordance with Sections 101.0504 and 101.0505 of this Code.

Abatement Schedule

Adjusted Value	*Market*	*Abatement Date*
Less than	$500.00	April 1, 1973
$ 500.00 to	999.99	July 1, 1973
1,000.00 to	1,499.99	October 1, 1973
1,500.00 to	1,999.99	January 1, 1974
2,000.00 to	2,999.99	April 1, 1974
3,000.00 to	3,999.99	July 1, 1974
4,000.00 to	4,999.99	October 1, 1974
5,000.00 to	7,499.99	January 1, 1975
7,500.00 to	9,999.99	April 1, 1975
10,000.00 to	12,499.99	July 1, 1975
12,500.00 to	14,999.99	October 1, 1975
15,000.00 to	19,999.99	January 1, 1976
20,000.00 and over		April 1, 1976

Notwithstanding any other provisions of this Code, all outdoor advertising display signs which are not signs designating the name of the owner or occupant of the premise upon which such signs are placed or which do not identify such premises or which do not advertise goods manufactured or produced or services rendered on the property upon which such signs are placed and which are signs designed to be viewed from any portion of a freeway, landscaped freeway, scenic highway or freeway, or parkway as defined in Sections 95.0302.1, 95.0302.2, 95.0302.3 and 95.0302.4 of this Code and are located within 500 feet from the boundary line of said freeway, landscaped freeway, scenic highway or freeway, or parkway shall be abated within 90 days of the effective date of these regulations. Any such sign not abated within 90 days of the effective date of these regulations shall be subject to all of the provisions of Section 101.0700, paragraph E.

E. Removal of Nonconforming Signs

Any sign that is in noncompliance with the regulations of this Code as defined in Section 101.0700 shall be removed prior to or upon the date designated for removal in the above abatement schedule. If the owner of, or the person or persons responsible for, the sign fails to remove the nonconforming sign, the owner of the premises upon which the sign is located shall be responsible for the removal of the sign and the work shall be done within 90 days following the date of nonconformance. The procedure for the removal of all nonconforming signs shall be as follows:

1. The Zoning Administrator, after proper notification, may cause the removal of any nonconforming sign and shall, at his discretion, charge the costs incurred against any of the following, each of whom shall be jointly and severally liable for said charges; provided, however, that any decision or determination of the Zoning Administrator may be appealed in accordance with Sections 101.0504 and 101.0505 of this Code.

a. The permittee.

b. The owner of the sign.

c. The owner of the premises on which the sign is located.

d. The occupant of the premises on which the sign is located.

2. A sign removed by the City shall be held not less than 30 days by the City during which time it may be recovered by the owner upon payment to the City for costs of removal and storage. If not recovered prior to expiration of the 30-day period, the sign and supporting structures shall be declared abandoned and title thereto shall vest in the City and the cost of removal shall be billed to the owner.

F. Signs Exempt From These Regulations

The following types of signs shall be exempt from the provisions of these regulations:

1. Any sign erected and maintained pursuant to and in discharge of any governmental function or required by any law, ordinance or governmental regulation.
2. Bench signs located at designated public transit bus stops; provided, however, that such signs shall have any necessary permits required by Sections 62.0501 and 62.0502 of this Code.
3. Signs being manufactured, transported and/or stored within the City limits of the City of San Diego shall be exempt; provided, however, that such signs are not used, in any manner or form, for purposes of advertising at the place or places of manufacture or storage.
4. Commemorative plaques of recognized historical societies and organizations.
5. Religious symbols, legal holiday decorations and identification emblems of religious orders or historical societies.
6. Signs located within malls, courts, arcades, porches, patios and similar areas where such signs are not visible from any point on the boundary of the premises.
7. Signs designating the premises for sale, rent or lease; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located.
8. Public service signs limited to the depiction of time, temperature or news; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located.
9. Signs on vehicles regulated by the City that provide public transportation including, but not limited to, buses and taxicabs.
10. Signs on licensed commercial vehicles, including trailers; provided, however, that such vehicles shall not be utilized as parked or stationary outdoor display signs.
11. Temporary off-premise subdivision directional signs if permitted by a conditional use permit granted by the Zoning Administrator.
12. Temporary political campaign signs, including their supporting structures, which are erected or maintained for no longer than 90 days and which are removed within 10 days after election to which they pertain.

G. Conflict With Other Regulations of This Code

Where there is a conflict between the regulations of Section 101.0700 and the regulations of any other section of this Code, the regulations of Section 101.0700 shall prevail; provided, however, that the regulations of other sections shall prevail in the following cases:

1. Where the regulations of any other section are more restrictive.
2. Where a sign control district has been established by ordinance, provided that the assigned regulations of said district are comprehensive and provide sign regulations for all zones located within said district.
3. Where a planned district has been established in accordance with the procedure set forth in Section 103.0101 of this Code, provided that any such planned district regulations shall include comprehensive sign regulations encompassing the entire planned district area.
4. Where an architectural control district has been established by ordinance, provided that any such architectural control district regulations shall include comprehensive sign regulations encompassing the entire architectural control district area.

H. Compliance With Chapter IX of This Code

Nothing in the regulations of Section 101.0700 shall relieve any party from the requirements to obtain any or all permits required by Chapter IX of this Code.

APPENDIX B

THE JOINT STIPULATION OF FACTS

[SOURCE: Jurisdictional Statement for Appellant, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), pp. 119a–127a.]

The parties to this litigation are filing cross-motions for summary judgment. This Stipulation of Facts is entered into for the purpose of these motions and for any judgment thereon or appeals therefrom and for no other purpose. The parties agree that the facts specified herein are true for said purposes only and none of the parties hereto shall be bound thereby for any other purposes.

STIPULATED FACTS

1. On March 14, 1972, the City Council of the City of San Diego adopted Ordinance No. 10795, a true, correct and complete copy of which is attached hereto and incorporated herein by reference as Exhibit A.

2. If enforced as written, Ordinance No. 10795 will eliminate the outdoor advertising business in the City of San Diego.

3. The City of San Diego, with a population of 750,000 people*, is the second most populated city in the State of California, the most populated state in the nation.

4. The City of San Diego is the seat of the county government of the County of San Diego. The County has a population in excess of 1,500,000 persons.*

5. The City of San Diego contains approximately 320 square miles or 204,800 acres.

6. The City of San Diego is multi-faceted, containing beaches, hills, residential areas, parks, a major seaport and naval base, a substantial commercial area, hundreds of miles of streets, highways and freeways, a large industrial area, a major airport and numerous major industries.

