Loyola University Chicago Law Journal

Volume 13
Issue 3 *Spring 1982*

Article 4

1982

What Happened to the First Amendment: The *Metromedia* Case

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NOTES

What Happened to the First Amendment: The *Metromedia* Case

INTRODUCTION

When the United States Supreme Court noted probable jurisdiction over *Metromedia, Inc. v. City of San Diego*,[1] many national associations, public interest groups, and state and local governments expected that the Court's ruling would clarify the extent to which governmental units could regulate commercial speech.[2] In that case, two billboard companies had appealed a California Supreme Court decision upholding San Diego's outdoor advertising ordinance.[3] The companies had unsuccessfully argued that the city's ordinance, which prohibited most outdoor advertising signs, violated the free speech clause of the first amendment.[4]

The first amendment issue was particularly important because of the general confusion concerning the status of commercial speech. Although the United States Supreme Court had recently held that commercial speech was entitled to constitutional protection,[5] the Court also had stated that commercial speech did not merit the

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1. 453 U.S. 490 (1980).

2. The case produced a number of amicus curiae briefs arguing both sides of this issue. Parties listed in connection with the case at the U.S. Supreme Court level include: the United States, Pacifica Legal Foundation, American Newspaper Publishers Association, American Civil Liberties Union, City of Alameda, City of Champaign-Urbana, State of Hawaii, State of Vermont, State of Maine, City of San Francisco, County of San Francisco, National Institute of Municipal Law Officers, and Outdoor Advertising Association.

3. Metromedia, Inc. v. San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980). For case comments on the California Supreme Court's treatment of *Metromedia*, see, Note, *Aesthetics, the First Amendment, and the Realities of Billboard Control*, 9 ECOLOGY L.Q. 295 (1981); Note, *City-Wide Prohibition of Billboards: Police Power and the Freedom of Speech*, 30 HASTINGS L.J. 1597 (1979); Recent Developments, *Zoning, Billboards, and the Exercise of the Police Power of Aesthetics*, 47 TENN. L. REV. 901 (1981).

4. U.S. CONST. amend. I provides in pertinent part, "Congress shall make no law . . . abridging freedom of speech or of the press."

5. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). For a discussion of the case see *infra* notes 28-33 and accompanying text.

same degree of protection as noncommercial speech.[6] For this reason, courts were unsure about what constitutional test to apply in determining the validity of commercial speech regulations.[7] Adding to the difficulty was the absence of any clear statement as to how commercial speech should be defined.[8]

The Supreme Court decided *Metromedia* on July 2, 1981. Since then the decision has been greeted with confusion and uncertainty. It has been reported in various publications,[9] yet not explained. Perhaps this should not be surprising due to the peculiar alignment of the Court and the outcome of the case. Although six justices concluded that San Diego's ordinance violated the first and fourteenth amendments, their varied approaches make it impossible to predict what kinds of restrictions on commercial speech may be upheld in the future.[10] In analyzing *Metromedia*, this note will

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6. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). For a discussion of the case see *infra* notes 39-48 and accompanying text.

7. State and federal courts had applied a variety of inconsistent balancing tests. *See, e.g.*, John Donnelley & Sons v. Mallar, 453 F. Supp. 1272 (D. Me. 1978), *rev'd sub nom.* John Donnelley & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980)(lower court upheld regulation under commercial speech test); Combined Communications Corp. v. City and County of Denver, 542 P.2d 79 (Colo. 1975) (invalidating a city-wide ban on billboards using a reasonableness standard); John Donnelley & Sons, Inc. v. Outdoor Advertising Bd., 339 N.E.2d 709 (Mass. 1975)(upholding a city-wide ban using a reasonableness standard); Suffolk Outdoor Advertising Co. v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368, *appeal dismissed*, 439 U.S. 808 (1978)(ban upheld under commercial speech test); Daikeler v. Zoning Board of Adjustment of Montgomery Township, 1 Pa. Commw. Ct. 445, 275 A.2d 696 (1971)(invalidating a city-wide ban using a strict scrutiny test).

8. The Supreme Court has variously defined commercial speech in terms of whether its purpose is commercial, Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943); and as speech that does no more than propose a commercial transaction, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); and as speech motivated by a desire for personal gain, Breard v. Alexandria, 341 U.S. 622, 642 (1951).

For purposes of this article, the term commercial speech will be used to refer only to "speech of any form that advertises a product or service for profit or for [a] business purpose." J. NOWAK, R. ROTUNDA & I.N. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 767 (1978) [hereinafter cited as NOWAK, ROTUNDA & YOUNG].

9. *See* R. Young *Billboard Advertising Decision Indecisive*, 67 A.B.A.J. 1350, 1362-63 (1981); Note, *Metromedia v. City of San Diego*, LAND USE L. & ZONING DIG. (Sept. 1981). *Billboard Regs Hit*, L.A. Daily J., p. 1, col. 6 (July 6, 1981); *Are Billboards Protected by the First Amendment*? L.A. Daily J., p. 4, col. 4 (Oct. 2, 1981); *See also, The Supreme Court 1979 Term: Freedom of Speech*, 95 HARV. L. REV. 93, 211-21 (1981) (discussing *Metromedia* and sharply criticizing the plurality opinion).

10. A handful of courts have cited *Metromedia* in support of tentative and conflicting propositions. *See* Metromedia, Inc. v. Mayor and City Council of Baltimore, 538 F. Supp. 1183 (D. Md. 1980) (invalidating city billboard ordinance on the basis of the plurality holding); May v. People, 636 P.2d 672, 675 (Colo. 1981) (citing *Metromedia* for the rule that a litigant with commercial speech interests may assert the noncommercial speech interests of others); Norton Outdoor Advertising v. Village of Arlington Heights, 69 Ohio St. 2d 539, 433

present a brief overview of traditional limitations on the regulation of noncommercial speech and the manner in which the Court has applied these limitations to the regulation of commercial speech. It will describe the background of *Metromedia* and the inconsistent bases of the Supreme Court's opinions. The effect of the Court's decision on the content neutrality doctrine and on the Court's traditional first amendment balancing tests will then be examined. The note will conclude with a statement of the reasons why the several opinions have departed significantly from traditional first amendment principles.

BACKGROUND: THE SCOPE OF THE FREE SPEECH CLAUSE

Limitations on Regulating Protected Speech

Notwithstanding its pre-eminent position among constitutionally protected values, the right to individual self-expression is often in direct conflict with a government's right to enact general legislation for the public welfare. This conflict is most often present at the local level and has existed since the Supreme Court held that the free speech clause of the first amendment applied to the states.[11] To resolve this conflict, the Court has developed a set of guidelines and tests to assist local governments in determining when and how they may regulate various forms of speech. Underlying these guidelines and tests is the broad principle that governmental regulations should not be used to suppress freedom of expression.[12]

The requirement that a regulatory measure be content neutral is

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N.E.2d 198 (1982) (applying the plurality's bifurcated approach to invalidate a billboard ordinance, but concluding that aesthetic and traffic safety interests do not justify a ban on commercial speech); Maurice Callahan & Sons, Inc. v. Outdoor Advertising Bd., 427 N.E. 2d 25 (Mass. App. 1981) (applying only a commercial speech test to uphold a billboard regulation). *See also*, City of Lakewood v. Colfax Unlimited Ass'n, 634 P.2d 62 (Colo. 1981) (invalidating the sign code of the city ordinance). The court observed that a total of five justices in *Metromedia* held that a municipality may value some commercial messages more highly than others. *Id.* at 67. The court also chose to rely partially on Justice Brennan's concurring opinion that content based distinctions will only be allowed upon a showing of compelling interest. *Id.* at 69.

