The Burger Court Opinion Writing Database

Metromedia, Inc. v. San Diego

453 U.S. 490 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 17, 1981

RE: No. 80-195, Metromedia, Inc. v.
City of San Diego

Dear Byron:

I shall circulate a dissent shortly.

Regards,

WEB

Justice White

Copies to the Conference

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

No. 80-195, Metromedia, Inc. v. City of San Diego From: The Chief Justice

Circulated: APR 10 1981

Recirculated: _____

CHIEF JUSTICE BURGER, dissenting:

Today the Court takes an extraordinary--even a bizarre--step by severely limiting the power of a city to act on risks it perceives to (a) traffic safety and (b) aesthetics posed by large, permanent billboards. The Court holds a city may not minimize these traffic hazards and eyesores simply because, in exercising rational legislative judgment, it has chosen to permit a narrow class of signs that serve special needs.

Simplistic platitudes about content, subject matter, and the dearth of other means to communicate urged by the billboard industry--and now largely adopted by the Court--ignore the growing problems that every municipality faces in the effort to protect safety and preserve urban beauty in an urban area where certain kinds of information must be communicated. The Court today exhibits insensitivity to the impact of these billboards and the delicacy of the judgments involved in regulating them. Instead, it leaves American cities, as a matter of federal constitutional law, with three unsatisfactory options: (a) allowing all billboards, despite the dangers just mentioned; (b)

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: APR 23 1981

CHANGES AS MARKED

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–195

Metromedia, Inc., et al., Appellants, *v.* City of San Diego et al. } On Appeal from the Supreme Court of California.

[April —, 1981]

CHIEF JUSTICE BURGER, dissenting.

Today the Court takes an extraordinary—even a bizarre—step by severely limiting the power of a city to act on risks it perceives to (a) traffic safety and (b) the environment posed by large, permanent billboards. The Court invalidates a city's efforts to minimize these traffic hazards and eyesores simply because, in exercising rational legislative judgment, it has chosen to permit a narrow class of signs that serve special needs.

Simplistic platitudes about content, subject matter, and the dearth of other means to communicate urged by the billboard industry—and now largely adopted by the Court—ignore the growing problems that every municipality faces in the effort to protect safety and preserve beauty in an urban area where certain kinds of information must be communicated. The Court today exhibits a vast insensitivity to the impact of these billboards on those who must live with them and the delicacy of the judgments involved in regulating them. Instead, it leaves American cities desiring to mitigate the dangers mentioned, as a matter of *federal constitutional law*, with two unsatisfactory options: (a) allowing all "noncommercial" signs, no matter how many, how dangerous, or how damaging to the environment; or (b) forbidding *all* signs, period. Indeed, lurking in the recesses of the Court's opinion is a not-so-veiled threat that the second op-

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

3,5-79 11-5

2nd DRAFT

Recirculated: MAY 6 1981

SUPREME COURT OF THE UNITED STATES

No. 80–195

Metromedia, Inc., et al., Appellants, *v.* City of San Diego et al. } On Appeal from the Supreme Court of California.

[April —, 1981]

CHIEF JUSTICE BURGER, dissenting.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1981

No: 80-195 - Metromedia, Inc. v. City of San Diego

MEMORANDUM TO: Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

Byron's memo of today suggests at least a possibility that my view might engage the interest of those of you who have not spoken.

At this stage, I see no point in running another draft unless I have some expression of what might tempt each of you to join something along the lines of my position.

I'm open to suggestions so long as we don't carry the First Amendment to the point of telling a municipality - or a state - that it cannot ban "distracting" billboards.

Fire away!

Regards,

WEB

P.S. We have said repeatedly that time, place and manner regulation of expressions must be sustained if they serve "a significant public interest" and all I think we need to do is say that San Diego has not gone beyond that here. If you agree with that general proposition, I am prepared to add all necessary caveats.

To: Mr. Justice [illegible]
Mr. Justice [illegible]
Mr. Justice [illegible]
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: JUN 18 1981

CHANGES
THROUGHOUT

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-195

Metromedia, Inc., et al., Appellants, *v.* City of San Diego et al. | On Appeal from the Supreme Court of California.

[April —, 1981]

CHIEF JUSTICE BURGER, dissenting.

Today the Court takes an extraordinary—even a bizarre—step by severely limiting the power of a city to act on risks it perceives to traffic safety and the environment posed by large, permanent billboards. The Court invalidates a city's efforts to minimize these traffic hazards and eyesores simply because, in exercising rational legislative judgment, it has chosen to permit a narrow class of signs that serve special needs.

