SUPREME COURT OF THE UNITED STATES

No. 91–1200

CITY OF CINCINNATI, PETITIONER *v.* DISCOVERY NETWORK, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 24, 1993]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE THOMAS join, dissenting.

Concerned about the safety and esthetics of its streets and sidewalks, the city of Cincinnati decided to do something about the proliferation of newsracks on its street corners. Pursuant to an existing ordinance prohibiting the distribution of "commercial handbills" on public property, the city ordered respondents Discovery Network, Inc., and Harmon Publishing Company, Inc., to remove their newsracks from its sidewalks within 30 days. Respondents publish and distribute free of charge magazines that consist principally of commercial speech. Together their publications account for 62 of the 1,500–2,000 newsracks that clutter Cincinnati's street corners. Because the city chose to address its newsrack problem by banning only those newsracks that disseminate commercial handbills, rather than regulating all newsracks (including those that disseminate traditional newspapers) alike, the Court holds that its actions violate the First Amendment to the Constitution. I believe this result is inconsistent with prior precedent.

"Our jurisprudence has emphasized that `commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to `modes of regulation that might be impermissible in the realm of noncommercial expression.'" *Board of Trustees of State Univ. of New York* v. *Fox*, 492 U. S. 469, 477 (1989) (quoting

Ohralik v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978)); see also *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 64–65 (1983). We have advanced several reasons for this treatment, among which is that commercial speech is more durable than other types of speech, since it is "the offspring of economic self-interest." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 564, n. 6 (1980); *Virginia State Bd. of Phar-macy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 772, n. 24 (1976). Commercial speech is also "less central to the interests of the First Amendment" than other types of speech, such as political expression. *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 758, n. 5 (1985) (opinion of Powell, J.). Finally, there is an inherent danger that conferring equal status upon commercial speech will erode the First Amendment protection accorded noncommercial speech, "simply by a leveling process of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik, supra*, at 456.

In *Central Hudson*, we set forth the test for analyzing the permissibility of restrictions on commercial speech as follows:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U. S., at 566.

I agree with the Court that the city's prohibition against respondents' newsracks is properly analyzed under *Central Hudson*, see *ante*, at 5, but differ as to the result this analysis should produce.

As the Court points out, "respondents do not challenge their characterization as `commercial speech,'" and "[t]here is no claim in this case that there is anything unlawful or misleading about the contents of respondents' publications." *Ibid.* "Nor do respondents question the substantiality of the city's interest in safety and esthetics." *Ibid.* This case turns, then, on the application of the last part of the *Central Hudson* analysis. Although the Court does not say so, there can be no question that Cincinnati's prohibition against respondents' newsracks "directly advances" its safety and esthetic interests because, if enforced, the city's policy will decrease the number of newsracks on its street corners. This leaves the question whether the city's prohibition is "more extensive than necessary" to serve its interests, or, as we elaborated in *Fox*, whether there is a "reasonable fit" between the city's desired ends and the means it has chosen to accomplish those ends. See 492 U. S., at 480. Because the city's

"commercial handbill" ordinance was not enacted specifically to address the problems caused by newsracks, and, if enforced, the city's prohibition against respondents' newsracks would result in the removal of only 62 newsracks from its street corners, the Court finds "ample support in the record for the conclusion that the city did not establish [a] reasonable fit." *Ante*, at 6 (internal quotation marks omitted). I disagree.

According to the Court, the city's decision to invoke an existing ordinance "to address its recently developed concern about newsracks" indicates that "it has not `carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition." *Ante,* at 7. The implication being that, if Cincinnati had studied the problem in greater detail, it would have discovered that it could have accomplished its desired ends by regulating the "size, shape, appearance, or number" of all newsracks, rather than categorically banning only those newsracks that disseminate commercial speech. *Ibid.* Despite its protestations to the contrary, see *ante*, at 7, n. 13, this argument rests on the discredited notion that the availability of "less restrictive means" to accomplish the city's objectives renders its regulation of commercial speech unconstitutional. As we observed in *Fox*, "almost all of the restrictions disallowed under *Central Hudson*'s fourth prong have been substantially excessive, disregarding far less restrictive and more precise means." 492 U. S., at 479 (internal quotation marks omitted). That there may be other—less restrictive—means by which Cincinnati could have gone about addressing its safety and esthetic concerns, then, does not render its prohibition against respondents' newsracks unconstitu-tional.