7. The citizens of the City of San Diego derive their livelihood from a variety of sources, including retail businesses, heavy industry, commercial centers, tourist services, agriculture, government contracts, wholesale supplies and a variety of services.

* As of April, 1974.

8. The homes, commercial structures and industrial facilities of the City of San Diego are of all vintages, old and new. Some sections of the City of San Diego are scenic, some blighted, some containing strips of vehicle related commercial uses, some contain new and attractive office buildings, some functional industrial development and some areas contain older but useful commercial establishments.

9. Approximately 13% of the City of San Diego is zoned for residential purposes. 1.4% for commercial uses, 1.4% industrial, 8.5% for streets and highways, 20% for public and semi-public uses and the balance is vacant or used for agricultural purposes.*

10. The City of San Diego General Plan adopted in 1967 indicates its citizens found employment substantially as follows in the year 1962:**

Agriculture	1.6%
Construction	6.6%
Manufacturing	22.4%
Transportation, Communication and Utilities	4.7%
Wholesale Trade	3.2%
Retail Trade	17.5%
Finance, Insurance and Real Estate	4.5%
Services	19.2%
Government	19.7%

11. The City of San Diego General Plan of 1967 projected a 1985 population of almost double that of 1967.

12. Both of the plaintiffs are companies legally engaged in the outdoor advertising business in the City of San Diego and the State of California. (Defendant, of course, contends that Ordinance No. 10795 is legal and valid and that plainfiffs are currently in violation of this Ordinance. Accordingly, to this extent, defendant does not admit that plaintiffs are at this time "legally engaged in business in the City of San Diego.")

13. Each of the plaintiffs are the owners of a substantial number of outdoor advertising displays (approximately 500 to 800) in the City of San Diego.

14. Substantially all of the displays owned by plaintiffs are located on property leased by the owners thereof to the plaintiffs for the purposes of maintaining outdoor advertising displays thereon.***

15. Each of the displays were legally erected in full compliance with all applicable municipal and state laws and are in full compliance with such laws except for the contested legality of Ordinance No. 10795.

16. The cost of producing and erecting each display was substantial.

17. The displays have varying values depending upon their size, nature and location.

18. Each of the displays has a fair market value, as a part of an income-producing system, of between $2,500 and $25,000.

19. Each display has a remaining useful income-producing life in excess of 25 years.

20. All of the signs owned by plaintiffs in the City of San Diego are located at areas zoned for commercial and industrial purposes.

* These figures are approximate figures for 1967, the date of the San Diego General Plan. The same general proportions may be considered valid for all other periods relevant to this litigation.

** Certain minor fractions have been omitted from this table. While the fractions specified have undoubtedly fluctuated over the years, such changes would be of such magnitude as not to be material to this motion. Therefore, these figures may be taken as true for all periods relevant to this litigation.

*** A few may be located on property owned by the plaintiffs.

21. Outdoor advertising is a means of communication and a media for the expression of ideas.

22. There is a difference between the outdoor advertising business and "on-site" or business signs. On-site signs advertise businesses, goods or services available on the property on which the sign is located. On the other hand, the outdoor advertising businesses lease real property and erect signs thereon which are made available to national and local advertisers for commercial, political and social messages. Outdoor advertising is different from on-site advertising in that:

(a) The outdoor advertising sign seldom advertises goods or services sold or made available on the premises on which the sign is located.

(b) The outdoor advertising sign seldom advertises products or services sold or made available by the owner of the sign.

(c) The outdoor advertising sign is, generally speaking, made available to "all-comers", in a fashion similar to newspaper or broadcasting advertising. It is a forum for the communication of messages to the public.

(d) The copy of the outdoor advertising sign changes, usually monthly. For example, a particular sign may advertise a local savings and loan association one month, a candidate for mayor the next month, the opening of the San Diego Zoo the third month, a new car the fourth month, and a union grievance the fifth month.

23. Outdoor advertising is available for all forms of advertising messages. For example, it has been used in the City of San Diego to advertise national and local products, goods and services, new products being introduced to the consuming public, to publicize the "City in motion" campaign of the City of San Diego, to communicate messages from candidates for municipal, state and national offices, including candidates for judicial office, to propose marriage, to seek employment, to encourage the use of seat belts, to denounce the United Nations, to seek support for Prisoners of War and Missing in Action, to promote the United Crusade and a variety of other charitable and socially-related endeavors and to provide directions to the traveling public.

24. Outdoor advertising is customarily purchased on the basis of a presentation or campaign requiring multiple exposure. Usually a large number of signs in a variety of locations are utilized to communicate a particular advertiser's message. An advertiser will generally purchase a "showing" which would involve the utilization of a specific number of signs advertising the same message in a variety of locations throughout a metropolitan area. Each separate sign provides exposure of various portions of the populace and each sign thereby forms an integral part of an interdependent whole. As a result, each sign in addition to producing income in and of itself, lends value to the entire system. Therefore, each sign has a value substantially more as a part of the system than it does separately. The value of each sign as a part of an overall system is not readily susceptible to precise measurement.

25. Outdoor advertising is presented in two basic standardized forms. A "poster panel" is a 12-foot by 24-foot sign on which a pre-printed message is posted, in sheets. A "painted bulletin" is generally a 14-foot by 48-foot sign which contains a hand painted message. The message will remain in one place for a period of time, usually a month, and will then be disassembled and replaced by another message while the first message is moved to another sign. In this way, the same hand painted message will be moved throughout a metropolitan area over a six-month or twelve-month period.

26. Plaintiffs' outdoor advertising displays produce substantial gross annual income.

27. Plaintiffs' outdoor advertising displays produce income to a variety of segments of the national, state and local economy and stimulate the flow of trade and commerce. Land owners and advertising agencies receive income from outdoor advertising.

28. Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of outdoor advertising. Many businesses

and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitally expensive.

29. Enforcement of Ordinance No. 10795, in addition to eliminating outdoor advertising within the City of San Diego, will adversely affect plaintiffs' businesses outside the City of San Diego in that many national or state-wide advertisers will be inclined to select other media capable of communicating with a wider segment of the consuming public, including San Diego, rather than selecting outdoor advertising which would be unable to communicate with the citizens of San Diego.

