BILLBOARD BLIGHT: IS THE AESTHETIC QUALITY OF VERMONT'S LANDSCAPE IN JEOPARDY AFTER *METROMEDIA*?

INTRODUCTION

In *Metromedia v. San Diego*,[1] the United States Supreme Court held San Diego's sign control ordinance[2] invalid as an unconstitutional infringement of protected speech. This decision is particularly relevant to Vermont because Vermont's present billboard statute[3] is quite similar to the invalidated San Diego ordinance. Therefore, the constitutional validity of the Vermont statute is in question.

This question is not easily answered, however, because *Metromedia* is a source of great confusion. While a majority of six Justices decided that the San Diego ordinance was unconstitutional, only a plurality of four Justices could agree on the analytical basis for this decision, and five Justices wrote separately. *Metromedia's* ambiguity was cogently summarized by Justice Rehnquist in his dissenting opinion: "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 principle can be clearly drawn . . . ."[4] Although *Metromedia* does not definitively answer how a governmental unit can constitutionally regulate outdoor advertising, it does provide a basis for anticipating future decisions.

This note addresses the question of how Vermont can constitutionally regulate billboards after *Metromedia*. The note begins with overviews of *Metromedia*, and of Vermont's present billboard statute. A separate discussion of each *Metromedia* opinion follows to determine how individual Justices would vote on a first amendment challenge to the Vermont statute. This section suggests ways in which Vermont would have to amend its statute to address the concerns of each Justice. The note concludes with suggested amendments to the Vermont statute which would increase its

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1. 453 U.S. 490 (1981).

2. SAN DIEGO, CAL., ORDINANCE No. 10795 (New Series) (March 14, 1972). As cited in *Metromedia*, 453 U.S. at 493 n. 1 (hereinafter cited as SAN DIEGO ORDINANCE).

3. VT. STAT. ANN. tit. 10, §§ 481-505 (1973 & Supp. 1983 & Noncumulative Supp. 1984).

4. *Metromedia*, 453 U.S. at 569 (Rehnquist, J., dissenting).

chances of withstanding a constitutional challenge, without defeating its purpose.

I. An Overview of Metromedia

As noted, *Metromedia* was a plurality decision. Justice White announced the judgment of the Court and was joined by Justices Stewart, Marshall and Powell.[5] The plurality first held that the ordinance validly banned off-site commercial billboards in order to promote traffic safety and preserve aesthetics.[6] However, the plurality went on to hold the ordinance unconstitutional on its face as a city-wide ban of noncommercial speech.[7] Justice White reasoned that the city overstepped its authority by allowing an on-site commercial exception without a similar noncommercial exception, because noncommercial speech is afforded greater constitutional protection than commercial speech.[8] Justice White further reasoned that, because the ordinance contained specific exceptions for selected kinds of noncommercial signs, such as temporary political campaign signs, regardless of their location, the city impermissibly chose the proper subjects for public debate.[9]

Justice Brennan wrote a concurring opinion in which Justice Blackmun joined.[10] Justice Brennan, unlike the plurality, interpreted the ordinance as a total ban on billboards with the exceptions not altering the character of the ban.[11] He would require the city to prove it had a substantial interest in either of the legitimate goals of traffic safety, or aesthetics, before he would allow a total ban.[12] Justice Brennan did not think that San Diego had demonstrated a substantial interest in either of these goals.[13] Therefore, he agreed with the plurality's result, that the ordinance was invalid, but not with their rationale.[14]

Justice Stevens dissented in part.[15] He, like the plurality,

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5. *Id.* at 493.

6. The plurality was joined by Justice Stevens in this holding. *Id.* at 541.

7. *Id.* at 521.

8. *Id.* at 513.

9. *Id.* at 514-15. The San Diego ordinance allowed temporary political campaign signs and their supporting structure to be maintained for 90 days. *Id.* at 495.

10. *Metromedia*, 453 U.S. at 521 (Brennan, J., concurring in the judgment).

11. *Id.* at 525-26.

12. *Id.* at 528-34.

13. *Id.*

14. *Id.* at 521-40.

15. *Id.* at 540.

thought the city could constitutionally prohibit off-site commercial billboards, while allowing on-site commercial billboards.[16] Contrary to the plurality, he agreed with Justice Brennan that the ordinance was a total ban.[17] Unlike either the plurality or Justice Brennan, however, Justice Stevens would have upheld the San Diego ordinance.[18] He thought that the ordinance was content neutral[19] and the overall communications market in San Diego was sufficient.[20] Therefore, he thought the ordinance was valid under the first amendment.[21]

Chief Justice Burger also dissented;[22] like Justice Stevens, he too would have upheld the San Diego ordinance.[23] Much of the Chief Justice's opinion was devoted to criticism of the opinions of Justices White and Brennan.[24] He thought their opinions were insensitive to those who must live with billboard blight.[25] The Chief Justice deferred to the city for determination of how it wants to protect its citizens' substantial interests in traffic safety and aesthetics.[26] Like Justice Stevens, the Chief Justice thought the most important considerations were content neutrality and availability of other adequate means of conveying messages.[27] The Chief Justice determined that the regulation was content neutral and he characterized the exceptions as "negligible."[28] He also concluded that a variety of adequate media were available to put forth the same messages.[29] Thus, the Chief Justice concluded the San Diego ordinance was constitutional.[30]

Adding to the confusion, Justice Rehnquist also dissented in a separate opinion.[31] While he stated that he agreed substantially with the views expressed by the Chief Justice and Justice Stevens,

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16. *Id.* at 541.
17. *Id.* at 542.
18. *Id.*
19. *Id.* at 552.
20. *Id.* at 552-53.
21. *Id.* at 553.
22. *Id.* at 555.
23. *Id.* at 563.
24. The Chief Justice characterized the Court's holding as "bizarre" and the plurality's opinion as a "remarkable ipse dixit." *Id.* at 555, 561.
25. *Id.* at 556.
26. *Id.* at 561.
27. *Id.*
28. *Id.* at 562.
29. *Id.* at 562-63.
30. *See id.*
31. *Id.* at 569.

he did not think that either of their opinions came close enough to his own to warrant a compromise.[32] Justice Rehnquist thought aesthetic considerations alone were sufficient to justify a total prohibition of billboards within a community regardless of its currently existing aesthetic quality.[33] Because he also thought the exceptions to the San Diego ordinance were constitutionally permissible, Justice Rehnquist would have upheld the ordinance.[34]

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32. *Id.* at 569-70.

33. Justice Rehnquist disagreed with Justice Brennan on this point; Justice Rehnquist would not require a city to prove that it had a substantial interest in aesthetics before he would allow a total ban. *Id.* at 570.

34. *Id.* Two other cases are worthy of consideration at this point. The first is John Donnelly & Sons v. Campbell, 639 F.2d 6 (1980). In this case, which was decided before *Metromedia*, the First Circuit Court of Appeals held Maine's billboard statute invalid on first amendment grounds. 639 F.2d at 16. This case is significant because Maine's statute was patterned after Vermont's statute and was substantially similar. *See* 4 N. WILLIAMS, AMERICAN LAND PLANNING LAW, § 121.09a (1983 Cum. Supp.).

The holding in *John Donnelly & Sons* was based on a rationale similar to Justice White's rationale in *Metromedia*. *See* 629 F.2d at 16. The Maine statute had an on-premise commercial exception and selected off-premise noncommercial exceptions to its general ban. The court reasoned that the statute affected noncommercial speech more heavily than commercial speech, and was therefore unconstitutional. *Id.* at 15-16.

The significance of the First Circuit's decision in *John Donnelly & Sons*, as it relates to Vermont's statute, should be neither overstated nor understated. First, Vermont is under the jurisdiction of the Second Circuit Court of Appeals where First Circuit decisions are not controlling authority. However, because of the regional proximity of these circuits, and the substantial similarity between the two statutes, the First Circuit's opinion would likely be considered as fairly persuasive authority in the Second Circuit. As noted, however, a majority of the Justices of the Supreme Court could not agree on a similar rationale in *Metromedia*. Because *Metromedia* was decided after *John Donnelly & Sons*, the viability of the First Circuit's rationale is therefore called into question.

The second case which should be considered is City Council v. Taxpayers For Vincent, 104 S.Ct. 2118 (1984). In this case the Supreme Court upheld a Los Angeles ordinance which prohibited the display of signs on public property. *Id.* at 2135-36. The ordinance was challenged by the supporters of Roland Vincent, a candidate for the Los Angeles City Council. Vincent's supporters claimed the ordinance abridged their freedom of speech because it prohibited them from posting their campaign signs on city property. *Id.* at 2122-23.

