FIRST AMENDMENT ISSUES IN STATE REGULATION OF BILLBOARDS AND SAFETY REST AREAS

Edward V. A. Kussy, Federal Highway Administration

There are several reasons for considering First Amendment issues relating to state regulation of rest areas and billboards together. The Supreme Court decided both *Metromedia v. City of San Diego*, 101 S.Ct. 2882 (1981), decision below at 164 Cal. Rep. 510 (1980), which specifically addressed a city billboard ordinance, and *Heffron v. Intern Soc. for Krishna Consciousness*, 101 S.Ct. 2559 (1981), decision below at 299 N.W. 2d 79 (Minn. 1980), which involved petitioning at a state fair, but is directly relevant to the regulation of activities in rest areas, in a single month.

Metromedia and *Heffron* leave very little doubt that a total prohibition of either billboards or activities in rest areas could not withstand a constitutional challenge. This confronts states with a series of difficult questions: What type of regulation is permitted? Under what circumstances may regulation be imposed? And, what degree of regulation is allowed?

The difficulty of constitutionally regulating billboards is well portrayed in *Metromedia*. There, the issues centered around a city-wide billboard ban. The case produced four different opinions, all of which were somewhat contradictory. The four justices supporting the plurality opinion held that the ordinance was valid as applied to commercial speech, but invalid as applied to noncommercial speech. Therefore, the ordinance was ruled unconstitutional on its face. Although there were twelve exemptions from the ban (some of which pertained to noncommercial speech), the plurality held that "with respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse." *Metromedia*, 101 S.Ct. at 2896. It was concluded that when balancing the State's police power interest in safety and aesthetics against the general concern for protecting First Amendment freedom of speech, the State's power in the area of noncommercial speech was strictly limited.

Justices Brennan and Blackmun concurred in the judgment, but dealt with the ordinance more broadly. In their opinion, even a ban on commercial speech had not been justified by the city on the basis of safety and aesthetics. They made clear that a ban on only commercial billboards would be unconstitutional, as it would leave city officials in the position of determining whether the content of a message was commercial or noncommercial. *Id.*, at 2907. This "presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech." *Id.* They did suggest that a limited ban on billboards could be, but had not been, justified. Justice Stevens' dissent presented yet a third variation. He agreed with the plurality that the ordinance was constitutional as applied to commercial signs, but also thought the ordinance properly regulated noncommercial signs.

Finally, Justices Burger and Rehnquist argued in dissent that cities have the requisite police power to regulate commercial and noncommercial billboards equally. They felt that the content of a message was, in this instance, separable from its form, i.e., the billboard. Billboards are not an inherently protected form of speech, for there are many other channels by which the public may be reached. The fact that billboards may be a cheaper and more visible form of expression is irrelevant. *Id.*, at 2921.

The *Metromedia* decision is difficult to reconcile with the cases which preceded it. Historically, the regulation of free speech in relation to billboards breaks down rather nicely into three eras. The first era is characterized by several cases decided in the 1940s, of which *Valentine v. Chrestensen*, 316 U.S. 52 (1942), is the leading example. This case involved a law forbidding distribution of commercial advertising matter in the streets.

Mr. Chrestensen prepared a handbill containing commercial advertising, and in order to escape the law (or so the Court ruled), he included a message of public protest. In upholding the law, the court reasoned that pure commercial speech was not intended to be protected by the First Amendment. *Id.*, at 54. Thus, the States were free to regulate as they wished in the area of commercial speech. First Amendment protection applied essentially to speech which was considered "non-commercial."

Chrestensen remained the law until approximately 1975, at which time the second era was ushered in by such cases as *Biglow v. Virginia*, 421 U.S. 809 (1975), *Bates v. State Bar Association of Arizona*, 433 U.S. 350 (1977), and *Ohralik v. Ohio Bar Association*, 436 U.S. 447 (1978). In *Bigelow*, an advertisement had been published in a Virginia newspaper (Bigelow was director and managing editor) describing where women could go in New York City to be placed for a legal abortion. Bigelow was convicted of violating a statute which prohibited such encouragement of abortion. The Supreme Court overturned the conviction, ruling that commercial advertisements do retain First Amendment protection. *Bigelow*, 421 U.S. at 818.

However, although commercial speech was protected by the First Amendment, the Court maintained that commercial speech could be regulated to a greater degree than noncommercial speech. The regulation had to be based on a valid police power interest in the content of the commercial speech. Typical examples of constitutional laws regulating commercial speech are truth-in-advertising laws, and the ban of certain cigarette advertisements. For purposes of these cases, whether a billboard carried a commercial or non-commercial message was irrelevant, since billboards are typically regulated for reasons of safety and aesthetics, neither of which is content-related.

