

TO WHAT EXTENT DOES THE POWER OF GOVERNMENT TO DETERMINE THE BOUNDARIES AND CONDITIONS OF LAWFUL COMMERCE PERMIT GOVERNMENT TO DECLARE WHO MAY ADVERTISE AND WHO MAY NOT?

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*Whether a State may ban all advertising of an activity that it permits
but could prohibit . . . is an elegant question of constitutional law.*¹

INTRODUCTION

In 1986, the Supreme Court considered a case coming to it from the Commonwealth of Puerto Rico. The case was before the Court to review a regulation forbidding any advertising of any kind, in any generally available medium within Puerto Rico, placed by or on behalf of any of the several casinos then operating in San Juan. The question before the Court was whether that virtually complete ban² on any such advertisements, regardless of their factual accuracy and representations, and regardless of the accuracy of any other statements the casinos might provide in such advertisements in the absence of the threat to revoke their licenses were they to presume to do so, was reconcilable with the First Amendment.

Was this blanket ban on information that casinos were forbidden to provide to residents of Puerto Rico by any means, in any generally available local medium, and at their own expense, somehow sustainable under the First Amendment? It would seem difficult, on the face of things, to see how or why that could be so. Indeed, this case, *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, might well have been regarded as quite easy

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¹ *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 359 (1986) (Stevens, J., dissenting).

² An exception was allowed for advertising not carried by media generally available to residents of Puerto Rico, but available just to tourists (e.g., in hotel room brochures) and advertising to "outsiders" (e.g., residents of New York, and ads in the *New York Times*). In brief, the local authorities were not averse to the operation of legal casinos even on a very large scale. Rather, they wished simply to discourage any local patronage by banning all advertising in media generally available to residents of Puerto Rico, even while encouraging the economic success of casinos and leaving tourist and "off shore" advertising quite unaffected by the ban.

for the Court. Such blanket censorship, altogether prohibiting any statements a lawful business might provide at its own expense, respecting even its location, or hours of operation, much less a mere straightforward description of its services, would appear to offer a very easy target for a facial "overbreadth" First Amendment complaint.³

Of course, Puerto Rico might have forbidden casinos to operate, in which event, to be sure, they—such "outlawed" enterprises—could likewise also be forbidden to advertise.⁴ But that was not at issue. For however it might otherwise have been, under the laws of Puerto Rico, the casinos' operations were as completely lawful when conducted in keeping with their general regulation as otherwise provided by law in Puerto Rico, as were, and are, the operation of the various licensed casinos in New Jersey, or in Nevada, as lawfully conducted in each of those respective states.

So the issue obviously was *not* what Puerto Rico might do in prohibiting a "criminal enterprise" from advertising, but what it may do in prohibiting a lawful business from publishing information of its existence, location, hours, services, or prices. Indeed, one may fairly describe the question under the First Amendment even in the following way: On what possible basis, consistent with the First Amendment, may Puerto Rico presume to treat *truthful* advertising by lawful casinos as per se a form of "*criminal*" speech? Nor is this an inappropriate way of framing the question. Rather, the description is quite accurate and exactly fits the case, for that is, without exaggeration, precisely what the Commonwealth had presumed to do in *Posadas*, as the case came to the Supreme Court.⁵

³ The argument scarcely needs elaboration. The prohibition was not in any respect limited (or "tailored") to forbidding the use of partial, false, or misleading advertisements. Rather, to the contrary, it was quite plainly adopted in order to reach—and equally to suppress—wholly accurate information, quite as much as to suppress any that might be thought to be inaccurate or incomplete in some respect. The *reach* of the ban, overreaching any good faith concern regarding the integrity of casino advertising—indiscriminately forbidding accurate informational advertising which the state itself would concede to be neither false nor misleading—would provide the basis for the strong, First Amendment, void-on-its-face, "overbreadth" complaint. For the most recent example applying "overbreadth" analysis to hold an act of Congress void on its face, see *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002).

⁴ The case is an easy one. The advertisement effectively solicits the commission of a crime (i.e., a transaction itself already validly prohibited by criminal law). The First Amendment has never been regarded as a source of defense for criminal solicitations. See, e.g., *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 493 U.S. 1072 (1993).

⁵ And, here, again, the case would seem easy. (What could make such speech "*criminal*"?) This is hardly an "incitement" to "*illegal*" action of any kind, much less incitement of "violence" or of some other dreadful wrong. Cf. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Even when the speech in question involves "advocacy" of "the use of force or of law violation" (neither of which is involved here), it remains

Possibly, too, Puerto Rico might have forbidden residents of Puerto Rico to frequent any of the casinos, even while permitting and encouraging nonresidents to “come on down.” And, had it done so, maybe (just maybe) an accompanying restriction, forbidding advertising directed to residents (who were now prohibited by law to frequent the casinos) might have been sustainable (again, by viewing such locally-directed ads as oblique, perhaps even direct, forms of criminal solicitation). But the case provided no testing of that idea, either.⁶ Indeed, according to the law of Puerto Rico, it was no more unlawful for Puerto Rico residents to visit the casinos in San Juan than it is in Nevada for residents of that State to be treated on equal terms by the lawful casinos in that State.

Therefore, what was at issue—and the only thing at issue—was whether the government of Puerto Rico could forbid truthful information to be furnished by a lawful enterprise at its own expense, in order to keep it out of the hands of residents of Puerto Rico; and *not* because of concern for anything false or misleading it might contain, but because of concern for the effect it might have in influencing their thoughts and possibly also their decisions, as it might in respect to others (i.e., nonresidents present in Puerto Rico) *not* subject to the censorship regime imposed by the state. To state the question this way would again seem, however, to state a virtually foregone outcome of the case in the Supreme Court; namely, that this kind of act would surely fail, set aside as a denial of equal protection and as an abridgment of freedom of speech.⁷

protected by the First Amendment “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Id.* Here, of course, there is no such advocacy even faintly involved; nor, as we have already observed, was the ban tailored merely to reach false or misleading statements casinos might be tempted to include were they not subject to such sanctions a valid law, closely tailored to that end, might well impose.

⁶ Had Puerto Rico adopted such a measure (i.e., either prohibiting a resident from frequenting any San Juan casino, or prohibiting any San Juan casino from (knowingly?) admitting any local resident to its premises as a customer), a question might be presented as to whether it would fail as a matter of “equal protection” (denying “equal protection” to residents). But the question, interesting passing as it may be, need not detain us here, for Puerto Rico did not presume to proceed along that kind of line. As noted in the text, it was equally lawful for residents, as for nonresidents, to seek service in the various casinos, and to be assured of equal service in the various casinos, under Puerto Rico law.

⁷ The two claims are linked (i.e., the equal protection claim is related to the free speech claim) in just the following way: residents of Puerto Rico are treated in a discriminatory fashion by Puerto Rico, in being denied equal freedom of access to information that casinos are permitted to provide to others (nonresidents) but not to them; even as the casinos are put under a censor’s thumb, denying them a freedom of speech to provide truthful information to Puerto Rico residents, proposing nothing legally wrong, or violent, much less false. For a familiar example supporting the standing of an affected lawful business to plead the affected rights of those he or she is forbidden to appeal to, in litigating a restriction imposed upon his lawful business, see *Craig v. Boren*, 429 U.S. 190 (1976).

Instead, the Court upheld the Puerto Rico legislation, albeit by a divided Court, in an opinion by Justice Rehnquist that strongly implied that insofar as the state could altogether forbid a certain kind of commercial activity, it could assuredly take the more modest step of substituting a mere restriction banning advertisements of any such businesses. But whether Justice Rehnquist had the matter well in hand (i.e., whether the way he both framed the question presented in *Posadas*, as well as the manner in which he then presented the obviousness of the answer) was ultimately left unsettled by the case.⁸ In some measure, despite subsequent cases seeking clarification (or repudiation or even confirmation) of the “*Posadas* doctrine,” its status, meaning, scope, and implications—such as they may or may not be—remain unsettled even now.⁹ This Article means to look again at all of the propositions examined in *Posadas* and in the principal case—*Central Hudson*¹⁰—the Court relied upon in its alternative holding in *Posadas*. In turn, this Article shall then take full notice of what has happened since, to describe the corner the Court has now painted itself into, as it has sought to work its way back from the disagreements that first divided it so sharply in *Posadas* and in some measure have continued to divide it ever since. At the end, albeit briefly, this Article shall also outline what seems to be the obvious way out, even as de facto (but

⁸ This was so because, without retracting or qualifying in any way the broad proposition laid down in this dramatic part of his opinion (which four other Justices evidently agreed with as well), Justice Rehnquist then went on to say why, in any event (i.e., without reference to this proposition), the severe restriction was sustainable even if one might not agree with that part of the opinion he thought quite sufficient by itself, i.e., as conclusive per se. (For a more complete elaboration of Justice Rehnquist’s analysis, see Part II of this Article.) Moreover, from the point of view of the several Justices in dissent, they were not convinced that the issue, as framed by Justice Rehnquist, was even before the Court. For even assuming that Justice Rehnquist might be right (a proposition three of the Justices, Brennan, Marshall, and Blackmun, disputed). *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 350 (1986), they noted that this particular act was distinguishable in that it presumed to draw a distinction, treating local residents in an inferior way to the treatment accorded nonresidents—a disparity of treatment that, in their view, the First Amendment could not condone. *Id.* at 359 (Stevens, Marshall & Blackmun, JJ., dissenting). And the most that Justice Stevens was willing to concede was that the question Justice Rehnquist had posed, though not in his view posed in this case, “is an elegant question of constitutional law.” *Id.*

⁹ The most recent (and very lengthy) review, acknowledging the unsettled status of matters (but overall arguing that Justice Rehnquist had things more right than others who have tracked the issue have been willing to concede), is Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at “The Greater Includes the Lesser,”* 55 VAND. L. REV. 693 (2002). See also *id.* at 696-97 nn.18-22 (collecting previous articles by more than two dozens authors on this subject). For a full review of where matters currently stand, see *infra* Part III.

¹⁰ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557 (1980). *Central Hudson* is the case that is virtually eponymous with the “standard” formula used by the Court in reviewing “commercial speech” cases under the First Amendment; i.e., one speaks of “the *Central Hudson* test.”

not yet *de jure*) the most recent cases coming from the Court display a new willingness to adopt.

As *Posadas* did not itself cleanly pose the question Justice Stevens described as “elegant” (rather, the case was compromised by the fact that the prohibitory regulation provided more favored treatment of nonresidents than of residents by excluding advertising directed to nonresidents from its scope), I think it is not the best case to consider in beginning this review. And, in casting about for another area of advertising for a kind of product that many people evidently believe may be more detrimental than beneficial both to the user as well as to others, I think that among the many items one might name, as well fitting that description, motorcycles (especially the high-powered kinds one sees out on the roads nearly every day) will do as well as any other. Consider, then, the following case, constructed deliberately to make it somewhat messy and even somewhat complicated, as one finds these matters often are in real life

I. PROPOSING THE “ELEGANT QUESTION” IN A SUITABLY MESSY CASE

A.

Five years ago, Thomas Jeffries, the owner and publisher of *The Charlottesville Observer*, decided to add a new weekly feature in the Metro news section, in which local motorcycle dealers were identified by trade name, location, and business hours, listing new cycles and any special sales. Jeffries added the feature and captioned it “Motorcycle News,” thinking it might eventually establish a certain cachet with some readers, if merely in the same manner of the five-day weather forecast feature that other readers had come regularly to look for in the paper.

Jeffries also thought this feature might catch on especially well in Charlottesville. It was a college town, located in a beautiful part of Virginia, benefiting from a mild climate. Jeffries noted, too, that campus parking for cars at the University of Virginia was already quite crowded and increasingly expensive. The sprawl and congestion of asphalt lots gradually crowding the campus seemed to have no end in sight. Yet few students and townspeople were willing to settle for getting around by bicycles or public transportation. The proposed “Motorcycle News” feature might suggest an alternative. If not, still little would be lost, or so, at least, Jeffries thought.

The weekly feature ran as Jeffries had planned. And, surprising even himself, he proved to be quite right that indeed there had been an interest in his innovative news feature as he was pleased to learn from an informal reader survey just this year, on the strength of which he decided to continue the feature indefinitely. Jeffries was also pleased that it seemed to have encouraged more students and others to rely on motorcycles than on cars, reducing parking congestion in the campus area, contributing to easier traffic flow in the Charlottesville area, and lessening the need for more city asphalt parking lots, developments which, earlier, in Jeffries's view, had threatened the great charm of Charlottesville. An incidental benefit which also pleased Jeffries was that the several local motorcycle dealers located in and nearby Charlottesville realized they were benefiting from favorable reader response to the weekly Metro "Motorcycle News" feature of the *Observer*. Accordingly, they now much more regularly sought out the newspaper to place more advertising than they had previously been inclined to do.

Of course, not everyone was quite as pleased, including a number of car dealers for whom sales had been quite flat in the Charlottesville area, and some of whom were inclined to blame Jeffries, as well as the motorcycle dealers, for contributing to their plight. And, this year, through their trade association, the Virginia Car Dealers Association (VCDA), they sought help through the Virginia General Assembly where, in comparison with the very much smaller Virginia Motorcycle Dealers Association (VMDA), they had always had much more influence than the motorcycle dealers possessed. In seeking that help, they counted, too, on attracting strong support from several public interest groups, such as Mothers Against Motorcycle Madness (MAMM), as well as the highly influential Virginia Medical Association (VMA), and Citizens for a Drug-Free America (CDFA), a citizens' group that associated motorcyclists with the drug culture.

