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Case Comments

Standard of Review For Regulations of Commercial Speech: Metromedia, Inc. v. City of San Diego

I. INTRODUCTION

In 1972, the city of San Diego enacted an ordinance banning outdoor advertising display signs. This general prohibition exempted on-site signs and twelve other specific categories of advertisements. The ordinance did not distinguish between commercial and noncommercial messages. After the California Supreme Court upheld the ordinance against a first amendment challenge, two outdoor advertising companies argued to the United States Supreme Court that the ordinance violated the first amendment because it impermissibly restricted billboard messages on the basis of their content. The appel-
lants also argued that even the application of the ordinance to purely commercial speech would be invalid because it reached farther than was necessary to achieve its stated aims of traffic safety and aesthetics. In a plurality opinion, the United States Supreme Court reversed, holding that a ban on noncommercial billboards that contains exceptions defined by the subject matter of the exempted signs violates the first amendment, but that a prohibition of off-site commercial billboards which is intended to promote traffic safety and aesthetics is permissible. 

In a plurality opinion, the United States Supreme Court reversed, holding that a ban on noncommercial billboards that contains exceptions defined by the subject matter of the exempted signs violates the first amendment, but that a prohibition of off-site commercial billboards which is intended to promote traffic safety and aesthetics is permissible. 

This holding reflects the Court's bifurcated method of reviewing the San Diego ordinance; stricter scrutiny was applied to the law's noncommercial application than to its commercial component. This bifurcated analysis resulted from the Court's relaxation of its previously established standard for review of commercial speech regulations. The Metromedia opinion does not, however, justify this more lenient review or delineate the scope of its application. If this deferential standard and the resulting bifurcated analysis are not limited to the facts of Metromedia, courts reviewing regulations that apply to both commercial and noncommercial speech will have to distinguish between them. Unless this line is clearly drawn, however, the bifurcated analysis will encourage evasion of commercial speech regulations and will also infringe on some fully protected expression. The Court's commercial speech decisions do not, however, offer a consistent definition of commercial speech.

This Comment will review the development of the com-
cational speech doctrine and describe Metromedia's departure from the established standard of scrutiny for commercial speech regulations. The resulting bifurcated analysis of billboard regulations will also be examined. Arguing that the commercial component of the San Diego ordinance warranted a deferential review, the Comment offers a justification for this deferential standard and concludes that this level of scrutiny applies to a broad subcategory of commercial speech regulations. After noting the definitional problems created by the bifurcated approach, the Comment suggests that none of the definitions proposed by the Court, nor any reasonable modification of them, can solve these problems. The Comment therefore proposes modifying the present commercial speech doctrine underlying the standards of review that leads to the bifurcated approach. The Court should recognize that commercial speech can be regulated more strictly than noncommercial speech only when the regulation relates to the contractual function of commercial advertising. This theory provides a satisfactory definition of commercial speech and is consistent with all of the Court's commercial speech decisions except Metromedia itself.

II. DEVELOPMENT OF THE COMMERCIAL SPEECH DOCTRINE

A. VIRGINIA STATE BOARD OF PHARMACY v. VIRGINIA CITIZENS CONSUMER COUNCIL, INC.

Application of first amendment limitations to the regulation of commercial advertisements is a recent development. The Supreme Court originally considered a first amendment challenge to a commercial advertising regulation in 1942, upholding an ordinance prohibiting commercial handbilling. The opinion suggested that commercial speech was not protected by the first amendment.

15. Other forms of speech that are arguably "commercial" have long received full first amendment protection. For example, speech does not lose its protected status because it is based in part on the economic motivation of the speaker, Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) (sale of literature by Jehovah's Witnesses), because it takes the form of a paid advertisement, New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964) (paid political advertisement in newspaper), or because it is sold for profit, Smith v. California, 361 U.S. 147, 150 (1959) (books).


17. The Valentine Court held that first amendment restraints upon regulations of the time, place, or manner of speech in public forums do not apply to commercial advertising. Id. at 54. Some lower courts and commentators, however, have cited Valentine for the broader proposition that commercial speech
In 1976, the Court rejected this characterization of the first amendment's scope, holding in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* that purely commercial advertising was entitled to first amendment protection because of its informational value to the consumer and the general public. The Court noted, however, that its holding was not intended to foreclose all regulations of commercial speech and indicated that laws prohibiting false or misleading advertising were permissible. Although regulation of deceptive advertising appears to violate first amendment principles, the Court maintained that such regulation is, generally, constitu-


19. *Id.* at 761-70. The Court identified three justifications for such protection: consumers have a strong interest in receiving information about products; the free flow of commercial price and product information promotes intelligent consumer decisions and thus contributes to a proper allocation of resources; and such information allows the formation of intelligent opinions concerning regulation of the commercial system. *Id.* at 763-65.

20. *Id.* at 770.


22. Since the value of commercial speech lies in the information conveyed, see *supra* note 19 and accompanying text, false and misleading advertisements are not protected by the first amendment. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-64 (1980). Nevertheless, established first amendment principles present several obstacles to laws designed to protect consumers from deceptive advertising. For example, prohibitions on such advertisements may run afoul of the "chilling effect" doctrine. A law produces a chilling effect when speakers are deterred from engaging in constitutionally protected expression because they fear that their speech will be held unprotected and lead to liability. L. Tribe, *supra* note 17, § 12-12, at 634 (1978). Like false and misleading commercial speech, false noncommercial speech is not protected for its own sake. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). Yet the chilling effect doctrine prohibits defamation laws from imposing liability without fault. *Id.* at 347. Prohibitions on false advertising, however, usually impose strict liability on disseminators of false commercial information. E.g., Porter & Dietsch, Inc. v. Federal Trade Comm'n, 605 F.2d 294 (7th Cir. 1979); Federal Trade Commission Act § 12(a), 15 U.S.C. § 52(a) (1980).

Full disclosure laws and prior restraints are two other primary methods of protecting consumers from deceptive advertising. See Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U.L. Rev. 372, 393-95 (1979). Both devices are strictly limited by traditional first amendment doctrine. Laws requiring a newspaper, for example, to print a particular noncommercial message are generally invalid under the first amendment, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), as are laws imposing prior restraints on speech, New York Times Co. v. United States, 403 U.S. 713 (1971).
Beginning with *Virginia Pharmacy*, the commercial speech doctrine developed into a separate set of first amendment principles. These principles reflect the Court's attempts to permit legislative control of deceptive advertising without weakening first amendment protection for noncommercial forms of expression.

