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Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser"

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INTRODUCTION

Over half a century ago, the Puerto Rico legislature legalized casino gambling in an effort to promote tourism to the island.[1] To help ensure that the local population would not overindulge in this particular vice, however, the legislature at the same time provided that "[n]o gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico."[2] Thirty years later a casino operator challenged the statutory advertising ban and its implementing regulations as violating the freedom of speech guaranteed by the First Amendment.[3] Although the Superior Court of Puerto Rico agreed with the casino that the regulations—which, among other things, had barred the use of the word "casino" on matchbooks and even interoffice or external correspondence—were "capricious, arbitrary, erroneous and unreasonable, and ha[d] pro-

1. Games of Chance Act of 1948, Act No. 221 (codified as amended at 15 P.R. LAWS ANN. §§ 71-79 (1999)). The Act's Statement of Motives explained that the Act's purpose was "to contribute to the development of tourism by means of the authorization of certain games of chance which are customary in the recreation places of the great tourist centers of the world." § 1 (codified as amended at 15 P.R. LAWS ANN. § 71 (1999)).

2. § 8 (codified as amended at 15 P.R. LAWS ANN. § 77 (1999)).

3. U.S. CONST. amend. I. The Supreme Court had held Puerto Rico subject to the First Amendment Speech Clause in *Balzac v. Porto Rico*, 258 U.S. 298, 314 (1922).

duced absurd results which are contrary to law,"[4] it refused to invalidate the statutory advertising ban. Instead, it issued narrowing constructions of the statute and regulations to prohibit "advertisements . . . in the local publicity media addressed to inviting the residents of Puerto Rico to visit the casinos."[5] The Puerto Rico Supreme Court upheld the lower court and the casino appealed to the U.S. Supreme Court.

In *Posadas de Puerto Rico Associates v. Tourism Co.*, the Supreme Court affirmed the Puerto Rico courts by a 5-4 decision written by then-Justice Rehnquist.[6] First applying the mid-level scrutiny for regulations of commercial speech that it had announced in its *Central Hudson* decision six years earlier,[7] the majority determined that the regulations, as narrowed by the Puerto Rico courts, passed muster because they directly advanced a substantial governmental interest in reducing demand for casino gambling by the residents of Puerto Rico and were no more extensive than necessary to serve that interest.[8] Second, and seemingly in the alternative, the majority explained that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[9]

The four liberal Justices dissented in two separate opinions. Justice Brennan, joined by Justices Marshall and Blackmun, spent the bulk of his dissent arguing that the majority did not faithfully apply *Central Hudson*.[10] Observing first that the legislature permitted Puerto Rican residents "to engage in a variety of other gambling activities—including horse racing, 'picas,' cockfighting, and the Puerto Rico lottery—all of which are allowed to advertise freely to

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4. Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 334 (1986) ("*Posadas*") (quoting App. to Juris. Statement 29b).

5. *Id.* at 335 (quoting App. to Juris. Statement 38b-40b).

6. *Id.* at 328.

7. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566-71 (1980) ("*Central Hudson*"). According to the four-part *Central Hudson* test:

> At the outset, we must determine whether the expression is protected by the First Amendment. [1] For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

United States v. Edge Broad., 509 U.S. 418, 424 (1993) (quoting *Cent. Hudson Gas & Elec.*, 477 U.S. at 566, and inserting numbering).

8. *Posadas de Puerto Rico Assocs.*, 478 U.S. at 340-44.

9. *Id.* at 345-46.

10. *Id.* at 351-59 (Brennan, J., dissenting).

residents,"[11] Brennan concluded that the government had failed to show that a substantial interest supported the advertising ban. But even assuming otherwise, he continued, the government also failed to show either that the advertising ban directly advanced its "interest in controlling the harmful effects allegedly associated with casino gambling,"[12] or that its interests could not be advanced in a manner more solicitous of speech interests—as by "establish[ing] limits on the level of permissible betting, or promulgat[ing] additional speech designed to discourage casino gambling among residents."[13]

Justice Stevens, also joined by Justices Marshall and Blackmun, responded to the majority's use of the greater/lesser reasoning. Although observing that "[w]hether a State may ban all advertising of an activity that it permits but could prohibit—such as gambling, prostitution, or the consumption of marijuana or liquor—is an elegant question of constitutional law,"[14] Stevens contended that it was not a question "appropriate to address . . . in this case because Puerto Rico's rather bizarre restraints on speech are so plainly forbidden by the First Amendment."[15] In particular, Stevens identified at least three defects arising from the fact that Puerto Rico did not actually ban *all* advertising of casino gambling: the regulations "plainly discriminate[d] in terms of the intended listener or reader," singling out "Puerto Rico's residents . . . for disfavored treatment in comparison to all other Americans";[16] "establish[ed] a regime of prior restraint"; and were "hopelessly vague."[17]

While Justices Stevens, Marshall, and Blackmun were willing to leave open whether, as the majority had asserted, a state's greater power entirely to ban an activity entailed the lesser power to permit the activity while entirely banning its advertisement, academic commentators were not as restrained. Philip Kurland's brief but impassioned critique in the *Supreme Court Review* is notable.[18] Although arguing at some length that the majority's application of the *Central Hudson* test was indefensible,[19] Kurland

11. *Id.* at 353.
12. *Id.* at 355.
13. *Id.* at 356-57.
14. *Id.* at 359 (Stevens, J., dissenting).
15. *Id.*
16. *Id.* at 360.
17. *Id.* at 359.
18. Philip B. Kurland, Posadas de Puerto Rico v. Tourism Company: *" 'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful,"* 1986 SUP. CT. REV. 1.
19. *Id.* at 8-12.

frankly acknowledged that that aspect of the opinion was of relatively little significance. "If the *Posadas* opinion had done no more than patently to misapply its own established commercial speech doctrine to what is concededly an idiosyncratic set of facts,"[20] Kurland admitted, it would warrant little attention. The greater/lesser analysis is what really drew his ire. This bit of reasoning, he concluded, "is violative of every notion of what the Free Speech Clause has stood for."[21] That is strong language. But over the fifteen years since *Posadas* was decided, the sentiment has garnered near-universal scholarly agreement.[22]

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20. *Id.* at 12.

21. *Id.*

22. *See, e.g.*, MICHAEL G. GARTNER, ADVERTISING AND THE FIRST AMENDMENT 17 (1989) (describing *Posadas* as "highly illogical" and "a terrible decision"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 903 (2d ed. 1988) ("At the very least, the 'greater power including the lesser power' form of analysis seems singularly inappropriate in the first amendment context."); Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 43 n.190 (1995) (denouncing *Posadas*'s use of the greater/lesser as "lethal"); Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 IOWA L. REV. 909, 938-43 (1992); Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 MINN. L. REV. 289, 290-91 (1987) (*Posadas* "mocks the constitutional status of commercial speech"); Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 37 (1989) (Rehnquist's approach amounts to "a basic affront to human dignity"); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 42 n.195 (2000) ("It is remarkable that after a decade of commercial speech decisions, Rehnquist was able to assemble a Court for [the greater/lesser] approach."); Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 604 (1996) ("The greater-includes-the-lesser reasoning, when relied upon to justify reducing constitutional protection of speech advocating commercial conduct to the level of protection afforded the conduct itself, is contradicted by constitutional text, theory and policy."); Jef I. Richards, *Clearing the Air About Cigarettes: Will Advertisers' Rights Go Up in Smoke?*, 19 PAC. L.J. 1, 31 (1987) (*Posadas* was not merely "*wrongly* decided," but "*poorly* decided"); Ronald D. Retunda, *The Constitutional Future of the Bill of Rights: A Closer Look at Commercial Speech and State Aid to Religiously Affiliated Schools*, 65 N.C. L. REV. 917, 928 (1987) (concluding that "[i]f the case really means that states can ban advertising in an effort to dampen demand for a legally offered product, then *Posadas* is another example of unprincipled decision-making"); *The Supreme Court, 1995 Term, Leading Cases*, 110 HARV. L. REV. 216, 222 (1996) [hereinafter *Leading Cases*] (*Posadas*'s reasoning was "misguided"); Symposium, *Commercial Free Speech in the Marketplace of Ideas*, 41 RUTGERS L. REV. 719, 739 (1989) (comments of Floyd Abrams) (disagreeing with argument "that because casino gambling could be banned, it therefore followed that the advertising of it could be banned" and stating that argument "is, simply and totally, an inversion of first amendment theory . . . [and] plain wrong"); *id.* at 731 (comments of C. Michael Carvin) ("The overwhelming response of the commentators and scholars was to denounce [Rehnquist's use of the greater/lesser] as plainly inconsistent with basic first amendment jurisprudence . . . ."); William Van Alstyne, *Quo Vadis*, Posadas?, 25 N. KY. L. REV. 505, 514-28 (1998); Brian J. Waters, Comment, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the* Central Hudson *Test for Commercial Speech*, 27 SETON HALL L. REV. 1626, 1639 (1997) (describing *Posadas* as "infamous"). Additional commentaries that also reject *Posadas*'s use of the greater/lesser, albeit somewhat less ardently, include ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 900-01 (1997); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 857-58 (1999); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV.

In only a short time, the Court came around to the prevailing scholarly view. It took a first step in that direction in the 1995 case of *Rubin v. Coors Brewing Co.*, which involved a challenge to a federal statute that, in order to prevent strength wars, prohibited beer labels from displaying the beer's alcohol content.[23] Two years earlier, in a challenge to federal statutes that prohibited broadcast of lottery advertising by radio broadcasters licensed to nonlottery states, the Court had pointedly refrained from addressing the issue. Having concluded that the statute passed the *Central Hudson* test, the Court in the earlier case, *United States v. Edge Broadcasting Co.*, had deemed it unnecessary to decide whether "the greater power to prohibit gambling necessarily includes the lesser power to ban its advertisement."[24] In *Coors Brewing,* in contrast, a unanimous Court determined that the labeling ban failed *Central Hudson.*[25] Relying on *Edge Broadcasting*, the government urged that the labeling ban should survive on the strength of *Posadas* notwithstanding *Central Hudson.* But the Court rejected this contention in a footnote, explaining merely that, although "*Posadas* did state that the Puerto Rico Government could ban promotional advertising of casino gambling because it could have prohibited gambling altogether . . . the Court reached this argument only *after* it had already found that the state regulation survived the *Central Hudson* test."[26]

The clear implication that the greater/lesser reasoning in *Posadas* was not only an alternative ground, but an incorrect one as well, was reinforced the following year in *44 Liquormart, Inc. v. Rhode Island*, in which the Court again unanimously invalidated a commercial speech regulation.[27] The Court's decision striking down a forty-year-old Rhode Island law that prohibited the advertisement of retail prices for alcoholic beverages is known mostly for the wide diversity of views it expressed regarding the proper test for regula-

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627, 648-49 (1990); Thomas W. Merrill, *The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising,* 93 NW. U. L. REV. 1143, 1173 (1999); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression,* 91 COLUM. L. REV. 334, 344-45 (1991); and David F. McGowan, Comment, *A Critical Analysis of Commercial Speech,* 78 CAL. L. REV. 359, 436-39 (1990).

23. 514 U.S. 476, 478-81 (1995).

24. United States v. Edge Broad. Co., 509 U.S. 418, 425 (1993).

25. *Coors Brewing,* 514 U.S. at 483-91. Justice Stevens agreed with this conclusion hut concurred separately to opine that the "commercial speech doctrine" was inapplicable because the regulation was not animated by concerns related "to the special character of commercial speech," and therefore should fail any standard of review. *Id.* at 491-92 (Stevens, J., concurring).

26. *Id.* at 482 n.2.

27. 517 U.S. 484, 515-16 (1996).

tions of commercial speech.[28] Just as interestingly, though, Justice Stevens took the opportunity to address the "elegant question" he had posed a decade earlier. Formally writing only for himself and Justices Kennedy, Thomas, and Ginsburg, Stevens explained "that the 'greater-includes-the-lesser' argument should be rejected for the . . . important reason that it is inconsistent with both logic and well-settled doctrine."[29] He concluded that "the entire Court apparently now agrees [that] the statements in the *Posadas* opinion [regarding the greater/lesser analysis] are no longer persuasive."[30]

Although this statement came in a part of the principal opinion that only three other Justices formally joined, it is consistent with both *Coors Brewing* and the fact that no other opinion in *44 Liquormart* even addressed the greater/lesser argument—an argument which, if correct, would have required upholding the challenged regulation. Accordingly, lower courts and commentators writing in the wake of *44 Liquormart* generally agreed that the greater/lesser doctrine was now dead.[31]

Any doubts that may have remained were put to rest by two commercial speech cases decided the very last week of the 2000 Term.[32] One case, *Lorillard Tobacco Co. v. Reilly*,[33] involved chal-

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28. In a part of the principal opinion joined by Justices Kennedy and Ginsburg, Justice Stevens intimated that prohibitions against truthful, nonmisleading advertising for a lawful product warranted strict scrutiny or something close to it. *Id.* at 501-04. In response, Justice O'Connor, joined by the Chief Justice and Justices Souter and Breyer, concurred specifically to remark on the inappropriateness of addressing "whether the test we have employed since *Central Hudson* should be displaced." *Id.* at 532 (O'Connor, J., concurring). Also without passing on the general validity of *Central Hudson*, Justice Thomas concurred to argue that a governmental interest in "keep[ing] legal users of a product or service ignorant in order to manipulate their choices in the marketplace . . . is *per se* illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial speech.' " *Id.* at 518, 523 n.5 (Thomas, J., concurring). Justice Scalia wrote separately to express sympathy with Justice Thomas's "discomfort" with *Central Hudson*, as well as doubt that, absent more briefing regarding historical practice, the Court had "the wherewithal to declare *Central Hudson* wrong—or at least the wherewithal to say what ought to replace it." *Id.* at 517-18 (Scalia, J., concurring). For a more detailed examination of *44 Liquormart*, see Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123.

29. *44 Liquormart*, 517 U.S. at 511.

30. *Id.* at 513.

31. *See, e.g.*, Greater New Orleans Broad. Ass'n v. United States, 149 F.3d 334, 341 (5th Cir. 1998) (Politz, C.J., dissenting), *rev'd*, 527 U.S. 173 (1999); Halberstam, *supra* note 22, at 785 n.58; Merrill, *supra* note 22, at 1173-75; Redish, *supra* note 22, at 599-604; Van Alstyne, *supra* note 22, at 521-28; *Leading Cases*, *supra* note 22, at 222.

32. *Lorillard Tobacco* bolstered the already growing perception that conservatives are more protective of commercial speech than are the liberals. *See, e.g.*, David G. Savage, *Figures of Speech*, A.B.A. J., Aug. 2001, at 30, 31 (citing statements by Professor Eugene Volokh). For previous statements, see, for example, David G. Savage, *The Shifting Sands of Free Speech*, A.B.A. J., Dec. 1996, at 42, 42-44 (1996); Frederick Schauer, *The Political Incidence of the Free Speech*

lenges to Massachusetts restrictions on tobacco advertising and therefore fell naturally within a family of commercial speech cases including *Posadas, Edge Broadcasting, Coors Brewing,* and *44 Liquormart.* Although the Court divided on the constitutionality of various state regulations of smokeless tobacco and cigar advertising, not a single Justice went so far as even to mention the greater/lesser thesis, if only to rebut it.[34]

That the greater/lesser approach has fallen out of the range of legitimate legal argument was dramatically reinforced by the 2000 Term's second major commercial speech decision, *United States v. United Foods, Inc.*[35] Four years earlier, in *Glickman v. Wileman Bros. & Elliot,* a 5-4 Court had upheld a federal rule that, as part of an elaborate scheme regulating the growing and marketing of California tree fruits, compelled growers, handlers, and processors to pay for generic advertising of the California fruits.[36] *United Foods* involved a similar forced assessment imposed on mushroom producers. This time, however, the compulsory advertising rule was not part of a more comprehensive regulatory scheme. One might think the constitutionality of the latter rule would follow a fortiori from the constitutionality of the former. The greater power to enact a system of regulation that includes minimum-price and maximum-output rules in addition to compelling payments for generic advertising would include the lesser power to enact a less intrusive scheme that included only the compelled payments for generic advertising. Instead, the *United Foods* Court struck down the advertising rule as a violation of mushroom growers' rights of commercial speech. The decision was six to three, Justices Stevens and Kennedy from the *Glickman* majority now joining the *Glickman* dissenters. Remarkably, though, neither Justice expressed doubt about his vote in the earlier case. Instead, in a striking inversion of

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Principle, 64 U. COLO. L. REV. 935, 941-42 (1993). As *Posadas* demonstrates, it was not always thus.

33. 533 U.S. 525 (2001).

34. The Court first held, 5-4, that Massachusetts's regulations of cigarette advertising were preempted by federal law. *Id.* at 540-51. A majority also held that, although the state's regulations of advertising for smokeless tobacco and cigars were not preempted, they violated the First Amendment. *Id.* at 566-67 (O'Connor, J.) (invalidating regulations under *Central Hudson*); *id.* at 570-71 (Kennedy, J., concurring); *id.* at 572-73 (Thomas, J., concurring) (invalidating regulations under strict scrutiny). The dissenters would have held the regulations not preempted and would have remanded for trial on the question whether the advertising regulations satisfied *Central Hudson*'s fourth prong. *Id.* at 590-91 (Stevens, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 590 (Souter, J., concurring in part and dissenting in part).

35. 533 U.S. 405 (2001).

36. 521 U.S. 457, 474-77 (1997).

the greater/lesser doctrine, each viewed the government's *failure* to impose the additional onerous restrictions on the mushroom growers that it had imposed on the fruit growers as a constitutionally aggravating factor.[37]

In sum, then, *Posadas*'s much-derided greater/lesser reasoning appears to have no hold on the present Court. Unfortunately, though, its death has not put commercial speech doctrine on a more secure footing. To the contrary, the prevailing view today, as it has been for decades, is that the Court's commercial speech jurisprudence is confused and unstable.[38]

This Article arises from a belief that the present unsatisfactory status of commercial speech doctrine and the flat rejection of the greater/lesser approach are related—in particular that the doctrine is in disarray largely *because* the Court and its commentators have been far too quick to dismiss the instinct, as applied to regulations of commercial advertising, that the greater does include the lesser. To be sure, this is not a logically valid deduction. But that does not mean it has no value as an inference. This Article will argue that, properly understood, it has an important role to play in the jurisprudence of commercial speech. Each of these two separate qualifications is important. First, the greater/lesser thesis has a role to play only when we correctly identify precisely what is the greater power, and what is the lesser. Second, even when properly understood, the greater/lesser argument has only *a* role to play; it is not dispositive. In other words, the critics of *Posadas* have erred in frequently misconstruing precisely *what* lesser power *Posadas* said flowed from the supposedly "greater power" to ban the commercial activity, whereas the *Posadas* majority erred in assuming that that lesser power *necessarily* followed.

The plan of this Article is as follows. Part I develops the affirmative case for *Posadas*. That is, it aims to show that the greater-includes-the-lesser intuition has substantial force as a justification for a ban on casino advertising. Part II reviews the most common objections to the Court's use of the greater/lesser rationale in *Posadas* and shows that they do not carry the weight the critics have claimed for them. Although the reasoning then-Justice Rehnquist explicitly employed is too broad—any implication that a "greater" power to ban an activity *necessarily* entails a "lesser" power to permit that activity while banning advertisements of it is false—the familiar criticisms do not substantially undermine the

37. *United Foods*, 533 U.S. at 414-16 (Kennedy, J.); *id.* at 417-18 (Stevens, J., concurring).

38. *See infra* note 240; *see also supra* note 28 (noting fractured opinions in *44 Liquormart*).

twin judgments that seemingly form the core of the majority's invocation of the greater/lesser argument. Those twin judgments are first, that the advertising ban was constitutional, and second, that it was constitutional in substantial part *because* Puerto Rico could have prohibited casino gambling. These two statements are probably true.

Having said enough to throw common wisdom about the greater/lesser approach into doubt, the Article pauses in Part III to identify the different sets of interests that speech regulations, "commercial" or otherwise, implicate—namely, interests of the speaker, the audience, and the citizenry. Although I think this is uncontroversial, making these interests explicit helps to structure the analysis. The task, I suggest, is to examine how the advertising ban at issue in *Posadas* affects these three sets of interests.

Speaker interests are considered first, in Part IV. The primary complaint a speaker might have is that he is *coerced* not to speak (or to speak). When the speech regulation is the lesser portion of a greater power to regulate or prohibit the speaker's conduct, however, it will often turn out not to be coercive. Contrary to the greater/lesser approach's most intemperate critics, that is a meaningful conclusion.

Contrary to its most uncritical supporters, however, it is not dispositive, because the fact that a given speech regulation is not coercive does not resolve whether it nonetheless violates constitutional interests held by the speaker's intended audience or by the citizenry as a whole. To simplify a bit, audience interests are chiefly measured on the dimension of regulatory effects: the audience's concern lies with how the governmental action affects the amount and character of communication to which they are exposed. In contrast, citizen interests are most prominently captured on the dimension of purpose: the systemic concern is that the government not act in order to suppress truthful information. Part V provides reasons why the advertising ban at issue in *Posadas* should not be held unconstitutional by reason of its effects, and Part VI does the same with respect to its purposes.

Part VII puts these pieces together to sketch out one way that doctrine could respond to these diverse interests—speaker, audience, and citizenry—and the corresponding three dimensions of constitutional violation—means, effects, and purposes. Having started by focusing on *Posadas* and the greater/lesser reasoning, this last part advances a surprising conclusion. A principal criticism of the Supreme Court's commercial speech jurisprudence is that there exists no coherent way to define the category of "com-

mercial speech" that, under *Central Hudson*, receives a reduced level of constitutional protection. Often, the conclusion is supposed to follow that restrictions of commercial speech should receive strict scrutiny, which would most often prove fatal. Part VII shows how a more nuanced, multipart test for content-based regulations of speech can result in significant latitude for government regulation of (some sorts of) commercial speech, even without requiring different doctrinal tracks. Put another way, if the argument of this Article is on target,[39] it turns out that *Posadas* is the key, not just to understanding any so-called vice exception to commercial speech jurisprudence,[40] but also to a wholesale abandonment of any separate doctrine for "commercial speech," married to a significant revision of the free speech doctrine that would then generally apply to commercial and noncommercial speech alike. Under that revision, regulations of speech that is related to a speaker's commercial interests would tend to face a less stringent burden of justification than regulations of speech that is not similarly related to the speaker's commercial interests. This disparity would arise, however, not because the doctrine assigns different value judgments to the two different sorts of speech, but because the regulations of the two sorts of speech will tend to assume different structures in ways made relevant by the logic of constitutional reasoning.

Due to the present political salience of the issue, one implication deserves mention up front: this revised doctrine would grant government broad constitutional authority to regulate, and even ban, advertising for tobacco products.[41] That is not a telos to which this partial rehabilitation of the greater/lesser thesis is directed. But it is a consequence—one that should be taken seriously.

I. *POSADAS* AND THE GREATER/LESSER ANALYSIS: THE AFFIRMATIVE CASE

Because the greater/lesser reasoning in *Posadas* is so widely, even fervently, condemned,[42] we are likely to gain a fresh perspective by striving to understand it sympathetically at the outset. This part develops that sympathetic reading. Its objective is to examine what can be said, not for the argument that the greater includes the

39. As will become apparent, one can accept this predicate without agreeing that, all things considered, *Posadas* was rightly decided.

40. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 513-14 (1996) (principal opinion) (rejecting a "vice" exception).

41. *See infra* text accompanying notes 289-94.

42. *See supra* note 22.

lesser as some abstract proposition of logic or law, but rather for its specific deployment in *Posadas* as a route to the conclusion that Puerto Rico's ban on casino advertising was constitutionally permissible. It is a testament to the surface plausibility of Rehnquist's intuition that the task is not difficult.[43]

Although the Court did announce (perhaps too cavalierly) that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling,"[44] that was not the entirety of its reasoning. Seeking to distinguish previous cases in which the Court had struck down regulations banning the advertising of condoms[45] and abortion services,[46] the majority explained further:

> [I]t is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing tbe demand through restrictions on advertising. It would surely be a Pyrrhic victory for casino owners such as appellant to gain recognition of a First Amendment right to advertise their casinos to the residents of Puerto Rico, only to thereby force the legislature into banning casino gambling by residents altogether. It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.[47]

As William Van Alstyne observed in a recent essay highly critical of *Posadas*, "[t]he straightforward idea here . . . might be thought to be so obvious, as hardly to be worth spelling out."[48] Nonetheless, Van Alstyne did proceed to spell it out, and did so in

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43. As Justice Stevens emphasized in his dissent, *see supra* text accompanying note 17, the actual Puerto Rico advertising ban raised concerns about vagueness, prior restraint, and discrimination against Puerto Rico residents that a flat ban on casino advertising might not. Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 359-63 (1986). To simplify discussion, the analysis that follows proceeds as though the regulation barred all casino advertising, or even all domestic casino advertising. *Cf. id.* at 349 (Brennan, J., dissenting) ("[E]ven assuming that appellee will now enforce [the regulations] in a nonarbitrary manner, I do not believe that Puerto Rico constitutionally may suppress truthful commercial speech in order to discourage its residents from engaging in lawful activity."). My undefended intuitions, though, are that the prior restraint and discrimination arguments are red herrings, and that worries about vagueness are legitimate, though almost certainly surmountable.

44. *Posadas de P.R. Assocs.*, 478 U.S. at 345-46.

45. Carey v. Population Servs. Int'l, 431 U.S. 678, 700-02 (1977).

46. Bigelow v. Virginia, 421 U.S. 809, 821-30 (1975).

47. *Posadas de P.R. Assocs.*, 478 U.S. at 346.

48. Van Alstyne, *supra* note 22, at 516. Although this Article cites to Van Alstyne's essay at various points, the readers should be aware that the published version of that essay contains several errors in editing. A corrected version of the essay is available from Professor Van Alstyne.

terms cogent enough to warrant being quoted at length. "[N]o one," he explained,

> is forced to get into the casino trade . . . and insofar as one understands that the legislature closely regulates this particular (prohibitable) trade in a certain way (including, as here, by providing that no advertising thereof is permitted by or on behalf of one who engages in that trade), one may conclude that, in light of the restriction, it is not worthwhile, that is, that one would be better off pursuing some other line of business (namely, one not subject to this particular restraint). And so one is perfectly free to do. What one may not do, however, is to suppose that one may take up the business of the casino trade, and then simply disregard one of the clearest restrictions of all: namely, that while engaged in this trade, one will abstain from all advertising related thereto. Given that this is a business the legislature could forbid outright, if one nevertheless wants to pursue what one thinks may well be a lucrative business notwithstanding the restrictions, one is welcome to do so. But when, as here, it is a business the legislature could altogether forbid, to quote Justice Rehnquist (from still a different case), "a litigant in the position of the appellee must take the bitter with the sweet."[49]

Maybe the argument ultimately fails, as Van Alstyne himself argues.[50] But it would be ungenerous, perhaps disingenuous, to deny that Rehnquist has made out a rather plausible prima facie case. As another critic of the greater/lesser reasoning acknowledged in a pre-*Posadas* article, "[t]he durability of the argument that the greater includes the lesser is a tribute to its prima facie intuitive appeal. Even defenders of the unconstitutional conditions doctrine have been apologetic in their criticism of the argument."[51]

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49. *Id.* at 516-17 (quoting Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974) (plurality opinion)). Rehnquist's position in *Arnett* was that government was not obligated to provide any procedural due process protections for public employees beyond the procedures that it established when creating the job at issue. 416 U.S. at 163-64. A majority of the Justices rejected that analysis in *Arnett* itself and formally repudiated it in *Cleveland Board of Education. v. Loudermill*, 470 U.S. 532, 540-48 (1985).

50. Although Van Alstyne dismisses the greater/lesser as employed in *Posadas*, he had endorsed a different instantiation of the argument elsewhere. The case of *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), involved a challenge to a municipal ordinance that barred commercial newsracks while permitting noncommercial ones. A majority of the Court, in an opinion by Justice Stevens, applied the *Central Hudson* test and held the policy unconstitutional. *See id.* at 416-31. Chief Justice Rehnquist dissented, objecting that the decision "places the city in the position of having to decide between restricting more speech—fully protected speech—and allowing the proliferation of newsracks on its street corners to continue unabated. It scarcely seems logical that the First Amendment compels such a result." *Id.* at 445 (Rehnquist, C.J., dissenting). Van Alstyne agreed with the dissent, noting that "[i]t not only 'scarcely seems logical,' but scarcely seems credible (i.e., plausible)." William Van Alstyne, Essay, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1642 n.24 (1996). To be sure, Van Alstyne's acceptance of Rehnquist's use of the greater/lesser in *Discovery Network* is not logically incompatible with his rejection of Rehnquist's use of the greater/lesser in *Posadas*. The two forms of the greater/lesser are not the same. *See infra* note 130. Nonetheless, one would have hoped for some mention of the precise grounds upon which Van Alstyne would effect the reconciliation.

51. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1310 (1984). Professor Kreimer goes on to argue that "[s]uch

Indeed, the case for *Posadas* becomes more plausible still once one considers the history behind the 1948 legislation that simultaneously legalized casino gambling in Puerto Rico and barred its advertisement to local audiences.[52] As it happened, various Puerto Rico interests, including hoteliers and others in the tourist industry, had lobbied strenuously for the legalization of casino gambling for decades. During this time polls continually reflected that a substantial majority of Puerto Ricans opposed casino legalization for a variety of reasons. Some opponents, for example, expressed fear that casinos would bring organized crime, prostitution, and other evils in their wake. Others, believing that gambling was simply immoral, refused to concede that the fact that Puerto Rico already permitted some of its forms justified making the affirmative decision to cater further to this vice. Still others argued that casino gambling was worse than traditional Puerto Rican forms of gambling, such as cockfighting, because they believed it would prove seductive to more people and more likely to be addictive. They also speculated that the actual mechanics of casino gambling made it especially easy for players to lose large sums of money in short periods of time. Remaining critics objected that casinos would siphon off gambling dollars that otherwise would be spent on the official lottery for the benefit of public schools. Faced with this strong and consistent opposition, the casino movement failed ever to garner more than limited legislative support.