The strong first preference of the organized automobile dealers, and equally of their highly supportive public interest allies was to have the Virginia General Assembly adopt a statute simply prohibiting motorcycles. Their shared notion was that these machines, even more than the ill-fated Corvair (the car once made by General Motors but eventually put out of production after an exposé launched by a then-youthful Ralph Nader), are simply "too dangerous at any speed." And, toward the end of making their case with the legislature, they agreed to launch a general campaign calculated to educate the public on the dangerousness of motorcycles, which also played to the negative stereotypes of motorcyclists, of their recklessness, their association with a drug

culture, and with the public burden of excessive medical costs borne by the public from cyclist injuries—injuries that purportedly would have been avoided with the greater shielding of automobiles. In mounting this campaign, and in thinking it might well have its desired effect, they took their cue from an earlier era in which a trade association of American railroads had sought measures of a similar restrictive nature against motor freight carriers.¹¹ As that earlier effort had itself been quite successful, so, likewise, they thought, might they be similarly successful as well.

Moreover, in moving in just this fashion, to secure legislative curtailment of lawful motorcycle sales, they were much encouraged by their attorneys' advice. Their attorneys assured them that *were* the Virginia General Assembly to outlaw motorcycles, even outright to forbid any further retail motorcycle trade, simply as a public safety, health, and general welfare measure, they could be confident that the measure would easily be upheld against any Fourteenth Amendment "substantive due process" or "equal protection" constitutional complaints any affected motorcycle dealers might bring against such legislation in any state or federal court. The same attorneys were also confident that there was likewise nothing in the state constitution that would stand in the way.

On each point, moreover, the attorneys' confidence seemed well-warranted. For example, the few pertinent clauses of the state constitution, such as they were, had been construed by the state supreme court to apply in a no more stringent fashion than the way the federal courts had declared to govern the overlapping provisions of the Fourteenth Amendment in respect to the very broad police powers of the states. In turn, the futility of a successful challenge being brought under those overlapping provisions, such as the Due Process Clause of the Fourteenth Amendment, was all but guaranteed in view of the U.S. Supreme Court's own long-standing, virtual abdication of judicial review of legislation of the sort involved in just this kind of case.¹²

¹¹ For an instructive description of the episode, see *E.R.R. Presidents Conf. v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961) (detailing the coordinated railroad industry campaign to discredit motor freight carriers, to induce public opinion to bring about restrictive congressional legislation of motor carriers).

¹² The well-established jurisprudence of the Court left the outcome of such matters as this pretty much to the discretion of each state's own legislature, whatever that outcome might happen to be. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) (commenting on such legislation insofar as it is impugned on due process grounds, and rejecting such a complaint, declaring: "it is up to the legislatures, not the courts, to decide on the wisdom and utility of [such] legislation"); *Olsen v. Neb. ex rel. W. Ass'n*, 313 U.S. 236, 246 (1941) (Douglas, J., for a unanimous Court) ("We are not concerned . . . with the wisdom, need, or appropriateness of the legislation."); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (maintaining the same position by the

For much the same reason, the motorcycle dealers could expect to do no better by pursuing a claim they might seek to base on the Equal Protection Clause, rather than on the Due Process Clause. For just as in respect to the Due Process Clause, the attorneys correctly noted that the current standard of judicial review for ordinary economic equal protection rights is an enfeebled inquiry of mere imaginable legislative rationality in drawing distinctions among products, services, or goods. In brief, in the Supreme Court's own view, if there is any imaginable basis that might support a legislature's decision as to what kinds of vehicles present such hazards as to warrant forbidding their sale and use, as distinct from other kinds the legislature does not assess in the same negative way, the judicial inquiry is at its end.¹³

Beyond these considerations, moreover, even absent total legislative success (i.e., to secure a ban on motorcycles simply as "too dangerous at any speed" to permit their operation on the public roads), the VCDA and the influential public interest groups allied with them agreed to press for a series of strong alternative measures suitably designed to the same end, so to reduce the sales and uses of motorcycles, and so to divert consumer purchases to a different choice (cars, bicycles, or public transportation) deemed to be better and safer by the legislature of the state. Included among these proposed fallback measures were measures of the following sort: a law severely limiting the number and location of authorized cycle dealers; a companion measure adding a thirty percent sales surtax on motorcycle sales; a new measure requiring completion of an "approved motorcycle training program" to qualify

Court in respect to similar acts of Congress when challenged under Fifth Amendment Due Process Clause); *Nebbia v. New York*, 291 U.S. 502, 537 (1934); ("With the wisdom of the policy, adopted with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."). For a still classic and useful critical review of this standard, see Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

¹³ For the most recent reiteration of this (non)standard, see *FCC v. Beach Communications*, 508 U.S. 307, 313-15 (1993) (Thomas, J., for a unanimous Court) ("This standard of review is a paradigm of judicial restraint. . . . On rational-basis review . . . those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." (emphasis added)). See also WILLIAM COHEN & JONATHAN VARAT, CONSTITUTIONAL LAW 690, 691 (10th ed. 1997) ("Despite occasional dissenting expressions of discomfort with the 'toothlessness' of rational basis review as applied in the realm of purely economic regulation . . . the Court consistently has refused to invalidate any such measure, with one notable exception, for more than 50 years.") The authors further noted that the one exception was itself subsequently overruled. The exception was *More v. Doud*, 354 U.S. 457 (1957). It was overruled in *New Orleans v. Dukes*, 427 U.S. 297 (1976). For a well-regarded critical review of this toothless standard, see Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (noting that the prevailing standard is "minimal scrutiny in theory and virtually none in fact").

for a motorcycle driving permit;¹⁴ and a fourth measure, increasing the minimum age for licensed owners, restricting such licenses to those over the age of twenty-one. Again, they had no doubt that whichever of these approaches—whether separately or all at once—the Virginia General Assembly might adopt “to reduce effective demand”¹⁵ for this “dangerous product,” the affected motorcycle dealers and anyone else who might side with them would readily fail in any court to have them set aside on some conjured constitutional ground.¹⁶

As it happened, however, despite the best efforts of these allied groups to secure the necessary votes on their preferred first choice, nothing approaching a majority of members in the Virginia General Assembly were ready to vote simply to outlaw motorcycles, either outright, or even as merely unlawful to use on public roads. For the moment, moreover, neither was there a sufficient consensus to pass any of the other proposals, although, it appeared *very* likely that several of these measures, perhaps even all of them, *would* command an *easy* majority in the legislature if a strongly preferred first option that a member of the legislature suggested were to prove ineffective in diminishing

¹⁴ Under this part of the proposed plan, moreover, it was agreed that the state itself would not provide such programs, leaving it entirely to the dealers, or to someone else, to make their own provision for any such programs, wholly at their own expense. To qualify, it was agreed, such programs would need to have “state certification and approval,” a certification process itself involving substantial fees the state would charge, as the proponents of this measure would urge the state to do (further to discourage motorcycle training, sales, and use).

¹⁵ Cf. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (“[W]e can . . . agree with the State’s contention that it is reasonable to assume that demand . . . is somewhat lower whenever a higher, noncompetitive price level prevails.”); *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986) (“The interest at stake in this case, as determined by the Superior Court, is the reduction of demand . . .”). So, here, a “reduction in demand” is sought quite directly, e.g., in the measure imposing the thirty percent sales surtax, putting the price of the product out of reach for buyers at the margin of affordability. In *Posadas* and in 44 *Liquormart*, the “reduction in demand” is sought somewhat more indirectly, by prohibiting advertising (thus to diminish public awareness of product availability, price, features, comparison with other products, imposing increased search costs on potential consumers, and relying also on a simple psychological truth (“out of sight, out of mind”). See also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980) (using the same technique).

¹⁶ As to the futility of seeking relief from any of these measures on a due process or equal protection complaint, see *supra* notes 12-13. That a complaint seeking relief on the strength of the Privileges and Immunities Clause of the Fourteenth Amendment would likewise fail, see for example, *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873) (holding state regulation of lawful ways of making a living—in this instance conferring an exclusive monopoly on a named company, and putting several hundred competitors out of business pursuant to bribery of state legislators to do so—wholly unaffected by Privileges and Immunities Clause of the Fourteenth Amendment). For a detailed, critical review, see VI CHARLES FAIRMAN, *HISTORY OF THE SUPREME COURT: RECONSTRUCTION AND REUNION 1864-88, 1320-74* (1971).

motorcycle sales and use to “tolerable”¹⁷ levels, a matter to be determined after seeing how well this preferred first option tended to produce the desired effect during a trial period of five years.

The “preferred first option,” suggested by a member of the Virginia legislature, was simply to enact a statute forbidding motorcycle dealers to advertise.¹⁸ The intended effect would be twice beneficial and conducive to the prosperity of car dealers, who individually (by dealership) and collectively (by common trade association ads touting cars) would continue to promote the merits of *their* products (even as the major auto manufacturers would doubtless also continue to do), even while the statute would at once strike off any individual motorcycle dealer ads, any institutional (motorcycle trade association) ads,¹⁹ or manufacturer advertising of motorcycles. The act would at once remove these “commercial voices” altogether and ought, predictably, lead to much lower motorcycle sales.

The legislative proposal was also aimed at Jeffries’s kind of “Motorcycle News” weekly feature, moreover, to exactly the same end. Thus, it took care specially to forbid “*any* ‘advertising’ of retail motorcycle dealers, their business locations, services, or prices, whether provided for consideration, *or provided gratuitously*.” The italicized language was meant to cover Jeffries’s “Motorcycle News” feature and other things of a like sort.²⁰ This final part of

¹⁷ That is, *whatever* that “tolerable level” might be deemed to be (for this, again, would merely be a matter within the discretion of the legislature to decide, consistent with its own view of how “the public interest” is best served).

¹⁸ “Advertise,” meaning “advertising in any manner whatsoever” (as in 44 *Liquormart*, 517 U.S. 484, the ban would be total, all media, all audiences, all times). Cf. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (pertaining to ban of alcohol content information from being provided on beer bottle labels, but not otherwise); *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 332-33 (1986) (upholding ban on casino advertisements directed to tourists exempted, but otherwise forbidden by any media or means); *Cent. Hudson*, 447 U.S. 557, 559 (disallowing a distinction between “informational,” and “promotional” regulated utility advertising).

¹⁹ Trade association advertisements of a commercial product or service offered by the association’s members are of course “commercial speech” (that they may not mention particular brands or dealers in no respect makes them “noncommercial” speech). See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 n.13 (1983).

²⁰ The wording (“gratuitously”) was selected to exempt from the statute’s coverage anything reasonably within any bona fide news coverage (thus, Jeffries’ feature might be reached insofar as it appeared regularly, but “gratuitously,” because generated by no news events). For a suitable analogy encouraging the legislature to believe such a measure might be sustained, see *Briscoe v. Reader’s Digest Ass’n*, 93 Cal. Rptr. 866 (Cal. 1971) where in an invasion of privacy claim against Reader’s Digest for story accurately identifying plaintiff as having been convicted of hijacking eleven years earlier, the court held that insofar as there had been no recent event involving plaintiff, making this report newsworthy, defendant could be held liable despite *New York Times v. Sullivan*, 376 U.S. 254 (1964).

the proposed bill was set off in a separate section, and accompanied by an express severability clause.²¹

B.

Shortly following enactment of the described statute, however, a civil suit challenging the announced intention of the Virginia Attorney General to begin enforcement of its several provisions was filed in federal district court in nearby Richmond. The plaintiffs included several named individuals, each identified as a resident over eighteen years of age, each possessing a valid Virginia motor vehicle operator's permit, and eligible to own and to operate a motorcycle in Virginia. These plaintiffs sought a declaratory judgment and an injunction to forbid enforcement of the new statute by the state.

In filing this action, these first-listed, "citizen-consumer" plaintiffs (none of whom was a motorcycle dealer and none of whom had any direct economic stake derived from how well or how poorly motorcycle sales may fare)²² proceeded exactly as other Virginia residents had done in seeking injunctive relief from an earlier advertising ban on drug price advertising in Virginia, just twenty years before.²³ Thus these particular plaintiffs appeared not on behalf

²¹ The reason for this treatment was obvious, as all agreed: the legislature (as well as the automobile dealers and their public interest allies) was not at all certain that this provision could be sustained under the First Amendment, at least as applied to the Jeffries's sort of Metro News feature (that is, provided by him in his own newspaper as owner-publisher of a standard newspaper). It might be seen as an impermissible form of editorial censorship violating "the freedom of the press." See, e.g., *Miami Herald Publ'g. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper . . . constitutes the exercise of editorial control and judgment."). Assuming it might not be sustained, however, the severability clause would still operate; it would leave the balance of the act unimpaired.

²² That is, none was alleged even to own stock in a motorcycle manufacturing company, much less a particular dealership.

²³ See *Virginia Bd. of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748 (1976) (holding in favor of a consumer group to enjoin a ban on pharmacist prescription drug price advertising both as to their standing to sue, and on the merit of their First Amendment claim, though state law in no respect limited their own freedom of speech). Though no pharmacist had joined in this suit, it was enough, in the Court's view, that the plaintiffs alleged that there were pharmacists who would provide such advertising were it not forbidden by the state. *Id.* at 756. The significance of the Court's holding on standing in *Virginia Pharmacy* is usefully explored in William E. Lee, *The Supreme Court and the Right to Receive Expression*, 1987 SUP. CT. REV. 303.

