AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 10: The Reagan Era – Democratic Rights/Free Speech

**Metromedia, Inc. v. San Diego, 453 U.S. 490** (1981)

*San Diego adopted an ordinance prohibiting “outdoor advertising display signs.” The ordinance included exceptions for signs on the site of a business or a variety of specific categories, such as government signs, bus stops, signs depicting time and temperature. Metromedia Inc. owned a number of billboards in the city on which they rented space for advertising both commercial and noncommercial messages. Metromedia sought an injunction in state court to block the implementation of the ordinance on the grounds that it violated their First Amendment rights to free speech. The trial court agreed, but the state supreme court reversed that judgment. In a 6-3 decision, the U.S. Supreme Court reversed the state supreme court, holding that the ordinance was an invalid restriction on free speech.*

JUSTICE WHITE delivered the opinion of the Court.

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This Court has often faced the problem of applying the broad principles of the First Amendment to unique forums of expression. . . . Even a cursory reading of these opinions reveals that at times First Amendment values must yield to other societal interests. These cases support the cogency of Justice Jackson's remark in *Kovacs v. Cooper* (1949): Each method of communicating ideas is "a law unto itself" and that law must reflect the "differing natures, values, abuses and dangers" of each method. We deal here with the law of billboards.

Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages. . . . But whatever its communicative function, the billboard remains a "large, immobile, and permanent structure which like other structures is subject to . . . regulation." Moreover, because it is designed to stand out and apart from its surroundings, the billboard creates a unique set of problems for land-use planning and development.

Billboards, then, like other media of communication, combine communicative and noncommunicative aspects. As with other media, the government has legitimate interests in controlling the noncommunicative aspects of the medium, but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects. Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, it has been necessary for the courts to reconcile the government's regulatory interests with the individual's right to expression. . . .

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Thus, under the ordinance (1) a sign advertising goods or services available on the property where the sign is located is allowed; (2) a sign on a building or other property advertising goods or services produced or offered elsewhere is barred; (3) noncommercial advertising, unless within one of the specific exceptions, is everywhere prohibited. The occupant of property may advertise his own goods or services; he may not advertise the goods or services of others, nor may he display most noncommercial messages.

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The extension of First Amendment protections to purely commercial speech is a relatively recent development in First Amendment jurisprudence. Prior to 1975, purely commercial advertisements of services or goods for sale were considered to be outside the protection of the First Amendment. . . .

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. . . . There is no suggestion that the commercial advertising at issue here involves unlawful activity or is misleading. Nor can there be substantial doubt that the twin goals that the ordinance seeks to further— traffic safety and the appearance of the city—are substantial governmental goals. . . . Similarly, we reject appellants' claim that the ordinance is broader than necessary. . . . 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 to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows onsite advertising and some other specifically exempted signs.

The more serious question, then, concerns the third of the *Central Hudson Gas & Electricity v. Public Service Commission* (1980) criteria: Does the ordinance "directly advance" governmental interests in traffic safety and in the appearance of the city? . . . The California Supreme Court noted the meager record on this point but held "as a matter of law that an ordinance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety." . . .

We reach a similar result with respect to the second asserted justification for the ordinance—advancement of the city's esthetic interests. It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an "esthetic harm." . . .

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In the first place, whether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is under-inclusive because it permits onsite advertising. Second, the city may believe that offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising. . . . It does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising. Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted.

. . . . In light of the above analysis, we cannot conclude that the city has drawn an ordinance broader than is necessary to meet its interests, or that it fails directly to advance substantial government interests. In sum, insofar as it regulates commercial speech the San Diego ordinance meets the constitutional requirements. . . .

It does not follow, however, that San Diego's general ban on signs carrying noncommercial advertising is also valid under the First and Fourteenth Amendments. The fact that the city may value commercial messages relating to onsite goods and services more than it values commercial communications relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others.

[O]ur recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech. San Diego effectively inverts this judgment, by affording a greater degree of protection to commercial than to noncommercial speech. There is a broad exception for onsite commercial advertisements, but there is no similar exception for noncommercial speech. . . .

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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. . . . 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.

Finally, we reject appellees' suggestion that the ordinance may be appropriately characterized as a reasonable "time, place, and manner" restriction. The ordinance does not generally ban billboard advertising as an unacceptable "manner" of communicating information or ideas; rather, it permits various kinds of signs. Signs that are banned are banned everywhere and at all times. We have observed that time, place, and manner restrictions are permissible if "they are justified without reference to the content of the regulated speech, . . . serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council* (1976). Here, it cannot be assumed that "alternative channels" are available, for the parties stipulated to just the opposite: "Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." . . . It is apparent as well that the 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.