In 1947, however, the Puerto Rico Hoteliers Association conceived the idea of promising not to engage in any domestic casino advertising if casinos were legalized. Working through sympathetic sponsors in the legislature, they drafted a bill that would permit applicants to operate gambling casinos on the condition that they

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deference is unwarranted, for . . . the argument in defense of government's unbridled prerogative to condition allocations is deeply flawed." *Id.* Note, though, that at this stage we need not examine whether government's power to condition benefits that it may withhold is "unbridled," for nothing depends upon that being true. Our narrow concern here is whether greater-includes-the-lesser reasoning has argumentative weight on the facts of *Posadas*. In that respect, it is worth reconsidering views expressed by Laurence Tribe. Although Professor Tribe was unambiguously critical of *Posadas*'s use of the greater/lesser, *see* TRIBE, *supra* note 22, at 902-04, he did observe in a footnote that "the proposition that, where a state has determined that an activity is intrinsically harmful and should be stopped but would be too impractical or intrusive on privacy to ban altogether, the state may choose to ban advertising that would directly encourage the activity to go on" constitutes a "plausible basis for reconciling *Posadas*" with *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) ("*Virginia Pharmacy*"), an earlier case that had invalidated a state ban on the advertising of pharmaceutical prices. *See id.* at 904 n.92; *see also Symposium*, *supra* note 22, at 735 (comments of C. Michael Carvin).

52. *See infra* note 53 and accompanying text.

not advertise (and so long as they satisfied various other eligibility criteria). At the same time, associations representing the tourism industry mounted a media blitz designed to sway public opinion. The theme was to concede legitimacy to many of the expressed concerns, while urging that the advertising ban would effectively meet them. The media campaign proved successful, tipping popular support in favor of casino legalization and winning the bill a bare majority of votes in the Puerto Rico legislature. This bill became the law challenged over thirty years later in *Posadas*.

In truth, I have made up this story. But it *could* have happened like this. For all I know, perhaps it did.[53] Whether historical fact or fancy, however, merely being able to imagine a process like this should reinforce the intuition that Puerto Rico's power to ban casinos entirely ought to include the power to permit them on the condition that they not advertise. For one thing, the potentially Pyrrhic character of the outcome the casino sought in *Posadas* appears rather more profound than the Court conveyed. The Puerto Rico legislature might choose, not just to "ban[ ] casino gambling by residents altogether," but to order the casinos to close shop completely.[54] And while public choice theorists might suspect that, decades into the casino experiment, this is not really a live option, it would be a bizarre doctrine under which the casino operators' constitutional claims grow in strength in proportion to the amount of time they wait to press them.[55] Finally, no matter what the Puerto Rico legislature's response, striking down the advertising restrictions could well prove Pyrrhic for casino interests elsewhere, for the

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53. And, in fairness, whether it did might be relevant to a full-bore equitable analysis—at least if the complaining casino had been party to the original deal. It is not clear, though, that a sensible constitutional doctrine designed to cover a large number of commercial speech cases ought to depend upon the results of a legislative history inquiry of this sort. Note, accordingly, that the prominent criticisms of *Posadas* examined in Part II would appear to dismiss this history, even if true, as constitutionally irrelevant.

54. Donald Lively seems to misunderstand the Court's point when objecting that its reference to Pyrrhic victories "is misleading" because "[t]he first amendment has never been read to safeguard advertisement of an illegal activity or false or misleading expression." Lively, *supra* note 22, at 299 n.64.

55. Even if the critical factor is not the passage of time per se, but rather a change in prediction due to the entrenchment that comes as a consequence of time's passage, much more needs to be said in order to establish that predictions concerning how the government would in fact respond to disallowance of the advertising restriction are constitutionally significant. Unconstitutional conditions theories that turn on "predictive baselines," *see* Kreimer, *supra* note 51, at 1351-96; Kenneth W. Simons, *Offers, Threats, and Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 289, 311-17 (1989), have generally been thought inadequate. *See* Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 13-14 (2001) (citing criticisms); *id.* at 46 n.168 (explaining how my approach to coercion compares to the predictive-baseline analysis).

result would be to preempt their efforts in other noncasino states to propose just this sort of compromise to avoid an outcome—the continued prohibition of casino gambling—that all relevant parties might conceivably agree is socially suboptimal. Rejecting the greater/lesser rationale, in other words, would have had the effect of making a casino's First Amendment right to advertise effectively unwaivable: any purported waiver of a right to advertise as a condition for receiving a casino license would be unenforceable. To be sure, that could be the correct reading. But it would be that outcome—not the one Rehnquist engineered—which should strike us as the more remarkable.

II. THREE COMMON OBJECTIONS

Part I demonstrated that the greater-includes-the-lesser intuition has enough force as applied to the facts of *Posadas* to shift the argumentative burden to its critics. Given all the scorn heaped upon that case, one might suppose that its critics have marshaled numerous and powerful counterarguments. In fact, almost all of the criticisms in the scholarly literature fall into one of two categories:[56] first, that the greater/lesser reasoning does not apply because a speech ban is actually more intrusive than the corresponding conduct ban; and second, that the greater/lesser reasoning proves too much, for it would allow the state to ban all commercial advertising.

This part examines each of these arguments. Before doing so, though, it briefly addresses another objection frequently leveled

56. A third common charge is that the majority misapplied *Central Hudson*—the principal complaint Justice Brennan had voiced in dissent. *See supra* notes 10-13 and accompanying text; *see, e.g.*, Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 488-91 (1992); Kurland, *supra* note 18, at 6-12; Lively, *supra* note 22, at 300-03; Ricbards, *supra* note 22, at 23-29; Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1182 n.1 (1988); Albert P. Mauro, Jr., Comment, *Commercial Speech After* Posadas *and* Fox: *A Rational Basis Wolf in Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931 *passim* (1992). *But see* John M. Blim, Comment, *Free Speech and Health Claims Under the Nutritional Labeling and Education Act of 1990: Applying a Rehabilitated* Central Hudson *Test for Commercial Speech*, 88 NW. U. L. REV. 733, 751-57 (1994) (concluding that *Posadas* is largely consistent with *Cental Hudson*). I will put this charge aside because its force depends upon assuming what, in a very real sense, is precisely in issue—namely, whether *Central Hudson* is the appropriate test for regulations of commercial advertising. Put another way, we have just seen that *Posadas*'s use of the greater/lesser has strong intuitive force. If we cannot show why the greater/lesser argument fails for reasons that do not depend upon acceptance of contingent Court-created doctrine (and doctrine of recent vintage at that), then any inconsistency between the result in *Posadas* and the *Central Hudson* test is more likely to indict the latter than the former.

against greater/lesser reasoning, even though it has not played a prominent role in the literature on *Posadas* in particular. The contention, in short, is that the greater includes the lesser fails deductively: greater powers do not always include the lesser. This part demonstrates that, alone or collectively, these criticisms utterly fail to demonstrate that *Posadas* erred in concluding that the greater/lesser analysis warrants upholding the ban on casino advertising.

A. The Greater Does Not Necessarily Include the Lesser

Consider first the Court's assertion that "the greater power to completely ban casino gambling *necessarily* includes the lesser power to ban advertising of casino gambling."[57] As Brooks Fudenberg has observed, it is not clear what to make of this claim, for it

> may be an extremely narrow argument—i.e., one specific power *A* includes another specific power *B*. To the extent the argument is case-specific (this specific power includes this other specific power), it is difficult to refute by either analogy or general principles (to show that *Q* does not include *R* does not disprove a claim that *S* includes *T*). To the same extent, however, the argument is then "tautological." (That is, if *Q* includes *R* because I say it does, and not for any reasons broader than that, my argument lacks substance.)[58]

For this reason, "[t]he hard questions concern an argument meant as something broader than that, and yet less broad than 'all powers to deny include all powers to condition.' "[59]

The most plausible reading, I think, is something like this:

(1) greater powers necessarily include lesser powers;
(2) the power to ban casinos is greater than the power to ban advertising of casinos;
(3) therefore, the power to ban casinos includes the power to ban advertising of casinos.

The conclusion follows from the premises. Therefore, if this is the implicit structure of Rehnquist's argument, a critic is compelled to deny either premise (1), or premise (2), or both.

The obvious move is to deny the major premise. And, in fact, the logical invalidity of the claim that greater powers necessarily

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57. *See supra* text accompanying note 9 (emphasis added).

58. Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 435 n.245 (1995). Much of my argument in this section draws on Fudenberg's astute analysis. *See id.* at 432-41.

59. *Id.* at 435 n.245.

entail lesser ones has long been established.[60] But, as many commentators have remarked, so what? Consider John Garvey's argument designed to illustrate that the deduction fails: "If I can lift 100 pounds, it does not logically follow that I can lift fifty pounds. (Perhaps my muscles only respond to big challenges.)" This is true but, as Garvey noted, "not very satisfactory."[61] Imagine that, having just seen me move a heavy sofa, you ask for my assistance in moving a chair. Were I to object that your request was predicated on a logically invalid inference, you'd no doubt think me a jackass: in assuming I had the power to help, you were not relying on logical deduction, but on your experience of how the world (including human physical capacities) tends to work. And if I then refused, I venture you would feel pretty confident in attributing my failure to help to unwillingness, not inability.

The point, of course, is that Rehnquist does not need the claim of necessity.[62] As Justice Holmes, one of the great judicial proponents of the greater/lesser approach,[63] said when upholding a state law that, instead of prohibiting the sale of alcohol statewide, left the issue for local determination under procedures that favored prohibitionists: "It is true that the greater does not always include the less. . . . But in general the rule holds true, and it does here."[64] Following Holmes, Rehnquist could reformulate the syllogism as follows:

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60. The deduction was first disproved in Thomas Reed Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99, 106-12 (1916). Other worthwhile contributions to the literature include, in addition to those otherwise cited in this section, Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 238-49; Robert M. O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CAL. L. REV. 443, 456-63 (1966); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1428-56 (1989); Peter Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 745-53 (1981); Peter Westen, *The Rueful Rhetoric of "Rights,"* 33 UCLA L. REV. 977, 1010-18 (1986); and John D. French, Comment, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234, 236-48 (1961).

61. John H. Garvey, *The Powers and the Duties of Government*, 26 SAN DIEGO L. REV. 209, 215-16 (1989).

62. *See* Fudenberg, *supra* note 58, at 434 & n.244.

63. Holmes's attraction to this argument is discussed in Kreimer, *supra* note 51, at 1306-14 and Sullivan, *supra* note 60, at 1459-60.

64. Rippey v. Texas, 193 U.S. 504, 509-10 (1904); *see also* United States v. O'Neil, 11 F.3d 292, 296 (1st Cir. 1993) ("The principle that the grant of a greater power includes the grant of a lesser power is a bit of common sense that has heen recognized in virtually every legal code from time immemorial."); Kreimer, *supra* note 51, at 1311 n.54 ("Although . . . writers have demonstrated that the greater and lesser argument fails deductively, the argument is not left without any force; it may work inductively or as a persuasive analogy. Such forms of reasoning, though invalid in formal logic, predominate in legal and practical argument.").

(1') there is a strong presumption that a greater power includes its lesser powers;
(2) the power to ban casinos is greater than the power to ban advertising of casinos;
(3') therefore, there is a strong presumption that the power to ban casinos includes the power to ban advertising of casinos.

This syllogism, like the first, is logically valid. Moreover, it seems entirely consistent with the way we sought to rehabilitate *Posadas* in Part I, for that discussion did not seek to rely on logical deduction. That is, it did not endeavor to prove that the greater/lesser reasoning is always true or even ordinarily true. It simply demonstrated that there is a strong intuition behind its use in *Posadas*.[65]

Now, how is the critic to respond? Professor Garvey's hypothetical makes premise (1') look secure. Consequently, the critic has two options: to attack the conclusion by denying premise (2) (perhaps the power to ban casinos is *not* greater than the power to ban their advertising), or to accept the conclusion but provide reasons why the presumption is overcome. Because talk of "greater" and "lesser" powers in this context is just metaphorical, however, these two moves amount to the same thing: the same reasons can be advanced for believing either that the conduct ban is not "greater" than the advertising ban *in the relevant sense* or that, although the conduct ban *is* greater, it does not "include" the advertising ban. All depends upon whether the reasons are persuasive.

B. The Conduct Ban Is Not Less Intrusive

The first effort to rebut the *Posadas* majority's use of the greater/lesser analysis—once that argument is softened to abandon claims of logical necessity—comes from Justice Brennan's *Posadas* dissent. Although Brennan concentrated his fire on the majority's application of the *Central Hudson* test, he did not entirely ignore the majority's use of the greater includes the lesser. Responding directly to the pivotal passage quoted earlier,[66] he disagreed "that a ban on casino advertising is 'less intrusive' than an outright prohibition of such activity. . . . Thus, the 'constitutional doctrine' which

65. The strategy of this Article, then, follows that set forth in Daniel Hays Lowenstein, *"Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1205-08 (1988), where Professor Lowenstein advocates an inductive, rather than deductive, approach to assessing the Court's commercial speech cases.

66. *See supra* text accompanying note 47.

bans Puerto Rico from banning advertisements concerning lawful casino gambling is not so strange a restraint—it is called the First Amendment."[67]

Influential commentators have approved this response.[68] I find it rather too condensed to be helpful. After all, the First Amendment's Free Speech Clause is notoriously vague. The question is whether it should be *interpreted* to forbid states from banning advertising of an activity that they could prohibit. Without providing a reason *why* the advertising ban is not less intrusive than the corresponding conduct ban that does not depend merely upon citing the First Amendment itself, Brennan's argument borders on the circular.

The root idea behind Brennan's somewhat cryptic charge, however, has been fleshed out by others. David Strauss, for example, explains that

> a lie—and, by extension, a manipulative restriction on access to information—is a different kind of affront from outright coercion. . . . For the government to frustrate the desire to gamble . . . is different from the government manipulating the flow of information so that some people who would otherwise have developed that desire never do so. Which imposition is worse may depend on the facts of the specific case. But the restriction on information imposes a different *kind* of control on people. Tbat is enough to answer the "greater includes the lesser" argument.[69]

Well, yes and no. It is enough to answer the argument that the power to ban casino gambling necessarily includes the power to ban casino advertising.[70] But that we already knew. It is not enough to answer the revised claim that the (greater) power to ban casinos should *as a legal matter* be held to include the (lesser) power to ban casino advertising. Strauss acknowledges, after all, that "[w]hich imposition is worse may depend on the facts of the specific case." And on the facts of *this* case, that a ban on casino gambling would be the more intrusive seems very hard to deny. This is because a legislative prohibition of casino gambling is not truly an alternative to a legislative prohibition of casino advertising. Rather, as a prac-

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67. Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 355 n.4 (1986) (Brennan, J., dissenting).

68. *See, e.g.*, TRIBE, *supra* note 22, at 903 (commenting that Brennan's retort "is only slight exaggeration").

69. Strauss, *supra* note 22, at 359-60.

70. *Cf.* Lynn A. Baker, *The Missing Pages of the Majority Opinion in* Romer v. Evans, 68 U. COLO. L. REV. 387, 391-92 (1997) ("The most common critique of greater-includes-the-lesser arguments is that the two types of state action being compared are not a 'greater' and a 'lesser' variant of the same power but are qualitatively different powers."). For thoughtful reactions to this sort of argument, see generally Fudenberg, *supra* note 58, at 448-54.

tical matter, actual imposition of a gambling ban encompasses an advertising ban.[71]

There are two reasons. First, the Court has held that the First Amendment does not foreclose the government from prohibiting advertisements for illegal activities,[72] a premise with which even *Posadas*'s critics appear to agree.[73] Second, even if the Court is wrong on this, there is little if any reason to advertise products or services that are illegal to provide.[74] Consequently, if the state were to ban casino gambling, it would essentially ban gambling *and* advertising about gambling. So to insist that a ban on advertising is more intrusive than a ban on gambling is not to the point. Surely a ban on casino advertising is not more intrusive than a compound ban on casino gambling as well as casino advertising. Put in Strauss's terms, the greater power to ban casino gambling *both* "frustrate[s] the desire to gamble . . . [and] manipulat[es] the flow of information so that some people who would otherwise have developed that desire never do so."[75] Therefore, the fact that advertising bans create a different type of intrusion does not provide a weighty reason against Rehnquist's argument that, because Puerto Rico could ban casinos, considerations of type and magnitude of intrusion still suggest that Puerto Rico should be able to permit casinos on the condition that they not advertise.

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71. *See,* Fudenberg, *supra* note 58, at 460. Indeed, the whole of Fudenberg's solution to the unconstitutional conditions problem follows from conceding that a casino advertising ban is "included" within a casino gambling han in this sense, but then arguing that this inclusion is all but irrelevant for constitutional purposes:

> [T]he only answer is that, where the government seeks to separate powers along constitutionally suspect lines, heightened scrutiny should be required. . . . Thus, where the government seeks to separate the lesser power to deny speech rights (as in *Posadas*) . . . heightened scrutiny should be required. The focus is not on the greater power, nor on the lesser, but on the separation of that lesser.

Id. at 463-64. Unfortunately, despite his very cogent criticisms of the greater/lesser literature, this proposed solution does not succeed. For one thing, Fudenberg's solution has the ring of ipse dixit about it. This is *his* answer, but why the *only* one? More fundamentally, even as only one *possible* answer, it is not a very persuasive one, for the result would be heightened scrutiny in *every* "unconstitutional conditions" case—which would require a striking reconfiguration of constitutional law. *See, e.g., infra* text accompanying notes 135-37.

72. This is made clear by *Central Hudson*'s first prong. *See supra* note 7; *see also* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973).

73. *See, e.g.,* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 436 n.4 (1993) (Blackmun, J., concurring).

74. *See, e.g.,* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 208 (1993). We can imagine counterexamples—a manufacturer might advertise an illegal product as part of a campaign to make it legal—but they would be the exception, not the rule.

75. *See supra* text accompanying note 69.

As an implicit, perhaps subconscious, concession to this point, most critics of the greater/lesser argument as a justification for commercial speech regulation couch their counterargument slightly differently. Representative is the reasoning Justice Stevens advanced when, in *44 Liquormart,* he came to revisit the question he had tabled in his *Posadas* concurrence:

> Although we do not dispute the proposition that greater powers include lesser ones, we fail to see how that syllogism requires the conclusion that the State's power to regulate commercial activity is "greater" than its power to han truthful, nonmisleading commercial speech. Contrary to the assumption made in *Posadas*, we think it quite clear that hanning speech may sometimes prove far more intrusive than banning conduct. As a venerable proverb teaches, it may prove more injurious to prevent people from teaching others how to fish than to prevent fish from being sold. Similarly, a local ordinance banning bicycle lessons may curtail freedom far more than one that prohibits bicycle riding within city limits. In short, we reject the assumption that words are necessarily less vital to freedom than actions, or that logic somehow proves that the power to prohibit an activity is necessarily "greater" than the power to suppress speech about it.[76]

Justice Stevens was entirely right to "reject the assumption that words are necessarily less vital to freedom than actions, or that logic somehow proves that the power to prohibit an activity is necessarily 'greater' than the power to suppress speech about it." And yet this rejection has no bearing on the propriety of the greater/lesser analysis as it applied to *Posadas* (or to *44 Liquormart* for that matter). The governments of neither Puerto Rico nor Rhode Island had claimed that the greater power to ban an activity—casino gambling or alcohol sales, respectively—entailed the lesser power to ban speech "about" that activity. They claimed that the greater power to ban the activity entailed the lesser power to permit it on the condition that those who engage in the activity not advertise it. Consequently, it is wholly unwarranted to attribute to the *Posadas* majority "the assumption . . . that banning speech [cannot] prove far more intrusive than banning conduct." What Rehnquist had characterized as less intrusive than a conduct ban was an *advertising* ban.[77] He nowhere said that a ban on *nonadvertising* speech "about" casino gambling was less intrusive than a ban on the underlying conduct, nor did he so much as hint that such a ban would be constitutional for any other reason. Tellingly, Stevens was markedly more careful in his *Posadas* dissent than he was in

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76. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 511 (1996). Notice that, although he ultimately disagrees with the greater/lesser analysis of *Posadas,* in one respect Stevens conceded to that approach more validity than it deserves: as a "syllogism," "the proposition that greater powers include lesser ones" fails.

77. *See supra* text accompanying note 47.

44 Liquormart. In the earlier opinion he more accurately described the "elegant question" that the majority answered (but that he did not) as "[w]hether a State may ban all advertising of an activity that it permits but could prohibit."[78] If that is the question—as indeed it was—then his ruminations about how speech in general can prove more valuable than conduct (and, concomitantly, on how bans on teaching people to fish or bicycle are more intrusive than bans on fishing or bicycling)[79] do not entail any conclusions about the greater/lesser reasoning as it was implicated in *Posadas*.

The importance of this point can hardly be overstated, for in devastating a form of the greater/lesser argument that relies on an entirely different "lesser power" than is contemplated in *Posadas*, Justice Stevens's plurality opinion in *44 Liquormart* stands in crowded company. Martin Redish, one of the more dedicated *Posadas* detractors, puts his argument this way:

> The fallacy of the greater-includes-the-lesser rationale as a justification for speech suppression can be demonstrated by examining its conceivable application in the noncommercial speech context. Government clearly has the power to prohibit attempts at violent overthrow; indeed, it actually has prohibited such conduct, by making it criminal. Yet the Supreme Court has nevertheless extended substantial First Amendment protection to the advocacy of violent overthrow. Under the greater-includes-the-lesser reasoning, of course, the government's "greater" power to suppress the conduct of violent overthrow would logically subsume within it the supposedly "lesser" power to suppress advocacy of that conduct. Thus, First Amendment doctrine has long been shaped on a rejection of the overly simplistic logic of the greater includes the lesser. While one might seek to distinguish reliance on this precept in the realm of commercial speech regulation from its use in the noncommercial speech context, no reason exists to believe that the logic is somehow more compelling as a rationale for commercial speech regulation than for noncommercial speech regulation. Either one proceeds on the assumption that government's power to prohibit conduct subsumes within it the power to prohibit advocacy of that conduct, or one rejects such reasoning. The commercial nature of the expression in no way increases the force of this logic. Hence, attempts to rely on the greater-includes-the-lesser rationale are just as unacceptable as a justification for commercial speech regulation as when used to rationalize noncommercial speech regulation.[80]

Professor Redish might be right that "[e]ither one proceeds on the assumption that government's power to prohibit conduct subsumes within it the power to prohibit advocacy of that conduct,

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78. *44 Liquormart*, 517 U.S. at 359 (Stevens, J., dissenting).

79. For different criticisms of these examples, see Merrill, *supra* note 22, at 1173 n.108.

80. Redish, *supra* note 22, at 600. He advanced essentially the same point some years earlier. *See* Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433, 1441 (1990); *see also* Redish, *supra* note 22, at 616 ("[T]he Court in *Posadas* employed the highly dubious reasoning that the greater power to regulate conduct logically includes within it the lesser power to regulate advocacy of that conduct.").

or one rejects such reasoning. The commercial nature of the expression in no way increases the force of this logic." But as far as *Posadas* is concerned, he, like Justice Stevens, is attacking a strawman—the very same strawman assailed time and again in the literature.[81] Suppose, for example, that Puerto Rico had barred the local news media from covering the casinos or from running editorials "advocating" that residents patronize the casinos because casino gambling is more humane than cockfighting and pays out at a higher rate than the lottery. Under the *44 Liquormart*/Redish characterization of *Posadas*, that Court would have upheld the ban as a lesser power entailed by the state's greater power to prohibit casinos entirely. But nothing in *Posadas* suggests that would be so. These arguments, therefore, have no bearing on the precise structure of the greater/lesser rationale as used in *Posadas*. Put another way, because Rehnquist was referring to one type of "speech about" an activity—namely, advertising—critics have not demonstrated that the power to regulate *that* type of speech does not follow from the power to regulate the activity in question just by showing that *other* types of speech about the activity cannot be regulated, so long

81. *See, e.g.*, Kozinski & Banner, *supra* note 22, at 649 n.74 (contending, *pace Posadas*, that "it is not clear that the power to regulate a specific economic activity necessarily comprises the power to regulate speech about that activity"); Law, *supra* note 22, at 938 ("Justice Rehnquist's claim that the state can suppress speech advocating conduct that it could prohibit is flatly inconsistent with a settled body of First Amendment jurisprudence that protects speech that advocates prohibited actions."); Neuborne, *supra* note 22, at 37 ("Justice Rehnquist's argument in *Posadas* that it is a lesser intrusion into human behavior to ban speech about an activity than to ban the activity itself is wrong."); *cf.* McGowan, *supra* note 22, at 437 ("The government's 'greater' power to control the conduct of elections and counting of ballots never would be construed to include the 'lesser' power to regulate speech made in contemplation of an election.").

It is noteworthy that this error does not appear in an important early article—which predated and was cited by the *Posadas* majority, *see* 478 U.S. at 340 n.7—that had argued against extending First Amendment protection to commercial speech. Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979). Like Rehnquist following them, the lesser power Jackson and Jeffries refer to, *see id.* at 34-36, is only the power to ban "advertising," not the power to ban other types of communication relating to the commercial transaction. Indeed, insofar as Jackson and Jeffries endorse the Supreme Court's definition of advertising as "speech that does 'no more than solicit a commercial transaction,' " *id.* at 34 (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 762, which itself quoted *Pittsburgh Press Co. v. Commission on Human Relations*, 413 U.S. 376, 385 (1973)), the lesser power they envision may be even narrower than the lesser power I discuss here. In fact, I think that the structure of their argument—which depends upon the state's power to prohibit solicitations for illegal transactions—requires that they do rely on that narrow definition. Consequently, what their use of the greater/lesser argument does not appear to accommodate, but mine does, is an outcome in which the state could bar Phillip Morris from running advertisements that declare, "Smoke Marlboros. Be Happy," even though the clear and present danger test of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), would protect the company were it to urge instead, "Smoke Marijuana. Be Happy."

as there exists a principled basis upon which to distinguish the two types of speech. If such a basis exists,[82] then no argument advanced in this section rebuts the greater/lesser analysis as it was employed in *Posadas*.[83]

C. The Greater/Lesser Analysis Produces Absurd Results

Perhaps the most widely espoused criticism of *Posadas* relies upon a reductio ad absurdum advanced first, and most forcefully, by Professor Kurland. "If the activity was subject to government ban but was not banned," he explained,

> advertising of that activity could be subject to ban, because advertising was only a lesser included part of the whole activity. The grossness of this perversion of First Amendment law may be realized through the recognition that, since the death of "substantive due process," there is almost no area of economic activity which is not subject to government regulation. Presumably, then, under *Posadas*, there is no advertising that is not subject to government censorship.[84]

To put the point another way, if the greater/lesser argument is right, it would entirely supplant *Central Hudson* as the test governing regulations of commercial advertising.[85] Unpacked, the argument runs like this:

(1) *Posadas* relies upon the proposition that the state should be allowed to ban advertising of whatever activity it could ban outright;
(2) the state is allowed to ban almost any commercial activity;

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82. As the coercion analysis undertaken in Part IV will make clear, it does.

83. To reiterate, I am referring to the greater/lesser argument as used in *Posadas* with the qualification that any references to logical or legal necessity are dropped. *See supra* text accompanying notes 64-65.

84. Kurland, *supra* note 18, at 13; *see also, e.g.*, Fried, *supra* note 22, at 43 n.190 ("Because, after the rejection of Lochner, the legislature might forbid virtually any activity not independently covered by a constitutional protection (say, abortion services), the *Posadas* principle would have effectively eliminated the protection of commercial speech."); Kozinski & Banner, *supra* note 22, at 649 n.74; Lively, *supra* note 22, at 300; Mary B. Nutt, *Trends in First Amendment Protection of Commercial Speech*, 41 VAND. L. REV. 173, 205 (1988); Redish, *supra* note 80, at 1441; Van Alstyne, *supra* note 22, at 521 n.52; Steve Younger, Comment, *Alcoholic Beverage Advertising on the Airwaves: Alternatives to a Ban or Counteradvertising*, 34 UCLA L. REV. 1139, 1172 (1987).

85. *See, e.g.*, P. Cameron DeVore, Posadas de Puerto Rico v. Tourism Company of Puerto Rico*: The End of the Beginning*, 10 HASTINGS COMM. & ENT. L.J. 579, 580 (1988) (arguing that *Posadas* "simply cannot be squared with *Central Hudson*"); Rotunda, *supra* note 22, at 925 (arguing that "*Posadas* cannot mean that the government has tbe power to ban all advertising for a product or service if the government also has the power to make the product or service illegal" because such a reading "would overrule *Central Hudson*"); Schauer, *supra* note 56, at 1182; *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 173 (1986).

(3) therefore, *Posadas* would permit the state to ban advertising of almost any commercial activity;
(4) therefore, *Posadas* is wrong.

But if this is the structure of the argument, at least three possible moves are open to those who would resist the final conclusion. First, and most conspicuously, proponents of this argument tend to provide little reasoning to move from conclusion (3) to conclusion (4); that the consequence *Posadas* entails *is* absurd is assumed to be self-evident. One response, then, is simply to affirm that, constitutionally speaking, "there *is* no advertising that is not subject to government censorship." Indeed, for thirty years the Supreme Court construed the "freedom of speech" protected by the First Amendment as not to encompass commercial advertising.[86] Perhaps, in short, *Central Hudson ought* to be abandoned. That the states are constitutionally free to regulate or ban advertising does not, after all, mean that they would do so.

Although this is the most obvious move, it is not one I prefer to endorse. I am willing to assume, arguendo, that conclusion (3) is unacceptable, and hence would, if true, entail conclusion (4). But conclusion (3) is itself vulnerable in two respects. First, the absurdity of conclusion (3) might be attributable to premise (2). This is Richard Epstein's position: "[T]his larger problem, and the horribles it suggests, would disappear if we returned to the older cases on occupational freedom requiring the state to show a strong justification before banning any ordinary commercial activity."[87] In other words, that the second premise is an accurate statement of constitutional doctrine at the turn of the twenty-first century does not compel one to accept that it is correct.

The second route to challenging conclusion (3) runs through premise (1). There is no question that this premise finds support in language from the majority opinion. Rehnquist thought it "a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising."[88] But, of course, the result in *Posadas* does not depend upon such a doctrine, despite its

86. For a very brief review of the history, see *infra* notes 111-18 and accompanying text. More comprehensive histories of commercial speech jurisprudence appear in many places. A fine recent summary is Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 58-72 (1999).