For a different example, see *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (Where, though no school librarian subject to school board directive claimed standing to object, and no affected publisher or author whose book was affected by school board directive joined as plaintiffs, adversely affected plaintiff public school students held to have First Amendment standing, not as "speakers" (no speech of theirs at issue in any way) but solely as affected readers, to seek injunctive relief against school board order that certain books be removed from school library. The Court expressly noted that "we have held in a variety of contexts 'the Constitution protects the right to receive information and ideas.'" *Id.* at 867 (emphasis added) (quoting *Stanley v. Georgia*, 394 U.S. 557, 565 (1969), and citing *Kleindienst v. Mandel*, 408 U.S. 753, 762-763

of, or in substitution of, any motorcycle dealer, or motorcycle manufacturer, or motorcycle trade association. Rather, they appeared on their *own* behalf, as "individuals adversely affected by the state law, in being denied information respecting the availability of a lawful product, foreclosed by state law from receiving it in a useful form and from an otherwise responsible, willing, and able source."²⁴

Other plaintiffs of course included several named retail motorcycle dealers, now forbidden by Virginia law from providing any off business premises notice of their locations, hours, inventory, services, or any other information of a like sort, suing to lift the ban. Attached to their complaint was an example of such a forbidden advertisement. The Attorney General had straightforwardly advised a dealer it could not be used, whether, as previously, for publication in the *Charlottesville Observer*, in any direct mailing to local residents, or in any other medium in the state, so to call attention to the dealership as such. This is the "business notice" (i.e., the advertisement) in its entirety, as previously carried in the *Observer*, and now disallowed pursuant to the new Virginia act:

Charlottesville Honda is a full service, authorized dealer of Honda motorcycles. Located at 2134 Alta Vista Rd., in Charlottesville, with business hours from 9:30 a.m. to 9:30 p.m. weekdays, and Saturdays from 10:00 a.m. to 5 p.m. Our inventory includes all current Honda street cycles from 250 cc (average 60 mpg in fuel economy) to 1500 cc touring cycles, including the new 450 cc Silver Arrow (recently reviewed in Cycle Magazine as "overall best in its class"). Charlottesville Honda also carries a full line of Honda, U.S.D.O.T. safety-approved helmets, gloves, and all-weather clothing. All inquiries are welcome. Charlottesville Honda will sell only to purchasers who present a current license confirming their age and certifying their competence lawfully to operate a cycle in Virginia. Charlottesville Honda has been in business in Charlottesville for thirty years.

The VMDA likewise appeared as a named plaintiff, suing on its own behalf²⁵ and on behalf of its members. And of course Thomas Jeffries is also a

(1972)). See also *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (holding that postal addressee has First Amendment standing to object to government restriction on third party material that would otherwise have come to him but which material the government had intercepted and detained). *Lamont* is the first case establishing a "right to receive information from a willing source," as sufficient to provide standing to complain of a restriction imposed on the source. *Id.* at 305.

²⁴ See cases and discussion *supra* note 23.

²⁵ The VMDA's standing to sue in its own right is uncontested, given that its organizational purpose is the promotion of motorcycle sales, and given also that the VMDA itself occasionally sponsors generic

plaintiff, as owner and publisher of the *Charlottesville Observer*, restricted as he is by the new Virginia law.

Last, three other individual residents are also named plaintiffs in this case. Like the first-named individual plaintiffs, each asserts a claim of right to uncensored information “as it would otherwise be forthcoming to them but for the ban imposed by the new state law.” Each asserts a claim as a person who resides in Charlottesville and who seeks uncensored information respecting certain lawful goods and services available in Charlottesville, “the better to form an informed opinion in respect to their worth relative to other (i.e., alternative) services and goods.” They assert standing of their own. They sue to enjoin the ban “as a constitutionally prohibited attempt to influence public and private choice by disallowing the free circulation of truthful information the state does not wish its citizens to have equal access to see lest they compare it with information they receive from others and reach conclusions different from those the state prefers them to entertain.”²⁶

All of the plaintiffs’ causes of action were brought pursuant to 42 U.S.C. § 1983.²⁷ It is conceded that federal court jurisdiction is itself proper pursuant

advertising of motorcycles as a superior alternative to cars or gas-guzzling SUVs that hog the roads, pollute the environment, and block other drivers’ views.

²⁶ In short, they claim that the purpose of the law enacted by the Virginia legislature is partly one of “thought control” and not merely “marketplace control,” as such (the phrase, “thought control,” is taken from a part of the opinion in *American Booksellers v. Hudnut*, cited *infra* this footnote). The power of the state in respect to the latter (marketplace control, i.e., *what* can be bought and sold, by *whom*, and on *what terms*), these and the other plaintiffs do not dispute. The power of the state in respect to the former (thought control), these plaintiffs say, assuredly is disputable, in exactly the following, specific sense. Car dealers and motorcycle dealers (among others) in contemplation of the law at hand, are “speech rivals,” fully as much as railway carriers and motor freight carriers have been in the past and continue to be even now. The state, wishing the views solely promoted by the car dealers to prevail, has muffled one side the better to assure that the other side will have a clear field. The object is not to assure success to car dealers vis-à-vis motorcycle dealers by setting terms of trade, rather, the object is to assure success by biasing what the public may see, so to bias what the public shall know. Car dealers, manufacturers, and trade associations may freely advertise, inclusive of ad copy offering positive “facts” regarding why their products are desirable and negative “facts” regarding why motorcycles are undesirable, while motorcycle dealers (and motorcycle manufacturers, motorcycle trade associations, etc.) are forbidden to use merely the same medium even to dispute their claims, or to offer countervailing observations or information, or offer any response, i.e., to “answer.” See *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (“[The state] has no . . . authority to license one side of a debate to fight free-style, while requiring the other to follow Marquis of Queensbury Rules.”); *Thomas v. Collins*, 323 U.S. 516, 545 (1943) (Jackson, J., concurring) (“The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind”); *Am. Booksellers v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986) (“The state may not ordain preferred viewpoints in this way.”).

²⁷ 42 U.S.C. § 1983 (2000) provides that “[e]very person who, under color of any statute . . . of any State . . . subjects . . . any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or

to 28 U.S.C. §§ 1331, 1343(a)(3).²⁸ The plaintiffs also appropriately named the Virginia Attorney General as defendant. It is conceded that all have standing to proceed in this way and that the Attorney General is a proper party to answer to the complaint. And so, what shall be its disposition, and what would *Posadas* fairly suggest?

II. PARSING *POSADAS*

A.

The “*Posadas* question”²⁹ seems to be the real question, for the Virginia statute is not designed—nor is there any pretense that it is tailored—merely to forbid, forestall, or to provide redress for the circulation of commercially *deceptive*, or *false* or *misleading* information.³⁰ The Attorney General concedes that this is so but merely demurs and observes that, under the Virginia law: “The mere accuracy or ‘truth’ of such information as an advertisement respecting motorcycles may contain will not save it—truth is irrelevant so far as this statute is concerned.”³¹ The statute’s object, straightforwardly, is *not* to assure that only truthful information is supplied. Rather, in large measure its object is to see that such information is *not* provided, insofar as it is within the power of the state to affect that end.³²

immunities secured by the Constitution . . . , shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”

²⁸ “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (2000). “The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . [t]o redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by the Constitution” 28 U.S.C. § 1343(a)(3).

²⁹ See the framing of that question *supra* note 1 and accompanying text.

³⁰ See, for example, the sample advertisement submitted by Charlottesville Honda. *Supra*, p. 1524. There is nothing false or misleading in any of its statements or representations, nor does the Attorney General claim otherwise. *Cf. Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 626 (1985) (holding that advertisement placed by attorney promising that “[i]f there is no recovery, [there will be] no legal fees,” while literally true, may nonetheless mislead—by omitting to mention court costs, thus state may require such additional information to be provided but not otherwise ban such advertisements).

³¹ Indeed, from the state’s point of view, “truth” is the greater part of the problem (i.e., it is the very accuracy, rather than any inaccuracy, of representations of product availability, of price, features, fuel economy, colors, options, zero-to-sixty acceleration rates, and top running speeds, of different makes and models (of motorcycles), the state seeks to suppress from concern of how just such information may influence those to whose attention it may come).

³² See discussion *supra* note 31.

Neither, as the Attorney General also concedes, is the statute directed to (or "tailored") merely to avoid *coercive* or *stressful* forms of high pressure marketing practices or tactics. It is subject to no such saving rationale. Its object, in brief, is not to blunt or forestall varieties of commercial overreaching, for in no respect is it reasonably limited to circumstances or to settings presenting such a risk.³³ Neither is it an enactment meant merely to provide some fair sanctuary in one's home or place of business from *intrusive* marketing practices, such as they might otherwise be, were it the case (as it is *not* the case)³⁴ that the law could provide no relief from the incessant "calls of commerce" *wherever* one might turn. Nor, again, in this same vein of obvious distinction, is it on a common footing with still older kinds of "time, place, and manner" ordinances, i.e., those of a limited sort such as those restricting commercial handbill hawkers from adding to the general congestion of the public streets.³⁵

³³ Cf., e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (upholding a state bar restriction on "bedside" personal injury solicitation of clients by lawyers). See also *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (extending *Ohralik* to sustain a state law restriction forbidding direct mail professional inquiries within thirty days of personal injury). But see *Edenfield v. Fane*, 507 U.S. 761 (1993) (invalidating state law forbidding uninvited in-person solicitations by certified public accountants). For a recent critical review of the *Florida Bar* and related attorney-advertising cases, see Ronald D. Rotunda, *Lawyer Advertising and the Philosophical Origins of the Commercial Speech Doctrine*, 36 UNIV. RICH. L. REV. 91 (2002).

³⁴ See, e.g., *Moser v. FCC*, 46 F.3d 970 (9th Cir.), cert. denied, 515 U.S. 1161 (1995) (sustaining congressional ban on mass telemarketing use of "automatic-dialing-and-announcing-devices"—devices programming prerecorded commercial messages, automatically dialing and playing when one answers one's telephone, with no live operator on the line); *Bd. of Trustees v. Fox*, 491 U.S. 469 (1989) (sustaining a university restriction on salesmen soliciting in university dormitories); *Breard v. Alexandria*, 341 U.S. 622 (1951) (sustaining a local ordinance disallowing uninvited door-to-door commercial solicitations) (Black & Douglas, JJ., dissenting as applied to magazine sales solicitations, though agreeing that the ordinance would survive as a time and place restriction on soliciting sales for "pots and pans" or other products not covered by the First Amendment). See also *Watchtower, Bible, & Tract Soc'y of New York v. Vill. of Stratton*, 122 S. Ct. 2080 (2002) (invalidating village registration requirement prior to making any door-to-door solicitations as overly broad as applicable to anonymous political speech or religious proselytizing, and including dicta that a more narrowly drawn ordinance applicable to ordinary commercial solicitations would be distinguishable and valid on its face). Cf. *Martin v. City of Struthers*, 319 U.S. 141 (1943).

³⁵ See, e.g., *Valentine v. Christensen*, 316 U.S. 52 (1942) (sustaining ordinance ban on ordinary commercial handbill distribution on public streets); cf. *Schneider v. State*, 308 U.S. 147 (1939). Because commercial speech is indeed "hardy," it may well be that restrictions limiting certain forums to noncommercial speech are sustainable, when ample outlets (and the commercial incentive to use them) remain fully available for the usual advertisement of ordinary lawful goods and services. See *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976). Indeed, it is arguable that the Court may have erred in not adequately acknowledging the extent to which this may be so. See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); cf. William W. Van Alstyne, *Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635 (1996).

Rather, this statute means also to ban the mere placement of plaintiffs' sample advertising copy in an ordinary newspaper of general circulation, as it means to ban it as well even as a simple mailed "advertising" brochure. In short, even as the Virginia Attorney General concedes, it has no qualified, or limited, commercial speech "time, place, or manner" rationale.³⁶ So much as this being incontestably clear, is it the case that the statute is nevertheless *not* objectionable so far as the First Amendment is concerned? And if it is, then on what reasoning might one rely?

Is it simply this, even as crisply suggested by Justice Rehnquist, in *Posadas*, that "the greater power to completely ban [an activity or product] necessarily includes the lesser power to ban advertising of [such an activity or product]"³⁷ even without otherwise presuming to interfere with it, or to regulate it in more substantial ways, so far as the legislature is currently disinclined to do? That is, is *this* the whole of the answer to the "elegant question" as framed by Justice Stevens,³⁸ precisely on the further explanation that Justice Rehnquist went on briefly to elaborate in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,³⁹ namely, this: "[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 the demand through restrictions on advertising."⁴⁰ This is so, moreover, even though it is true here, as may have been equally true in *Posadas* itself, that there may be nothing in the content of such advertising (and also nothing in the manner of its presentation, its format, its means of distribution, or the age or competence of those to whom it may be directed) distinguishing it in *any* respect from advertisements others are free to use in respect to goods or services they can lawfully provide. Perhaps it is true, but if it is, still one may ask what *makes* it

³⁶ See *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, *provided* the restrictions . . . 'are narrowly tailored to serve a significant governmental interest, *and* that they leave open ample alternative channels for communication of information.'" (emphasis added) (quoting *Clark v. Comty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984))).

³⁷ Cf. *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 345-46 (1986) (Rehnquist, J.) ("In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . ."). In the instant case, plaintiffs concede the legislature could forbid motorcycles to be sold, so, on its face, the point of Chief Justice Rehnquist's observation, though made with reference merely to "casinos," seems equally applicable here.

³⁸ See *Posadas*, 478 U.S. at 359 (1986) (Stevens, J., dissenting) (as quoted *supra* note 1 and accompanying text).