30. Plaintiffs and their predecessors have engaged in outdoor advertising in the City of San Diego for more than 60 years.

31. Many of the plaintiffs' signs are within 660 feet and others are within 500 feet of Interstate or Federal Aid Primary highways and are designed to be viewed therefrom.

32. Enforcement of Ordinance No. 10795 will prevent plaintiffs from engaging in the outdoor advertising business in the City of San Diego and will cause plaintiffs to suffer substantial monetary losses.

33. Plaintiffs have entered into contracts to display messages on their respective signs in the City of San Diego; said contracts extending for various periods of time.

34. "The amortization provisions" of Ordinance No. 10795 have no reasonable relationship to the fair market value, useful life or income generated by the signs and were not designed to have such a relationship.

Dated: November 21, 1974

[1] For a brief review of the rise and decline of substantive due process economic doctrine, see A. VAN ALSTYNE, K. KARST & J. GERARD, SUM & SUBSTANCE OF CONSTITUTIONAL LAW §§ 6.5400 to 6.5483-3 (3d ed. 1981) (hereafter cited SUM & SUBSTANCE).

[2] Berman v. Parker, 348 U.S. 26 (1954) (an eminent domain case).

[3] This historical summary is derived from Floyd & Shedd, *Highway Beautification: The Environmental Movement's Greatest Failure* 3–64 (1979); Cunningham, *Billboard Control under The Highway Beautification Act of 1965*, 71 MICH. L. REV. 1295, 1346–1350 (1973); and Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955).

[4] Pub. L. No. 85-767, 72 Stat. 904 (1958).

[5] Pub. L. No. 89-285, 79 Stat. 1028 (1965).

[6] Lotze v. Washington, 444 U.S. 921 (1979); Newman Signs, Inc. v. Hjelle, 440 U.S. 901 (1979); Suffolk Outdoor Advertising Co. v. Hulse, 439 U.S. 808 (1978).

[7] Dismissal for want of a substantial federal question is a decision on the merits. *E.g.*, Hicks v. Miranda, 422 U.S. 332 (1975).

[8] 453 U.S. 490 (1981).

[9] See Mandelker, *The Free Speech Revolution in Land Use Controls*, to be published in a forthcoming issue of CHI.-KENT L. REV.

[10] *See generally*, SUM & SUBSTANCE §§ 10.1120–10.1200; J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 718–22 (1978).

[11] These issues are reviewed in detail under the section heading, "First Amendment, Background, *infra*.

[12] Hague v. CIO, 307 U.S. 496 (1939), is traditionally cited as the landmark case. For a perceptive analysis of the early public forum cases, see Kalven, *The Concept of the Public Forum*, 1965 Sup. Ct. Rev. 1.

[13] Niemotko v. Maryland, 340 U.S. 268 (1951), is an early case that helped to establish the rule.

[14] Cox v. New Hampshire, 312 U.S. 569 (1941).

[15] *See* SUM & SUBSTANCE §§ 10.3000, 10.3100.

[16] See generally *id.* § 10.2000 *et seq.*

[17] For advocacy of unlawful conduct, *see* Brandenburg v. Ohio, 395 U.S. 444 (1969); for obscenity, *see* Miller v. California, 413 U.S. 15 (1973); for libel, *see* New York Times v. Sullivan, 376 U.S. 254 (1964) and Gertz v. Robert Welch, 418 U.S. 323 (1974). The concept of vagueness plays an especially important role in first amendment litigation. "A law that restricts First Amendment freedoms must pass a more rigorous test of precision than, for example, a law restricting economic liberty. This distinction is not so much a rule as it is an expression of judicial attitude, an inclination to insist on more specific definitions in laws restricting speech. The distinction is grounded in the fear of self-censorship by persons whom the law might deter from engaging in speech that is constitutionally protected." SUM & SUBSTANCE § 10.1432. See generally *id.* §§ 10.1400 to 10.1442-2(b).

[18] This is the legendary problem of prior restraints. It is reviewed in SUM & SUBSTANCE §§ 10.1300 to 10.1393.

[19] Feiner v. New York, 340 U.S. 315 (1951), is the landmark case. *See also* Terminiello v. Chicago, 337 U.S. 1 (1949); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[20] Schenck v. United States, 249 U.S. 47, 52 (1919).

[21] *Compare* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (sustaining ordinance that prohibited political, but not commercial, advertising on buses) *with* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (overturning an official's refusal to rent a municipal auditorium because the intended presentation was unsuitable for families).

[22] The Court viewed Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972), as such a case. There, an ordinance that prohibited the picketing of schools, but exempted labor picketing, was invalidated. For a comprehensive discussion of content discrimination, see Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1976).

[23] *E.g.*, United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981). *See* SUM & SUBSTANCE §§ 10.2730–10.2731, 10.3113.

[24] SUM & SUBSTANCE §§ 10.2700–10.2750 reviews all of these cases.

[25] 427 U.S. 50 (1976).

[26] SUM & SUBSTANCE § 10.2712.

[27] *Id.* § 10.2100 *et seq.*

[28] *Id.* § 10.2200 *et seq.*

[29] *Id.* § 10.2300 *et seq.*

[30] *Id.* § 10.2400 *et seq.*

[31] *Id.* § 10.2600 *et seq.*

[32] The Court never has attempted to specify precisely what governmental interests are protected by the prohibition against obscenity. It simply has relied on history to support the proposition that obscenity is "not protected speech." *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957). Nevertheless, the Court's continual efforts to refine the definition of obscenity clearly reflect the balancing process described in the text. *See* SUM & SUBSTANCE § 10.2200 *et seq.*

[33] See text at notes 19 and 20 *supra*.

[34] The author does not mean to say that there must be scientific evidence that billboards are hazardous. The questions summarily raised here are dealt with in the final section of this paper under, "Future Prospects of Outdoor Sign Control," *infra*.

[35] See text at note 25, *supra*, for a description of *Young*. *Young* is not the only recent case to approve a content-based regulation. FCC v. Pacifica Found., 438 U.S. 726 (1978), for example, sustained a regulation restricting the broadcasting of "indecent" speech by radio stations. There, the Court engaged in the process described in the text. But frequently it does not do so, even when it is upholding a content-based restriction. In cases sustaining such restrictions, the Court as often as not pitches its decision on the ground that the particular "forum" in question is not "public." *See* SUM & SUBSTANCE §§ 10.2700–10.2760 for a discussion of why this is no more helpful than the closed class approach. The issue of whether a "forum" should be considered "public" is of no im-

portance to the concerns of this paper and is therefore not developed further.