A good example of the Court using a First Amendment analysis during this era in examining the commercial content of an advertisement is *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557 (1980). The New York Public Service Commission (PSC) tried to prevent two utility companies from inserting in their monthly bills advertisements encouraging the use of electricity. At that time the State of New York was campaigning to promote energy conservation, and the PSC thought the utilities should not be permitted to encourage energy use. Although the Court found that the government's interest in energy conservation was substantial, and that the regulation directly advanced that interest, the regulation was held unconstitutional on the ground that there were many other ways to urge energy conservation without such an intrusion on the utilities' right to free speech. *Id.*, at 570. The regulation was simply too extensive. See also, *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530 (1980).

Prior to its decisions in the *Public Service Commission* cases, the Supreme Court had already recognized that certain types of commercial signs were "unique forums," and had to be premitted. See *Linmark Associates, Inc. v. Town of Willingboro*, 431 U.S. 85 (1977), which concerned on-premise signs

advertising the sale of homes. Willingboro attempted to ban these "for sale" signs in order to stem the flight of white homeowners from racially integrated neighborhoods. The Supreme Court noted that the alternatives to "for sale" signs available to sellers were inadequate. *Id.*, at 93. Perhaps, the Court was also influenced by its conclusion that prohibiting the for sale signs would not result in Willingboro retaining its integrated character. *Id.*, at 95.

Prior to *Metromedia*, the Supreme Court had repeatedly declined to review billboard ordinances, most of which were challenged on the grounds that they violated the First Amendment rights of sign owners or advertisers. *Suffolk Outdoor Advertising Co., Inc. v. Hulse*, 373 N.E. 2d 483 (1977), appeal dismissed 439 U.S. 808 (1978); *Madjeska Sign Studios, Inc. v. Berle*, 373 N.E. 2d 255 (1977), appeal dismissed 439 U.S. 809 (1978); *Lotze v. Washington*, 593 P. 2d 811 (1979), appeal dismissed 444 U.S. 921 (1979). *Newman Signs, Inc. v. Hjelle*, 268 N.W. 2d 741 (1978), appeal dismissed 440 U.S. 901 (1979). The dismissal of these cases for failure to state a Federal question was precedential, inasmuch as all of the ordinances were thus sustained. See *Hicks v. Miranda*, 422 U.S. 332 (1975). Thus, it seemed well established that commercial and noncommercial speech were on similar footing.

However, three new cases seem to indicate that the Supreme Court has once again changed direction. See *State ex rel. Dept. of Transp. v. Pile*, 603 P. 2d 337 (Okla. 1979), *cert. denied*, 453 U.S. 922 (1981); *John Donnelly & Sons v. Canpbell*, 639 F. 2d 6 (1st Cir. 1980), *aff'd* 101 S. Ct. 3151 (1981); and *Metromedia, supra*.

In *Pile*, the Supreme Court of Oklahoma struck down the State's outdoor advertising control law as it applied to noncommercial signs. (This state law was essentially identical to the Highway Beautification Act of 1965.) At issue was a sign in the vicinity of a federal highway, with the message: "Get us out of the United Nations". The court applied a First Amendment analysis and held that commercial and noncommercial signs were different; that, if applied to non-commercial signs, the State law would not pass constitutional muster; and that, therefore, the State law did not apply to noncommercial signs. The Oklahoma court considered the case entirely in terms of First Amendment, and ignored the fact that the State (and Federal) beautification laws are not direct restraints on speech, but are land use laws which seek to control the roadside for safety and aesthetic purposes. The court was also unimpressed with the fact that the State law permitted signs at numerous other locations.

In *John Donnelly and Sons v. Campbell, supra*, the First Circuit found unconstitutional a statewide billboard ban in Maine. The Court clearly differentiated between commercial and noncommercial speech, concluding that under the facts of the case, the State had adequately justified a ban on commercial signs, but could not prohibit noncommercial ones.

The distinction between commercial and noncommercial speech was reaffirmed by the plurality opinion in *Metromedia*. In the United States Supreme Court, the billboard industry (Metromedia) emphasized the traditional protection given noncommercial signs, filling their briefs with pictures of billboards displaying political and religious messages. This obvious appeal to the First Amendment sympathies of the Court may have served to focus the plurality's attention on the difference between commercial and noncommercial speech, which as indicated above, had been eroding prior to *Metromedia*.