In *Virginia Pharmacy* the Court attempted to reconcile regulation of advertising with established first amendment rules by emphasizing, in dictum, that stricter control of commercial speech is permissible because of the greater verifiability of such expression and the profit motive supporting it. The Court stated that these differences between commercial speech and other protected expression explain why the first amendment does not prohibit the regulatory devices most commonly used to protect consumers from deceptive advertising. This analysis suggests that regulations of truthful commercial speech that do not rely on these devices should be reviewed according to traditional first amendment principles; content-based regulations should be strictly scrutinized, and content-neutral regulations should be subjected to a more lenient balancing test. The standard of review the Court applied

23. 425 U.S. at 770-72 & n.24. See id. at 776 (Stewart, J., concurring).
25. 425 U.S. at 771 n.24 (dictum).
26. Id. The Court indicated that direct prohibitions, full disclosure laws, and prior restraints are permitted as applied to commercial advertising. Id. Commercial speech's greater verifiability allegedly makes it more resistant to a chilling effect from direct prohibition, and the profit motive supporting commercial speech supposedly lessens the deterrent effect of the three restrictions. Id. *Contra* Farber, supra note 22, at 385-86.
28. The purpose of content-based regulations relates to the communicative impact of the speech or expression. E.g., L. Tribe, supra note 17, at §§ 12-2, 12-3; Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1497 (1975). But see Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 Geo. L.J. 727, 743-46 (1980). There are essentially two types of content-based regulations: those which explicitly restrict expression according to its content, and those which, although facially content-neutral, are substantially motivated by government hostility toward certain content. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81, 81 n.3 (1978); see L. Tribe, supra note 17, at §§ 12-2, 12-3, 12-5. A content-based regulation is permitted only if the speech regulated falls within one of a few unprotected categories or if the regulation is narrowly drawn to serve a compelling state interest. L. Tribe, supra note 17, § 12-8, at 602.
29. 425 U.S. at 771. When evaluating content-neutral restrictions of non-commercial speech, the Court has weighed the burden imposed on communication against the state interests served by the regulation. L. Tribe, supra note 17, § 12-20, at 683; see Ely, *Legislative and Administrative Motive in Constitu-
in *Virginia Pharmacy*, and later in *Linmark Associates, Inc. v. Township of Willingsboro,* is consistent with this interpretation of the *Virginia Pharmacy* dictum. Although this analysis also suggests that the Court would review regulations of deceptive advertising more leniently than analogous regulations of noncommercial speech, the Court did not articulate this third level of scrutiny.

B. **Central Hudson Gas & Electric Corp. v. Public Service Commission**

The Court subsequently adopted a broader justification for permitting stricter regulation of commercial speech. Such laws can be reviewed more leniently because commercial advertising occupies a "subordinate position in the scale of first amendment values." The implications of this new rationale became evident in *Central Hudson Gas & Electric Corp. v. Public Service Commis-**

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31. In both cases, the Court applied the customary strict standard of review to content-based restrictions on commercial speech that were unrelated to consumer protection. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 575-77 (1980) (Blackmun, J., concurring); Cox, *Foreward: Freedom of Expression in the Burger Court*, 94 HArv. L. REV. 1, 34-36 (1980). The possibility that the message will have an undesirable effect does not, by itself, constitute a compelling interest or render the speech unprotected. See L. Tribe, *supra* note 17, at §§ 12-8-12-11. In *Virginia Pharmacy* and *Linmark*, the state sought to prevent consumers from receiving commercial information because it believed they would act on that information in a manner not in their self-interest. The Court rejected both prohibitions on advertising as "paternalistic." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 766-69; *Linmark Assocs., Inc. v. Township of Willingsboro*, 431 U.S. at 94-96.
32. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). If commercial speech is less valuable than other forms of expression, it follows that all regulations of commercial advertising should be less strictly scrutinized than analogous noncommercial regulations. See *The Supreme Court, 1979 Term*, 94 HArv. L. REV. 75, 163 n.58 (1980) (implying that rationale for lesser protection of commercial speech in *Ohralik* explains departure from strict scrutiny of content-based regulations in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980)).
The Central Hudson Court adopted a three-part test subjecting all regulations of protected commercial speech to an intermediate level of scrutiny. Under this test, a commercial speech regulation is valid only if it seeks to implement a substantial government interest, directly advances that interest, and reaches no further than necessary to accomplish the given objective. In Central Hudson, the challenged regulation prohibited advertisements by utilities promoting use of electricity; it therefore regulated nondeceptive speech and was facially content-based. The intermediate standard of review is clearly more permissive than the compelling state interest test applied in the review of content-based regulations of noncommercial speech. The Court left untouched, however, the established rule of strict scrutiny for content-based regulations of noncommercial speech. Thus, a court reviewing a content-based regulation that applies to both commercial and noncommercial speech must apparently divide the ordinance into separate components and review each according to the appropriate standard.

C. Metromedia, Inc. v. City of San Diego

Reflecting the two-level analysis of content-based regulation suggested by Central Hudson, the plurality in Metromedia reviewed the San Diego ordinance’s application to

34. Id. at 566.
35. Id. at 559.
36. Id. at 559.
37. Cox, supra note 31, at 34-36 (comparing rules applied in Linmark and Central Hudson). The purpose of the regulation in Central Hudson was to prevent the increased electricity consumption the promotional ads would likely induce. 447 U.S. at 559. Although the ban would have been struck down as "paternalistic" under the rationale of Virginia Pharmacy and Linmark, see supra note 28, the Central Hudson Court recognized the ban as a legitimate way of promoting energy conservation. 447 U.S. at 568-69.
38. Four Justices joined the plurality opinion, and Justices Brennan and Blackmun concurred in the result. Metromedia, Inc. v. City of San Diego, 101 S.Ct. 2882, 2900 (1981). The three dissenters filed separate opinions. Id. at 2909 (Stevens, J., dissenting); id. at 2917 (Burger, C.J., dissenting); id. at 2924 (Rehnquist, J., dissenting). Although the plurality opinion struck down the San Diego ordinance based on the invalidity of its noncommercial component, it held that the commercial portion would be constitutional if the California Supreme Court ruled that it was severable from the invalid noncommercial part. 101 S.Ct. at 2899-900 n.26. By contrast, the Brennan-Blackmun concurrence applied a unitary standard of review and held the ordinance as a whole invalid. See id. at 2902, 2907 (Brennan, J., concurring). Similarly, the three dissenters reviewed the ordinance without separating its two components. All three, however, used a deferential standard of review and upheld the law. See id. at 2915 (Stevens,
commercial and noncommercial messages under different standards. The plurality reviewed the commercial component of the ordinance under the three-part test for commercial speech established in *Central Hudson*, a test embodying an intermediate level of scrutiny. Finding that the ordinance sought to implement the substantial government interests of traffic safety and aesthetics and that it reached no farther than necessary to promote these interests, the *Metromedia* plurality summarily concluded that the ordinance satisfied the first and third criteria of the *Central Hudson* test. Finally, the plurality held that the ordinance directly advanced the city's two interests because the presence of billboards impaired both traffic safety and the city's appearance. In reaching this conclusion, the plurality found that the city's judgment that these signs created safety and aesthetic problems was "not manifestly unreasonable." This language suggests a standard of review similar to the "rational basis" test used in evaluating due process challenges to economic regulations. Thus, while claiming to apply the intermediate scrutiny mandated by *Central Hudson*, the

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39. 101 S. Ct. at 2891. The two-tiered approach is appropriate because both parts of the ordinance are content-based. The commercial component exempts on-site commercial billboards, and such signs are defined according to their subject-matter. See supra note 2 and accompanying text. In addition, the non-commercial component also contains exceptions defined by subject matter. The exemption for political campaign signs is an example. See supra note 3 and accompanying text. Even restrictions of noncommercial speech that do not single out a particular viewpoint but only a type of subject matter are considered content-based and are subjected to strict scrutiny. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980); see Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96, 99 (1972).

