In an eloquent dissent from the denial of Goldman's request for a rehearing in the court of appeals, Judge Starr recalled that "the inalienable right of all our people as free men and women to worship God . . . is what this country is all about."[46] A more sensitive and compelling constitutional vision than that profferred by the *Goldman* Court would have demanded a more persuasive justification for the impairment of religious liberty and diversity. Even in the military context, the Court, as the final guardian of the civil liberties of all Americans, has a duty to establish guidelines for government action when that action impinges upon constitutionally protected interests.[47] The *Goldman* majority's refusal to discharge that duty sends a legitimating message to military officials prone to suppress the individuality of service personnel and leaves unanswered the question of when, if ever, the Court is prepared to defend the liberties of Americans who serve their country in the armed forces.

E. Freedom of Speech

1. *Commercial Speech — Advertising Bans.* — The Supreme Court has vacillated for a decade over what level of constitutional protection to accord commercial speech. Two conflicting visions have influenced its decisions. One vision of commercial speech has convinced the Court to extend first amendment protection as an essential safeguard of a "free market of ideas";[1] another vision has convinced the Court to limit first amendment protections in an effort to uphold state reg-

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[46] Goldman v. Secretary of Defense, 739 F.2d 657, 660 (D.C. Cir. 1984) (Starr, J., dissenting from denial of rehearing).

[47] *See* Chappel v. Wallace, 462 U.S. 296, 304 (1983) (noting that the Supreme Court "has never held . . . that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service"); Parker v. Levy, 417 U.S. 733, 758 (1974) (stating that "the members of the military are not excluded from the protection granted by the First Amendment"); Goldman v. Secretary of Defense, 530 F. Supp. 12, 16 (D.D.C. 1981) (maintaining that deference to the military "cannot and does not permit a court to abdicate its constitutional responsibilities") (citing Rostker v. Goldberg, 453 U.S. 57, 70 (1981)); *see also* Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 422 (1984) (arguing that "[a]n appropriate view of the military . . . is not as a branch of government independent of judicial review, but rather as an administrative arm of government like any other agency," whose actions are "subject to review").

[1] *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2277 (1985) (striking down disciplinary rules from Ohio's Code of Professional Responsibility that forbade attorneys to use illustrations or to give legal advice in newspaper advertisements, because such advertisements were "conducive to reflection and the exercise of choice"); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765, 770 (1976) (rejecting a "highly paternalistic approach" toward commercial speech on the assumption that "this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them").

ulations that protect consumers from harmful commercial speech.[2] In 1980, the Court arrived at an uneasy compromise between these competing strains of commercial speech theory in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[3] by formulating a commercial speech test that incorporates elements of both. Under this test, a state can limit nondeceptive advertisements for lawful products and activities only if (1) the state has a substantial interest in limiting the speech; (2) the limits directly advance that interest; and (3) the state has no less restrictive means.[4] Last Term, in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,[5] the Court upheld a Puerto Rican law that forbade advertisements inviting citizens of Puerto Rico to gamble legally in casinos. Although *Posadas* did not overrule *Central Hudson* — indeed, it purported to apply the *Central Hudson* test — the members of the *Posadas* majority eviscerated the *Central Hudson* compromise, rejecting the free market in ideas approach in favor of the consumer protection approach.

In 1948, Puerto Rico enacted a law permitting casino gambling but barring advertising of casinos to the public of Puerto Rico.[6] Regulations issued by the Tourism Company of Puerto Rico, a public corporation empowered to implement the Act, permitted casinos to advertise "through newspapers, magazines, radio, television and other publicity media outside Puerto Rico" but forbade them to advertise in Puerto Rican media.[7] The tourism company fined Posadas de Puerto Rico Associates (Posadas), the operator of a hotel and casino in Puerto Rico, for violating the Act and its regulations.[8] Posadas paid the fines under protest and then filed suit in the Superior Court of Puerto Rico seeking a declaratory judgment that the Act and the implementing regulations violated the first amendment both facially and as applied by the tourism company.[9]

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[2] *See, e.g.*, Friedman v. Rodgers, 440 U.S. 1, 15 (1979) (upholding a statute that prohibited optometrists from practicing under a trade name against a first amendment challenge because the law promoted the state's substantial interest in protecting the public from deceptive advertisements); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 (1978) (upholding a ban on in-person solicitation by attorneys, because the state has an important interest in protecting the public from "fraud, undue influence, intimidation, [and] overreaching").