In any event, the point being made in the text is that the Court frequently has failed to explain why a particular restriction should be content neutral, not that it has failed to explain why it need not be.

[36] For an example, see Justice Brennan's concurring opinion in *Metromedia*, 453 U.S. at 536 and 538.

[37] The following recent works review the historical development of commercial speech doctrine. Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Roberts, *Toward a General Theory of Commercial Speech and the First Amendment*, 40 OHIO ST. L. J. 115 (1979).

[38] Valentine v. Chrestensen, 316 U.S. 52 (1942).

[39] 376 U.S. 254 (1964).

[40] In Pittsburgh Press v. Human Relations Comm'n, 413 U.S. 376 (1973), the Court upheld over a first amendment claim an executive order that forbade the publication of help wanted ads designated by the gender of the desired applicant. The Court treated the order as a business regulation, but now rationalizes the decision as sustaining a ban on advertising an illegal (sex discrimination) transaction. In Bigelow v. Virginia, 421 U.S. 809 (1975), the Court overturned a law that prohibited newspapers from carrying advertisements for commercial abortion services, but handled the case mainly as an aspect of its abortion decisions.

[41] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[42] Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

[43] *E.g.*, Bolger v. Youngs Drug Products Corp., 103 S. Ct. 2875 (1983). *See* SUM & SUBSTANCE § 10.2621.

[44] SUM & SUBSTANCE § 10.2620.

[45] *Id.* §§ 10.2622 to 10.2625.

[46] Ohralik v. Ohio Bar Ass'n, 436 U.S. 447, 456 (1976).

[47] Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980).

[48] *Id.*

[49] *See* SUM & SUBSTANCE §§ 10.2630–10.2644 for a review of the cases that make this clear.

[50] In the *Central Hudson* case, *supra* note 47, there was no dispute that the speech met the threshold requirement of being lawful and not misleading, but the Court proceeded to consider whether it might nevertheless be regulated.

[51] SUM & SUBSTANCE § 10.2630.

[52] See text at note 44 *supra*.

[53] See L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8 (1978).

[54] A sampling of the leading cases that support the statement in the text is reviewed in SUM & SUBSTANCE § 10.3000 *et seq.*

[55] *Id.* § 10.1411.

[56] Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 164 Cal. Rptr. 510, 610 P.2d 407 (1980).

[57] 610 P.2d at 410 n.2.

[58] *Id.*

[59] *See* SUM & SUBSTANCE § 10.1431.

[60] The ordinance is set out in full in Appendix A of this paper *infra*. It is taken from the Jurisdictional Statement for Appellant at 106a–113a, Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981).

[61] Ordinance § B. This key term was not defined by the ordinance. See text at notes 76–78 *infra*.

[62] *Id.*

[63] *Id.* § F. These provisions are also set out in a footnote to the Court's opinion, 453 U.S. at 495 n.3.

[64] *Id.* subsections 2, 3, 6, 9, and 10.

[65] Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976).

[66] See Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 164 Cal. Rptr. 510, 610 P.2d 407, 410 n.1 (1980).

[67] Stipulation 20, Joint Stipulation of Facts, Jurisdictional statement for Appellant, *supra* note 60, at 119a, 123a. The joint stipulation is set out in full in Appendix B of this paper *infra*.

[68] *Id.* stipulation 2.

[69] *Id.* stipulation 28.

[70] *Id.*

[71] Varney & Green v. Williams, 155 Cal. 318, 100 Pac. 867 (1909).

[72] *Metromedia, supra* note 66.

[73] 610 P.2d at 413 and 416 n.12.

[74] *Id.* at 413.

[75] *Id.*

[76] See text at notes 56–58 *supra*.

[77] 610 P.2d at 410 n.2.

[78] Exemptions 4, 5, 7, 9, and 10, text at note 63 *supra*.

[79] *Id.* at 417.

[80] See text at note 6 *supra*.

[81] 610 P.2d at 417.

[82] If it chooses to do so, a state is free to grant to such interests as speech greater protection than they are accorded by the Federal Constitution. See, *e.g.*, PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), holding that the Constitution allows a state to require shopping centers to permit speech-related activities to be conducted on their premises even though the first amendment does not impose such a requirement.

[83] 610 P.2d at 418.

[84] *Id.*

[85] *Id.* at 418–20.

[86] See text at note 70 *supra*.

[87] 610 P.2d at 419 n.14.

[88] SUM & SUBSTANCE § 10.1430. The distinction is important in first amendment litigation. See *id.* § 10.1431.

[89] 610 P.2d at 419 n.14.

[90] *Id.* at 430 (Clark, J., dissenting).

[91] *Id.* at 429 and 430 (Richardson and Newman, JJ., concurring).

[92] All of the *amici* listed here and in the next sentence are identified at 453 U.S. 492 n.* except the group of 19 organizations. This group filed a "Statement in Support of the Jurisdictional Statement" of Metromedia, which for all practical purposes was a brief on the merits, but apparently did not participate thereafter.

A "jurisdictional statement" is the Supreme Court equivalent of a notice of appeal. The Outdoor Advertising Association of America (OAAA) also supported Metromedia, of course. OAAA filed two briefs, one in support of the jurisdictional statement, another on the merits. These two documents contain a wealth of information about the relative costs of billboard and other forms of advertising.

San Diego was also supported by an especially thoughtful brief filed on behalf of Alameda and seven other California cities with billboard restrictions.

[93] See 453 U.S. at 510 n.16.

[94] The stipulation may explain why, after having refused three times in two years to grant plenary review to billboard cases (see text at notes 6 and 79–81 *supra*), the Court agreed to hear the *Metromedia* case. In its Jurisdictional Statement, the function of which is to explain why the Court should grant plenary review, Metromedia continually emphasized the institutional benefits to the Court of being able to review a case that was decided on stipulated facts. One such benefit, it was argued, was the absence of a need to speculate about the effects the ordinance would have on speech, because all disputes about such matters had been resolved by stipulation. See Jurisdictional Statement, *supra* note 60, *passim*.

[95] As will become evident in the next section of the text, there is a legitimate doubt about exactly what the plurality did decide.