Justice Stevens wrote the majority opinion. He determined that, because it was a total prohibition with no exceptions and had been enforced in an evenhanded manner, the ordinance was content neutral, both on its face and in its application. *Id.* at 2128-29. Justice Stevens then applied the test for a viewpoint neutral regulation as defined in United States v. O'Brien, 391 U.S. 367 (1968). This test has several parts: The regulation must be within the constitutional power of the government; further an important or substantial government interest, which is unrelated to the suppression of free expression; and restrict expression no further than necessary to achieve the asserted interest. 104 S.Ct. at 2129.

Justice Stevens first held the city may legitimately exercise its police powers to advance aesthetic values and that this interest is a sufficient justification for a total prohibition of signs. In reaching this conclusion, Justice Stevens relied heavily on the opinions of seven Justices in *Metromedia*: the plurality plus the dissents of Justices Stevens, Burger and Rehnquist. *Id.* at 2129-30.

Justice Stevens next held the ordinance curtailed no more speech than was necessary to

II. An Overview of Vermont's Billboard Statute

The desire to enhance the aesthetic qualities of Vermont through statewide billboard regulation began as early as 1939.[35] Although the original statute was quite unique, it was functionally defective,[36] and required major revision which finally occurred with the adoption of Vermont's current statute in 1968.[37] The present statute totally prohibits the erection or maintenance of outdoor advertising visible to the traveling public.[38] The statute gave owners of pre-existing, lawful, outdoor advertising a maximum of five years to remove their signs and provided for notice of demand for removal and compensation for the owner's loss.[39] The state may

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accomplish its purpose. He reasoned that visual blight is the product of the medium of expression itself; therefore, a total prohibition of that medium curtails no more speech than is necessary to remedy the visual nuisance. *Id.* at 2132. He further reasoned that the private citizen's interest in controlling the use of his own property is a sufficient justification for the city to distinguish between signs posted on public as opposed to private property and ban only the former. *Id.* Justice Stevens relied on the findings of the district court to conclude that there are ample alternative modes of communication in Los Angeles as a further justification for the city's prohibition of the posting of signs on public property. *Id.* at 2133.

Justice Brennan reaffirmed the opinion he expressed in *Metromedia* that a court should not simply defer to a governmental unit's determination that a restriction on speech is necessary to advance an interest in aesthetics. Rather, in his view, a court should require a governmental unit to prove that it is seriously and comprehensively addressing aesthetic concerns before a restriction on speech will be allowed to further an asserted aesthetic interest. *Id.* at 2138. Because he did not think that Los Angeles carried this burden, Justice Brennan dissented. *Id.* at 2142-43.

Thus, the *Taxpayers For Vincent* case is important because it reveals that a total ban on signs will be upheld in some instances. It is also important because it shows that Justice Brennan will continue to adhere to the strict view which he expressed in *Metromedia*. However, it should be noted that the Los Angeles ordinance upheld in *Taxpayers For Vincent* was a total ban with no exceptions. Therefore, it did not make the on-premise commercial/noncommercial distinction which the plurality held impermissible in *Metromedia*. Because the Vermont statute does make this distinction, *Metromedia* would still be the controlling authority for a first amendment challenge to Vermont's statute.

35. 1939 Vt. Acts No. 221, § 6.

36. The law had a setback formula which required that there be no more square feet on the face of the sign than linear feet between the sign and the highway. This was effective as a regulation of large billboards but resulted in many small billboards close to the edges of highways because the formula measured the required distance from the center, instead of the edge of the right-of-way. 4 N. Williams, American Land Planning Law §§ 121.06, 121.09 (1975).

37. Vt. Stat. Ann. tit. 10, §§ 481-505 (1973 & Supp. 1983 & Noncumulative Supp. 1984) (effective March 23, 1968).

38. *Id.* at § 488.

39. *Id.* at §§ 496, 498, 502. The compensation provision was a requirement of the Federal Highway Beautification Act of 1965, 23 U.S.C. § 131(g) (1982). It should be noted that the federal act has been a failure in the relief of billboard blight along interstate highways in states that have not enacted their own more stringent controls. Even though the Act made

take down signs which the owners fail to remove and may bring an action in state district court to recover expenses incurred in removal.[40] The statute also provides that a violator may be fined one hundred dollars or imprisoned for up to thirty days, or both, with each day of violation constituting a separate offense.[41] The statute is not only a total prohibition of outdoor advertising with limited exceptions; it is a comprehensive system of aesthetic controls combined with an information network.

The statute exempts some classes of signs[42] from the regula-

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billboard control along federally funded highways mandatory, the Act has failed due to the compensation requirement and a provision which allowed billboards in areas zoned for commercial or industrial uses. *See,* Floyd, *Requiem for the Highway Beautification Act,* 48 J. AM. PLAN. ASSOC. 441 (1982).

40. VT. STAT. ANN. tit. 10, § 497 (1973).

41. *Id.* at § 503.

42. The exemptions are listed in VT. STAT. ANN. tit. 10, § 494 and are as follows:
   (1) Signs located on or in the rolling stock of common carriers.
   (2) Signs on registered and inspected motor vehicles except those which are determined by the Travel Information Council to be circumventing the intent of this chapter.
   (3) Signs, with an area of not more than 260 square inches, identifying stops or fare zone limits of common carriers by motor bus.
   (4) Signs erected and maintained by a town outside the highway right-of-way, each of which does not exceed 64 square feet in area, excluding panel and frame, which may show the place and time of services or meetings of churches and civic organizations in the town, and which may include a panel which identifies the name of the town, the charter date, the date the town was founded, or any other significant date in the history of the town, and which the town wishes to identify. The panel may bear the wording "welcome to" the particular town. Not more than two such signs may be erected and maintained readable by traffic proceeding in any one direction on any one highway. The signs shall meet the criteria of the transportation agency and the travel information council.
   (5) Residential directional signs, each of which does not exceed 4 square feet in area, along highways other than limited-access facilities (but not within the highway right-of-way), except that a license is required if the person maintains a professional, commercial or business activity at this residence and wishes to indicate its existence.
   (6) Official traffic control signs.
   (7) Signs of a duly constituted governmental body including traffic and similar regulatory devices, legal notices or warnings at railroad crossings.
   (8) Small signs displayed for the direction, instruction or convenience of the public, including signs which identify rest rooms, freight entrances, posted areas or the like, with a total surface area not exceeding 4 square feet.
   (9) Signs to be maintained for not more than two weeks announcing an auction, or a campaign, drive or event of a civic, philanthropic or religious organization.
   (10) Memorial signs or tablets.

tion while it specifically provides for other classes of signs. For example, it includes a specific provision for on-premise signs.[43] An on-premise sign is defined as "an accessory sign which directs attention to a business, profession, commodity, service, or entertainment carried on, sold, or offered on the same premises."[44] In addition to the purposes included in the definition, the section for on-premise signs provides for the advertisement of the sale or lease of the premise, or activities being conducted thereon.[45] This provision provides a service to both the owner and the general public by allowing the owner to identify the premises and to state what, if anything, is being offered to the public.

In addition to the on-premise sign provision, the statute contains several other provisions to supply travelers with information. It provides for "official tourist information centers,"[46] which have been established near the principle entrance points to the state.[47] The centers supply information about public accommodations, commercial services and other points of interest.[48]

Official business directional signs and sign plazas,[49] which provide needed information at various points throughout the state as an alternative to billboards, are maintained by the state agency of transportation.[50] Guidebooks and other published information are available at various public places and businesses.[51] Finally, a

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(11) Signs erected by county fairs and expositions for a period not to exceed six weeks.

(12) Directional signs, subject to regulations promulgated by the bureau of public roads, with a total surface area not to exceed 4 square feet providing directions to places of business offering for sale agricultural products harvested or produced on the premises where the sale is taking place.

43. VT. STAT. ANN. tit. 10, § 493 (1973).

44. *Id.* at § 481(3).

45. *Id.* at § 493. (This section and § 481(3) must be read together).

46. *Id.* at § 485.

47. *Id.* There are four information centers in Vermont, one at each of the following locations: U.S. Route 4 at Fair Haven, Vt.; Interstate 91 at Guilford, Vt.; Interstate 89 at High Gate Springs, Vt.; and Interstate 91 at Derby Line, Vt. Telephone interview with Carrol King, Clerk of the Travel Information Council in the Agency of Transportation, Montpelier, Vt. (Feb. 10, 1984). *See also, Vermont, Official State Map* (1982-83) (location of information centers indicated).