[3] 447 U.S. 557 (1980).

[4] *See id.* at 566. The Court did not agree unanimously on this compromise. Two concurrences, relying on a free market of ideas theory, called for strict judicial scrutiny of restrictions on commercial speech. *See id.* at 573–79 (Blackmun, J., concurring); *id.* at 579–83 (Stevens J., concurring). The dissent, influenced by a consumer protection theory, advocated minimal first amendment protection for commercial speech. *See id.* at 583–606 (Rehnquist, J., dissenting).

[5] 106 S. Ct. 2968 (1986).

[6] *See* P.R. LAWS ANN. tit. 15, §§ 71, 77 (1972).

[7] *See* 106 S. Ct. at 2972.

[8] *See id.*

[9] *See id.* at 2973.

The superior court struck down both the administrative interpretation and the application of the Act as arbitrary and unreasonable interferences with freedom of speech.[10] It then issued a narrowing construction of the Act under which the ban applied only to advertisements "in the local publicity media addressed to inviting the residents of Puerto Rico to visit the casinos" but not to advertisements "addressed to tourists . . . even though said announcements may incidentally reach the hands of a resident."[11] The superior court found that although the tourism company's application of the statute had violated Posadas' constitutional rights, the court's narrowing construction rescued the Act from facial unconstitutionality.[12] The Supreme Court of Puerto Rico dismissed Posadas' appeal for lack of a substantial constitutional question.[13]

The Supreme Court of the United States, in a 5–4 decision, affirmed.[14] Writing for the majority,[15] Justice Rehnquist sustained Puerto Rico's restriction on casino advertising, as interpreted by the superior court, under each requirement of the *Central Hudson* test.[16] First, he argued, Puerto Rico had a substantial interest in reducing the demand for casino gambling among its residents, because excessive casino gambling "'would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as . . . the increase in local crime, the fostering of prostitution . . . and the infiltration of organized crime.'"[17] Second, the legislature could reasonably have believed that the prohibition directly advanced this goal, because any advertisements directed at the residents would have increased the demand for casino gambling.[18] Finally, the Puerto Rican legislature could reasonably have concluded that no less intrusive means — such as speech by the government attempting to dissuade Puerto Ricans from gambling — would effect its goal, because its residents were "already aware of the risks of casino gambling, yet

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[10] *See id.*

[11] *Id.* at 2973–74.

[12] *See id.* at 2974.

[13] *See id.* at 2974–75.

[14] The Court interpreted the Puerto Rico Supreme Court's dismissal for want of a substantial constitutional question as "a decision on the merits in favor of the validity of the challenged statute and regulations," *id.* at 2975, and therefore asserted jurisdiction over the appeal under 28 U.S.C. § 1258(2) (1982).

[15] Chief Justice Burger and Justices White, Powell, and O'Connor joined Justice Rehnquist's majority opinion.

[16] The Court noted at the outset that the advertising at issue concerned lawful activity and was neither misleading nor fraudulent. It therefore proceeded to the other three steps in the *Central Hudson* analysis. *See* 106 S. Ct. at 2976.

[17] *Id.* at 2977 (quoting Brief for Appellees at 37, *Posadas* (No. 84-1903)).

[18] *See id.*

would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct."[19]

Justice Rehnquist rejected two arguments against the Act's constitutionality. First, Posadas argued that the advertising restrictions should have been struck down as underinclusive — and therefore not *directly* advancing the government purpose — because the restrictions did not apply to other forms of gambling such as horse racing, cockfighting, and the state-run lottery.[20] Justice Rehnquist found that Puerto Rico could reasonably have excluded from the ban forms of gambling that, because they had a longer tradition in Puerto Rico, posed a less serious threat of disruption. The ban, therefore, was not underinclusive.[21] Second, Posadas argued that Puerto Rico had violated the first amendment by restricting advertisements for a lawful activity. Posadas contended that because Puerto Rico had chosen to allow casino gambling, it could not restrict casino advertising.[22] Justice Rehnquist responded that the argument was backwards; precisely *because* Puerto Rico could have made casino gambling illegal, it could exercise the lesser power of forbidding "the stimulation of demand for [casino gambling] through advertising."[23]