[96] Throughout this paper, the term "traditional speech" is used to refer to speech that is entitled to full first amendment protection. All of the opinions in *Metromedia* distinguish "commercial speech" from "noncommercial speech," and use the latter to refer to speech entitled to full protection. This has been the practice of lower courts and commentators also. However, the practice is considered by the author of this paper to be misleading. Obscenity and libel are "noncommercial speech," but are not protected by the first amendment. "Noncommercial" is therefore unhelpful at best, and deceptive at worst, as an indicator of whether the speech at issue is entitled to protection. Second, it is confusing. Identifying a "non"-anything as a something with inherent constitutional value creates difficulties of comprehension. Nonetheless, those who are untroubled by these matters may simply substitute "noncommercial speech" each time the term "traditional speech" is used in this paper.

[97] See text at notes 6 and 80–81 *supra*. The Court expressly overruled one of these three decisions (*Lotze, supra* note 6). 453 U.S. at 513–14 n.18.

[98] 453 U.S. at 504 n.11. See text at notes 86–89 *supra*.

[99] SUM & SUBSTANCE § 10.1411; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-29 (1978). See also note 17 *supra*.

[100] The test is set out in full in the text at note 47 *supra*.

[101] 453 U.S. at 507–08.

[102] *Id.* at 508.

[103] *Id.* at 509.

[104] *Id.*

[105] *Id.* at 509–10.

[106] *Id.* at 511–12.

[107] *Id.* at 513.

[108] *Id.*

[109] *Id.* at 514–15.

[110] *Id.* at 515 n.20.

[111] Stipulation 28, Appendix B *infra*. See text at notes 70 and 86 *supra*.

[112] *Id.* at 517–18.

[113] *Id.* at 520.

[114] See text at notes 65–66 *supra*.

[115] See text at notes 103–05 *supra*.

[116] Stipulation 23, Appendix B *infra*, which contains more examples than are listed in the text.

[117] The photographs were contained in Appendix I to the Jurisdictional Statement, *supra* note 60.

[118] 453 U.S. at 525–26 (concurring opinion). He later argued that the ordinance should be treated as a total ban also because it would put outdoor advertising companies out of business, and thus there would be no billboards. *Id.* at 436 n.13.

[119] Id. at 527 (concurring opinion).

[120] FCC v. Pacifica Found., 438 U.S. 726 (1978).

[121] 453 U.S. at 528 (concurring opinion).

[122] *Id.*

[123] *Id.*

[124] *Id.* at 530 (concurring opinion). All of the signs owned by the plaintiffs in this case were in areas zoned commercial or industrial. Stipulation 20, Appendix B *infra*.

[125] Stipulation 8, Appendix B *infra*, which is more comprehensive than the snippet quoted in the text suggests.

[126] 453 U.S. at 530–34 (concurring opinion).

[127] *Id.* at 528–29 (concurring opinion).

[128] *Id.* at 536–40 (concurring opinion). See text at note 36 *supra*.

[129] *E.g.*, "This is the long arm and voracious appetite of federal power—this time judicial power—with a vengeance, reaching and absorbing traditional concepts of local authority." 453 U.S. at 556 (dissenting opinion).

[130] *Id.* at 556–59 (dissenting opinion).

[131] *Id.* at 560 (dissenting opinion).

[132] *Id.* at 562 (dissenting opinion).

[133] *Id.* at 563 (dissenting opinion). (Emphasis in the original.)

[134] *Id.* at 564 (dissenting opinion).

[135] *Id.* at 565 (dissenting opinion).

[136] *Id.*

[137] The plurality said, "the city may not choose the appropriate subjects for public discourse." *Id.* at 515.

[138] *Id.* at 565 (dissenting opinion).

[139] *Id.* at 567–69 (dissenting opinion).

[140] *Id.* at 541 (dissenting opinion).

[141] *Id.* at 540 (dissenting opinion).

[142] See text at 110 *supra*.

[143] The standing question raised by Justice Stevens is different from the one that had been suggested by the California Supreme Court and that was rejected in the plurality opinion. See text at notes 98–99 *supra*. The state court had suggested that billboard *owners* had no standing to raise the free speech rights of billboard *advertisers*. So far as one can tell from the various opinions in *Metromedia*, no member of the Court disputed the plurality's conclusion that they could do so under standard overbreadth doctrine. Justice Stevens' argument, on the other hand, was that *offsite* billboard *owners* had no standing to raise the question of the ordinance's effect on *onsite* property *owners* who were permitted to display commercial but not traditional messages. He argued that the Burger Court's recent cutbacks in the scope of the overbreadth doctrine (*see* SUM & SUBSTANCE §§ 10.1443 to 10.1443-2(e)) supported his conclusion that they tipped the balance against finding standing in this case. See 453 U.S. at 545–48 (dissenting opinion).

[144] 453 U.S. at 543–48 (dissenting opinion).

[145] *Id.* at 545 (dissenting opinion).

[146] *Id.*

[147] *Id.* at 549 (dissenting opinion).

[148] *Id.*, referring to stipulation 28, Appendix B *infra*. Here Justice Stevens returned to a theory he had advanced in his plurality "opinion of the Court" in Young v. American Mini Theatres, described in the text at note 25 *supra*. His opinion in *Young* emphasized that the total market in the community for "adult movies" was "essentially unrestrained." *See* SUM & SUBSTANCE § 10.2750. As the text indicates, he adopted that same "measuring the market" approach in *Metromedia*.

[149] 453 U.S. at 549–50 (dissenting opinion).

[150] *Id.* at 552 (dissenting opinion).

[151] *Id.*

[152] *Id.*

[153] *Id.* at 553 (dissenting opinion).

[154] *Id.* at 554–55 (dissenting opinion).

[155] *Id.* at 569.

[156] *Id.* at 570 (dissenting opinion). Justice Brennan's test is set out in the text at note 121 *supra*.

[157] This is a paraphrase of Gunther, *In Search of Judicial Quality on a Changing Court*, 24 STAN. L. REV. 1001, 1013–14 (1972).

[158] 453 U.S. at 556–57 (dissenting opinion).

[159] *See* SUM & SUBSTANCE § 10.1122.

[160] Times Film Corp. v. Chicago, 365 U.S. 43 (1961).

[161] *See* Near v. Minnesota, 283 U.S. 697 (1931). The "almost" in this sentence was inserted out of an excess of caution. No one really believes that such a licensing requirement could validly be applied to newspapers or books.