87. EPSTEIN, *supra* note 74, at 210.

88. *See supra* text accompanying note 47.

apparent strangeness, *never* holding true. It depends only upon the claim that, because the legislature is constitutionally authorized to ban *casino gambling*, it may permit the gambling but forbid the stimulation of demand for such gambling through advertising. To be sure, one might worry that there is no principled way to maintain this proposition without at the same time affirming the broader proposition—premise (1)—upon which Kurland's reductio ad absurdum relies. But this worry ought not be overstated, for fact-bound intuitionism is central to the common law methodology—including as employed by the Supreme Court in its development of constitutional law.[89] As an illustration (though not one I favor), one could avoid the force of the reductio by affirming the greater/lesser argument only with respect to activities that long-standing American historical practice proscribed as vices.[90]

In sum, notwithstanding the substantial scholarly literature attacking *Posadas*, it remains unclear why Puerto Rico's constitutional authority to ban casino gambling ought not to entail its authority to permit gambling yet ban its advertising. If we take the greater/lesser intuition more seriously than scholarly commentators have tended to do, and if we take the limits on the greater/lesser reasoning more seriously than *Posadas* itself did—that is, if we take the holding of *Posadas* as seriously as critics have taken its dicta—perhaps we can articulate a sensible middle ground. Absent an explanation of why the greater never includes the lesser, a more satisfactory and nuanced constitutional rule would enable us to identify when a state's constitutional power to ban an activity does entail the power to ban advertising about it, and when it does not.[91]

III. ONE STEP BACK: IDENTIFYING FIRST AMENDMENT INTERESTS

Before directly engaging that task, it will be helpful to think about why in the first place we should be concerned about government regulations that affect speech. If there is a standard blueprint

89. *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Fudenberg, *supra* note 58, at 439 n.261; Lowenstein, *supra* note 65; Post, *supra* note 22, at 18. One lesson, of course, is that we ought not always demand that the Court announce the fully articulated rule under which the case falls. But, furthermore, if the Court does happen to announce a rule, we should not necessarily reject the result just because that rule proves too broad. This is why Part I focused on bolstering case-specific intuition, not abstract principles.

90. This is suggested in, for example, EPSTEIN, *supra* note 74, at 210; Merrill, *supra* note 22, at 1174, and intimated by Justice Scalia in his *44 Liquormart* concurrence, *see* 517 U.S. at 517.

91. *See* Fudenberg, *supra* note 58, at 436-37.

for commercial speech scholarship, it involves a critique of existing doctrine, followed by a review of the values the First Amendment is designed to serve—that is, the "theories of the First Amendment"—and concluding by measuring "commercial speech" against them. Consistent with this (perfectly reasonable) strategy, scholars have argued, for instance, that because the First Amendment principally serves interests in self-government and individual self-fulfillment (of the speaker), commercial speech does not merit First Amendment protection;[92] or that precisely because the First Amendment serves interests in individual self-fulfillment (of the listener), commercial speech merits full First Amendment protection;[93] or that because the First Amendment serves to protect the search for truth, commercial speech deserves intermediate First Amendment protection.[94]

This is not quite my approach. I am disposed to believe that many supporting values—centering on those just mentioned[95]—combine to provide partially overlapping support for expressive freedom. But this view already has its able defenders[96]—and detractors[97]—and would, in any event, require an article of its own for adequate treatment. Accordingly, instead of exploring *what* interests the First Amendment protects, I will take the less contentious

92. *See, e.g.*, C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Jackson & Jeffries, *supra* note 81.

93. *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 630-35 (1982); *cf.* Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789, 802 (1998) (noting that the First Amendment protection of commercial speech is designed to ensure the free flow of truthful information to consumers and thereby contribute to market efficiency); Robert T. Cahill, Jr., Note, City of Cincinnati v. Discovery Network, Inc.: *Towards Heightened Scrutiny for Truthful Commercial Speech?*, 28 U. RICH. L. REV. 225, 252 (1994).

94. *See, e.g.*, Nutt, *supra* note 84, at 205-06 (arguing that intermediate scrutiny is appropriate to protect the free exchange of ideas in the marketplace).

95. For a review of values often thought to underlie the Free Speech Clause, see generally Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

96. The most prominent proponents of this view include Professors Frederick Schauer and Steven Shiffrin. *See, e.g.*, FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 13-14 (1982); Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1303-04 (1983); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983); *see also* Eberle, *supra* note 56, at 417, 442-54 (concluding that *Virginia Pharmacy* "relied upon a web of interlocking values to fashion broad support for commercial speech").

97. *See, e.g.*, MARTIN REDISH, FREEDOM OF EXPRESSION 1 (1984) (advocating "self-realization" as the fundamental value underlying freedom of speech); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 964-90 (1978) (speaking of individual self-fulfillment as the major justification for freedom of speech); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

tack here of identifying *whose* interests it protects—or, less contentious still, whose interests it *potentially* protects.

Abstracting from the problem of commercial speech, and even from the First Amendment, it is natural to suppose that constitutional rights are somehow animated by a purpose in safeguarding interests held by the individual right-holder—that is, the agent whose freedom of action, or freedom from interference, the right nominally or most immediately protects. The Eighth Amendment's prohibition on cruel and unusual punishment, for example, seems most directly geared to protecting the physical and dignitary interests of persons against whom such punishment might otherwise be applied. This is no more than common sense.

But while this narrowly individualistic focus is no doubt part of the story, it is not a complete account of the purposes underlying constitutional rights. First, some constitutional rights might be thought to serve interests of persons other than those whom the right most directly or immediately shields. The Sixth Amendment right to jury trial, for instance, can be conceived as guarding not only the personal interests of the criminal defendant, but also interests of the victim and the community in gaining information and catharsis.[98] Second, as Akhil Amar has famously argued at length, constitutional rights perform a structural function in checking the aggrandizement of government power, thereby serving the citizenry's long-term interests in limited government.[99] This is self-evident in the cases of the Second[100] and Third[101] Amendments, as well as the First Amendment's Press Clause.[102]

In sum, and very generally, constitutional rights can be understood as serving interests of the right-holder herself, of other individuals who could be expected to benefit from the right-holder's enjoyment of her right, and of the citizenry as a (more or less) undifferentiated whole. Put another way, we can understand constitu-

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98. *See* Thomas W. Merrill, Dolan v. City of Tigard*: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 886 n.118 (1995). The main theme of this thoughtful article is to explore how the Takings Clause can he understood in similar terms.

99. *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS (1998). For earlier arguments in a similar vein, see, for example, Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343 (1993); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994).

100. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

101. U.S. CONST. amend. III ("No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

102. Whether the Press Clause retains any content independent of the Speech Clause is an increasingly vexed question. *See, e.g.*, David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429 (2002).

tional rights across at least three discrete dimensions—an individual protection dimension, a public goods dimension, and a structural check dimension. Very possibly, some constitutional rights are most usefully conceptualized on one or two of these dimensions, but not all three. That is plainly untrue, however, of the freedom of speech guaranteed by the First Amendment.[103]

Because even the most cursory review of landmark speech cases would reveal the Court's sensitivity to the diverse (yet often overlapping) interests of speaker, audience, and citizenry, illustrating the point with a survey of cases would be more tedious than enlightening. Justice Jackson's moving and eloquent opinion for the Court in *West Virginia State Board v. Barnette,*[104] can, therefore, be pressed to do triple duty. *Barnette*, of course, overruled a three-year-old precedent[105] to hold compulsory flag salute laws unconstitutional. Given its cardinal place among decisions striking down state action designed to promote political orthodoxy, *Barnette* is understandably read as validating a systemic concern in checking governmental power. And, to be sure, Justice Jackson's stirring and oft-quoted conclusion—"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein"[106]—supports this reading.[107] At the same time, though, in explaining that "scrupulous protection of Constitutional freedoms of the individual" is necessary to ensure that we not "strangle the free mind at its source,"[108] Jackson affirmed the importance to the individual of choosing whether, and how, to express herself. And in adding that "we can have . . . the rich cultural diver-

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103. Here I am elaborating upon, and I hope sharpening but perhaps just modifying, observations made by others. *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 423-27 (1996) (distinguishing between speaker-oriented and audience-oriented conceptions of the First Amendment, and proposing a third conception focused on governmental reasons); David A. Strauss, *Rights and the System of Freedom of Expression*, 1993 U. CHI. LEGAL F. 197 (distinguishing between a "rights-based" justification grounded in speech's value to the speaker, and a "structural justification" which is based on the value of the system that free speech supports).

104. 319 U.S. 624 (1943).

105. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

106. *Barnette*, 319 U.S. at 642.

107. The canonical cite for the structural importance of freedom of speech, though, is probably *New York Times v. Sullivan*, 376 U.S. 254 (1964), where the Court famously described the "central meaning" of the First Amendment as entailing that, as Madison put it, " 'the censorial power is in the people over the Government, and not in the Government over the people.' " *Id.* at 275 (quoting 4 ANNALS OF CONG. 934 (1794)).

108. *Barnette*, 319 U.S. at 637.

sities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes,"[109] he evinced sensitivity to the public goods dimension of expressive freedoms as well.[110] This single great First Amendment decision, in short, exemplifies how freedom of speech respects all three basic dimensions of constitutional rights.

The question of whether *commercial* speech in particular implicates as wide a variety of interests as other forms of speech do has played a central role in the development of commercial speech doctrine.[111] In its first commercial speech case, decided just one year prior to *Barnette*, a unanimous Court suggested that *none* of these interests was at stake. *Valentine v. Chrestensen*[112] involved a challenge to a municipal ordinance that, for reasons of litter control, barred the distribution of commercial handbills. Even though Chrestensen had craftily affixed a protest against the ordinance to the back side of his advertisement, the Court dismissed First Amendment objections by deeming it "clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."[113] By the time it decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[114] over thirty years later, however, the Court was prepared to take the matter more seriously.

Virginia Pharmacy concerned a state law barring the advertisement of prescription drug prices. Writing for the majority, Justice Blackmun began by noting the variety of interests potentially at stake:

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109. *Id.* at 641-42.

110. A more recent case that especially emphasized audience interests is *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), where the Court struck down a federal law that broadly prohibited federal employees from accepting any compensation for making speeches or writing articles. Although the Court did note that the ban burdened expressive interests of the employees themselves, it highlighted the "significant burden" imposed "on the public's right to read and hear what the employees would otherwise have written and said." *Id.* at 470.

111. For one useful history that emphasizes the dynamic between speaker interests and listener interests, see Halberstam, *supra* note 22, at 779-92. As intimated above, *see supra* notes 92-93 and accompanying text, the academic debate over commercial speech has often pitted scholars (such as Edwin Baker) who downplay the autonomy-style interests of commercial speakers, against those who play up the informational interests of the consumer (such as Martin Redish and Burt Neuborne).

112. 316 U.S. 52 (1942).

113. *Valentine*, 316 U.S. at 54. For a history of commercial speech regulations prior to *Valentine*, see generally Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993).

114. 425 U.S. 748 (1976).

> The question first arises whether, even assuming that First Amendment protection attaches to the flow of drug price information, it is a protection enjoyed hy the appellees as recipients of the information, and not solely, if at all, by the advertisers themselves who seek to disseminate that information. Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.[115]

But in finally bringing straightforward commercial advertisements within the First Amendment, the Court seemed ultimately impressed by the interests of listeners. "[T]he particular consumer's interest in the free flow of commercial information," Justice Blackmun explained, "may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[116] The law, as a consequence, was held unconstitutional.

Today, after another quarter-century of cases, constitutional protection for commercial speech remains mostly predicated on the listener interests emphasized in *Virginia Pharmacy*.[117] And yet, as Justice Souter has recently observed, the issue cannot be quite that simple. For "so long as self-interest in providing a supply is as legitimate as the self-interest underlying an informed demand, the law could hardly treat the advertiser's economic stake as 'utterly without redeeming social importance' and isolate the consumer's interest as the exclusive touchstone of commercial speech protection."[118]

At this stage in our reexamination of *Posadas* and the greater/lesser approach, it would be premature to try to resolve this debate. It seems doctrinaire to insist, categorically, that commercial speech does not implicate the interests of one or another of these familiar First Amendment interest-holders—the speaker, the audience, or the citizenry. This is all the more true given repeated worries that the precise contours of the category of "commercial speech" are impossible to articulate.[119] The most promising way to assess

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115. *Id.* at 756.

116. *Id.* at 763.

117. *See, e.g.*, United States v. United Foods, Inc., 121 S. Ct. 2334, 2346-47 (2001) (Breyer, J., dissenting) (citing cases); Halberstam, *supra* note 22, at 779 ("As a basis for First Amendment protection, the Court has settled on the idea that commercial communications are valuable to the listener."); Post, *supra* note 22, at 14 ("Commercial speech doctrine . . . is sharply audience oriented.").

118. Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 479 (1997) (Souter, J., dissenting) (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)). A majority of the Court seemed to grant this point in last Term's *Lorillard Tobacco* decision. *See* 533 U.S. 525, 571 (2001) ("[S]o long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information.").

119. *See infra* notes 246-51 and accompanying text.

Posadas, then, is to consider directly how the casino advertising ban affected the interests of the casinos themselves, the local audience for casino gambling, and the general public, that might warrant constitutional solicitude.[120] That is the strategy behind the following three parts. Part VII reaps the dividends of this systematic inquiry by turning attention from *Posadas* itself toward the problems and possibilities of commercial speech doctrine more generally.

IV. SPEAKER INTERESTS AND THE PROBLEM OF COERCION

The effort of Part III has one obvious payoff. As deployed in *Posadas,* the greater/lesser reasoning seemed to focus heavily on the interests of the would-be speakers. The thrust of the Court's argument was to render incredible the notion that the advertising ban could give casino operators anything to complain about given that Puerto Rico could have barred the casino operations entirely. From this speaker-oriented perspective, Brennan's claim that the advertising ban is the "more intrusive" rings false.[121] However, one possible rejoinder is now apparent: the greater/lesser analysis indicates, at most, only that *the casino operators* have no grounds for complaint. But the audience for the casino operators' speech—the actual and would-be *casino gamblers*—also has an interest that must be taken into account.[122] Perhaps, then, the greater/lesser approach fails because the advertising ban imposes constitutionally cognizable harm upon persons who would want exposure to the casino operators' advertising. We will consider this possibility in Part V. This part takes on the greater/lesser argument closer to its heart by examining whether, despite initial appearances, the casino operators might actually have cause for complaint on their own behalf.

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120. *Accord* Henry P. Monaghan, *Some Comments on Professor Neuborne's Paper,* 55 BROOK. L. REV. 65, 69 (1989) ("Any adequate theory of the First Amendment will necessarily be a complex one. This means that it will take into account a wide range of factors, including the interests of the speaker, the interests of the audience, and the interests of third parties who are not the intended audience of the speech.").

121. Even Professor Redish concedes this. *See* Redish, *supra* note 22, at 599 ("Certainly, viewed exclusively from the perspective of tobacco producers and sellers, a han on advertising actually is a less restrictive measure than a complete ban on sales.").

122. *See, e.g.,* McGowan, *supra* note 22, at 437-38.

A. The Greater/Lesser Analysis and the Unconstitutional Conditions Doctrine

Fruitful investigation begins with an argument I took pains to develop in Part II.[123] There I argued that the lesser power approved in *Posadas* was not, as so many have represented, the power to ban "speech about" casino gambling, but rather the power to ban the *advertising* of casino gambling. We can now make clearer why this distinction matters. *Advertising of* casino gambling is a narrower category than *speech about* casino gambling in two respects. It is narrower, first, with regard to the content or character of the speech. Speech about casino gambling can bear all sorts of relationships to the activity—descriptive, evaluative, predictive, etc. Advertising assumes a particular attitude towards the subject, one of promotion or "advocacy." It is narrower, second, with regard to the speaker. Anyone can "speak about" casino gambling, even "advocate" it, but only casinos themselves can advertise it.[124]

Of these two differences, the latter is the more salient. We can now understand the advertising ban at issue in *Posadas* as essentially a conditional offer made by the government to parties who might wish to operate a casino.[125] The default rule, the government can be understood to say, is that casinos are illegal. Nonetheless, you may operate one if you agree not to advertise it (and so long as you meet any other reasonable eligibility requirements).[126] In other

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123. *See supra* Part II.B.

124. Although dictionary definitions are often broad enough to allow for "advertising" by those without a financial interest, see, for example, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 31 (1993), it is suitably clear that the *Posadas* Court used the term in its primary and narrower sense. *See* Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 346 (1986) (describing as a "strange doctrine," a constitutional rule that would "deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising *on behalf of those who would profit from such increased demand*") (emphasis added). This is appropriate given that the type of "advertising" the Puerto Rico statute barred was only such as might be conducted by the casinos themselves. *See supra* text accompanying note 2. According to this view, speech promoting casinos by parties with only a derivative interest in the success of casinos—say, bars or taxicabs—would not be "casino advertising." The distinction between advertising and other speech about a given commercial activity emerges also in Halberstam, *supra* note 22, at 851-57.

125. This perspective was suggested earlier. *See supra* text accompanying note 59. I now make it explicit.

126. Critics often describe *Posadas* as posing the question whether Puerto Rico could have barred casino advertising even though it decided not to bar casino gambling. *See, e.g.*, Van Alstyne, *supra* note 22, at 519 ("Whether or not a legislature may forbid an activity (a question it will be time enough to consider if and when the legislature presumes to do so), when it has not done so (i.e., when it has not exercised that power, such as it may be), there is no reason to suppose its power to restrict or forbid speech providing information pertinent to that activity is at all the same as though it had exercised that power."). From the conditional-offer perspective,

words, the Supreme Court's assertion that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling"[127] could just as well have been phrased as: "[T]he greater power to completely ban an individual or entity from operating a casino necessarily includes the lesser power to authorize the operation on the condition that the casino not advertise itself."[128] Of course, I do not mean to imply that merely recasting the issue in these terms resolves the problem; this reformulation of the greater/lesser argument is no more valid than any other. The point is that a prohibition against *anyone's* speaking about casino gambling—or even "advocating" it—simply lacks the same conditional-offer *structure* that a ban on advertising can assume.

Conceptualizing Puerto Rico's ban on casino advertising as a conditional offer is a first step toward glimpsing the path we will need to travel if we are to arrive at a conclusion that the ban wrongs the casino operators, for there exists a variety of contexts in which a conditional offer of a benefit that the offeror is free to withhold nonetheless is understood to aggrieve the offeree herself. Outside of constitutional law, the crime of blackmail provides the canonical example.[129] The adulterer would have little grounds for complaint if a neighbor were to reveal his infidelities to the adulterer's wife. But we do think him aggrieved if the neighbor offers the benefit of her silence for a fee.

Within constitutional law, we are in the land of the unconstitutional conditions doctrine.[130] The unconstitutional conditions

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though, this way of viewing the matter is not unproblematic. The proposition that, "when it has not exercised that power in respect to a particular activity, *and insofar as the activity is permitted,* the First Amendment applies to prohibit the legislature from presuming to forbid those lawfully engaged in it to provide public information in respect to that activity," *id.* at 520 (emphasis added), has no force if the activity is permitted precisely "insofar as it's not advertised."

127. *See supra* text accompanying note 9.

128. Any complications that might be thought to arise insofar as the advertising ban was enforced by sanctions (such as fines) other than automatic withdrawal of the establishment's gambling license can, I think, be safely ignored. I assume that a casino that repeatedly flouted the advertising restriction would be forbidden to operate.

129. The "paradox of blackmail" has generated a substantial literature. Representative contributions are presented in Symposium: Blackmail, 141 U. PA. L. REV. 1565, 1565-1989 (1993). For my views along with additional citations to the literature, see Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously,* 65 U. CHI. L. REV. 795 (1998).

130. In his classic attack on *Posadas,* Professor Kurland observed that the majority's use of the greater/lesser "bears a great similarity to that long since rejected under the rubric of unconstitutional conditions." Kurland, *supra* note 18, at 13. I am urging, instead, that the majority used the greater/lesser in *precisely* the manner that the unconstitutional conditions doctrine rejects. *Cf.* Sullivan, *supra* note 60, at 1415 (explaining that the unconstitutional conditions problem implicates the question whether "the greater power to deny a benefit includes the lesser

problem is said to arise wbenever government conditions a "benefit" upon the offeree's waiver of a constitutional right.[131] It appears in a multitude of contexts, as when the state conditions a zoning variance on the property owner's conveying a public easement without insisting on her Fifth Amendment right to just compensation;[132] or when it offers a business license to a foreign corporation on the condition that the corporation waive its federal right (protected by the Supremacy Clause) to remove suits to federal court;[133] or when a state prison conditions family visitation privileges on an inmate's waiver of his right, protected by the Free Exercise Clause, not to participate in a religiously oriented substance abuse program.[134]

In all of these cases the courts have held the proposal unconstitutional, thereby rejecting the government's claim that the greater power to withhold the benefit (a land use variance, or domestic corporate privileges, or family visitation) includes the lesser power to condition the benefit on the offeree's waiver of a constitutional right. Furthermore, in none of these cases can the offer's unconstitutionality be most sensibly attributed to its impingement on interests of third parties. In each, the intuition is that notwithstanding the supposed greater power to withhold the benefit, the state's conditional offer wrongs the right-holder.

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power to impose a condition on its receipt"). Yet this does not get Kurland as far as he would like, for, as I have explained elsewhere, all that the unconstitutional conditions doctrine rejects is that the state's constitutional power to deny a benefit *necessarily* entails the authority to condition its receipt. *See* Berman, *supra* note 55, at 3; *see also, e.g.*, Merrill, *supra* note 98, at 859. So observing that *Posadas* raises an unconstitutional conditions problem (as many commentators have, see, for example, EPSTEIN, *supra* note 74, at 206; Fudenberg, *supra* note 58, at 382; and Sullivan, *supra* note 60, at 1462-64) no more tells us whether it was rightly decided than does recognizing, see *supra* Part II.A, that the lesser power can never be logically deduced from the greater.

It bears emphasis that I do not claim tbat the greater/lesser argument is synonymous with the conditional-offer problem at issue in the unconstitutional conditions doctrine. I am saying only that the particular type of the greater/lesser argument which was invoked in *Posadas* is the one to which the unconstitutional conditions doctrine responds. Different varieties of the greater/lesser were implicated when the *United Foods* Court distinguished *Glickman, see supra* notes 35-37 and accompanying text, and in *Discovery Network, see supra* note 50. Justice Scalia appealed to yet a fourth variety in his *Romer* dissent. Romer v. Evans, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting) ("If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct."). I offer no thoughts regarding how the greater-includes-the-lesser intuition is most usefully typologized.

131. *See, e.g.*, Sullivan, *supra* note 60, at 1421-22. Although I problematize this definition elsewhere, *see* Berman, *supra* note 55, at 8-12, for most purposes, it is a perfectly adequate statement of the issue.

132. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834-36 (1987).

133. *See, e.g.*, Terral v. Burke Constr. Co., 257 U.S. 529, 532 (1922).

134. Griffin v. Coughlin, 673 N.E.2d 98, 105 (N.Y. 1996), *cert. denied*, 519 U.S. 1054 (1997).

Perhaps then the casino operator in *Posadas* is like the adulterer or the property owner or the foreign corporation or the inmate. On the other hand, if these cases demonstrate (again) that the *Posadas* majority was wrong to suppose that the greater power to withhold the benefit logically (or "necessarily") entails the power to offer it on condition, they do not yet demonstrate that the majority's bottom-line conclusion was wrong. Put another way, these examples do not demonstrate that the greater power to withhold a benefit *never* entails the lesser power to offer it on condition. To the contrary, a vast number of constitutional cases suggest that it generally does. For example, the Supreme Court has held that a state may condition welfare benefits on the recipient's waiver of her Fourth Amendment right not to be subjected to warrantless searches without particularized suspicion,[135] that it may condition a reduced criminal charge on the defendant's waiver of his right to put the government to its burden of proof at trial,[136] and that it may condition Medicaid funds on the recipient hospital's waiver of its right to perform abortions.[137] Although one might reasonably disagree with any particular decision, the overall trend of these cases should not be too surprising, for the principle that the greater power to withhold a benefit generally does include the lesser power to offer it on condition holds true outside of constitutional law as well. Indeed, blackmail has proven so puzzling to legal scholars—as well as to economists[138] and moral philosophers[139]—precisely because it exists against a deeply entrenched background rule that the power to withhold a benefit usually *does* entail the power to offer it on condition.

The challenge, then, is to elucidate the principle that explains all of the above cases and then to determine how the casino operator in *Posadas* fares against it.[140]

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135. Wyman v. James, 400 U.S. 309, 326 (1971).

136. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

137. Webster v. Reprod. Health Servs., 492 U.S. 490, 507-08 (1989).

138. *See, e.g.*, Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 667 (1988).

139. *See, e.g.*, JOEL FEINBERG, HARMLESS WRONGDOING 240-58 (1988); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 84-87 (1974).

140. I am far from the first to perceive an important linkage among blackmail, the unconstitutional conditions doctrine, and the greater/lesser reasoning. To the contrary, the organizers of an important symposium on blackmail introduced the topic hy observing that "one cannot think about coercion, contracts, consent, robbery, rape, unconstitutional conditions, nuclear deterrence, assumption of risk, the greater-includes-the-lesser arguments, plea bargains, settlements, sexual harassment, insider trading, bribery, domination, secrecy, privacy, law enforcement, utilitarianism and deontology without being tripped up repeatedly by the paradox of blackmail." Leo Katz & James Lindgren, *Instead of a Preface*, 141 U. PA. L. REV. 1565, 1565 (1993). My claim, in the

B. Of Penalties and Coercive Offers

The answer, I think, is that in all of the foregoing cases in which the conditional offer of a putative benefit is thought to aggrieve the offeree, the offer constitutes the wrong of coercion.[141] Because I have developed this argument at length in other places,[142] a summary will here suffice.

At its core, coercion is the wrong of manipulating a person to act in a certain way by placing wrongful pressure upon her alternatives.[143] Paradigmatically, it takes the form of a biconditional proposal—"if you don't do *x* then I will do *y*; if you do *x* then I will not do *y*"—in which *x* is the conduct the maker of the proposal desires, and *y* is the sanction he threatens to impose or allow to obtain. The proposal is coercive if and only if the maker of the proposal would be engaging in a wrong were he to carry out the threat of *y*. Thus, the gunman's proposal—"if you don't give me your wallet, I'll shoot you; if you do give me your wallet, then I won't shoot you"—is coercive (as a matter of conventional morality) because it would be (morally) wrongful for him to shoot you. Contrariwise, the fishmonger's proposal—"if you don't give me $8.99, then I won't give you a pound of tilapia; if you do give me $8.99, then I will give you a pound of tilapia"—is not coercive if (as I assume) it is morally permissible for her to withhold the fish.

What makes blackmail interesting is that although the blackmailer has the legal and (generally) moral right to disclose the information she threatens, the case turns out to be akin to the gunman case, not the fishmonger's. The key factor is the evidentiary value of the conditional proposal itself.

There are two significant features of the types of acts with which a blackmailer threatens his victim.[144] First, they cause cognizable legal harm. (The disclosure of one's infidelities, for example,

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smallest of nutshells, is that the prima facie wrongfulness (within any normative system) of threatening to penalize the exercise of what that normative system considers a right is the core insight necessary to understand, and therefore to rationalize, blackmail, unconstitutional conditions, and the commercial speech doctrine.

141. For the thought that *Posadas* was wrongly decided precisely because it overlooked the casino operators' constitutional interest in not being coerced to relinquish their speech rights, see, for example, Fudenberg, *supra* note 58, at 387 (suggesting this argument without endorsing it).

142. *See generally* Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45 (2002); Berman, *supra* note 55.

143. *See* Berman, *supra* note 142, at 52.

144. I first advanced this argument in Berman, *supra* note 129. This summary is drawn from Berman, *supra* note 142, at 81-82.

can result in both reputational injury and emotional distress.) Second, they are morally indeterminate in the particular sense that they are often undertaken with bad motives, but other times with good.[145] This latter feature is critical. The supposition that, as a matter of empirical fact, persons who perform such actions frequently have good motives for doing so makes it difficult or impossible to generalize that such acts are morally bad. This moral indeterminacy provides a sufficient (if not necessary) reason not to criminalize the types of acts that are generally leveraged into blackmail proposals (here, truthfully unmasking an adulterer).

A conditional threat to perform such an act, however, affects our beliefs about the nature of the act threatened. It suggests (albeit not conclusively) that the threatener would lack the good motives that would be required to justify his undertaking the action he threatens. The threat tends to reveal, in other words, that *in this case* the act would be morally wrongful. And *if* performance of the act would be morally wrongful, so too is the threat. That is, the threat wrongs the blackmailee by coercing him. Furthermore, because most theories of punishment permit criminalization of morally blameworthy, harm-threatening conduct, blackmail's criminalization is justifiable as well as explicable. We might put it this way: Insofar as blackmail is defined as a threat to perform a legal act, it necessarily follows that it is not criminally coercive. However, because the blackmailer would (most likely) be acting in a morally wrongful manner were he to carry out his threat, the threat itself is morally coercive. The threat is criminal, finally, not because it is coercive as a criminal matter (i.e., threatens a criminal wrong), but because it is coercive as a moral matter (i.e., threatens a moral wrong), and because moral wrongfulness is a sufficient basis for criminalization.

The analysis in the unconstitutional conditions context proceeds similarly, although here we need to introduce another concept, that of a penalty. Much simplified, constitutional rights either permit the rights-holder certain liberties of action (such as liberty to speak, or to worship, or to legislate) or authorize her to make certain demands of the state (such as just compensation for a taking or a jury trial preliminary to adjudication of guilt). But constitutional rights need not be exercised. Though I could place a placard on my

145. Very possibly, a third-party's revelation of one spouse's infidelity to the other spouse might be motivated by the beliefs that (a) such disclosure will encourage the "innocent" spouse to divorce the adulterous scoundrel, (b) such spouse will be happier after the divorce; and (c) any adverse effect on the adulterer counts for less in the moral balance because of his wrongdoing.

front lawn declaring "Save Social Security," or "Don't Save Social Security," or even "I don't care whether you save Social Security or not," I could choose to refrain from communicating on the matter.[146] And if the state condemns my backyard for a freeway, and then pays me just compensation, I could choose not to cash the check. Suppose, though, that I choose *not* to waive my rights—that is, for example, I do post a placard or cash the check. Could the State of Texas fire me from my job at the University of Texas? Could it bar me from using the state highway system? Of course not; constitutional rights would be virtually meaningless if it could.