Justice Brennan, in dissent,[24] reiterated his view from *Central Hudson*: that limitations on truthful commercial speech regarding lawful activities should be subject to greater scrutiny than the *Central Hudson* test permits.[25] He argued that although commercial speech generally receives less protection from the first amendment than do other constitutionally safeguarded forms of expression, the government should not be permitted to "suppress commercial speech in order to

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[19] *Id.* at 2978. According to the majority, the question whether alternative measures might be as effective as an advertising ban should be left to the legislature to decide. *See id. But see id.* at 2985 (Brennan, J., dissenting).

[20] *See* 106 S. Ct. at 2977; Brief for the Appellant at 41–43, *Posadas* (No. 84-1903) [hereinafter Brief for the Appellant].

[21] *See* 106 S. Ct. at 2977–78. Justice Rehnquist also contended that the ban, even if it had been underinclusive, advanced the government's goal of reducing the demand for gambling among Puerto Ricans. *See id.* at 2977.

[22] *See id.* at 2979; Brief for the Appellant, *supra* note 20, at 34–35.

[23] 106 S. Ct. at 2979. Posadas also argued that the advertising ban violated the first amendment as interpreted in Carey v. Population Services International, 431 U.S. 678, 700 (1977) (holding unconstitutional a ban on advertisements or displays of contraceptives), and Bigelow v. Virginia, 421 U.S. 809 (1975) (holding unconstitutional a ban on advertisements for abortion clinics). *See id.* Justice Rehnquist distinguished these cases on the ground that the Constitution bars the state from prohibiting the underlying conduct in those cases, but it does not bar the state from prohibiting gambling.

[24] Justices Marshall and Blackmun joined Justice Brennan's dissent.

[25] *See* 106 S. Ct. at 2982 (Brennan, J., dissenting); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 573 (1980) (Blackmun, J., joined by Brennan, J., concurring).

deprive consumers of accurate information concerning lawful activity."[26] Because this sort of regulation is "'a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice,'"[27] the regulation of accurate information concerning lawful activity should be subject to strict judicial scrutiny.

Justice Brennan further contended that even under *Central Hudson*'s test, which is less demanding than strict scrutiny, the majority should have found the statute unconstitutional. He disputed three elements in the majority's analysis. First, he attacked the majority for speculating about what reasons might have motivated the legislature to ban the advertisements rather than waiting for Puerto Rico to prove which interests it sought to promote and how substantial it considered those interests.[28] The majority wrongly accepted as bases for the legislation the interests that Puerto Rico set forth: decreasing prostitution, combatting organized crime, and alleviating other social problems associated with casino gambling. If criminals, prostitutes, and social problems inevitably followed casinos, then they would come to Puerto Rico even if no Puerto Rican gambled in the casinos. Therefore, some other interest must have motivated the legislature.[29] Second, the majority did not apply the "directly advances" test correctly. They should have inquired not whether the advertising ban would discourage casino gambling among Puerto Rican residents, but rather whether it would advance Puerto Rico's interest by combatting the social ills that are associated with casinos, such as prostitution

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[26] 106 S. Ct. at 2981–82 (Brennan, J., dissenting). Justice Brennan claimed that the Court had consistently invalidated such restrictions. *See id.* at 2981. Several of the cases that he cited in support of this proposition, however, did not state whether they struck down the statutes under a per se rule against restrictions of accurate information about legally sold goods or whether, in line with the reasoning of *Central Hudson*, they struck down the statutes because the statutes either unnecessarily burdened constitutional rights or burdened them in order to achieve goals in which the state had less than a substantial interest. *See, e.g.*, Linmark Assoc. v. Willingboro, 431 U.S. 85 (1977); Virginia Pharmacy Bd. v. Citizens Consumer Council, 425 U.S. 748 (1976). Furthermore, even if these cases did rest on a per se rule, their justifications are, arguably, no longer binding precedent in light of *Central Hudson*'s subsequent rule permitting regulation of true commercial speech regarding legal activities under certain specified circumstances.

[27] 106 S. Ct. at 2982 (Brennan, J., dissenting) (quoting *Central Hudson*, 447 U.S. at 574–75 (Blackmun, J., concurring)).