³⁹ *Id.* at 347.

⁴⁰ *Id.* (second emphasis added).

so, and what in *Posadas* itself made the proposition so self-evident to Justice Rehnquist that it could be offered virtually as a syllogism, or as though it were but an easy example of Euclidean proof (i.e., “If *X*, then also *Y*”)?

Perhaps the basic idea here, even as it might have seemed within *Posadas* itself, might be thought to be so obvious as hardly to be worth more words to spell it out. Indeed, perhaps the answer is just as blunt, and straightforward, as this: that just as no one in *Posadas* was forced to get into the casino trade, so, no one is forced here to get into (or remain in) the business of marketing motorcycles (as others are certainly not forced to get into, or remain in, commercial trafficking in cigarettes, liquor, or other goods or services of debatable worth). And, as a second step, insofar as one understands that the legislature *closely regulates* this particular (prohibitible) trade in a certain way (here, quite specifically as in *Posadas*, by providing that no advertising thereof is permitted by or on behalf of one who engages in this kind of trade), one may very well rightly conclude that in light of that duly-enacted restriction, it simply is not worthwhile to take up, or to remain in, this particular line of business. Indeed, one would be better off by pursuing some *other* line of business, namely, one not similarly subject to outright prohibition or subject to this particular restraint. *And so one is perfectly free to do*, even as the legislature well understands. 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: 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 attendant restrictions, one is welcome to do so. But when, as here, it *is* a business the legislature could altogether forbid, to quote Justice Rehnquist still again (albeit from a different case),⁴¹ “a litigant in the position of the appellee must take the bitter with the sweet.”⁴²

To be sure, if this is the explanation, the position taken by Justice Rehnquist, as reflected by his opinion in *Posadas*, is not without precedential support. Indeed, it is hauntingly familiar, resting (as it may) on an observation proffered by Justice Holmes many decades earlier, in the quite famous case of *McAuliffe v. Mayor of New Bedford*,⁴³ in dismissing a policeman’s complaint

⁴¹ *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974).

⁴² *Id.* at 153-54 (1974) (Rehnquist, J., dissenting).

⁴³ 29 N.E. 517 (Mass. 1892).

on the strength of observations of a strikingly similar sort.⁴⁴ The policeman, or, rather, former policeman, involved in that earlier case had been discharged for violating a rule of which he was made very well aware when he *became* a policeman (a rule disallowing a variety of political activities while employed as a policeman). "The petitioner," Holmes observed in *McAuliffe*, "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."⁴⁵ If one wants nonetheless to be a policeman, he may, on finding the terms and conditions as prescribed by law for one accepting such a position that the state has no obligation to provide to be unreasonable (i.e., "unreasonable" in his own view though perhaps *not* "unreasonable" from the view of his public employer) or attempt to negotiate *different* terms (i.e., other terms—terms he believes to be more appropriate or "less restrictive" of him in some respect). Alternatively, he may decline to take the terms "as is." In the end, however, failing to negotiate different terms, fully apprised of those which the public employer, though not he, believes to be suitable in respect to the position, "he takes the employment on the terms which are offered him," neither more nor less—and having done so, Holmes declared, "he cannot complain."⁴⁶ Thus the basis of the suggestion, previously put forward by Justice Rehnquist in *Arnett*, and now merely equivalently offered again in *Posadas*, that "a litigant in the position of the appellee must take the bitter with the sweet." The reasoning, by Holmes, in *McAuliffe*, and then by Rehnquist, in *Arnett*, and in *Posadas*, seems altogether parallel and in phase.

Yet, there is surely some problem here. For, first of all, even in the particular case in which Justice Rehnquist initially offered this view (i.e., of the "bitter with the sweet"), the Supreme Court had disagreed with Justice

⁴⁴ *Id.*

⁴⁵ *Id.* at 518.

⁴⁶ More specifically, Holmes observed in the following more complete quotation: "There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him." *Id.* at 517-18. But is the comparison bracketed within this quotation convincing? That one may have to part with some portion of one's "constitutional right[] . . . of idleness" (emphasis added) if one means to be paid at all, surely seems right (it could hardly be otherwise). How much of one's "constitutional right . . . of free speech" the state may *also* require one to forego merely in order to be paid for one's well-performed work *as* a public employee, however, could surely be quite a different case and might reasonably be thought to raise a separate question of law. Indeed, under a strong view of the First Amendment (as the paramount governing "law" constraining the state), the answer might be "none." Or, if that response seems too dogmatic, then at most, "only as much as can be objectively and narrowly justified by the nature of the particular work, such as it is, *and neither more nor less.*" For matched examples, roughly applying this view, one sustaining the restriction and the other not, see, *United States v. National Treasury Employees Union*, 515 U.S. 454 (1995), and *Snepp v. United States*, 444 U.S. 507 (1980).

Rehnquist's analysis, such as it was, and declined to follow it *even in part*.⁴⁷ Rather, in *Arnett v. Kennedy*, in which Justice Rehnquist had stated his view *pace* Holmes, and subsequently in a case styled *Cleveland Board of Education v. Loudermill*,⁴⁸ the Court held that it is *the state* (and *not* the "employee") that must sometimes accept "the bitter" with "the sweet." Specifically, as it was held to be in the setting of *Arnett*, that the state must sometimes accept something *it* may not want (namely, the obligation to provide tenured employees with pretermination procedural due process required by the Fourteenth Amendment, rather than some lesser, legislatively-preferred summary procedure), in order to get something *it* desires to have (namely, the better quality of service it hopes to receive by providing at least *some* kind of job tenure for its employees rather than by compelling all to serve solely for fixed terms or to be terminable simply at will). The exact point was plainly put by Justice Powell, in the following way, in *Arnett*: "While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, *once conferred*, without appropriate procedural safeguards."⁴⁹

Nor was this development in *Arnett v. Kennedy* itself some novelty suddenly invented by the Court. In fact, quite early on and long prior to cases such as *Arnett*, the Supreme Court had heavily qualified the "greater-and-lesser" (or "right-privilege") Holmes syllogism in respect to the First Amendment itself, and very much in the same way as the Court did, merely later in time, in respect to procedural due process in *Arnett*. It had done so originally via its doctrine of "unconstitutional conditions."⁵⁰ Indeed, had the

⁴⁷ See *Arnett*, 416 U.S. at 166-67.

⁴⁸ 470 U.S. 532 (1985).

⁴⁹ *Arnett*, 416 U.S. at 167 (emphasis added). By "appropriate" procedural safeguards, Justice Powell meant, specifically, those identified to the Due Process Clause of the Fifth Amendment, and not some lesser (i.e., more summary) procedures the employing government preferred, so to make it easier to discharge such employees. So, here, too, one might suggest the legislature may be free not to permit any lawful trade of a certain sort. Nevertheless, part of its decision will likewise turn on being made to realize that *should* it decide to permit it, in doing so, it will likewise also have to accept the "bitter" (certain things, e.g., advertising, it would strongly rather avoid) along with the "sweet." Those permitted lawfully to engage in motorcycle enterprise, thus will gain merely the same rights to furnish public information at their own expense respecting the lawful trade in which they are engaged, *even as others are free to do in respect to such trade as is likewise lawful for them*.

⁵⁰ "[T]he doctrine of unconstitutional conditions limits the government's ability to make someone surrender constitutional rights . . . to obtain an advantage that could otherwise be withheld." See *Clifton v. Fed. Election Comm'n*, 114 F.3d 1309, 1315 (1st Cir. 1997) (construing an act of Congress as not forbidding the spending-for-speech at issue in the case; and so construing the act in order to avoid the likelihood that the act would otherwise be vulnerable as invalid for imposing an unconstitutional condition). See generally Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA

Court not done so, even as it recorded its view at the time, it would have ended up sanctioning a power in government to subordinate nearly all, perhaps all, constitutional rights under the manipulations of the "right-privilege" doctrine such as it then was (i.e., as reflected in the dictum by Holmes in the *McAuliffe* case). And this fateful step, the Court was quite unwilling to take, even as the Court acknowledged in the course of its own critical review, when it repudiated the general doctrine as it did.⁵¹

Exactly in this light, it may be better now to face up to the issue posed both in *Posadas* and in our own motorcycle test case more directly, and this time without recourse to mere dueling legal epigrams (e.g., of the "greater-and-lesser" on the one hand and of the "unconstitutional conditions" on the other), and to return still again to *Posadas*. And uncorrupted by maxims, perhaps one may more correctly put the critical matter in just the following form, i.e., a form that speaks more straightforwardly to the issue at hand. So let us try, specifically by reframing the issue, in just the following way: "If it is true that the power to forbid a given kind of activity implies a power to forbid any advertisement of such an activity, and to do so even when the activity has not been forbidden (just as Justice Rehnquist suggests in *Posadas*), still it is 'true'

L. REV. 371, 458-62 (1995) (with additional references at 373 n.1); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 83 HARV. L. REV. 1429 (1968). See also Philip Kurland, *Posadas de Puerto Rico v. Tourism Company*: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful,'" 1986 SUP. CT. REV. 1, 13 (noting the argument offered by Justice Rehnquist in *Posadas* "bears a great similarity to that long since rejected under the rubric of unconstitutional conditions." Indeed, it does. Being forced to forbear from any advertising whatever, including all merely of the same conventional sort all others are free to provide in respect to their goods and services, as a condition of being allowed to compete at all, is arguably a condition of just this (i.e., *unconstitutional*) kind. If it is not, i.e., if it is not an "unconstitutional" condition, it should be easy enough for the state to demonstrate why not. It does not acquit itself of that burden, however, merely by observing that it might, if it so chose, outlaw or otherwise regulate the trade or the product in which the would-be tradesman seeks to become engaged.).

⁵¹ See, e.g., *Frost & Frost Trucking Co. v. R.R. Comm'n. of California*, 271 U.S. 583, 594 (1926) ("If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."). See also *United States ex rel. Milwaukee Publ'g. Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting) (describing the mail as something that could be abolished whenever the government might choose to do, but which, in the meantime, so long as the government chose to maintain it (that is, so long as the government finds it useful to provide a postal system), it must be prepared to accept some of the "bitter" (certain mail it would strongly prefer not to carry because of its content) as long as it wants whatever advantage it finds in the "sweet" (the mail it does desire to carry for such value as it may be thought to have)). Holmes's position in *Burleson* reflected a considerable change in his thinking since his dismissive opinion in the *McAuliffe* case. And, indeed, the *McAuliffe* syllogism itself was abandoned in subsequent decisions by the Court. See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

only because the Supreme Court is so inclined to read the Constitution so to provide." So much as this may, of course, seem obvious. Indeed, it is obvious. Still, I suggest that, obvious as it ought to be, and is, it may also be quite useful. For putting the matter in just this way surely helps to clear the air. It permits us to start afresh.

So, the question remains to be answered. And that question, I think, is simply this one: Why should the Supreme Court read the Constitution "*so to provide,*" *when nothing in the Constitution itself suggests that this is necessarily a correct reading, or correct understanding, of its relevant provisions, including the First Amendment itself?* Certainly *nothing* in its text compels such a reading. Nor is it simply some sort of obvious "self-evident truth." For example, surely it would be at least equally plausible to read the Constitution quite differently, even in the following way:⁵²

Whether or not a legislature may forbid an activity (a question 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 plainly no reason to suppose its power to restrict or forbid the publication of accurate information, pertinent to that activity, whether by one commercially engaged in that activity or otherwise, is nearly as broad as when it has exercised that power, such as it is. Indeed, it is surprising that anyone should think that it is, for there is no equivalency in the circumstances at all. In the one instance, so to presume to seek transactions in the service or product, is to solicit a criminal transaction. In the other, no such taint of illegality or culpability attaches itself to either party, i.e., either to one who proposes the transaction, or the other, i.e., the one who responds to the advertisement or to the proposal and completes a lawful transaction exactly according to information willingly furnished in the manner it was provided and received.

Perhaps, indeed, it—the legislature—*may* altogether forbid the activity in question. For purposes of our current discussion we may concede the very point, for nothing relevant here, under the First Amendment, turns on that point.⁵³ But, however that may be, when

⁵² Indeed, why isn't the following as logical or even a more logical "reading" of the Constitution than that suggested by Justice Rehnquist for the Court in *Posadas*, so to say something quite different about the Constitution, of the following sort?

⁵³ And perhaps, also, a legislature may do so for virtually any reason satisfactory to itself: that this is so if just because the Constitution may scarcely place any restraint on its power to do so, insofar as we have concluded, for better or for worse, that when it does so, such decisions as it shall make, when of *this* sort, are hardly subject to judicial review at all. That point may be conceded as well, for it is without effect on the case at hand.

it has not exercised that power in respect to a particular activity, commercial or noncommercial as the case may be, exactly insofar as the activity *is* permitted, the First Amendment assuredly applies to prohibit the legislature from then presuming to forbid those lawfully engaged in it from “speaking” to it, i.e., merely to furnish at their own expense a fair description of what it is (*what* the ‘activity’ consists of, *to whom* it is lawfully available, *when*, and on *what* appropriate terms), even while always answerable equally as others are likewise answerable, for the truth, the accuracy, and the completeness of their representations, such as those representations may be, neither more nor less than others who likewise offer other lawful goods or services, whatever they are. For so much as this, we think, the First Amendment plainly does secure, i.e., secures of its *own* force, it is not a matter of mere legislative grace. In brief, this unremarkable understanding of the matter merely acknowledges how the First Amendment operates: it operates as an *independent* restraint on Congress, and equally, by means of the Fourteenth Amendment, as an independent restraint on the States as well.