One might be inclined to suppose, then, that every constitutional right by its very nature entails a claim-right that the state not discriminate in the distribution of benefits against those who have chosen to exercise a constitutional right—or, correlatively, that the state has a constitutional duty not to discriminate on this basis. But surely this is too broad. I suppose I have a constitutional right not to bathe: the state may not forcibly wash me. Nonetheless, and notwithstanding any other qualifications I might have, the state may choose not to employ me on account of my stench. More prosaically, each state has a right, valid against the federal government, to legislate or not legislate as it sees fit, so long as such legislation (or the lack thereof) is consistent with the Constitution and valid federal law. Nonetheless, courts have consistently upheld federal law that conditions federal Medicare funds on a state's providing services to undocumented aliens.[147]

A revision is therefore necessary: Every constitutional right entails a claim-right that the state not *penalize* the exercise (or nonwaiver) of the constitutional right itself *in the sense of imposing (or allowing to obtain) consequences upon the right-holder that are*

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146. It is tempting to characterize this alternative as an exercise of my First Amendment right not to speak. But if I have views on the subject that I choose not to express because of laziness, it seems more perspicuous to describe this as a decision not to exercise my First Amendment rights. In a similar vein, the right *not* to vote recognized in the United States is not quite the same as the right, recognized in many European countries, to cast a blank ballot.

147. *See, e.g.*, Texas v. United States, 106 F.3d 661, 666-67 (5th Cir. 1997); California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997); New Jersey v. United States, 91 F.3d 463, 466-67 (3d Cir. 1996); Padavan v. United States, 82 F.3d 23, 28-29 (2d Cir. 1996). A more well-known example would be *South Dakota v. Dole*, 483 U.S. 203, 210-11 (1987), where the Court upheld federal law that conditioned highway funds on each state's enacting a minimum drinking age no lower than twenty-one. I argue elsewhere, though, that the spending condition was in fact coercive and, therefore, that *Dole* was wrongly decided. *See* Berman, *supra* note 55, at 36-42; *see also* Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How To "Fix"* Florida Prepaid *(and How Not To)*, 79 TEX. L. REV. 1037, 1143-46 (2001).

adverse relative to the consequences that the state would impose (or allow to obtain) but for the state's purpose in having the right-holder experience the consequences as disagreeable. That is largely what it *means* to have a constitutional right.[148] It follows that the withholding of what seems to be a "benefit" is in fact a "penalty"—and hence is unconstitutional—if undertaken for the purpose of punishing or discouraging exercise of a right. And a conditional proposal is *coercive* (in the constitutional sense) if the state threatens to impose a *penalty* for the refusal to waive a constitutional right.

This account of how a government's conditional offer of a "benefit" that it is presumptively permitted to withhold can be coercive, and therefore presumptively impermissible, might seem hopelessly arcane. In fact, I believe, it is simply a reasonably careful articulation of common intuition.[149] Moreover, it finds reflection in Supreme Court case law, such as the Court's 1987 decision in *Nollan v. California Coastal Commission*.[150]

The Nollans, owners of a beachfront lot, sought to demolish their existing bungalow and to replace it with a three-bedroom house. California law required, however, that they obtain a development permit from the state coastal planning commission before proceeding with construction. The Commission granted the permit but only on condition that the Nollans convey a public easement across a portion of their private beach to allow beachgoers to travel between a public park a quarter mile to the north and a public

148. I develop this argument in Berman, *supra* note 55, at 32-36.

149. I am reminded of the story basketball great Bill Walton has told of legendary college coach John Wooden. Walton was a center for the UCLA Bruins basketball team in the early seventies. He also had a reputation as something of a free spirit. Wooden did not. As best I recall the story, Walton showed up at practice one year with long hair, and Wooden told him to get it cut. When Walton refused, and Wooden threatened to drop him from the team, Walton defended his coiffure as an important expression of personal and political values. "Tell me if you really feel tbat way," Wooden pressed, "because I would not demand that you act against your scruples." Walton insisted that he did. "Well Bill," Wooden rejoined, "you're a tremendous asset to this team. We're going to miss you."

Assuming arguendo a constitutional right to wear one's hair long, *but see* Kelley v. Johnson, 425 U.S. 238, 248 (1976), one might wonder whether Coach Wooden (as a state actor) threatened to penalize Walton's expressive rights. On the analysis in text, it depends. According to Walton, Wooden explained years later that he insisted that players wore short hair for safety reasons. Long hair could get in a player's eyes, causing—well, precisely what harm it would cause is not entirely clear, but presumably something really bad. If this really was his view, then the conditional proposal (you may play on my team if and only if you cut your hair) did not threaten a penalty, hence was not coercive: taking Walton's decision as a given, Wooden really would prefer, for safety reasons, tbat Walton not play. Then again, Wooden did not win a record ten NCAA championships without knowing something ahout psychology. Walton showed up for practice the next day, his hair trimmed short.

150. 483 U.S. 825 (1987).

beach some comparable distance to the south. The Nollans objected to the imposition of the condition as an unconstitutional taking, and the Supreme Court agreed in a five-to-four vote.

Writing for the majority, Justice Scalia concluded that the condition could not stand because it was not germane to the legitimate purposes the Commission could have for refusing the requested permit. Assuming that the Commission might constitutionally deny the Nollans a permit in order to advance a legitimate state interest in, among other things, the public's *visual* access to the beach, Justice Scalia reasoned, the Commission could not threaten to withhold the permit in order to secure *lateral* access for the public to cross the beach.[151] When the "essential nexus" between the purpose of the condition and the purpose of the prohibition is eliminated, the Court explained,

> the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to tbose willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster. Similarly here, the lack of nexus between the condition and the original purpose of the building restrictions converts that purpose to something otber than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them. In short, unless the permit-condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion.[152]

Many ideas underlie this passage. The first is that, even though the granting of an exemption from the development ban is in one sense a benefit that the state is not constitutionally compelled to provide, the Constitution does constrain the state's purposes for withholding it. More particularly, the state may not withhold it for the purpose of pressuring property owners into waiving their Fifth Amendment rights to just compensation. (In my terminology, the state may not *penalize* a right-holder for standing on her constitutional rights.) Second, a threat to withhold a benefit for that proscribed purpose is itself proscribed, as constituting extortion. (In my terminology, the threat to impose a penalty is unconstitutionally *coercive*.) And third, if the exaction demanded of the

151. *See id.* at 836-42.

152. *Id.* at 837 (internal quotation marks and citation omitted).

property owners would not serve the same legitimate purpose that the state claims lies behind the land use ban, then the refusal to grant an exemption to the ban is not really motivated by that purported legitimate purpose, hence the withholding of the benefit is a penalty, and the conditional proposal constitutes coercion. That this third step might be too rigid (as I have in fact argued)[153] should not distract us from the importance of the first two: *Nollan* confirms that it is unconstitutionally coercive for the state to threaten a penalty.[154]

C. The Casino Advertising Ban Was Not Coercive

If all of this is correct, then the casino operators subject to the Puerto Rico advertising ban are more like the welfare beneficiaries subject to the warrantless search condition and the criminal defendant offered a plea bargain than either the Nollans or the inmate threatened with loss of visitation privileges.

We assess whether the conditional offers involve a threatened penalty by imagining whether withholding the offered benefit, upon noncompliance with the demand, would advance legitimate state interests beyond preserving the benefit's capacity to induce behavior by others. The answer is pretty clearly no in the inmate case. And a majority of the Court concluded that the same was true in *Nollan* as well. In both cases, then, the proposal threatens to impose a penalty and so is coercive. In the welfare case and the plea bargain, in contrast, the answer is very possibly yes. If the welfare department feels itself without adequate means to confirm that the applicant does not live with another adult, it prefers not to give benefits designed for single-parent households; if the criminal defendant will not spare the state the risk and expense of trial, the state has no reason to grant a discount from the otherwise appropriate sentence in the event the defendant is convicted.[155] In these

153. *See* Berman, *supra* note 55, at 91-94.

154. Similar views have cropped up elsewhere in the unconstitutional conditions case law. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 631 (1969) ("If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' " (alterations in original) (quoting United States v. Jackson, 390 U.S. 570, 581 (1968))).

155. This analysis assumes that the sentence the state threatens—and not the one it offers—is the "appropriate" one, taking into account only constitutionally legitimate considerations. Whether this is so is most likely undiscoverable in any given case, which is why the courts should probably circumscribe the plea bargaining process with more prophylactic-style rules designed to protect defendants from coercive plea offers. *See* Berman, *supra* note 55, at 98-103.

latter cases, then, withholding the offered benefit would not constitute a penalty, so the conditional proposal is not coercive.

Although these matters are necessarily speculative, it seems plausible to view the Gaming Act of 1948 as manifesting the following preference hierarchy. The legislature's highest preference was for legalized casino gambling that attracted tourists but not locals, but if that combination was unattainable, it preferred to do without casinos entirely. Therefore, because the legislature assumed (sensibly enough) that domestic advertising would generate domestic demand, it actually preferred that an applicant for a casino license who would not agree to waive its First Amendment rights to advertise not operate a casino at all.[156] This is true regardless of whether the government's purpose was to keep a lid on domestic gambling for purposes of morals or health, or to protect the cockfight industry and the state-run lottery.[157]

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156. Alternatively, the legislature might have been prepared to sacrifice its own citizens to the unrestrained lures of the casino industry sooner than it would have abandoned its interest in using casinos to attract tourists. Were that the case, then the legislature's supposed preference that *any given* casino that refused to abstain from domestic advertising not operate at all depended upon its confidence that some *other* persons would accept the legislative deal of furnishing unadvertised casino gambling. That, I suppose, would make the proposal coercive. Of course, even if all this is right in some sort of conceptual or logical sense, there is no denying that it raises practical challenges. How, under such circumstances, is a court supposed to determine the true ranking of legislative preferences? Although the matter deserves further attention, it is worth noting to start that there is no single correct solution, and all might depend upon judicial allocation of the burden of proof. It is worth noting too that the practical difficulties should not be overstated. After all, severability doctrine relies on just this sort of judicial imagining of legislative preferences, requiring courts to determine whether the legislature would have enacted the constitutional sections of a challenged provision absent those sections held unconstitutional. *See* Alaska Airlines v. Brock, 480 U.S. 678, 685 (1987).

One apparent implication, though, is that restrictions imposed on the advertisements and solicitations of licensed professionals such as lawyers, accountants and pharmacists (which regulations constitute a large percentage of the Supreme Court's commercial speech cases) are extraordinarily likely to be coercive, which means in turn that they are likely to be unconstitutional for failing strict scrutiny—unless, of course, the Court becomes persuaded that something other than strict scrutiny ought to govern coercive restrictions of some sorts of professional speech. The appropriate constitutional status of professional speech is sensitively explored in Halberstam, *supra* note 22, at 834-39.

157. For arguments in support of Justice Brennan's view that it does matter, see EPSTEIN, *supra* note 74, at 207-09; Neuborne, *supra* note 22, at 37 ("[T]he legislature's censorship decision is entitled to no deference because it is a self-interested attempt to favor a government lottery system at the expense of its private sector competition. Whatever the result might be if Puerto Rico genuinely sought to prevent its citizens from gambling at all, no serious argument in favor of selective censorship exists when the government sponsors a lottery and then seeks to cripple the ability of private competitors to inform consumers of a choice between government sponsored gambling and a lawful private alternative."). Although I think Puerto Rico's interest in protecting its lottery revenue, and even in protecting its cockfighting constituents, suffices to render the advertising restriction noncoercive, if Puerto Rico can defend the ban only on the strength of

Furthermore, this analysis reveals why the many hypothetical and actual cases that critics claim are indistinguishable from *Posadas* are in fact distinguishable and unconstitutionally coercive. Consider first the argument that regulations restricting speech about casinos issued by the casino operators cannot be distinguished from identical speech about the casinos issued by someone else. Once again, Van Alstyne puts the point clearly and forcefully:

> [T]he First Amendment [does not] provide an exception that the Court should be willing to recognize, permitting the suppression of . . . information, to keep it from reaching the public, just on account of its commercially interested source. . . . That the speech in question the government seeks to suppress appears in a flyer distributed by a [retailer of the commodity to which the information relates], rather than in an identical flyer distributed to all the same persons by an individual or an association who differ solely in that they may personally have less economically at stake in doing so, would appear to provide very little by way of distinction between them . . . in respect to the proper measure of protection each may be due, so far as the First Amendment is concerned. . . . A legislature may not regard it as a contribution to the public welfare that a newspaper would run a local feature on casinos the state sees fit to license . . . , and yet have no power to suppress that feature. . . . Nor will it matter whether the feature is carried partly, or even principally, or even wholly, because the newspaper thinks it conducive to the newspaper's own commercial success so to provide that feature, rather than for some reason more sublime.[158]

The proposition that the state may not prohibit, or even regulate, a column about casinos published in the local newspaper is unimpeachable. But the argument developed in this part reveals that there is, in fact, much by way of distinction between this hypothetical and the actual case. Through the Games of Chance Act of 1948, the Puerto Rico legislature was seeking to induce persons who might be interested in promoting the consumption of casino gambling to waive their rights to actively promote that consumption via advertising in exchange for licenses to operate gambling casinos. In contrast, a ban on speech advocating casino gambling by persons other than casino operators—whether, for instance, journalists or private citizens—operates by "offering" a very different sort of benefit in exchange for waiver of one's First Amendment rights—for example, the "benefits" of not being shut down, not paying a fine, or not going to jail. The actual advertising ban raises the unconstitutional conditions problem (as conventionally defined) because it offers a benefit (a license to operate a casino) in exchange for waiver of a right. Moreover, under the circumstances, the offer is probably not coercive. A hypothetical restriction on newspaper

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these interests, and not as a way of protecting public "morals," that might make a difference at other stages in the full constitutional analysis. *See infra* notes 273-78 and accompanying text.

158. Van Alstyne, *supra* note 22, at 524-26.

coverage of casinos does not even raise the unconstitutional conditions problem, for the carrot it extends to induce newspaper publishers to induce them to waive their First Amendment rights are not benefits *the state is free to withhold.*[159] Such a regulation, therefore, is palpably coercive and appropriately subject to strict scrutiny.[160]

If coercion analysis provides one meaningful basis for distinguishing speech based on the identity of the speaker (the same speech raising different issues when engaged in by a casino operator rather than by a journalist), it also supports distinguishing different sorts of speech engaged in by a single commercial entity. Consider in this regard *First National Bank of Boston v. Bellotti*, which involved a Massachusetts law providing that no corporation incorporated within the state may "directly or indirectly give, pay,

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159. One might wonder what makes a license to operate casinos a "benefit" but a license to operate newspapers not. Nothing in the objective nature of things—though it is obviously relevant that licensing of the press was historically at the core of free speech concerns. *See, e.g.*, LEONARD W. LEVY, LEGACY OF SUPPRESSION 173 (1963). That determinations of what is and is not a "benefit" are themselves the products of (potentially contestable) substantive judgments of constitutional law is why I would attach a note of caution to the conventional formulation of the unconstitutional conditions problem. *See supra* note 131. For other arguments designed to undermine the supposed naturalness of conventional formulations of the unconstitutional conditions doctrine, see, for example, CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 293 (1993) ("There is no fundamental or metaphysical difference between the unconstitutional conditions case (welfare benefits will be eliminated for those who criticize the government) and the ordinary constitutional case (people who criticize the government must pay a fine)."); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-49 (1968).

This point has obvious significance for the public forum debate. It suggests that, analytically, the core difference between public and nonpublic forums is simply that access to the former is not a "benefit" in the sense of something the government may withhold with minimal justification so long as the withholding does not amount to a penalty. It suggests too that there will exist no value-neutral way to identify the substantive principles—such as "tradition," *see* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46-47 (1983), or anything else—that should be relied upon to do the necessary classification. For valuable explorations of the problem, see, for example, Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 85; Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1758-64 (1987).

160. Compare Rodney Smolla's observation that "[i]t is only the linkage between commercial speech and a commercial transaction that gives government the theoretical leverage to presume to regulate the speech at all. Because government has virtually unchecked constitutional power to regulate transactions, government may legitimately claim some special prerogative to regulate speech about transactions." Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993). This, I think, is true. But it is also cryptic and conclusory. What is the *nature* of this "theoretical leverage"? *Why* does government's expansive power to regulate transactions give it authority to regulate speech about transactions? What is the *scope* of this "special prerogative"? The answers emerge, I suggest, once we imagine the advertising ban as a conditional offer and recognize that it is not a coercive one.

expend or contribute . . . any money or other valuable thing for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."[161] Splitting five to four, the Court struck down the law as a violation of the First Amendment.

In my view, this statute is problematic for a variety of reasons.[162] Here, though, I want only to examine whether it is coercive. At first blush it seems more like the actual Puerto Rico ban on casino advertising than the hypothetical ban on newspaper features concerning casino gambling in being describable in unconstitutional conditions terms. That is, the inducement offered in exchange for a business entity's waiver of its expressive rights—the "privilege" of assuming the corporate form—might look like a "benefit" that the state is free to withhold. But even if that is so, the refusal to confer that benefit because of the offeree's refusal to agree to abide by the statutory limitation on its expression is most reasonably viewed as a penalty. Put very simply, the public benefits that accrue from granting incorporation are of sufficient scope and magnitude that, were Massachusetts to take an applicant's refusal to waive its expressive rights as a given, the state would most probably prefer to extend the benefit rather than withhold it. If this is right (and I concede that I have done no more than assert it), then the conditional offer (you may become incorporated only if you agree not to exercise your First Amendment rights in certain specified ways) threatens to penalize those who would not accede to the condition, hence is coercive.

The upshot is that a conceptualization of coercion that extracts from the greater/lesser feature of Puerto Rico's ban on casino advertising the conclusion that that particular ban was not coercive does not usher in a parade of horribles. The casino advertising ban is fairly distinguished from (a) bans on the same types of communication about casino advertising, but made by entities other than the casinos themselves; and (b) restrictions on other types of communication that might plausibly be characterized as "commercial speech." Instances of these latter types of speech regulations often will be coercive, thereby infringing First Amendment interests of the speakers.[163]

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161. 435 U.S. 765, 768 n.2 (1978).

162. Surely, for instance, it is worrisome on the dimension of effects. *See infra* Part V.

163. The importance of shaping doctrine to be somehow sensitive to the presence or absence of coercion is highlighted by *Thompson v. Western States Medical Center*, Docket No. 01-344, a

case involving federal restrictions on the advertising of drug "compounding" that was argued before the Supreme Court this past February.

Compounding is the pharmaceutical process of combining or altering ingredients to create a medication for an individual patient. It is often used to furnish alternatives to generally available drugs, as when a patient is allergic to an ingredient in the manufactured drug or requires that the drug be administered in a different manner. Federal law provides generally that a new drug may not be introduced into interstate commerce until the drug's manufacturer or distributor demonstrates to the Food and Drug Administration ("FDA") that the drug is safe and effective for each of its intended uses, 21 U.S.C. § 355(b) (2001), although the FDA routinely exempted compounded drugs from the requirement that they obtain prior approval. In the Food and Drug Modernization Act of 1997, Congress essentially codified existing agency practice by formally exempting compounded drug products from the FDA approval process subject to several conditions. Two conditions restricted the compounding pharmacist's speech: the compounded drug must be prepared for an individual patient in response to an unsolicited prescription from a physician, 21 U.S.C. § 353a(a) (Supp. V 1999); and the pharmacy must "not advertise or promote the compounding of any particular drug, class of drug, or type of drug," § 353a(c), though it may advertise that it performs compounding services. The district court held these two restrictions—on soliciting prescriptions and on advertising particular compounded drugs—unconstitutional for failing *Central Hudson*, and the Ninth Circuit affirmed. W. States Med. Ctr. v. Shalala, 69 F. Supp. 2d 1288 (D. Nev. 1999), *aff'd*, 238 F.3d 1090 (9th Cir. 2001).

This is a complex case that cannot possibly be treated fully in a footnote. What I want to suggest here is only that an essential (if somewhat hidden) component of the government's argument is that the regulation is not coercive and therefore does not infringe the First Amendment. *Central Hudson* looks like a justificatory test as opposed to an evidentiary one: its function is to determine whether governmental action that *infringes* the Constitution is justified by the way it advances a substantial governmental interest, thus is not a *violation*. But part of the government's argument in *Western States Medical Center*, I think, is that the regulation is not an infringement. This is an argument—regardless of whether it is right or wrong on the actual facts—that is not cognizable by, indeed is invisible to, existing commercial speech doctrine.

To understand this point, it will be helpful to start with one interest that the government claimed the solicitation and advertisement restrictions advanced, and which the lower courts agreed was substantial: "[M]aintaining the integrity of the drug approval process." *Id.* at 1302. I think that this argument can best be understood as an effort to justify the government's infringement of the pharmacists' First Amendment rights. Fleshed out, the argument runs as follows. The existence of the compounding exception manifests the following governmental preference hierarchy with respect to any particular drug that could satisfy the compounding rules: (1) the drug is submitted for ordinary approval and then made available for sale only if deemed safe and effective; (2) the drug is permitted for sale as an unapproved compound; and (3) the drug is not made available. Accordingly, the government's objective should be to make option (2) available only for those drugs which would otherwise fall into category (3), while foreclosing it for those drugs that would otherwise fall into category (1). The problem is that government cannot accomplish that sorting perfectly, and false negatives and false positives are both costly. A partial solution might be to treat whether a particular compounded drug is advertised in certain ways as a proxy for whether that drug could be shunted into track (1). That is, because the amount and sort of product advertisement provides some evidence for the amount of market share the manufacturer-pharmacist expects, barring the compounding of drug classes that are advertised (which is an alternative description of a ban on the advertising of drug classes that are compounded) is an imperfect way to make option (2) unavailable for those drugs, but only those drugs, that would otherwise be provided via option (1). In this way, the solicitation and advertising restrictions might serve government's interest in preserving the integrity of the drug approval process—though they could also fail the third and fourth prongs of *Central Hudson*, as the lower courts in fact held. *Id.* at 1303-09, *aff'd*, 238 F.3d 1090, 1094-96 (9th Cir. 2001).

Things get interesting, though, when we consider a second interest that the government advanced, "protecting the public health and safety." *Id.* at 1301. What is puzzling is that this

V. AUDIENCE INTERESTS AND BAD EFFECTS

We have seen that the majority's opinion in *Posadas* has likely survived its first test. True, the opinion was wrong to assert that the greater power necessarily includes the lesser. Nonetheless, if (as is quite possible) withholding the privilege to operate a gambling casino upon an applicant's failure to agree to abide by the advertising restrictions would be constitutionally permissible, Puerto Rico's conditional offer cum conditional threat was not coercive. For this reason it is sensible to conclude that the conditional offer did not infringe any speech interest of the casino operators. Of course, the casino operators' interests are not the only ones of constitu-

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should be presented as an *alternative* to the government's interest in preserving the integrity of the drug approval process, when surely that latter interest is itself only a mediate interest in service of the more ultimate interest in protecting public health and safety. To present these goals as separate governmental interests can make sense only if the government means to suggest that the challenged restrictions promote public health and safety in some way other than via the chain of causation that the notion of "protecting the integrity of the drug approval process" is intended to capture. But how could this be?

The path to one possible answer begins, I think, by answering two prior questions. First, why does the government not generally allow unapproved drugs? And second, why does it allow unapproved drugs that have been compounded? The answer to the first question is obvious: drugs are dangerous, and untested drugs could do more harm than good. Not always, though. So the FDA might sensibly try to identify and carefully delimit the situations in which a particular drug, albeit not FDA-approved, is likely to offer greater expected health benefits to the consumer than expected health costs. One circumstance might be this: when (a) the particular drug is carefully tailored for the patient's particular benefit by a licensed pharmacist; and (b) no drug that has already been approved would be adequate for her. This looks like an answer to the second question; it explains why compounded drugs are allowed.

The question now, of course, is whether the fact that the pharmacy advertises its compounding of particular types of drugs, or solicits prescriptions, could affect the above calculus. And it is easy to see how the answer could be yes. When the pharmacy advertises the compounding of particular drug types or classes, the risk increases that the benefit to the average individual patient will not exceed the risk to her because that particular class or type of drug will be compounded for the median expected patient rather than being adequately tailored to each patient's particular needs; when the pharmacy solicits prescriptions, some doctors might prescribe a compounded drug for patients for whom approved drugs would be adequate. In either case, the expected public health benefits of allowing the compounded drugs would not exceed the expected public health risks.

Surely this argument is logically coherent. If true, then withholding permission to compound from a pharmacy that refuses to comply with the advertising/solicitation restrictions would directly promote public health and safety, unmediated by a purpose in deterring or punishing pharmacies that refuse not to advertise. That is, carrying out the threat would not be a penalty, and the conditional proposal would not be coercive. To be sure, I have no way of judging whether the argument is factually plausible, let alone sound. But the interesting and important point transcends the dispute over this particular statute. The point is that the two ways that the solicitation and advertising restrictions might be alleged to promote public health are meaningfully distinct: they reflect the difference between denying an infringement and justifying it. The argument that would deny an infringement is just the sort that the coercion inquiry is designed to entertain. It is one that *Central Hudson*, in contrast, cannot perceive.

tional significance. This part examines whether the advertising ban violates First Amendment interests belonging to the would-be audience for the casinos' advertising.

Supporters of the advertising ban might be tempted to resort to the greater/lesser intuition once again. To be sure (they would start by conceding), ordinarily the would-be consumers of a product or service would most prefer legalization both of the product or service itself and of advertisements for it. But if government is constitutionally free to prohibit the transaction and then to ban advertisements soliciting it, that consumers find a mere advertising ban suboptimal cannot be of constitutional significance. Even were it true (to take the extreme case) that the lack of advertising would render consumers wholly unable to avail themselves of the product or service, they would still be no worse off than they would be if government exercised its greater power to prohibit the transaction as well as its advertising. Therefore, from the perspective of the audience, no less than that of the speaker, the greater power to ban a product or service should include the lesser power to permit the ban on condition that it not be advertised.

Stated this categorically, the argument is clearly false. Consider, for example, contemporary debates over whether the state should ban the sale of all-terrain vehicles ("ATVs") or St. John's Wort, due to concerns, respectively, with rollover risk and with impurity and misuse. Now suppose that the state decides to permit these products notwithstanding their dangers. Many competitors would enter the market and, if these concerns were not fanciful, would likely compete on precisely these safety and health issues (among others). One problem with a conditional advertising ban now becomes apparent. Allowing the products but disallowing the advertising might place consumers in the worst of all possible worlds: they would be free to buy potentially dangerous products but hampered from receiving information that would better enable them to choose the less dangerous brands. Moreover, without effective ways to educate consumers about their product's relative health and safety advantages, manufacturers would have less incentive to make their products less dangerous.

The direct lesson is simple: even if manufacturers accede to a noncoercive advertising ban, the effects of that ban on consumers can be matters of real importance. The critical task, then, is to determine how constitutional doctrine should take these effects into account.

One might suppose that *Central Hudson* (or something like it) already provides the correct solution. The intermediate scrutiny

of *Central Hudson* is generally defended (when defended at all) on the grounds that commercial speech is of lower value than the type of speech that is protected by strict scrutiny.[164] But the analysis of Part IV furnishes a very different possible justification for the reduced degree of protection that commercial speech enjoys. All restrictions on speech—commercial and noncommercial—impinge upon interests of the (actual or potential) audience. However, restrictions on advertising are frequently not coercive and, to the extent they are not, do not infringe upon the constitutional interests of the speaker.[165] So even if commercial and noncommercial speech are of equal constitutional value (whatever that might mean), regulations of the latter should face a heavier burden of justification, if only because they implicate interests of speakers and audience alike, whereas regulations of the former (when not coercive) implicate interests only of the audience.

Although this is a provocative defense of *Central Hudson,* I think it cannot succeed. First of all, it is not clear that there exists any principled way to distinguish a doctrinal solution that makes the applicable level of scrutiny turn upon the number of *sets* of persons who are affected (speakers and audience together provoking a higher level of scrutiny than audience alone) from one that would make the level of scrutiny turn upon the total number of *persons* affected (a regulation that infringes interests of $2n$ persons ipso facto warranting heavier scrutiny than one infringing the interests of only n persons). But that latter approach is plainly unacceptable, for it would lead to the absurd consequence that the constitutional protection due given expression is proportional to its popularity.

There is a more important reason too. *Central Hudson* is often called a "balancing test."[166] Yet if not quite a misnomer, this is

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164. *See* Jeffrey M. Shaman, *The Theory of Low-Value Speech,* 48 SMU L. REV. 297, 317-19 (1995) (describing the development of the doctrine of low-value speech as applied to commercial speech); *see also* Fla. Bar v. Went for It, Inc., 515 U.S. 618, 623 (1995) (" '[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' " (quoting Bd. of Trs. v. Fox, 492 U.S. 469, 477 (1989), quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978))).

165. This is not to deny, of course, that the would-be speakers experience the advertising restriction as a setback to their interests relative to a world in which they are allowed to peddle their wares and to advertise.

166. *See, e.g.,* Andrew S. Gollin, Comment, *Improving the Odds of the* Central Hudson *Balancing Test: Restricting Commercial Speech as a Last Resort,* 81 MARQ. L. REV. 873 (1998). On the Court, apparently only Justice Thomas refers to *Central Hudson* as a balancing test. *See* Lorillard Tobacco Co. v. Reilly, 531 U.S. 525, 572 (2001) (Thomas, J., concurring in part and concurring in the judgment); Glickman v. Wileman Bros. & Elliott, Inc. 521 U.S. 457, 504 (1997) (Thomas, J., dissenting); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas,

at the least misleading. *Central Hudson* requires that regulations of non-misleading speech concerning a lawful activity *directly* advance a *substantial* government interest and do so without abridging more speech than necessary.[167] If the interests at stake are those of the government and of the audience, the test is partially sensitive to differences in magnitude or weight of the former (substantial government interests faring better than not-quite substantial ones) but wholly insensitive to differences in the weight of the latter. The audience's interest in receiving the speech is treated as though it were invariant.

Comparing the advertising ban at issue in *Posadas* with the hypothetical bans on advertising for ATVs or St. John's Wort, however, suggests the wrong-headedness of that approach. Simply put, the effects on audience interests of the latter two bans are of an entirely different character than are the effects of a ban on casino advertising. Whereas bans on advertising for ATVs or herbal remedies threaten consumer interests in safety and health, the casino advertising ban threatens an interest in (to be only a little facetious) identifying the loosest slots. The *Central Hudson* approach cannot take this difference into account. Better, one might think, to employ a true balancing test—one that, like the well-known (albeit much-criticized)[168] *Pike* balancing test of dormant commerce clause jurisprudence,[169] weighs, in any given case, the character and magnitude of the government's interest against the character and magnitude of the private interests that the challenged action frustrates. The Court has in fact protected First Amendment rights via such true balancing tests in the past.[170] Arguably, this would be the more ap-

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J., concurring in part and concurring in the judgment). Justice Souter's description of *Central Hudson*'s midlevel scrutiny as "similar" to a pure balancing test, *see* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 383 n.2 (1997) (Souter, J., dissenting), strikes me as more perspicuous.