Through simplistic platitudes about content, subject matter, and the dearth of other means to communicate, the billboard industry—and now the Court—attempt to escape the real and growing problems every municipality faces in protecting safety and preserving the environment in an urban area. The Court's treatment of the serious issues involved exhibits a vast insensitivity to the impact of these billboards on those who must live with them and the delicacy of the legislative judgments involved in regulating them. American cities desiring to mitigate the dangers mentioned must, as a matter of *federal constitutional law*, elect between two unsatisfactory options: (a) allowing all "noncommercial" signs, no matter how many, how dangerous, or how damaging to the environment; or (b) forbidding signs altogether. Indeed, lurking in the recesses of the Court's opinion is a not-so-veiled threat that the second option, too, may soon be withdrawn. This

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: JUN 2 6 1981

CHANGES AS MARKED

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-195

Metromedia, Inc., et al., Appellants, *v.* City of San Diego et al. | On Appeal from the Supreme Court of California.

[April —, 1981]

CHIEF JUSTICE BURGER, dissenting.

Today the Court takes an extraordinary—even a bizarre—step by severely limiting the power of a city to act on risks it perceives to traffic safety and the environment posed by large, permanent billboards. ~~The~~ plurality opinion invalidates a city's efforts to minimize these traffic hazards and eyesores simply because, in exercising rational legislative judgment, it has chosen to permit a narrow class of signs that serve special needs.

Those joining the

Relying on simplistic platitudes about content, subject matter, and the dearth of other means to communicate, the billboard industry attempts to escape the real and growing problems every municipality faces in protecting safety and preserving the environment in an urban area. The Court's ~~treatment~~ of the serious issues involved exhibits insensitivity to the impact of these billboards on those who must live with them and the delicacy of the legislative judgments involved in regulating them. American cities desiring to mitigate the dangers mentioned must, as a matter of *federal constitutional law*, elect between two unsatisfactory options: (a) allowing all "noncommercial" signs, no matter how many, how dangerout, or how damaging to the environment; or (b) forbidding signs altogether. Indeed, lurking in the recesses of ~~the plurality's opinion~~ is a not-so-veiled threat that the second option, too, may soon be withdrawn. This is the long arm

disposition

today's opinions

STYLISTIC CHANGES
5, 15

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

5th DRAFT

Recirculated: JUN 29 1981

SUPREME COURT OF THE UNITED STATES

No. 80-195

Metromedia, Inc., et al., Appellants, *v.* City of San Diego et al. } On Appeal from the Supreme Court of California.

[April —, 1981]

CHIEF JUSTICE BURGER, dissenting.

Today the Court takes an extraordinary—even a bizarre—step by severely limiting the power of a city to act on risks it perceives to traffic safety and the environment posed by large, permanent billboards. Those joining the plurality opinion invalidate a city's effort to minimize these traffic hazards and eyesores simply because, in exercising rational legislative judgment, it has chosen to permit a narrow class of signs that serve special needs.

Relying on simplistic platitudes about content, subject matter, and the dearth of other means to communicate, the billboard industry attempts to escape the real and growing problems every municipality faces in protecting safety and preserving the environment in an urban area. The Court's disposition of the serious issues involved exhibits insensitivity to the impact of these billboards on those who must live with them and the delicacy of the legislative judgments involved in regulating them. American cities desiring to mitigate the dangers mentioned must, as a matter of *federal constitutional law,* elect between two unsatisfactory options: (a) allowing all "noncommercial" signs, no matter how many, how dangerous, or how damaging to the environment; or (b) forbidding signs altogether. Indeed, lurking in the recesses of today's opinions is a not-so-veiled threat that the second option, too, may soon be withdrawn. This is the long arm and voracious

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 2, 1981

RE: No. 80-195 Metromedia v. City of San Diego

No. 79-1640 Schad v. Borough of Mount Ephraim

Dear Chief:

Byron is willing to take the assignments in the above cases.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 23, 1981

RE: Metromedia, Inc. v. City of San Diego, No. 80-195

Dear Byron,

As I mentioned to you the other day, I am mulling over some issues about this case and will be back to you as soon as I can.

Sincerely,

Bill

Justice White

Copies to the Conference

80-195 = Merits Nos.

80-195

May 11, 1981

Dear Byron,

I find this a difficult case. Let me spell out my concerns to you.

1) I am fairly convinced that we should bite the bullet and address the question whether a city can ban billboards altogether. This is unlike Linmark, for example, where the town specifically banned only for sale signs, and not "all lawn signs -- or all lawn signs of a particular size or shape--in order to promote aesthetic values." 431 U.S. 85, 93 (1977). Perhaps the fairest characterization of what San Diego has really done here is to ban billboards altogether, and then to make exceptions for some interests it feels are important. Therefore, I lean toward an analysis that decides whether a city can ban billboards altogether, and if so, under what circumstances may exceptions to its ban be allowed.