48. VT. STAT. ANN. tit. 10, § 485 (1973 & Noncumulative Supp. 1984).

49. *Id.* at § 486.

50. There are currently 87 sign plazas and approximately 1400 official business directional signs in Vermont. Telephone interview with Carrol King, Clerk of the Travel Information Council in the Agency of Transportation, Montpelier, Vt. (Feb. 10, 1984).

51. VT. STAT. ANN. tit. 10, § 487 (1973 & Noncumulative Supp. 1984).

Travel Information Council[52] oversees the administration of the statute. The Council is required to take scenic and aesthetic values into consideration when making decisions under the act.[53]

The statute is actually entitled "Tourist Information Services."[54] It is obvious from the foregoing description of the statute that the legislature was concerned with both preserving and enhancing the aesthetic quality of the state, and with providing needed information to travelers.[55] The statute embodies a balance of these competing concerns by eliminating scattered outdoor advertisements while providing alternative advertisement methods. The aesthetic harms caused by these alternative methods are mitigated by strict and uniform regulation. Thus, the legislature has successfully insured a more visually pleasing environment for both Vermont citizens and visitors, while concurrently providing guidance to locations of interest throughout the state.

III. An Application of *Metromedia* Standards to Vermont's Billboard Statute

A. *The Distinction Between Off-Premise and On-Premise Commercial Signs*

In *Metromedia,* Justice White, writing for the plurality,[56] joined by Justice Stevens,[57] held clearly that it was constitutionally permissible for the City of San Diego to ban off-premise commercial signs while allowing on-premise commercial signs to be displayed.[58] This is an important holding for the State of Vermont

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52. *Id.* at § 484.

53. *Id.* See *infra* note 153, for a description of the Scenery Preservation Council.

54. Vt. Stat. Ann. tit. 10, §§ 481-505 (1973 & Supp. 1983 & Noncumulative Supp. 1984).

55. *Id.* at §§ 482, 483.

56. *Metromedia,* 453 U.S. at 493 (plurality opinion).

57. *Id.* at 541 (Stevens, J., concurring in part).

58. *Id.* at 512. This part of Justice White's analysis is considered separately because a majority of five Justices agreed on both the holding and the rationale. It is, therefore, one of the few holdings in *Metromedia* which can be applied directly to Vermont's billboard statute.

The constitutional basis for this distinction, between on-premise and off-premise commercial signs, is that the first amendment does not give full protection to purely commercial speech. In fact, before 1975, purely commercial speech received no first amendment protection. For instance, in Valentine v. Chrestensen, 316 U.S. 52 (1942), the Court held that a New York City ordinance, which prohibited the distribution of commercial handbills but which allowed the distribution of handbills devoted solely to "information or a public protest," was valid under the first amendment. *Id.* at 54. The Court reasoned simply that the

because the Vermont statute makes this distinction[59] and because most billboard blight is caused by off-premise commercial billboards.

Justice White applied the test adopted in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*,[60] which determines the validity of a government restriction on commercial speech, to the San Diego ordinance in order to arrive at this holding.[61] The *Central Hudson* test has four elements. First, to be protected under the first amendment, commercial speech must concern lawful activity and not be misleading.[62] Second, a restriction on protected

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Constitution did not restrain the city from prohibiting purely commercial advertising in its streets. *Id.*

Then, in Bigelow v. Virginia, 421 U.S. 809 (1975), the Court held that a commercial advertisement of a New York City organization, which offered to arrange low cost abortions for women with unwanted pregnancies, was deserving of some first amendment protection. *Id.* at 825. The appellant, who was the managing editor of a weekly newspaper in Virginia, was convicted of violating a Virginia statute which made it a misdemeanor to encourage an abortion by the sale or circulation of a publication. *Id.* at 811-13. The Court overturned the conviction and held the law under which the appellant was convicted unconstitutional. *Id.* at 829. The Court reasoned that the advertisement was in the public interest because it informed interested citizens on the development of reform in anti-abortion law and that the activity advertised pertained to constitutional interests. *Id.* at 822 (citing Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973)). The Court declined to decide to what extent other commercial speech was protected. *Id.* at 825.

As opposed to the abortion issue in *Bigelow*, Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976), squarely presented the commercial speech issue. The Court struck down a Virginia statute which declared it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. *Id.* at 770. The Court held that an advertiser's purely economic interest in a commercial advertisement does not disqualify him from protection under the first and fourteenth amendments. *Id.* at 762. The Court considered that a particular consumer, as well as society in general, may have strong interests in the free flow of commercial information. *Id.* at 763-64. The Court concluded that the state's justification of maintaining the professionalism of its licensed pharmacists was not sufficient to override the first amendment interest involved. *Id.* at 766-70.

The Court applied the principles of *Virginia Pharmacy Bd.* to the facts in Bates v. State Bar of Arizona, 433 U.S. 350 (1977) to hold that price advertising in newspapers by attorneys for routine legal services was entitled to first amendment protection. *Id.* at 384. The Court concluded that the state's interest in maintaining the professionalism of the state bar was not an acceptable basis for completely suppressing this type of commercial advertisement. *Id.* at 370-72. The Court warned, however, that there are "common sense differences" between commercial speech and noncommercial speech, which might justify more strict regulation of the former than would be permitted with the latter. *Id.* at 380-81.

Finally, in Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980), the Court adopted a four-part test for determining the validity of a government restriction of commercial speech. *Id.* at 566.

59. *Compare* VT. STAT. ANN. tit. 10, §§ 488 to 493 (1973 & Noncumulative Supp. 1984).

60. 447 U.S. 557 (1980).

61. *Metromedia*, 453 U.S. at 507-12.

62. 447 U.S. at 564.

commercial speech is valid only if it seeks to implement a substantial government interest.[63] Third, the restriction must directly advance the interest.[64] Finally, the restriction must reach no further than necessary to accomplish the given objective.[65]

The San Diego ordinance, as it pertained to commercial speech, passed the *Central Hudson* test.[66] There was no question that the commercial speech involved concerned lawful activity and was not misleading.[67] Justice White held that the asserted governmental interests of traffic safety and aesthetics were clearly substantial.[68] He thought that it was reasonable for the city to conclude that billboards are both traffic hazards[69] and unattractive.[70]

Justice White also concluded that the ordinance directly advanced those interests, notwithstanding the fact that it distinguished between on-premise and off-premise commercial billboards, and forbade only the latter.[71] He reasoned that an off-premise prohibition directly furthered the city's interests; the city could reasonably conclude that off-premise billboards posed a greater threat to those interests; and the city's opposing interest of allowing the identification of goods and services available at a particular premise could outweigh its interest in traffic safety and aesthetics.[72] Justice White also held the ordinance to pass the fourth part of the *Central Hudson* test, because he thought it reached no further than necessary to accomplish the city's interest.[73]

Vermont's statute should also pass the *Central Hudson* test. Commercial speech displayed on Vermont on-premise signs probably would concern lawful activity[74] and not be misleading. It would therefore be protected. Certainly, Vermont's interests in traffic safety and aesthetics are as substantial as those of the City of San

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63. *Id.*
64. *Id.*
65. *Id.*
66. *Metromedia*, 453 U.S. at 512.
67. *Id.* at 507.
68. *Id.* at 507-08.
69. *Id.* at 509.
70. *Id.* at 510.
71. *Id.* at 511.
72. *Id.* at 511-12.
73. *Id.* at 508.
74. VT. STAT. ANN. tit. 10, § 495(c)(1) (1973 & Noncumulative Supp. 1984), forbids an on-premise sign from being erected or maintained which advertises any activity which is illegal under federal or state law.

Diego.[75] Vermont's statute should also pass the third and fourth parts of the *Central Hudson* test, because it makes the same distinction between on- and off-premise commercial signs as did the San Diego ordinance. Therefore, under *Metromedia,* the Vermont statute, as far as the distinction it makes between on- and off-premise commercial billboards, should be constitutional.[76]

B. *The Remainder of Justice White's Analysis and the Vermont Statute*

Justice White would likely invalidate the Vermont billboard statute. Vermont's statute has problems analogous to the problems he found with the San Diego ordinance. The San Diego ordinance permitted signs to be located only on a premise which "either . . . designate[d] the name of the owner or occupant of the premises . . . or . . . advertise[d] goods manufactured or produced or services rendered on the premises . . . ."[77] It did not allow general noncommercial messages to be displayed on a premise, but apparently, the ordinance did allow a noncommercial message to be displayed if the message "designate[d] the name of the owner or occupant of the premises."[78] Justice White did not think this was permissible. He stated:

> 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 . . . . [T]he city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.[79]

The Vermont on-premise provision is similar to that of the San Diego ordinance.[80] While the Vermont statute does not expressly allow a sign which designates the name of an occupant or

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75. For an argument that Vermont has demonstrated that its interest in aesthetics is quite substantial, see *infra,* notes 143-83 and accompanying text.