167. *See supra* note 7. The Court has struggled to articulate precisely what the fourth prong concerning fit requires. In *Board of Trustees v. Fox*, 492 U.S. 469, 476-81 (1989), it made clear that this was only a "narrow tailoring" requirement, not one of "least restrictive means."

168. *See generally* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1106-08 (1986).

169. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

170. *See, e.g.*, *Timmons*, 520 U.S. at 358 ("When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." (internal quotation marks and citations omitted)). In the public employment context,

propriate way to take into account audience interests in the free flow of communication: the more important the restricted communication is for advancing such First Amendment values as individual self-realization, political self-governance, and the search for truth, the more important need be the interest the government claims in justification.

In rejecting an approach of this sort, a defender of *Central Hudson* might be tempted to deny the premise that, from the perspective of audience interests, the casino advertising ban at issue in *Posadas* differs in any meaningful respect from the other advertising bans I have hypothesized. Recall Justice Blackmun's oft-quoted remark in *Virginia Pharmacy*: "[T]he particular consumer's interest in the free flow of commercial information may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[171] If consumers may subjectively value commercial information as highly as, or more highly than, political information, by the same token they may subjectively value information about casinos as highly as information about ATV safety (or about candidates for political office or surgeons).

Yes, they may, but it is not likely. Even without overriding people's actual subjective valuations, one could simply believe that, as an empirical matter, people probably do value a free flow of (truthful) information useful for making decisions related to safety more than the free flow of information that can help them maximize the value of their leisure dollars. Surely a legislature might think

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the Court also engages in halancing. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."); *see also* United States v. Nat'l Treas. Emp. Union, 513 U.S. 454, 466 (1995) (discussing how the *Pickering* balancing test applies to statutes that ban whole classes of employee speech, as opposed to individual disciplinary actions); United States Civil Serv. Comm'n v. Nat'l Assoc. of Letter Carriers, 413 U.S. 548, 564 (1973).

A hint of the true balancing approach has even surfaced in the commercial speech case law. In *City of Cincinnati v. Discovery Network, Inc.*, in striking down a city ordinance that barred commercial newsracks from public sidewalks while permitting noncommercial ones, the Court held the fit prong of *Central Hudson* unsatisfied because the city "has not 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition." 507 U.S. 410, 417 (1993). This is not what a strict reading of *Central Hudson* would require. Interestingly, nearly two decades ago, Steven Shiffrin lauded the Court's commercial speech jurisprudence for what he perceived as something akin to a case-by-case balancing approach. *See* Shiffrin, *supra* note 96, at 1252.

171. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976).

so. If this is so, the question becomes why we should interpret the Constitution so as to foreclose the legislature from making distinctions based on the value of information to the listener. To be clear, the issue is not whether the legislature should enjoy constitutional free reign to trench upon audience interests in being exposed to advertising. The more precise issue is whether constitutional doctrine should foreclose *the judiciary* from taking into account differences in what it adjudges the value of the communication to be to the audience when exercising its power of judicial review.[172]

Resolving this issue might seem to require that we confront the familiar objections to judicial balancing—principally that it is unpredictable and relies too much on the subjective value determinations of individual judges.[173] But perhaps this is unnecessary, for the present doctrine that I would replace with a more comprehensive balancing is itself a balancing test of a sort.[174] In requiring that the courts assess commercial speech regulations by reference to the

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172. Put another way, even assuming arguendo that the effects of speech restrictions in reducing people's access to communication are always of potential constitutional significance, it does not follow that the constitutional analysis need treat preferences in receiving communications of every imaginable variety as of equal constitutional value.

173. The most valuable scholarly discussions of balancing include T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 75-83 (1997); Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); and James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 805-06 (1995). A third objection holds that the very enterprise is incoherent. As Justice Scalia memorably put it: "[T]he scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy." Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring). To this, Richard Fallon's response can hardly be improved upon:

> [So long as] "balancing" is viewed as a metaphor for multifactor decisionmaking, the "incommensurability" objection becomes either too strong or too weak. It is too strong to be credited at all—because too inconsistent with the deepest assumptions of practical reasoning—if it suggests that, when different kinds of considerations bear on a decision, there can be "no basis in our knowledge of value" to say that one decision is rationally preferable to another. In contrast, if the claim allows that rational "comparability" is possible (even if "commensurability," in the sense of measurement according to a single metric, is not), then it is too weak to show that balancing in the metaphorical sense should be abandoned as an approach to legal . . . decisionmaking.

Fallon, *supra*, at 80 (internal citations omitted).

174. *See* Kathleen M. Sullivan, *Governmental Interests and Unconstitutional Conditions Law: A Case Study in Categorization and Balancing*, 55 ALB. L. REV. 605, 606 (1992) ("Intermediate scrutiny is real balancing."). My point above was only that it is obscuring to use a single term to refer both to immediate scrutiny and true balancing tests like *Pike* and *Timmons*. It was not to deny that the different sorts of tests share characteristics in common. Indeed, we might usefully think of *Timmons* and *Central Hudson* as both belonging to the balancing genus, whereas only *Timmons* belongs to the balancing species.

substantiality of the government interest, the directness with which the regulation advances that interest, and the closeness of means-ends fit, *Central Hudson* already exhibits the vices of judicial subjectivity and lack of predictability. So long, then, as the alternative to ad hoc balancing is a nonabsolutist test—like *Central Hudson* or strict scrutiny—that is responsive to differences in character and magnitude of state interest, a balancing of the sort I propose—one that is sensitive to differences on *both* sides of the ledger—cannot fairly be rejected on the strength of the usual objections to balancing.[175]

The better-tailored objection to two-handed balancing, as opposed to its one-handed cousin, then, probably arises from a concern that courts will systematically undervalue audience interests. While I would not dismiss this worry out of hand, the tension it creates with well-settled Supreme Court practice cannot be ignored. When focusing on the governmental interest side of the ledger, the Court has frequently determined, in a variety of contexts, that the state's interest in protecting safety and health is qualitatively greater than its interest in conserving fiscal resources.[176] What this really means, of course, is that an interest in protecting *the people's* health and safety is greater than an interest in saving *the people's* money. But if these differences are properly accounted for on one side of the constitutional balance, much more needs to be said to explain why the courts are not competent to effectuate the very same judgment on the other side as well. That is, if the Court may declare that interests in health and safety are qualitatively greater than financial interests, then, all else being equal, government action that restricts communication that principally advances audience interests related to health or safety should raise greater constitutional concerns—i.e., impose a heavier burden of justification—

175. For an argument that intermediate and strict scrutiny routinely, perhaps inevitably, involve bilateral balancing, see Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 31-33. Concededly, to the extent that judicial application of *Central Hudson* turns especially on questions of fit, the two-handed balancing I propose would add an additional dimension of value judgment.

176. Under the Dormant Commerce Clause, for example, the Court has repeatedly attributed special importance to state interests in promoting safety. *See, e.g.*, Kassel v. Consol. Freightways, 450 U.S. 662, 670 (1981) (plurality opinion) (citing many cases for the proposition that "regulations that touch upon safety—especially highway safety—are those that the Court has been most reluctant to invalidate" (internal quotation marks and citations omitted)). And in the equal protection context, the Court has held that administrative ease and convenience—and consequent financial savings—are interests of insufficient importance to justify gender-based classifications. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 690 (1973); Stanley v. Illinois, 405 U.S. 645, 656 (1972); Reed v. Reed, 404 U.S. 71, 76 (1971).

than communication that principally advances audience interests of a financial nature.

A summary is in order. First, this part argued that regulations of commercial advertising can differ markedly in terms of the character and magnitude of the audience interests they affect. Second, it observed that *Central Hudson* is unable to recognize these differences, and proposed that a more rational commercial speech jurisprudence should be able to do so. Third, it briefly considered, and rejected, objections to a constitutional doctrine that would be more sensitive to those differences. This does not yet determine precisely what that doctrine should look like.[177] Although true ad hoc balancing is one obvious possibility, there might exist a range of alternatives that would be more sensible than *Central Hudson*.[178] Whatever the approach taken, the casino advertising barred by Puerto Rico must certainly rate near the low end of the scale. If audience interests in receiving commercial communication are protected by any sort of test that is sensitive to real-life differences in the character of those interests and the extent to which they are impaired, the Puerto Rico casino advertising ban at issue in *Posadas* is likely to fare pretty well. Surely the public's interest in receiving casino advertising is of sufficiently slight importance as to generate a correspondingly slight justificatory burden upon the government.

VI. CITIZEN INTERESTS AND IMPERMISSIBLE PURPOSES

Focusing on speaker interests, Part IV concluded that the casino operators had no constitutional grounds for complaint because they validly waived their First Amendment interests when accepting the government's noncoercive conditional offer to operate

177. *Cf.* Post, *supra* note 22, at 54 ("If commercial speech is constitutionally valuable because it conveys information to facilitate better public decision making, then constitutional analysis ought to assess the impact of government regulations on the circulation of information, using as a standard of assessment the potential effect on public decision making and public opinion. . . . The exact parameters of any such test would no doubt require much careful consideration.").

178. One example would be a definitional balancing approach that recognizes more gradations within the universe of speech than simply commercial and noncommercial. Perhaps, for instance, regulations of commercial advertising that threaten consumer interests in health or safety should be subjected to intermediate scrutiny whereas regulations that implicate other sorts of interests might provoke only rational basis review. I am inclined to believe that such an approach would raise a host of difficult questions—including ones related to the difference between facial and as-applied challenges—and I am far from advocating it. I mention this only to show that ad hoc halancing along the lines of *Pike* or *Timmons* is not the only conceivable solution.

casinos. Focusing on audience interests, Part V argued that, even though the First Amendment should be (and has been) construed to protect interests of the communication's audience, not all information reductions should require equally compelling governmental interests to sustain them. A ban on casino advertising, it contended further, should be scrutinized more leniently than *Central Hudson* would provide. This part examines the systemic interests of the citizenry in restraining government from aggrandizing its own power.

Let us begin by clarifying just what this interest looks like. First, although the systemic or structural interest underlying freedom of expression overlaps the speaker and (especially) audience interests, it is importantly distinct. The audience interest refers to non-speakers' interest in actually being exposed to particular communication. For some communications, however, there may in fact be no potential listener with an interest in hearing what the speaker would like to communicate. Think, for instance, of the Nazis' march in Skokie. However, the citizenry has a long-term structural interest in government not acting as the censor, even if none of its members has any interest in hearing the speech that, on a particular occasion, the government proposes to silence.

The second point follows from the first. Whereas the individualistic dimension of constitutional rights is generally oriented to the rather immediate interests of the rights-holder, the structural dimension of constitutional rights often assumes a more expansive perspective. Put somewhat differently, whereas interests of individual speakers, and even of individual sets of listeners, can be threatened by specific acts of government, including the enactment of specific laws, the citizenry's interest in restraining governmental power attaches to the more general practices that individual acts and laws instantiate. And this has a further consequence. Insofar as we are concerned with how discrete laws impact upon discrete individuals, we are likely to think in terms of the means that the law employs (e.g., is it coercive? discriminatory?) and the effects that it has. But insofar as government action might be unconstitutional because the practice under which it falls is thought likely to produce bad results over the long run, the practice is likely to be defined, at least in part, in terms of impermissible government purposes.[179] In sum, when, or to the extent that, a constitutional right

179. I am agnostic here and throughout the Article regarding whether references to governmental purposes should be construed "subjectively" in terms of what actually motivated decisionmakers or "objectively" in terms of the motivations that would be inferred from more circum-

right serves a systemic or structural function, we should not be surprised to see it protected by a purpose test.[180]

And, indeed, one purpose test does emerge time and again in the commercial speech case law. It appears at least as far back as *Virginia Pharmacy,* where Virginia defended its ban on price advertising by pharmacists as a means to preserve the relationship between customer and professional pharmacist from destruction by presumably low-quality discounters, thus provoking the Court to observe "that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance."[181] This motivation, the Court concluded, rendered the ban unconstitutional: "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."[182] Ever since, individual Justices have frequently reiterated the view that state action undertaken for the purpose of suppressing information is a special type of First Amendment evil. In *Central Hudson,* for example, Justice Blackmun, *Virginia Pharmacy*'s author, concurred in the judgment precisely to reject the majority's adoption of intermediate scrutiny, and to opine that strict scrutiny should "be applied when a State seeks to suppress information about a product in order to manipulate a private economic decision,"[183] and Justice Stevens concurred to a similar effect in *Coors Brewing.*[184] More recently, Justice Thomas has put the position even more strongly, arguing in *44 Liquormart* that "the government's asserted interest . . . to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace . . . is *per se* illegitimate . . . ."[185]

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scribed classes of evidence. A still useful exploration of this issue is John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 YALE L.J. 1205, 1217-21 (1970).

180. For elaboration of this observation, see Berman, *supra* note 55, at 25 n.100. To be more precise, we would expect that the judicial test turns either directly upon purposes or upon other factors that are adopted as proxies for the purposes that are deemed constitutionally bad.

181. 425 U.S. 748, 769 (1976).

182. *Id.* at 770.

183. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring).

184. Rubin v. Coors Brewing Co., 514 U.S. 476, 498 (1995) (Stevens, J., concurring) ("Congress may limit directly the alcoholic content of malt beverages. But Congress may not seek to accomplish the same purpose through a policy of consumer ignorance, at the expense of the free-speech rights of the sellers and purchasers.").

185. 517 U.S. 484, 518 (1996) (Thomas, J., concurring). Unfortunately, it is hard to reconcile this view with the fact that Thomas joined the Supreme Court majority in granting a stay of the recount in *Bush v. Gore,* 513 U.S. 1046 (2000). In an opinion defending the stay, Justice Scalia explained that "[t]he counting of votes that are of questionable legality . . . threaten[s] irrepara-

Justice Brennan thought this rule was enough to condemn the advertising ban at issue in *Posadas*. As he explained in his dissent, "where the government seeks to suppress the dissemination of nonmisleading commercial speech relating to legal activities, for fear that recipients will act on the information provided, such regulation should be subject to strict judicial scrutiny."[186] Thus, strict scrutiny should apply "where, *as here,* the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity."[187]

I think Brennan was wrong. Even supposing that heightened scrutiny—perhaps even a per se rule of invalidity—should apply whenever government acts for the purpose of promoting "ignorance" or "suppressing information,"[188] it is naive to suppose that all regulations limiting advertising are animated by such a purpose. Pay close attention to Brennan's language. Over the course of two pages, he says essentially the same thing no fewer than seven times, each time emphasizing the impropriety of government acting for the *purpose* of suppressing *information*.[189] But the notion that advertising has much to do with conveying information in the ordi-

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ble harm to [Governor Bush], and to the country, by casting a cloud upon what he claims to be the legitimacy of his election." *Id.* at 512 (Scalia, J., concurring). As David Strauss has observed, "The premise of this argument is that there is a legitimate interest in suppressing truthful information—information about what the recount ordered by the Florida Supreme Court would have disclosed—in order to protect the President of the United States from political harm." David A. Strauss, Bush v. Gore*: What Were They Thinking?, in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 184, 190 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

186. Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 351 (1986) (Brennan, J., dissenting).

187. *Id.* at 350 (emphasis added).

188. Of course, maybe this proposition should be resisted. The argument of Part V might be adapted in support of the view that the level of judicial scrutiny should vary depending upon the type of information that government seeks to keep from the citizens. After all, the principal proponents of the view that government may not act for the purpose of suppressing information apparently agree that the government may permissibly regulate commercial speech for the purpose of suppressing *false* information. *See, e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 432-33 (1993) (Blackmun, J., concurring). And this position might suggest a continuum: government needs only slight justification when regulating for the purpose of suppressing false commercial information, compelling justification when regulating for the purpose of suppressing some specified sorts of true information, and moderate justification when regulating for the purpose of suppressing other specified sorts of true information. I am not sympathetic to this argument partly because I believe that balancing (definitional or otherwise) makes more sense as part of an effects test geared to audience interests than as part of a purpose test designed to protect systemic interests. But developing this intuition would take us far afield.

189. *See also, e.g., Posadas de P.R. Assocs.*, 478 U.S. at 350 (asserting that the government has sought "to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity"); *id.* at 351 (asserting that "the government seeks to manipulate private behavior by depriving citizens of truthful information concerning lawful activities").

nary sense of "knowledge" or "a collection of facts or data"[190] is quaint. As Ronald Collins and David Skover have persuasively argued, "[t]he history of modern advertising is the story of the general movement from product-information to image and lifestyle advertising."[191] Today, "[i]mage, not information, is the touchstone of much of our commercial discourse."[192] This basic description (which readers who have personally encountered advertising can perhaps confirm for themselves) is accepted even by their critics. Alex Kozinski and Stuart Banner, for example, acknowledge, as "unlikely to be disputed," that "[m]uch advertising is about conveying product images, or molding consumers' own self-images, rather than about conveying information about products themselves," and that "much advertising is nonsense."[193]

According to Collins and Skover, this more realistic picture of commercial advertising justifies removing commercial speech from the First Amendment's protective embrace.[194] And it is here that their critics jump ship. As Kozinski and Banner argue:

> The First Amendment, one might think, prevents the people's representatives in legislatures from prohibiting speech the majority doesn't like. That's the whole point. People might quibble about *why* that should be so, or about the *values* served by the freedom of speech, but there seems to be no debate that the First Amendment bars the majority from suppressing the speech of some simply because others find it to have little value.
>
> Given that premise, it strikes us as odd to argue that a particular form of speech shouldn't receive First Amendment protection solely because that speech has little value. This is exactly the type of argument the First Amendment should foreclose. People value speech differently, and all sorts of different people think that all sorts of different speech is valueless or downright pernicious.[195]

Arguably this is not entirely responsive. The distinction they would favor, Collins and Skover might rejoin, depends not upon contestable judgments of high and low value, but upon qualitative

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190. THE AMERICAN HERITAGE DICTIONARY 927 (3d ed. 1992); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1160 (1993).

191. Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 700 (1993).

192. *Id.* at 736.

193. Kozinski & Banner, *supra* note 113, at 748; *see also* Smolla, *supra* note 160, at 778 (agreeing "that the basic descriptive portrait of contemporary advertising drawn by Collins and Skover is realistic").

194. Collins & Skover, *supra* note 191, at 726 ("All of these consequences of commercial communication might prompt us to reconsider the structure of traditional First Amendment analysis. Is the central question, as typically thought, whether commercial expression should receive constitutional protection? Or is it whether the government should act affirmatively to fortify the First Amendment wall against the battering ram of commercial advertising?").

195. Kozinski & Banner, *supra* note 113, at 751-52.

differences between speech that has cognitive content and speech that has only emotional or subliminal appeal.[196] But this distinction is no more satisfactory, and the Supreme Court has rejected it outside of the commercial speech arena. As Justice Harlan powerfully put it in *Cohen v. California*:[197] "We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."[198] And for reasons Sylvia Law has urged, this seems plainly right: "[A] broad principle curtailing or denying First Amendment protection for image advertising justifies suppression of much speech that forms a valuable part of our culture. More damaging, however, the distinction between informational and emotive speech undermines the First Amendment protection for vulnerable artistic and personal expression."[199]

I fully agree with the critics. Indeed, even much core political speech is as heavily emotive and lightly informational as is commercial advertising. So it bears emphasis that I aim to make much less ambitious use of the fact that advertising is not really about conveying information.[200] I do not take this to mean that commer-

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196. An argument along these lines is advanced in Lowenstein, *supra* note 65, at 1225-37, and critiqued in, for example, McGowan, *supra* note 22, at 411-29. Similarly, Martin Redish argued in 1971 that only "informational advertising," and not "persuasive advertising," should be protected, Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 445-47 (1971), only to disavow this same distinction a decade later, *see* Redish, *supra* note 93, at 630 n.135. Redish was right to reject this line of argument. My distinction is drawn in terms of the (predominant) regulatory *purposes*, not the (predominant) *character* of the speech being regulated (though I recognize, of course, that the two principles of classification will yield extensional overlap). Thus, for the Puerto Rico casino advertising ban to fall on the right side of the line, I need not make the "plainly misplaced" assumption (as McGowan correctly observes that Lowenstein must) "that the advertisements in *Posadas* were noninformational." McGowan, *supra* note 22, at 423.

197. 403 U.S. 15 (1971) (overturning conviction for the wearing of a jacket bearing the language "Fuck the Draft" under a statute prohibiting "offensive conduct").

198. *Id.* at 26.

199. Law, *supra* note 22, at 933; *see also, e.g.*, Halberstam, *supra* note 22, at 800-05; Smolla, *supra* note 160, at 782 (arguing that "the distinction that is central to the Collins and Skover argument, a distinction that seeks to drive a wedge between the rational and irrational components of advertising, is one that has been repudiated in virtually all other areas of current First Amendment doctrine").

200. Although, as we have seen, Kozinski and Banner vehemently disagreed with the legal conclusion that Collins and Skover advanced, they acknowledged the importance of taking a realistic view of the matter being regulated:

> [Collins and Skover have] convincingly demonstrated that the practice of advertising out there in the world looks quite a bit different from the descriptions of advertising in the opinions of appellate courts. Regardless of whether this divergence has any implications for the First Amendment, it is an important

cial speech warrants no constitutional protection, or even that it warrants less protection than more information-heavy speech. My point is simple. The grievous sin often thought present in *Posadas* was that Puerto Rico had adopted its casino advertising ban for the purpose of promoting "ignorance" or suppressing "information."[201] But one might wonder precisely what information these critics supposed the legislature was trying to keep its residents ignorant of—that the casinos existed? Surely not.[202] Indeed, it is far from self-evident—and almost certainly false—that the legislature acted for the purpose of suppressing information at all.[203] Much more plausibly, the advertising ban was driven not to maintain consumer "ignorance" of any facts or "information," but to protect the public from the noncognitive affective force of advertising. Stated differently, the informational content of casino advertising was most probably *not* the government's target when enacting the advertising ban; its nonrational, want-creating function was.[204] In short, the

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> point in itself. If courts are going to apply the First Amendment to commercial speech with any coherence, they should have a grasp of what commercial speech actually is.

Kozinski & Banner, *supra* note 113, at 747. I agree. My objective in this part is to turn the descriptive claim elaborated by Collins and Skover (among others) to different legal effect.

201. *See* 478 U.S. 328, 358 (1986) (Brennan, J., dissenting) ("I would hold that Puerto Rico may not suppress the dissemination of truthful information about entirely lawful activity merely to keep its residents ignorant."); *see also* Halberstam, *supra* note 22, at 858 ("In both *Posadas* and *Edge Broadcasting*, the reason for keeping the information from potential consumers was not based on a concern about such information coming from any seller, but simply on a desire to keep such information from the audience as a general matter."); *cf.* Redish, *supra* note 22, at 604 ("An inherent assumption underlying a total ban on tobacco advertising . . . is that the citizenry cannot be trusted to make proper judgments on the basis of exposure to truthful advocacy on behalf of a lawful activity. The premise of the proposed ban, then, is that individuals are incapable of making their own judgments on the basis of the expression of competing views and information." (internal citation omitted)).

202. *Cf.* United States v. Edge Broad. Co., 509 U.S. 418, 434 (1993) ("Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling, even if the North Carolina audience is not wholly unaware of the lottery's existence. Congress has, for example, altogether banned the broadcast advertising of cigarettes, even though it could hardly have believed that this regulation would keep the public wholly ignorant of the availability of cigarettes.").

203. To be sure, as we saw in Part V, the han would have the *effect* of reducing dissemination of some information (hours of operation, the existence of special promotions, comparative payout rates, etc.), an effect that no doubt could have been predicted. But acting with knowledge of likely consequences is not the same as acting for the purpose of producing those consequences. And the difference often matters in practical, ethical, and legal reasoning. *See, e.g.*, MODEL PENAL CODE § 2.02 (1985) (differentiating purposely and knowingly as levels of criminal culpability).

204. As William Van Alstyne noted, legislators who suppress advertising are often exploiting "a simple psychological truth ('out of sight, out of mind')." Van Alstyne, *supra* note 22, at 508 n.8. Needless to say, that something is "out of mind" within contemplation of this maxim does not mean that the actor doesn't *know* it, but only that she's not *thinking about* it.

Puerto Rico legislature is often lambasted for engaging in a constitutional sin—regulating for the purpose of keeping its citizens ignorant—of which it was almost certainly innocent.

Again, so what? One might object that even if Puerto Rico was not trying to suppress "information" or keep its residents "ignorant," its purposes were nonetheless constitutionally improper. Perhaps. That is indeed the debate worth having. Notice, though, that this argument comes without support from the major premise that the state may not act for the purpose of suppressing information or keeping its citizens ignorant—a premise that Justice Brennan thought important enough to employ an average of once every page of his dissent. The challenge for *Posadas*'s opponents, then, is to identify precisely what purpose or motivation thought to animate Puerto Rico's casino advertising ban runs afoul of the First Amendment. Although a comprehensive assessment of all possible candidates cannot, of course, be attempted here, examining some of the more obvious proposals will provide a flavor of the task's difficulty.

Start with these possible rules that have appeared in the case law and the commentary. The regulation of private speech should provoke significantly heightened scrutiny (or even be subject to a per se rule of invalidity) whenever imposed (1) "for the purpose of manipulating public behavior";[205] (2) out of paternalistic regard for the audience;[206] (3) because the government fears "that the speech is likely to persuade people to do something that the government considers harmful";[207] (4) "out of concern for its likely

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205. *Edge Broad.*, 509 U.S. at 436 (Stevens, J., dissenting); *see also, e.g.*, Redish, *supra* note 22, at 605-06 ("[I]f our constitutional system allows government to control expression out of a fear that the public cannot be trusted to make proper judgments on the basis of that expression, the only remaining question concerns a determination of which potential public choices the government deems unwise. No meaningful system of free expression can flourish if government is given such a power."). Notice, incidentally, how Redish links the structural dimension of freedom of speech to the policing of governmental purposes.

206. *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476, 497-98 (1995) (Stevens, J., concurring) ("[T]he Government's asserted interest, that consumers should be misled or uninformed *for their own protection*, does not suffice to justify restrictions on protected speech in *any* context, whether under 'exacting scrutiny' or some other standard." (first emphasis added)). The antipaternalistic theme of many of the Court's commercial speech decisions is traced in Stern, *supra* note 86, at 58-72.

207. Strauss, *supra* note 22, at 335 (adding that "[p]ut another way, harmful consequences resulting from the persuasive effects of speech may not be any part of the justification for restricting speech"). Thomas Scanlon had earlier raised a nearly identical idea, *see* Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972), only to repudiate it, *see* T.M. Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 532-34 (1979).

communicative impact";[208] or (5) "based on hostility—or favoritism—towards the underlying message expressed."[209] Call these, respectively, the manipulation principle, the paternalism principle, the persuasion principle, the communicative-impact principle, and the ideology principle.[210] Added to the ignorance principle that we have already examined—that government may not suppress speech for the purpose of keeping its citizens ignorant—this makes six closely related purpose-based rules.[211] Although these different principles often appear clumped together and will overlap in their conclusions, each differs from the others both intentionally and extensionally.[212] My strategy is to tease them apart and consider them separately. My conclusions are as follows: The manipulation and paternalism principles are questionable as general principles and, in any event, do not condemn Puerto Rico's casino advertising ban; the persuasion principle seems plausible, but also very possibly does not condemn the casino advertising ban; and the communicative-impact and ideology principles probably would condemn the casino advertising ban, but are not sound rules when applied to *noncoercive* speech regulations.

Consider first the manipulation and paternalism principles. Of course, government is not generally prohibited from acting "for the purpose of manipulating public behavior."[213] Large swaths of the law—from criminal law to torts to many parts of the tax code—are motivated by little else. Nor does the purposeful manipulation of public behavior automatically raise constitutional concerns when it is done for paternalistic reasons. A great number of laws that regulate or bar victimless conduct (drug use, gambling, driving

208. United States v. Eichman, 496 U.S. 310, 317 (1990).

209. R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

210. I am here following and extending the work of David Strauss, who coined the phrase "the persuasion principle" in reference to candidate rule (2). Furthermore, my label "the ideology principle" for the rule announced in *R.A.V.* derives from Elena Kagan's defense and elaboration of that rule in Kagan, *supra* note 103, where she distinguishes between "harm-based" and "ideological" reasons for restrictions of speech. *See id.* at 430. As Kagan describes it, what I have called the ideology principle differs from Strauss's persuasion principle in "posit[ing] that the government is forbidden from restricting speech on the ground that it will persuade people to adopt wrong or false opinions (rather than persuade people to take actions causing harm)." *Id.* at 436 n.68.

211. A distinction between purpose and motive might plausibly be drawn here, but I follow conventional wisdom in treating purpose and motive as synonymous. *See* Berman, *supra* note 55, at 23 n.87 (citing authorities).

212. For example: a ban on loud communications could be based on paternalistic reasons but have nothing to do with the speech's communicative impact; a ban on speech could be adopted to manipulate public behavior, but not for paternalistic reasons, etc.

213. *See supra* note 205.

without a seatbelt, etc.), though often rationalized as concerned with negative externalities, are undoubtedly paternalistic at their core. Accordingly, the question is why these purposes should taint laws that proceed by regulating expression but not by prohibiting conduct. And the most plausible answer, I think, proceeds along lines proposed by Professor Strauss and noted earlier: it is one thing to prevent people from satisfying their desires, but the First Amendment stands against government action designed to prevent people from formulating those desires in the first place.[214]

This is not persuasive.[215] Desires are formulated by experience as much as, if not more than, by the receipt of communication. No matter how many accounts I might read of, say, the use of putatively mind-expanding drugs or riding a motorcycle without a helmet, I cannot really know what these experiences are like—and therefore whether they are things I very much want to do—unless I have done them. And that is precisely what the law forbids.[216] Much more needs to be said, then, to explain why the First Amendment should be construed to make speech special in the particular sense that it forecloses government from enacting speech regulations to advance precisely the paternalistic and/or manipulative purposes government may pursue with ease via regulations of conduct.

Moreover, even were these sound principles of First Amendment law, that they would damn the casino advertising restrictions at issue in *Posadas* is very doubtful. This is more apparent with respect to the paternalism principle. Justice Brennan, after all, surmised "that the legislature chose to restrict casino advertising not because of the 'evils' of casino gambling, but because it preferred that Puerto Ricans spend their gambling dollars on the Puerto Rico lottery."[217] To the extent this is true, the law was not paternalistic (although Brennan notably did not consider that a point in the statute's favor).

As for the manipulation principle, all depends upon what is meant by manipulation. This is another place where some realism about the manipulative effects of advertising becomes important. If

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214. *See supra* text accompanying note 69.