2) As for the total ban question, my view is that the city could ban billboards at least in areas where it is clearly demonstrated by evidence that the city's aesthetic interests are directly promoted (residential, historical, open space). I suppose the traffic safety argument could also be supported, although there was certainly no evidence presented in this case. I start from the proposition that Williamsburg (at least the historical

Brennan 80

portion), Nantucket, and Yellowstone can ban all billboards, noncommercial or commercial. Undoubtedly this is because their interests in aesthetics are sufficiently important that the First Amendment value attached to billboards must yield. Of course, the evidentiary burden for these cities could be easily met. Once this proposition is accepted, I have some difficulty prohibiting San Diego from striving to be Nantucket. As improbable as that goal may sound, I would suppose that a city, or even a state (Vermont), may try to ensure itself an aesthetic environment.

At the same time, there are differences which a court can recognize between Nantucket and certain areas of San Diego. Undoubtedly the drawing of lines between two types of areas may not be altogether satisfying, but I still think that the aesthetic interest in some areas (industrial, some commercial areas) is not readily apparent and the city should have to demonstrate why billboards do not fit in to that particular environment. I think Judge Pettine's concurring opinion in the First Circuit's Maine billboard case deals reasonably with this specific issue. Therefore, the question whether a total ban in San Diego is allowable to further the city's aesthetics goal is one for the trier of fact in the first instance. In this way, the analysis would be similar to Schad.

I do think that billboards pose a unique problem of regulation. They are permanent structures for the most part. Therefore, a time restriction is probably unrealistic, although the city's ordinance does do exactly that for political signs.

As for a manner restriction, it may be that the very existence of billboards, no matter how tastefully designed, detracts from accomplishment of the interest in aesthetics. The place restriction may be the only obvious one that can directly further the state's interest, and even that becomes questionable in Nantucket.

3) If the state may ban all billboards at least in certain areas, then can it have exceptions? I suppose my problem with the exceptions in this case, as your opinion points out, is that they undercut accomplishment of the primary goals of aesthetics and traffic safety that the city has set out to accomplish. In many ways, this is similar to your analysis in Schad. At the same time, it would make little sense to say that the city has an all or nothing proposition -- either ban all billboards, or none at all. My view on the exceptions issue is that the city must have at least as important an interest justifying the exception as its overall interest in the total ban, and perhaps even an interest outweighing the overall ban goals. When an exception is content-based, as some surely are here, then I think that they must be justified by compelling interests. My concern is that the city should not be in the business of preferring some messages at the expense of others.

4) Bringing these general views to the specifics of Metromedia, I generally agree with your analysis of the exceptions in Part V. Since the city allows on-premise and temporary political signs,

it is making content-based speech exceptions and I would say must therefore justify them with compelling interests. In addition, the city has made no attempt to limit the number of these signs, for instance one sign per building for indentification, nor has it regulated the size and shape of the permissible signs. Therefore, the seriousness of the city's aesthetics and traffic safety goals is severely undercut by the exceptions it permits.

5) I do have trouble with Part IV of your opinion. I think it is a mistake to divide the case into commercial vs. non-commercial speech. Your opinion appears to allow cities to ban totally commercial speech while perhaps being forced to permit political speech billboards. Of course, this may have the effect of banning all political billboards in any event, since without commercial patronage the billboard industry might withdraw all its billboards. More importantly for me, however, it puts the city in the undesirable position of deciding between what is commercial and what is political speech. I can imagine a Jules Feiffer cartoon, where the first panel contains a billboard attached to an ice cream parlor with the message "Joe's Ice Cream Shoppe," the next "Milk is good for you," and the last "Support dairy supports." I worry that allowing such daily censorship impinges very directly on First Amendment values, in a fashion similar to the police chief deciding who receives a sound truck permit. While it is true that individuals claiming that their billboard contains political speech may go to court, I worry

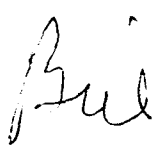
about delegating such daily decisions to the city in the first instance.

In addition, I do not think that Central Hudson is the appropriate test to apply here, perhaps because I think of this more as a "total ban of one medium" case. In addition, I think that your opinion tends to alter Central Hudson from an intermediate scrutiny to a rational basis test. See p. 20.

I find this one of the tougher cases we have had in a while. I think you are right to try and offer cities across the country advice on what they can and cannot do. I think we should go a little further and create an analytical framework addressing the "total ban with exceptions" issue without bifurcating the analysis between commercial and non-commercial speech. I believe that, at least in certain areas, a city may ban all billboard speech, political or commercial, in order to advance the goal of aesthetics or perhaps traffic safety.