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*Reversed*.

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN joins, concurring.

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. . . . Speakers in San Diego no longer have the opportunity to communicate their messages of general applicability to the public through billboards. None of the exceptions provides a practical alternative for the general commercial or noncommercial billboard advertiser. Indeed, unless the advertiser chooses to buy or lease premises in the city, or unless his message falls within one of the narrow exempted categories, he is foreclosed from announcing either commercial or noncommercial ideas through a billboard.

The characterization of the San Diego regulation as a total ban of a medium of communication has more than semantic implications, for it suggests a First Amendment analysis quite different from the plurality's. Instead of relying on the exceptions to the ban to invalidate the ordinance, I would apply the tests this Court has developed to analyze content-neutral prohibitions of particular media of communication. . . .

. . . . In the case of billboards, I would hold that a city may totally ban them if it can show that a sufficiently substantial governmental interest is directly furthered by the total ban, and that any more narrowly drawn restriction, *i. e.,* anything less than a total ban, would promote less well the achievement of that goal.

Applying that test to the instant case, I would invalidate the San Diego ordinance. The city has failed to provide adequate justification for its substantial restriction on protected activity. *Schad v. Borough of Mount Ephraim* (1981). First, although I have no quarrel with the substantiality of the city's interest in traffic safety, the city has failed to come forward with evidence demonstrating that billboards actually impair traffic safety in San Diego. . . .

Second, I think that the city has failed to show that its asserted interest in aesthetics is sufficiently substantial in the commercial and industrial areas of San Diego. . . .

. . . . Here, San Diego has failed to demonstrate a comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors to an unattractive environment. In this sense the ordinance is underinclusive. . . .

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More importantly, I cannot agree with the plurality's view that an ordinance totally banning commercial billboards but allowing noncommercial billboards would be constitutional. For me, such an ordinance raises First Amendment problems at least as serious as those raised by a total ban, for it gives city officials the right—before approving a billboard—to determine whether the proposed message is "commercial" or "noncommercial." Of course the plurality is correct when it observes that "our cases have consistently distinguished between the constitutional protection afforded commercial as opposed to noncommercial speech," but it errs in assuming that a *governmental unit* may be put in the position in the first instance of deciding whether the proposed speech is commercial or noncommercial. In individual cases, this distinction is anything but clear. Because making such determinations would entail a substantial exercise of discretion by a city's official, it presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech.

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JUSTICE STEVENS, dissenting.

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. . . . Our cases upholding regulation of the time, place, or manner of communication have been decided on the implicit assumption that the net effect of the regulation on free expression would not be adverse. In this case, however, that assumption cannot be indulged.

The parties have stipulated, correctly in my view, that the net effect of the city's ban on billboards will be a reduction in the total quantity of communication in San Diego. If the ban is enforced, some present users of billboards will not be able to communicate in the future as effectively as they do now. This ordinance cannot, therefore, be sustained on the assumption 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.

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Archaeologists use the term "graffiti" to describe informal inscriptions on tombs and ancient monuments. The graffito was familiar in the culture of Egypt and Greece, in the Italian decorative art of the 15th century, and it survives today in some subways and on the walls of public buildings. It is an inexpensive means of communicating political, commercial, and frivolous messages to large numbers of people; some creators of graffiti have no effective alternative means of publicly expressing themselves. Nevertheless, I believe a community has the right to decide that its interests in protecting property from damaging trespasses and in securing beautiful surroundings outweigh the countervailing interest in uninhibited expression by means of words and pictures in public places. If the First Amendment categorically protected the marketplace of ideas from any quantitative restraint, a municipality could not outlaw graffiti.

Our prior decisions are not inconsistent with this proposition. Whether one interprets the Court's decision in *Kovacs v. Cooper* (1949) as upholding a total ban on the use of sound trucks, or merely a ban on the "loud and raucous" use of amplifiers, the case at least stands for the proposition that a municipality may enforce a rule that curtails the effectiveness of a particular means of communication. . . .

I therefore assume that some total prohibitions may be permissible. It seems to be accepted by all that a zoning regulation excluding billboards from residential neighborhoods is justified by the interest in maintaining pleasant surroundings and enhancing property values. The same interests are at work in commercial and industrial zones. . . .

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The essential concern embodied in the First Amendment is that government not impose its viewpoint on the public or select the topics on which public debate is permissible. The San Diego ordinance simply does not implicate this concern. . . .