[162] FCC v. Pacifica Found., 438 U.S. 726 (1978).

[163] *See* Miller v. California, 413 U.S. 15 (1973).

[164] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[165] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

[166] For a discussion of this problem, see Leffler, *The Prohibition of Billboard Advertising: An Economic Analysis of the Metromedia Decision*, 1 SUP. CT. ECON. REV. 113 (1982). See also note 180 *infra*.

[167] 453 U.S. at 525–34 (concurring opinion).

[168] *Id.* at 548–553 (dissenting opinion).

[169] *Id.* at 570 (dissenting opinion).

[170] *Id.* at 515 n.20: "Because a total prohibition of outdoor advertising is not before us, we do not indicate whether such a ban would be consistent with the First Amendment. But see *Schad* v. *Mount Ephraim*, 452 U.S. 61 (1981), on the constitutional problems created by a total prohibition of a particular expressive forum [*sic*], live entertainment in that case."

Schad overturned a confusing zoning ordinance that was aimed at forbidding nude dancing in peep shows but was construed to prohibit all live entertainment.

[171] See text at note 116 *supra*.

[172] *See* United States v. Grace, 103 S. Ct. 1702 (1983), overturning a statute that prohibited the carrying of placards on the sidewalks surrounding the Supreme Court Building in Washington.

[173] 453 U.S. at 551 (dissenting opinion).

[174] 334 U.S. 558 (1948).

[175] 336 U.S. 77 (1949).

[176] *See* SUM & SUBSTANCE §§ 10.3220, 10.3420–10.3425.

[177] See *id.* § 10.1133.

[178] Cohen v. California, 403 U.S. 15, 21 (1971).

[179] *Id.* at 21–22. *See generally* SUM & SUBSTANCE § 10.2340.

[180] This was recognized by lower courts more than 70 years ago. See Floyd & Shedd, *supra* note 3, at 17–19. That the government provided the audience is frequently relied on by courts as a reason to deny compensation to landowners who lost the income from billboards when they were prohibited. See Mandelker, *Land Use Law* § 11.4 (1982).

[181] That those offended can avert their eyes from messages they do not wish to receive is the usual reason given for rejecting the captive audience concept as a justification for a restriction on speech. *See, e.g.*, Cohen, *supra* note 178, at 21.

There are 229,000 standardized billboards in the United states which "yield 109,912,667 adult exposure opportunities in any given day." Statement of Outdoor Advertising Association of America in Support of Jurisdictional Statement of Appellant at 9, Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981). "Adult exposure opportunities" might also be called "driver distraction opportunities."

[182] All of these statements are based on the personal experience of the author of this paper as an Air Force pilot.

[183] *See, e.g.*, Central Hudson Gas & Electric Corp. v. Public Service Comm., 447 U.S. 557 (1980).

[184] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[185] This discussion deals only with the reasons given in Part V of the plurality opinion. It ignores the uncertainties about the plurality's ruling that were created by the addition of Part VI. Those uncertainties are analyzed in the text following note 112 *supra*.

[186] 453 U.S. at 513.

[187] Justice Stevens, dissenting, argued that this issue was not properly before the Court. See text at notes 143–46 *supra*.

[188] "A city reasonably may decide that onsite signs, by identifying the premises (even if in the process of advertising), actually promote traffic safety. Prohibiting them would require motorists to pay more attention to street numbers and less to traffic." 453 U.S. at 565 n.6 (dissenting opinion).

[189] *Id.* at 520.

[190] *Id.* at 513 (emphasis added).

[191] This statement ignores the summary dispositions cited in note 6 *supra*.

[192] 336 U.S. 106 (1949).

[193] 453 U.S. at 508, 509, 511, and 512.

[194] *Id.* at 512.

[195] First National Bank v. Bellotti, 435 U.S. 756 (1978).

[196] Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977).

[197] The distinction could be justified, of course, *if* the Court were willing to look for justification. But the six Justices in the majority in *Metromedia* were not willing to do so.

[198] It would not be the first time the Court itself created a content-based rule of law which it would have declared unconstitutional if the law had been enacted by a legislature. In Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), the Court overturned an injunction banning labor picketing of a store in a privately owned shopping center. But four years later the Court upheld a shopping center ban on persons distributing anti-war leaflets. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). Together, *Logan Valley* and *Lloyd* amounted to a law that all speech activities, except labor picketing, could be prohibited in shopping centers. But the Court overturned a statute which included exactly this kind of content discrimination in favor of labor picketing the same year it decided *Lloyd*. Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972). See note 22 *supra*. The Court eventually overruled *Logan Valley* in Hudgens v. NLRB, 424 U.S. 507 (1976). *See* SUM & SUBSTANCE §§ 10.3320–10.3321 for discussion. See also the text at note 36 *supra*.

[199] 418 U.S. 298 (1974).

[200] 427 U.S. 50 (1976).

[201] 424 U.S. 828 (1976).

[202] Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977).

[203] 438 U.S. 726 (1978).

[204] Haig v. Agee, 453 U.S. 280 (1981).

[205] 452 U.S. 640 (1981).

[206] See text at notes 12–13 *supra*.

[207] See text at notes 132, 137–38 *supra*.

[208] See text at notes 152–54 *supra*.

[209] Regan v. Taxation with Representation, 103 S. Ct. 1997 (1983).

[210] That is to say they were not mentioned in the crucial Parts V and VI of the plurality opinion, where the San Diego ordinance was declared unconstitutional. *American Mini Theatres* (453 U.S. at 506) and *Pacific* (*id.* at 501) were cited in other parts of the opinion. *Heffron* was cited in a footnote in Part VI (*id.* at 517–18 n.23) but for an unrelated proposition.

[211] *Id.* at 514 n.19.

[212] See text at notes 177–80, and note 180, *supra*.

[213] Ordinance § F.1., Appendix A of this paper *infra*.

[214] See 453 U.S. at 562–66 (dissenting opinion).

[215] See *id.* at 553–55 (dissenting opinion).

[216] See text at note 36 *supra*.

[217] "[T]he ordinance distinguishes in several ways between permissible and impermissible signs at a particular location by reference to their content. *Whether or not these distinctions are themselves constitutional*, they take the regulation out of the domain of time, place, and manner restrictions." 453 U.S. at 516–17 (emphasis added). See also *id.* at 517–18 n.23 ("As we demonstrated above, the San Diego ordinance is not such a restriction. . . .").