[28] *See id.* at 2984.

[29] *See id.* at 2984–85. Justice Brennan suggested that Puerto Rico might have instituted the ban in order to promote its own lottery. As evidence for this suggestion, he noted that Puerto Rico permits advertising for the lottery and for other forms of lawful gambling. *See id.* at 2983. One might imagine even less legitimate purposes, such as discouraging casino gambling among Puerto Ricans due to fear that racist tourists would not frequent casinos that also attracted Puerto Rican customers.

and local crime.[30] Third, the majority ignored alternative means of achieving the government's goal that would not have intruded on first amendment values, such as careful monitoring of casino operations.[31] The Court should have required the tourism company to prove that these alternative means were insufficient to effect its desired ends.[32]

Justice Stevens, also in dissent,[33] criticized the Court for considering the question whether a state could ban advertisements for lawful activities. Because "Puerto Rico's bizarre restraints on speech are so plainly forbidden by the First Amendment," the Court could have disposed of the case without ever reaching this "elegant question of constitutional law."[34] In Justice Stevens' opinion, the statute unconstitutionally discriminated among speakers and listeners based on the content of the speech and used unjustified prior restraint and unacceptably vague standards.[35]

The divergence between the majority opinion and Justice Brennan's dissent in *Posadas* resurrects the conflict that was temporarily put to rest by *Central Hudson*: the degree to which states may restrain commercial speech in order to protect listeners. The rule articulated by the majority in *Central Hudson* accommodates two antithetical social visions that underlie commercial speech doctrine.[36] The "free market in ideas" vision, which informs traditional first amendment doctrines, presupposes autonomous individuals acting in a well-functioning market. The "consumer protection" vision, which underlies much social welfare legislation, posits a need for state regulations that protect individuals from the hazards of a free market. Unfortunately, all nine justices of the *Posadas* Court abandoned the *Central Hudson* compromise and retreated toward polar ideals of complete individual autonomy and uninhibited government control.[37]

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[30] *See id.* at 2985.

[31] *See id.*

[32] *See id.* Justice Brennan also challenged the majority because it characterized a ban on speech as less intrusive than an outright prohibition of the activity. He argued that the regulation of speech was not less intrusive, because it intruded on first amendment values. *See id.* at 2984 n.4.

[33] Justices Marshall and Blackmun joined Justice Stevens' dissent.

[34] 106 S. Ct. at 2986 (Stevens, J., dissenting).

[35] *See id.* at 2986–87. Justice Stevens criticized on yet another ground the majority's assumption that the case raised the question resolved by the Court. He asserted that Puerto Rico could not ban casino gambling for its citizens and yet permit casino gambling for visitors. Because Puerto Rico does not have the power to make such discriminatory laws, the question whether it can ban advertising of legal products that it has the power to prohibit never arises. *See id.* at 2988 n.3.

[36] The *Central Hudson* court rejected both the "'highly paternalistic' view that government has complete power to suppress or regulate commercial speech" and the free market in ideas view that the first amendment demands demonstration of a clear and present danger by a state attempting to suppress commercial speech. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562 (1980).

[37] These ideals were articulated in *Central Hudson* by Justice Blackmun's concurrence and

Justice Rehnquist's manner of applying the *Central Hudson* test suggests that he saw regulation of commercial speech as benign legislation intended either to protect listeners from their own choices, or to protect everyone from social ills, but not as sinister interference with the listener's individual autonomy.[38] His analysis neglected the danger that states might ban advertising ostensibly to protect citizens from themselves or from other dangers but actually to manipulate citizens for some illegitimate or insubstantial goal.[39] Had Justice Rehnquist applied the *Central Hudson* test with vigor, he would have struck down Puerto Rico's law on the ground that it was enacted in pursuit of too insubstantial a purpose to justify the interference with individual choice.[40] As Justice Brennan noted,[41] the legislature could not have enacted the ban because it believed that advertising of casinos directed at Puerto Ricans would significantly contribute to the spread of prostitution and organized crime.[42] Furthermore, even if it were plausible to believe that the presence of Puerto Ricans in the casinos would contribute to the amount of crime and prostitution, the government did not explain why it chose to ban advertising rather than to exclude its citizens from the casinos altogether.[43]