I appreciate that these suggestions may require a major reworking of parts IV and V of your opinion. I am therefore not circulating this memorandum to the Conference in the hope that, if we can agree, others may see the light.

Sincerely,



Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 15, 1981

RE: No. 80-195 Metromedia v. City of San Diego

Dear Byron:

On further reflection after our talk yesterday I think it might be the better course for me to circulate for your consideration a memorandum outlining the approach I suggest for deciding this case. In substance that approach is that rather than bifurcate the analysis between commercial and non-commercial speech, I suggest a treatment of the question as one of a total ban on a medium of expression, commercial/non-commercial, but with exceptions. I think that what I have in mind can be better expressed through a written memorandum than by ad hoc suggestions of changes in your opinion. I'll get about it promptly and hope not to hold you up for long.

Sincerely,

Bill

Justice White

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: JUN 9 1981

Recirculated: _____

Metromedia, Inc. v. City of San Diego

No. 80-195

Memorandum of JUSTICE BRENNAN:

Believing that "a total prohibition of outdoor advertising is not before us," ante, at 23, n. 20, Byron does not decide "whether such a ban would be consistent with the First Amendment," ibid. Instead, he concludes that San Diego may ban all billboards containing commercial speech messages without violating the First Amendment, thereby sending the signal to municipalities that bifurcated billboard regulations prohibiting commercial messages but allowing noncommercial messages would pass constitutional muster. I have circulated this memorandum to explain my view that this case, for all practical purposes, presents the total ban question. In addition, I fear that Byron's bifurcated approach in itself raises serious First Amendment problems and relies on a distinction between commercial and noncommercial speech unanticipated by our prior cases.

As construed by the California Supreme Court, a billboard subject to San Diego's regulation is "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

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 10, 1981

MEMORANDUM TO THE CONFERENCE

RE: No. 80-195 Metromedia, Inc. v. City of San Diego

In light of Byron's memorandum I'll convert my memorandum of June 9 into an opinion concurring in the judgment of reversal.

Bill

W.J.B.Jr.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: JUN 2 3 1981

Recirculated: _____

Metromedia, Inc. v. City of San Diego

No. 80-195

JUSTICE BRENNAN, concurring in the judgment:

Believing that "a total prohibition of outdoor advertising is not before us," ante, at 23, n. 20, the Court does not decide "whether such a ban would be consistent with the First Amendment," ibid. Instead, it concludes that San Diego may ban all billboards containing commercial speech messages without violating the First Amendment, thereby sending the signal to municipalities that bifurcated billboard regulations prohibiting commercial messages but allowing noncommercial messages would pass constitutional muster. Id., at 30, n.24. I write separately because I believe this case in effect presents the total ban question, and because I believe the Court's bifurcated approach itself raises serious First Amendment problems and relies on a distinction between commercial and noncommercial speech unanticipated by our prior cases.

I

As construed by the California Supreme Court, a billboard

Metromedia, File

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

80-195

June 30, 1981

Dear Lewis,

I wanted to thank you for going to the trouble to obtain the Williamsburg ordinance. That was certainly beyond the call of duty.

At least I think we know that Williamsburg could ban all billboards.

Bill

Justice Powell

STYLISTIC CHANGES
SEE PAGES:

1, 5, 10, 11, 12, 13

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–195

Metromedia, Inc., et al., Appellants, *v.* City of San Diego et al. | On Appeal from the Supreme Court of California.

[June —, 1981]

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

Believing that "a total prohibition of outdoor advertising is not before us," *ante*, at 23, n. 20, the plurality does not decide "whether such a ban would be consistent with the First Amendment," *ibid.* Instead, it concludes that San Diego may ban all billboards containing commercial speech messages without violating the First Amendment, thereby sending the signal to municipalities that bifurcated billboard regulations prohibiting commercial messages but allowing noncommercial messages would pass constitutional muster. *Id.*, at 30, n. 25. I write separately because I believe this case in effect presents the total ban question, and because I believe the plurality's bifurcated approach itself raises serious First Amendment problems and relies on a distinction between commercial and noncommercial speech unanticipated by our prior cases.

I

As construed by the California Supreme Court, a billboard subject to San Diego's regulation is "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." 26 Cal. 3d 848, 856, n. 2, 610 P. 2d 407, n. 2 (1980), quoting California

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 17, 1981

Re: 80-195 - Metromedia, Inc. v. San Diego

Dear Byron:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 16 APR 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-195

Metromedia, Inc., et al., Appellants, *v.* City of San Diego et al. } On Appeal from the Supreme Court of California.