40. 101 S. Ct. at 2892. See supra notes 34-35 and accompanying text.


42. 101 S. Ct. at 2893. Although the plurality readily accepted this conclusion, it is possible that limiting the size and placement of billboards could achieve the same ends with fewer restrictions. The plurality, however, was applying the *Central Hudson* test deferentially. See infra notes 46-48 and accompanying text. Thus, it may not have felt constrained to consider empirical evidence on this issue in reaching its conclusion.

43. 101 S. Ct. at 2892.

44. Id. at 2893.

45. Id.

plurality actually evaluated the commercial component of the ordinance under a more lenient “deferential” test.\textsuperscript{47} This deferential review is also evident in the plurality's assertion that the city “could reasonably conclude” that off-site signs created a more acute problem than on-site signs and that a greater need for on-site signs justified their exemption from the ban.\textsuperscript{48}

Notwithstanding the plurality's deferential treatment of the ordinance's commercial aspect, they subjected its noncommercial component to strict scrutiny,\textsuperscript{49} holding that portion invalid because it was not narrowly drawn.\textsuperscript{50} The ordinance exempted political campaign signs, for example, without evidence that they had a less adverse effect on traffic safety or aesthetics than prohibited noncommercial signs.\textsuperscript{51} In addition, the plurality noted an alternative ground for invalidating the ordinance. Although the San Diego ban contains an exception for on-site commercial billboards, it prohibits all but a few noncommercial signs in the same location, even though noncommercial signs pose no greater threat to traffic safety and aesthetics.\textsuperscript{52} The ordinance thus values commercial messages concerning goods and services connected with a particular site more than it values most noncommercial messages.\textsuperscript{53} Such an ordinance is invalid because it violates the doctrine that noncommercial speech is more valuable, and therefore entitled to more protection, than commercial speech.\textsuperscript{54}

\section*{III. ANALYSIS OF THE BIFURCATED APPROACH}

A. The Standard of Review: Intermediate Scrutiny or Reasonableness

The Court in \textit{Metromedia}\textsuperscript{55} failed to explain its retreat from

\textsuperscript{47} See 101 S. Ct. at 2906 n.12 (Brennan, J., concurring).

\textsuperscript{48} 101 S. Ct. at 2894-95. Under an intermediate standard, exceptions to a regulation, unless actually justified, would undermine the conclusion that the regulation directly advanced a state interest. See, e.g., Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 73-74 (1981).

\textsuperscript{49} The exceptions to the noncommercial component are defined only in terms of general subject matter, rather than in terms of the expression of any particular viewpoint. Nevertheless, a regulation containing such exceptions is content-based and subject to strict scrutiny. See supra note 39.

\textsuperscript{50} See 101 S. Ct. at 2896.

\textsuperscript{51} Id.

\textsuperscript{52} Id. at 2895.

\textsuperscript{53} Id.

\textsuperscript{54} Id.

\textsuperscript{55} Only the plurality divided the ordinance into commercial and noncommercial components, each of which is then reviewed under a different standard. See supra note 38. Nevertheless, a majority of the Court would review the com-
Central Hudson's intermediate standard of review to a more deferential standard of review for regulations of billboards with commercial messages.\textsuperscript{56} It is unclear whether these different standards can be reconciled, or whether Metromedia represents a general relaxation of the Central Hudson test. To answer that question, this section will examine three alternative justifications for the deferential review of the San Diego ordinance.

1. Aesthetics

The subjective nature of San Diego's aesthetic interest in the billboard ban may explain the different standards of review in Metromedia and Central Hudson. Although traffic safety was also a stated objective of the ordinance, the Metromedia plurality may have believed that this interest was minimal and was merely added to bolster the aesthetic purpose.\textsuperscript{57} If the plurality believed that only the aesthetic interest was genuine,
their deferential evaluation may stem from a reluctance to impose their judgment in an admittedly subjective area.\textsuperscript{58}

Both courts and commentators, however, have proposed methods of objectively reviewing aesthetic regulations. For example, Justice Brennan suggested in his \textit{Metromedia} concurrence that if a regulation is part of a comprehensive plan to remedy aesthetic problems over a period of time, that regulation will be valid even if it implements only a portion of the overall plan.\textsuperscript{59} This approach distinguishes haphazard cleanup efforts from aesthetic planning and thus allows courts to apply more than minimal scrutiny while deferring to a city's conception of its aesthetic needs. Therefore, if the plurality departed from the intermediate standard in \textit{Central Hudson} to avoid heightened scrutiny of the aesthetic value of the San Diego ordinance, that departure is unjustified.

2. \textit{Minimal Informational Value}

The \textit{Metromedia} plurality's failure to acknowledge the interests of consumers and the public in receiving information contained in commercial billboard advertisements\textsuperscript{60} suggests another explanation for its deferential treatment of the ordinance's commercial component. Some commercial advertising uses persuasive messages designed to create a favorable impression of a product and consequently contains little information.\textsuperscript{61} Because billboards must be visible from a distance, their content is necessarily limited to visual imagery and short verbal messages. This feature of billboard advertising suggests

\textsuperscript{58}See 101 S. Ct. at 2925 (Rehnquist, J., dissenting). The belief that aesthetic justifications for land-use regulations are too subjective to be reviewed has deterred some state courts from applying more than minimal scrutiny to such laws. Rowlett, \textit{Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality}, 34 VAND. L. REV. 603, 645 (1981); Williams, \textit{Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation}, 62 Minn. L. REV. 1, 2-4, 5 n.16 (1977). The Court has avoided the question of whether land-use regulations based on aesthetics can be subjected to heightened scrutiny. \textit{E.g.}, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

\textsuperscript{59}Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2904-05 (1981) (Brennan, J., concurring). \textit{See also} Williams, \textit{supra} note 58, at 6-20.