[218] *Id.* at 503.

[219] See text, "The Requirement of Content Neutrality," under section heading, "First Amendment Background," *supra*, for discussion.

[220] Appendix B *infra*.

[221] 453 U.S. 114 (1981).

[222] See *id.* at 116–17, 119–20. For information about the relative costs of billboard and other forms of advertising, see the material cited in note 92 *supra*.

[223] The Court held that mailboxes were not part of the "public forum" and thus that the organization had no right of access to them. See note 35 *supra* for a brief discussion of this "no public forum" rationale. Billboards are not part of the public forum either. See text following note 23 *supra*.

[224] 453 U.S. at 119–20.

[225] 336 U.S. at 88–89. Cox v. New Hampshire, 312 U.S. 569 (1941), was the seminal time, place, and manner decision (see text at notes 14–15 *supra*). It held that an organization could be charged a fee for holding a parade, provided the fee was reasonably related to the costs of cleaning up and supplying protection and traffic guidance.

[226] 453 U.S. at 501, 502 and 517–18 n.23.

[227] *Id.* at 525 and 527 (concurring opinion).

[228] 453 U.S. at 530–34 (concurring opinion).

[229] *Id.* at 552–53 (dissenting opinion).

[230] St. Louis has a number of shopping centers, some with many separate buildings (Westport Plaza and Northwest Plaza) and some in one major building (Frontenac Plaza, West County Center), that are visually appealing. It has at least one industrial concern (McDonnel-Douglas Aircraft) that resembles a college campus from the street.

[231] Additional evidence of the absence of any necessary connection between zoning classification and aesthetics can be found in Ewald & Mandelker, *Street Graphics* (1971).

[232] See Crawford, *The Metromedia Opportunity*, 4 ZONING & PLANNING L. REP. 145 (1981); Blumoff, *After Metromedia: Sign Controls and the First Amendment* (1982), an unpublished paper prepared for, and distributed by, the Planning and Law Division of the American Planning Association.

[233] Crawford, *supra* note 227, and *The Metromedia Impact*, 6 ZONING & PLANNING L. REP. 97 (1983).

[234] 23 U.S.C. § 131(d) (Supp. 1983).

[235] 453 U.S. at 515 n.20.

[236] The Court said that "an absolute prohibition on a particular type of expression will be upheld only if *narrowly drawn* to accomplish a *compelling* governmental interest." United States v. Grace, 103 S. Ct. 1702, 1707 (1983) (emphasis added). *Grace* overturned a federal statute that forbade the carrying of placards outside the Supreme Court building.

[237] Metromedia v. City of San Diego, 32 Cal. 3d 180, 185 Cal. Rptr. 260, 649 P.2d 902 (1982).

[238] 639 F.2d 6 (1st Cir. 1980), *aff'd*, 453 U.S. 916 (1981).

[239] 453 U.S. at 513–14 n.18.

[240] 444 U.S. 921 (1979).

[241] State v. Lotze, 92 Wash. 2d 52, 593 P.2d 811 (1979).

[242] See text at notes 6–7 *supra*.

[243] Lamar-Orlando Outdoor Adv. v. City of Ormond Beach, 415 So.2d 1312 (Fla. App. 1982).

[244] White Advertising Metro, Inc. v. Zoning Hearing Bd., 453 A.2d 29 (Pa. Cmwlth 1982).

[245] City of Lake Wales v. Lamar Adv. Assn., 414 So.2d 1030 (Fla. 1982); Maurice Callahan & Sons, Inc. v. Outdoor Advertising Board, 427 N.E.2d 25 (Mass. App. 1981); R.O. Givens, Inc. v. Town of Nags Head, 294 S.E.2d 388 (N.C. App. 1982).

[246] Taxpayers for Vincent v. Members of City Council, 682 F.2d 847 (9th Cir. 1982); Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982); City of Antioch v. Candidates' Outdoor Graphic Service, 557 F. Supp. 52 (N.D. Cal. 1982); Rhodes v. Gwinnett County, 557 F. Supp. 30 (N.D. Ga. 1982); Metromedia, Inc. v. Mayor & City Council of Baltimore, 538 F. Supp. 1183 (D. Md. 1982); Southern New Jersey Newspapers v. New Jersey, 542 F. Supp. 173 (D.N.J. 1982); City of Lakewood v. Colfax Unlimited Assn., 634 P.2d 52 (Colo. en banc 1981); H & H Operations, Inc. v. City of Peachtree, 283 S.E.2d 867 (Ga. 1981); Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 69 Ohio St. 2d 539, 433 N.E.2d 198 (1982); City of Indio v. Arroyo, 191 Cal. Rptr. 565 (Cal. App. 1983).

[247] Minnesota v. Hopf, 323 N.W.2d 746 (Minn. 1982); Temple Baptist Church, Inc. v. City of Albuquerque, 646 P.2d 565 (N.M. 1982); City of Sunrise v. D.C.A. Homes, Inc., 421 So.2d 1084 (Fla. App. 1982); Singer Supermarkets, Inc. v. Hillsdale Board of Adjustment, 183 N.J. Super. 285, 443 A.2d 1082 (1982).

[248] H & H Operations, Inc. v. City of Peachtree, 283 S.E.2d 867 (Ga. 1981).

[249] Taxpayers for Vincent v. Members of City Council, 682 F.2d 847 (9th Cir. 1982); Southern New Jersey Newspapers v. New Jersey, 542 F. Supp. 173 (D.N.J. 1982); City of Indio v. Arroyo, 191 Cal. Rptr. 565 (Cal. App. 1983).

[250] Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982); Rhodes v. Gwinnett County, 557 F. Supp. 30 (N.D. Ga. 1982); Metromedia, Inc. v. Mayor & City Council of Baltimore, 538 F. Supp. 1183 (D. Md. 1982); Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 69 Ohio St. 2d 539, 433 N.E.2d 198 (1982).

[251] City of Antioch v. Candidates' Outdoor Graphic Services, 557 F. Supp. 52 (N.D. Cal. 1982); City of Lakewood v. Colfax Unlimited Assn., 634 P.2d 52 (Colo. en banc 1981).

[252] Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982).

[253] Rhodes v. Gwinnett County, 557 F. Supp. 30 (N.D. Ga. 1982).

[254] Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 69 Ohio St. 2d 539, 433 N.E.2d 198 (1982).