[April —, 1981]

JUSTICE WHITE delivered the opinion of the Court.

This case involves the validity of an ordinance of the city of San Diego, Cal., imposing substantial prohibitions on the erection of outdoor advertising displays within the city.

I

Stating that its purpose was "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City," San Diego enacted an ordinance to prohibit "outdoor advertising display signs."[1] The California Supreme

[1] San Diego Ordinance No. 10795 (New Series), enacted March 14, 1972. The general prohibition of the statute reads as follows:

"B. Off-Premise Outdoor Advertising Display Signs Prohibited

"Only those outdoor advertising dispblay 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 prod-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 23, 1981

MEMORANDUM TO THE CONFERENCE

Re: 80-195 - Metromedia, Inc. v. San Diego

I have sent to the printer the following additional section to the circulation in the above case.

Byron

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 4/23/81

Recirculated: _____

VI

Despite the rhetorical hyperbole of the Chief Justice's dissent, there is a considerable amount of common ground between the approach taken in this opinion and that suggested by the dissent. Both recognize that each medium of communication creates a unique set of First Amendment problems, both recognize that the City has a legitimate interest in regulating the noncommunicative aspects of a medium of expression, and both recognize that the proper judicial role is to conduct "a careful inquiry into the competing concerns of the State and the interests protected by the guarantee of free expression." Our principal difference with the dissent is that it gives so little weight to the latter half of this inquiry. Indeed, it fails even to acknowlege that the private interests affected by a restriction on billboards include some that are entitled to a special degree of protection under the Constitution.

The Chief Justice writes that

pp. 15, 25-29, & stylistic

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-195

Metromedia, Inc., et al., Appellants, *v.* City of San Diego et al. } On Appeal from the Supreme Court of California.

[April —, 1981]

JUSTICE WHITE delivered the opinion of the Court.

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Stating that its purpose was "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City," San Diego enacted an ordinance to prohibit "outdoor advertising display signs."[1] The California Supreme

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"3. Any sign which advertises or otherwise directs attention to a prod-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 13, 1981

Re: 80-195 - Metromedia, Inc. v. City of San Diego

Dear Bill,

I do appreciate your memorandum about this case, and let me say that that it would be well for you to write separately and communicate your views to the Conference. The case is worth it, and the Conference should have the benefit of your particular treatment of the issues even if I were now convinced that the draft should be revised in an attempt to follow your approach. Since I am not now convinced -- although I may be when your views are written out -- it is natural that you should circulate.

Although I would likely go as far as you would in sustaining a total ban on billboards in some or all areas of the City, we do not have such a case before us. The principal issue here, and surely the one of central importance to the commercial billboarders, is whether a city may forbid off-site commercial billboarding. The draft says that the City's interest in traffic and esthetics are sufficient to sustain such a ban and that it does not become invalid because on-site billboards are allowed. In arriving at these conclusions, the draft follows the Central Hudson standard for judging restrictions on commercial speech. Of course, I understand that you did not join that opinion; but it is an opinion of the Court, and the draft is faithful to that opinion, despite your doubts.

The draft goes on to invalidate the ordinance because it also forbids non-commercial signs at locations where on-site commercial signs are permitted and at other places bars all signs except the non-commercial signs specifically excepted. Thus, even assuming that the City could ban all signs, both commercial or non-commercial, the San Diego

Brennan 80

ordinance could not pass muster for the reasons that the draft states.

I should say also that I have joined those opinions maintaining the distinction between commercial and non-commercial speech, a recognition which the draft repeats. I am not now inclined to equate the two categories for purposes of applying the First Amendment even for the purposes of dealing with the unique area of billboards.

It might also be well, just to get the ball rolling, to circulate your letter to me and this response. With your permission, I shall do so.

Sincerely,

Justice Brennan

To: The Chief Justice
Mr. [illegible]
Mr. [illegible]

pp. 15, 25-26
stylistic throughout

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-195

Metromedia, Inc., et al., Appellants, v. City of San Diego et al. } On Appeal from the Supreme Court of California.

[April —, 1981]

JUSTICE WHITE delivered the opinion of the Court.

This case involves the validity of an ordinance of the city of San Diego, Cal., imposing substantial prohibitions on the erection of outdoor advertising displays within the city.

