QUO VADIS, POSADAS?

By William Van Alstyne

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

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, benefitting from a mild climate, and a fine, inviting road system with connecting links to Richmond, the nearby capital city, with additional scenic roads wending eastward toward Colonial Williamsburg. 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 seemed to have no end in sight, yet few students and townspeople were willing to settle for getting around by bicycles or public trans-

1. "Dicit ei Simon Petrus Domine quo vadis?" (Vulgate) ("Simon Peter said unto him, Lord, whither goest thou?") (The Bible, King James Version, John 3:36.5.) Also fitting this essay, perhaps, is the enigmatic answer: "Respondit Jesus quo ego vado non potes me modo sequi sequeris autem postea" ("Jesus answered him, Whither I go, thou canst not follow me now; but thou shalt follow me afterwards.")

2. William & Thomas Perkins Professor of Law, Duke University. This article is derived from the Siebenthaler Lecture delivered at Salmon P. Chase College of Law in the Spring of 1997. I am most grateful for the hospitality extended by Dean David Short, Professor David Elder, and the faculty and students.

portation. The proposed "Motorcycle News" feature might suggest an alternative. If not, still little would be lost, or so Jeffries thought.

The weekly feature ran as Jeffries had planned. He proved to be quite right. 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' view, had threatened the great charm of Charlottesville.

An incidental benefit, which also pleased Jeffries, was that the several local motorcycle dealers 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 and tended to place more advertising with the Observer than they had previously been inclined to do.

Of course, not everyone was quite as well pleased (no one ever is, it seems), 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 their plight.

Consequently, through their trade association, the Virginia Car Dealers Association ("V.C.D.A."), they sought help through the Virginia General Assembly where, in comparison with the very much smaller Virginia Motorcycle Dealers Association ("V.M.D.A."), they had always had much more influence than the motorcycle dealers possessed. They counted, too, on attracting strong support from several public interest groups, such as Mothers Against Motorcycle Drivers ("M.A.M.D."), the highly influential Virginia Medical Association ("V.M.A."), and Citizens for a Drug-Free America ("C.D.F.A."), a citizens' group who associated motorcyclists with the drug culture.

The Automobile Dealers' and their highly supportive public-interest allies' strong first preference was to have the Virginia General Assembly adopt a statute simply prohibiting motorcycles. Toward that end, their preferred strategy was to launch a general campaign well calculated to educate the public on the dangerousness of motorcycles, playing to the negative stereotypes of motorcyclists: of recklessness, drug culture, and the public burden of excessive medical costs borne by the public from cyclist injuries, injuries that 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. Moreover, in moving in just this fashion, insofar as it would prove effective, they were much encouraged by their attorney's advice.

Their attorney assured them that were the General Assembly to outlaw motorcycles, to forbid any further retail motorcycle trade, as a public safety, health, and general welfare measure, they could be confident that the measure would easily hold up against any mere Fourteenth Amendment "substantive due process" or "equal protection" constitutional complaint any motorcycle dealers might press in any state or federal court. There was likewise nothing in the state constitution that would stand in the way.

The attorney's confidence seems to have been well warranted. The few pertinent clauses of the state constitution, such as they were, had been uniformly construed by the state supreme court merely to mimic what the federal courts had done in applying the restrictions of the Fourteenth Amendment to the states. And the futility of a challenge under the due process clause of the Fourteenth Amendment was all but guaranteed in view of the Supreme Court's own long-standing, virtual abdication of judicial review of legislation of this sort, leaving the outcome on such matters as this pretty much to legislative will. Similarly, the motorcycle dealers could expect to do no better by pursuing a claim based on an alleged denial of

4. For an instructive description of the episode, see Eastern R.R. Presidents Conf. v. Noerr Freight, 365 U.S. 127 (1961) (coordinated industry campaign to discredit motor freight carriers to induce public opinion to bring about restrictive congressional legislation of motor carriers exempt from the reach of federal anti-trust laws, the Court holding that, even assuming the campaign was a "conspiracy" in "restraint of trade," insofar as the means of seeking such a restraint was to bring it about through legislation, the First Amendment protected the right of the railroads to seek measures concededly within the power of Congress to adopt).