[255] The test is set out in the text at note 47 *supra*.

[256] See text at note 53 *supra*.

[257] City of Lakewood v. Colfax Unlimited Assn., 634 P.2d 52 (Colo. en banc 1981).

[258] *See* SUM & SUBSTANCE §§ 10.2630–10.2632.

[259] H & H Operations, Inc. v. City of Peachtree, 283 S.E.2d 867 (Ga. 1981).

[260] Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 69 Ohio St. 2d 539, 433 N.E.2d 198 (1982).

[261] 634 P.2d (Colo. en banc 1981).

[262] 538 F. Supp. 1183 (D. Md. 1982).

[263] See 453 U.S. at 530–34. He specifically mentioned Williamsburg, Va.

[264] 323 N.W.2d 746 (Minn. 1982).

[265] *See, e.g., John Donnelly & Sons, supra* note 238; *City of Lakewood, supra* note 261; City of Antioch v. Candidates' Outdoor Graphic Service, 557 F. Supp. 52 (N.D. Cal. 1982).

[266] *See, e.g.*, T. Emerson, *The System of Freedom of Expression* 6 (1970); A. Meiklejohn, *Free Speech and Its Relation to Self-Government* 48 (1948).

[267] Taxpayers for Vincent v. Members of City Council, 682 F.2d 847 (9th Cir. 1982); City of Antioch v. Candidates' Outdoor Graphic Service, 557 F. Supp. 52 (N.D. Cal. 1982).

[268] *City of Lakewood, supra* note 261; Temple Baptist Church, Inc. v. City of Albuquerque, 646 P.2d 565 (N.M. 1982).

[269] *Temple Baptist Church, supra* note 268.

[270] 557 F. Supp. 52 (N.D. Cal. 1982).

[271] Note 261 *supra*.

[272] 682 F.2d 847 (9th Cir. 1982).

[273] The Colorado Supreme Court also made use of Justice Brennan's concurrence, but arguably in a more sensible fashion. See *City of Lakewood*, 634 P.2d at 69–70.

[274] *Temple Baptist Church, supra* note 268.

[275] 634 P.2d at 68 n.15.

[276] Rhodes v. Gwinnett County, 557 F. Supp. 30 (N.D. Ga. 1982).

[277] Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982).

[278] Rhodes v. Gwinnett County, 557 F. Supp. 30 (N.D. Ga. 1982).

[279] City of Sunrise v. D.C.A. Homes, Inc., 421 So.2d 1084 (Fla. App. 1982).

[280] Singer Supermarkets, Inc. v. Hillsdale Board of Adjustment, 183 N.J. Super. 285, 443 A.2d 1082 (1982).

[281] *Id.*

[282] *Temple Baptist Church, supra* note 268. See text at note 269 *supra*.

[283] *City of Lakewood, supra* note 261.

[284] City of Indio v. Arroyo, 191 Cal. Rptr. 565 (Cal. App. 1983).

[285] Minnesota v. Hopf, *supra* note 264.

[286] *City of Lakewood, supra* note 261.

[287] 191 Cal. Rptr. 565 (Cal. App. 1983).

[288] Note 47 *supra*.

[289] 453 U.S. at 564 (dissenting opinion).

[290] *Id.* at 540 (dissenting opinion).

[291] *Id.* at 515 n.20.

[292] For a more recent application of this "more restriction is better than less" philosophy, also in the area of land use control, see Larkin v. Grendel's Den, Inc., 103 S. Ct. 505 (1982). There, the Court struck down a statute which permitted schools or churches to object to the issuance of a liquor license to an establishment within a certain distance of their premises. The majority implicitly conceded that a flat ban on the sale of liquor in such locations would have been permissible.

[293] See text at notes 252–53 and 257 *supra*.

[294] See Rhodes v. Gwinnett County, 557 F. Supp. 30 (N.D. Ga. 1982).

[295] See text at notes 253–54 *supra*.

[296] See text at notes 272–73 *supra*.

[297] See 453 U.S. at 538–39 (concurring opinion).

[298] For a recent example of this technique, but which was unimportant to the resolution of that case, see Bolger v. Youngs Drug Products Corp., 103 S. Ct. 2875 (1983).

[299] Text at notes 239–42 *supra*.

[300] See text at notes 186–98 *supra*.

[301] *See, e.g.*, J. Wachtel & R. Netherton, *Safety and Environmental Design in the Use of Commercial Electronic Variable-Message Signage* 22–23 (Report No. FHWA/RD-80/051 1980); Dukeminier, *supra* note 3.

[302] The term "free rider" is taken from the cases dealing with the validity of compulsory union membership under the first amendment. The Court has held that workers may be required to pay dues to unions, but only to the extent their contributions are actually used for collective bargaining and similar purposes. Any extraction of dues beyond that amount violates the first amendment. *See, e.g.*, Abood v. Detroit Board of Education, 431 U.S. 209 (1977). The Court has accepted the argument that the union's interest in preventing "free riders" from taking advantage of its collective bargaining activities without contributing to the costs of those services justifies overriding first amendment values to this limited extent. There is an obvious parallel between free riding union members and billboard companies.

[303] The amount of revenue lost would have to be reduced by the tax revenues generated from the sign companies of course.

[304] For discussions of the difficulties of determining the meaning of no-majority decisions, see Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981); Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 (1980).

[305] SUM & SUBSTANCE § 10.1300.

[306] *Id.* at §§ 10.1320–10.1322.

[307] *Id.* at §§ 10.1340 to 10.1341-2.

[308] *Id.* at §§ 10.1342-1 to 10.1342-2.

[309] *Id.* at § 10.2625.

[310] *Cf. id.* at § 10.1374–3.

[311] City of Lakewood v. Colfax Unlimited Assn., 634 P.2d 52 (Colo. en banc 1981); Minnesota v. Hopf, 323 N.W.2d 746 (Minn. 1982); Maurice Callahan & Sons, Inc. v. Outdoor Advertising Board, 427 N.E.2d 25 (Mass. App. 1981); White Advertising Metro, Inc. v. Zoning Hearing Bd., 453 A.2d 29 (Pa. Cmwlth. 1982).

[312] City of Indio v. Arroyo, 191 Cal. Rptr. 565 (Cal. App. 1983).

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators and their legal counsel, and engineers responsible for the planning, design, and construction of facilities. Officials are urged to review their practices and procedures to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document.

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