Nor does the fact that, if enforced, the city's prohibition would result in the removal of only 62 newsracks from its street corners. The Court

attaches significance to the lower courts' findings that any benefit that would be derived from the removal of respondents' newsracks would be "`minute'" or "`paltry.'" *Ante*, at 7. The relevant inquiry, though, is not the degree to which the locality's interests are furthered in a particular case, but rather the relation that the challenged regulation of commercial speech bears to the "overall problem" the locality is seeking to alleviate. *Ward* v. *Rock Against Racism*, 491 U. S. 781, 801 (1989). This follows from our test for reviewing the validity of "time, place, or manner" restrictions on noncommercial speech, which we have said is "substantially similar" to the *Central Hudson* analysis. *Board of Trustees of State Univ. of New York* v. *Fox, supra*, at 477 (internal quotation marks omitted). Properly viewed, then, the city's prohibition against respondents' newsracks is directly related to its efforts to alleviate the problems caused by newsracks, since every newsrack that is removed from the city's sidewalks marginally enhances the safety of its streets and esthetics of its cityscape. This conclusion is not altered by the fact that the city has chosen to address its problem by banning only those newsracks that disseminate commercial speech, rather than regulating all newsracks alike.

Our commercial speech cases establish that localities may stop short of fully accomplishing their objectives without running afoul of the First Amendment. In *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U. S. 328, 342 (1986), where we upheld Puerto Rico's ban on promotional advertising of casino gambling aimed at Puerto Rico residents, we rejected the appellant's argument that the ban was invalid under *Central Hudson* because other types of gambling (*e.g.,* horse racing) were permitted to be advertised to local residents. More to the point, in *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490 (1981) (plurality opinion), where we upheld San

Diego's ban of offsite billboard advertising, we rejected the appellants' argument that the ban was invalid under *Central Hudson* because it did not extend to onsite billboard advertising. See 453 U. S., at 511 ("[W]hether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising"). See also *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 810–811 (1984) (rejecting the argument that the city's prohibition against the posting of signs on public property could not be justified on esthetic grounds because it did not extend to the posting of signs on private property). Thus, the fact that Cincinnati's regulatory scheme is underinclusive does not render its ban on respondents' newsracks unconstitutional.

The Court offers an alternative rationale for invalidating the city's policy: viz., the distinction Cincinnati has drawn (between commercial and noncommercial speech) in deciding which newsracks to regulate "bears no relationship *whatsoever* to the particular interests that the city has asserted." *Ante*, at 14 (emphasis in original). That is, because newsracks that disseminate noncommercial speech have the same physical characteristics as newsracks that disseminate commercial speech, and therefore undermine the city's safety and esthetic interests to the same degree, the city's decision to ban only those newsracks that disseminate commercial speech has nothing to do with its interests in regulating newsracks in the first place. The city does not contend otherwise; instead, it asserts that its policy is grounded in the distinction we have drawn between commercial and noncommercial speech. "In the absence of some basis for distinguishing between `newspapers' and `commercial handbills' that is relevant to an interest asserted by the city," however,

the Court refuses "to recognize Cincinnati's bare assertion that the `low value' of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing `commercial handbills.'" *Ante*, at 17.

Thus, despite the fact that we have consistently distinguished between commercial and noncommercial speech for the purpose of determining whether the regulation of speech is permissible, the Court holds that in attempting to alleviate its newsrack problem Cincinnati may not choose to proceed incrementally by burdening only commercial speech first. Based on the different levels of protection we have accorded commercial and noncommercial speech, we have previously said that localities may not favor commercial over noncommercial speech in addressing similar urban problems, see *Metromedia, Inc.* v. *San Diego*, *supra*, at 513 (plurality opinion), but before today we have never even suggested that the converse holds true. It is not surprising, then, that the Court offers little in the way of precedent supporting its new rule. The cases it does cite involve challenges to the restriction of noncommercial speech in which we have refused to accept distinctions drawn between restricted and nonrestricted speech on the ground that they bore no relationship to the interests asserted for regulating the speech in the first place. See *ante*, at 14, citing *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Bd.*, 502 U. S. ——, —— (1991); *Carey* v. *Brown*, 447 U. S. 455, 465 (1980). Neither of these cases involved the regulation of commercial speech; nor did they involve a challenge to the permissibility of distinctions drawn between categories of speech that we have accorded different degrees of First Amendment protection.