Nor do we readily understand what could so mislead a legislature to suppose otherwise, i.e., to suppose that the First Amendment, despite the manner in which it is written (“no law abridging the freedom of speech”) secretly keeps something back—that it somehow carved out some exception, not express but merely implied, and despite its terms, nonetheless means—or should be construed to mean, that “it is largely just up to legislative bodies to decide the extent to which people shall be permitted to learn, or not learn, of services and products lawfully available to them.” We know of no such doctrine. More to the point, we find no compatibility between this view and the very different view reflected in Constitution of the United States.

B.

To be sure, one might concede to this view that the First Amendment does operate as an “independent” source of restraint on Congress.⁵⁴ But, even after

⁵⁴ The proposition is also much more of a piece with what the Court elsewhere reports as its own view, for example, in *Edenfield v. Fane*:

The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, *not the government*, assess the value of the information presented.

conceding that there may be some merit in this view (i.e., to the view that the First Amendment does apply as a source of *independent* restriction on Congress and, via the Fourteenth Amendment, also on the states), might one still rejoin by taking a slightly different tack, namely, that any restriction on advertising, whether by motorcycle dealers or others whose commercial activity the state could altogether shut down, while not *exempt* from First Amendment scrutiny, need meet merely “minimal scrutiny requirements” of ordinary economic substantive due process review rather than some more stringent (i.e., “heightened”) First Amendment standards as such?⁵⁵ And, when judged by *that* “mere rationality” standard (i.e., the (non)standard of minimal scrutiny, bordering on virtual nonjusticiability)⁵⁶—the standard applicable, however, where *no one’s speech* as such is the object of any restrictive law—the Virginia statute clearly meets the appropriate test.⁵⁷

507 U.S. 761, 767 (1993) (emphasis added). See also *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1399 (2002) (“As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear.”). This position is also merely the same, as we have already noted, as the Court has taken, equivalently, in respect to the requisites of Fourteenth Amendment procedural due process (e.g., in cases such as *Loudermill* and *Arnett*). And for a fuller elaboration, see also Brooks R. Fundenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 458-62, 476-78 (1995) for a review of *Posadas* and a useful diagramming of “greater-and-lesser” powers; Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589 (1996).

⁵⁵ See, in strong accord with this suggestion, Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979) (noted and cited by Justice Rehnquist in *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 340 n.7 (1986)). For a similar, but not identical view, see also Berman, *supra* note 9.

⁵⁶ See *supra* notes 12-13, & 16.

⁵⁷ Indeed, but this is merely a virtual *reiteration* of Justice Rehnquist’s *Posadas* position, rather than a different approach (even as his reference to the Jackson & Jeffries article, *supra* note 55, further suggests). Treating the matter this way once again simply elides any distinction between presuming to regulate the product and presuming to suppress accurate commercial information descriptive of the regulated product, treating them as equally within the discretion of the legislature to dispose of as it may please itself to do. For with no significant difference in rephrasing, what the Justice necessarily suggested (in the “greater-and-lesser intrusion” view of the law involved in *Posadas*), was that (constitutionally speaking) whatever reasons, no matter how utterly unconvincing or even petty, would be deemed constitutionally adequate by the Court insofar as the government enacted a “wholesale prohibition” on a given kind of commerce, *the very same reasons* must perforce also be constitutionally adequate when the government takes “the *less* intrusive” step of tolerating the trade and merely forbids any advertising by those permitted to engage in it—that this is so (again), that is, “precisely *because*” the government could have taken the more restrictive step of outlawing the trade (the greater—the power to ban the trade—includes the lesser, the power to ban advertising of such trade as the government permits in any line of trade the government could ban).

Again, however, as we have seen, since there is almost no line of commerce government cannot prohibit, even merely for the purpose of favoring those in competing goods and services (see, still again, cases and discussion *supra* notes 12-13, & 16), this would leave only a thin (and highly uncertain) category of goods and services not subject to nearly uncabined legislative power to declare “who may advertise and who may not,” and giving the *First Amendment no nontrivial separate work to do*. Indeed, to escape the rationale, such few goods as government could not reach on this basis (namely, such privately-offered commercial goods or

Or is it because while this may not be true either⁵⁸ (rather, what *is* true is that the “advertising restrictions” at issue here are obviously specific, content-directed bans of *truthful* statements of *lawful* consumer information in contemplation of utterly lawful transactions and, as such, are speech restrictions unexceptionally subject to “normal” standards of First Amendment review), the restrictions nevertheless can fairly be defended insofar as they “directly advance the government’s substantial interest in the health, safety, and welfare of its citizens;” *and* that in doing so, they “are no more extensive than necessary to serve the government’s interest,” and thus, in turn, can be said to meet the Court’s *own* First Amendment, *Central Hudson* “commercial speech” test,⁵⁹ just as a majority of the Court likewise also found in *Posadas*,⁶⁰

commercial services of a kind government could *not* ban), would have to find some special “anchor” in the Constitution itself and thus, in finding some substantively protected “marketing entitlement” secured against government in the Constitution, not be goods or services of a kind the government could ban: e.g., possibly “commerce” in certain printed matter, such as newspapers, as implicitly protected by “the freedom of the press”; or possibly “commerce” in at least some kinds of legal services (as implicitly protected in the due process clause of the Fifth Amendment and in one part of the Sixth Amendment that refer to the “right to counsel”); or possibly even some “commerce” in condoms or other contraceptive items and abortion services (as necessary to certain constitutionally-anchored “privacy” rights pursuant to *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Roe v. Wade*, 410 U.S. 113 (1973)). All of this, incidentally, Philip Kurland presciently recognized in the critique he offered of *Posadas* more than a decade ago. See *supra* note 50; see also Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433, 1440-41 (1990).

⁵⁸ See discussion *supra* note 57.

⁵⁹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980):

In *commercial speech* cases . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For *commercial speech* to come *within* that provision, it . . . must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is *substantial*. If both inquiries yield positive answers, we must determine whether the regulation *directly* advances the governmental interest asserted, *and* whether it is *not more extensive than is necessary to serve that interest*.

Id. (emphasis added). If the restriction meets these requirements, it is to be upheld.

⁶⁰ “[T]he statute and regulations at issue in this case, as construed by the Superior Court, pass muster under each prong of the *Central Hudson* test. We therefore hold that the Supreme Court of Puerto Rico properly rejected appellant’s First Amendment claim.” 478 U.S. at 344.

The argument in this branch of *Posadas* does not rely on the “greater-and-lessor” reasoning. Rather, it is independent of that conflation, i.e., it purports to stand on its own two feet. It is much the same sort of analysis, for example, as that which might sustain a state-law based tort action for invasion of privacy in respect to a newspaper presuming to publish private facts of a private person, unassociated with any bona fide newsworthy event (e.g., the kind of case specifically discussed *supra* note 20). “The state obviously has a *substantial* interest in protecting each person’s ‘right to be left alone,’” such a court might declare, as an initial step in applying a mere *Central Hudson* standard of First Amendment review. And “the restriction placed on the newspaper,” it might then proceed to say, is plainly “no more extensive than necessary” to secure that particular right such as it is. And, obviously, also, its manner of securing that right is “direct” (rather than “indirect”). Q.E.D., the state law (here, a feature of its tort law) is valid on its face and as applied. (*Query*:

quite in keeping with what was later rightly noted as an *alternative* basis for the holding in that case?⁶¹

So, here, specifically in respect to our motorcycle advertising ban, tracking the specific word formula of *Central Hudson*, may it be said that the state has a “substantial” interest in the good health of its citizens (surely it does); and likewise, therefore, a “substantial interest” also in reducing the number of hazardous, unshielded, crash-prone, powered motorcycles in private use and at large on the public roads? Why not? For surely it *may* be so “said,” just as the Virginia legislature, alert to the test, can be expected to take due care so to declare, regardless of what the actual, typically more complex mixture of purposes-sought-to-be-served may in point of fact happen to be. And, next, as to whether this measure is “no more extensive than is necessary to serve that interest,” is there any obvious ground for saying that it *is* “more extensive” than is “necessary” to serve that interest? If so, in what way, and, indeed, on what basis are the courts so to declare? If the legislature declares that it is merely as extensive as it needs to be to do its task efficiently, on what basis could a court presume to say otherwise, *e.g.*, to declare that “something more compromising,” or “something permitting at least *some* advertising” would be “enough?” “Enough” *for what*? Surely a *total* ban on motorcycle advertising would have much greater effect than some half-way measure, would it not?

So, thus applying the “test,” if, indeed, the *Central Hudson* formula *is* to supply that formula without further qualification, though it is ostensibly quite different from, and more demanding than, the mere economic substantive due process “test,” what does it practically come to, in the end? That even the larger part, if not the whole part, of the legislative purpose was in fact to secure the greater prosperity of the automobile dealers, rather than any particular “public safety” concern, may well be true. Still, if securing their greater prosperity (either *per se* or because it is felt, by the legislature, that their products are more in the public interest than the products of competitors) is not

however, even accepting the argument here, in the “privacy” case, how well, if at all, does it transfer into the quite different setting of our case? Truthful information on the availability of a lawful product, one might note, prejudices no one’s “rights”; and wherein, moreover, does the government presume to a power to claim that it *has* a “substantial” interest in keeping consumers prejudicially uninformed in respect to the relative cost, relative advantages, features, and availability, of one kind of lawful product or lawful service vis-a-vis others they may in fact not prefer? Nothing in *Central Hudson* itself furnishes an adequate response to either of these suggestions, even less can it be found in anything apparent in *Posadas* or in any related case.).

⁶¹ See Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 43 n.190 (1995) (reviewing *Posadas*, rightly noting that subsequent cases “demoted” its “greater-and-less reasoning” to the status of an alternative holding).

likely to be regarded as a "substantial" interest, then the legislature is simply unlikely so to admit the point, indeed, *least* of all will it be inclined to do so, given its awareness of the requirements of the *Central Hudson* test. Rather, one may expect it will say little (or nothing) about wanting to protect automobile dealers and will cite solely a concern for "public safety," so as to meet the "substantial" interest part of the *Central Hudson* test. So much being shown, nothing remains, then, except possibly a quarrel as to whether the chosen mode of restriction—the ban on advertising in any form—"directly advances the governmental interest asserted." And who is to say that it does not satisfy that requirement as well?⁶²

C.

Or is it the case, rather, that even this suggested fallback position asserted by the Court in *Posadas* ought to fail as well,⁶³ so that whether or not motorcycles (or some other goods or services, whether margarine, muslin, or mopeds) could be outlawed, heavily taxed,⁶⁴ or otherwise restricted, and whether for private use or in commerce (for, indeed, there may be scarcely any meaningful constitutional restraint limiting either Congress or even the states in this regard), "the state may not suppress truthful speech in order to discourage its residents from engaging in a lawful activity"⁶⁵ *however* else it *may* presume to regulate that activity, *or* determine the conditions or terms of its lawful pursuit (down to and including its outright prohibition), *or otherwise* restrict its own residents' access to that activity, so far as a legislature may so

⁶² See David A. Anderson, *Torts, Speech, and Contracts*, 75 TEX. L. REV. 1499, 1521 (1997) (reviewing all of the Court's commercial speech cases and usefully noting that "[N]o commercial speech restriction has been struck down on the ground that it was indirect.") (emphasis added); see also Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 42 (2000) (noting that the "bland, generic quality" of the *Central Hudson* three-part test, as well as the "astonishingly abstract" way it articulates the First Amendment "safeguards" . . . "which is [he adds] no doubt why they have proved susceptible to such wide swings of application" by the Court).

⁶³ See also discussion *supra*, note 60, respecting the manner in which a literal *Posadas*-style of applying *Central Hudson* standards would appear to work out, and why they may nonetheless be inappropriate as applied here.

⁶⁴ See, e.g., *McCray v. United States*, 195 U.S. 27 (1904) (sustaining ten cent per pound tax imposed on colored margarine, none on butter (whether artificially colored or not), on basis that colored margarine could be outlawed and therefore, even assuming the tax "discriminated against oleomargarine in favor of butter, to the extent of destroying the oleomargarine industry for the benefit of the butter industry" as was alleged, it would not matter; the result was no different than might have been done directly, albeit ostensibly for "consumer protection" as the alleged purpose).

⁶⁵ See *Posadas*, 478 U.S. at 349 (Brennan, J., dissenting) ("I do not believe that Puerto Rico constitutionally may suppress truthful commercial speech in order to discourage its residents from engaging in lawful activity.").

decide to do? In brief, that *both Posadas and Central Hudson* (to the extent *Posadas* relied on *Central Hudson* in its alternative holding) are simply in error if understood to support a different regime? Surely one might so argue, indeed, in some measure, we have already noticed the essential features of that argument several times even before reaching this point.