76. *See supra* note 56-59 and accompanying text.

77. SAN DIEGO ORDINANCE, *supra* note 2.

78. *See id.*

79. *Metromedia,* 453 U.S. at 513.

80. *Compare* VT. STAT. ANN. tit. 10, §§ 483(3), 493 (1973) to SAN DIEGO ORDINANCE, *supra* note 2.

owner of a premise to be displayed, it does allow for the advertisement of "activities being conducted" on a premise.[81] Thus, the Vermont statute would allow a noncommercial message to be displayed on a premise if the message advertises a noncommercial activity being conducted thereon. However, the Vermont statute, like the San Diego ordinance, does not allow general noncommercial messages to be displayed on a premise.[82] Therefore, Justice White probably would invalidate the Vermont billboard law for the same reason he invalidated the San Diego ordinance.

The distinction between a general noncommercial message and a message which identifies the location of an enterprise devoted to a noncommercial activity demonstrates the inherent problem in Justice White's analysis. Neither the San Diego ordinance nor the Vermont statute discriminates against general noncommercial messages based upon their content; all general noncommercial messages are prohibited. The noncommercial messages which may be displayed on a premise are those messages which are so connected with the premise that they identify its location. Thus, both the San Diego ordinance and the Vermont statute are neutral as to what noncommercial messages may be displayed on a premise if the purpose of the message is to identify the premise.

The same is true for commercial messages. The only on-premise commercial messages which are allowed by either the San Diego ordinance or the Vermont statute are those which advertise goods or services available where the signs are displayed. These messages necessarily identify the premises as the location where those goods or services are available. Therefore, neither the San Diego ordinance nor the Vermont statute favors commercial over noncommercial speech. Both laws place only one qualification on any on-premise sign: The sign must identify the premise upon which it is located. The San Diego ordinance and the Vermont statute favor on-premise identification signs over other on-premise signs which do not serve this purpose.

The justification for allowing on-premise identification signs is readily apparent: These signs provide a service to our highly mobile society. Local residents could eventually learn the identity of every premise within their immediate area and thus have no problem in obtaining all the services they demand without these signs.

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81. VT. STAT. ANN. tit. 10, § 493 (1973).
82. *Id.* at § 488.

However, the same is not true for individuals who travel on a regional, statewide, or national scale. The point is simple. A modern society could not operate efficiently without signs which tell travelers what goods and services are available at specific premises. Because identification signs serve this purpose, while signs which carry general noncommercial messages do not, a governmental body is acting quite reasonably when it allows the former but prohibits the latter.

Under Justice White's analysis in *Metromedia,* however, the Vermont statute, like the San Diego ordinance, is constitutionally deficient because it prohibits the display of on-premise signs which carry general noncommercial messages, while it allows the display of identification signs for both commercial and noncommercial establishments. To satisfy Justice White, Vermont must allow the display of on-premise, general noncommercial messages. This requirement of allowing on-premise general noncommercial messages raises practical, as well as constitutional, problems for the Vermont Legislature.

One practical problem is that general noncommercial or ideological messages are not necessarily connected with a particular premise. They are ideas and assertions which by definition have no situs. If the Vermont Legislature amended its statute to comport with Justice White's opinion, displays of all general noncommercial messages would have to be allowed regardless of these messages' locations. Furthermore, these displays would have to be allowed even if they would destroy the most scenic view from a Vermont highway.

As a practical matter, few people will go to the trouble and expense of erecting a billboard just to assert their belief on a given subject. Nonetheless, only a few billboards at prime scenic locations would adversely affect the aesthetic quality of the Vermont landscape. Furthermore, commercial advertisers would have an incentive to circumvent the statute by disguising their commercial messages as noncommercial messages.[83] If they were successful in doing so, additional signs would be scattered across the Vermont countryside. The requirement of allowing on-premise general noncommercial messages also raises a constitutional problem as to how the state could administratively weed out commercial messages

83. Justice Brennan recognized this possibility in his concurring opinion. *Metromedia,* 453 U.S. at 540 (Brennan, J., concurring in the judgment).

without infringing on the noncommercial advertiser.

The line between commercial and noncommercial speech is not always a clear one. Justice Brennan raised this issue in his opinion in *Metromedia* and sharply criticized the plurality for encouraging this type of administrative line drawing.[84] He pointed out that the Court has invalidated police power regulations which gave discretion to administrative officials to control the free exercise of first amendment rights.[85]

Thus, even if Vermont widened its on-premise sign provision to allow all general noncommercial signs in an attempt to satisfy Justice White's analysis, there is still a risk that the statute would be declared unconstitutional. The choice is paradoxical.

The on-premise sign provision is not the only problem with Vermont's statute under Justice White's analysis. The San Diego ordinance had exceptions for various noncommercial signs, whether on-premise or off, such as its exception for temporary political campaign signs.[86] Justice White held that by doing so, the ordinance impermissibly distinguished between the value of different categories of noncommercial speech.[87] Vermont's statute has

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84. *Id.* at 536-40.

85. *Id.* at 537-38. For example, in Saia v. New York, 334 U.S. 558 (1948), the Court invalidated a Lockport, N.Y. penal ordinance which prohibited the use of sound amplification devices in public places except with the permission of the Chief of Police. The Chief of Police had the discretion to determine whether particular messages concerned "items of news and matters of public concern" and thus were permissible. *Id.* at 559 n. 1. The Court held the ordinance unconstitutional as a prior restraint on freedom of speech in violation of the first amendment because there were no standards prescribed to guide the Chief's discretion. *Id.* at 559-60.

Similarly, in Cantwell v. Connecticut, 310 U.S. 296, 304-5 (1940), the Court invalidated a statute which gave discretion to the Secretary of the Public Welfare Council to determine which groups could solicit money. The discretionary standard was whether their cause was religious. The Court held this to be an impermissible censorship of religion under the first amendment. *Id.* at 305. The Court further held that a guarantee of judicial review of the administrative official's action did not make it valid because it was still a prior restraint. *Id.* at 305-06. *See also,* Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 622 (1976) (ordinance which required that advance written notice must be given to the police department in order to solicit for a "recognized charitable cause" held invalid); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-53 (1969) (ordinance which required a permit to be obtained from City Commission before holding a public parade invalidated); Kunz v. New York, 340 U.S. 290, 294-95 (1951) (ordinance which required a permit in order to hold religious services on city streets held invalid); Lovell v. City of Griffin, 303 U.S. 444, 450-51 (1938) (ordinance which prohibited the distribution of literature of any kind without a permit held invalid).

86. SAN DIEGO ORDINANCE, *supra* note 2.

87. *Metromedia,* 453 U.S. at 514.

similar exceptions.

For example, signs may be "erected and maintained by a town . . . which may show the place and the time of services and meetings of churches and civic organizations . . . ."[88] The statute also allows signs to "be maintained for not more than two weeks announcing an auction, or a campaign, drive or event of a civic, philanthropic or religious organization."[89] Similarly, the statute exempts "[s]igns erected by county fairs and expositions for a period not to exceed six weeks."[90]

Justice White wrote: "Because some noncommercial messages may be conveyed on billboards . . . San Diego must similarly allow billboards conveying other noncommercial messages . . . ."[91] If Justice White were to evaluate Vermont's law in light of the above mentioned exceptions he would likely hold it unconstitutional. The messages allowed on the excepted signs are noncommercial messages. Like the on-premise sign provision,[92] these exceptions are for identification signs even though the signs are not located on the advertised premises. They serve the purpose of identification by announcing where and when church services, civic events, and county fairs are held.