Justice Rehnquist's dissent, respectively. Justice Blackmun, joined by Justice Brennan in a *Central Hudson* concurrence, rejected the *Central Hudson* test, because it permitted a state to dampen demand for a product by suppressing information. *See id.* at 574 (Blackmun, J., concurring). They suggested that bans on truthful advertising of lawful products should be strictly scrutinized. *See id.* at 573, 577. The dissenters in *Posadas* adopted this approach. The majority in *Posadas*, by applying the *Central Hudson* test deferentially, effectively adopted the approach advocated by Justice Rehnquist's dissent in *Central Hudson*. There he had urged the Court not to "substitute[ ] its own judgment for that of the State in deciding how a proper ban on promotional advertising should be drafted" in order not to "unduly impair a state legislature's ability to adopt legislation reasonably designed to promote interests that have always been rightly thought to be of great importance to the State." *Id.* at 584–85 (Rehnquist, J., dissenting). *Posadas* marks the effective victory of Justice Rehnquist's dissenting position in *Central Hudson*, not merely over Justice Brennan's position in that case, but over the sensible majority compromise.

[38] Prior to *Posadas*, the Court had upheld advertising bans only if the state could prove that the bans protected listeners from harms that the state had a legitimate interest in preventing. These decisions respected the citizens' personal autonomy by allowing them to make decisions using their own best judgment, *see* cases cited *supra* note 1, except in those instances when a state reasonably feared that its citizens would act against their own best interests, *see* cases cited *supra* note 2.

[39] The fact that Puerto Rico decided not to make casino gambling illegal for Puerto Ricans should have raised a suspicion that it wanted to ban casino advertisements for some reason other than the harmfulness of casino gambling. The underinclusiveness of the advertising regulation should have raised the same suspicion. *See* 106 S. Ct. at 2983 (Brennan, J., dissenting).

[40] *See supra* note 29.

[41] *See* 106 S. Ct. at 2983–84 (Brennan, J., dissenting).

[42] *See supra* p. 176.

[43] Although Justice Stevens suggested that Puerto Rico could not constitutionally have banned casino gambling for Puerto Ricans, *see* 106 S. Ct. at 2988 n.3 (Stevens, J., dissenting), the majority did not inquire into why Puerto Rico chose to ban advertising but not gambling.

One can imagine government interests that might plausibly have supported the legislation. For example, had Puerto Rico acted out of concern that its poorer citizens could not afford to be swept into the habits of gambling, the ban might have been justified under the *Central Hudson* test.[44] But by accepting as legitimate the weak interests advanced by Puerto Rico, the Court set a precedent for accepting bans on commercial speech that do not advance a substantial government purpose. In failing to consider that Puerto Rico's goal could be less important than the individual choices sacrificed in pursuit of that goal, Justice Rehnquist undervalued the personal autonomy of Puerto Rican citizens.

Justice Brennan, however, also offered a one-dimensional analysis. Just as Justice Rehnquist overlooked the listener's autonomy when he deferentially applied the *Central Hudson* test, Justice Brennan undervalued the paternalistic aspect of the commercial speech doctrine when he called for strict scrutiny. By jealously guarding the rights of potential gamblers to receive information about gambling, Justice Brennan underemphasized the danger that commercial speech will lull consumers into purchasing dangerous, albeit legal, products from which they need government protection.[45]

Justice Brennan called for strict scrutiny of limits on truthful advertisements for lawful products in order to defeat covert government attempts "'to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice.'"[46] But the Court — including Justice Brennan — condoned regulation of advertisements proposing

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[44] This motivation would explain why the ban applied only to advertisements directed at Puerto Ricans. Under this rationale, Puerto Rico might even have been able to explain why it had not banned casino gambling or why it had not banned other addictive games of chance. For example, Puerto Rico might have contended that it limited the ban to advertising of casino gambling because it thought that the impetus to bet large sums would be greater in casinos, which are frequented by rich tourists who make large bets. The legislature could have decided not to make casino gambling illegal for Puerto Ricans because illegality would simply have driven Puerto Rican gamblers to break the law, rather than dissuading them from gambling.