I

Stating that its purpose was "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City," San Diego enacted an ordinance to prohibit "outdoor advertising display signs."[1] The California Supreme

[1] San Diego Ordinance No. 10795 (New Series), enacted March 14, 1972. The general prohibition of the statute reads as follows:

"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 prod-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

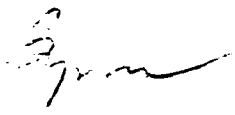
May 15, 1981

Re: 80-195 - Metromedia v. San Diego

Dear Bill,

As you know, from our conversation yesterday, I think it much the best course for you to circulate your views on this case. Since you did not join the Court's opinion in Central Hudson, it is understandable that you have some resistance to my circulating draft, which does recognize the distinction the Court's cases have drawn between commercial and non-commercial speech.

Sincerely yours,



Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 9, 1981

MEMORANDUM TO THE CONFERENCE

Re: 80-195 - Metromedia, Inc. v. City of San Diego

As I now see it, I have no major revisions in the draft I have circulated, if for no other reason than that I would not like to disturb the one wise Justice who has joined that effort. Seriously, it would seem that I am fairly at issue with the Chief Justice on the one hand and with Bill Brennan on the other. The Chief Justice would sustain the entire ordinance as it is written. As I understand Bill's submission, however, Bill would make it rather difficult for the City to sustain any ban on non-commercial billboards and if that ban is not sustained, neither could commercial billboards be forbidden. To put it another way, I give more weight to the noncommercial speech involved here than does the Chief and to the commercial less than Bill. In terms of the impact on San Diego, I am perhaps closer to the Chief since able legislators could achieve most of their ends and remain consistent with my present draft. I am also not ready to amalgamize commercial and non-commercial speech or to forbid, as apparently Bill would, any efforts at official categorization. Of course, this all may mean another case at some point in the future, but I can await its arrival with equanimity. In short, I prefer to adhere to the present draft with its relatively narrow impact.

- Stylistic & pp. 14, 23, 25-29 -

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 22 JUN 1981

Recirculated: _____

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-195

Metromedia, Inc., et al., Appellants, *v.* City of San Diego et al. } On Appeal from the Supreme Court of California.

[April —, 1981]

JUSTICE WHITE delivered the opinion of the Court.

This case involves the validity of an ordinance of the city of San Diego, Cal., imposing substantial prohibitions on the erection of outdoor advertising displays within the city.

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"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 prod-

Stylistic & pp. 1, 8, 20, 29

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 23 JUN 1981

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-195

Metromedia, Inc., et al., Appellants, v. City of San Diego et al. } On Appeal from the Supreme Court of California.

[April —, 1981]

JUSTICE WHITE announced the judgment of the Court and delivered an opinion in which JUSTICE STEWART, JUSTICE MARSHALL and JUSTICE POWELL join.

This case involves the validity of an ordinance of the city of San Diego, Cal., imposing substantial prohibitions on the erection of outdoor advertising displays within the city.

I

Stating that its purpose was "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City," San Diego enacted an ordinance to prohibit "outdoor advertising display signs."[1] The California Supreme

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 26, 1981

MEMORANDUM TO THE CONFERENCE

Cases held for No. 80-195 -
Metromedia, Inc. v. City of San Diego

Four cases have been held:

1. No. 80-196 - San Diego v. Metromedia.

This is the cross petition in the Metromedia case. The City challenges that portion of the California Supreme Court decision which held the City ordinance to be preempted by the Federal Highway Beautification Act insofar as the city ordinance does not require compensation for the removal of billboards constructed near interstate highways. California has an ordinance that requires compensation for removal of billboards when such compensation is necessary to protect the state's share of federal highways funds. Outdoor Advertising Act, §5412. The Highway Beautification Act, as amended in 1978, states that "[j]ust compensation shall be paid upon the removal of any outdoor advertising sign ... lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section." Subsection (c) requires, with limited exceptions, that all signs within 660 feet of federal interstate and primary highways must be removed. The court held that the actions of San Diego requiring removal of the billboards at issue fell within the literal language of the federal act. It recognized that this conclusion conflicts with that of the Washington Supreme Court in Ackerley Communications, Inc. v. Seattle, 602 P.2d 1177, which denied compensation for removal of signs within commercial and industrial zones. (Ackerley, however, seems to have been based on the pre-1978 version of the federal act.)

The City basically makes a Tenth Amendment argument here, contending that this is an unwarranted intrusion on local zoning power. Since the Court has declared the San Diego ordinance unconstitutional, the question of compensation seems to be moot. I would deny.

Stylistic & p. 26

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 29 JUN 1981

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-195

Metromedia, Inc., et al., Appellants, v. City of San Diego et al. } On Appeal from the Supreme Court of California.

[April —, 1981]

JUSTICE WHITE announced the judgment of the Court and delivered an opinion in which JUSTICE STEWART, JUSTICE MARSHALL and JUSTICE POWELL join.