\textsuperscript{60}The plurality viewed the issue of the constitutionality of the ordinance's commercial component as a "conflict between the city's land use interests and the commercial interests of those seeking to purvey goods and services within the city." 101 S. Ct. at 2895.

that the plurality may have reviewed the San Diego ordinance deferentially because they believed that billboard advertisements usually contain little of the informational value justifying first amendment protection for commercial speech in other media.62 But a hierarchical approach to the review of commercial speech regulations based on the informational content of that speech presents obvious problems of consistency and objectivity.63 If the plurality based their deferential review on this approach, the opinion is flawed because it fails to set out appropriate criteria to classify advertisements according to the degree of their informational content.64

3. The Noncommercial Speech Analogy

The different levels of scrutiny employed in Central Hudson and Metromedia can be reconciled by analogizing to first amendment treatment of restrictions on noncommercial speech, which employs two levels of review—a strict standard for content-based regulations and a more relaxed one for content-neutral regulations.65 Because commercial speech requires less protection than noncommercial speech,66 the two levels of review for regulations of commercial expression should be more lenient than the standards applied in reviewing analogous regulations of noncommercial speech. Content-based regulations of commercial speech should therefore receive intermediate scrutiny, and content-neutral regulations should be reviewed even more leniently, perhaps according to the deferential rational basis test employed in Metromedia.67

62. In Virginia Pharmacy, the Court held that informational interests of consumers and the public provided the only justification for protecting commercial speech under the first amendment. 425 U.S. at 763-65. If the regulation of commercial billboards implicates these first amendment values minimally or not at all, then the conflict is between the city's land-use interests and the economic interests of commercial advertisers. See supra note 60. The constitutional issue then becomes the validity of an economic regulation under the due process clause rather than the validity of a regulation of speech under the first amendment. This interpretation of the plurality's reasoning explains the deferential standard of review it employed, because such a deferential standard is used in the adjudication of economic due process challenges. See supra note 46.

63. See Farber, supra note 22, at 383-84.

64. The promotional advertisements of utilities were reviewed according to an intermediate standard in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980). The plurality does not explain, however, why such advertisements are likely to contain more information than billboard advertisements.

65. See supra notes 28-29 and accompanying text.

66. See supra notes 32-37 and accompanying text.

67. See supra note 47.
Using two levels of scrutiny to review regulations of commercial speech is appropriate because the rationale for the two-tier review of noncommercial speech regulations applies, at least in part, to regulations of commercial advertising. Courts scrutinize content-based regulations of noncommercial speech more strictly than content-neutral regulations for two reasons. First, content-based regulations generally create greater distortion of "the marketplace of ideas" and thereby impair more seriously the first amendment ideal of an unhindered search for social and political truth. The stricter scrutiny applied to these regulations probably reflects the Court's determination that a more compelling reason is required to justify greater distortion. Because the commercial speech doctrine is designed to further intelligent consumer choices and public knowledge of the commercial system, a regulation that is more likely to distort the flow of commercial information also demands stricter scrutiny. The second justification for stricter scrutiny of content-based regulations of non-commercial speech derives from the need to identify impermissible government motives. Government disapproval of a non-commercial message is not a legitimate ground for regulation, and content-based regulations are more likely than content-neutral ones to be based on such disapproval. The greater need to identify these motives in reviewing content-based regulations therefore provides the second justification for stricter scrutiny of such laws. In contrast, because government disapproval of a commercial message is a permissible basis for restricting that message, content-based regulations of commercial advertising need not be scrutinized more strictly than content-neutral ones to ferret out improper government motives. Nevertheless, the first rationale for the

68. Stone, supra note 28, at 101.
69. Id. at 101-02.
70. See supra note 19 and accompanying text.
71. Stone, supra note 28, at 81 n.3. Ordinarily, any viewpoint-differential impact, see infra note 76, of a content-neutral regulation will include a whole range of viewpoints. Stone, supra note 28, at 110-11. This decreases the probability that the government intended to restrict any of them. By contrast, content-based regulations explicitly focus on specific views, and the inference to an improper motive is correspondingly stronger. Id.
72. Id. at 107.
73. Even if government disapproval is a legitimate reason for prohibiting a commercial message, at least one of the reasons for strictly scrutinizing regulations which are probably based on such disapproval applies to commercial as well as noncommercial speech. There are two reasons why the government is prohibited from restricting non-commercial messages of which it disapproves. First, the system of free expression serves personal growth, autonomy, and self-realization by fostering individual social and political choice. Stone, supra
two-tiered approach, prevention of distortion, does apply to commercial speech, and consequently the two-tiered system of review is arguably justified as applied to such expression.

Under the proposed analogy, deferential review of the commercial component of the San Diego ordinance would be appropriate if the ordinance were content-neutral. Because the ordinance is content-based, however, Metromedia's departure from the intermediate standard of review in Central Hudson is justified only if there is some reason to treat the commercial component of the ordinance as if it were content-neutral. The commercial component does not restrict any particular message, but only the general subject matter of billboards. Moreover, the off-site category used in the commercial component of the San Diego ordinance is broadly defined. One commentator has suggested that the Court has treated subject matter regulations as if they were content-neutral when the categories of subject matter were broadly defined.76 According

note 28, at 104. See, e.g., Cohen v. California, 403 U.S. 15, 24 (1971); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Repressive government motive is inconsistent with those ideals. This rationale, however, presumably does not apply to commercial speech. Regulations of nonverbal economic conduct have long inhibited individual commercial decisions without violating the Constitution. Restrictions on noncommercial messages that are based on government disapproval are also impermissible, however, because such regulations distort the marketplace of ideas. Stone, supra note 28, at 103-04. If this second rationale has any significance beyond the general concern for such distortion, see supra note 69 and accompanying text, it must be that intentional distortion is likely to be more drastic, because it is more focused than unintentional distortion. Therefore, even if regulations of commercial messages that are based on government disapproval are permissible, they should be scrutinized more strictly than regulations in which such motives may be absent.

74. See supra note 39.

75. Off-site signs are those that refer to a product not produced or sold, or a company not located, where the billboard is placed. See supra note 2. This category does not distinguish among types of products and services, so its message-differential impact, if any, will include ads for a wide variety of products.