11. Gitlow v. New York, 268 U.S. 652, 666 (1925).

12. Members of the Court resorted to numerous images and phrases to explain the importance of this principle. Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 559 (1976) (a concern for avoiding potentially "chilling" or "freezing" effects of restraints on expression); New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (commitment to "uninhibited, robust, and wide-open" public discussion); Abrams v. United States, 250 U.S. 616, 630 (1919) (a reflection of the belief that "the best test of truth is the power . . . to get itself accepted in the competition of the market").

one means of safeguarding this central, first amendment principle. The doctrine of content neutrality expresses the judicial belief that governmental regulations on speech may not be used to suppress the proliferation of ideas or to assess the merits of particular viewpoints.[13] By its very nature, a regulation affecting the content of speech requires a governmental value judgment and thus, to some degree, may be used to suppress ideas which a government deems unacceptable.[14] Conversely, a regulation on speech which is based upon some nonideological attribute of speech poses less of a threat to traditional first amendment freedoms.[15] Hence, it will be afforded more deferential treatment by a court.

The importance of content neutrality in first amendment analysis is evidenced by the fact that it is a prerequisite for application of the Court's most deferential balancing test. This test, known as the time, place, and manner rule, allows a local government to restrict expression if (1) it has important reasons for doing so, and (2) the restrictions are applied in a neutral fashion, without regard to content. The Court formulated the time, place, and manner rule in *Cox v. New Hampshire*[16] when it upheld a state statute that

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13. The Court's first statements of this principle appeared in its earliest first amendment cases. *See, e.g.*, Whitney v. California, 274 U.S. 357, 374-77 (1927) (Brandeis, J., concurring) Schenck v. United States, 249 U.S. 47 (1919).

See generally, G. ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT (1971); Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941); NOWAK, ROTUNDA & YOUNG, *supra* note 8 at 711-22; Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461 (1953); for a discussion of the historical and philosophical purposes of the first amendment.

14. The Court made its strongest statement of the content neutrality doctrine in Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972). Chicago's ordinance prohibited all picketing, except for peaceful picketing, in front of schools during school hours. Justice Marshall, writing for the majority, struck the ordinance and stated that there was an "equality of status in the field of ideas," adding that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Id.* at 95-96.

See also Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). The author views *Mosley* as a landmark decision, affirming the importance of content neutrality as a fundamental principle of first amendment law. For a contrary view, see Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

15. In Konigsberg v. State Bar of California, 366 U.S. 36 (1961), Justice Harlan stated that "general regulatory statutes, not intending to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendments forbade Congress or the States to pass, when they have been justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved." *Id.* at 50-51.

16. 312 U.S. 569 (1941).

required persons to obtain licenses before holding a public meeting or parade. The Court held that a government could exercise its police powers to restrict speech so long as the restriction was narrowly drawn and contained no elements of substantive censorship or discrimination.[17]

A regulation on protected speech which cannot be classified as a time, place, and manner restriction is judged by a much stricter balancing test. Under this second, stricter test, a regulation on protected speech will be upheld against a first amendment challenge only if a government shows: (1) that it has compelling interest in restricting speech; (2) that the restrictions directly further such an interest; and (3) that any more narrowly drawn restrictions will frustrate its interest.[18] This test is applied to strike regulations which are content-based.[19] It is also applied to strike regulations which are overly broad or vague in distinguishing between protected and unprotected speech,[20] and to regulations which completely prohibit one form of protected speech.[21] The Court demands a greater showing of governmental necessity in these situations because the restriction on freedom of expression is sig-

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17. *Id.* at 576-77.

18. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940) (protection of peace and order not a compelling interest for barring religous proselytizing); Schneider v. State, 308 U.S. 147 (1939)(ban on handbills does not directly further prevention of littering); Lovell v. Griffin, 303 U.S. 444 (1938) (prohibition against distribution of literature not narrowly drawn).

19. *See e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972)(picketing). *See also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (ban on rock musical "Hair"); Cox v. Louisiana, 379 U.S. 536 (1965)(mass demonstrations); Niemotko v. Maryland, 340 U.S. 268 (1951)(parades); Cantwell v. Connecticut 310 U.S. 296 (1940)(religious proselytizing); Lovell v. Griffin, 303 U.S. 444 (1938)(license for handbills).

20. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973)(political activities of government employee). *See also* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)(films with nudity); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)(city theater ban on rock musical "Hair"); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969)(picketing and parading); Staub v. City of Baxley, 355 U.S. 313 (1958)(solicitation); Kunz v. New York, 340 U.S. 290 (1951)(public meetings); Terminiello v. City of Chicago, 337 U.S. 1 (1949)(labor picketing); Cantwell v. Connecticut, 310 U.S. 296 (1940)(religious proselytizing); Hague v. C.I.O., 307 U.S. 496 (1939)(handbills).

Like the doctrine of content neutrality, the doctrines of overbreadth and vagueness are intended to insure that a regulation on protected speech does not unduly inhibit freedom of expression. *See generally* NOWAK, ROTUNDA & YOUNG, *supra* note 8 at 722-27; Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 110-13 (1960).

21. *See, e.g.*, Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981)(live nude dancing) Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)(films with nudity); Saia v. New York, 334 U.S. 558 (1948)(loudspeakers); Jamison v. Texas, 318 U.S. 413 (1943)(handbills); Martin v. City of Struthers, 319 U.S. 141 (1943); Schneider v. State, 308 U.S. 147 (1939).

nificant. This second, "strict scrutiny" balancing test greatly reduces the chances that a governmental regulation will be upheld.

The time, place, and manner rule and the stricter balancing test enable the Court to reconcile competing interests and, at the same time, place limitations upon governmental regulation of speech. The time, place, and manner rule reflects the judicial belief that first amendment rights should give way to legitimate local regulatory interests where the restriction on protected speech is incidental. The stricter test, in turn, reflects the belief that governmental regulations should not be used to unduly restrict or prohibit protected expression.

Since the limitations on governmental regulation of speech apply only to speech which is protected by the first amendment, the Court has frequently had to determine whether a particular form of expression merits protection. Generally, the Court has decided this question by looking to the purpose and function of the first amendment. Sometimes the Court has emphasized the public interest aspect of the first amendment, stating that the purpose of free expression is to assure the availability of a wide range of political, social and moral viewpoints.[22] At other times, the Court has emphasized that freedom of speech is a liberty interest intended to protect the individual from governmental censorship of ideas.[23] Although both definitions are broad enough to include a wide range of expression,[24] until recently neither was thought to be broad enough to include commercial speech.

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22. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 102 (1940) in which the Court stated that the purpose of free expression is to protect "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *See also* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Anastaplo, *Human Nature and the First Amendment*, 40 U. PITT. L. REV. 611 (1979).