5. See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 728 (1963) (commenting on such legislation insofar as it is impugned on due process grounds, and rejecting such a complaint, declaring: "[I]t is up to the legislatures, not the courts, to decide on the wisdom and utility of [such] legislation"); Olsen v. Nebraska, 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 Products Co., 304 U.S. 144 (1938) (same position by the 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, 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. For an extended and compelling argument that the Court's virtual abdication of due process review of legislation stifling product competition is wholly unwarranted by any mere repudiation of Lochner v. New York, 198 U.S. 45 (1905), see Frank R. Strong, Substantive Due Process--A Dichotomy of Sense and Nonsense (1986).
equal protection. For just as in respect to an attempt to bring a due process challenge, the current review standard for ordinary economic equal protection rights is an enfeebled inquiry of "imaginable rationality" and little, if anything, more. If there is some imaginable basis that would make the difference in treatment reasonable, the statute must be sustained, so the Court has declared, even if the legislature did not act on that basis (but, rather, acted little better than as mere rent seekers, virtually selling their votes to those offering the greater political support).  

Even absent total legislative success of this kind (i.e., total success in having motorcycles banned as simply "too dangerous at any speed"), the automobile dealers and the influential public interest groups allied with them would press other 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. Among the proposed measures were these: a state law severely limiting the number and location of authorized cycle dealers; a new measure levying a heavy thirty percent sales surtax on motorcycles; an additional measure requiring completion of an "approved motorcycle training program," for licensing eligibility for a motorcycle driving permit; and fourth, increasing the minimum age for licensed owners to twenty-one. Here, too, they had no doubt that whatever of these approaches (or several others) the Virginia General Assembly might adopt "to reduce effective demand" for this "dangerous" product, the

6. For the most recent reiteration of this (non)standard, see FCC v. Beach Communications, 508 U.S. 307, 313-14 (1993) (Thomas, J., for a unanimous Court) (emphasis added) ("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."). 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 fifty years") (and noting, that the one exception was itself subsequently overruled). (The exception was Morey v. Doud, 354 U.S. 457 (1957). It was overruled in New Orleans v. Dukes, 427 U.S. 297 (1976)). (For a critical review of this toothless standard, see Gerald Gunther, [A] Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972) (nonetheless also noting, that the prevailing standard is "minimal scrutiny in theory and virtually none in fact."))

7. 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 process itself involving substantial fees.

8. 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 Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 339, 341 (1986) ("The interest at stake in this case, as determined by the Supe-
motorcycle dealers and anyone else who might side with them would readily fail in any effort to have them set aside on some conjured constitutional ground. Once again, that is, they were reliably assured that nothing in any of three principal clauses of the Fourteenth Amendment would stand in the way.9

As it happened, however, despite their best efforts 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, to be sure it appeared very likely that several of them, perhaps even all of them, would command an easy majority in the legislature if a strongly preferred first option a member of the legislature suggested were to prove ineffective in diminishing motorcycle sales and use to "tolerable" 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.10

The "preferred first option" suggested by a member of the Virginia legislature was simply to enact a statute forbidding motorcycle dealers to advertise.12 The intended effect would be twice beneficial, 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 continue to do), even while the statute would at once strike off any individual motorcycle dealer ads, or any institutional (motorcycle trade association) ads or manufacturer advertising of motorcycles. The act would at once remove these commercial voices altogether and, predictably, lead to much lower motorcycle sales.

The legislative proposal also aimed at Jeffries' kind of "Motorcycle News" feature, moreover, to exactly the same end. Thus it took care 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' "Motorcycle News" feature and other things of a like sort). This final part of the proposed bill was set off in a separate section, and accompanied by an express severability clause.

Shortly following enactment of the described statute, however, a civil suit challenging the announced intention of the Virginia Attorney General to enforce it, was filed in federal district court in nearby Richmond. The

---

13. 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 Products Corp., 463 U.S. 60, 66 at n. 13 (1983).