Unlike the on-premise sign provision, these exceptions are not content neutral concerning what group, organization or event may be identified on the signs. Only churches and civic organizations may be identified on town maintained signs;[93] no other group is allowed. Similarly, only a civic, philanthropic or religious organization may advertise their campaign, drive or event.[94] But even if these exceptions were amended to be content neutral concerning what group or event may be identified, Justice White's analysis still would not be satisfied. Under Justice White's analysis in *Metromedia,* Vermont would have to broaden these exceptions to include all general noncommercial messages, thus creating an unlimited exception. Alternatively, Vermont could rid the statute of the exceptions. Because the exceptions are not nearly as important for the efficient day-to-day operations of the state, as on-premise

88. VT. STAT. ANN. tit. 10, § 494(4) (Noncumulative Supp. 1984).
89. *Id.* at § 494(9).
90. *Id.* at § 494(11).
91. *Metromedia,* 453 U.S. at 515.
92. VT. STAT. ANN. tit. 10, § 493 (1973).
93. VT. STAT. ANN. tit. 10, § 494(4) (Noncumulative Supp. 1984).
94. *Id.* at § 494(9).

identification signs, this option is plausible.

Other problems with the Vermont statute under Justice White's analysis concern the provisions for official business directional signs[95] and sign plazas.[96] An official business directional sign is defined in the statute as "a sign erected and maintained by the state to indicate to the traveling public the route and the distance to public accommodations, commercial services for the traveling public, and points of scenic, historic, cultural, educational and religious interest."[97] The signs are off-premise, and the messages allowed are both commercial and noncommercial, but the provision is not content neutral even for the purpose of giving direction. Only a point of scenic, historic, cultural, educational, or religious interest may be advertised; all other points of interest are excluded because they do not fall within the given set of permissible interests. But even if the Vermont Legislature amended this provision to make it content neutral for the purpose of identification, it would still be unconstitutional under Justice White's analysis unless widened to allow general noncommercial messages.

A sign plaza is defined as "any area established and maintained by the agency of transportation adjacent to a highway, where official information plaza plaques are grouped in tiers or on panels."[98] An official information plaza plaque is simply a scaled down version of an official business directional sign; only the same locations and points of interest may be identified.[99] Therefore, the sign plaza provision is also not content neutral concerning what points of interest may be identified. Again, however, unless all general noncommercial messages are allowed to be posted, putting all points of interest on equal footing would not satisfy Justice White's analysis. While the state could amend this provision of the statute to allow any and all noncommercial messages to be displayed at a sign plaza, the amendment alone would not satisfy Justice White's analysis unless the other provisions and exceptions were also broadened.

Widening the range of messages allowed on sign plazas could also cause administrative problems. The state would have to accept

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95. *Id.* at § 486.

96. *Id.*

97. *Id.* at § 481(2).

98. *Id.* at § 481(7).

99. *Compare* VT. STAT. ANN. tit. 10, § 481(2) (official business directional sign) to § 481(9) (official information plaza plaque) (1973 & Noncumulative Supp. 1984).

all messages regardless of content, even if these messages were critical of the state government. This would probably not appeal to many legislators. Furthermore, it would not seem fair to charge everyone who wanted to display a general noncommercial message the twenty-five dollar fee currently charged to businesses.[100] This would exclude the messages of those who could not afford the fee. If the state wanted to remedy this inequity by charging only commercial advertisers, it would run into the dilemma of deciding which messages are truly commercial and which are noncommercial.[101] Alternatively, the state could delete the provision from the text of the statute and tear down the existing plazas. There are no easy answers to Justice White's analysis.

C. *Justice Stevens's Analysis and the Vermont Statute*

Justice Stevens did not think the plaintiffs had standing to challenge the ordinance on the basis that it impacted too heavily on messages which property owners could display on their own premises.[102] He viewed their claims as hypothetical because there was no evidence in the record which indicated that the on-site signs covered by the ordinance had ever been used for noncommercial messages.[103] The rest of Justice Stevens's opinion, however, indicated that if he thought the question had been properly before the Court, he would have upheld the ordinance. The test he formulated allows a total ban of outdoor advertising.[104]

In fact, Justice Stevens thought that the question of a total ban of outdoor advertising was before the Court.[105] He believed there were two separate questions to be answered to determine whether such a total prohibition would be permissible:[106]

> First, is there any reason to believe that the regulation is biased in favor of one point of view or another, or that it is a subtle method of regulating the controversial subjects that may be placed on the agenda for public debate? Second, is it fair to conclude that the market which remains open for the communication of both popular and unpopular ideas is ample

100. VT. STAT. ANN. tit. 10, § 501(1)(B) (Noncumulative Supp. 1984).
101. *See supra* notes 82-84 and accompanying text.
102. *Metromedia*, 453 U.S. at 544 (Stevens, J., dissenting in part).
103. *Id.* at 543-44.
104. *Id.* at 552.
105. *Id.* at 542.
106. *Id.* at 552.

and not threatened with gradually increasing restraints?[107]

This test requires content neutrality and an adequate overall communications market. Justice Stevens thought that the San Diego ordinance passed this test.[108] He concluded that the city's actions were unbiased, and the overall communications market in San Diego was not only adequate, but perhaps excessive.[109]

He also thought the exceptions contained in the San Diego ordinance posed no first amendment problem.[110] He found only four exceptions contained in the ordinance which were based on the content matter of the communication.[111] Of these four, he considered only the exception for political campaign signs to be potentially suspect. He thought the special value on additional communication during a political campaign rendered the exception permissible, but if the signs gave one party an unfair advantage, the exception would be suspect.[112]

Vermont's current statute could possibly pass the first part of Justice Stevens's test. Excepting official business directional signs,[113] sign plazas,[114] town maintained signs[115] and signs which announce a campaign, drive or event,[116] Vermont's statute is content neutral concerning allowable identification signs. The bias found in these exceptions is similar to the bias found in an exception to the San Diego ordinance which allowed "commemorative

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107. *Id.*
108. *Id.* at 552-53.
109. *Id.*
110. *Id.* at 553.
111. The four were by number:

> 4. Commemorative plaques of recognized historical societies and organizations.
> 5. Religious symbols, legal holiday decorations and identification emblems of religious or historical societies.
> 8. Public service signs limited to the depiction of time, temperature or news . . . .
> 12. Temporary political campaign signs . . . which are erected or maintained for no longer than 90 days and which are removed within 10 days after the election to which they pertain.

Metromedia, 453 U.S. 554 n.25 (Stevens, J., dissenting in part). *See* 453 U.S. 495 n. 3 (list of exceptions).
112. *Metromedia*, 453 U.S. 554-55 (Stevens, J., dissenting in part).
113. VT. STAT. ANN. tit. 10, §§ 486, 481(2) (1973 & Noncumulative Supp. 1984).
114. *Id.* at §§ 486, 481(7).
115. *Id.* at § 494(4) (Noncumulative Supp. 1984).
116. VT. STAT. ANN. tit. 10, § 494(9) (1973).

plaques of *recognized historical societies and organizations.*"[117] Because Justice Stevens found no first amendment problem with the San Diego exception,[118] he might similarly find no first amendment problem with the Vermont exceptions. There is, however, no guarantee that Justice Stevens would evaluate these exceptions to the Vermont statute in the same manner, and it would be risky to assume that he would. Therefore, the Vermont statute should be amended so that these exceptions will be content neutral as to whom or what may be identified.[119] The Vermont statute then would stand a very good chance of passing the first part of Justice Stevens's test.

Vermont's statute should be able to pass the second part of Justice Stevens's test[120] without any difficulty. The overall communications market in Vermont is certainly ample[121] and does not appear to be threatened with gradually increasing restraints. Therefore, if amended as indicated, the Vermont statute should pass Justice Stevens's test on a first amendment challenge.

D. *Chief Justice Burger's Analysis and the Vermont Statute*

The Chief Justice was strongly in favor of upholding San Diego's attempt at billboard control. He defined the question presented in terms of the authority of local governments to enact effective billboard legislation.[122] After concluding that traffic safety and aesthetics are substantial governmental goals, the Chief Justice deferred to the city to determine how best to effectuate those goals.[123] The Chief Justice, like Justice Stevens, thought it was the Court's duty "to determine whether the legislative approach is essentially neutral to the messages conveyed and leaves open other adequate means of conveying those messages."[124] The Chief Justice characterized the exceptions to the San Diego ordinance as "negli-

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117. 453 U.S. at 495 n. 3 (emphasis supplied).

118. *See Metromedia*, 453 U.S. at 554 (Stevens, J., dissenting in part).

119. *See infra* 194-201 and accompanying text.

120. *Metromedia*, 453 U.S. at 552 (Stevens, J., dissenting in part).