The Court's reliance on *Bolger* v. *Youngs Drug Products Corp.*, see *ante*, at 16–17, is also misplaced. In that case we said that the State's interest in

"shield[ing] recipients of mail from materials that they are likely to find offensive" was invalid regardless of the type of speech— commercial or noncommercial—involved. See 463 U. S., at 71–72. By contrast, there can be no question here that the city's safety and esthetic interests justify its prohibition against respondents' newsracks. This at least is the teaching of *Metromedia*. There, seven Justices were of the view that San Diego's safety and esthetic interests were sufficient to justify its ban on offsite billboard advertising, even though the city's reason for regulating these billboards had nothing to do with the content of the advertisements they displayed. See 453 U. S., 507–510 (opinion of WHITE, J., joined by Stewart, Marshall, and Powell, JJ.); *id.*, at 552–553 (STEVENS, J., dissenting in part); *id.*, at 559–561, 563 (Burger, C. J., dissenting); *id.*, at 569–570 (REHNQUIST, J., dissenting). Without even attempting to reconcile *Metromedia*, the Court now suggests that commercial speech is only subject to lesser protection when it is being regulated because of its content (or adverse effects stemming therefrom). See *ante*, at 5, n. 11, 15. This holding, I fear, will unduly hamper our cities' efforts to come to grips with the unique problems posed by the dissemination of commercial speech.

If (as I am certain) Cincinnati may regulate newsracks that disseminate commercial speech based on the interests it has asserted, I am at a loss as to why its scheme is unconstitutional because it does not also regulate newsracks that disseminate noncommercial speech. One would have thought that the city, perhaps even following the teachings of our commercial speech jurisprudence, could have decided to place the burden of its regulatory scheme on less protected speech (*i.e.,* commercial handbills) without running afoul of the First Amendment. Today's decision, though, places the city in the position of having to decide between restricting more speech—fully protected speech—and allowing the

proliferation of newsracks on its street corners to continue unabated. It scarcely seems logical that the First Amendment compels such a result. In my view, the city may order the re-moval of *all* newsracks from its public right-of-ways if it so chooses. See *Lakewood* v. *Plain Dealer Publishing Co.*, 486 U. S. 750, 780–781 (1988) (WHITE, J., joined by STEVENS and O'CONNOR, JJ., dissenting). But however it decides to address its newsrack problem, it should be allowed to proceed in the manner and scope it sees fit so long as it does not violate established First Amendment principles, such as the rule against discrimination on the basis of content. "[L]ittle can be gained in the area of constitutional law, and much lost in the process of democratic decisionmaking, by allowing individual judges in city after city to second-guess . . . legislative . . . determinations" on such matters as esthetics. *Metromedia*, *supra*, at 570 (REHNQUIST, J., dissenting).

Cincinnati has burdened less speech than necessary to fully accomplish its objective of alleviating the problems caused by the proliferation of newsracks on its street corners. Because I believe the city has established a "reasonable fit" between its substantial safety and esthetic interests and its prohibition against respondents' newsracks, I would hold that the city's actions are permissible under *Central Hudson*. I see no reason to engage in a "time, place, or manner" analysis of the city's prohibition, which in any event strikes me as duplicative of the *Central Hudson* analysis. Cf. *Board of Trustees of State Univ. of New York* v. *Fox*, 492 U. S., at 477. Nor do I think it necessary or wise, on the record before us, to reach the question whether the city's regulatory scheme vests too much discretion in city officials to determine whether a particular publication constitutes a "commercial handbill." See *ante*, at 13, n. 19. It is undisputed, by the parties at least, that respondents' magazines constitute commercial

speech. I dissent.