14. The wording ("gratuitously") was selected in order 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) (invasion of privacy claim against Reader's Digest for story identifying plaintiff as having been convicted of highjacking eleven years earlier, 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)). See also state statute reviewed in Near v. Minnesota, 283 U.S. 697, 702 (1931) (newspaper publication of defamatory statements deemed privileged only if both truthful and "published with good motives and for justifiable ends").

15. 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, as applied to the Jeffries' sort of 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. Co. v. Tornillo, 418 U.S. 241, 257 (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.

16. Indeed, on the same day it was to take effect.
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. Each 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) proceeded exactly as other Virginia residents had done in seeking injunctive relief from an earlier advertising ban, a ban on drug price advertising in Virginia, just twenty years before. These plaintiffs appeared not on behalf of, or in substitution of, any motorcycle dealer, manufacturer, or trade association, rather, they appeared on their own behalf, as "individuals adversely affected by the state law, 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." Other plaintiffs of course included several named retail motorcycle

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

18. See Virginia Board of Pharmacy v. Virginia Citizens Council, 425 U.S. 748 (1976) (suit by consumer group to enjoin ban on pharmacist prescription drug price advertising, held, in their favor in the Supreme Court, both as to their standing to sue, and on the merit of their First Amendment claim (though the 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.) (The significance of the Court's holding regarding 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 Board of Education v. Pico, 457 U.S. 853 (1982) (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 a school board order that certain books be removed from the 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 from Stanley v. Georgia, 394 U.S. 557, 565 (1969), and citing Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972). See also Lamont v. Postmaster General, 381 U.S. 301 (1965) (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 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); Dickson v. Sitterson, 280 F. Supp. 486 (M.D.N.C. 1968) (students of state university have First Amendment standing to assert right of freedom to receive information willing speakers would have provided on campus but were forbidden to provide because of state law forbidding them to speak on campus).

19. See cases and discussions, supra, note 18.
dealers, now forbidden by Virginia law from providing any off premises business 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 has straightforwardly advised a dealer it could not be used, whether, as previously, for publication in the Charlottesville Observer or in any direct mailing to local residents, or in another medium in the state; so as 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. We are located at 2134 Alta Vista Rd., in Charlottesville, just off Exit 34 Jefferson Boulevard. Our business hours are 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 1997 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, protective 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 Virginia Motorcycle Dealers Association ("V.M.D.A.") likewise appeared as a named plaintiff, suing on its own behalf and on behalf of its members. Of course, Thomas Jeffries is also a plaintiff, as owner and publisher of the Charlottesville Observer, restricted as he is, as a newspaper publisher, by the new Virginia law.

Lastly, 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." And each asserts a claim as a person who resides in Charlottesville, who seeks uncensored information respecting certain lawful goods and services available in Charlottesville,

20. The V.M.D.A.'s standing to sue in its own right is uncontested, given that its organizational purpose is the promotion of motorcycle information and use, and also that it occasionally sponsors generic advertising of motorcycles as well as of motorcycling, as both a regular and recreational alternative to other means of commuting, travel, and sport.
"the better to form an informed opinion in respect to their worth relative to other (i.e., alternative) services and goods." These plaintiffs also assert standing of their own. They seek to attack 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 them 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." 21

All of the plaintiffs' causes of action have been filed pursuant to 42 U.S.C.S. section 1983,22 and federal court jurisdiction has been plainly stated pursuant to 28 U.S.C.S. sections 1331 and 1343(a)(3).23 The plaintiffs have 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

21. In short, they say, the purpose of the law is obviously partly one of "thought control" and not merely "marketplace control" (the phrase, "thought control," is taken from a part of the court's 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, on what terms, etc.), these and the other plaintiffs say, is not in dispute. The power of the state in respect to the former (thought control), these plaintiffs say, assuredly is. 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 in order to assure that the other side will have a clear field. The object is not to assure success 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 (and car manufacturers, car trade associations, etc.) 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 counter-vailing observations or information, or offer any response, i.e., to "answer". See Rosenberger v. Rector and Visitors of the University 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."); American Booksellers v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985), summarily aff'd, 475 U.S. 1001 (1986) ("The state may not ordain preferred viewpoints in this way."); 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 . . . .").