Following these three cases was *Maurice Callahan & Sons v. Outdoor Adver. Bd.*, 427 N.E. 2d 25 (Mass. App. 1981), which involved a fairly traditional billboard ordinance. Although the ordinance banned both commercial and noncommercial signs (with the customary exceptions), the Court addressed the conditionality of the ordinance only as it applied to commercial signs. The Court ruled that the plaintiffs lacked standing to challenge the law on the basis of First Amendment protection of noncommercial speech, for their signs were entirely of commercial content. Interpreting the ordinance to be consistent with *Metromedia*, the court then upheld the ban on off-premise commercial signs. *Maurice Callahan*, 437 N.E. 2d at 29.

From the above, it would seem that, while safety and aesthetics are still valid basis for billboard regulation, area-wide bans will be treated with suspicion. Courts will look not only at what the law says, but at its actual impact as well. For example, in *Central Advertising Co. v. City of St. Joseph*, 309 N.W. 2d 613 (Mich. App., 1981), a seemingly neutral 100 foot setback requirement was struck down under *Metromedia* because the ordinance effectively banned billboards in St. Joseph. *Id.*, at 614.

Given *Metromedia*, it is likely that henceforth commercial speech will receive less protection than noncommercial speech, irrespective of any police power interest in its content. However, each ordinance will have to be reviewed individually, both as to its basis and its scope. Actually, *Metromedia* has not done much in a positive way for the billboard industry. Although it provides a basis for attacking area-wide bans, it has also made it easier for governments to regulate commercial signs directly.

The legal issues raised by the regulation of activities in roadside rest areas are, in many ways, quite similar. The Courts have been much more clear with respect to these issues, and thus regulations in this area are more readily analyzed in a constitutional sense. This is not to say that actual implementation is a simple matter. Although not specifically a rest area case, *Heffron v. Iskon, supra*, dealt extensively with the issues raised by the type of restrictions which States often seek to impose in rest areas.

The question presented in *Heffron* was whether a religious organization (the Har Krishnas) desiring to sell and distribute literature and solicit domations at a state fair, could be required to restrict its activities to an assigned booth. The activities involved are considered by the Hare Krishna to be an important religious rite called sankirtan. The Supreme Court held that in order to maintain methodical crowd movement and assure safety and convenience, the State could require an assigned booth. Although the Hare Krishnas consider public activity to be a religious ritual, the majority opinion of the Court saw it as sales, and thus commercial activity. In other words, even where a State could not prevent the Hare Krishnas from wandering about preaching to the public, it may regulate commercial activity. It does not really matter that the group considered the activity to be a religious rite -- a sale is a sale.

By implication, *Heffron* indicates (and confirms a long line of lower court decisions) that some activity must be permitted. It is only a question of the extent to which the State may regulate the activity. Recently, there has been increasing pressure to permit a variety of activities in rest

areas. Vending machines are increasingly allowed in rest areas, and there is an "experimental" duty-free store in a Vermont rest area.

There is little scientific data about the safety benefits of restrictions on activities in rest areas. It is true that rest areas have limited space and limited capacity, that their purpose is to provide a undisturbed atmosphere, and that police protection in rest areas is difficult and costly. For example, if Hare Krisnas were allowed to practice sankirtan in rest areas police protection would be a necessity. It is not difficult to imagine a tired and irritable motorist becoming angered by a solicitious Krishna. Nevertheless, possibilities of anger or violence are not legitimate reasons for denying a group their First Amendment rights.

The serious problems of limited space and capacity still remain. Rest areas are typically designed for the thirtieth peak hour. Thus, on many occasions, such as holiday weekends, the rest areas is at or near capacity. If the time the travelers spend in the rest areas on these occasions is increased even slightly (for example, because of their conversations with Krishnas), congestion could result. This results in motorists not stopping for needed rest. If rest areas are made less tranquil because of a lack of protective restrictions, motorists may avoid rest areas even on normal travel days. No studies are available as to the likelihood of such conduct by motorists. In addition, given the number of activities specifically allowed, such as vending machines, information centers, etc., it is more difficult to exclude other activities which may cause motorists to be disturbed or to tarry in rest areas.

In order to successfully inhibit the exercise of First Amendment rights, it is essential to know exactly why the expression should be prevented. Clearly, some forums are recognized by the Supreme Court as limited use forums (such as state fairgrounds), and are susceptible to more extensive regulation. It seems that rest areas are good candidates for this category. Unlike public parks and streets, which are traditionally open for everyone, rest areas serve a specific, significant purpose for highway motorists.

Any restrictive regulatory scheme, if it is to be upheld, must provide for the exercise of First Amendment rights which do not interfere with the basic purpose for which the restriction was imposed. Any restrictions must be complemented a permitting scheme which includes clear, not unduly burdensome, and objective standards pursuant to which a permit can be obtained. This point is illustrated by *International Society for Krishna Consciousness v. Hays*, 438 F. Supp. 1077 (D. Fla. 1977), which involved a regulation prohibiting the distribution of circulars on the Florida Turnpike system without permission from the State Department of Transportation. The District Court held that the statute was unconstitutional on its face for lack of objective standards, as it gave the licensing official unlimited discretion to grant or deny permission. *Id.*, at 1081.