76. See generally Stone, supra note 28. Neither subject-matter nor content-neutral regulations explicitly restrict particular viewpoints. Nevertheless, both types of regulations can restrict one viewpoint more than another. Id. at 109-10. For example, a subject-matter-based ban on street demonstrations addressing the propriety of the Vietnam war would have restricted expressions of opposition to that war more than expressions of support, because the war's critics relied more heavily on this mode of communication. Id. Similarly, a ban on all handbills, although content-neutral, restricts the expression of viewpoints by people in lower economic classes more than it restricts the views by groups able to afford access to more expensive media. See, e.g., Martin v. Struthers, 319 U.S. 141, 146 (1943) (door-to-door distribution of circulars essential to causes of poorer people). If the category of subject matter is a broad one, such as public-interest issues, the viewpoint-differential impact will be
to this theory, the plurality was justified in treating the commercial component of the San Diego ordinance as if it were content-neutral and reviewing it under a standard more lenient than the *Central Hudson* test.\(^7\)

On the strength of the analogy to noncommercial speech, it thus appears that the Court will extend the deferential review applied in *Metromedia* to other regulations of commercial speech that are effectively content-neutral. Only those regulations of commercial speech that are content-based will continue to receive the intermediate level of scrutiny applied in *Central Hudson*. The Court's treatment of the commercial component of the San Diego ordinance does not, therefore, represent a general weakening of the intermediate-level *Central Hudson* test. It merely indicates that the lower value the court assigns to commercial speech affects the review of content-neutral as well as content-based regulations.

\(^{77}\) It could be argued that the deferential rational basis test is too lenient, in that billboards are the least expensive, most practical means of advertising for some businesses, Joint Stipulation of Facts, Nos. 24, 28, App. at 44a, 48a, *Metromedia*, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981), and hence the San Diego ordinance will probably have the greatest impact on the messages of smaller, less wealthy companies. When content-neutral regulations of noncommercial speech have a viewpoint-differential impact, the government's burden in justifying those regulations increases. See * supra* note 28, at 86-87; * supra* notes 71-72 and accompanying text.

77. It could be argued that the deferential rational basis test is too lenient, in that billboards are the least expensive, most practical means of advertising for some businesses, Joint Stipulation of Facts, Nos. 24, 28, App. at 44a, 48a, *Metromedia*, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981), and hence the San Diego ordinance will probably have the greatest impact on the messages of smaller, less wealthy companies. When content-neutral regulations of noncommercial speech have a viewpoint-differential impact, the government's burden in justifying those regulations increases. See * supra* note 28, at 86-87; * supra* notes 71-72 and accompanying text. This reasoning also applies to the analogous distortion of the free flow of commercial information. Consequently, a level of review between the rational basis test and the *Central Hudson* standard is arguably appropriate for the commercial component of the San Diego ordinance. The Supreme Court's decision in *Friedman* v. Rogers, 440 U.S. 1 (1979), is an apparent precedent for such a "low-intermediate" level of review. In *Friedman*, the ban on the use of trademarks by optometrists would clearly affect the flow of information about commercial optometrists who used trademarks more than it would affect advertisements by "professional" optometrists, whose code of ethics forbade such use. Banning such advertising would at least temporarily reduce the flow of information about the services of the optometrists, because constant usage had created an association between the quality of service and the trademark. In reviewing this ban, the Court examined actual evidence of a connection between the regulation and the danger of deceptive advertising it was to prevent. * Id.* at 13-14. Nevertheless, the regulation's overinclusiveness did not invalidate it. * Id.*
B. Definition of Commercial Speech

1. The Definitional Problem Raised by Metromedia

Metromedia’s bifurcated approach to billboard advertising requires courts reviewing regulations of this medium to distinguish between commercial and noncommercial speech. Under the Court’s current commercial speech doctrine, however, the distinction is not clear. The lack of definitional clarity is critical for two reasons. Noncommercial speech is valued more highly than commercial expression and therefore receives greater protection from governmental regulation. Given this difference, if advertisers are uncertain about the status of a particular message, they may decide to forego publication rather than risk regulation. The definitional problem thus threatens to chill some protected noncommercial speech. Alternatively, the lack of a consistent definition of commercial speech may encourage advertisers to modify their messages to avoid regulation. Because Metromedia requires courts to scrutinize regulations of noncommercial advertising more strictly than regulations of commercial advertising, a municipality that enacts a general prohibition may be able to justify only the commercial component of its ordinance. Thus, municipalities may choose to weaken or delete the noncommercial component of their ordinances. Should this occur, advertisers may circumvent regulatory attempts by appending a noncom-

78. The Court’s use of different definitions of commercial speech, even within one opinion, see infra note 94, blurs the distinction between commercial and noncommercial expression. The most recent and most elaborate explanation of these definitions makes the line between commercial advertisements and political speech of sellers and manufacturers especially unclear. See infra notes 90-94 and accompanying text.

79. See supra notes 32, 54, 65-77 and accompanying text.

80. The chilling effect doctrine is usually used to invalidate statutes, not to evaluate definitions the Court has developed. Nevertheless, one commentator suggested that the Court will avoid using a constitutional doctrine if its vagueness is likely to chill protected speech. L. Tribe, supra note 17, § 12-26, at 714-16.

81. The requirement that a definition of commercial speech preclude any substantial opportunity for evasion is an example of the fundamental precept that a constitutional category should serve the purposes for which it was intended. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 579 (1980) (Stevens, J., concurring). The Court distinguished commercial speech from other protected expression to explain why the regulation of false and misleading advertising is constitutional. See supra notes 22-24 and accompanying text. If a substantial amount of commercial advertising the Court wants the government to be able to regulate escapes the Court’s definition, then the main purpose of the commercial speech doctrine has been subverted. See id.
mmercial component to an otherwise commercial message.\textsuperscript{82}

2. The Supreme Court's Definitions

In view of the definitional problems posed by the bifurcated approach, an adequate definition of commercial speech must satisfy three criteria: it must be sufficiently clear so that ordinances imposing greater restrictions on commercial speech will not significantly chill noncommercial expression; it must prevent any substantial degree of evasion by commercial advertisers; and, it must permit an explanation of why commercial speech is less valuable than noncommercial speech.\textsuperscript{83} Although the Supreme Court has formulated three alternative definitions of commercial speech,\textsuperscript{84} none of these definitions, nor any reasonable modification of them, satisfy all three criteria.

The Court's first definition of commercial speech, "speech that does 'no more than propose a commercial transaction,'"\textsuperscript{85}

\textsuperscript{82} See Metromedia, Inc. v. City of San Diego, 101 S. Ct. at 2909 (Brennan, J., concurring). For example, if taken literally, the definition of commercial speech as "speech that does no more than propose a commercial transaction," see infra note 85 and accompanying text, is easily circumvented. Advertisers need only append some brief political or public interest message to the promotion of their product. Even with the added requirement that the promotional part be relevant to the political portion, this definition presents a substantial problem of evasion. See infra notes 88-89 and accompanying text. Nevertheless, the problem of evasion may be reduced in the case of billboards because of the limited complexity of the messages they can convey. Interview with Daniel A. Farber, Associate Professor of Law, University of Minnesota (Nov. 4, 1981). The bifurcated approach in Metromedia, however, is readily applicable to review of regulations of other media, such as handbills, where the messages are longer and the potential evasion problem is consequently more acute.