Every 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 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.

23. 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.S. § 1331 (1998).

"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.S. § 1343(a)(3) (1998).
proper party, to have to answer to the complaint. The case is admitted to be timely, serious, and ripe. So, what shall be its disposition (and what would Posadas fairly suggest)?

I. THE POSADAS QUESTION

The "Posadas question" (as we shall call it) 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, such as such information might happen to be.25 The Attorney General concedes that this is so but merely demurs and points out that, under the Virginia law, "the 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." Its object 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 within the power of the state so to do.26

Neither is the statute concerned (or "tailored") merely to avoid coercive or stressful forms of high pressure marketing practices or tactics. It is subject to no such saving rationale. This, too, the Attorney General also admits. Its object is not to blunt or forestall varieties of commercial "overreaching," for in no respect is it reasonably limited to conditions presenting such a risk.28

Nor is it of a common piece of a more general measure, regulating

---

24 See the framing of that question, supra, note 1.

25 See, e.g., the sample advertisement submitted by Charlottesville Honda. 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 (1985) (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 mention of court costs, thus state may require such additional information to be provided but not otherwise ban such advertisements).

26 Indeed, from the state's point of view, "truth" is the greater part of the problem (that is, it is the accuracy, rather than any inaccuracy, of representations of product availability, price, features, fuel economy, colors, options, zero-to-sixty acceleration rates, or top running speeds, etc., 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).

27 See discussion supra note 26.

28 Cf., e.g., Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (state bar restriction on "bedside" personal injury solicitation of clients by lawyers, sustained). See also Florida 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)).
commercial speech as even a broad, community-wide restriction on billboards might represent.\(^\text{29}\) 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 \textit{not} the case)\(^\text{30}\) that the law could provide no common relief from the incessant "calls of commerce" \textit{wherever} one might turn.

Nor, again, is it merely akin to still older kinds of "time, place, and manner" municipal ordinances of a sort forbidding commercial handbill hawkers from adding to the general congestion of the public streets.\(^\text{31}\) Rather, serving no similar end or ends, this statute bans the mere placement of plaintiffs' sample advertising copy in an ordinary newspaper of general circulation, as it bans it equally, even as a simple mailed brochure. Accordingly, and as the Virginia Attorney General concedes, it has no qualified, or limited, commercial speech "time, place, or manner" rationale.\(^\text{32}\)

29. See, \textit{e.g.}, \textit{Song of the Open Road} (O. Nash, \textsc{I Wouldn't Have Missed It: Selected Poems of Ogden Nash} 31 (1975) (usefully quoted in \textit{Metromedia, Inc. v. City of San Diego}, 164 Cal. Rptr. 510, 532 (1980)):

\begin{quote}
I think I shall never see
A billboard lovely as a tree.
Indeed, unless the billboards fall,
I'll never see a tree at all.
\end{quote}

\textit{See also} Walter Lippmann, \textit{Drift and Mastery} 52-53 (1914) (describing modern advertising as a "deceptive clamor that disfigures the scenery, covers fences, plasters the city, and blinks and winks at you through the night").

30. See, \textit{e.g.}, Moser \textit{v.} FCC, 46 F.3d 970 (9th Cir. 1995), \textit{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); Board of Trustees \textit{v.} Fox, 491 U.S. 469 (1989) (university restriction on salesmen soliciting in university dormitories, sustained); \textit{Breard v. Alexandria}, 341 U.S. 622 (1951) (sustaining a local ordinance disallowing uninvited door-to-door commercial solicitations, Black and 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). \textit{Cf.} \textit{Martin v. City of Struthers}, 319 U.S. 141 (1943).

31. See, \textit{e.g.}, \textit{Valentine v. Christensen}, 316 U.S. 52 (1942) (sustaining ordinance ban on ordinary commercial handbill distribution on public streets). \textit{Cf.} \textit{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 indeed ample outlets (and the commercial incentive to use them) remain fully available for the usual advertisement of ordinary lawful goods and services. \textit{See Virginia State Bd. v. Virginia Citizens Consumer Council}, 425 U.S. 748, 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. \textit{See, e.g.}, \textit{City of Cincinnati v. Discovery Network, Inc.}, 507 U.S. 410 (1993) and \textit{compare William Van Alstyne, Some Cautionary Notes on Commercial Speech}, 43 U.C.L.A. L. REV. 1635 (1996).