121. According to *Vermont Yearbook*, 59-60 (1984 ed.), there are in Vermont: 19 A.M. radio stations, 22 F.M. radio stations, 3 television stations, 9 daily newspapers, 31 weekly publications, 2 bi-monthly publications, 6 monthly publications, and 4 quarterly publications. This is all for a population of 511,456. *Id.* at 15 (1980 census).

122. *Metromedia*, 453 U.S. at 557 (Burger, C.J., dissenting).

123. *Id.* at 560-61.

124. *Id.* at 561.

gible"[125] and did not think they even remotely endangered freedom of speech.[126]

The Vermont statute, if amended, should also be able to pass the Chief Justice's test. The Chief Justice, like Justice Stevens, would require the Vermont statute to be content neutral.[127] While the Chief Justice characterized the exceptions to the San Diego ordinance as "negligible"[128] he might not characterize the exceptions to the Vermont statute in the same manner. Therefore, Vermont's statute should be amended, as indicated in the preceding section, to insure that it will pass the Chief Justice's test.

E. *Justice Rehnquist's Analysis and the Vermont Statute*

Justice Rehnquist's dissent was short and to the point. He thought the aesthetic justification alone was sufficient to sustain a total prohibition of billboards regardless of the existing aesthetic character of the community.[129] He had no trouble with the exceptions to the San Diego ordinance after he determined that the political campaign sign exception was self-limiting and reasonable.[130] Thus, Vermont's statute would pass constitutional muster under Justice Rehnquist's opinion in *Metromedia.*

F. *Justice Brennan's Analysis and the Vermont Statute*

Justice Brennan viewed the ordinance as a total ban.[131] He concluded that a governmental unit may entirely ban billboards only "if it can show that a sufficiently substantial governmental interest is directly furthered by the total ban, and that any more narrowly drawn restriction . . . would promote less well the achievement of that goal."[132] Applying this test to San Diego's ordinance, Justice Brennan considered the ordinance unconstitutional.[133]

Justice Brennan considered the city's interests in traffic safety

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125. *Id.* at 562.
126. *Id.* at 564.
127. *Id.* at 561.
128. *Id.* at 562.
129. *Id.* at 570 (Rehnquist, J., dissenting). *See supra* note 33.
130. *Id.*
131. *Id.* at 522 (Brennan, J., concurring in the judgment).
132. *Id.* at 528.
133. *Id.*

and aesthetics separately. He concluded that the city had not proven that it had a sufficiently substantial governmental interest in promoting either of these legitimate goals.[134] Justice Brennan relied on the fact that the city did not come forward with any evidence to prove that a ban on billboards directly furthered traffic safety in San Diego.[135] He also thought the ordinance was not narrowly drawn to achieve the city's goal[136] and he recognized that traffic safety was often proffered as a justification for regulations when aesthetics alone were considered to be insufficient.[137]

Justice Brennan further believed the city had not shown a sufficiently substantial aesthetic interest in the commercial and industrial areas of San Diego where the ordinance applied.[138] While he intimated that it was constitutionally possible for a governmental unit to improve blighted areas through aesthetic controls, he emphasized that such controls must be part of a comprehensive effort to address aesthetic concerns:[139] "By showing a comprehensive commitment to making its physical environment . . . more attractive, and by allowing only narrowly tailored exceptions, if any, . . . [a governmental unit] could demonstrate that its interest in creating an aesthetically pleasing environment is genuine and substantial."[140]

Once this test is met, Justice Brennan would allow an exception to a sign prohibition only if: (1) it advanced an interest at least as important as the governmental unit's interest in aesthetics; (2) it was no broader than necessary to advance the special goal; and (3) it was narrowly drawn to detract as little as possible from the aesthetic interest advanced.[141] Moreover, he stated that if an

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134. *Id.* at 528-29.

135. *Id.* at 528.

136. *Id.* at 528-29.

137. *Id.* at n.7.

138. *Id.* at 530.

139. *Id.* at 531.

140. *Id.* Justice Brennan adhered to this test in City Council v. Taxpayers For Vincent, 104 S.Ct. 2118, 2136-43 (1984) (Brennan, J., dissenting). In this case he further set forth the reasoning behind his test. Justice Brennan identified "the unavoidable subjectivity of aesthetic judgments" as the fundamental problem in aesthetic cases. *Id.* at 2138. This subjective judgment raises problems for judicial review because a governmental unit could assert its justification for sign regulation on aesthetic grounds when its real purpose is to suppress speech. *Id.* at 2138-39. Because of this danger, Justice Brennan would require a substantial aesthetic interest to justify a restriction on speech. Therefore, he would require a comprehensive network of aesthetic controls unrelated to speech to prove that an asserted aesthetic interest was indeed substantial. *Id.* at 2141.

141. *Metromedia*, 543 U.S. at 532 n.10.

exception relied on a content-based distinction, it would be carefully scrutinized under this test.[142]

Justice Brennan's test is strict; few states or municipalities will be able to pass its requirements. Vermont, however, should be able to do so because Vermont has shown a comprehensive effort to make its physical environment more attractive. This comprehensive effort consists of six specific programs or pieces of legislation whose purpose is to improve and enhance the aesthetic quality of Vermont. The six are: (1) the billboard statute,[143] (2) the scenic roads program,[144](3) Act 250,[145] (4) historic preservation legislation,[146] (5) the statute governing mobile home parks,[147] and (6) the bottle bill.[148] The billboard statute has been described at length.[149] While it is one of the most important pieces of legislation which furthers aesthetic quality in Vermont, the other statutes listed will be briefly described because they also play major roles in achieving the same goal.

The Scenic Roads Program[150] allows the state transportation board to designate any state highway, or a portion of any state highway, as a state scenic road on the recommendation of the Scenery Preservation Council.[151] Towns may also designate any town highway as a town scenic highway on recommendation of their planning commissions or legislative bodies.[152] A special council was created to oversee the administration of the program.[153]

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142. *Id.*

143. VT. STAT. ANN. tit. 10, § 481-505 (1973 & Supp. 1983 & Noncumulative Supp. 1984).

144. VT. STAT. ANN. tit. 19, §§ 1018, 1019 (Supp. 1984).

145. VT. STAT. ANN. tit. 10, §§ 6001-6089 (1973 & Supp. 1983 & Noncumulative Supp. 1984).

146. VT. STAT. ANN. tit. 24, § 4407(6) (1972).

147. VT. STAT. ANN. tit. 10, §§ 6201-6241 (1973 & Supp. 1983 & Noncumulative Supp. 1984).

148. VT. STAT. ANN. tit. 10, §§ 1521-1527 (1975 & Supp. 1983 & Noncumulative Supp. 1984).

149. *See supra,* notes 35-55 and accompanying text.

150. VT. STAT. ANN. tit. 19, §§ 1018, 1019 (Supp. 1984).

151. *Id.* at § 1018(a).

152. *Id.* at § 1019(a).

153. VT. STAT. ANN. tit. 10, § 425(a) (1973 & Supp. 1983). The Scenery Preservation Council consists of ten members including the secretary of the agency of environmental conservation, the commissioner of the department of highways and the director of the state planning office or their designees. *Id.* The Council's major duties are to promote the state's scenic roads program and to advise and consult local legislative bodies in the designation of municipal scenic roads. *Id.* at § 425(b).

In addition, the Council encourages and assists the public in understanding and partici-

This program, besides recognizing that many Vermont roads have special scenic qualities, also provides a method of evaluating and preserving those roads. Thus, the program significantly adds to the enhancement and preservation of the aesthetic quality of the Vermont landscape.

One of Vermont's most important aesthetic controls is the statewide land use statute known as Act 250.[154] The Act set up the longest running state and regionally administered land use permitting system in the country.[155] There are nine District Environmental Commissions[156] which directly administer the Act, and have authority to issue permits,[157] deny permits[158] or issue permits with conditions.[159] A State Environmental Board[160] oversees the District Commissions[161] and has authority to make substantive rules.[162]

The Act has ten specific environmental criteria that must be met by all developments[163] over a certain acreage.[164] Criteria (8) specifically addresses aesthetics.[165] Under criteria (8) a development permit will not be issued unless the proposal, "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas."[166] Thus, the State of Vermont has taken steps to insure that no major development in the state will adversely affect aesthetics. Such steps are very strong evidence of Vermont's substantial and comprehensive commitment to make its physical environment more

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pating in scenic preservation and reports biennially to the governor and general assembly on the Council's effectiveness. *Id.* The Scenery Preservation Council prepared a detailed field guide to assist the state transportation board and local governments in the designation of scenic roads. M. ASHCROFT, CRITERIA AND METHODS FOR THE DESIGNATION OF SCENIC ROADS IN VERMONT (1978). A town or state scenic road must be maintained in the condition which existed at the time of the designation. Rule No. 118-3, "Standards and Rules for Designation, Maintenance and Reconstruction of Scenic Roads," Vermont Department of Transportation (1977).