83. The last criterion ensures that the definition is consistent with the Court's justification for permitting stricter regulation of commercial speech. See supra notes 25-26, 32 and accompanying text. This requirement also prevents any narrowing of the scope of protection for noncommercial speech and the resulting dilution of first amendment principles, and therefore helps ensure that any definition of commercial speech will further the purpose of the commercial speech doctrine. See supra notes 22-24 and accompanying text.

84. In Virginia Pharmacy, the Court implied that commercial speech includes only advertisements that do "no more than propose a commercial transaction." 425 U.S. 748, 771 n.24 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)). Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), employed two definitions: "'speech proposing a commercial transaction,'" id. at 562 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978)), and "expression related solely to the economic interests of the speaker and its audience," id. at 561. For a discussion of the distinction between the first definition proposed in Central Hudson and the definition used in Virginia Pharmacy, see infra note 90. Lower courts have noted the lack of a consistent definition of commercial speech. E.g., Casbah, Inc. v. Thone, 651 F.2d 551, 563 (8th Cir. 1981).

85. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,
fails to prevent evasion by commercial advertisers.\textsuperscript{86} This definition appears to include only advertisements that contain product and price information, and possibly persuasive content, without reference to any subject of broader public concern.\textsuperscript{87} Regulations based on this definition can be evaded because commercial advertisers can obtain the full protection of the first amendment merely by including messages of general public interest in their advertisements. Although the Court might avoid this problem by requiring that the price and product information in advertisements be relevant to their public interest component to qualify for full protection,\textsuperscript{88} this approach does not completely preclude the evasion of restrictions on commercial advertising. Because of the highly politicized nature of current economic problems, price and product information will frequently be relevant to political and economic questions.\textsuperscript{89} Comparison of prices and features on Japanese and American cars, for example, is clearly relevant to an American car manufacturer's advertisements encouraging consumers to fight unemployment by "buying American." Although the price and product information in this advertisement poses the same dangers of deception to consumers as does "speech that does no

\textsuperscript{86} It could be argued that this definition also fails the third criterion. See \textsuperscript{supra} note 83 and accompanying text. The value the Court has identified in commercial speech is factual information concerning products and prices. See \textsuperscript{supra} note 19 and accompanying text. Because a responsible evaluation of ideas depends on facts, factual information is implicated in the search for political truth which the constitutional protection of ideological speech is designed to foster. In fact, the Court has identified the political importance of commercial information as one of its values. See \textit{id}. Nevertheless, the Court probably distinguishes the political value of commercial advertising from that of ideological speech, because the former contributes less directly to the expression of political opinions. See \textit{Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council}, Inc., 425 U.S. 748, 779-80 (1976) (Stewart, J., concurring).

\textsuperscript{87} The Court devised this definition when it determined that even this type of speech should be protected by the first amendment. Originally, the purpose of this definition was to isolate speech lacking any explicit political content. \textit{Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council}, Inc., 425 U.S. at 764-65. The Court, however, used this definition to distinguish commercial speech from other expression that enjoys greater first amendment protection. \textit{id.} at 771-72 n.24.

\textsuperscript{88} The Court has implied that a similar approach could be used to deal with the problem of pornographers who attempt to "upgrade" their otherwise unprotected product with quotes from the classics. See \textit{Kois v. Wisconsin}, 408 U.S. 229, 230-31 (1972) (per curiam).

more than propose a commercial transaction," the message falls outside this definition of commercial speech.

By broadening the definition of commercial speech to include "speech which proposes a commercial transaction," the Central Hudson Court avoided evasion by advertisers. This definition fails, however, to explain why commercial speech is less valuable than noncommercial speech, and threatens to chill some noncommercial expression.

The Court has explicitly included within this definition statements about issues of public concern that appear in commercial advertisements. For example, this definition of commercial speech includes an advertisement by a utility promoting electricity consumption by emphasizing its environmental benefits, or an advertisement by an American car manufacturer encouraging consumers to buy American-made cars because such purchases will reduce unemployment. Because this definition includes advertisements with clear political significance, it fails to explain why commercial speech is less valuable than noncommercial speech.

The Court attempted to minimize the significance of this problem by noting that commercial entities "enjoy the full panoply of First Amendment protections for their direct comments on public issues." The Court thus implicitly suggested that commercial advertisements including political content can be regulated as strictly as other commercial speech, because the advertiser is free to excise the political message from its commercial context and express it directly. Political and commercial speech, however, cannot always be separated. Central Hudson held that commercial speech includes all advertisements that are clearly intended to promote sales. Since any message that mentions the political advantages of a product may reflect an intent to promote sales, sellers may be denied

90. Id. at 562. This definition is broader because commercial speech is no longer limited to speech which "does no more than" propose a sale. The more circumscribed definition used in Virginia Pharmacy was devised specifically to exclude advertisements that also contained broader socio-political content. See supra note 87. In Central Hudson, the Court explicitly included broader content in its definition, 447 U.S. at 563 n.5, and thus eliminated the possibility of evasion.


92. See id.

93. Id.

94. See id. at 559, 561.
their full first amendment rights to express the politically significant advantages of their products.

Under this definition of commercial speech, statutes that restrict only commercial expression may also create a chilling effect on the political speech of commercial entities. Although the Court has asserted that political speech of such entities is fully protected, *Central Hudson* appears to mandate that courts classify such expression as commercial speech if the advertisement relates to the political advantages of the seller's product. The resulting uncertainty in the scope of full first amendment protection may chill the expression of these political ideas, because the speaker can not express them in a way that avoids the risk of regulation.

The third definition of commercial speech—"expression related solely to the economic interests of the speaker and its audience"—fails to satisfy at least two of the three criteria of adequacy. First, evasion by advertisers is not precluded. Under this definition, a court would not classify an American car manufacturer's comparison of its products to Japanese cars as commercial speech if that comparison were used to support an argument that consumers should "buy American" to bolster the economy. Even if the manufacturer were motivated solely by profit, its speech would relate to the broader political concerns of its audience. In addition, this definition suggests that a paid speech by an economist to a group of investors, economic advice columns in newspapers, and perhaps even stock market reports are all commercial speech; consequently it fails to explain why commercial speech is less valuable, because these forms of expression are as valuable as fully protected speech.

3. The Definitional Dilemma

No definition of commercial speech can meet all three criteria of adequacy because commercial advertising and political speech substantially overlap. Consequently, any definition that excludes all political content will also exclude some messages containing price and product information, thus creating an incentive for evasion. A definition that includes all advertisements containing price and product information will,

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95. Id. at 561.
96. See id. at 579-80 (Stevens, J., concurring).
97. When price and product information are relevant to political issues, they become politically significant, and when a manufacturer touts the political advantages of its product, the political message assumes commercial overtones. See supra notes 89, 96 and accompanying text.
however, also encompass a number of political messages. There is no satisfactory solution to this dilemma, because a vague definition of commercial speech that avoids both problems will create a chilling effect on the political expression of commercial entities.