215. A narrowly utilitarian objection that I do not rely upon might observe that, if utility is measured by the satisfaction of wants, preventing people from developing wants in the first place reduces utility less than does preventing people from satisfying wants that they already have.

216. Actually, Texas law would allow me to ride a motorcycle helmetless. But the First Amendment would not prevent Texas from following the many states that prohibit it.

217. Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 354 (1986) (Brennan, J., dissenting). *But see* Lowenstein, *supra* note 65, at 1243 (claiming that *Posadas* "presented as pure a paternalism issue as the Court has seen").

government's hostility to particular speech stems from belief in that speech's manipulative character (a premise that would be plausible sometimes, though not always), it seems inapt to characterize a restriction on that speech as itself manipulative. Recall the story of Odysseus and the Sirens. Concerned with the seductive and manipulative character of the Sirens' song, Odysseus had himself tied to the mast and his sailors' ears plugged. To describe the earplugging order as enacted for the purpose of manipulating the sailors' behavior seems wrong. And that conclusion should not change if Odysseus, magically granted authority over the Sirens, had ordered them not to sing as his ship went by.

Similar things could be said about the persuasion principle. Strauss identifies *Posadas* as the one case other than those that by 1991 "ha[d] already been discredited, in which the Court explicitly rejected the persuasion principle."[218] If the persuasion principle is right, he concluded, then *Posadas* was clearly wrong.[219]

But *Posadas* did not "explicitly" reject the persuasion principle. Indeed, I doubt that *Posadas* rejected that principle even *implicitly*. " 'Persuade,' " Strauss is careful to emphasize, "does not mean simply 'induce.' 'Persuasion' denotes a process of appealing in some sense, to reason."[220] As something close to a subset of the ignorance principle, the persuasion principle "prohibits the government from deliberately denying information to people for the purpose of influencing their behavior."[221] Thus, "like certain forms of liberalism," it is "highly rationalistic; from the point of view . . . [of the persuasion principle,] speech is valuable only to the extent that it furthers *rational* decision making."[222]

But if all of this is so, one is entitled to wonder about Strauss's confident assertion that *Posadas* violated the principle. Indeed, at first blush one might think that many restrictions on advertising should be permissible on grounds Strauss explicitly acknowledges—namely, that in addition to false statements of fact, "[a]nother candidate for exclusion from the persuasion principle is

218. Strauss, *supra* note 22, at 359.

219. *Id.* at 345.

220. *Id.* at 335.

221. *Id.* at 355. This particular passage makes the persuasion principle look like a subset of the ignorance principle insofar as it bars the purposeful suppression of information out of concern for tbe persuasive effect of that speech, a qualification that the ignorance principle does not contain. Notwithstanding this passage, though, I suspect that whether the communication suppressed is "informational" is not really critical to the persuasion principle, as it might be to the ignorance principle, in which event neither of the two principles would be a subset of the other.

222. *Id.* at 370.

speech that seeks to precipitate an ill-considered reaction."[223] Strauss does not, however, expressly address this possibility. Instead, he proceeds to problematize the category: "The true problem with allowing the government to restrict speech that precipitates an ill-considered reaction is . . . that *every* action is to some degree ill-considered. . . . That is why this category is so ill-defined—because potentially it includes all manipulative private speech, a very broad category indeed."[224]

The oddity is that although Strauss defines the persuasion principle itself in terms of government's motives or reasons for action, he defines the "unclear and troublesome" category of "speech that seeks to precipitate an ill-considered reaction"[225] in terms of the character of the speech itself.[226] This disparity of categorizing principle cannot, I think, be coherently maintained. But the asymmetry could be cured by recognizing that much communication contains information as well as a capacity to induce ill-considered action. In other words, any given speech designed to induce action can operate *both* by providing rational reasons for action and by seducing the listener in nonrational ways. Accordingly, the scope of the protection the persuasion principle affords should depend upon categorizing, not the communication being regulated, but rather the reasons animating the regulation. It might follow that, consistent with its rationalistic underpinnings, the persuasion principle by its own force prohibits (absolutely or presumptively) governmental action that purposely "den[ies] information to people for the [further] purpose of influencing their behavior,"[227] whereas the more general concern with manipulation and coercion that Strauss describes as a close cousin to the persuasion principle[228] imposes a like prohibition against governmental action that coerces speakers for the purpose of manipulating the behavior of listeners, whether or not government's purpose is to suppress information. Because Puerto Rico's casino advertising ban was arguably not adopted for the purpose of denying information and was not coercive, then *Posadas* is not so clear an exception to the persuasion principle as Strauss supposes.

Lastly, consider the communicative-impact and ideology principles. The communicative-impact principle has been described

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223. *Id.* at 335.

224. *Id.* at 367.

225. *Id.* at 335.

226. *See id.* at 365 (asserting that "the persuasion principle . . . does not protect false statements of fact or statements that seek to precipitate ill-considered action").

227. *Id.* at 355.

228. *See, e.g., id.* at 355-59.

as declaring that "[t]he government may not restrict speech for any reason having to do with either the messages embedded in the speech or the consequences of those messages."[229] The ideology principle "prevents government from proscribing speech . . . because of disapproval of the ideas expressed."[230] Although the conclusion is not unchallengeable (much depends on what "message" and "idea" mean for purposes of these principles), Puerto Rico's casino advertising ban would seem to run afoul of each of these principles. The Puerto Rico legislature enacted the restriction out of concern that casino advertising would cause audience members to act in a certain way—namely, to engage in casino gambling—and because of hostility to the underlying message that residents should do precisely that.

Accordingly, the question boils down to whether either of these principles states a sound rule of First Amendment doctrine. Important First Amendment scholars have contended that they do,[231] and I concede that they could be right. Surely a full examination cannot be conducted in this short space. Here it will be enough, I think, to note how varied are the considerations that can be brought to bear against them.

First, we should take seriously language from the commercial speech case law that has repeatedly emphasized how particularly evil is government action motivated specifically to preserve public *ignorance*. Justice Stevens put the point sharply in his *Edge Broadcasting* dissent, where he complained that "the United States has selected the most intrusive, and dangerous, form of regulation possible—a ban on truthful *information* regarding a lawful activity *imposed for the purpose of manipulating, through ignorance*, the consumer choices of some of its citizens."[232] While I do not suggest that the many proponents of views of this sort are now somehow estopped from redescribing the set of governmental purposes that they contend should warrant especially heightened scrutiny, I do

229. Kagan, *supra* note 103, at 435.

230. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

231. The most prominent proponents of the communicative-impact principle include Laurence Tribe and John Hart Ely. *See* TRIBE, *supra* note 22, at 789-804; John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1493-96 (1975). Elena Kagan, who has elucidated the ideology principle, contends that it constitutes the central organizing principle around which the great hulk of existing First Amendment doctrine is framed, but stops short of valorizing it. *See* Kagan, *supra* note 103, at 415.

232. 509 U.S. 418, 439 (1993) (Stevens, J., dissenting) (emphases added).

believe that the repeated expression of such views reflects an underlying intuition that we should not cavalierly abandon.[233]

Second, without much difficulty we can identify reasons for the intuition that government action designed to suppress information so as to maintain the people's ignorance is especially pernicious. Most fundamentally, such a reading of the First Amendment is consistent with the widespread view of American political culture in general, and founding era political theory in particular, as highly rationalistic.[234] Relatedly, but distinctly, it follows from central First Amendment dogma that, in the much-quoted words of Justice Brandeis, when government seeks to cure the evil it associates with given speech, "the remedy to be applied is more speech, not enforced silence."[235] If (as seems plausible) the propositional aspects of speech are more susceptible to rebuttal by more speech than are the nonpropositional aspects, the "more speech" requirement has special force in prohibiting regulatory strategies motivated by hostility to speech's informational content.[236]

Third, a negative point. One might reasonably worry that the distinction I would hope to draw—between purposes of suppressing information and purposes to protect people from noninformational aspects of communication—would eviscerate protection for artistic expression and would essentially abandon *Cohen*. This belief would be mistaken. The argument of this part would not give the state carte blanche to restrict speech so long as it is not motivated by hostility to the speech's informational content (somewhat narrowly understood). The regulation would still have to pass scrutiny on the dimension of effects. Much more importantly, strict scrutiny would apply if the state pursues such ends via coercive means. Indeed, nothing in this part is inconsistent with the central distinction of First Amendment doctrine between content-neutral and content-based regulations, or with efforts to operationalize the content-based category by reference to communicative impact.[237]

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233. Robert Post draws a distinction much like the one I am proposing in recommending that we "distinguish between government efforts to alter public opinion by means of suppressing advertising and government efforts to modify behavior by means of suppressing the information contained in commercial speech." Post, *supra* note 22, at 50. Surprisingly, though, he proceeds to consider the possibility (though ultimately to reject it) that the former should be treated with the greater suspicion. *See id.* at 50-53.

234. *See, e.g.*, THOMAS PAINE, THE AGE OF REASON (1796) (not the book, just the title).

235. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

236. *See* Kozinski & Banner, *supra* note 22, at 636 ("To the extent certain speech is easily susceptible to debunking by counterspeech, there seems to be *less*, not more, justification for government interference.").

237. *See* authorities cited *supra* note 231.

Whether a *coercive* speech regulation provokes strict scrutiny might well depend upon whether it was adopted out of hostility to the speech's expected communicative impact.[238]

To summarize: First, the structural dimension of the Free Speech Clause might very well entail that demanding scrutiny be applied whenever the state regulates private speech[239] for the purpose of keeping the public ignorant of information. Second, even if the ignorance principle is a sound rule of First Amendment law, that has little if any bearing on *Posadas,* for the casino advertising ban there at issue most likely was *not* driven by a purpose in suppressing information or preserving public ignorance. Third, this does not establish, however, that government regulation raises no First Amendment worries on the dimension of purpose when enacted for reasons other than the suppression of "information." Indeed, other principles, kindred to the ignorance principle, have been articulated in the case law and scholarly commentary. But fourth, it is far from clear that any one of the most apparent candidate principles—what I have called the manipulation, paternalism, persuasion, communicative-impact, and ideology principles—both (a) states a sound purpose-based rule of First Amendment doctrine, and (b) is violated by Puerto Rico's casino advertising ban.

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238. To see this more clearly, imagine a zoning regulation that permits bookstores but prohibits the sale of sexually explicit materials. Assuming that a substantive understanding of the Free Speech Clause entails that individuals have a right to distribute protected material by means of retail stores open to the public, the regulation threatens to withhold from sellers of pornographic books a benefit to which they are presumptively entitled, and is therefore coercive. *See infra* Part VII.A.2. Now imagine three sorts of reasons for this coercive law: (1) to keep people ignorant of the types of sexual practices that the pornography depicts or describes; (2) to protect against the coarsening of values, or the development of misogynistic impulses, that the consumption of pornography can produce; (3) to combat the prostitution that stores specializing in sexually explicit materials might attract. (Of course, this menu of possibilities is simplified for purposes of illustration.) Only motives of the first sort would run afoul of the ignorance or persuasion principles. But this need not entail that only motives of the first sort render the regulation subject to strict scrutiny. If the line separating coercive speech regulations that are subject to strict scrutiny from coercive speech regulations that are subject to intermediate scrutiny is drawn in terms of whether the law is adopted out of concern for the likely communicative impact of particular speech (or, what is similar but not identical, out of hostility toward the expression's underlying message), then only zoning regulations motivated by the third sort of reasons escape strict scrutiny. *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-55 (1986).

239. Surely different issues will arise when the state acts to maintain public ignorance but does so in its capacity as speaker.

VII. BEYOND *POSADAS*

Notwithstanding widely differing views on such matters as the values that the First Amendment is most fundamentally designed to serve, the worth of commercial speech as measured against those diverse values, and the relative attractiveness of rules versus standards, most scholars of commercial speech have found common ground on one proposition: Existing commercial speech doctrine is a mess.[240] This part explores one way to clean it up. Because the formulation of judicial doctrine designed to implement or enforce the constitution's presumed meaning is a creative task, not an interpretive one, however, modesty is especially appropriate here. For one thing, I will not take myself to be writing on a blank slate. Although the revision I propose is, in some respects, fairly substantial, it is just that, a revision, and not a wholesale replacement. For instance, I preserve existing doctrine's central distinction between content-based and content-neutral regulations and employ conventional strict scrutiny within the content-based track. Furthermore, I do not pretend that what I propose here is complete or even "correct" as far as it goes. The most I can claim is that its basic outlines are sound and that it is far preferable to what exists. It is the starting point for analysis, emphatically not the end point.

Part VII.A sketches a doctrinal revision consistent with the arguments thus far developed. The modified and rationalized doctrine's most distinctive feature is that it contains no separate track for regulations of "commercial speech." Instead, a single multipart test applies to all regulations of speech. Part VII.B applies this test to a smattering of important recent commercial speech cases. This section fleshes out the skeletal doctrine put forth in the first section

240. *See, e.g.*, Greater New Orleans Broad. Ass'n v. United States, 149 F.3d 334, 335 (5th Cir. 1998) (stating that commercial speech "jurisprudence has become as complex and difficult to rationalize as the statutory advertising regulations the Court has condemned"), *rev'd*, 527 U.S. 173 (1999); Halberstam, *supra* note 22, at 778 ("[T]he Court's traditional commercial speech doctrine is in dire need of reform."); Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 CASE W. RES. L. REV. 1093, 1095 (1991) (calling commercial speech doctrine "simplistic," "naive," "ineffectual," and "procrustean"); McGowan, *supra* note 22, at 448 ("The commercial speech doctrine is in disarray."); Post, *supra* note 22, at 2 (" '[C]ommercial speech' doctrine [is] a notoriously unstable and contentious domain of First Amendment jurisprudence."); Van Alstyne, *supra* note 22, at 1635 ("The First Amendment law of commercial speech is currently in confusion."). *But see* Blim, *supra* note 56, at 736 (concluding that "contrary to . . . the conventional wisdom among commentators[,] . . . the Court's commercial speech decisions . . . form a relatively coherent body of law").

and also enables the reader to test the test against her own case-specific intuitions.

A. Toward Doctrinal Reform

Let us start with a capsule summary of the fundamental reasons why commercial speech doctrine has been unstable. Arguably, the core rule of free speech law is that content-based regulations are unconstitutional unless they satisfy "strict scrutiny," which requires that the regulation be narrowly tailored, and the least restrictive means, to achieve a compelling governmental interest.[241] Applying this rule to paradigmatically commercial speech like advertisements is often thought problematic for two related but distinct reasons. First, many Justices and scholars simply believe that commercial speech does not implicate the core values underlying the First Amendment, or advances them to a smaller degree than does noncommercial speech,[242] and, therefore, that subjecting all content-based regulations of commercial speech to the exacting rule of strict scrutiny would yield a great many normatively unacceptable outcomes.[243] The second argument is in a sense parasitic upon the first, but it takes judicial belief in the lower value of commercial speech as a brute sociological fact. Whether or not commercial and noncommercial speech are of equal constitutional value, the argument goes, if doctrine requires judges to subject all commercial speech regulations to strict scrutiny, and insofar as judges *believe* commercial speech is of lower value, they will distort the doctrine (consciously or not) to reach what they feel is the proper outcome in the case before them—namely, upholding the regulation. The danger is that this has a diluting or leveling effect on strict scrutiny generally, thereby yielding outcomes in *non*commer-

241. This is shorthand. Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1528-34 (1995), sets forth some of the ways strict scrutiny has been formulated.

242. Hence the Court's repeated affirmation of a "common-sense" distinction between commercial and noncommercial speech. *See, e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423 (1993); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. 425 U.S. 748, 771 n.24 (1976). Sometimes this is referred to as the " 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *E.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978).

243. If the narrow tailoring and least-restrictive means requirements are taken seriously, for example, they would seem to disallow even mandatory health warnings on cigarette packages and other unhealthy or dangerous products, as well as many regulations that police deceptive advertising.

cial speech cases that are insufficiently attentive to legitimate expressive interests.[244]

Considerations such as these have led the Court to place commercial speech in its own separate tier of constitutional value, garnering greater First Amendment protection than, say, obscenity, which gets none,[245] but less than ordinary non-commercial speech. The major problem with this approach has centered on the difficulty of adequately defining the predicate.[246] The Court's initial definition of "commercial speech" as speech that does " 'no more than propose a commercial transaction' "[247] seems as administrable

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244. *See, e.g., Ohralik,* 436 U.S. at 456; Schauer, *supra* note 56, at 1193-97; Van Alstyne, *supra* note 22, at 1640-48. That the dilution argument is heavily predictive and does not depend upon accepting that commercial speech *is* of less value than noncommercial speech appears to be overlooked by its critics. *See, e.g.*, McGowan, *supra* note 22, at 443 ("For the argument to be at all relevant, the Court must first justify its belief in the inferior value of commercial speech by reference to the values of the first amendment."); Redish, *supra* note 80, at 1458 ("The dilution concern . . . fallaciously places the conceptual cart before the horse. Unless one can justify rationally, at the outset, the distinction in treatment between the different types of expression in terms of free speech theory, the dilution criticism is misplaced."). Kozinski and Banner, for example, assert that "[t]he argument seems to assume that the total amount of first amendment protection available for judges to draw upon is constant, so that protecting speech in one place will leave less protection for speech in another place where we might really need it." Kozinski & Banner, *supra* note 22, at 648. But they misconceive the underlying assumption, which is that judges (including Supreme Court Justices) who are dispositionally inclined to view regulations of (some sorts of) commercial speech leniently will undertake the analyses mandated by strict scrutiny—such as what constitutes a "compelling" governmental interest and how close a fit is required to satisfy the demand of "narrow tailoring"—laxly in commercial speech cases, thereby diluting the protection of that test for all future cases. This is a prediction, thus may not be true, but it is not responsive to rejoin that "[p]rotecting commercial speech less than noncommercial speech leads exactly to what you would think—not enough protection for speech implicating economic concerns." *Id.* There is no inconsistency between this latter position and the dilution claim that protecting commercial speech *the same* as noncommercial speech leads to not enough protection for speech implicating *non*economic concerns.

Martin Redish goes even farther than do Kozinski and Banner, in arguing that commercial speech doctrine might lead not only to insufficient protection for speech implicating economic concerns, but for *all* speech via a process Redish terms "reverse-dilution." According to Redish, "[i]f the Court accepts a justification for the regulation of commercial speech that is in no way tied to the unique nature of that form of expression, there exists the danger that the same logic will be employed to uphold a similar regulation of noncommercial speech." Redish, *supra* note 22, at 592; *see also* Redish, *supra* note 80, at 1456-58. Nat Stern analyzes this claim, *see* Stern, *supra* note 86, at 107-10, concluding that "the phenomenon of reverse dilution is suspect in theory and unsupported in practice." *Id.* at 108.

245. *See* Miller v. California, 413 U.S. 15, 23 (1973).

246. *See, e.g.*, Stern, *supra* note 86, at 75 ("The argument for abolition of the commercial speech doctrine is based mainly on the contention that commercial expression, in its nature and its promotion of First Amendment values, cannot be categorically distinguished from noncommercial speech.").

247. *Va. State Bd. of Pharmacy,* 425 U.S. at 762 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)). A broader definition, beset by similar difficulties, appears in *Central Hudson,* where the Court defines commercial speech as "expression related solely to the economic interests of the speaker and its audience." 447 U.S. 557, 561

a definition as most that occur in constitutional law. But, of course, it is nearly a null set. Almost all speech that one would be disposed to label "commercial" does *something* more than propose a commercial transaction, and much does not do even that. Unfortunately, once this administrable but inadequate definition is rejected, nothing has appeared to take its place that is not intolerably vague or ambiguous,[248] or that does not threaten to expand the category of commercial speech beyond what can plausibly be defended as low value[249] (e.g., "speech undertaken for a profit motive"), or both.[250] Consequently, the Court has candidly acknowledged "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category."[251]

In this part, I accept (without defending) both that a definition of "commercial speech" that is workable and normatively acceptable is likely unattainable,[252] and that the First Amendment

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(1980). Naturally, this definition cannot do without the qualifier "solely," but cannot cover much with it.

248. One might think Robert Post's recent definition of commercial speech "as the set of communicative acts about commercial subjects that within a public communicative sphere convey information of relevance to democratic decision making but that do not themselves form part of public discourse," Post, *supra* note 22, at 25, falls into this category.

249. For an extreme example, see Kenton F. Machina, *Freedom of Expression in Commerce*, 3 LAW & PHIL. 375, 377 (1984) (defining commercial speech as "any expression concerned with buying or selling").

250. For an influential argument that the category of "commercial speech" cannot be drawn in a coherent fashion, see Kozinski & Banner, *supra* note 22, at 638-48. Others reaching the same conclusion include, for example, Eberle, *supra* note 56, at 418-19; McGowan, *supra* note 22, at 382-402; Post, *supra* note 22, at 7 (arguing that "the impossibility of specifying the parameters that define the category of commercial speech has haunted its jurisprudence and scholarship"); Redish, *supra* note 80, at 1444-56; and Shiffrin, *supra* note 96, at 1215. In contrast, Frederick Schauer argued over a decade ago that these criticisms were overblown, as resting on the mistaken assumption that "a distinction that cannot be sharply drawn cannot be drawn at all." Schauer, *supra* note 56, at 1189. This argument is developed at length in Stern, *supra* note 86. *See, e.g.*, *id.* at 57 (contending "that judicial reluctance to embrace a set of all-encompassing criteria for commercial speech represents a healthy pragmatism, not jurisprudential failure").

251. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993).

252. Perhaps the most promising effort appears in Thomas Merrill's student note, where Merrill accepts the Supreme Court's governing framework under which noncommercial speech is protected by strict scrutiny and commercial speech receives a categorically lower degree of scrutiny, and defines commercial speech as:

> (1) speech that refers to a specific brand name product or service, (2) made by a speaker with a financial interest in the sale of the advertised product or service, in the sale of a competing product or service, or in the distribution of the speech, (3) that does not advertise an activity itself protected by the first amendment.

Thomas W. Merrill, Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 236 (1976). A few quick thoughts. First, prong (1) is too restrictive. Strict scrutiny should not invariably apply to regulations of speech that satisfies the other two criteria but does not mention a specific brand. Also (a quibble), the

ought not to be construed so as to make regulations of paradigmatic instances of commercial speech as hard to defend as strict scrutiny would make them. I therefore advocate a third option. Instead of subjecting "commercial speech," however defined, to a categorically different level of scrutiny than applies to other speech, this part recommends that general First Amendment doctrine be recrafted to be more sensitive to the myriad factors that ought to be relevant to First Amendment analysis.[253] If this is done correctly, it should naturally result in conferring upon Congress and the states greater latitude to regulate some forms of commercial speech than would a reflexive application of strict scrutiny, even without diluting constitutional protection for other forms of expression.

I have argued elsewhere (not novelly) that government action can violate the Constitution in three ways: by the purposes that underlie it, by the effects that it produces, or by characteristics of the action itself.[254] That is, if the government has violated the Constitution it will be by dint of the purposes with which it has acted, the effects such action has caused or threatens to cause, the conduct that the government has engaged in or foregone, or some combination of these factors.[255] Coming from a different direction, this Article has argued that the First Amendment is designed to protect interests of the citizenry in checking governmental power, interests of the speaker's audience, and interests of the speaker herself. To be sure, there is not a one-to-one correspondence be-

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critical question for prong (3) should be whether the activity being advertised is constitutionally protected; if so, it should not matter on a coercion rationale whether the source of the protection is the First Amendment or something else. For these reasons, the test is underinclusive. But the overinclusiveness is more worrisome and less easily remedied. An illustration will make the point. I gather that Merrill's test would render a law barring advertisements that portray socialism in a favorable light subject to something other than strict scrutiny. That, it seems to me, cannot be right.

253. Howard, *supra* note 240, likewise takes this third path, though in a different direction than I do here.

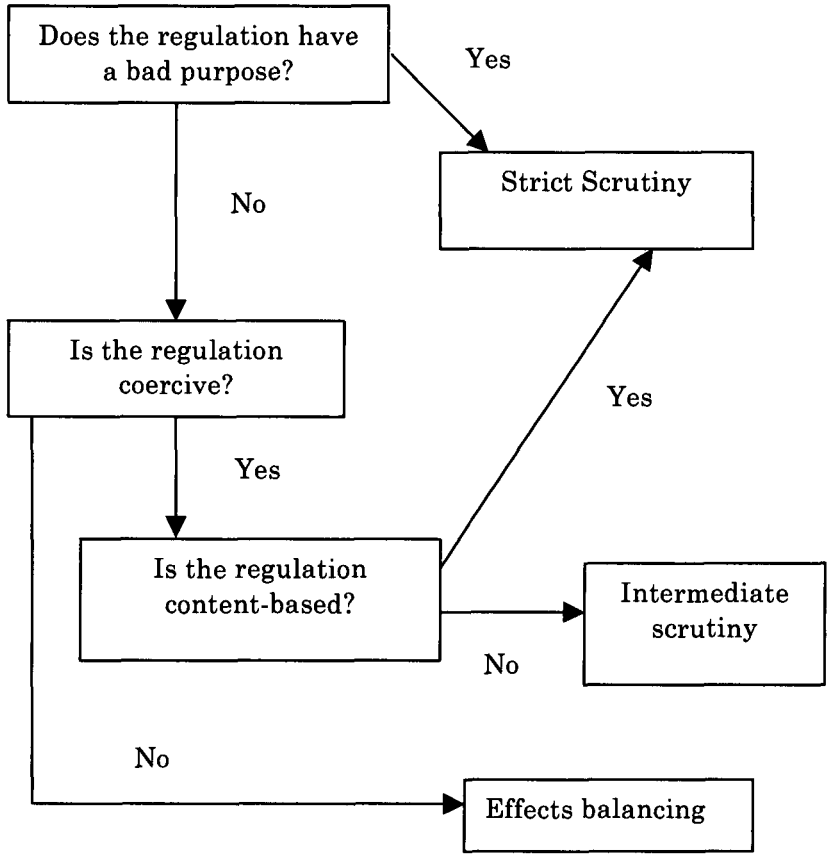
254. *See* Berman, *supra* note 55, at 19-29; *see also* Charles Fried, *Types*, 14 CONST. COMMENT. 55 (1997). Though this observation will likely strike most readers as obvious, I do believe that its importance is frequently overlooked.

255. This third category—conduct—is the only one that may be cryptic. In some cases, "conduct" might be more comfortably described as "means." So, for instance, the Equal Protection Clause allows the government to pursue certain ends, even when causing racially disparate effects, so long as it does not employ racially discriminatory means. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 238-48 (1976). Similarly, I have argued that government may act for certain purposes so long as it does not employ coercive means. Put in conduct terms, government may not engage in facial racial discrimination or coercion. Notwithstanding these examples, the "conduct" dimension of potential unconstitutionality is not reducible to "means." Take an illustration offered by Charles Fried, *see* Fried, *supra* note 254, at 67—the constitutional requirement that the President deliver a periodic address on the state of the union. *See* U.S. CONST. art. II, § 3. This command compels particular conduct, not purposes, effects, or means.

tween these two tripartite classifications. The purposes or effects of a given state action could be constitutionally bad because of the harm they do to any one of the three types of interests. Nonetheless, the mutually reinforcing character of these two distinct analytical lenses suggests that regulations of commercial speech ought to be analyzed in three steps.[256]

The discrete inquiries can be undertaken in any order, but the order described below and depicted in Figure 1 might prove most useful as the default.

Figure 1: Doctrinal Flow Chart



256. *Cf.* Post, *supra* note 22, at 43 (advocating separate inquiries into purpose and effect).

1. The Purpose Inquiry

As Part VII revealed, identifying the governmental purposes that presumptively or conclusively violate the First Amendment is a challenging task.[257] The ignorance and persuasion principles, however, provide reasonable starting points.[258] Accordingly, the questions are whether the regulation was adopted either for the purpose of keeping the public ignorant of certain information, or "on the ground that the speech is likely to persuade people to do something that the government considers harmful."[259] If so, strict scrutiny applies,[260] and the challenged action survives only if it is narrowly tailored to achieve a more ultimate governmental purpose that is deemed compelling. If it is not a purpose of the action either to suppress communication qua information or to prevent the audience from being persuaded to do something that the government disfavors, then the regulation is invalidated only if it serves no legitimate governmental interest.

2. The Coercion Inquiry

The courts ought to be concerned, next, with protecting expressive interests held by the immediate subjects of governmental action. The question here is whether the regulation coerces individuals into speaking or not speaking. And the test is whether the government is constitutionally entitled to bring about the outcome with which the speaker is threatened for not doing what the government wishes.

Sometimes the answer is presumptively no, either because the government has a strong obligation to provide the outcome gen-

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257. *See generally* Kagan, *supra* note 103.

258. Again, this is just a start. Additional purposes could be added to the list of those that absolutely or presumptively violate the First Amendment, and the appropriateness of even these two principles is still open for debate. But the goal now is to get clear on the bones of the overall analysis. It would paralyze the inquiry to demand at this early stage any fuller investigation of precisely what the impermissible purpose part of the doctrine should look like.

259. Strauss, *supra* note 22, at 335; *see supra* note 207.

260. For a strong argument that regulations which are adopted for a speech-restrictive purpose should be adjudged per se unconstitutional, see Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 788 (2001). I agree with Rubenfeld that government purposes are properly central to constitutional analysis generally and to the First Amendment in particular. But perhaps because Rubenfeld does not recognize the distinction that I urge is critical between coercive and noncoercive speech restrictions, he does not interrogate the category of speech-restrictive purposes as fully as I think is necessary.

erally, such that the reasons it may have for not doing so are substantially constrained (even wholly eliminated), or because the outcome is entailed by a substantive understanding of the right at issue. An example of the first situation would be if the government offers a jury trial to a criminal defendant on the condition that he cease his public criticisms of the government. An example of the second arises if the government conditions differential tax liability on one's expressive activities.[261]

Other times, the government has wide discretion in deciding not to provide the outcome in question, in which case we are disposed to call the outcome a "benefit." It is nonetheless unconstitutional, as amounting to a penalty, to withhold the benefit for the purpose either of punishing the right-holder for exercising her speech rights or of discouraging either the right-holder herself or other similarly situated parties from exercising their rights on future occasions. The way to determine whether withholding the benefit would constitute a penalty is through a thought experiment. If the state had to take as a given the offeree's refusal to comply with the speech-restrictive condition, and could not take into account how the granting or withholding of the benefit at issue would affect the exercise or nonexercise of rights by other parties who are subject to the same or similar conditional offer, would it better advance its legitimate and actual interests by granting the benefit offered, notwithstanding the offeree's (constitutionally protected) decision to reject the condition?[262] If the (admittedly speculative) answer is that it would, then withholding the benefit penalizes the offeree's First Amendment rights.