[45] The "free market in ideas" view of commercial speech has elicited charges that the Court has revived the discredited doctrines of Lochner v. New York, 198 U.S. 45 (1905). *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 589–91 (1980) (Rehnquist, J., dissenting). Just as the *Lochner* court struck down paternalistic legislation designed to protect workers from the harsh practices of the free market on the ground that such legislation interfered with their freedom to contract, strict scrutiny would strike down paternalistic legislation designed to protect consumers from the harsh practices of the free market on the ground that such legislation interferes with their first amendment rights. *Lochner* falsely assumed that the Constitution prohibited regulation of economic markets as an interference with contract rights. A court applying strict scrutiny to commercial speech regulations likewise would wrongly presume that the Constitution prohibits regulation of a market in ideas. *See id.* at 592.

[46] 106 S. Ct. at 2982 (Brennan, J., dissenting) (quoting *Central Hudson*, 447 U.S. at 575 (Blackmun, J., concurring)).

crimes,[47] even though such regulations manipulate citizens by depriving them of information. It seems to have determined in advance that the state always has a substantial interest in preventing crime.[48] Because the state may ban advertisements when the Court has predetermined that the state's interests are substantial, the Court should allow such bans whenever the state can demonstrate the substantiality of its interest. Increasing the scrutiny applied to such bans would establish a nearly per se rule against them. Strict scrutiny would all but preclude any inquiry into the substantiality of a state's interest and, in so doing, would sacrifice potentially legitimate state interests to an overzealous protection of autonomy.

Justice Brennan, despite the shortcomings of his argument, wisely recognized a danger lurking in the *Central Hudson* test: the further erosion of first amendment protection for commercial speech. Justice Rehnquist's application of the *Central Hudson* test confirms the potential for this erosion. But although Justice Brennan's strict scrutiny approach would halt such erosion, it might erode the other value protected by the *Central Hudson* test: consumer protection. Under strict scrutiny, the first amendment protections announced in *Central Hudson* could overpower legitimate regulation of commercial speech and thereby undermine states' ability to enact important economic and social legislation. One might view Justice Rehnquist's deferential application of the *Central Hudson* test as a measure to prevent this latter erosion.

The Supreme Court should return to the thoughtful rule that it articulated and correctly applied in *Central Hudson*.[49] Neither Justice Brennan's proposal for strict scrutiny — which would function as a

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[47] *See id.* at 2981; Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973).

[48] Although the Court has not discussed bans on advertisements for illegal activities in terms of the substantiality of the state's interest in preventing crime, this hypothesis offers one coherent picture of the Court's approach to commercial speech. The Court itself has merely asserted, without explaining why, that advertisements for illegal activities may be regulated by the state. *See Pittsburgh Press*, 413 U.S. at 388 (1973).

One might argue that bans on fraudulent and misleading advertising also manipulate consumers. By altering the choices that consumers would otherwise make, these bans manipulate consumers, not by persuasion, but by depriving them of information. One might interpret judicial acceptance of these bans as a predetermination both that the state always has a substantial enough interest in preventing fraud to justify the interference with autonomy and that information to counteract fraud would not adequately protect that interest.

[49] Prior applications of the *Central Hudson* test have indeed proven thoughtful. The *Central Hudson* Court itself carefully probed the requirement that a regulation be "narrowly tailored" to serve a governmental interest before striking down a ban on electricity advertisements. *See* 447 U.S. at 565–66, 569–71. Other cases have considered the scope of "substantial government function." *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2280 (1985) (finding that the state's interest in maintaining the dignity of the legal profession was not substantial enough to support a ban on attorney advertising).

nearly per se rule against bans on nondeceptive advertisements for lawful activities — nor Justice Rehnquist's excessively deferential application of the *Central Hudson* test is necessary to prevent the erosion of a well conceived rule governing commercial speech. The *Central Hudson* compromise recognized the legitimacy of restraints on advertising that protect citizens from their own bad choices or from other dangers. It also protected individual autonomy by prohibiting government control of speech when the state's insubstantial purposes masquerade as substantial social policy. Because it accommodated governmental and individual interests, the *Central Hudson* test, carefully applied, promised to fend off both arbitrary interference with commercial speech and unnecessary frustration of reasonable social legislation.