23. *See, e.g.*, Terminello v. City of Chicago, 337 U.S. 1 (1949). The Court stated that "[s]peech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. . . . The alternative would lead to standardization of ideas either by legislatures, courts, or dominent political or community groups." *Id.* at 4-5. Some commentators have spoken of the first amendment as incorporating the right to disobey. *See, e.g.*, Bickel, *Domesticated Civil Disobedience: The First Amendment from Sullivan to the Pentagon Papers*, in THE MORALITY OF CONSENT (1975).

24. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976)(campaign contributions), Street v. New York, 394 U.S. 576 (1969)(flag burning); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969)(student protest with black armbands); Thornhill v. Alabama, 310 U.S. 88 (1940)(labor picketing).

Commercial Speech

The Court first considered a first amendment challenge to a commercial speech regulation in *Valentine v. Chrestensen.*[25] The defendant in *Chrestensen* had been convicted of violating an ordinance which prohibited the distribution of advertisements on city streets. The Court upheld the ordinance. In a unanimous decision, the Court stated that purely commercial advertising was not entitled to first amendment protection.[26]

For more than thirty years, commercial speech remained unprotected, in part on the theory that commercial advertising had little to do with notions of self-government or with the exposition of ideas.[27] By the mid-1970s, however, the Court changed its tack and overruled *Chrestensen.*[28] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,*[29] the Court struck a state statute which prohibited pharmacists from advertising the price of subscription drugs, stating that the first amendment protected the public's right to receive truthful information of a commercial nature.[30] The Court acknowledged the state's interest in protecting the public against deceptive advertising, but concluded that such an interest did not justify the complete suppression of commercial information of importance to consumers.[31]

Although the decision in *Virginia Pharmacy* significantly broadened the scope of the first amendment, it did not alter traditonal first amendment analysis. After concluding that commercial speech

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25. 316 U.S. 52 (1942).

26. *Id.* at 54.

27. In denying commercial speech first amendment protection, the Court was essentially balancing the value of the communication against the governmental interest. A similar balancing approach was involved in the Court's decisions to deny protection to other forms of speech. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (libel and defamation); Miller v. California, 413 U.S. 15 (1973) (obscenity); New York Times v. Sullivan, 376 U.S. 254 (1964) (libel and defamation); Roth v. United States, 354 U.S. 476 (1957) (obscenity).

28. Without directly overruling *Chrestensen*, the Court had been qualifying the commercial speech doctrine for some time in an effort to protect noncommercial expression which arose in the context of commercial advertising or commercial transactions. *Compare e.g.*, Breard v. City of Alexandria, 341 U.S. 622 (1951)(door-to-door sale of magazine subscriptions is commercial speech) *with* Murdock v. Pennsylvania, 319 U.S. 105 (1943)(sale of religious books is not commercial speech). *See also* New York Times v. Sullivan, 376 U.S. 254 (1964)(political advertising is protected when its primary purpose is not commercial) and Bigelow v. Virginia, 421 U.S. 809 (1975)(newspaper advertisements conveying information about legal out-of-state abortions are not solely commercial speech since they contain information of public interest and relate to a constitutionally protected activity).

29. 425 U.S. 748 (1976).

30. *Id.* at 762-65.

31. *Id.* at 770.

was a protected form of expression, the Court discussed whether to apply the time, place, and manner test or the stricter test. It stated that the time, place, and manner test was inappropriate because the Virginia statute completely prohibited a form of protected speech on the basis of content.[32] Applying the stricter test, the Court invalidated the statute, concluding that Virginia had not shown that its statute was narrowly drawn to serve a compelling interest.[33]

The Court reaffirmed its *Virginia Pharmacy* holding in *Linmark Associates v. Township of Willingboro*.[34] Willingboro had passed an ordinance which prohibited the posting of for-sale signs. The township argued that the ordinance was a time, place, and manner restriction on commercial speech, but the Court viewed the ordinance as a content-based prohibition.[35] In a unanimous decision, the Court struck the ordinance, holding that the township had failed to satisfy the stricter first amendment standard of review.[36]

Both *Virginia Pharmacy* and *Linmark* illustrated the potential difficulties of including commercial speech within the protection of the first amendment. The doctrine of content neutrality, as well as the traditional balancing tests, presented a formidable barrier to most types of commercial regulations. Although the Court had never expressly stated that commercial speech was to be equated with noncommercial, ideological speech,[37] application of the first amendment tests had the effect of protecting both types to the same extent. In an effort to remedy this difficulty, some members of the Court began to search for a way to restrict the protections

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32. *Id.* at 771.

33. *Id.* at 773.

34. 431 U.S. 85 (1977).

35. *Id.* at 93-94.

36. *Id.* at 95-97.

37. Justice Stewart emphasized this point in his concurring opinion in *Virginia Pharmacy*. "The Court's determination that commercial advertising of the kind at issue here is not 'wholly outside the protection of' the First Amendment indicates by its very phrasing that there are important differences between commercial price and product advertising, on the one hand, and ideological communication on the other." 425 U.S. at 779. See also Justice Powell's majority opinion in Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447 (1978). "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalizaton, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Id.* at 456.

afforded commercial speech.[38] The result of their efforts was set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[39]

In *Central Hudson* the Court was faced with a statute which divided utility advertising into two categories: informational and promotional. The statute allowed informational advertising, but prohibited promotional advertising in order to encourage public conservation of fuel. Although eight justices struck the ban on promotional advertising, they were divided in their reasoning. Justice Powell, writing for a majority,[40] stated that information intended to encourage the purchase of goods or services should be subject to less protection than other constitutionally guaranteed expression.[41]

After emphasizing that commercial speech had never been equated with noncommercial speech, Justice Powell stated that a third, intermediate balancing test could be formulated from the Court's recent commercial speech decision.[42] The new test consisted of four parts: (1) If the regulated expression concerns a lawful activity and is not misleading, then the regulation will be valid if it (2) furthers a substantial governmental interest; (3) directly advances that interest; and (4) reaches no further than necessary to accomplish the asserted interest.[43] Applying this test to the statute, Justice Powell concluded that the commission had not shown the regulation to be sufficiently narrow in scope.[44]

Justice Blackmun, in a concurring opinion joined by Justice Brennan, objected to applying an intermediate level of scrutiny to the facts of the case.[45] He stated that the ban on promotional advertising should be treated like any other content-based prohibition on protected speech and subjected to the strict standard of first amendment review.[46] In another concurring opinion, Justices

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38. *See, e.g.*, Friedman v. Rogers, 440 U.S. 1 (1979)(deceptive advertising is not protected by the first amendment); Bates v. State Bar of Arizona, 433 U.S. 350 (1977)(overbreadth doctrine is not available to invalidate commercial advertising); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973)(commercial speech related to an illegal activity is not protected).

39. 447 U.S. 557 (1980).

40. Justice Powell was joined by Chief Justice Burger and Justices Marshall, Stewart, and White.

41. 447 U.S. at 562-63.

42. *Id.* at 564-66.

43. *Id.* at 566.

44. *Id.* at 571.

45. *Id.* at 573.

46. *Id.* at 573-74.

Stevens and Brennan objected to categorizing the regulation as a commercial speech regulation.[47] Justice Stevens warned that if commercial speech were defined too broadly, traditional first amendment expression would be included in the definition and then balanced away under a relaxed standard of review.[48]

The differences between the majority and the two concurring opinions in *Central Hudson* were irreconcilable. The majority sought to develop a special category of commercial speech law, distinct from traditional first amendment law and with its own separate rules and standards. The concurring justices were convinced that commercial speech must be integrated into the existing body of first amendment law. They were also concerned that the distinctions between commercial and noncommercial speech might not be able to be maintained without destroying traditional first amendment protections.