32. See \textit{Ward v. Rock Against Racism}, 491 U.S. 781, 790 (1989) (emphasis added) ("[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, pro-
Is it the case that the statute is nevertheless not objectionable on First Amendment grounds? If so, on what reasoning might one presume so to declare? Wherein does the explanation lie?

II. DOES THE GREATER POWER INCLUDE THE LESSER?

Is it because, as suggested by Chief Justice Rehnquist in Posadas, "[T]he greater power to completely ban [an activity or product] necessarily includes the lesser power to ban advertising of [such an activity or product]"33 without otherwise presuming to interfere with it so far as the legislature is currently disinclined to do? That is, is this the answer to the "elegant question" as framed by Justice Stevens,34 because as Chief Justice Rehnquist went on to elaborate in Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,35 "[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."36

That this is so, though 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 generally directed, etc.) distinguishing it in any respect from advertisements others are free to use in respect to such goods or services it is lawful for them to provide? But why should that be so?

The straightforward idea here (and in the preceding quotation from Posadas) might be thought to be so obvious, as hardly to be worth spelling out, indeed, simply this: that no one is forced to get into the casino trade (or, here, into the business of marketing motorcycles), and insofar as one understands that the legislature closely regulates this particular (prohibitible) trade in a certain way (including, as here, by providing that no advertising thereof is permitted by or on behalf of one who engages in that trade), one may conclude that, in light of the restriction, it is not worthwhile,

---

33. Cf Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345-46 (1986) (Rehnquist, C.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, though made with reference merely to "casinos," seems equally applicable here.

34. See supra note 1.

35. 478 U.S. at 347.

36. Id. (first emphasis in original, second emphasis added).
that is, that one would be better off pursuing some other line of business (namely, one not subject to this particular restraint). And so one is perfectly free to do. What one may not do, however, is to suppose that one may take up the business of the casino trade, and then simply disregard one of the clearest restrictions of all: namely, that while engaged in this trade, one will abstain from all advertising related thereto. Given that this is a business the legislature could forbid outright, if one nevertheless wants to pursue what one thinks may well be a lucrative business notwithstanding the restrictions, one is welcome to do so. But when, as here, it is a business the legislature could altogether forbid, to quote Justice Rehnquist (from still a different case)\(^\text{37}\), "a litigant in the position of the appellee must take the bitter with the sweet."\(^\text{38}\)

If this is the explanation, such as it is (and there seems little reason to think that it is not), the position taken by Justice Rehnquist in \textit{Posadas} seems to be constructed from an analysis not much different from that advanced by Justice Holmes' many decades earlier, in the quite famous case of \textit{McAuliffe v. Mayor of New Bedford},\(^\text{39}\) dismissing a policeman's complaint on observations of a strikingly similar sort neither more nor less.\(^\text{40}\) The policeman had been discharged for violating a rule of which he was well aware when he became a policeman (in this instance, a rule disallowing public statements reflecting on the police). "The petitioner," Holmes observed in \textit{McAuliffe}, "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."\(^\text{41}\) If one wants nonetheless to be a policeman, he may, Holmes observed, but in doing so, of course "he takes the employment on the terms which are offered him," neither more nor less.\(^\text{42}\) And having done so, Holmes declared, "he cannot complain."\(^\text{43}\) Thus the suggestion, pursued by Justice Rehnquist in \textit{Arnett} (and equivalently in \textit{Posadas}?), that "a litigant in the position of the appellee must take the bitter with the sweet." Or so it might be thought, if there were no more to be said.

Yet, in the particular case in which Justice Rehnquist first offered this view, the Supreme Court had disagreed with Justice Rehnquist's analysis, such as it was, declined to follow it at all.\(^\text{44}\) Rather, in \textit{Arnett} (and later also,


\(^{39}\) 29 N.E. 517 (Mass. 1897).

\(^{40}\) \textit{See Id.} at 518.