This definitional dilemma can only be resolved by abandoning one of the three criteria of adequacy. The first and second criteria are vital, because they ensure that a definition will serve the purpose of the commercial speech doctrine—to permit legislative control of deceptive advertising without weakening first amendment protection for other forms of expression. The third criterion, however, merely reflects the particular explanation that the Court has adopted to justify such legislative control. The Court could therefore solve the definitional problem by abandoning the theory that commercial speech is less valuable than political speech and that this difference justifies the stricter regulation of commercial speech. This solution requires the Court to adopt another justification for the control of deceptive advertising. To be viable, the new formulation of the commercial speech doctrine should allow regulation of commercial advertising to prevent consumer deception, but should also fully protect any political content in such speech.

The test for the validity of content-neutral regulations established in United States v. O'Brien suggests a means for achieving these goals. According to O'Brien:

A government regulation is sufficiently justified if it . . . furthers an important or substantial government interest, if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the interest.

Pursuant to O'Brien, the Court should identify an aspect of speech peculiar to commercial advertising that creates a governmental interest, unrelated to suppression of expression, in regulating false and misleading speech. If this uniquely commercial aspect of speech is isolated, the O'Brien test will explain why regulatory devices that are usually invalid as applied to noncommercial expression are permissible when used to control deceptive advertising. This approach also accommo-

98. See supra text accompanying note 83.
99. See supra notes 22-24, 81 and accompanying text.
100. See supra note 32 and accompanying text.
102. Id. at 377.
103. The O'Brien test is considerably weaker than the compelling state in-
dates the overlap between political and commercial speech. Because the *O'Brien* test applies to regulations of fully protected expression, even commercial advertising containing a political component can be justifiably regulated to prevent consumer deception without weakening first amendment protection for political speech.\(^{104}\) No definitional problems arise because controls on deceptive advertising are justified by the distinction between commercial and informational functions of expression, instead of the spurious distinction between commercial and political speech.\(^{105}\) With this approach commercial speech can then be defined as any speech that exhibits this commercial aspect, even speech that contains a political component.

IV. PROPOSAL: REGULATION OF THE CONTRACTUAL FUNCTION OF ADVERTISING

Professor Daniel Farber has proposed that the commercial aspect justifying the regulation of false and misleading advertising is the contractual function of commercial speech.\(^{106}\) Under this analysis commercial advertising serves a contractual function because it constitutes a seller's potential commitment to a buyer.\(^{107}\) This contractual function is distinct from advertising's informational function. According to Farber, “A

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\(^{105}\) A consequence of this approach is that regulations which are not justified by reference to some uniquely commercial aspect are subject to the same level of review whether applied to commercial or noncommercial speech. The justifications for the San Diego billboard ban, aesthetics and traffic safety, apply equally to commercial and noncommercial billboard messages. Because they have nothing to do with the message a billboard carries, these justifications do not depend on any commercial quality of the speech regulated. Under the proposed approach, the ordinance in *Metromedia* would therefore be reviewed according to a unitary standard.

\(^{106}\) Farber, *supra* note 22.

\(^{107}\) *Id.* at 387. Statements about a product made in an advertisement appear to function as express warranties when the advertisement results in a sale. *Id.* at 390. The Uniform Commercial Code states:

- (a) Any affirmation of fact . . . made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation . . . .

- (b) Any description of the goods which is made part of the basis of
justification for regulating the seller's speech relates to the contractual function of speech, if and only if, the state's interest disappears when the same statements are made by a third person with no relation to the transaction."\textsuperscript{108} The distinction between regulations of the contractual and the informational functions of expression is significant. Contractual language, unlike speech which conveys information, is a type of expression to which first amendment protections have not traditionally applied.\textsuperscript{109} Under Farber's proposal, regulations of the contractual function of advertising therefore serve government interests unrelated to free expression.\textsuperscript{110} Consequently, the validity of such regulations should be scrutinized under the \textit{O'Brien} test.\textsuperscript{111} Courts should review all other regulations of commercial speech, Farber maintains, under the appropriate standard for regulations of noncommercial speech.\textsuperscript{112}

Farber's proposal identifies a commercial aspect of speech which explains why prohibitions on false and misleading advertising are compatible with the first amendment. These laws are designed to serve the state's interest in ensuring that sellers perform their commitments to buyers;\textsuperscript{113} if misleading state-

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\textsuperscript{108} Farber, \textit{supra} note 22, at 388-89.  
\textsuperscript{109} Farber observes that  
\textsuperscript{110} The bargain creates an express warranty that the goods shall conform to the description.  
\textsuperscript{111} For a discussion of the \textit{O'Brien} test, see \textit{supra} notes 102-105 and accompanying text.  
\textsuperscript{112} The law of express warranties distinguishes between "affirmations," which constitute express warranties, and "puffs" or opinions, which
\end{flushleft}
ments about a product are made by a third party consumer organization, for example, the state's regulatory interest disappears. Under the proposed test, these regulations therefore relate solely to the contractual function of advertising. Consequently, the state's interest is unrelated to suppression of expression, and the second prong of the O'Brien test is satisfied. Truth-in-advertising laws also meet O'Brien's other requirements. The government interest in protecting consumers and ensuring fulfillment of express warranties is substantial, and the other method of enforcement—damages—is a less effective means to that end.

The contractual function theory also avoids the definitional problems inherent in the current commercial speech doctrine. There is no incentive for evasion by advertisers under the contractual function theory. Stricter regulation of commercial speech is justified whenever the government interest relates to the contractual function of advertising. Commercial advertisers cannot avoid regulations of deceptive advertising by modifying their messages, because the state's interest in regulating the

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do not. U.C.C. § 2-313(2) (1978). Although this distinction is not clear, J. White & R. Summers, supra note 107, at 329-31, it appears to depend in part on the reasonableness of the buyer's reliance on the seller's statements. Id. It might seem to follow that highly exaggerated advertising claims do not function as express warranties because reliance on them is unreasonable. If such claims are merely puff, they do not serve a contractual function, and consequently, according to the contractual function theory, the first amendment does not permit their regulation to prevent deception of consumers. This result would be undesirable because controls on deceptive advertising are designed to protect against highly exaggerated advertising claims. There are two reasons, however, why the range of the contractual function theory closely matches the intended scope of regulations of deceptive advertising. First, factors in addition to, or perhaps contributing to, the reasonableness of a buyer's reliance skew the distinction between an affirmation and a puff in favor of the buyer. These factors include the relative knowledge of buyer and seller, J. White & R. Summers, supra note 107, at 330, and the opportunity the buyer has to verify the seller's claim. Id. Thus, reliance on apparently farfetched claims may be reasonable if the claims go beyond the buyer's knowledge or the buyer's opportunity to acquire it. Second, truth-in-advertising laws have been construed to prohibit advertisements having a tendency to deceive the general public. See Doherty, Clifford, Steers, & Shenfried v. F.T.C., 392 F.2d 921, 928-29 (6th Cir. 1968) (construing 15 U.S.C. § 52). These laws were apparently not intended to protect the unusually gullible consumer. Yet, if an advertisement deceives most people, it follows that reliance on it, although misplaced, is not unreasonable. Therefore, the criterion of reasonableness incorporated in the contractual function theory through the Uniform Commercial Code closely matches the range of advertisements that existing controls on advertisements are designed to cover.