Future cases — which will probably involve bans on advertising for cigarettes or alcohol[50] — should examine carefully whether the state has some legitimate reason to ban advertising of a product that it chooses not to make illegal. For example, in evaluating a state law banning advertisements of alcohol, the Court ought to consider not only whether the state has any interest in protecting its citizens from the dangers of alcohol, but also whether the state can plausibly explain why it chose to advance that interest by banning the advertisement, rather than the use, of alcohol.[51] The state must have some reason to believe that advertising contributes to the specific consequences of drinking that it wishes to combat.[52] Because such a connection is not immediately obvious, the state should bear the burden of proving, through legislative history, that the ban is indeed the result of careful consideration and that the legislature reasonably believed the ban to be the best way to achieve its particular goal.

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[50] In Capital Broadcasting Co. v. Mitchell, 405 U.S. 1000 (1972) (mem.), *aff'g* 333 F. Supp. 582 (D.D.C. 1971), the Court upheld the constitutionality of § 6 of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1335 (1982), which prohibits cigarette advertisements on any medium of electronic communication regulated by the FCC. The precedential value of this case may be questioned, however, because it was decided prior to the development of commercial speech doctrine in *Central Hudson* and because later Supreme Court dicta have limited the holding to the special case of electronic broadcasting. *See* Bigelow v. Virginia, 421 U.S. 809, 825 n.10 (1975); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 773 (1976). A bill currently before Congress would, if enacted, ban all cigarette advertisements. *See* H.R. 4972, 99th Cong., 2d Sess. (1986).

[51] A state might conclude that alcohol consumption is extremely dangerous and therefore ought to be made illegal. But several factors might convince a state to refrain from passing such a law: the historic failure of Prohibition to stop alcohol consumption, the danger that criminals will control this activity, and the social harms of permitting citizens to become accustomed to breaking the law. In view of these dangers, a state might conclude that a ban on advertising would discourage alcohol consumption more rationally than would any other approach.

[52] For example, if the state bans alcohol advertisements because it believes that excessive use of alcohol seriously harms its victims, then it should have some evidence that advertising contributes to excessive drinking.

Unfortunately, the inquiry conducted by the *Posadas* majority does not proceed this carefully. The *Posadas* decision suggests that future bans on advertising will be perfunctorily accepted as long as the state can produce some reason — whether real or spurious — for believing that the product advertised might harm its citizens.

2. Negative Speech Rights for Corporations. — In recent years, the Supreme Court has increasingly recognized that the first amendment protects not only the right to speak but also the right to refrain from speaking. This concept of "negative free speech" provided the basis for decisions invalidating a New Hampshire law requiring car owners to display the state's motto on their license plates[1] and striking down a Florida statute requiring newspapers to provide a right of reply to candidates whose character or record they had challenged.[2] Last Term, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,[3] the Court reaffirmed and extended this right to refrain from helping to spread another's message. In a plurality opinion by Justice Powell, the Court held that an order by the California Public Utilities Commission (PUC) granting a consumer group access to the utility billing envelopes of Pacific Gas & Electric Company (PG&E) was an impermissible restriction on the company's right of free speech. This ruling extended negative free speech rights to corporations for the first time, holding that corporate entities, like individuals and newspapers, have a right not to associate with speech with which they disagree. In so doing, the Court demonstrated its hostility to government attempts to equalize effective speech rights in limited fora and departed considerably from its historic rationale for protecting corporate speech.

For more than sixty years, PG&E had included *Progress*, its newsletter for consumers, in its monthly billing envelopes. *Progress* contained political editorials, feature stories on matters of public interest, and information about utility bills and services. In 1980, Towards Utility Rate Normalization (TURN), a public-interest consumer group that frequently intervened in PG&E's ratemaking proceedings before California's Public Utilities Commission, urged the commission to forbid PG&E from using its billing envelopes to distribute political editorials.[4] The PUC responded with an order that granted TURN access to the envelopes four times a year for the next two years. The commission's rationale was that ratepayers would benefit from exposure to a greater variety of views. It also argued that its order did not infringe on PG&E's first amendment rights because any "extra space" remaining in the billing envelope after the inclusion of the

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[1] *See* Wooley v. Maynard, 430 U.S. 705 (1977).

[2] *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

[3] 106 S. Ct. 903 (1986).

[4] *See id.* at 906.