\(^{41}\) \textit{Id.}

\(^{42}\) \textit{Id.}

\(^{43}\) \textit{Id.}

\(^{44}\) \textit{See Id.} at 166-67 (Powell, J., concurring). \textit{See also Cleveland Bd. of Educ. v. Loudermilk}, 470
in Loudermill), the Court held that it is the state (not the employee) that may sometimes accept "the bitter with the sweet". Specifically, in Arnett, that the state must accept something it may not want (providing tenured employees with pretermination procedural due process required by the Fourteenth Amendment, rather than some lesser, legislatively-preferred procedure), in order to get something it desires to have (presumably the better quality of service it may receive by providing 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 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."\(^{45}\)

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") syllogism, in respect to the First Amendment as well. It had done so via the doctrine of "unconstitutional conditions."\(^{46}\) Indeed, had the Court not done so, the power of the government effectively to crush constitutional rights under the powers of the "right-privilege" (and "greater-and-lesser") doctrines would have left very little not within government reach to command pretty much as it might wish, even as the Court

---

\(^{45}\) Arnett, 416 U.S. at 167 (emphasis added). So, here, too, one might suggest, the legislature may be free not to permit any lawful trade of a certain sort, but nonetheless conclude that "such an interest, once conferred, while conferred, and within the boundaries it has been conferred, brings with it commensurate rights of free speech" (that is, merely the same rights at one's own expense to furnish public information respecting that trade, even as others are free to do in respect to such trade as is likewise lawful for them).

\(^{46}\) "[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." Clifton v. Federal Elections Commission, 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, William Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 83 Harv. L. Rev. 1429 (1968); Kathleen Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415 (1989); Brooks Fudenberg, Unconstitutional Conditions and Greater Powers: A Separability Approach, 43 U.C.L.A. L. Rev. 371, 458-62 (1995) (with additional references at p. 373, n. 1). 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 specifically how 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. For being obliged to forbear from any advertising whatever (merely of the same utterly conventional sort all others are free to provide), as a condition of being allowed to compete at all, is arguably a condition of just this, "unconstitutional" kind.
acknowledged in the course of its own critical review.\textsuperscript{47}

To face up to the issue more directly, however, and this time without recourse to mere legal epigrams (whether of the "greater-lesser" sort on the one hand, or of the "unconstitutional conditions" sort on the other hand), in returning still again to \textit{Posadas}, perhaps one may more correctly say this, with appropriate detachment: "\textit{If it is true that the power to forbid an 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 \textit{Posadas}), it is true only because the Supreme Court is so inclined to read the Constitution so to provide. Otherwise it is not true.}" Puting the point this way, moreover, merely helps clear the air.

So, the question remains to be answered: why should the Supreme Court read the Constitution \textit{so to provide,}\textsuperscript{1} when nothing in the Constitution suggests that this is necessarily a correct reading or understanding of its various provisions that may bear on the question? Certainly \textit{nothing} in its text compels such a reading. Nor is it simply some sort of obvious Euclidean self-evident truth. Indeed, perhaps it would be at least equally plausible to read the Constitution quite differently, for example, to say the following, instead:

Whether or not a legislature may forbid an activity (a question it will be time enough to consider if and when the legislature presumes to do so), when it has \textit{not} done so (i.e., when it has not exercised that power, such as it may be), there is no reason to suppose its power to restrict or forbid speech providing information pertinent to that activity is \textit{at all} the same as though it had exercised that power. Indeed, it is surprising that anyone should think that it is, for there is no equivalency in the circumstances at all. Perhaps it, the legislature, \textit{may} altogether forbid the activity in question; and perhaps, also, a legislature \textit{may} do so for virtually