If the action threatened would be unconstitutional for any of these reasons, then the conditional offer is coercive, in which case the distinction between content-based and content-neutral regulations becomes paramount.[263] A content-based coercive regulation is

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261. *Cf.* Speiser v. Randall, 357 U.S. 513, 528-29 (1958) (invalidating a California law providing that property tax exemptions for veterans would be available only to those who would declare that they did not advocate the forcible overthrow of the government).

262. A simpler, and perhaps good-enough, version would ask merely whether, under the specified conditions, the state "would grant the benefit offered." The awkward "better advance its legitimate and actual interests" formulation is designed to yield the conclusion that withholding the benefit does penalize the offeree's rights in circumstances where the simple version of the question generates a negative answer, but only because the state decisionmaker was motivated by vindictive or otherwise improper motives.

263. Precisely how to operationalize this distinction is a matter of much disagreement—especially after the Supreme Court's *Turner Broadcasting* decisions. Turner Broad., Inc. v. FCC, 520 U.S. 180, 213 (1997); 512 U.S. 622, 623 (1994); *see, e.g.*, Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 MCGEORGE L.

subjected to strict scrutiny; a content-neutral one provokes intermediate scrutiny. If the regulation is not coercive, then it ordinarily will not violate constitutionally protected interests of the speaker.

3. The Effects Inquiry

If the challenged governmental action does not run afoul of the First Amendment by virtue of any animating purposes, and if it is not coercive, then the remaining worries center on its effects. First, the regulation should be held unconstitutional if it excessively diminishes the communication available to the public.[264] One appropriate way to measure whether any diminution in communication is "excessive" would be to provide that the regulation is unconstitutional if the character and magnitude of the communication lost to the potential audience outweighs the state interests that the regulation advances.[265] Second, and relatedly,[266] the Court should ensure that the regulation does not excessively chill expression to which the regulation does not by its own terms apply.

B. Some Illustrations

This section applies the approach just outlined to a sampling of cases grouped into four recurring problem areas of regulation: (1) truthful advertising; (2) false or deceptive advertising; (3) compelled payments for advertising; and (4) nonbrand-specific advertis-

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REV. 69, 110 (1997); Ofer Raban, *Content-Based, Secondary Effects, and Expressive Conduct: What in the World Do They Mean (and What Do They Mean to the United States Supreme Court)?*, 30 SETON HALL L. REV. 551, 576-77 (2000). The analysis proposed in this part is designed to accommodate any resolution of this debate.

264. Of course, as others have observed, if governmental action can violate the First Amendment solely because of the action's expressive effects, then every governmental policy is potentially at risk because every single state action (including inaction) has what Larry Alexander calls "information effects." Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 929 (1993); *see also, e.g.*, Rubenfeld, *supra* note 260, at 794-97; Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 273-77 (1992); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 724 (1991). I am not too troubled by this fact so long as the burden of proving excessive diminution falls on tbe challenger, though I appreciate that much more must be said to rebut reasonable suspicion that my position rests on a naive and unjustified confidence in the foresight of courts and litigants.

265. *See supra* note 170 (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)). I suppose that this test should be applied at the aggregate level, and not with respect to each individual application of the law being challenged.

266. The relationship is not an exceedingly close one, however, for unintentional chilling effects threaten speaker interests as well as audience interests.

ing.[267] More than to show how individual cases should have been resolved, the goal is to demonstrate that this approach is coherent and yields (by and large) intuitively acceptable outcomes. The hope is that further study would reinforce the promise of this approach while providing the necessary tuning, both fine and gross.

1. Restrictions on Truthful Advertising

a. Constitutionally Protected Activities

These are easy. Take, for example, the cases distinguished in *Posadas* itself, *Bigelow v. Virginia*[268] and *Carey v. Population Services International*,[269] which involved, respectively, restrictions on the promotion of abortion services and the sale of condoms. Of course, the ignorance and persuasion principles are likely to render any such restrictions unconstitutional on the dimension of purpose. Moreover, because the provision of condoms and abortion services are themselves constitutionally protected activities,[270] any advertising restriction that might amount to a conditional proposal to permit an individual to engage in such activities if and only if she does not advertise them[271] threatens an unconstitutional consequence, hence is coercive. Strict scrutiny applies and will prove fatal.

b. "Vices"

It is most particularly in respect of coercion that the *Posadas* majority was right to think the casino advertising ban there at is-

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267. One area I do not discuss concerns discrimination against commercial speakers in circumstances where the commercial speaker harms the state's interests no more than do the noncommercial speakers whose activities are not restricted. *See, e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 425-26 (1993) (discussed *supra* note 50); Van Alstyne, *supra* note 22, at 1643-48. I leave open the possibility that the doctrine sketched in Part VII.A should be supplemented with a fourth prong directly addressed to discrimination of this sort.

268. 421 U.S. 809 (1975).

269. 431 U.S. 678 (1977); *see also* Bolger v. Youngs Drug Prods., 463 U.S. 60, 75 (1983) (striking down federal statute that prohibited the mailing of unsolicited advertisements for contraceptives).

270. *See* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (reaffirming the constitutional right of a woman to choose to have an abortion before fetal viability); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (holding that individuals have a constitutional right to use contraceptives, and granting third-party standing to a distributor of contraceptives to vindicate the rights of the users).

271. As it happens, the statute at issue in *Bigelow* cannot even be construed in this way, because it criminalized not just abortion providers' own advertising of their services, but "the sale or circulation of any publication, or in any other manner, [to] encourage or prompt the procuring of [an] abortion. . . ." *See Bigelow*, 421 U.S. at 812-13 (quoting VA. CODE ANN. § 18.1-63 (1960)).

sue distinguishable from *Bigelow* and *Carey*. There is, of course, no constitutional right to operate a gambling casino. Furthermore, as already argued in Part IV, Puerto Rico would have legitimate reasons, independent of the wish to discourage others from refusing to waive their First Amendment rights, for withholding a casino license from an applicant who did not accede to the no-advertising condition. Those reasons all involve the unquestionably legitimate state interest in preventing residents from engaging in casino gambling.[272] The proposal does not threaten a penalty and is not coercive.

Because (as argued in Part VI) the purposes behind the ban did not violate the ignorance principle or the closely allied persuasion principle,[273] the constitutionality of the restriction should turn upon the outcome of an effects-oriented balancing test. One side of the balance—the magnitude and character of the audience interest in receiving casino advertising—seems slight.[274] What about the weight and legitimacy of the countervailing government interests?[275] Puerto Rico's interests in controlling the vice that might accompany casino gambling—such as organized crime and prostitution—might provide reason for banning the casinos, but only slight support, if any, for the advertising restrictions. However, that still leaves such governmental interests as reducing the personal and social costs that gamblers incur and protecting the flow of revenue to the government-run lottery.[276] Each is a legitimate state interest that the advertising ban would promote.[277] This necessitates a

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272. This interest is unquestionably legitimate *as a matter of current constitutional law*. I do not mean to pass any judgment on whether this is a legitimate state interest as a matter of my preferred substantive political morality or even whether the Constitution should be construed to impose a presumption against putative state interests of this sort.

273. *See supra* text accompanying notes 201-04 and 219-28.

274. *See supra* Part V.

275. I take no position here on whether the courts should consider any governmental interests that the advertising restriction might possibly serve, or just those argued by the government, or just those the court believes did in fact animate the challenged action. *See, e.g.*, Edenfield v. Fane, 507 U.S. 761, 768 (1993).

276. That the lottery is a regressive tax is not an adequate objection. Surely that is a reason—perhaps even a compelling one—to oppose state-run lotteries. But once that battle is lost, it does not provide an independent basis for concluding that the state lacks an interest in trying to steer gambling dollars to its own coffers—for public use—as opposed to private ones.

277. That Puerto Rico permitted other forms of gambling, and did not restrict their advertising, *see supra* text accompanying note 11, is far from sufficient to demonstrate that Puerto Rico was not concerned with the adverse consequences that casino gambling could have on the lives of those who indulge in it. It could well be that the legislature appreciated that other forms of gambling raised similar dangers, but also believed that domestic political realities would not allow imposing advertising restrictions upon them. Or, the legislature could have believed that casino

judgment call, to be sure. My judgment is that if the effects-based costs of the advertising restriction are accorded their appropriately low weight, then the casino advertising ban ought to pass a sensible balancing.[278] Unless the regulations were so vague as to significantly chill protected expression, *Posadas* was correctly decided.

A more challenging and intriguing case is *Edge Broadcasting*,[279] in which the Court upheld a federal law prohibiting radio stations licensed to states that prohibit lotteries from broadcasting advertisements for lotteries run by other states. Because I am inclined to agree with those who have argued that spectrum scarcity provides an inadequate rationale for federal regulation of broadcasters,[280] I would hold that the First Amendment significantly constrains the federal government's discretion in allocating broadcast licenses, and that this condition runs afoul of those constraints even if it does not threaten a penalty (which it might). But I will not try my readers' patience by pursuing this line of thought now. Instead, I would like to imagine a variation on the actual facts of that case, one in which the federal law applied not to broadcasters but to states themselves (and therefore does not implicate any puzzles particular to broadcasting regulation).

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gambling would hold an allure for more residents than the existing domestic forms of gambling did.

The fact that Puerto Rico was not worried about the costs imposed on tourists seems even farther beside the point. Richard Epstein, for instance, decries that "[t]he Puerto Rican policy is cynical: gambling has terrible consequences for the social fabric, so Puerto Rico attempted to externalize its costs by taking the money of tourists, who will take their social and psychological problems home with their other belongings." EPSTEIN, *supra* note 74, at 207. Why any such cynicism would be relevant to the constitutional analysis is not clear; it is in the nature of states to care for their own. More fundamentally, though, the charge of cynicism is overblown. For one thing, assuming casino gambling has consumptive value for those who participate, Puerto Rico is externalizing many of its benefits too. Beyond that, the fact that a tourist stays and gambles for only a limited time means not only that any problems gambling has caused her will leave with her, but that those problems are likely to be small in the first place. Put another way, the legislature could reasonably have surmised that casino gambling can create problems for those who patronize the casinos as part of their everyday lives wholly different in kind from the problems it causes those who play when on vacation.

278. As noted earlier, this indeterminacy and subjectivity is not a fatal consideration against balancing. *See supra* text accompanying notes 173-75. Whether the accepted interest in preserving community morals is "substantial" or even "compelling" is comparably subjective, yet this type of inquiry is required under, respectively, the existing *Central Hudson* test and its principal alternative, strict scrutiny.

279. 509 U.S. 418, 436 (1993).

280. In *Red Lion Broadcasting, Inc. v. FCC*, 395 U.S. 367, 400-01 (1969), the Court held that because the electromagnetic spectrum is a limited resource, the government could impose regulations on licensees that it could not impose upon traditional media. For a good summary of criticisms of this rationale, see Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1013-16 (1989).

As the *Edge Broadcasting* Court explained, the federal broadcasting restriction was designed to accommodate the conflicting interests of lottery and nonlottery states.[281] Federal intervention was thought necessary to correct a structural asymmetry. The legalization of a lottery by one state adversely affects the interests of any neighboring states that seek to protect their own citizens from the vice of gambling because citizens in the nonlottery state may cross the border to play the lottery state's lottery, whereas the interests of a lottery state are not adversely affected by its neighbor's non-lottery policy. (To the contrary, when one state chooses to sit out the lottery business, it increases demand for the service its lottery-state neighbors provide.) But precisely because of this asymmetry, the federal government should be constitutionally empowered to choose to protect the interests of the nonlottery states by simply making the lottery illegal everywhere.[282] If this is so, Congress could extend this conditional offer to any state (and perhaps to nonstate entities as well): you may operate a lottery only if you respect the interests of the nonlottery states by not directing advertising to them. More precisely (and more administrably), Congress could demand, for example, that the lottery operator not advertise with any broadcaster licensed in a nonlottery state, or not advertise with any broadcaster that had more than a specified percentage of its audience living in a nonlottery state, no matter where the broadcaster itself was located. Carrying out the threat of withholding permission to operate a lottery would not constitute a penalty, and the conditional offer would not be coercive.

But approving of *Posadas* and *Edge Broadcasting* (or this variation on *Edge Broadcasting*) does not lead one down the presumably unacceptable path of permitting all restrictions on the advertisement of transactions that (unlike the provision of abortions and the sale of condoms) the state may prohibit. *Coors Brewing* (which involved a federal ban on printing alcohol content on beer labels) and *44 Liquormart* (which involved a state ban on including prices in liquor advertising) are good examples. In both cases, the government did act for the purpose of keeping citizens ignorant of truthful information—the alcohol content of beer and the prices of alcoholic beverages, respectively—which would be a signal First Amendment infringement under the ignorance principle, albeit pre-

281. 509 U.S. at 428.

282. Of course, that would give no weight to the interests of the lottery states, but the federal government makes choices like that all the time—consider, for instance, how federal law would limit the options of any state that might now wish to legalize marijuana.

sumably not under the persuasion principle. Neither regulation could survive strict scrutiny were it to apply. Moreover, the regulation at issue in *Coors Brewing* was quite possibly thrice damned. In addition to having been adopted for a presumptively bad purpose, it was coercive because, under the Twenty-first Amendment, the federal government is without authority to prohibit alcohol sales.[283] And third, the effects of the ban are more problematic than in *Posadas, Edge Broadcasting,* or *44 Liquormart.* An essentially puritanical constitutional culture is not likely to accord much weight to consumers' interests in getting the biggest buzz for the buck. But it is not likely to similarly downgrade consumers' interest in being able to select a beer on the basis of its *lower* alcohol content.

For many years now the great social and constitutional issue looming over all commercial speech cases has concerned the extent of state power to restrict advertising for tobacco products. Scholars have divided over whether any such restrictions could be consistent with the First Amendment.[284] And the Court's recent decision in

283. At least so I assume. Although the relevant portion of the Amendment provides merely that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited," U.S. CONST. amend. XXI, § 2, the Court had long interpreted it to provide the states with nearly plenary authority over the importation, sale, and use of liquor within their borders. *See, e.g.*, Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 107-08 (1980). Then again, Justice Stevens asserted in *Coors Brewing*—unfortunately, without citation to any authority—that "Congress may limit directly the alcoholic content of malt beverages." 514 U.S. 476, 498 (1995).

284. The literature on the topic is vast. Even prior to *Lorillard Tobacco,* Thomas Merrill concluded that "the consensus of the legal commentators seems to be that these restrictions [on tobacco advertising] cannot survive scrutiny under *Central Hudson,* or at least that they cannot survive under *Central Hudson* as reinterpreted hy *44 Liquormart.*" Merrill, *supra* note 22, at 1195-96 & nn.179-80 (citing commentators). As recently as a decade ago, however, the handicapping looked different. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 415 (1992) (Blackmun, J., concurring) (predicting that "the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech"); Lowenstein, *supra* note 65, at 1248 ("There appears to be little danger that the Supreme Court will fail to uphold a cigarette advertising han, if Congress should enact one.").

On the question whether the First Amendment *should* be interpreted and applied to ban such regulations, putting existing case law aside, scholarly opinion has been much more divided. For a sampling, compare, for example, Vincent Blasi & Henry Paul Monaghan, *The First Amendment and Cigarette Advertising,* 256 J. AM. MED. ASS'N 502 (1986); Law, *supra* note 22, at 954-55; Merrill, *supra* note 22, at 1204; David C. Vladeck & John Carey Sims, *Why the Supreme Court Will Uphold Strict Controls on Tobacco Advertising,* 22 S. ILL. U. L.J. 651, 676 (1998) (all arguing that restrictions on cigarette advertising should be upheld), with Redish, *supra* note 22, at 639; Strauss, *supra* note 22, at 343-45; Krista L. Edwards, Comment, *First Amendment Values and the Constitutional Protection of Tobacco Advertising,* 82 NW. U. L. REV. 145, 179-80 (1987); Matthew L. Miller, Note, *The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements,* 85 COLUM. L. REV. 632, 655 (1985).

Lorillard Tobacco Co. v. Reilly[285] constitutes one weighty, though inconclusive, vote of "no."[286] After holding a host of Massachusetts regulations governing the advertising and sale of cigarettes preempted by federal law, a majority of the Court held unconstitutional a state rule prohibiting outdoor advertising of smokeless tobacco or cigars within 1,000 feet of a school or playground. Justice O'Connor's opinion for the majority held, in particular, that the regulation failed *Central Hudson's* fourth prong by "unduly imping[ing] on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products."[287] Four Justices—Stevens, Souter, Ginsburg, and Breyer—thought the question was closer and would have remanded the case for trial to better develop facts relevant to the question of fit.[288] Three other Justices—Scalia, Kennedy, and Thomas—thought the question was even less close than did Justice O'Connor. Continuing to maintain the position he had first set forth in *44 Liquormart*, Justice Thomas argued that the advertising restrictions should be subject to strict scrutiny, not to the intermediate review of *Central Hudson*.[289] Justice Kennedy, joined by Justice Scalia, added a brief concurrence to record general agreement with Justice Thomas's views while noting that "[t]he obvious overbreadth of the outdoor advertising restrictions" made it unnecessary to decide whether scrutiny more demanding than *Central Hudson's* was appropriate.[290]

Under the analysis advocated here, restrictions on cigarette advertising—even up to total bans—present an easy case. First, they are not driven by a purpose in suppressing information "to keep legal users of a product or service ignorant in order to manipu-

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285. 533 U.S. 525 (2001).

286. *Lorillard Tobacco* is inconclusive because it turned (as Justice O'Connor's authorship might have led one to predict) on *Central Hudson's* fit prong, which is necessarily highly fact-bound. *Id.* at 561. In this light, it is especially significant that Massachusetts defended the geographical restrictions on tobacco advertising only by reference to a state interest in protecting *minors* from the advertising's baleful effects. Had the state banned *all* outdoor advertising of tobacco products as a way to protect adults and minors alike from demand-inducing advertising, the ban would no longer be overinclusive. At the same time, of course, the substantiality of the state's interest would be put back in play. But as I have suggested, it is hard to imagine how a majority of the Court—especially a majority that often rails against judicial subjectivity—could hold the state's interest in protecting even adults from tobacco advertising is not substantial given, among other things, the number of adults who die from tobacco use each year and the fact that the state is constitutionally empowered to prohibit adults from engaging in all sorts of conduct for essentially paternalistic reasons.

287. *Id.* at 565.

288. *Id.* at 601-04 (Stevens, J., concurring in part and dissenting in part).

289. *Id.* at 572-90 (Thomas, J., concurring).

290. *Id.* at 571 (Kennedy, J., concurring).

late their choices in the marketplace,"[291] nor are they animated by concern that the advertising might "persuade" listeners to act in harmful ways. Tobacco advertisements are virtually devoid of information[292] and do not proceed by means of the rational persuasion that the persuasion principle is designed to safeguard. Hostility to tobacco advertising is based not on such advertising's capacity to inform or persuade, but rather on its ability to manipulate and seduce. That does not mean, to reiterate, that the First Amendment does not protect such communication. It might well mean, though, that advertising restrictions do not infringe the First Amendment by virtue of their purposes.

Second, tobacco advertising restrictions are not coercive. Such regulations should be understood as offers conditioning permission to sell dangerous products that the state could prohibit upon the seller's waiver of her First Amendment right to stimulate additional demand through public advertising. Such a middle ground between cigarette prohibition and the status quo has much to recommend it, or so legislators might think. A prohibition on tobacco products would sacrifice the liberty interests of persons who exercise (relatively) affirmative and autonomous choice in deciding to smoke. But the status quo sacrifices the health interests of such persons, as well as the interests of persons who would like to quit (or not to start) but smoke mostly out of weakness of will. Permitting the product on the condition that it not be advertised might seem the best way to accommodate both sets of persons. If a cigarette manufacturer refuses to comply with the condition, however, thereby forcing the state to choose between (a) barring the cigarette sales; and (b) permitting sales and their advertisement, that the state would not legitimately prefer the former is logically possible and empirically plausible. In short, if the purpose for attaching the condition is to reduce the risk that the vice at issue will be indulged in to excess, then carrying out the threat is likely to be supported by paternalistic purposes that present constitutional doctrine

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291. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring).

292. *See, e.g.*, Collins & Skover, *supra* note 191, at 737 ("Entire categories of commercial communication are essentially bereft of any real informational content. For cosmetics, fragrances, alcohol, tobacco, clothes, and other products, billions of advertising dollars say much about image and little about information."); Law, *supra* note 22, at 931 ("As with most advertisements in general, the majority of tobacco and alcohol advertisements do not convey information, but rather create an image, invoke a mood, appeal to emotion, and associate the product with a vision of the good life."). Of course cigarette ads are not wholly noninformational. Inescapably, they convey the information that the manufacturer wants to associate its product with whatever particular images the advertising exploits. But this is trivial.

deems permissible. And if the conditional offer does not reveal that carrying out the act threatened—barring the transaction—would be a penalty, then the proposal itself is not coercive.[293]

Third, a tobacco advertising ban should satisfy any sensible effects-oriented balancing test with ease. On one hand, the ban would significantly advance weighty state interests in protecting public health. The audience interests on the other side of the scale are, if not de minimis, awfully close. Surely little of constitutional value is lost if consumers are made unaware or less aware that smokers of Newport cigarettes are "Alive with Pleasure,"™ or that Marlboros are associated with images involving cowboys. True, a complete advertising ban might make it somewhat more difficult for consumers to learn which brands are marginally less dangerous than others ("Carlton is Lowest"™), but this information will be available on the cartons themselves as well as from third parties such as the government and *Consumer Reports*. Which set of interests exceeds the other is not a close call.

It is with respect to bans on tobacco advertising, in sum, that the greater/lesser intuition of *Posadas* has such powerful force and that its categorical rejection is so tragic. Of course a ban on cigarette advertising is paternalistic. But so would be a ban on cigarette *sales*. And not only would that pass constitutional muster, under existing constitutional doctrine it would not even provoke heightened scrutiny. Consequently, the Court ought to revisit with greater respect the instinct underlying *Posadas* that a strong presumption of constitutionality must attend a law that simultaneously imposes such a ban and exempts manufacturers and retailers on the condition that they not promote their dangerous products in specified ways.[294]

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293. Presumably the proposal would be coercive if brand advertising for cigarettes affected only market share, not overall consumption. Were that the case, then barring a single manufacturer that insists on advertising from selling its product would have no effect on public health because other manufacturers would simply take over the barred product's market share. In fact, though, advertising does increase overall demand (for example, by continually attracting new consumers), not just market share. *See* Halberstam, *supra* note 22, at 863 & n.407.

294. Thirty years ago, a three-judge district court upheld against First Amendment challenge a Federal Communications Commission ("FCC") rule prohibiting cigarette advertisements on any medium of electronic communication subject to FCC jurisdiction. Capital Broad. Co. v. FCC, 333 F. Supp. 582, 586 (D.D.C. 1971). Although that court's reliance on "[t]he unique characteristics of electronic communication," *id.* at 584, though consistent with Supreme Court precedent, was likely misguided, *see supra* note 280 and accompanying text, the holding was probably right.

c. The Wide Middle Ground

Most commercial activities are neither constitutionally protected (like providing abortions and contraceptives) nor involve behaviors (like gambling, prostitution, alcohol, and drug use) that society often considers harmful to the health or morals of its participants and which, therefore, the state sometimes prohibits entirely. How does the analysis developed here apply to laws that restrict advertising for activities that occupy the broad middle ground between constitutional rights and "vices"?

Consider this illuminating hypothetical crafted by William Van Alstyne.[295] Believing that motorcycle sales have been eating into their own business, car dealers in Virginia lobby the state legislature to ban motorcycles from the state. Failing that, they propose other measures, such as a severe limitation on the number and location of authorized cycle dealers, a thirty-percent sales surtax on motorcycles, a rigorous training program imposed as precondition for receipt of a motorcycle license, and raising the minimum age for a motorcycle license to twenty-one. When the legislature rejects each of these proposals, the car dealers propose that the state simply forbid motorcycle dealers from advertising. A law doing precisely that is promptly passed.

On the surface, this advertising prohibition seems similar to bans on casino or tobacco advertising already considered. It quite possibly does not run afoul of the ignorance or persuasion principles: the state could plausibly argue that motorcycle ads, like casino and tobacco ads, provide little in the way of information and operate mostly by seducing potential customers with images of fast and sexy bikes.[296] Again like the casino and tobacco examples, the motorcycle advertising ban would not be coercive on the theory that the state is willing to tolerate a limited number of motorcycle sales, and a limited amount of motorcycle use, but no more. If manufacturers or retailers refuse to refrain from seeking to grow demand via advertising, the state would withhold permission to engage in the business at all in order to ensure that motorcycle use (or purchase) not exceed the maximum acceptable level. Carrying out the threat, accordingly, would not constitute a penalty, and the regula-

295. Van Alstyne, *supra* note 22, at 505-14. In the essay, Professor Van Alstyne modestly conceals his authorship of the tale, suggesting instead that it is a true story.

296. This would he more plausible if the legislature barred advertisements by manufacturers rather than by dealers. You might prefer to suppose, then, tbat the statute barred advertising by manufacturers and dealers both.

tion is therefore not coercive. The motorcycle advertising ban does not look quite so good, however, on the dimension of effects. First, motorcycle ads may contain more *information* of value to the potential consumer than do cigarette ads (though perhaps less than casino ads), in which case the corresponding advertising causes the audience greater harm. More significantly, the government interests at stake—mostly, protecting car dealers from economic competition—are quite weak. As a result, the motorcycle advertising ban seems more likely to fail an effects-oriented balancing test than should many restrictions on the advertising of what are conventionally termed vices.

Admittedly, this is not a slam dunk argument for the unconstitutionality of the Virginia ban on motorcycle advertising. I anticipate that many readers will feel that the motorcycle advertising ban is so obviously unconstitutional that an approach that yields a conclusion this tepid must be wrong. If you fall into this category, I would ask you to reflect on how you would view the ban on motorcycle *sales* that the Virginia car dealers originally proposed and that the legislature first contemplated. One might think that this is quite an outrageous, illiberal thing to do. One might think, further, that the Constitution ought to be interpreted in such a way as to subject a ban of this sort to some form of heightened scrutiny.[297] That is, the threatened action should be subject to more searching scrutiny than contemporary doctrine provides. And were the Constitution so interpreted, then the advertising ban might turn out to be coercive, and thus subject to heightened scrutiny on the ground that the governmental action that the advertising restriction threatens on failure of offerees to comply with the no-advertising condition would itself prove unconstitutional. In short, insofar as my analysis confers inadequate protection against advertising restrictions, it might be precisely because the Constitution has been construed (rightly or wrongly) to confer inadequate protection against a wide variety of straightforward commercial restrictions. In assessing this proposed reformulation of First Amendment doctrine (or any other one for that matter), then, we should be mindful of what Laurence Tribe has called the topology of constitutional law,[298] and what Frederick Schauer has referred to as its architec-

297. There is no shortage of constitutional provisions—most notably, the Due Process, Equal Protection, and Privileges and Immunities Clauses, and the Ninth Amendment—from which such a rule could be read.

298. *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1236 (1995).

ture.[299] Schauer observed the "unfortunate frequency" with which "particular legal approaches to particular social concerns remain imprisoned in their particularism, ignoring the extent to which specific rules or principles may affect other rules and principles located some doctrinal distance away."[300] To the extent restrictions on commercial speech should be assessed in greater/lesser terms, we should not take for granted the precise contours of existing constitutional doctrine governing the state's "greater" power to make commercial activities illegal.

2. False and Deceptive Advertising

In his broadside against judicial doctrine that accords second-class First Amendment status to truthful commercial advertising, Michael Gartner, onetime president of NBC News, accepted as unproblematic restrictions on false advertising.[301] But, as has often been remarked, this is not such a comfortable position to occupy.[302] Because government enjoys no special latitude when regulating noncommercial speech by claiming, or even demonstrating, that it is false, it seems that critics of reduced protection for commercial speech would have to bite the bullet and agree that regulations of false (not to mention "deceptive") commercial speech must always be subjected to strict scrutiny too. I am aware of no commercial

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299. *See* Schauer, *supra* note 56, at 1181.

300. *Id.*

301. *See* GARTNER, *supra* note 22, at 2 ("This paper seeks to explore and explain commercial speech. . . . False commercial speech, although an exceedingly important topic, is not examined here because the law and logic in this area are well established. Under the law, false commercial speech can be regulated or prohibited because, as the Supreme Court has stated, the First Amendment does not afford protection to illegal conduct in which speech is incidentally employed. . . . [S]ince deception in a commercial transaction constitutes fraud, deceptive speech can be prohibited even though truthful commercial speech is protected."). But Gartner seems to miss the point, which is not whether false or deceptive commercial speech is different from truthful nondeceptive commercial speech (surely it is), but whether regulations of false or deceptive commercial speech should be scrutinized under more forgiving constitutional standards than regulations of false or deceptive noncommercial speech. The present doctrinal answer is "yes," an answer that Gartner cannot concede is well established in logic, so long as he insists that the commercial/non-commercial distinction carries absolutely no weight with respect to truthful nondeceptive speech, unless he provides reason for distinguishing the two contexts. And the fact that "deception in a commercial transaction constitutes fraud" does not provide adequate grounds for distinction insofar as the nub of the matter really becomes why deception in a noncommercial matter cannot also be made illegal—under the caption "fraud" or anything else.

302. *See, e.g.*, McGowan, *supra* note 22, at 444 ("Perhaps the most persistent concern" militating against full First Amendment protection for commercial speech is that it "would impair the legitimate efforts of the states to protect consumers against false advertising."). *See generally* Howard, *supra* note 240.

speech enthusiast who accepts this horn of the dilemma and none who offers a persuasive argument that would avoid it.[303]

The approach outlined here, however, demonstrates how one can reject a special tier of scrutiny for commercial speech and yet reach the intuitively compelling conclusion that regulations of false and deceptive commercial speech (including laws that mandate disclosures deemed necessary to prevent deception) can stand even if not demonstrably necessary and narrowly tailored to achieve a compelling state interest. Although the analysis changes a little when we move from regulations of factually false speech to regulations of merely deceptive speech, the bottom lines remain the same.