To offer the obvious first-level distinction once again, so far as the *latter* kind of power is concerned (i.e., so far as the power to determine *what* commercial services may or may not be permitted, and in what amounts, and on what terms), to be sure, the First Amendment may indeed have very little to say, if just because the First Amendment (*unlike* the Fifth Amendment such as it is, whether under its “Due Process” clause or under its “Takings” Clause⁶⁶) is frankly simply not addressed to government power generally to determine *what* goods and services may or may not be lawfully provided or whether, if provided, to whom they may be provided, under what circumstances, or on what particular terms. But (and need we really be reminded still again?) the First Amendment *does* speak to restrictions on *speech*, the immediate—indeed the *sole*—contested feature of the Virginia law put into challenge in this case.⁶⁷ And, at the next step, moreover, the First Amendment provides no general exception to its strict scrutiny standards applicable to censorship measures the Court would readily recognize as categorical exception just because the speech in question supplies specific information on particular lawful goods and services, whether motorcycles or milk (or milk substitutes), rather than information about something else (e.g., information about today’s weather, information about tomorrow’s election, or information about yesterday’s smash up of cars on some local road).⁶⁸

⁶⁶ See cases and discussion *supra* notes 12-13, 16 & 60; see also *Carolene Prods. Co. v. United States*, 323 U.S. 18 (1944) (*Carolene Products II*). Despite clear labeling sufficient to dispel any consumer confusion or possible product misidentification, and despite uncontested proffer of proof that lower cost, vitamin-fortified, vegetable oil in defendant’s product met *all* the nutritional standards of whole milk, such that there was *no* basis to describe defendant’s product as either adulterated or as misbranded, Act of Congress successfully lobbied by dairy industry to totally forbid defendant’s lower cost product was sustained: the Fifth Amendment (substantive) Due Process Clause would provide no ground for relief. *Id.* For an effective critique of *Carolene Products II*, see FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW, A DICHOTOMY OF SENSE AND NONSENSE 226-31 (1986).

⁶⁷ See also *Redish*, *supra* note 54, at 599 (“It is beyond dispute that the First Amendment provides greater constitutional protection to speech than the Fifth Amendment’s Due Process Clause provides to the sale of a product.”).

⁶⁸ See also 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509-14 (1996) (Stevens, J. was joined in this part of the opinion (Part VI), by Kennedy, Thomas, & Ginsburg, JJ.).

The reasoning in *Posadas* does support the State’s argument, but, on reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis. . . .

Nor, at the third step (and here perhaps we do reach a critical juncture in this admittedly essentially tendentious Article) does the First Amendment expressly or by implication provide an exception that the Court *should* be willing to recognize, permitting the suppression of such information, to keep it from reaching the public, *just on account of its commercially interested source*.⁶⁹ In brief, that unexceptionally accurate information respecting the availability of a lawful product or service is forthcoming principally, or even solely, by the exertions of one from whom it may be purchased (and who on that account may expect to recover the cost of providing the information from lawful transactions in the particular product or service), does not suggest why it should be more subject to suppression on *that* account, under the First Amendment, than were it provided instead in the most ordinary reportage of a general newspaper, or in an ordinary subscription copy, or mere public library copy of *Consumer Reports* where, were it to appear in any of these sources, we can be quite sure it would be fully protected by the First Amendment rather than protected merely in some diluted form.

Accordingly, that the speech in question the government here seeks to suppress appears in a flyer distributed by a motorcycle shop, rather than in an identical flyer distributed to all the same persons by an individual or an

....
Because the 5-to-4 decision in *Posadas* marked such a sharp break from our prior precedent ... we decline to give force to its highly deferential approach.

....
We also cannot accept the State's second contention, which is premised entirely on the "greater-includes-the-lessor" reasoning endorsed toward the end of the majority's opinion in *Posadas*. ...

....
... [T]he First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.

....
Moreover, the scope of any 'vice' exception to the protection afforded by the First Amendment would be difficult, if not impossible, to define. ...

Id.

⁶⁹ Of course, one can *invent* (or "read in") such an ultimate exception, if one is so inclined, but assuredly the burden is appropriately placed on those so inclined to do; and the question at once presents itself as to why one would wish to follow that particular idea (and also, perhaps at least as importantly, what makes one think the First Amendment adopts that idea). Note, again, the question here is whether the power is greater to suppress the information, regardless of accuracy, "just on account of its commercially interested source" (i.e., that there is something about that kind of source *per se* that establishes its—the information's—"lessor" First Amendment worth). Offhand (or otherwise), it is difficult to see how this can be so. See also comparisons and discussion *infra*, note 79.

association who differ solely in that they (unlike the shop owner) may personally have less economically at stake in doing so, would appear to provide very little by way of distinction between them, in this regard, in respect to the proper measure of protection *each* may be due, so far as the First Amendment is concerned.⁷⁰

D.

So, now, to press the point, albeit not inappropriately (one hopes), merely consider variations on the unprepossessing case immediately at hand, even as modeled on *Posadas* itself. So, for example, a legislature may not regard it as a positive contribution to the public welfare that a newspaper would run a regular local feature on casinos the state sees fit to license (though it need license none), and yet have *no* power to suppress that feature—full of unexceptionably accurate casino information as it may be—though the legislature may dislike this feature, or despise this feature of the newspaper for such reasons as they may have. Nor will it matter, we may well suppose, so far as the First Amendment is concerned, 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.⁷¹

So, too, the legislature may see no value—but only a profound public disservice—to a news story bringing to public attention the crude fact that the state's official lottery (which the state allows freely to engage in promotional advertising as indeed most state lotteries do)⁷² offers a payout much inferior by

⁷⁰ See *First Nat'l Bank v. Belotti*, 435 U.S. 765, 777 (1978) (Powell, J., for the Court) ("The inherent worth of the speech in terms of its capacity for informing . . . does not depend upon the identity of its source . . ."); see also *Posadas*, 478 U.S. at 354-55 (Brennan, J. dissenting); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

⁷¹ See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 384 (1973) (emphasis added):

If a newspaper's profit motive were determinative, all aspects of its operations, from the selection of news stories to the choice of editorial position, would be subject to regulation if it could be established that they were conducted with a view toward increased sales. *Such a basis for regulation clearly would be incompatible with the First Amendment.*

See also *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring) ("The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise.").

⁷² See Robyn Gearey, *The Numbers Game*, NEW REPUBLIC, May 19, 1997, at 19 (reviewing large state lottery advertising budgets to increase demand); Michael J. Sandel, *The Hard Questions*, NEW REPUBLIC, March 10, 1997, at 27 (noting that state lotteries are "among the largest advertisers in the country" (an

far to any of the commercial casinos in the state.⁷³ That the “public interest” might *well* be deemed by the legislature to be disserved by the publication of that datum of information may be true.⁷⁴ We may provisionally agree that it is. But it is also quite beside the point. For though it may be true, one may with reasonable confidence predict that the legislature may not on that account seek⁷⁵ to prevent an ordinary newspaper from publishing just such information insofar as it *is* true. Nor may it seek (i.e., *successfully* seek) to subject the newspaper to some penalty (e.g., some fine) for what it has presumed to do.⁷⁶

Nor is it obvious (rather it is not obvious) on what basis it should feel entitled to expect more First Amendment deference if it “merely” forbids any casino (though *not* “any newspaper”) to publish those differences—those between the odds offered by the state lottery vis-à-vis the different odds provided by lawful, albeit tightly regulated, private enterprises in the same state, such as those differences are in fact, much less, indeed, to forbid it to publish *any* information whatever respecting its location, its lawful services,

estimated \$400 million each year and noting, too, that while “only about 50%” of state lottery takings are paid out in winnings, Las Vegas “slot machines and blackjack tables pay out around 90% of their take in winnings.”). Yet, the most recent article re-examining *Posadas* and this field regards it as a “legitimate” state interest to “protect[] the flow of revenue to the government-run lottery” by banning commercial lottery ads, i.e., to keep from having to compete on a level playing field even in the field of accurate information (fearing its advantage in propaganda might be compromised were it not to suppress speech coming from private rivals, which it will not permit to operate unless they “agree” in this rankly coerced and collusive way, and threatening any who might break the “agreement” with delicensing). See Berman, *supra* note 9, at 773-74; See also *id.* at 795-96 (qualifying the statement with the disclaimer that the speech-suppressive regime must not “unduly harm interests of the [suppressed] speech’s audience.”).

⁷³ Cf. *Posadas*, 478 U.S. at 353-54 (Brennan, J. dissenting) (noting how the Puerto Rico ban on casino advertising at issue likewise did not apply to advertising by the state lottery, and further suggesting that “it is surely not far-fetched to suppose 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”).

⁷⁴ For, to be sure the newspaper’s disclosures may generate a switch of consumer interest more toward casinos and away from the state lottery, the net proceeds of which (*unlike* the casino’s proceeds) are earmarked for public schools, the adequate financial support of which, from state lottery net proceeds, is of course of overriding legislative concern.

⁷⁵ Or, rather, may not *successfully* seek—for who knows what the legislature may *try* to do, especially once released from First Amendment constraints.

⁷⁶ To be sure, the legislature, one may once again readily concede, could prohibit casinos from offering any gaming odds more favorable than those offered by the state lottery, or heavily tax their proceeds, or restrict their ownership, or indeed simply “remove them from the field.” Yet, though all this is true, it could have *no* hope, consistent with the First Amendment, in any effort to forbid newspapers, or radio talk show hosts (or anyone else, for that matter), from informing the public of such differences as there may still be (*whatever* they still are as between the casinos, such as *they* are, and the state lottery, such as *it* is). See and compare *New York Times Co. v. United States*, 403 U.S. 713 (1971) (the famous “Pentagon Papers” case). In respect to the newspaper, in brief, nothing in the nature of the mere *Central Hudson* test would be used.

and its ordinary business hours, such as they may be.⁷⁷ For now—to quote Justice Rehnquist against himself⁷⁸—it would be “a strange constitutional doctrine” (i.e., a strange *First Amendment* doctrine) which would hold that it is to be left up to the newspapers (governed just by such interests as may varyingly motivate their publishers)⁷⁹ to determine what information (if any) is to be available, on the range of goods and services lawful for citizens to consider for themselves. Nor, indeed, is there anything offered in either *Posadas* or in *Central Hudson* to suggest that this is somehow the manner in which the First Amendment guarantee of freedom of speech, that “Congress shall make no law abridging the freedom of speech,” is *meant* to work.

E.

To be sure, as we now turn toward some closure on this Article, insofar as a commercial enterprise offers a lawful service which, however, it also does no more than to describe to others in no less truthful terms (but merely the *same* terms), and by no more intrusive means (but merely the *same* means) as other lawful enterprises are equally free to do in respect to such goods or services as may likewise be lawful for them to provide, and to do so, moreover, at its own

⁷⁷ See again Justice Powell’s observation, in *First National Bank v. Bellotti*, 435 U.S. 765, 777 (1978) (“The inherent worth of the speech in terms of its capacity for informing . . . does not depend upon the identity of its source . . .”). See also Fundenberg, *supra* note 54 at 458-62, 476-78.

⁷⁸ Cf. *Posadas*, 478 U.S. at 346.

⁷⁹ Consider merely the description of the case at hand regarding the “motives” of our invented Thomas Jeffries as publisher: (a) one part altruistic and public-spirited (i.e., he believes—rightly or wrongly—more motorcycles and fewer cars will, all things considered, provide a better community than the one that was troubling him, with its ever-crowding, pre-existing, pro-automobile trend); but also (b) one part “businessman” (i.e., he believes adding this feature will add (or help retain) readers and paying subscribers (which in turn helps attract advertisers) and so add profit or at least help avoid loss; and perhaps (c) one part “free speech altruist” (i.e., subject to only certain minimum standards, he believes it to be part of a newspaper’s function to provide information readers find of meaningful interest, whether it would necessarily be of similar interest to him). But the case would not differ, however, if the newspaper publisher were *utterly* a “pure profit-maximizer” (even as some so regard the international publishing magnate, Rupert Murdoch, and others still would identify, say, Larry Flynt).

So, too, in respect to those simply selling motorcycles or other lawful goods, no doubt the range of motives is both wide and at least equally mixed (i.e., there is no reason to assume that they see no benefits, or positive social value to their products, much less that they attach no positive informational value to what they put in their advertisements, but seek merely to euchre the credulous by putting out false or misleading descriptions of their services or goods). “Altruism” (in the larger sense of the word), in brief, need not be some missing component from varieties of business, nor, oppositely, is the motive of pure “profiteering” unknown within the weedy fields of the fourth estate (i.e., “the press”). See David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429 (2002). Cf. C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 781-816 (1995).

expense,⁸⁰ it is no doubt also true that neither we or any legislature can have some sought-after assurance that people will make good choices ("good choices," that is, as we or as some legislature may regard such "good choices" to be). Indeed, *while* it—the activity—*remains* lawful,⁸¹ and *within the boundaries that it is lawful*, however, perhaps it is a fairer (i.e., a "better"?) reading of the First Amendment to suggest that that is a matter ultimately left for *them* to determine, according to their *own* lights, and not for the legislature to presume to do by deflecting, suppressing, or outlawing information that would otherwise reach them from a competent and willing source. For, to be sure, the First Amendment may not require the government to support any kind of commerce or, for that matter, oblige it even to endorse, much less to support any particular kind of speech;⁸² but it firmly sets its countenance against regimes of government censorship to deny, steer, or deflect information out of public view lest those to whose attention it might otherwise come might presume to find something in it the government does not want them so freely to be allowed to know.

So, at least, one may believe the First Amendment is to be understood, indeed, so much as this, merely in keeping with but the most *ordinary* understanding of freedom of speech, rather than anything peculiar, arcane, or strained.⁸³ And even as others have previously suggested, moreover, including

⁸⁰ And merely in the same manner as any other producer or retailer may likewise do.

⁸¹ A matter the First Amendment does not presume to decide and, indeed, a matter with respect to which the Constitution as a whole may have only a little to say, leaving decisions of this sort largely to political determination such as it may be.

⁸² See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991) (sustaining an act of Congress providing funds subsidizing "family planning" clinics providing information on healthy pregnancy practices and family support services, but declining to regard abortion as within the definition of family planning). Cf. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (congressional restriction on kinds of legal issues federally-assisted private lawyers may raise for low-income clients, held, unconstitutional).