This case involves the validity of an ordinance of the city of San Diego, Cal., imposing substantial prohibitions on the erection of outdoor advertising displays within the city.

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"2. Any sign identifying a product which is not produced, sold or manufactured on the premises.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 10, 1981

Re: No. 80-195 - Metromedia, Inc. v. City of San Diego

Dear Byron:

Please join me.

Sincerely,

T.M.

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 22, 1981

Re: No. 80-195 - Metromedia, Inc. v. City of San Diego

Dear Bill:

This will confirm my statement at Conference yesterday that my views in this difficult case are closest to those you have expressed in your memorandum of June 9. I thus probably will be able to join you when you have converted that memorandum into an opinion concuring in the result.

I would hope, however, that we shall be able to avoid anything that would commit us in litigation concerning the Federal Highway Beautification Act which probably will come here in due course. I, for one, would like to keep my options open as to that.

Sincerely,

Harry

Mr. Justice Brennan

Brennan 80

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 24, 1981

Re: No. 80-195 - Metromedia, Inc. v. City of San Diego

Dear Bill:

As I told you, your position in your opinion concurring in the judgment is the closest to my views. I do wish to join you and, because I do, I offer the following suggestions for your consideration:

1. Appending the following footnote at the end of the next to last full sentence of part II on page 15, that is, immediately before the citation to Schad:

> "Likewise, I express no view on the constitutionality of the Highway Beautification Act of 1965, Pub. L. 89-285, 79 Stat. 1028. I note, however, that a different analysis comes into play if the challenged legislation is simply a time, place, or manner regulation, rather than a total ban of a particular medium of expression."

2. Appending the following footnote at the end of the partial sentence at the top of page 18, that is, after the word "noncommercial":

> "Moreover, the plurality appears to misunderstand the distinction our prior cases have drawn between commercial and noncommercial speech. 'We have not suggested that the "commonsense differences" between commercial speech and other speech justify relaxed scrutiny of restraints that suppress truthful, nondeceptive, noncoercive commercial speech.' Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 578 (1980) (opinion concurring in the judgment)."

3. Softening somewhat what seems to me to be almost "insurmountable burden" language on page 12, particularly, the statement that "a court must be convinced that a city is seriously and comprehensively addressing aesthetic concerns in its environment." A community may find itself blocked by political or other pressures from enacting a comprehensive redevelopment plan, and it would seem anomalous to hold that it cannot take partial steps, such as banning billboards. On

Brennan JS

the other hand, if billboards alone are banned and no further steps are contemplated or likely, the situation would be like that in Schad. Perhaps my concern can be largely alleviated if the words "to demonstrate a comprehensive coordinated effort" in the seventh line of the double-spacing on page 12 would be replaced with something like "to put forth an effort," and if the words "and comprehensively" and "comprehensive" in the fifth and last lines, respectively, of page 12 could be eliminated. I think you see my point. I do want to preserve the possibility of step by step development.

Sincerely,

Harry

Mr. Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 25, 1981

Re: No. 80-195 - Metromedia, Inc. v. City of San Diego

Dear Bill:

I am glad to join your opinion, concurring in the judgment, along the lines hammered out by our respective clerks this afternoon.

Sincerely,

Harry

Mr. Justice Brennan

Brennan 88

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 29, 1981

Re: No. 80-195 - Metromedia, Inc. v. City of San Diego

Dear Bill:

This will formally confirm my joinder in your opinion concurring in the judgment.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 17, 1981

80-195 Metromedia v. San Diego

Dear Byron:

Please join me.

Sincerely,

Lewis

Mr. Justice White

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 6/19/81

Recirculated: _____

Re: No. 80-195 Metromedia, Inc. v. City of San Diego

JUSTICE REHNQUIST, dissenting.

I agree substantially with the views expressed in the dissenting opinions of The CHIEF JUSTICE and Justice STEVENS and make only these two additional observations: (1) In a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn; and (2) I regret even more keenly my contribution to this judicial clangor, but find that none of the views expressed in the other opinions written in the case come close enough to mine to warrant the necessary compromise to obtain a Court opinion.

Printed

1st DRAFT

JUN 23

SUPREME COURT OF THE UNITED STATES

No. 80-195

Metromedia, Inc., et al., Appellants, *v.* City of San Diego et al. | On Appeal from the Supreme Court of California.

[June —, 1981]

JUSTICE REHNQUIST, dissenting.

I agree substantially with the views expressed in the dissenting opinions of THE CHIEF JUSTICE and JUSTICE STEVENS and make only these two additional observations: (1) In a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn; and (2) I regret even more keenly my contribution to this judicial clangor, but find that none of the views expressed in the other opinions written in the case come close enough to mine to warrant the necessary compromise to obtain a Court opinion.