The opinions in *Central Hudson* presaged the difficulties the Court would have a year later in deciding the *Metromedia* case. If local governments were held to a less stringent standard of review when they regulated commercial speech, as opposed to any other type of speech, then they would be able to suppress certain forms of expression simply by labeling them as "commercial." Equally troublesome was the question of whether the decision to grant commercial speech first amendment protection had created too great a barrier against legitimate local regulation. These were the issues which the Court faced in *Metromedia, Inc. v. City of San Diego.*

The *Metromedia* Case

Background

San Diego enacted its outdoor advertising ordinance in 1972, prior to the Court's commercial speech rulings.[49] The city's stated purpose was "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City."[50] The ordinance prohibited most off-site signs.[51]

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47. *Id.* at 577.

48. *Id.* at 579-83.

49. In 1972, *Valentine v. Chrestensen* had not yet been overruled. *See infra* notes 25-28 and accompanying text.

50. San Diego, Cal. Code, § 101.0700(A)(1972).

51. The pertinent provisions stated:

This general prohibition was subject to two groups of exemptions. The first exemption applied to on-site signs. The ordinance expressly exempted signs which designated the owner or occupant of the premises; identified the premises; or advertised on-site goods or services.[52] On-site signs with messages which did not fit into at least one of these categories were prohibited.

The second set of exemptions applied to certain off-site signs conveying noncommercial information. The ordinance listed twelve categories of permissible off-site signs.[53] They included historical

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The following signs shall be prohibited:

1. Any sign identifying a use, facility or service which is not located on the premises.

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

3. Any sign which advertises or otherwise directs attention to a product, service or activity, event, person, institution or business which may or may not be identified by a brand name and which occurs or is generally conducted, sold, manufactured, produced or offered elsewhere than on the premises where such sign is located.

Id. § 101.0700(B).

52. The specific language was set forth as follows:

Only those outdoor advertising display signs, hereinafter referred to as signs in this Division, which are either signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed shall be permitted.

Id.

53. The ordinance exempted the following types of off-site signs:

1. Any sign erected and maintained pursuant to and in discharge of any governmental function or required by any law, ordinance or governmental regulation.

2. Bench signs located at designated public transit bus stops; provided, however, that such signs shall have any necessary permits required by Sections 62.0501 and 62.0502 of this Code.

3. Signs being manufactured, transported and/or stored within the City limits of the City of San Diego shall be exempt; provided, however, that such signs are not used, in any manner or form, for purposes of advertising at the place or places of manufacture or storage.

4. Commemorative plaques of recognized historical societies and organizations.

5. Religious symbols, legal holiday decorations and identification emblems of religous orders or historical societies.

6. Signs located within malls, courts, arcades, porches, patios, and similar areas where such signs are not visible from any point on the boundary of the premises.

7. Signs designating the premises for sale, rent or lease; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located.

8. Public service signs limited to the depiction of time, temperature or news; provided, however, than any such sign shall conform to all regulations of the particular zone in which it is located.

9. Signs on vehicles regulated by the City that provide public transportation including, but not limited to, buses and taxicabs.

10. Signs on licensed commercial vehicles, including trailers; provided, however,

plaques, religious symbols, time-weather-news public service signs, for-sale signs, for-lease signs, temporary political campaign signs,[54] and signs relating to governmental functions. An off-site sign which did not fit into one of the twelve categories was prohibited.

Two billboard companies, Metromedia, Inc. and Pacifica Outdoor Advertising Co., sued San Diego to enjoin enforcement of the ordinance. They won a motion for summary judgment in the California superior court,[55] which the California appellate court affirmed.[56] The California Supreme Court reversed, upholding the ordinance as a valid time, place, and manner restriction on commercial speech.[57]

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that such vehicles shall not be utilized as parked or as stationary outdoor display signs.

11. Temporary off-premise subdivision directional signs if permitted by a conditional use permit granted by the Zoning Administrator.

12. Temporary political campaign signs, including their supporting structures, which are erected or maintained for no longer than 90 days and which are removed within 10 days after election to which they pertain.

Id. at § 101.0700(F).

54. The exemption for temporary political campaign signs was added in October, 1977, after the Ninth Circuit ruling in Baldwin v. Redwood City, 540 F.2d 1360 (1976). The court struck an ordinance regulating temporary political campaign signs as an unconstitutional restriction on political speech. Telephone interview, Dec. 8, 1981, with city attorney Alan Sumption.

55. The superior court found both due process and first amendment violations. *Cited in* Metromedia, Inc. v. City of San Diego, 136 Cal. Rptr. 453, 456 (1977).

Two of the parties' Joint Stipulation of Facts were critical to the outcome of the case. The first stated that, "If enforced as written, Ordinance No. 10795 will eliminate the outdoor advertising business in the City of San Diego." Jt. Stip. of Facts (J.S.F.) No. 2. *Id.* at 455-56. The second stipulation acknowledged that the ordinance applied not only to signs conveying commercial advertising, but also to those conveying political or social information. Jt. Stip. of Facts (J.S.F.) No. 28. *Id.*

With the benefit of hindsight, it is possible to see that both stipulations seriously hampered the city's ability to argue effectively that: (1) the ordinance was nothing more than a time, place, and manner regulation which left open alternative means of communication; and (2) only commercial speech was affected.

56. The appellate court discussed only the due process issue, holding that the city did not have the authority to ban a lawful business without proof that it was harmful or a public nuisance. 136 Cal. Rptr. at 460.

57. Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980). The California Supreme Court was careful to construe the ordinance as applying only to a "permanent structure contituting or used for the display of a commercial or other advertisement to the public." 26 Cal. 3d at 856 n.2. In this way, the court was able to state that the ordinance was a time, place, and manner restriction, enforced without regard to content. The court also rejected the plaintiffs' due process challenge, holding that the city's aesthetic and safety objections were of sufficient importance to outweigh the companies' economic interests. *Id.* at 863-66.

The Supreme Court Opinions

In a plurality opinion, Justice White, joined by Justices Marshall, Powell, and Stewart, characterized San Diego's ordinance as a general prohibition against off-site advertising.[58] Justice White stated that the ordinance was not a total ban because it contained exemptions, and it was not a time, place, and manner regulation because the exemptions were partially based on content.[59] He explained that both the stricter balancing test for noncommercial speech and the commercial speech balancing test developed in *Central Hudson* must be applied to determine the constitutionality of the ordinance. He stated that this bifurcated approach was necessary for two reasons. First, the parties had stipulated that both commercial and noncommercial speech were affected by the ordinance. Second, prior case law had established that commercial speech was not entitled to the same protection as noncommercial speech.[60]

In considering the impact of the ordinance on commercial speech, the plurality held that the city's interests outweighed the asserted commercial speech interests.[61] To reach this conclusion, Justice White applied the balancing test for commercial speech developed in *Central Hudson*. Under that test, a regulation must further a substantial governmental interest, directly advance that interest, and reach no further than necessary to accomplish that interest.[62] Justice White acknowledged the importance of the city's traffic safety and aesthetic interests and concluded that the ordinance did not unduly restrict commercial speech because on-site commercial signs were specificially exempted.[63] He expressed some doubt as to whether a general prohibition against off-site advertising directly furthered the city's interests. However, he was careful to state that the city's conclusions about the ill effects of billboards were not manifestly unreasonable, and that he was unwilling to substitute his judgment for that of the legislature.[64]

In reviewing the impact of the ordinance on noncommercial

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58. Metromedia, Inc. v. City of San Diego, 453 U.S. 493, (1981).