To the extent that the exceptions relate to subject matter at all, I can find no suggestion on the face of the ordinance that San Diego is attempting to influence public opinion or to limit public debate on particular issues. Except for the provision allowing signs to be used for political campaign purposes for limited periods, none of the exceptions even arguably relates to any controversial subject matter. As a whole they allow a greater dissemination of information than could occur under a total ban. Moreover, it was surely reasonable for the city to conclude that exceptions for clocks, thermometers, historic plaques, and the like, would have a lesser impact on the appearance of the city than the typical large billboards.

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CHIEF JUSTICE BURGER, dissenting.

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It is not really relevant whether the San Diego ordinance is viewed as a regulation regarding time, place, and manner, or as a total prohibition on a medium with some exceptions defined, in part, by content. Regardless of the label we give it, we are discussing a very simple and basic question: the authority of local government to protect its citizens' legitimate interests in traffic safety and the environment by eliminating distracting and ugly structures from its buildings and roadways, to define which billboards actually pose that danger, and to decide whether, in certain instances, the public's need for information outweighs the dangers perceived. The billboard industry's superficial sloganeering is no substitute for analysis, and the plurality opinion and the opinion concurring in the judgment adopt much of that approach uncritically. General constitutional principles indeed apply, but "each case ultimately must depend on its own specific facts . . . ."

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The means chosen to effectuate legitimate governmental interests are not for this Court to select. "These are matters for the legislative judgment controlled by public opinion." The plurality ignores this Court's seminal opinions in *Kovacs* by substituting its judgment for that of city officials and disallowing a ban on one offensive and intrusive means of communication when other means are available. Although we must ensure that any regulation of speech "further[s] a sufficiently substantial government interest," given a reasonable approach to a perceived problem, this Court's duty is not to make the primary policy decisions but instead is to determine whether the legislative approach is essentially neutral to the messages conveyed and leaves open other adequate means of conveying those messages. This is the essence of both democracy and federalism, and we gravely damage both when we undertake to throttle legislative discretion and judgment at the "grass roots" of our system.

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In the process of eradicating the perceived harms, the ordinance here in no sense suppresses freedom of expression, either by discriminating among ideas or topics or by supressing discussion generally. 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. . . .

The messages conveyed on San Diego billboards—whether commercial, political, social, or religious—are not inseparable from the billboards that carry them. These same messages can reach an equally large audience through a variety of other media: newspapers, television, radio, magazines, direct mail, pamphlets, etc. True, these other methods may not be so "eye-catching"—or so cheap—as billboards, but there has been no suggestion that billboards heretofore have advanced any particular viewpoint or issue disproportionately to advertising generally. 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. . . .

Where the ordinance does differentiate among topics, it simply allows such noncontroversial things as conventional signs identifying a business enterprise, time-and-temperature signs, historical markers, and for sale signs. It borders— if not trespasses—on the frivolous to suggest that, by allowing such signs but forbidding noncommercial billboards, the city has infringed freedom of speech. This ignores what we recognized in *Police Dept. of Chicago* v. *Mosley* (1971) that "there may be sufficient regulatory interests justifying selective exclusions or distinctions . . . ." For each exception, the city is either acknowledging the unique connection between the medium and the message conveyed, or promoting a legitimate public interest in information. Similarly, in each instance, the city reasonably could conclude that the balance between safety and aesthetic concerns on the one hand and the need to communicate on the other has tipped the opposite way. More important, in no instance is the exempted topic controversial; there can be no rational debate over, for example, the time, the temperature, the existence of an offer of sale, or the identity of a business establishment. The danger of San Diego's setting the agenda of public discussion is not simply *de minimis;* it is nonexistent. The plurality today trivializes genuine First Amendment values by hinging its holding on the city's decision to allow some signs while preventing others that constitute the vast majority of the genre.

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JUSTICE REHNQUIST, dissenting.

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In my view, the aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community. . . . Nor do I believe that the limited exceptions contained in the San Diego ordinance are the types which render this statute unconstitutional. . . .

Unlike Justice Brennan, I do not think a city should be put to the task of convincing a local judge that the elimination of billboards would have more than a negligible impact on aesthetics. Nothing in my experience on the bench has led me to believe that a judge is in any better position than a city or county commission to make decisions in an area such as aesthetics. Therefore, little can be gained in the area of constitutional law, and much lost in the process of democratic decisionmaking, by allowing individual judges in city after city to second-guess such legislative or administrative determinations.