⁸³ See also VINCENT BLASI, *MILTON'S AREOPAGITICA AND THE MODERN FIRST AMENDMENT* (Yale Law School Occasional Papers, 2d Series No. 1 1995). Interestingly (and useful for comparison), the Canadian Supreme Court has recently accepted the basic elements of this view and it has done so, in some reasonably strong degree, despite the considerably *weaker* protection generally provided in the Canadian Charter of Rights for freedom of speech in Canada than our First Amendment has been held to provide in the United States. See *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 127 D.L.R. 4th 1 (affirming the judgment declaring void large portions of the Tobacco Products Control Act of 1988, generally forbidding commercial advertisements of tobacco products in Canada).

The Canadian Tobacco Products Control Act of 1988 prohibited advertising of tobacco products in Canada (excepting only advertisements of foreign tobacco products appearing in imported publications). The Act also required unattributed health warnings on all tobacco products and forbade manufacturers from putting any other material on tobacco packages. The Canadian Supreme Court sustained plaintiffs' request for a declaratory judgment that these provisions of the Act violated § 2(b) of the Canadian Charter of Rights (the Charter section generally protecting freedom of speech and of the press) and were not saved by § 1 (the

several (albeit not yet all) from within the Court itself,⁸⁴ neither *Posadas* or *Central Hudson* (so far as *Central Hudson* figured as an alternative ground in *Posadas*) contains an explanation, much less a convincing rationale, for some more diluted view.

III. SO, “*QUO VADIS*,” *POSADAS*?

More by way of a mere postscript than anything more elaborate or labored, for the benefit of those quite well-informed of the most recent developments within the Supreme Court during the decade-and-a-half that has elapsed since *Posadas*, some few additional observations may be added to show where matters currently appear to stand with the Court.

“savings” section permitting such infringements as are “reasonable and demonstrably justified in a free and democratic society”). Much of the balance of the act was also declared invalid (but largely because of nonseverability rather than on independent constitutional grounds). The principal opinion for the Court was by McLachlin, J. *Id.* at 74-88.

It is noteworthy that the Canadian Court reached its decision in this, a *purely* “commercial speech” case, despite its earlier decisions sustaining quite sweeping national bans on so-called “hate” and “discriminatory” speech (such as these categories of speech are deemed to be in Canada), in *Regina v. Butler*, [1992] 1 S.C.R. 452, and *Regina v. Keegstra*, [1990] 3 S.C.R. 697, *neither* of which forms of restriction on speech have survived court tests in the United States. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

⁸⁴ See *Cent. Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557, 573 (Blackmun, J., concurring):

[I]ntermediate scrutiny [i.e., *Central Hudson* scrutiny] is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech. I do not agree, however, that the Court’s four-part test is the proper one to be applied when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly.

44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518, 523 (1996) (Thomas, J., concurring):

I do not join the principal opinion’s application of the *Central Hudson* balancing test because I do not believe that such a test should be applied to a restriction of “commercial” speech, at least when . . . the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark.

See also *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) (“[A]ny description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech’s potential to mislead.”); *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 349 (1986) (Brennan, J., dissenting) (“I do not believe that [a state] may constitutionally may suppress truthful commercial information in order to discourage its residents from engaging in [a] lawful activity.”). And see also Justice Jackson’s memorable dictum, in *Thomas v. Collins*, 323 U.S. 516, 545 (1943) (Jackson, J., concurring) (“The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . .”).

A.

Posadas was, as we noted early on, a case with alternative holdings. The principal opinion by Justice Rehnquist, spoke for five members of the Court. In the first part of that opinion—the part that swiftly became identified to the case, the Rehnquist concluded the prohibition on casino advertising was sustainable simply on the *same* basis as would a prohibition on the operation of casinos. In this view, again, if completely banning casinos would be constitutionally unproblematic (as all agreed it would be unproblematic), the ban on casino advertising could be no more problematic, because it was a lesser restriction, and *as* a “lesser” restriction obviously need not meet any requirement a greater restriction need not itself have to meet.

This was rightly seen as the “economic substantive due process” view of the case as distinct from “a restriction on freedom of speech” view of the same case. And the case was regarded as explosive precisely because it appeared to announce an exception of uncertain magnitude to the Court’s then-recent commercial speech cases, demoting some—perhaps many commercial speech restrictions—from the First Amendment. On its face, the opinion expressly demoted all “vice” products or “vice” services in this fashion. But it apparently also thus demoted the treatment of all equally “prohibitible” products, or equally prohibitible services, as well, even as the first critical article reacting to the case, the article by Professor Kurland,⁸⁵ was quick to note.

Thus, under this branch of *Posadas* (i.e., the “first branch” as we shall call it), the Court, *per* the opinion of Justice Rehnquist, plainly seemed to suggest that *prior* to asking whether a particular regulation of commercial speech involved in a case before the courts could meet the so-called *Central Hudson* (four-part commercial speech) test previously established by the Court, one would first ask whether it need do so. Perhaps it need not meet that test, for despite being a restriction on commercial speech, it might not be subject to that test. Indeed, again, it would not be, so the Court suggested in *Posadas*, if the product or service were merely a product or service the legislature could prohibit outright, without successful challenge under the Due Process or Equal Protection clauses. If it were, then it fell into the *Posadas* profile of analysis. Only if it were not, i.e., only if it were of a product or service the legislature

⁸⁵ See *supra* note 50.

could not outlaw, would the legislation have to meet the “standard” (i.e., *Central Hudson*) commercial speech test, such as it was.⁸⁶

The Rehnquist opinion went on to declare (for the same five justices) that the casino advertising ban was equally sustainable, however, insofar as in their view, it also easily met the requirements of the *Central Hudson* formula, as well. Readily accepting the claim that casino-associated social problems (prostitution, destruction of local folkways, attraction of criminal elements) could be reduced in significant degree insofar as casinos were forbidden to advertise, the Court, applying a rather weak view of *Central Hudson*, wrapped up the case as quite easy.⁸⁷ In turn, our inquiry has been one of *quo vadis*, *Posadas* in respect to *each* of its branches, not merely the first branch. And, despite more recent developments, though it may seem otherwise to some quite well-informed readers, the answer to *quo vadis*, *Posadas*, remains quite uncertain, even now.

In one of its more recent addresses to that question, in Part VI of the plurality opinion in *44 Liquormart, Inc. v. Rhode Island*,⁸⁸ it was plain enough that *four* justices unequivocally repudiated the first branch.⁸⁹ Moreover, it is also true that *no* member of the Court (including Rehnquist) relied upon that analysis to sustain the price-advertising ban at issue in the *44 Liquormart* case. Nor has its “first branch” doctrine been relied upon by any member of the Court in any later case as well.⁹⁰ It would thus seem to be a fair comment to

⁸⁶ See also Post, *supra* note 62, at 42 n.195 (“By concluding that the power to regulate conduct necessarily implied the power to regulate commercial speech that advertised the conduct, Rehnquist effectively reduced First Amendment protections of commercial speech to the due process safeguards for the conduct the commercial speech sought to advertise. *It is remarkable that after a decade of commercial speech decisions, Rehnquist was able to assemble a Court for this approach.*”) (emphasis added).

⁸⁷ Advertising stimulates awareness; awareness increases interest; interest stimulates greater participation; greater participation contributes to the associated social problems. Q.E.D.: the advertising ban is valid under *Central Hudson* as a direct (or at least direct enough) means of coping with those problems, by “reducing demand.”

⁸⁸ 517 U.S. 484 (1996).

⁸⁹ *Id.* at 509-14 (Stevens, J. was joined in this part of the opinion (Part VI) by Kennedy, Thomas, & Ginsburg, JJ.).

⁹⁰ The most recent confirming case is *Thompson v. W. States Med. Ctr.*, 122 S. Ct. 1497 (2002) (more elaborately discussed *infra* note 101). The Court divided five-to-four in holding unconstitutional an Act of Congress forbidding pharmacies to engage in any advertising of “compounded” drugs (certain drugs Congress need not permit to be marketed without testing-and-approval by the FDA as otherwise required for lawful prescription or sale, but that it nonetheless does permit to be marketed, if not advertised). *None* of the Justices, including those in dissent, used a “*Posadas*” analysis in addressing this case. That it was not even adverted to, much less relied upon by any member of the Court, is among the more significant points to be noted about *Thompson*. Thus, no one suggested that because the congressionally-enacted advertising ban of compounded drugs was a far lesser restriction than the greater restriction Congress had the power to enact—and would still

declare (as others have so declared) that *Posadas* appears to be practically abandoned, even “overruled” (although *not* by express declaration by a majority of the Court since, again, only four members of the Court expressly repudiated *Posadas* by name). What has been left in place, while seemingly a much more serious First Amendment standard, however, is beset with anomalies that may strangely echo the regime of *Posadas* itself. Briefly, here is how that is so.

B.

44 *Liquormart* and subsequent cases⁹¹ revised *Posadas* and ostensibly revised *Central Hudson* as well. But in the latter respect, it did so principally only in declaring that the state must be prepared to show that the restriction it has imposed will in fact make a *substantial* difference in achieving some postulated social good, if it hopes to have its restrictive measure sustained.⁹² If the state cannot make that showing, the restriction will fall. And in 44 *Liquormart* itself, the ban (on any kind of off-premises advertisement of liquor price) was held to be wanting precisely in this regard. It failed because the state lacked hard evidence of the extent to which its liquor price advertising ban would “*substantially*” (rather than merely marginally or *insubstantially*) affect liquor consumption or, more specifically, help eliminate “*intemperance*” in alcohol beverage consumption among Rhode Island residents.⁹³

On its own terms, i.e., given the requirement the Court set for the state (which the state was quite unable to meet), this was an unexceptional ruling by the Court. Indeed, there were no dissents. And to be sure, the Court assuredly seemed to have a valid point, making it possible for all nine justices to agree on the result. For given the fact that the law did ban *truthful* speech, surely it ought not be upheld if it could not be justified by showing not merely that it sought a suitably important public objective, but that it would in fact offer real effectiveness toward that end.

be free to enact as in theory it might, if suitably disturbed by a holding that advertising was to be allowed, the advertising ban as such was therefore of no significant First Amendment concern. Rather, *all*, including those in dissent, regarded the First Amendment issue as substantial and of real concern. Indeed, the majority struck the advertising restriction down as offensive to the First Amendment on grounds we shall shortly review (de facto, a form of “strict scrutiny” review, albeit in the guise of applying a *Central Hudson* stepped-up test).

⁹¹ See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

⁹² 44 *Liquormart*, 517 U.S. at 505-07.

⁹³ *Id.* at 506.

Nevertheless, the very point that brought the Rhode Island statute down has its own built-in anomaly. Indeed, in retrospect, it may now appear to be that it was just the relative *modesty* (or “underinclusiveness”) of the Rhode Island liquor advertising restriction, *rather than its breadth*, that rendered it vulnerable under the Court’s reformulated test. The advertising restriction, being solely on price advertising and nothing else (for no other kind of liquor advertising was affected), was likely to produce only a marginal effect on overall liquor sales and it was likely to have an even more merely marginal effect on “temperance.” Since *only* price advertising was forbidden, but not any other liquor advertising (“promotional” as well as “informational”), it could fairly be said—as the Court observed—that no great gain could be plausibly expected in affecting just how much less liquor would be bought and consumed, or by whom. The principal effect to be expected would be, at most, to dampen price competition as such, keeping consumers unaware that “sales” might be in progress, mostly in large volume stores, preserving profit margins of small volume retailers insofar as consumers, having less information of “bargain prices,” would be kept in ignorance and thus less likely to switch their trade.

Viewed as a means to protect smaller retailers from larger volume stores, perhaps the Rhode Island statute *would* have a reasonably “close fit”⁹⁴ (albeit perhaps not as close a fit as a simple, direct minimum price-fixing law). But as a measure leaving wholly unaffected the general advertisement of liquor—everything but price—it seemed most unlikely to affect sales overall more than modestly, much less encourage “temperance” as such.⁹⁵

But notice that if one needs to demonstrate a *substantial* gain (i.e., if this is what is expected of the state to show as both a necessary and sufficient condition to sustain its speech restriction insofar as it imposes a direct restriction on truthful commercial speech), the decision strongly implies that the state need merely proceed by enacting a *more* substantial restriction—a restriction more in keeping with the larger blackout restriction in *Posadas*

⁹⁴ Which, however, merely raises an *additional* question about the case. Had Rhode Island been less defensive in suggesting that this, indeed, *was* the objective of the legislature, might its total price advertising ban *then* have been upheld? Given the Court’s overall position, perhaps it would (for who is to say that the preservation of many small businesses cannot be stated in terms of a “substantial” government interest, in which case the price advertising ban, being substantially serviceable to that end, might then be upheld).

⁹⁵ As to the latter, as Justice Stevens noted, the most “*intemperate*” drinkers (i.e., the most habituated or even addicted drinkers) would likely be less influenced by price than temperate drinkers, even as they might also be expected, as serious drinkers, to know (or have a strong motive to find out) about such price differences among retail liquor outlets as might in fact exist. 44 *Liquormart, Inc.*, 517 U.S. at 506-10.

itself. Thus, if this be true, the strange beast may come stalking back, still again.