59. *Id.* at 515-16.

60. *Id.* at 504-07.

61. *Id.* at 507-12. The plurality was balancing the city's asserted interests in traffic safety and aesthetics against the right of the public to receive commercial information conveyed on billboards.

62. *See infra* notes 42-44 and accompanying text.

63. 453 U.S. at 508.

64. *Id.* at 508-12.

speech, however, the plurality found two defects of sufficient importance to invalidate the entire ordinance.[65] First, the ordinance gave greater protection to commercial speech than to noncommercial speech. An owner of a building, said Justice White, could maintain a sign with a commercial message on his premises, but could not maintain that same sign if it carried a noncommercial message.[66] He found no support for the city's claim that such a substantial restriction on noncommercial speech was justifiable.[67]

The second deficiency in the ordinance was that the twelve exemptions for noncommercial off-site signs were based solely on content.[68] Justice White explained that while a city may distinguish between the relative value of different categories of commercial speech, it did not have the same flexibility when noncommercial speech was involved.[69] The plurality held that the ordinance was unconstitutional on its face because it reached too far in restricting protected speech.[70]

Justices Brennan and Blackmun, in an opinion which concurred with the plurality only in result, disagreed with Justice White's bifurcated approach. The concurring justices stated that if local governments were able to pass separate regulations for commercial and for noncommercial speech, local officials would be left with the discretion to determine whether a particular message was commercial or noncommercial.[71] The two justices agreed with the plurality that commercial speech should not be entitled to the same protection as noncommercial speech. However, they did not agree that the differences between the two forms of speech compelled the conclusion that local governments could be entrusted routinely with the responsibility of categorizing speech for the purpose of regulating it.[72]

Justices Brennan and Blackmun also disagreed with the plurality's characterization of the ordinance. They stated that the ordinance was a complete ban on outdoor advertising signs.[73] The exis-

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65. *Id.* at 512-15.
66. *Id.* at 513.
67. *Id.* Justice White reasoned that the city was, in effect, deciding that an owner of an on-site sign could communicate information about his goods and services, but could not communicate his own ideas or the ideas of others.
68. *Id.* at 514-15.
69. *Id.*
70. *Id.* at 521.
71. *Id.* at 537-40.
72. *Id.*
73. *Id.* at 525-26.

tence of a few exemptions, they added, did not change the overall effect of the ordinance. Since the ordinance was a complete ban, they said, it was unnecessary to engage in different balancing tests. Under traditional first amendment analysis, a total ban could be upheld only if the city showed that it had a compelling interest, that the prohibition directly furthered the city's interest, and that a less restrictive regulation would promote those interests less well.[74] The justices concluded that San Diego had failed to meet this test and therefore the ordinance was unconstitutional.[75]

Justice Stevens's opinion partially concurred with and partially dissented from the plurality. Justice Stevens was alone in taking the position that a city ought to be able to totally prohibit billboards.[76] For this reason he concurred with the portion of the plurality opinion which upheld the ordinance as a commercial speech regulation.[77] However, he thought the plurality should not have discussed the possible impact of the ordinance on on-site advertisers who might wish to post signs with noncommercial messages.[78] He stated that the plaintiff advertising companies did not have standing to raise the issue of whether the distinction between on-site and off-site signs was unconstitutional because the plaintiffs only used off-site signs.[79] Thus, he concluded that an overbreadth argument such as the plurality used to invalidate the ordinance was inappropriate under the facts of the case.[80]

Justice Stevens stated that the issues for resolution were whether the ordinance was designed to suppress unpopular ideas and whether it left open alternative channels of communication.[81] He found no hint of censorship and no indication that the elimination of billboards would inhibit the exchange of information of ideas.[82] The essential first amendment concern, said Justice Stevens, is that a government not impose its viewpoint on the public or select permissible topics for discussion.[83] In the absence of either of these concerns, he concluded, San Diego's ordinance should

74. *Id.* at 528.
75. *Id.* at 528-34.
76. *Id.* at 542.
77. *Id.* at 541.
78. *Id.* at 542, 543.
79. *Id.* at 544-48.
80. *Id.* at 548. *See also supra* note 20.
81. *Id.* at 552.
82. *Id.* at 552-55.
83. *Id.* at 553.

be upheld.[84]

Chief Justice Burger, in a separate dissent, stated that it did not matter whether the Court viewed the ordinance as a total ban or as a general prohibition with some exceptions. The two issues for resolution, he continued, were whether a local government might eliminate certain billboards on the basis of aesthetics and safety, and whether it might also determine that in some instances the public's need for information outweighed the dangers perceived by the legislature.[85] He thought that the legislature's goals were important and that its conclusions about the ill effects of billboards were reasonable.[86] He agreed with Justice Stevens that the exemptions were essentially neutral and allowed access to information of public interest.[87] The ordinance, he concluded, should have been upheld.[88]

Chief Justice Burger also disagreed with the plurality's bifurcated balancing approach because it would require the Court to distinguish between types of billboards solely on the basis of their messages. He described this approach as both unsatisfactory and unrealistic. It left governments with the choice of banning all billboards or confining their prohibition to billboards with commercial messages.[89] The first alternative, he said, may not be constitutional.[90] The second alternative offered no practical solution, since San Diego objected to the billboards themselves, not to the messages they carried.[91]

Justice Rehnquist, in a third dissent, criticized the Court's inability to articulate a set of guidelines or to explain how the first amendment should be applied at the local level.[92] The only issue the Court had to decide, he said, was whether the aesthetic justification was sufficient, by itself, to sustain a total prohibition.[93] In his opinion, it was.[94] He added that city officials were entitled to more deference than the Court had shown in this case; local officials should not be forced to justify and prove that the elimination

84. *Id.* at 555.
85. *Id.* at 557.
86. *Id.* at 559-61.
87. *Id.* at 564-66.
88. *Id.* at 563.
89. *Id.* at 564.
90. *Id.*
91. *Id.*
92. *Id.* at 569-70.
93. *Id.* at 570.
94. *Id.*

of billboards was necessary to improve the appearance of their city.[95]

ANALYSIS

The five *Metromedia* opinions highlight the tension which exists between the Court's recent treatment of commercial speech and the traditional rules and doctrines it has developed in the context of noncommercial speech. Absent a clear definition of the distinct characteristics which set commercial speech apart from all other speech, the *Metromedia* opinions indicate that more harm than good is done to first amendment principles by giving commercial speech a semi-protected status. The five opinions raise doubts about the effectiveness of content neutrality as a check on potential abuse of discretion by governments. The opinions also call into question the effectiveness of the Court's own balancing tests.