114. See Farber, supra note 22, at 390.

115. Farber argues that a damage action for breach of warranty is not a substitute for regulation of advertising, because the damage remedy is primarily remedial rather than preventative. Farber, supra note 22, at 391.
contractual function will remain even if the advertisements contain political content. In addition, there is little danger that regulation of advertising will inhibit political expression by commercial advertisers, either by direct prohibition or by a chilling effect. For example, a car manufacturer's advertisement urging consumers to support the country's economy by purchasing American-made cars clearly expresses a political opinion, and the contractual function theory accords this statement full first amendment protection. The contractual function of advertising stems from the potential incorporation of a seller's advertising claims into an express warranty of its products. Only those statements, however, that represent an affirmation about the product, as opposed to a mere opinion or "puff," become a part of this warranty. The manufacturer's political opinions about its products do not, therefore, serve a contractual function and consequently cannot be prohibited by regulations of false and deceptive advertising. In addition, there is little danger that these opinions will be chilled by such regulations. Although the distinction between an affirmation and an opinion or puff is not clear, most expressions of political opinions about a product are easily recognized as such by both advertisers and their audience. In the example of the hypothetical car manufacturer, no buyer could reasonably conclude that the advertisement constitutes a promise that purchasing this type of car will have a beneficial effect on the economy. The contractual function theory therefore does not create the uncertainty necessary to generate a chilling effect.

Abandoning the current commercial speech doctrine in favor of the contractual function theory also maintains consistency with prior precedent. The scale of first amendment values approach and the contractual function theory differ primarily in their treatment of regulations that do not relate to the contractual function of the message. With the exception

116. See supra note 97 and accompanying text.
117. See U.C.C. § 2-313(2) (1978); supra note 113.
119. Id.
120. The contractual function theory provides that such regulations should be reviewed according to ordinary first amendment standards. See supra note 112 and accompanying text. By contrast, the scale of first amendment values approach requires that all regulations of commercial speech be reviewed more leniently than analogous regulations of noncommercial speech. See supra notes 65-73 and accompanying text. Under the proposed analysis, if the government's regulatory interest relates to the contractual function of advertising, the intermediate level O'Brien test is used. That standard is similar to the Central Hudson test for content-based regulations of commercial speech. Content-
of *Central Hudson* and *Metromedia*, the Court has decided all of the cases reviewing a regulation of this type pursuant to traditional first amendment principles.121 Because these standards would also apply under the contractual function theory,122 the result will be the same under either approach. In *Central Hudson*, the state's regulatory interest was similarly unrelated to the contractual function of the prohibited advertisements. The state's interest in energy conservation would exist whether the utility or a third party ran advertisements promoting the use of electricity. Under the contractual function theory, the ban on promotional advertisements should therefore be reviewed according to ordinary first amendment principles for content-based regulations. Consistent with the Court's disposition of that case, although contrary to its reasoning,123 the law would be invalidated under the compelling state interest test.124

The contractual function theory, however, would require the Court to modify its decision in *Metromedia*. San Diego's prohibition of most billboard advertisements did not relate to the contractual function of the regulated speech, because the ordinance's stated purposes of promoting aesthetics and traffic safety would be frustrated even if third parties purchased billboard space to advertise a seller's products. Under the contractual function theory, the commercial component of the ordinance should be reviewed according to the ordinary balancing test for content-neutral regulations.125 Since the San Diego

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121. In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), the Court reviewed a regulation whose purpose was the maintenance of high professional standards among pharmacists. The regulation addressed in *Linmark Assocs., Inc. v. Township of Willingsboro*, 431 U.S. 85 (1977), sought to prevent "white flight" from a neighborhood by banning "for sale" signs. For a discussion of the standard of review employed in those cases, see *supra* notes 28, 37 and accompanying text.

122. *See supra* note 112 and accompanying text.

123. The regulation was struck down because it was not necessary to achieve the goal of energy conservation. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 568 (1980).

124. *See supra* note 37.

125. Although the commercial component is, technically speaking, content
ordnance fails to preserve adequate alternative channels of communication\textsuperscript{126} and has a de facto viewpoint-differential impact,\textsuperscript{127} the applicable standard of review requires a substantial justification for the ordinance.\textsuperscript{128} The record in \textit{Metromedia}, however, does not demonstrate that the ordinance improved aesthetics or traffic safety,\textsuperscript{129} and the ban should therefore be invalidated under the contractual function theory.

\section*{V. CONCLUSION}

The Supreme Court divided San Diego's prohibition against billboards into a commercial and a noncommercial component, and reviewed the commercial aspect of the ordinance deferentially while subjecting its noncommercial aspect to heightened scrutiny. This bifurcated approach resulted from a departure from the test applied to commercial speech regulations in \textit{Central Hudson}. Although this departure can be reconciled with \textit{Central Hudson}, \textit{Metromedia}'s bifurcated approach makes an adequate definition of commercial speech impossible. Any definition will allow either some commercial advertisements to escape reasonable consumer protection regulation or will unduly inhibit fully protected political expression.

Because \textit{Metromedia} leads to a definitional impasse, this Comment has suggested that the Court revise its justification for permitting commercial speech to be regulated more strictly than noncommercial speech. Under the suggested approach, the Court should justify strict controls on advertising by reference to the contractual function of such expression. All other restrictions on commercial speech should be reviewed according to the standards applicable to regulations of noncommercial speech. This proposal has several advantages. By appealing to the distinction between the contractual and informational functions of expression, the Court would avoid reliance on an untenable distinction between commercial and political speech. In addition, the contractual function theory is consistent with all of the Court's commercial speech decisions except \textit{Metromedia} itself, and unlike the present commercial speech doc-

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\bibitem{126} See \textit{supra} note 77.
\bibitem{127} \textit{Id.}
\bibitem{128} See \textit{supra} note 29.
\bibitem{129} 101 S. Ct. at 2903-04.
\end{thebibliography}
trine, it justifies regulation of false or misleading advertising without weakening first amendment protection for other expression. The Court should therefore abandon the current commercial speech doctrine and adopt the contractual function theory.