Start with regulations that apply to false commercial speech. First, it is a permissible governmental purpose to suppress false statements. Second, laws regulating false speech appear not to be coercive. If "there is no constitutional value in false statements of fact,"[304] it would very probably follow that there is no constitutional right to lie,[305] in which case punishments for doing so are not "penalties" in the constitutional sense.[306] Third, and for a similar reason, the effects-based balancing test also appears to be satisfied:

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303. I have already commented on Gartner's failure fully to appreciate the problem. *See supra* note 301. Other critics of the commercial/noncommercial distinction grasp the issue better, but offer no more satisfactory way out. Kozinski and Banner, for example, argue that "a simple consumer fraud statute probibiting false representations about a product" is a content-neutral regulation, hence appropriately subjected to intermediate scrutiny, because "[t]he governmental interest is unrelated to the suppression of expression; the seller is free to say whatever he likes about the product, true or not, as long as he doesn't induce sales in reliance on what he says." Kozinski & Banner, *supra* note 22, at 651. But under this analysis, the same would be true of regulations of campaign speech: the state could prohibit and punish false and deceptive political speech, subject only to the content-neutral test of *United States v. O'Brien,* 391 U.S. 367 (1968), because the speaker "is free to say whatever he likes about [a candidate], true or not, as long as he doesn't induce [votes] in reliance on what he says." *Id.* at 377. Indeed, it would seem even to demand a radical dilution of First Amendment doctrine concerning libel. If, as Kozinski and Banner would have it, First Amendment doctrine ought not distinguish between commercial and noncommercial speech, the justification they advance to uphold consumer fraud statutes would appear to dictate that a newspaper publisher may publish whatever it likes, but only so long as it does not thereby induce people to alter their opinions of anyone in reliance on what the newspaper says. Yet *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), confers much greater protoction than this. *See id.* at 283. In short, Kozinski and Banner's effort to preserve existing low-level review of false and deceptive commercial regulations relies upon an implausibly narrow conception of what constitutes content-based speech regulation. For somewhat similar observations, see Halberstam, *supra* note 22, at 804-05, 827 n.237.

304. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

305. I do not think this is inconsistent with Justice Scalia's claim in *United States v. Dickerson,* 530 U.S. 428 (2000), that "the Court has viewed the importation of 'chill' as itself a violation of the First Amendment," as opposed to a judge-made prophylactic rule. *Id.* at 459 (Scalia, J., dissenting).

306. *See supra* notes 146-49 and accompanying text.

the audience suffers little or no harm in being deprived of false communications.

So far, of course, I have said nothing to distinguish the commercial context from the noncommercial. That is, this analysis would seem to permit laws prohibiting false noncommercial speech as much as false commercial speech. Here, though, is where a concern about chilling effects enters. Chilling-effect analysis is always sensitive to the value of the speech chilled, as the Court made clear in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, when holding that heightened protection for defamation defendants applied only to "speech on matters of public concern that is at the heart of the First Amendment's protection."[307] But if determinations of constitutionality may depend upon the judiciary's empirical judgments about the likely amount of speech that a given regulation (or type of regulation) will chill, and on its evaluative judgments about the constitutional value of the speech chilled, and if the Court is constitutionally authorized to implement these judgments partly via ex ante rules instead of being compelled to rely upon wholly ad hoc assessments—even though such rules will inevitably correspond imperfectly to their underlying considerations[308]—it is hard to see why the Court may not draw the rules it does formulate either explicitly in commercial/noncommercial terms or at least in a fashion that comes close to tracking just a distinction. This is enough to explain why regulations of false commercial speech enjoy greater constitutional latitude than do regulations of false noncommercial speech. It is not because commercial speech receives a lesser degree of First Amendment protection categorically, but because regulations of false speech—commercial or noncommercial—can run afoul of the First Amendment only on chilling-effects grounds, and because there is reason to believe that (by and large) such regulations will chill more speech (and, arguably, more speech that approaches "the heart of the First Amendment's protection") when applied to noncommercial speech than commercial speech.[309]

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307. 472 U.S. 749, 758-59 (1985) (plurality opinion) (internal quotation marks and citations omitted).

308. *See, e.g., Gertz*, 418 U.S. at 343-44 ("Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.").

309. As Justice Stewart explained in *Virginia Pharmacy*:

> In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or ser-

When we turn to regulations of deceptive speech, the analysis remains much the same with respect to purposes and effects, including chilling effects. The state's purpose in preventing deception is permissible, the effects of curbing deception are largely unproblematic, and the regulation's chilling effects on nondeceptive communication can perhaps be accommodated in a way that distinguishes between commercial and noncommercial contexts. The coercion analysis, however, might be different. Even if, per *Gertz,* "there is no constitutional value in false statements of fact,"[310] there may be constitutional value in speech that is strictly truthful, albeit potentially deceptive. More to the point, speakers may have a constitutional right to engage in deception. If this is true, it would seem that regulations of speech that is deceptive but not false violate the speakers' interests, rendering such regulations coercive in commercial and noncommercial contexts alike.

In fact, though, greater/lesser reasoning once again applies in a way that both (a) permits regulations of commercial speech; and (b) does so in a way that effectively distinguishes commercial and noncommercial contexts. A state might actually prefer (indeed, very likely will prefer) that a would-be seller not be allowed to ply her trade unless she agrees to comply with whatever rules the state sets forth to guard against commercial fraud and deception, including rules governing warning labels and mandatory disclosures that might otherwise run afoul of constitutional doctrine disfavoring prior restraints. In that event, regulations of deceptive speech in the commercial context might again be viewed as noncoercive conditional offers. That alone does not make them constitutional. It does, however, when added to the conclusions already advanced: that a state purpose in preventing fraud and deception is permissible, that the speech directly suppressed is of little or no constitutional value, and that laws regulating false and deceptive commercial speech are likely to chill little truthful and nondeceptive speech.

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vice he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. There is, therefore, little need to sanction "some falsehood in order to protect speech that matters."

425 U.S. 748, 777-78 (1976) (Stewart, J., concurring) (quoting *Gertz,* 418 U.S. at 341).

This is not an adequate reason for relegating commercial speech to an entirely different tier for all First Amendment purposes. It is adequate, however, for the limited purpose to which I put it in text (though "substantially eliminates" is surely an overstatement).

310. *See supra* text accompanying note 304.

3. Compelled Speech

Recall the two "compelled commercial speech" cases introduced earlier: *Glickman v. Wileman Bros. & Elliott*,[311] and *United States v. United Foods, Inc.*[312] In *Glickman*, the Court upheld the U.S. Department of Agriculture ("USDA") regulations that assessed payments from growers, handlers, and processors of California tree fruits, which funds were used to pay for generic product advertising. Four years later, in *United Foods*, the Court struck down similar USDA advertising assessments levied on mushroom handlers. Oddly, though, instead of overruling the previous case, the *United Foods* Court distinguished it on the ground that the assessments on mushroom handlers suffered from the constitutional defect of not being part of a "more comprehensive program restricting marketing autonomy."[313] This proffered ground of distinction ringing hollow,[314] the cases cry out for reexamination.

Two steps of the three-dimensional analysis are passed with ease. Surely the government's purpose in imposing the assessments—to augment demand for the produce at issue, and thereby to improve the economic position of growers—is constitutionally unproblematic, as are the assessments' effects—to encourage consumers to believe that nectarines, plums, peaches, and mushrooms are tasty and healthful.[315] The seemingly more difficult question is whether the regulatory assessments are coercive.

To answer this question it will be helpful to explicitly reconceive the regulations at issue in conditional-offer terms. Much simplified, the assessments challenged in *Glickman.* look something like this: you may sell nectarines in interstate commerce if and only if you pay *n*% of your nectarine-related revenue into a fund that

311. 521 U.S. 457 (1997).

312. 533 U.S. 405 (2001).

313. *Id.* at 410.

314. Justice Breyer made this same argument in his *United Foods* dissent. *See id.* at 419-24 (Breyer, J., dissenting).

315. Any objection that the assessments produce a constitutionally problematic effect because, by compelling producers to pay for generic advertising, they eat into funds the producers might have used for brand-specific advertising, thereby reducing the amount of information available to the public is untenable. The Court properly rejected this contention, observing that it would prove far too much for the same is true of "assessments to cover employee benefits, inspection fees, or any other activity that is authorized by a marketing order." *Glickman,* 521 U.S. at 470. In fact, the infirmity of this objection is even more profound: *every* governmental policy that directly or indirectly increases the producers' operating costs or reduces their revenue would have a like effect on the producers' advertising budget, and thus on information available to consumers. *See supra* note 264.

will be used to purchase advertising encouraging nectarine consumption. When Wileman Bros. refuses to pay its assessment, the government's only reason for carrying out its threat is to deter other growers from refusing the assessment too. That makes imposition of the threatened sanction a penalty and the threat coercive. To be sure, government has a pretty good reason for threatening this penalty: the growers face a classic collective action problem that can be overcome only by effectively preventing free riding. But that is an argument aimed to *justify* the use of coercion in this case, not a reason to conclude that the sanction is something other than a penalty or that the threat is something other than coercive.[316] And unfortunately for the government, its interest in overcoming a collective action problem so as to promote the financial interests of nectarine producers does not look sufficiently important to satisfy intermediate scrutiny, let alone the strict scrutiny that I have been assuming (arguendo) should govern coercive speech regulations.

If the analysis proposed in Part VII.A is basically sound, then, it seems that the agricultural assessments at issue in *Glickman* and *United Foods* violate the First Amendment. Of course, all this assumes that the growers have a cognizable First Amendment interest in not paying into an advertising fund. After all, if the as-

316. This distinction—between rebutting the existence of coercion and justifying it—provides the best way to make sense of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and its progeny. In *Abood*, the Court held that the state could require public-sector employees who chose not to join the employees' union to pay to the union a service fee equal in amount to union dues, but that such fees could not be used for expressive purposes not germane to the union's responsibilities as collective-bargaining representative. *Id.* at 217; *see also, e.g.*, Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 514 (1991) (holding that union may not use compulsory dues for political purposes unrelated to collective bargaining); Keller v. State Bar, 496 U.S. 1, 6 (1990) (prohibiting use of compulsory state bar dues to finance activities that are not "necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services").

Often, a germaneness test is properly employed to help determine whether a particular conditional proposal is coercive. If the offeree's compliance with the government-imposed condition would serve a purpose related to the purpose that would be served by denying the offered benefit on failure of the condition, then denial of the benefit is more likely not to be penalty, rendering the proposal not coercive. *See* Berman, *supra* note 55, at 112. Indeed, the Court used germaneness in essentially this way in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), although it wrongly transformed an inferential relationship into a necessary one. *See supra* text accompanying notes 152-54. Cases like *Abood* and *Keller*, however, seem pretty clearly to involve coercion. The laws at issue conditioned, respectively, a public-sector job or a license to practice law, on payments that infringed the offerees' expressive interests, in circumstances where denial of the offered benefit on failure to comply with the condition seems to amount to a penalty. In these cases, though, the Court seems to be saying that where the funds thereby extracted are used for purposes germane to the fundamental purposes of the union or the integrated bar, then use of coercion is constitutionally justifiable (i.e., the constitutional "infringement" does not amount to a "violation") as a means to prevent free riding.

sessments are not speech then the government may compel growers to pay them without engaging in constitutionally proscribed coercion.[317] And it is this assumption, I think, that demands greater scrutiny.

Start with the fact that government uses tax revenue to facilitate the communication of all sorts of messages with which individual taxpayers might strenuously disagree. For example, when holding in *Wooley v. Maynard* that New Hampshire violated the First Amendment by enforcing criminal sanctions against motorists who, due to ideological objections, covered that part of their state-issued license plate that bore the state's motto, "Live Free or Die," the Court expressed no disagreement with then-Justice Rehnquist's view, in dissent, that no constitutional difficulty would arise "were New Hampshire to erect a multitude of billboards, each proclaiming 'Live Free or Die,' and tax all citizens for the cost of erection and maintenance . . . ."[318] Consequently, Rehnquist reasoned, "[f]or First Amendment principles to be implicated, the State must place the citizen in the position of either apparently or actually asserting as true the message."[319]

Rehnquist seemed to attract a majority of the Court to that view three years later when, in *Pruneyard Shopping Center v. Robins,* the Court held that a provision of the California Constitution that required owners of private shopping centers to allow orderly speech and petitioning by others did not violate a property owner's First Amendment right "not to be forced by the State to use his property as a forum for the speech of others."[320] Writing now for the majority, Rehnquist identified as the "most important" consideration that "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner."[321]

Something like this "traceability" test[322] seems sensible, though it might be appropriately expanded to recognize First

317. *See supra* text accompanying note 148. The state is constitutionally entitled to "penalize" conduct (including inaction) that does not amount to a constitutional right. It may therefore threaten such a penalty without engaging in "coercion" in the specific sense of committing a prima facie constitutional wrong.

318. 430 U.S. 705, 721 (1977) (Rehnquist, J., dissenting).

319. *Id.* (internal quotation marks omitted).

320. 447 U.S. 74, 85 (1980).

321. *Id.* at 87.

322. James B. Lake, Note, *Lawyers, Please Check Your First Amendment Rights at the Bar: The Problem of State-Mandated Bar Dues and Compelled Speech,* 50 WASH. & LEE L. REV. 1833, 1852 (1993).

Amendment interests where the plaintiff himself can reasonably view what he must submit to as an affirmation of belief, even in circumstances where ordinary members of the audience would not infer any such affirmation.[323] And under either variant, Wileman Bros. seemed to make out a colorable claim. Though the company objected to various aspects of the USDA-administered program,[324] its core complaint seemed to be that the advertising portrayed all California nectarines as essentially equal, and that this was a view with which they fervently disagreed.[325]

The crux of the Court's response, then, was to deny that the assessments could "engender any crisis of conscience" because the growers could not in fact have "political or ideological disagreement with the content of the message" that the assessments financed.[326] This is perhaps true, but the air of ipse dixit is disquieting. As an empirical matter, that Wileman Bros. really was motivated by ideological objection does seem unlikely. The Court's assertion, however, reads like a statement of conceptual truth, and that cannot be right. People subscribe to all sorts of unusual beliefs. It is hard to imagine what definitions of "political" or "ideological" must be in play in order to preclude the possibility that some growers' disagreement with the advertisement's message of a fundamental fungibility among California nectarines qualifies.

For this reason, the *Glickman* Court's ideological/non-ideological gloss on the traceability test seems misguided. And if that is so, then the compulsory assessments at issue in *United Foods* and *Glickman* probably did coerce producers to relinquish First Amendment rights not to "speak," and warranted heightened scrutiny.

This should not, however, sound the death knell for efforts by the USDA to assist growers. A simple solution would be to supplement the advertising program with a separate program that is designed to stimulate demand through some nonexpressive means, say, by researching possible new markets, or new uses, for the produce. Growers could then be compelled to pay into one of the two

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323. *See* David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995, 1010-14 (1982).

324. *See* Glickman v. Wileman Bros. & Elliot, 521 U.S. 457, 468 n.11 (1997).

325. That this was a significant part of the company's objection emerges with reasonable clarity from oral argument, *see* Oral Argument, Glickman v. Wileman Bros. & Elliott, Inc., 1996 WL 700569 (Dec. 2, 1996), at 29-57 (argument of Thomas E. Campagne), a presentation that was much ridiculed. *See, e.g.*, Steve Lash, *Justices Hear First Amendment Challenge to Government-Required, Industry-Wide Agricultural Ads*, West's Legal News, 1996 WL 687547 (Dec. 3, 1996).

326. *Glickman*, 521 U.S. at 472.

segregated funds—one for advertising, the other for purposes that do not implicate First Amendment interests. Presumably, if advertising is more effective at increasing demand for nectarines, than is, say, a market survey of the prospects for exporting nectarines to Southeast Asia, then the only growers who choose to contribute to the latter rather than the former will be those who have genuine expressive objections to being associated with a particular message—just as Wileman Bros. claimed to have. This solution would keep the judiciary from having to rule on whether growers like Wileman Bros. did in fact harbor the Maynard-esque sort of objection to compelled payments that the First Amendment ought to be concerned about, or alternatively are simply trying to exploit the First Amendment as a way to free ride.

4. Issue and Image Advertising

Consider one final set of problems that has frequently vexed commercial speech commentators, matters sometimes filed under the headings of image advertising, issue advertising, and corporate commentary,[327] and perhaps better introduced by examples than by definition. Here are some of the more commonly discussed ones: The Mobil Oil Corporation has long placed "advertorials" in the *New York Times* staking positions on various issues of foreign and domestic U.S. policy. The Philip Morris Company, the world's largest manufacturer of cigarettes, commemorated the bicentennial of the Bill of Rights by running a multimedia campaign celebrating our constitutional liberties and offering a free copy of the Bill of Rights to anyone who requested one. Each advertisement prominently displayed the Philip Morris logo. The National Commission on Egg Nutrition, an egg industry association, claimed in advertisements that there existed no scientific evidence that eating eggs increases the risk of heart disease. Unifying these somewhat disparate cases is a commercial entity's purchase of advertising space to influence public debate on matters of particular importance to the

327. While the prohlem is addressed throughout the commercial speech scholarship, commentaries focused specifically on the subject include Howell A. Burkhalter, Comment, *Advertorial Advertising and the Commercial Speech Doctrine*, 25 WAKE FOREST L. REV. 861 (1990); Robert B. Holt, Jr., Comment, *Corporate Advocacy Advertising: When Business' Right to Speak Threatens the Administration of Justice*, 1979 DET. C. L. REV. 623; C.C. Laura Lin, Note, *Corporate Image Advertising and the First Amendment*, 61 S. CAL. L. REV. 459 (1988); and Mark D. Lurie, Note, *Issue Advertising, Commercial Expressions, and Freedom of Speech: A Proposed Framework for First Amendment Adjudication*, 28 B.C. L. REV. 981 (1987).

entity, or to cultivate the image of the entity or its products, but without describing or purporting to promote its products or services. These cases, and others like them, are often cited to demonstrate how tenuous the line is between commercial and noncommercial speech.[328] That may be, but recall that the approach I propose here does not rely on any such distinction.

Proper treatment of the Mobil advertorials is clear-cut. Were the government to try to ban the practice, it would almost certainly be animated by a purpose that runs afoul of the ignorance and persuasion principles; the effects of the ban would raise considerable difficulties under an effects-oriented balancing; and the policy would seem to be coercive for threatening a penalty.[329] It is not surprising, therefore, that the government has not, as far as I am aware, ever tried to curb the practice.

The Philip Morris case is more intriguing, though again it is instructive that, although eyebrows were raised at the time, no branch of government sought to prohibit the ads or the giveaways.[330] Clear thinking on the problem begins, as Kozinski and Banner do, by pondering why Philip Morris started the campaign.

> Is Philip Morris running the commercials, at considerable expense to its shareholders, simply as a public service? Or is there a hidden agenda? . . . [T]he Philip Morris ads allow the company name to reach the favorable attention of millions of potential consumers. These same consumers may well remember the name when they shop for cigarettes and be induced to buy Philip Morris rather than brand X.[331]

Well, so what? Maybe there is just something unseemly about Philip Morris exploiting the Bill of Rights to increase its profits from tobacco sales. And if this nearly aesthetic objection were enough to motivate the government to prohibit the practice, the ignorance and persuasion principles would apparently not be violated, making the prohibition permissible on the dimension of purpose. An effects test could, I suppose, go either way, as the outcomes of balancing tests are often hard to predict. But that should not matter, for the prohibition is likely to prove unconstitutional because of its coerciveness. It seems unlikely that the ads would generate increased demand for cigarettes, serving instead, as Kozinski and Banner suggest, merely to increase Philip Morris's market share. And that means the government has no legitimate inter-

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328. *See, e.g.*, Kozinski & Banner, *supra* note 22, at 641-46.

329. This is for reasons discussed earlier in the context of *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). *See supra* text accompanying note 162.

330. Relevant history is traced in Stern, *supra* note 86, at 122-23.

331. Kozinski & Banner, *supra* note 22, at 645-46.

est in barring Philip Morris's products, just because they run the Bill of Rights ads, while permitting sales of their competitors' products.[332]

Of course, perhaps Kozinski and Banner misapprehend the true purpose behind the ads. The ads might be better understood as a tactic in the company's fight against prohibition, not its fight for market share. The intended audience, then, are not potential consumers but potential voters. However, the government could not easily make use of this hypothesis to rebut the above conclusion that a ban on such ads (which is to say, an offer to allow an entity to sell cigarettes on the condition that it not run such ads) would be coercive. The underlying logic of a ban on the Bill of Rights ads would then be expressed as a governmental policy to allow the sale of cigarettes only by those who do not try to encourage the electorate to believe that the sale of cigarettes should be allowed. It is unlikely that such a policy reflects even a legitimate governmental interest.

Last, consider one case in which the government did indeed intervene. Determining that it was false and misleading to claim "that there is no scientific evidence that eating eggs increases the risk of . . . heart and [and circulatory] disease," the Federal Trade Commission ("FTC") ordered the National Commission on Egg Nutrition ("NCEN") to cease disseminating such claims, and the Seventh Circuit upheld the action.[333]

This is an important case because it raises challenging questions about the appropriate standard of proof to which government should be held when trying to establish falsity and deceptiveness. No doubt courts should give weight to "the principle of epistemological humility."[334] But so long as the concept of falsity serves a function within First Amendment jurisprudence,[335] courts must not assume a posture of thoroughgoing agnosticism. And one might conclude that both the FTC and the Seventh Circuit played their roles responsibly. Neither labeled as "false" the assertion that egg consumption was healthy. Rather, the FTC concluded, and the court

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332. *See supra* note 293.

333. Nat'l Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 165 (7th Cir. 1977). A similar question arose when R.J. Reynolds ran an advertisement claiming that a government study suggested that cigarette smoking did not cause heart disease. After a dispute over FTC jurisdiction, *see In re* R.J. Reynolds Tobacco Co., 111 F.T.C. 539 (1988), the FTC secured the company's agreement to withdraw the advertisements. *In re* R.J. Reynolds Tobacco Co., 113 F.T.C. 344 (1990).

334. *See* Redish, *supra* note 80, at 1443-44.

335. *See, e.g.*, *supra* note 304 and accompanying text.

agreed, "that, impossible though it may be to determine whether consuming eggs in fact increases the risk of heart and circulatory disease, it is possible to determine the existence and amount of evidence on that issue"[336]—as well, one might add, as whether such evidence satisfies the methodological criteria that permit the designation "scientific." What was false in the NCEN materials, then, was just the claim that there existed no scientific evidence that eating eggs increases the risk of heart and circulatory disease.

The egg case, in short, poses concededly important questions of doctrinal fine-tuning. But it does not, it seems to me, challenge these basic observations made earlier: that government does not act coercively when offering to allow businesses into the stream of commerce only on condition that they refrain from deceiving their actual or potential customers; that government's purposes in making such an offer are constitutionally permissible; and that the judiciary should remain vigilant to ensure that the policy not be implemented in such a way as to bar or chill too much valuable expression. In all, there does not yet appear reason to fear that the existence of issue and image advertising will present insurmountable obstacles to an effort to revise existing doctrine in the direction to which the body of this Article points and which Part VII.A sketches—namely, to abandon the separate doctrinal category of "commercial speech," while reshaping general First Amendment doctrine to take into serial account considerations of coercion, purposes, and effects.

CONCLUSION

The body of this Article has focused on a single commercial speech case, the Supreme Court's 1986 decision in *Posadas de Puerto Rico Associates v. Tourism Company*.[337] There is reason for the relative narrowness of that focus, for *Posadas*—or, more precisely, the *rejection* of *Posadas*—has played a pivotal role in the development of contemporary commercial speech doctrine.

The story of commercial speech jurisprudence to date might reasonably be written in three chapters. By conventional wisdom, the story begins with the 1942 case of *Valentine v. Chrestensen,* and the Supreme Court's flat refusal to recognize commercial advertising even as speech, blithely asserting "that the Constitution imposes no such restraint on government as respects purely commer-

336. *Nat'l Comm'n on Egg Nutrition,* 570 F.2d at 161.
337. 478 U.S. 328 (1986).

cial advertising."[338] Chapter one, then, tells the tale of the Court's gradual abandonment of that view, leading through the explicit rejection of *Valentine* in *Virginia Pharmacy*,[339] and culminating in commercial speech's assumption of intermediate-value status, as represented by the *Central Hudson* decision of 1980.[340]

Chapter two, retreat, is, in large part, the story of *Posadas*.[341] Through its watered down application of the four-part *Central Hudson* test and, especially, through its embrace of the argument that the greater power to ban an activity includes the lesser power to permit the activity while banning its advertisement, *Posadas* threatened even a return to *Valentine*. That *Posadas*'s author, then-Justice Rehnquist, had dissented in *Virginia Pharmacy*[342] made the threat seem real.

The threat, however, proved illusory; chapter three, accordingly, is a tale of rejuvenation.[343] From the vantage point of 2002, the prospects for robust constitutional protection of commercial speech have never looked brighter. The Court having repudiated *Posadas* a half-dozen years ago, the question for Court-watchers now is not whether the Court will back off from the intermediate protection commercial speech has enjoyed for the better part of two decades, but whether it will resist elevating all of commercial discourse, including commercial advertising, to the ranks of "full value" speech, protected by strict scrutiny. Justice Thomas is explicitly committed to this view, while Justices Scalia and Kennedy have increasingly expressed their sympathy. Justice Stevens would also reject the categorical approach of *Central Hudson,* applying strict scrutiny unless the given commercial speech regulation is supported by a state interest in preventing deception or protecting

338. 316 U.S. 52, 54 (1942).

339. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The Court's growing disenchantment with *Valentine* is detailed in *id.* at 759 n.16.

340. 447 U.S. 557, 564 (1980).

341. *See, e.g.*, Symposium, *The Supreme Court and Local Government Law,* 7 TOURO L. REV. 283, 441-42 (1991) (comments of Burt Neuborne) ("Between 1975 and 1985 there was an absolute wave of Supreme Court decisions striking down regulation of commercial speech, culminating in a series of cases that set out very, very restrictive standards. The Court said that if the speech was not false or misleading, and if there was some overwhelming social need that could not be advanced any other way, the speech was going to be protected. It did not matter whether it was 'For Sale' signs on people's lawns, billboards, or a whole host of commercial material, the speech was protected. The Court began to retreat in 1986, in a case called *Posadas*. . . ." (internal citations omitted)).

342. *See Va. State Bd. of Pharmacy*, 425 U.S. at 781-90 (Rhenquist, J., dissenting).

343. *See* Stern, *supra* note 86, at 116 (describing the Court's commercial speech decisions of the 1990s as "signal[ing] a 'remarkable revival' of the protection of commercial speech in the wake of the ominous implications of *Posadas*").

the consumer from inaccurate or incomplete information.[344] The remaining five members of the Court[345] have resisted abandoning *Central Hudson*, but have been unable to furnish a coherent defense for it, or even to persuasively rebut Thomas's repeated calls to embrace strict scrutiny.

This is unfortunate, because the intuition that much of what passes under the loose description of commercial speech is different from the speech that should enjoy full First Amendment protection is a sound one. An advertisement for cigarettes (or motorcycles) should not garner as much constitutional protection as should, say, political campaign materials or *Huckleberry Finn*. That is, the First Amendment should not be interpreted to place as heavy a burden of justification upon government when it seeks to regulate the former as the latter. Perhaps these things differ in "First Amendment value." But, in any event, there is another reason: the state is not constitutionally compelled to allow the sale of cigarettes or motorcycles. If it has reasons to allow the sales but with misgivings, and if speech by the seller could exacerbate those legitimate governmental concerns, the state might reasonably think to offer permission to sell the product on condition that the seller not engage in the damaging speech.

This is the core insight behind the Court's assertion in *Posadas* that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." And while this is a gross overstatement, the post-*Posadas* Court has erred by throwing out the baby with the bathwater. Instead of repudiating this insight entirely, the Court should have sought to correct it. It might be truer, for instance, to say that a power to withhold legal authority to engage in a particular sort of commercial transaction entails the power to permit such transactions on the condition that the participants not promote the transaction in specified ways, so long as the purpose for imposing the speech-restrictive condition is the same as the purpose the state would have for barring the transaction entirely, and so long as im-

344. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501-04 (1996) (plurality opinion); Rubin v. Coors Brewing Co., 514 U.S. 476, 491-93 (1995) (Stevens, J., concurring). *But see* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 598-605 (2001) (Stevens, J., concurring in part and dissenting in part) (subjecting restrictions on tobacco advertising to a seemingly intermediate form of scrutiny). For a criticism of Stevens's approach, see Post, *supra* note 22, at 6-7 n.22.

345. This is more clearly true of Chief Justice Rehnquist and Justices O'Connor, Souter, and Breyer than of Justice Ginsburg, who has joined even those parts of Justice Souter's opinions in *44 Liquormart* and *Lorillard Tobacco* that appear to be in some tension. *See infra* note 349.

posing the speech-restrictive condition does not unduly harm interests of the speech's audience.

Certainly, this formulation might be improved upon.[346] But it is far closer than the Court came when simply rejecting "the 'greater-includes-the-lesser' argument . . . for the . . . important reason that it is inconsistent with both logic and well-settled doctrine."[347] We can put this point another way by reexamining the Court's decision in *Lorillard Tobacco*. The majority, recall, held that Massachusetts's ban on tobacco advertising within 1,000 feet of schools and playgrounds failed *Central Hudson*; Justices Stevens, Souter, Ginsburg, and Breyer would have remanded the question for trial. In advocating remand, however, Justice Stevens emphasized that he shared the majority's concerns on the question of fit, insisting "the state cannot by fiat reduce the level of discourse to that which is 'fit for children.' "[348] Perhaps, though, the ban on tobacco advertising does not proceed "by fiat" at all. Perhaps the underlying logic of the ban is more faithfully rendered as an *offer* to allow the sale of dangerous products in the commonwealth conditioned on a limited waiver of manufacturers' and retailers' First Amendment rights.[349] As I have emphasized, this re-articulation does not entail that such a ban is necessarily constitutional, all things considered. But a noncoercive offer is not a command, and a sensible First Amendment doctrine must start by recognizing the difference.

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346. For example, requiring that the demand serve precisely the same purpose as would withholding the benefit might be unnecessarily restrictive. *Cf.* Berman, *supra* note 55, at 91-94 (discussing *Nollan*).

347. *44 Liquormart*, 517 U.S. at 511.

348. *Lorillard Tobacco*, 533 U.S. at 601 (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

349. *Butler*, in contrast, involved a state law making it a crime to distribute any writing, picture, or drawing containing anything "lewd or lascivious . . . tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth. . . ." 352 U.S. at 381. Unlike the advertising ban at issue in *Lorillard Tobacco*, this law is not plausibly viewed as constituting the offer of a benefit conditioned upon waiver of the offeree's speech rights. The statute at issue in *Butler* did proceed by fiat.