For if this is what is implied (and in some measure it surely seems to be implied), the message here has its own perverse irony, resurrecting *Posadas*, perhaps in terms such as these, as directed to the state: "Foreclose truthful advertising only a little—and with only an expectation of some modest effect, if any, on consumer demand, then *do not expect such a measure can be upheld against First Amendment complaint.*" Censor more systematically, however, and cut off consumer information *more completely*—ban *all* means by which those who offer certain goods or services from furnishing at their own expense any publicly offered information respecting their product or service, location, hours, inventory (and now we seem to be talking *real censorship*), and demonstrate that "censorship really works" (as it is eminently more likely to work, the more total or complete one designs it to be), and the better one will be able to show its efficacy, with a far better chance to have it upheld.

But surely this is a system of First Amendment "perverse incentives," more nearly reinstating *Posadas* itself, so far as the First Amendment is concerned. For if government restrictions on commercial speech are to be sustained when indeed they promise substantially (rather than only insubstantially) to affect what people see or hear,⁹⁶ then the Court but gives notice to legislatures to take care to extend its bans, to achieve a more perfect control, to "channel" the mind of the public in ways it deems most suitable for the public good. It seemingly declares that it may invalidate only such measures as are *inept* toward such ends (e.g., the measure in *44 Liquormart*, or the measure in *Greater New Orleans*⁹⁷ or *Coors*⁹⁸). Is this the real lesson of *44 Liquormart*? Only further litigation is likely to say.

⁹⁶ Precisely to keep consumers uninformed, less aware, more ignorant, and indeed more subject to misinformation regarding features, differentiating attributes, and uses of a given service or product than of alternative services or products.

⁹⁷ *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (2001) (holding invalid a congressional ban on radio and television advertising of lotteries and similar schemes—held unconstitutional as failing at step three of *Central Hudson*; it allowed so many exceptions and exemptions (i.e., it was "so pierced by exemptions and inconsistencies") as to lack any real likelihood of making any substantial gain against social problems associated with such commerce).

⁹⁸ *Coors Brewing Co.*, 514 U.S. 476 (congressional ban on listing beer alcohol content on bottle label, but not in other advertising, similarly failing at step three).

C.

To be sure, there is a rejoinder to this line of argument, but not one without its own self-defeating irony in turn. One may still attack a regime of complete commercial speech censorship respecting a particular product or service (as in our motorcycle case, or as in *Posadas*) by saying, even as to it, “but there’s no evidence that (even) it really works,” i.e., that it makes any difference (or at least not any *substantial* difference) on whether, or how much, of one thing or service vis-à-vis another thing or service, people will be moved to buy. So, again, one will argue, unless the government can meet the requirement of demonstrating the requisite “close fit” and “substantial effect” it must show to have its regime of censorship sustained under the newer, more stringent version of the *Central Hudson* test—as interested parties will claim it cannot meet that burden—it should still lose. And, indeed, one not infrequently now does see just this style of argument being seriously advanced.⁹⁹

Still, not only is this not very persuasive as a real world matter (few believe it to be true other than in highly atypical circumstances). Rather, it is an exceedingly strange argument for strong exponents of the First Amendment to advance, even if it is a position now seemingly encouraged by the Supreme Court. It is a “*strange* argument” for strong First Amendment exponents to embrace because, indeed, if one believes government censorship of what people may receive and see and hear from others is in fact *unlikely* to matter (i.e., that people will learn what they will learn in any case, whether or not the

⁹⁹ Indeed, Judge Richard A. Posner has offered a variation of this argument in faulting the advertising ban in the original *Posadas* case itself. Thus, assessing the whole case from an *economist’s* point of view, Judge Posner suggests that while the advertising ban “deprived consumers of valuable information,” any reduction in local casino traffic resulting from the advertising ban would be offset by a commensurate *increase* in casino traffic insofar as costs saved should be reflected in *reduced casino prices*. Assuming that the casinos were competing for customers, as is surely likely (barring some collusion), each has a strong incentive to lower its prices and that it will, pressed competitively to do so, to the extent that being freed from paying for advertising enables each casino to offer its services at a lower price. If, then, Judge Posner observed, the volume of gambling by locals is pretty much the same *without* advertising (but with lower prices), as it is *with* advertising (but with higher prices), as he believes may plausibly be supposed, the ban on advertising will have no *net* effect on overall trade volume (and thus no net effect on the “secondary effects” associated with such trade) and cannot satisfy the second step of the *Central Hudson* requirement (i.e., the step of demonstrating how, and to what extent, the speech restriction in question will “directly” and “substantially” advance the alleged public interest). See Richard A. Posner, *The Speech Market and the Legacy of Schenck*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 121, 134 (Lee Bollinger & Geoffrey Stone eds., 2002). (Perhaps mere parity of reasoning should persuade us that our motorcycle dealers in our original case should likewise be indifferent to the “trade off” that would logically apply to them as well (i.e., that they will sell as many cycles either way, with-or-without being free to advertise?) Possibly, but, if so, possibly one may likewise believe that it was really Lichtenstein that started World War II.

government forbids any and all advertising of a given service or product, and that all the labors of government to forestall them are but as empty soundings of brass), one may be greatly cheered, by thinking the government can't meet its burden of showing the substantial effect (as required by *Central Hudson*), to be sure. *But then neither should one, according to one's own observations, be seriously troubled by what government presumes to do.* For according to one's own airy, assertive, and complacent hypothesis, respecting the futility of all such measures, one will dismiss government regimes of censorship as of no great moment after all, indeed, a waste of time to concern ourselves with, in a free speech sense.

Maybe so, but also maybe not. Either way, however, this is surely *not* the position one would readily expect strong exponents of the First Amendment would want to rush to embrace, much less is it an "explanation" that they would want to offer as a "reason" as to why a state or federal law restricting speech should be invalidated, i.e., that though a given law closes off all speech of a certain kind, still (as we shall argue?) it is impotent to influence patterns of the mind or significantly affect what people may choose to do, and so, *on account of its relative impotency*, should on *that* account be held unconstitutional on its face. The argument, albeit one seemingly invited by the Court's current doctrine, borders on the bizarre.

Indeed, and because it does, and yet remains as the current way these matters are now (quite awkwardly) presented in the Supreme Court, the original challenge framed by *Posadas* remains at large. The Court must simply decide what now to do. Perhaps what it needs to do, is just to work its way back to the First Amendment and consider its central idea once again. The obvious suggestion? When the object of the government regulation is to "suppress," rather than to "regulate" speech (i.e., to suppress it on account of its content and, more specifically, on account of its source), neither more nor less, the appropriate standard of First Amendment adjudication should reflect the core concerns of that amendment's aversion to forms of government censorship as such. Accordingly, the usual (i.e., "strict scrutiny") norm of First Amendment adjudication the government is expected to meet, should presumably apply. If it can meet *that* standard, well and good. But that *is* the appropriate standard, here, as in any other instance, *whenever* government places restrictions on speech it deems inappropriate for people to hear, or take into some account, as they go about conducting their lives, leaving them to wonder whether, given the way in which government quite deliberately manipulated what they might have seen or heard (but did not because of the

government's selective censorship regime), they lost the gift of their own autonomy to a degree they had not supposed a Constitution such as ours would condone.¹⁰⁰

CONCLUSION

To be sure, as I struggle now to close out these remarks, one may well acknowledge that laws meant flatly to foreclose accurate information from knowledgeable sources, whether it may relate merely to job opportunities, or to something else permitted as a matter of voluntary exchange (e.g., the mere advertised availability of specific "compounded" drugs on a physician's prescription, or motorcycles lawfully available at retail), may not per se strike as close to the core of democratic choices as those restricting or forbidding varieties of political speech. Even so, that observation, correct as it may be, standing alone, hardly provides reason why they *therefore* ought not be subject to strict scrutiny under the First and Fourteenth Amendments under the Constitution of the United States. The case for the "therefore," I think, has not been made and probably cannot be made. Rather, it is largely a non sequitur even as I think the Court itself has come close to agree is so.¹⁰¹

¹⁰⁰ See also *Griswold v. Connecticut*, 381 U.S. 479, 482 (1964) (Douglas, J., for the Court) ("[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."). At least it may not, one might add, without meeting a strict scrutiny demand of justification, whatever it is claimed to be. Or, as Justice O'Connor put it well most recently, in *Thompson v. W. States Med. Ctr.*, 122 S. Ct. 1497, 1507 (2002): "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort."

¹⁰¹ In addition to citations and references *supra* at note 84, providing statements by several Justices who have expressed very similar views, see also *Thompson*, 122 S. Ct. at 1504 (O'Connor, J., noting that "several Members of the Court have expressed doubts about *Central Hudson* analysis," vis-à-vis strict scrutiny analysis, when the object of the regulation is to suppress some specific disfavored—lawful nonmisleading, commercial speech, and identifying five current Justices within this group (Justices Thomas, Stevens, Kennedy, Ginsburg, & Scalia)).

Thompson is the most recent "commercial speech" decision from the Supreme Court, decided as this Article was otherwise completed. It does not resolve the issues addressed in this Article, but, rather, continues the uncertainty, even as it may move the discussion, however, still a little more toward the "strict scrutiny" end of the overall debate.

In a closely divided decision in *Thompson*, the Court held unconstitutional a congressional act forbidding pharmacy consumer-directed advertisements of specific compounded drugs. *Id.* at 1509. "Compounded" drugs are special, low-volume drugs prepared by pharmacists on a physician's prescription. *Id.* at 1500. While specially helpful for particular patients (patients who may suffer adverse reactions to FDA "approved" drugs), such drugs may pose certain risks (even fatal risks) FDA-approved drugs may not present. *Id.* at 1501. Unless so advised (e.g., advised by the prescribing physician or by a pharmacy's advertisement touting the drug), moreover, a patient requesting such a drug might not know the drug he or she was encouraged to request (i.e., "encouraged" by heavy advertising so to request) had not undergone the usual, rigorous, FDA testing-and-approval requirements. *Id.* at 1514. The Court struck down the blanket prohibition

Indeed, far from warranting a more “relaxed” standard, from one quite reasonable point of view one might well argue (as will be done here) that there is far *less* reason in this area (“commerce”) than in others (e.g., “politics”?) to *depart* from strict scrutiny review, given the extent to which Congress and the states are otherwise granted such a wide sweep of legislative powers they are conceded to possess in determining what may be lawfully provided, and on what terms, to whom, when, and where.¹⁰² For *given* the extreme latitude the Constitution otherwise reserves to legislative bodies in governing the shape, the content, and the terms of lawful trade in the United States, granting virtually plenary power in that respect (to Congress in the first instance via the Commerce Clause, and otherwise to the states and local governments), it is not as though a lack of additional *censorship* power (e.g., to say “who may ‘advertise’ and who may not”), significantly affects their authority to say which kinds of consumer decisions may be “better” and which may be “worse” (whether better or worse for the country, or merely for themselves, or merely for certain competitors, as the case may be). We have already observed the immense extent to which legislative bodies are already permitted to have their way, substantively, in just that respect, e.g., in controlling prices, imposing taxes, and even determining product- or service-legality *per se*. And so much being true, correspondingly, there can be little—if any—justification for

on pharmacy advertisements of such drugs even as directed to consumers. *Id.* at 1509. In doing so, it acknowledged the concern and noted that a less speech-restrictive alternative (e.g., an affirmative requirement in any such advertisement expressly acknowledging such compounded drugs are not FDA-approved for general use and may present undetermined risks), might well be sustained and remained available to Congress to enact. *Id.* at 1506-08.

To be sure, however, such an alternative regulation (i.e., a “less-speech restrictive” requirement than a flat ban on such pharmacy ads directed to consumers), as an adequate means of safeguarding public health interests under the circumstances, involving these kinds of drugs, had previously been considered—and rejected—by the FDA. Moreover, four justices concluded that Congress could reasonably agree—as it had agreed, with the FDA’s own conclusion that that alternative might *not* be adequate. *Id.* at 1513-14. The majority nonetheless went forward to hold the total ban void on its face as overly broad (forbidding—as it did—the communication of advertising information useful to many from whom it might otherwise have been withheld).

Overall, though the majority opinion nominally applies *Central Hudson*, the well-reasoned “applied-in-fact” First Amendment standard of judicial review in *Thompson*, seems much more of a piece with standard “strict scrutiny” review than with any (conventional) application of the *Central Hudson* test. Indeed, that Justice Stevens, who had already declared himself as no fan of *Central Hudson* in cases of this sort—cases involving total subject-matter bans on advertising, joined the dissent (rather than the majority) in *Thompson*, may itself merely confirm how much this may be true. Still, it will take at least an additional case, and a clearer statement by the Court, to lay this matter to rest.

¹⁰² A power very much more restricted by the Constitution, severely limiting legislative bodies to say who may lawfully form a political party, solicit memberships, field candidates, make extravagant appeals, seek to (mis)lead voters as to their own best interests, vote for their “product,” and take over the reins of government itself.

permitting them *also* simply to cordon off sources of accurate descriptions of that which *is* allowed—to whom, when, where, and on what lawful terms. Thus, far from a standard of “strict scrutiny” of such restrictions somehow seeming to be inappropriate, I suggest that it is not. Quite the opposite. Rather, it is exactly as one might suppose it assuredly *ought* to be. The means available to legislative bodies to “protect” the public from “undesirable” or from “unworthy” kinds of trade are nearly unbounded. It—that protection—surely does not require that powers of state censorship (who may advertise, who may not) be added to the list so to distort what people may see and consider for themselves.¹⁰³

¹⁰³ And, almost as an afterthought, it is easy to see how application of this straightforward idea would readily decide the simple Charlottesville case with which we began our tour of this commercial speech review.