154. VT. STAT. ANN. tit. 10, §§ 6001-6092 (1973 & Supp. 1983 & Noncumulative Supp. 1984).

155. R. HEALY & J. ROSENBERG, LAND USE AND THE STATES at 40 (2d ed. 1979).

156. VT. STAT. ANN. tit. 10, § 6026 (Supp. 1983).

157. VT. STAT. ANN. tit. 10, § 6086(a) (1973).

158. *See id.* at §§ 6086(a), 6087.

159. *Id.* at § 6086(10)(c).

160. *Id.* at § 6021.

161. *Id.* at § 6089.

162. *Id.* at § 6025.

163. *Id.* at § 6086 (1973 & Supp. 1983).

164. *Id.* at § 6001(3) (1973).

165. *Id.* at § 6086(8) (1973 & Supp. 1983).

166. *Id.*

attractive.

Vermont has not stopped at statewide land use control. It has also encouraged control at the local level. This is accomplished by the Vermont Municipal and Regional Planning Act,[167]which authorizes municipal planning and zoning. One purpose of the Planning Act is "[t]o protect and preserve the historic features of the Vermont landscape and of its villages, towns and cities, to preserve open space . . . and in particular to encourage and enhance the attractiveness of the Vermont scene."[168] The Planning Act allows municipalities to develop design control districts[169] to preserve their historic values. So far, six towns, three of which are Vermont's largest, have made use of this important preservation tool.[170]

In *Metromedia,* Justice Brennan recognized that the preservation of historical authenticity can show a substantial interest in preserving aesthetics and mentioned Williamsburg, Virginia, as an example.[171] The Vermont Legislature has also recognized the importance of historic preservation and has given municipalities the power to protect their historic values. Thus, Vermont has taken another important step in protecting the aesthetic quality of its environment.

Vermont has also shown a commitment to aesthetic quality while concurrently promoting the equally important goal of providing low cost housing for its citizens. This has been accomplished through the statute which governs mobile home parks.[172] The legislature first recognized that "the state of Vermont has scenic resources of great value, distributed throughout the state, which

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167. VT. STAT. ANN. tit. 24, §§ 4301-4494 (1975 & Supp. 1984).

168. *Id.* at § 4302(a)(4).

169. *Id.* at § 4407(6). A design control district is a planning tool which allows municipalities to preserve historical, architectural and cultural values. This is achieved by requiring planning commission approval before any "structure may be erected, reconstructed, substantially altered, restored, moved, demolished or changed in use or type of occupancy . . . within a designated district." *Id. See generally* Note, *Enhancing the Vermont Townscape: Design Review,* 7 VT. L. REV. 363 (1982) (in depth discussion of design control in Vermont).

170. *See* Note, *Enhancing the Vermont Townscape: Design Review,* 7 VT. L. REV. 363, 373 (1982). These communities are Montpelier, Burlington, St. Johnsbury, Manchester Center and Old Bennington. *Id.* at 373 & n. 84. Since the cited note, Woodstock has become the sixth Vermont town to develop a design control district. WOODSTOCK, VT. ZONING ORDINANCE §§ 1.3-4.106 (1983).

171. *Metromedia,* 453 U.S. at 533-34 (Brennan, J., concurring in part).

172. VT. STAT. ANN. tit. 10, §§ 6201-6240 (1973 & Supp. 1983 & Noncumulative Supp. 1984).

have long been precious to its citizens."[173] The legislature also recognized a need for new housing, particularly for low and moderate income families.[174] They further noted that uncontrolled proliferation of mobile homes can destroy scenic quality but that this can be checked with proper regulation.[175] Thus, the statute was enacted "to encourage the development of attractive sites for mobile homes . . . and to preserve the traditional scenic environment of the state."[176]

The result envisioned by this statute is mobile home parks which do not detract from the scenic quality of the state. This result is promoted by the requirements of the Act. Thus, even while encouraging low cost housing in the form of mobile home parks, Vermont has continued to strive for, and to provide, aesthetic quality.

The sixth and final statute which demonstrates Vermont's substantial interest in aesthetic quality is the beverage container statute.[177] This statute has been a major contributor to the preservation of aesthetic quality on Vermont highways through litter reduction.[178] The beverage container statute requires the consumer to pay a deposit for each container which is refunded upon return of the container to a retailer or redemption center.[179] These estab-

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173. 1969 Vt. Acts No. 291, § 1(a) (Adj. Sess.).

174. *Id.* at § 1(d).

175. *Id.* at § 1(f).

176. *Id.* at § 2. To achieve these purposes, the act established a permitting system for the establishment and maintenance of mobile home parks. VT. STAT. ANN. tit. 10, § 6231 (1973). Site plan review is required before permits may be issued. *Id.* at § 6232. Consideration must be given to the "arrangement of buildings and open spaces; protection of existing natural cover and plant material; and visibility of the park from public highways," among others. *Id.* at § 6239(a)(3)(9)(10). The agency that administers the act is also required to "encourage creative design, to provide a more convenient and attractive layout." *Id.* at § 6239(b).

The act also contains basic requirements and restrictions for all mobile home parks. VT. STAT. ANN. tit. 10, § 6235 (1973). There must be a substantial area between all mobile homes in the park and the traveled portion of any adjacent public highway or other boundary. *Id.* at § 6235(a)(1). This area must be landscaped with existing or newly planted trees or other plant material. *Id.* Furthermore, no mobile home can be located within 100 feet of any lake, pond or stream. *Id.* at § 6235(a)(2). There is also a lot area requirement of 8,000 square feet for each mobile home, and each lot must have at least two trees. *Id.* at § 6235(a)(3), (4).

177. VT. STAT. ANN. tit. 10, §§ 1521-1527 (1973 & Supp. 1983 & Noncumulative Supp. 1984).

178. In its first year the statute reduced can and bottle litter on Vermont highways by 75%. State of Vermont Special Highway Litter Evaluation Project, Vermont Department of Highways, Montpelier.

179. VT. STAT. ANN. tit. 10, § 1522 (Supp. 1983).

lishments are required to accept empty containers which in turn must be accepted by the manufacturer.[180] Beverage containers must be marked clearly to indicate they are returnable and no beverages in unmarked containers may be sold.[181] A maximum penalty of $1,000 is provided for violations of the statute.[182] Thus, the beverage container statute is another example of Vermont's commitment to aesthetic quality.

Vermont has shown that it has a comprehensive commitment to make its physical environment more attractive. The State Legislature has adopted six integrated statewide programs which specifically promote aesthetics. Therefore, under the first part of Justice Brennan's analysis, Vermont's billboard statute should be upheld because Vermont has sufficiently demonstrated a substantial interest in aesthetics to justify a statewide billboard prohibition.[183]

According to Justice Brennan's analysis, Vermont must also justify the exceptions to its general prohibition. Such exceptions must (1) advance interests at least as important as aesthetics;[184] (2) be no broader than necessary to advance the special interests;[185] and (3) be narrowly drawn to detract as little as possible from the state's aesthetic interest.[186] The exceptions must also be content neutral.[187]

Vermont has a substantial interest in providing travelers with information concerning what, if anything, is available at specific locations throughout the state. Identification signs are necessary for a highly mobilized society to function in an orderly manner.[188] Therefore, the exceptions to the Vermont statute which serve the purpose of indentification are potentially valid under Justice Brennan's analysis.

Vermont has tailored these exceptions so that they only serve the purpose of identification and detract as little as possible from aesthetics.[189] As discussed earlier, however, there are problems

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180. *Id.* at § 1523.
181. *Id.* at § 1524(a) (Noncumulative Supp. 1984).
182. *Id.* at § 1527.
183. *Metromedia,* 453 U.S. 532-33 (Brennan, J., concurring in part).
184. *Id.* at n. 10.
185. *Id.*
186. *Id.*
187. *Id.*
188. *See supra* text at 12-13.
189. For example, an on-premise sign can only direct attention to the premise which

with content neutrality concerning some of these exceptions.[190] Under Justice Brennan's analysis, an exception to a total ban for the purpose of identification will be carefully scrutinized if it is not neutral as to whom or what may be identified. Therefore, if Vermont wants to insure that its statute will be upheld under Justice Brennan's analysis, it should amend those exceptions to the statute which make content-based distinctions.