Content Neutrality

The principle that commercial speech merits less protection than noncommercial speech is directly at odds with the principle that restrictions on protected speech be made without regard to content. Ordinarily, the Court requires that a regulation on protected speech be content neutral.[96] In part, this requirement insures that a government will not use a regulation to suppress unpopular views or inhibit the free exchange of information or ideas.[97] It also reflects the belief that there is an "equality of status in the field of ideas."[98] However, by granting commercial speech a semi-protected status, the Court acknowledges that not all kinds of protected speech will be treated equally. Thus, the two principles are inconsistent.

Recognizing this inconsistency, some members of the Court have whittled away at the doctrine of content neutrality and sometimes equivocated over the extent of protection that it affords. In *Ohralik v. Ohio State Bar Association*,[99] the Court upheld Ohio's attorney anti-solicitation statute against a challenge that the statute impermissibly regulated commercial speech solely on the basis of content. The Court stated that content-based regulation of com-

95. *Id.*
96. *See supra* notes 12-15 and accompanying text.
97. *See supra* notes 16-21 and accompanying text.
98. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).
99. 436 U.S. 447 (1978).

mercial speech was justified because commercial speech held a "subordinate position in the scale of First Amendment values."[100]

In *FCC v. Pacifica Foundation*,[101] a case decided during the same term as *Ohralik*, the Court upheld the right of the FCC to regulate indecent broadcasts. In one portion of his plurality opinion, Justice Stevens, joined only by Chief Justice Burger and Justice Rehnquist, stated that the requirement of content-free regulation was not an absolute mandated by the Constitution.[102] Justice Stevens viewed the Court's treatment of commercial speech as evidence that content-based regulation was generally permissible, not only with respect to speech that "does no more than propose a commercial transaction,"[103] but also with respect to indecent speech.[104]

The plurality opinion in *Metromedia* marks a further departure from the strict application of the content neutrality doctrine, beyond either *Pacifica* of *Ohralik*. In both those cases, the governmental regulations were using content as a basis for distinguishing between protected and unprotected speech. In contrast, the plurality's analysis in *Metromedia* used content as a basis for distinguishing between two types of protected speech. By separately considering the effect of San Diego's ordinance on commercial and noncommercial speech, the plurality was able to hold that a prohibition on off-site commercial billboards was permissible.[105] The plurality reasoned that this holding was consistent with the fact that commercial speech is only partially protected by the first amendment.[106]

Until the plurality's decision in *Metromedia*, the doctrine of content neutrality would have hampered a government's ability to distinguish between types of protected speech. Presumably, a local

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100. *Id.* at 456.

101. 438 U.S. 726 (1978).

102. *Id.* at 743.

103. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 386 (1973).

104. 438 U.S. at 747-48.

105. Under the plurality's reasoning, a court would be required to examine the content of the speech being regulated. Although courts traditionally have had to look to content to detemine whether a particular type of speech is protected or unprotected, they have never been in the position of deciding whether a particular type of speech is deserving of more or less protection under the first amendment.

106. Presumably, the plurality was referring not only to *Central Hudson*, but also to cases such as *Bates* and *Friedman*, which also had placed limitations on the scope of commercial speech protection. *See supra* note 38.

government still may not discriminate among types of noncommercial speech without being subjected to a strict standard of review.[107] However, consistent with the plurality's analysis in *Metromedia*, a government may pass content-based regulations on commercial speech without being subjected to this strict standard of review.[108] Also, in the course of enforcing such regulations, a government will have the authority to routinely determine whether a particular form of speech is within the scope of its regulation.[109] This determination will be made on the basis of the content of the speech.[110]

The difficulties with giving governmental officials the authority to routinely categorize protected speech may not have been apparent in the commercial speech cases decided prior to *Metromedia*. In *Ohralik*, for example, the content-based regulation distinguished between protected commercial speech and unprotected commercial speech.[111] In *Virginia Pharmacy, Linmark,* and *Central Hudson*, the content-based regulations involved specific bans on specific categories of protected commercial speech.[112] In none of these four cases was there any indication that noncommercial speech was affected.

After *Metromedia*, however, both commercial and noncommercial speech could be affected. The fact that noncommercial speech

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107. This conclusion is consistent with the plurality's application of the strict standard of review, which it used in considering the effect of San Diego's ordinance on noncommercial speech. 453 U.S. at 512-15.

108. The plurality's bifurcated approach supports this conclusion, because the justices used the *Central Hudson* test to uphold San Diego's ordinance as a valid content-based restriction on commercial speech.

109. If, for example, a government passed a billboard ordinance which only prohibited signs with commercial messages, government officials would be left with the task of deciding, in each individual instance, whether a particular message was commercial and therefore prohibited, or noncommercial and therefore permissible. Justices Brennan and Blackmun stressed this point in their concurring opinion in *Metromedia*. They argued that so long as the line between ideological and commercial speech remains unclear, local officials should not be given the opportunity to routinely decide whether a particular form of speech is commercial or noncommercial. The justices concluded that such an approach "presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech." 453 U.S. at 536-37.

110. Ironically, the doctrine of content neutrality was developed to avoid exactly this type of situation. *See, e.g.*, cases cited *supra* at note 19.

111. 436 U.S. 447. In *Ohralik*, the statute distinguished between attorney advertising and attorney solicitation.

112. In *Virginia Pharmacy*, the statute prohibited price advertising of prescription drugs. In *Linmark*, the posting of for-sale signs was prohibited. *Central Hudson* involved a prohibition against promotional advertising.

was involved in *Metromedia* is critical because after that case a city could presumably prohibit only billboards with commercial messages. It would then be able to examine the content of every billboard message to determine whether or not the message was commercial. The danger with such an approach comes from assuming that the classifications might be simple and straightforward. Despite the plurality's assurance that the difference between commercial and noncommercial speech is a matter of "common sense,"[113] this may not prove to be the case in practice. If it is not, then there may be no adequate means of insuring that a government acts in a nondiscriminatory fashion.[114]

As objectionable as the plurality's analysis may seem in terms of traditional first amendment law, the dissenting justices offer an approach which may be more offensive to traditional first amendment principles. Chief Justice Burger and Justice Stevens, in their discussions of the statutory exemptions to the sign ordinance, argued that the exemptions did not violate the first amendment.[115] Although they agreed that the exemptions were based on content, they found that all were neutral in substance. Both justices stated that the alleged violation of content neutrality was, at most, a technical violation, since none of the exemptions favored particular viewpoints or threatened freedom of expression.[116]

The approach taken by Chief Justice Burger and Justice Stevens suggests that content neutrality may be at most a relative rule. Their approach also suggests that governments may legitimately regulate protected speech on the basis of content. If the require-

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113. 453 U.S. at 506.

114. Traditionally, the doctrines of content neutrality, vagueness, and overbreadth were applied to insure that regulations on speech were narrowly drawn and did not unduly restrict protected speech. The overbreadth doctrine, however, is not available in commercial speech cases. Bates v. State Bar of Arizona, 433 U.S. 350, 380-81 (1977). The content neutrality doctrine will be of limited effectiveness if governments are able to routinely distinguish between protected noncommercial speech and protected commercial speech. The vagueness doctrine may also prove inadequate so long as commercial speech is not defined with any certainty. This is particularly true since the Court's definitions have been far from explicit in terms of distinguishing between commercial and noncommercial speech. *See supra* note 8.

115. 453 U.S. at 553-55. (Stevens, J., dissenting); *Id.* at 564-66 (Burger, C.J., dissenting).