Another example of the effect of *Heffron* is *Dallas Ass'n, etc. v. Dallas City Hospital Dist.*, 478 F. Supp. 1250 (N.D. Tex. 1979), 656 F. 2d 1175 (5th Cir. 1981), *rev'd on rehearing*, 670 F. 2d 629 (5th Cir. 1982). Originally, the Circuit Court, without considering the hospital's "no solicitation rule," held that the hospital could constitutionally limit the activities of the plaintiff in certain sensitive areas. *Dallas Ass'n Etc.*, 656 F. 2d at 1181. On rehearing, however, the Court held that in light of *Heffron*, the hospital could not completely forbid freedom of expression. *Dallas Ass'n Etc.*, 670 F. 2d at 632. The "no solicitation rule" prevented expression on the hospital's property without permission of the hospital administration. Since the rule lacked objective standards, it was overbroad and, therefore, unconstitutional. *Id.*, at 633.

See also *Intern. Soc. for Krishna Conciousness v. Bowen*, 600 F. 2d 667 (7th Cir. 1979), *cert. denied*, 444 U.S. 963, where the officials responsible for the Indiana State Fair passed a resolution prohibiting sankirtan and other activities, such as distributing flowers. The Court rejected the prohibition. However, unlike *Heffron*, state fair officials had not established a strong basis for the restriction, relying instead on general assertions that the Krishna activities would threaten public safety. Nevertheless, much of the *Bowen* decision has lost its validity in light of *Heffron*.

In determining the propriety of a particular ordinance, courts have been willing to examine that ordinance in great detail. In *Intern. Soc. for Krishna Consciousness v. Eaves*, 601 F. 2d 809 (5th Cir. 1979), the Circuit Court analyzed a municipal ordinance line by line in a thirty page decision. Some provisions were rejected and some were accepted by the Court.

In addition to setting the appropriate objective standards, the regulations may not be content based. This is illustrated in *Iranian Muslim Org'n v. City of San Antonio*, 615 S.W. 2d 202 (Texas 1981), a case in which a group of Iranians who wanted to protest the Shah's presence in the United States were denied a parade permit. The City manager had announced that no permits would be issued to any group that planned a protest concerning the Iranian issue. This directive was held to be content based, and therefore, unconstitutional, regardless of the fear that violence might erupt from such a demonstration. *Id.*, at 206. "Such fears are not a constitutionally permissible factor." *Id.* This Court's admonition is a reminder that Krishnas may not be barred from practicing sankirtan in rest areas simply because it may lead to violence.

Billboard and rest area cases culminating with the principles of *Metromedia* and *Heffron*, suggest that a minimum level of expression must be permitted. The difficulty is in formulating regulation which will control the spread of billboards and expansion of rest area activities, while remaining consistent with the Supreme Court's interpretation of the Constitution.

In order to be sustained, such rules must:

(1) Not be entirely exclusive, unless an exclusion is clearly warrented by strong, objective evidence of a police power "interest."

(2) Be no more restrictive than necessary to accomplish the police power goals which require the issuance of any restriction. These goals should be well enunciated and fully understood.

(3) Establish clear, fair, and realistic permitting standards.

(4) Be carefully reviewed to make sure each restriction or requirement can be individually justified in the context of the overall rule.

Given the precision of judicial review, it is unlikely that completely predictable results will be achievable. Nevertheless, if rules are issued with care and sensitivity, reasonable regulations of billboards and rest areas should not be hampered sufficiently to cause serious operational problems. Much more difficult will be making inspectors and permit officials aware of the difficult legal and factual decisions which, of necessity, must become part of the regulatory process in the future.

SPONSORSHIP OF THIS CIRCULAR

GROUP 4--LEGAL RESOURCES
Robert F. Carlson, California Department of Transportation, Chairman

Committee on Environmental Issues in Transportation Law
Irwin Leroy Schroeder, Federal Highway Administration, Chairman
Laurence J. Aurbach; Robert K. Best;
David Gates Burwell; Leo A. Byrnes; Hal O. Carroll;
John J. Collins; Ray M. Druley; Joseph C. Easley;
Val Fairman; Joseph T. Fromme; Oscar S. Gray;
Nancy A. Greene; Alvin G. Greenwald;
John M. Hrubovcak; Edward V. A. Kussy;
Robert H. Raymond, Jr.; Nolan H. Rogers;
Richard L. Rudin; Richard L. Russell;
Robert C. Schwartz

Larry W. Thomas, Transportation Research Board, Staff Representative