IV. A Suggested Course of Action

The title of this note poses the question: Is the aesthetic quality of Vermont's landscape in jeopardy after *Metromedia*? To be sure, if Vermont's billboard law was subjected to a first amendment challenge today, it would likely be held unconstitutional, and the aesthetic quality of the state would indeed be in jeopardy. If, however, the Vermont Legislature would make minor amendments to the statute, it could withstand constitutional scrutiny and be upheld by a majority of the Supreme Court.

To receive legal approval by the *Metromedia* plurality, Vermont would have to make far reaching amendments which could have substantial adverse aesthetic effects.[191] Even then, the state could run into administrative difficulties of a constitutional magnitude which could lead to invalidation of the statute.[192] However, the Vermont statute would not have to receive favorable votes from the *Metromedia* plurality to be upheld by a majority of the Supreme Court.

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the sign identifies, *see* Vt. Stat. Ann. tit. 10, §§ 481(3), 493 (1973). These signs are limited to a total area of 150 square feet and may not extend more than 25 feet above ground level or more than 10 feet above the roof of a building if the sign is attached. *Id.* at 493. Similarly, signs which are allowed to announce "an auction . . . campaign, drive or event of an . . . organization" are limited in the amount of time for which they can be maintained to two weeks. *Id.* at § 494(9). Signs which may be erected to advertise "county fairs and expositions" can only be maintained for six weeks. *Id.* at § 494(9). Furthermore, no sign, other than traffic control signs, may be illuminated by any flashing intermittent or moving lights or have any animated or moving parts. *Id.* at § 495(a)(3).

Interestingly, in City Council v. Taxpayers For Vincent, 104 S.Ct. 2118, 2130 (1984) (Brennan, J., dissenting) Justice Brennan suggested that the City of Los Angeles could improve both pristine and blighted areas by regulating the size and location of permanent signs and by reserving specific locations such as "kiosks" for the posting of temporary signs. Perhaps Vermont's sign plazas are the very type of device Justice Brennan was referring to when he mentioned "kiosks." *See supra* notes 49-50 and accompanying text.

190. *See supra* notes 91-97 and accompanying text.

191. *See supra* notes 77-100 and accompanying text.

192. *See supra* notes 83-85 and accompanying text.

There are only two current members of the Court who joined in Justice White's opinion in *Metromedia*. Justice Stewart, a member of the *Metromedia* plurality, has since retired and Justice O'Connor has filled the resulting void.[193] Thus, if Vermont does not amend its statute to satisfy Justice White's analysis, it would be assured of receiving only three adverse votes if the statute was challenged before the Supreme Court.

The five remaining Justices could not all agree on the proper analysis to apply when a billboard prohibition is challenged under the first amendment. They each set out in their separate opinions what they thought were the most important considerations. If the Vermont billboard statute can satisfy each of these Justices, then it should be upheld under a first amendment challenge.

Justice Rehnquist, the Chief Justice, and Justice Stevens were sympathetic to the plight of state and local governments faced with aesthetic problems posed by billboard blight. Based upon his opinion in *Metromedia,* the Vermont statute should be upheld by Justice Rehnquist. The Vermont statute, as it now stands, may or may not be upheld by the Chief Justice and Justice Stevens. While both of these Justices would have upheld the San Diego ordinance in *Metromedia,* they each also stated that they would require any billboard regulation to be content neutral. Because the Vermont statute has several exceptions which are not content neutral, these exceptions should be amended to insure that the statute will satisfy the concerns of the Chief Justice and Justice Stevens.

Justices Brennan and Blackmun would require a governmental unit to show a substantial interest in aesthetics before they would allow a billboard prohibition to be based upon aesthetics. Vermont has demonstrated this interest. While their analysis would probably allow exceptions for the purpose of identification, it is clear that Justices Brennan and Blackmun would require these exceptions to be content neutral. Therefore, if the Vermont statute was amended so that its exceptions for identification would be content

193. Justice O'Connor was formerly on a division of the Arizona Court of Appeals which heard primarily administrative law cases. She penned no opinions involving the first amendment while there and has penned no opinions involving the first amendment and billboard regulations while on the Supreme Court. While she was a member of the majority in City Council v. Taxpayers For Vincent, 104 S. Ct. 2118 (1984), that case did not raise the *Metromedia* on-site commercial/noncommercial problem. *See supra* note 34. Because the Vermont statute does raise this problem, it would therefore be unfair to hypothesize how she might vote on a first amendment challenge to Vermont's law.

neutral as to whom or what could be identified, it should be upheld by Justices Brennan and Blackmun. Because this should also satisfy the Chief Justice, and Justices Stevens and Rehnquist, the statute would stand a very good chance of being upheld by a majority of the Supreme Court.

There are four exceptions to the Vermont statute which should be amended. These are the exceptions for official business directional signs,[194] sign plazas,[195] town maintained signs,[196] and signs which announce a campaign, drive or event.[197] The following suggestions illustrate how these exceptions can be amended so that they will be content neutral.

The exception for official business directional signs should be amended to read:

> A sign erected and maintained by the state to indicate to the traveling public the route and distance to public accommodations, commercial services for the traveling public, and points of interest.[198]

An appreciation for the spirit of neutrality would also be shown if the word "business" was deleted from the name of the exception.

Similarly, the definition of official information plaza plaque should be amended to read:

> A plaque erected and maintained by the state to indicate to the traveling public: public accommodations, commercial services for the traveling public, and points of interest, installed at an information plaza.[199]

This should cure the deficiency in the sign plaza exception.

The town identification sign exception should be amended to read:

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194. VT. STAT. ANN. tit. 10, § 481(2) (1973).

195. *Id.* at § 481(7) (Noncumulative Supp. 1984).

196. *Id.* at § 494(4) (Noncumulative Supp. 1984).

197. *Id.* at § 494(9).

198. It currently reads, "a sign erected and maintained by the state to indicate to the travelling public the route and the distance to public accommodations, commercial services for the travelling public, and points of *scenic, historic, cultural, educational and religious* interest." *Id.* at § 481(2) (emphasis supplied to show deletions in proposed amendment).

199. This definition currently reads: "a plaque erected and maintained by the state to indicate to the traveling public: public accommodations, commercial services for the traveling public, and points of *scenic, historic, cultural, educational and religious* interest, installed at an information plaza." *Id.* at § 481(9) (Noncumulative Supp. 1984) (emphasis added to show deletions in proposed amendment).

> Signs erected and maintained by a town outside the highway right-of-way, each of which does not exceed 64 square feet in area, excluding panel and frame, which may identify the name of the town, the charter date, the date the town was founded, or any other significant date in the history of the town which the town wishes to identify. The sign may bear the wording "welcome to" the particular town. Not more than two such signs may be erected and maintained which are readable by traffic proceeding in any one direction on any one highway. The signs shall meet the criteria of the transportation agency and the travel information council.[200]

The provision for signs which announce a campaign, drive or event, should be amended to read:

> Signs to be maintained for not more than two weeks announcing an auction, or a campaign, drive or event of any organization.[201]

If these amendments are made to the Vermont billboard statute, it will be neutral as to whom or what may be identified within each exception. This should satisfy the concerns of the five Justices who did not join Justice White's opinion in *Metromedia*. Because Vermont's billboard statute otherwise satisfies the analysis of each of these Justices, it should then gain their approval if challenged before the Court. If the Vermont Legislature acts now, the

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200. This exception currently reads:

> Signs erected and maintained by a town outside the highway right-of-way, each of which does not exceed 64 square feet in area, excluding panel and frame *which may show the place and time of services or meetings of churches and civic organizations in the town,* and which may include a panel which identifies the name of the town, the charter date, the date the town was founded, or any other significant date in the history of the town, and which the town wishes to identify. The panel may bear the wording "welcome to" the particular town. Not more than two such signs may be erected and maintained readable by traffic proceeding in any one direction on any one highway. The signs shall meet the criteria of the transportation agency and the travel information council.

VT. STAT. ANN. tit. 10, § 494(4) (Noncumulative Supp. 1984) (emphasis added to show deletions in proposed amendment).

201. This exception currently reads: "Signs to be maintained for not more than two weeks announcing an auction, or a campaign, drive or event of a *civic, philanthropic or religious* organization." *Id.* at § 494(9) (emphasis added to show deletions in proposed amendment).

aesthetic quality of the Vermont landscape should not be in jeopardy after *Metromedia*.

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