116. Justice Stevens stated that the first amendment protects against a government imposing its viewpoint on the public or selecting permissible topics for public debate. *Id.* at 553. He concluded that none of the exemptions for noncommercial speech contained in the ordinance related to either of these concerns. Chief Justice Burger agreed, describing the exemptions as "narrowly tailored to peculiar public needs." He concluded that the exemptions did not "remotely endanger freedom of speech" and accused the plurality of trivializing first amendment values. *Id.* at 564-65.

ment of content neutrality is a mere technicality, then courts will be left with the discretion of whether or not to enforce it. At best this approach is unpredictable; at worst, it leaves governments with wide discretion to control the free exercise of first amendment rights.[117]

First Amendment Balancing Tests

All five of the *Metromedia* opinions reflect a concern about the potentially formidable barrier that the first amendment could create against legitimate commercial regulation. The concern was expressed in a variety of ways, ranging from sympathetic acknowledgment of the "unique aspects of billboards" to unquestioning acceptance of the city's aesthetic interests.[118] The Court's sensitivity to underlying policy considerations, however, has the unfortunate consequence of readjusting first amendment rules and tests and of undermining traditional first amendment values. The Court's treatment of the content neutrality doctrine is one example. Its relaxed standards of review are another.

An element shared by the three dissenting justices in *Metromedia* was a reluctance to resort to first amendment tests and rules. While the plurality and the two concurring justices took pains to categorize the ordinance as either a complete ban or as a general prohibition and then to apply one or more first amendment tests, the dissenting justices avoided such labeling. Each framed the issues in the case in a different way, and each resolved them differently.[119]

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117. The Court's previous treatment of content-based regulations and of regulations which were overly broad or vague expressed a concern for precisely this issue. *See, e.g., supra* notes 19-21 and accompanying text. If strict application of the content neutrality doctrine is no longer necessary, there is little to distinguish the time, place, and manner test from the stricter balancing test.

118. The plurality in *Metromedia* emphasized the fact that billboards present a unique set of problems for land-use planning and development. 453 U.S. at 502. Justices Brennan and Blackmun willingly acknowledged that the elimination of billboards would enhance certain areas of a city. *Id.* at 530. Justice Stewart drew an analogy between billboards and graffiti. *Id.* at 549-50. Chief Justice Burger described billboards as unattractive, dangerous and distinguishable from other types of speech because of their "superficial sloganeering." *Id.* at 557. Justice Rehnquist also acknowledged the unsightliness of billboards. *Id.* at 570.

119. Justice Stevens concentrated on the fact that billboards are only one means of communicating information and ideas, and that a prohibition on billboards would only reduce the quantity of communication, not the quality. He compared the regulation of communications to the regulation of the economic market to suggest that curtailing the quantity of communications might have a salutory effect on the quality of ideas and information. *Id.* at 548-53.

Chief Justice Burger focused on a local government's authority under its police powers to

For the dissenting justices, the fact that speech was involved was incidental. In their view, San Diego was concerned about the physical nature of billboards, not about the messages the billboards carried. While this approach may reflect reality, it downplays the fact that the city's ordinance did affect first amendment interests. The dissenting justices may be correct in concluding that the first amendment is being interpreted too broadly. However, this is not a sufficient justification for treating a prohibition on protected speech as something less than what it is and subjecting it to only a cursory first amendment analysis.[120]

In contrast to the dissenters, Justices Brennan and Blackmun, in their concurring opinion, emphasized an analysis which fit within the bounds of traditional first amendment law. By categorizing the ordinance as a total prohibition on outdoor advertising, they eliminated the possibility of applying the time, place, and manner test. This conclusion compelled them to use the stricter balancing test traditionally applied to content-based prohibitions.[121] Unlike the plurality, they did not look to the type of speech involved and consequently did not evaluate the separate effects of the ordinance on commercial and noncommercial speech.[122]

Although the two justices used the strict test rather than the plurality's intermediate balancing test for commercial speech, language in their concurring opinion suggests that they might be willing, at least in some instances, to relax the traditionally strict scru-

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pass regulations which enhance the safety and beauty of the community. He emphasized that San Diego's ordinance was essentially directed at billboards, not at the messages they carried and therefore the first amendment was not directly implicated. *Id.* at 559-63. Justice Rehnquist stated that the only issue for resolution was whether aesthetics was a sufficient justification for banning billboards. He did not discuss first amendment doctrines or balancing tests, concluding only that the limited exemptions for noncommercial speech did not render the ordinance unconsititutional. *Id.* at 570.

120. The dissenting justices dealt with the first amendment issue only in relation to whether the selective exemptions indicated a desire to favor particular ideas or to suppress particular topics. Chief Justice Burger focused on the legitimacy of San Diego's classifications, not on the larger question of whether a ban on a form of protected communication violated the first amendment. Justices Stevens and Rehnquist thought a ban on a form of communication should be allowed, but their conclusions were not based on any first amendment balancing test. Instead, they emphasized the importance of the city's traffic safety and aesthetic objectives.

121. 453 U.S. at 528. *See also supra* notes 16-21 and accompanying text.

122. The analysis used by Justices Brennan and Blackmun reflects the traditional approach. It is quite different from the analysis used by the plurality because it does not require distinguishing between types of protected speech. *See also supra* notes 45-48 and accompanying text which discusses the concurring opinions of Justices Brennan, Blackmun and Stevens in *Central Hudson*.

tiny standard of review.[123] They suggested that if San Diego had demonstrated a greater commitment to improve the industrial and commercial areas, they too might have found that San Diego's aesthetic interests were of sufficient importance to justify a ban on billboards.[124] Thus, there is a possibility that the strict balancing test might be applied in a slightly more deferential manner when regulations on commercial speech are being reviewed. Although such an approach would be an indirect means of acknowledging the lesser status of commercial speech, it has the potential for undermining the effectiveness of the traditional "strict scrutiny" balancing test. There is a possibility that the standard of this test might be relaxed not only for commercial speech regulations, but also for various local government regulations intended to promote a variety of nebulous interests, ranging from aesthetics to the public welfare.

The bifurcated approach used by the plurality in *Metromedia* represents another means of offsetting the consequences of including commercial speech within the protection of the first amendment. In effect, the plurality creates a subcategory of first amendment law, exclusively for commercial speech. Under the plurality's approach, the deferential time, place, and manner test would still be applied to uphold regulations on commercial speech which are content neutral.[125] If, however, a regulation on commercial speech is content-based, a court is no longer compelled to use the stricter test normally applied to regulations based on content. Instead, it

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123. The two justices seemed primarily concerned with matters of proof rather than with the legitimacy of San Diego's asserted interests. For example, Justice Brennan stated that he had "no quarrel with the substantiality of the city's interest in traffic safety," but he added that the city had offered no evidence to support its conclusion that billboards actually impaired traffic safety. 453 U.S. at 528-30. Similarly, in discussing the city's aesthetics argument, Justice Brennan explained: "Of course, it is not for a court to impose its own notion of beauty on San Diego. But before deferring to a city's judgment, a court must be convinced that the city is seriously and comprehensively addressing aesthetic concerns with respect to its environment." *Id.* at 531.