In my view, the aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community, see *Berman* v. *Parker,* 348 U. S. 26, 32–33 (1954), regardless of whether the particular community is "a historic community such as Williamsburg" or one as unsightly as the older parts of many of our major metropolitan areas. Such areas should not be prevented from taking steps to correct, as best they may, mistakes of their predecessors. Nor do I believe that the limited exceptions contained in the San Diego ordinance are the type which render this statute unconstitutional. The closest one is the exception permitting billboards during political campaigns, but I would treat this as a vir-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 9, 1980

Re: 80-195 - Metromedia, Inc. v. City of San Diego

Dear Byron:

In Schad you persuasively argue that a governmental unit may not entirely prohibit live entertainment because it is a form of communication protected by the First Amendment. In Metromedia the California Supreme Court held that the City of San Diego may entirely prohibit off-site billboards even though they are a form of communication protected by the First Amendment. In view of the similarity of the issues in these two cases, what would you think about noting both appeals and setting the cases back to back?

Respectfully,

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JUN 10 '81

Recirculated: _____

80-195 - Metromedia, Inc. v. City of San Diego

JUSTICE STEVENS, dissenting.

If enforced as written, the ordinance at issue in this case will eliminate the outdoor advertising business in the City of San Diego.[1] The principal question presented is, therefore, whether a city may prohibit this medium of communication. Instead of answering that question, the Court focuses its attention on the exceptions from the total ban and, somewhat ironically, holds that the ordinance is an unconstitutional abridgment of speech because it does not abridge enough speech.

The Court first holds that a total prohibition of the use of "outdoor advertising display signs"[2] for commercial messages,

---

[1] The parties so stipulated. See Joint App. 42a, quoted in n. 7, infra.

[2] The ordinance does not define the term "outdoor advertising display signs." The California Supreme Court adopted the following definition to avoid overbreadth problems:

> "[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." Metromedia, Inc. v. City of San Diego, 26 Cal.3d 848,

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated:

Recirculated: JUN 4 1981

Printed

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-195

Metromedia, Inc., et al., Appellants, v. City of San Diego et al. } On Appeal from the Supreme Court of California.

[June —, 1981]

JUSTICE STEVENS, concurring in part and dissenting in part.

If enforced as written, the ordinance at issue in this case will eliminate the outdoor advertising business in the City of San Diego.[1] The principal question presented is, therefore, whether a city may prohibit this medium of communication. Instead of answering that question, the Court focuses its attention on the exceptions from the total ban and, somewhat ironically, concludes that the ordinance is an unconstitutional abridgment of speech because it does not abridge enough speech.

The Court first holds that a total prohibition of the use of "outdoor advertising display signs"[2] for commercial messages, other than those identifying or promoting a business located on the same premises as the sign, is permissible. I agree with the conclusion that the constitutionality of this prohibition is not undercut by the distinction San Diego has drawn between on-site and off-site commercial signs. See *ante*, at 19. I do and therefore join Parts I through IV of the Court's opinion.

[1] The parties so stipulated. See Joint App. 42a, quoted in n. 7, *infra*.

[2] The ordinance does not define the term "outdoor advertising display signs." The California Supreme Court adopted the following definition to avoid overbreadth problems:

"[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." *Metromedia, Inc.* v. *City of San Diego*, 26 Cal. 3d 848, 856, n. 2, 610 p. 2d 407, —, n. 2 (1980).

1

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. J... Blackmun
Mr. ...
Mr. ... st

From: Mr. Justice Stevens

Circulated: _____

Recirculated: _____

PP 1-2, 5, 8-9, 12, 15

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-195

Metromedia, Inc., et al., Appellants, v. City of San Diego et al. | On Appeal from the Supreme Court of California.

[June —, 1981]

JUSTICE STEVENS, dissenting.

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The plurality first holds that a total prohibition of the use of "outdoor advertising display signs" [3] for commercial messages,

[1] The parties so stipulated. See Joint Stipulation of Facts, No. 2, Joint App. 42a, quoted in n. 8, *infra*.

[2] That is the effect of both JUSTICE WHITE's reaction to the exceptions from a total ban and JUSTICE BRENNAN's concern about the city's attempt to differentiate between commercial and noncommercial messages, although both of their conclusions purportedly rest on the character of the abridgment rather than simply its quantity.

[3] The ordinance does not define the term "outdoor advertising display signs." The California Supreme Court adopted the following definition to avoid overbreadth problems:

"'[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'" *Metromedia, Inc.* v. *City of San Diego*, 26 Cal. 3d 848, 856, n. 2, 610 P. 2d 407, —, n. 2 (1980).