124. Justice Brennan explicitly stated what he believed was necessary to establish a valid argument for prohibiting billboards on the basis of aesthetics. "By showing a comprehensive commitment to making its physical environment in commercial and industrial areas more attractive, and by allowing only narrowly tailored exceptions, if any, San Diego could demonstrate that its interest in creating an aesthetically pleasing environment is genuine and substantial." *Id.* at 532-33. He emphasized that a city would not need to address all aesthetic problems at once. However, because first amendment rights were at stake, Justice Brennan stated that a city would have to show that its commitment to aesthetics went beyond simply banning billboards. *Id.* at 531-32.

125. The plurality considered this test in *Metromedia*, but rejected it because the exemptions for off-site noncommercial signs were based on content. *See supra* note 53.

may apply the new, intermediate level balancing test developed in *Central Hudson* and liberally expanded in application by the plurality in *Metromedia*.[126]

The intermediate level balancing test is clearly intended to allow various governmental units greater flexibility in regulating commercial speech. The question, however, is whether the new standard will be workable. In practical terms, the new test may be difficult to apply, particularly when elements of commercial speech and noncommercial speech are combined.[127] Courts may be forced to focus on problems of definition in an effort to articulate the differences between protected noncommercial speech and protected commercial speech.[128]

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126. The traditional strict first amendment test requires a government to show that it has a compelling interest in restricting speech; that the restriction directly furthers its interest; and that any more narrowly drawn restriction would promote less well its interest. This was the test applied by Justices Brennan and Blackmun in *Metromedia*. 453 U.S. at 528. In contrast, the *Central Hudson* test requires a government to show that it has a substantial interest; that the restriction directly advances that interest; and that the restriction reaches no further than necessary to accomplish that interest. 447 U.S. at 566. As the plurality in *Metromedia* indicated, this test is easier to satisfy, for doubts may be resolved in favor of the government. *See supra* notes 61-70 and accompanying text.

The plurality's application of the *Central Hudson* test is more expansive for two reasons. First, the justices used the test to differentiate between protected commercial speech and protected noncommercial speech; second, they clearly intended that the test should be viewed as an intermediate level balancing test, rather than an alternative balancing test to be applied only when commercial speech regulations are involved. The differences are critical, because the plurality has, essentially, established tiers for levels of protected speech. The sole basis for their approach is that commercial speech is not entitled to the same protection as noncommercial speech.

127. Several recent law review articles have focused on the problem of how to distinguish between commercial speech and noncommercial speech. The authors indicate that the distinction may be a difficult one to make. *See, e.g.*, Coase, *Advertising and Free Speech*, J. LEGAL STUD. 1 (1976); Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372 (1979); Jackson & Jefferies, *Commercial Speech, Economic Due Process, and the First Amendment*, 65 VA. L. REV. 1 (1979); Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977); Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976). *See generally* Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Meiklejohn, *Commercial Speech and the First Amendment*, 13 CAL. W.L. REV. 430 (1977); Rotunda, *The Commercial Speech Doctrine in the U.S. Supreme Court*, 1976 U. ILL. L.F. 1080; Schiros, *Commercial Speech: The Demise of a Chimera*, 1976 SUP. CT. REV. 45.

128. Problems of definition may account, in large part, for the Court's decision to overrule *Chrestensen*. The cases cited *supra* in note 28 give some indication of the difficulty the Court has had in trying to decide cases in which aspects of commercial and noncommercial expression are combined. Courts will be faced with a similar dilemma if they are forced to distinguish between protected commercial speech and protected noncommercial speech in order to apply the proper balancing test.

If, after *Metromedia*, it is possible for a city to prohibit billboard companies from advertising commercial messages, it seems at least plausible that a city might also be able to prohibit other forms of unwelcome enterprises simply by labeling them as commercial. In the past, for example, governments often have been frustrated in their attempts to restrict various forms of sexually explicit entertainment, because the Court regarded these types of expression as protected speech.[129] An argument, however, could be made that since these types of expression have a commercial as well as a noncommercial purpose, they could be classified as commercial speech. If a government were able to classify these forms of expression as commercial, it might be far more successful in regulating them.[130]

The theoretical difficulties with the plurality's approach may prove to be at least as great as the practical difficulties. In effect, the intermediate level balancing test creates tiers of preferred speech.[131] In the past, the Court has interpreted the first amend-

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129. *See, e.g.*, Schad v. Borough of Mt. Ephraim, 452 U.S. 81 (1981)(ban on live nude dancing), Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (films with nudity), Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)(ban on rock musical "Hair").

130. A recent opinion by a Massachusetts appellate court illustrates the manner in which the plurality's two-tier approach may be used to uphold billboard prohibitions under an intermediate level of scrutiny. In Maurice Callahan & Sons, Inc. v. Outdoor Advertising Bd., 427 N.E.2d 25 (Mass. App. 1981), a billboard owner brought suit to challenge the constitutionality of a town by-law similar to the ordinance struck down in *Metromedia*. The law prohibited virtually all off-site billboards, including pre-existing signs, on the basis of aesthetics and traffic safety. First, the court held that the billboard owner only had standing to raise a commercial speech argument because he used his signs solely for commercial purposes. Then, using the *Central Hudson* test, the court concluded that the ordinance must be upheld. *Id.* at 28-29.

131. If commercial speech is entitled to only semi-protected status, it seems reasonable to expect that other types of protected speech might also be assigned various tiers of protection. In this regard, Justice Stevens's comments in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) are instructive. In *Young* the Court upheld an anti-skid-row ordinance that regulated the location of adult movie theaters. Writing for the plurality, Justice Stevens concluded:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser magnitude than the interest in untrammeled political debate. . . . Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the context of these materials as the basis for placing them in a different classification from other motion pictures.

Id. at 70-71.

ment as preventing governments from distinguishing between types of protected speech solely on the basis of content. If, however, the first amendment is to be read as preferring certain types of speech over others, then the constitutional protection afforded by the free speech clause will depend, in part, upon the value of the speech. Ironically, in seeking to safeguard the protections afforded to noncommercial, ideological speech, the plurality in *Metromedia* may have undermined the basic principles upon which the first amendment is based.

CONCLUSION

If *Metromedia* were restricted to its facts, perhaps it could be dismissed as an aberration. Unfortunately, it has implications which go beyond the issue of billboard regulation. First, several of the opinions cast doubt upon the importance of content neutrality, either as a barrier to regulation or as a viable standard. Second, a majority of the justices seem willing, either directly or indirectly, to view the first amendment as something less than a guarantee that protected speech will be treated equally.

The five *Metromedia* opinions indicate that there are serious difficulties with broadening the scope of the first amendment to include commercial speech. If the differences between commercial speech and noncommercial speech are so significant, then perhaps the better method of reviewing regulations which affect both types of speech is under the equal protection or due process clause of the fourteenth amendment rather than the free speech clause of the first amendment. The language of the first amendment is unequivocal. If the values which it seeks to protect are interpreted too broadly or qualified too often, then its effectiveness as a barrier against suppression will be destroyed.

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It is worth noting not only Justice Steven's conclusion that the first amendment protects speech in varying degrees, but also his decision to resort to equal protection analysis rather than first amendment analysis to uphold a content-based classification on speech. If the Court determines that governments ought to be able to differentiate between types of protected speech, then equal protection analysis may prove to be a more effective means of reviewing such regulations. For an example of how the Court has applied equal protection analysis to a restriction involving advertising, see Railway Express Agency, Inc. v. New York 336 U.S. 106 (1949).