\textsuperscript{47} See, e.g., Frost & Frost Trucking Co. v. Railroad 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."). \textit{Arnett}, 416 U.S. 134 (1974). \textit{See also} United States ex rel. Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 437 (1920) (Holmes, J., dissenting), (describing the mail as something that could be abolished whenever the government might choose to do so, but which, in the meantime, so long as the government chooses 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' position in \textit{Burleson} thus reflects a considerable change in his thinking since his dismissive opinion in the \textit{McAuliffe} case. (And, indeed, the \textit{McAuliffe} syllogism itself was abandoned in subsequent decisions by the Court. See, e.g. \textit{Pickering} v. Board of Education, 391 U.S. 563 (1968); \textit{Keyishian} v. Board of Regents, 385 U.S. 589 (1967).)
any reason satisfactory to itself (i.e., 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). But, however that may be, when it has not exercised that power in respect to a particular activity, and insofar as the activity is permitted, the First Amendment applies to prohibit the legislature from presuming to forbid those lawfully engaged in it to provide public information in respect to that activity, so to furnish at their own expense a fair description of what it is (i.e., what the ‘activity’ consists of, to whom it is lawfully available, when, and on what terms), always answerable for the truth of their representations, such as those representations may be, neither more nor less than others who likewise offer other lawful goods or services may likewise be made to do. For so much as this, we think, the First Amendment secures of its own force. Nor do we readily understand what would so mislead a legislature to suppose otherwise, that the First Amendment, despite the manner in which it is written, somehow implies it is largely just up to legislative bodies to decide the extent to which people shall be permitted to learn or not of services and products lawfully available to them. We know of no such doctrine permitting legislative bodies thus to try to control what people may learn or from whom they may learn it. And we find no basis to accept it merely because requested so to do. 48

This view of the matter merely acknowledges how the First Amendment may operate as a independent restraint on Congress and on the states.49

48. Indeed, why isn’t this 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, merely of the following sort?

49. 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, 507 U.S. 761, 767 (1993). 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. Id

This position is also merely the same as the Court has taken, equivalently, in respect to due process in cases such as Loudermill and Arnett. And for fuller elaboration, see also Brooks Fundenberg, Unconstitutional Conditions and Greater Powers: A Separability Approach, 43 U.C.L.A. L. Rev 458-62, 76-78 (reviewing Posadas and usefully diagramming greater-and-lesser powers); Martin Redish, Tobacco Advertising and the First Amendment, 81 IOWA L. REV. 589 (1966).
But may we say instead that any restriction on advertising, whether by motorcycle dealers or others whose commercial activity the state could altogether shut down, while not necessarily exempt from First Amendment scrutiny, need meet only the minimal requirements of *ordinary economic substantive due process review* (rather than First Amendment standards as such)?\(^5\)

Judged by that "mere rationality" standard (i.e., the "(non)standard" of minimal scrutiny, bordering on virtual nonjusticiability)\(^5\); 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?\(^5\)

---


51. See supra notes 4, 5 and 9.

52. Indeed, but this is merely a virtual *reiteration* of the "greater-and-lesser" proposition explicit in Justice Rehnquist's *Posadas* position, rather than a different approach (even as his reference to the Jackson-Jeffries' article, supra n. 45, further suggests). It once again elides any distinction between presuming to regulate the product and presuming to suppress accurate commercial information about 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 Chief 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 un compelling 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 some 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. This is so "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, discussion supra notes 3, 4 and 7), this would leave only a thin (and highly uncertain) category of goods and services *not subject to nearly unbridled legislative power* to declare "who may advertise and who may not," and giving the First Amendment no 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 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 implicit in "the freedom of the press"); or "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 the part that refers to the "right to counsel"); or possibly some even "commerce" in condoms or other contraceptive items and abortion services (as necessary to certain constitutionally-anchored "privacy" rights pursuant to Roe v. Wade, 410 U.S. 113 (1973), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Griswold v. Connecticut, 381 U.S. 479 (1965). All of this, incidentally, Philip Kurland presciently recognized in the critique he offered of *Posadas* more than a decade ago. See supra note 41. See also Martin...
Or is it because while this may not be true either\textsuperscript{53} (rather, what \textit{is} true is
that the "advertising restrictions" at issue here are obviously specific, content-directed prohibitions of \textit{truthful} statements of \textit{lawful} consumer information in contemplation of utterly lawful transactions and, as such, are speech restrictions unexceptionally subject to conventional First Amendment review), the restrictions nevertheless can fairly be said to "directly advance the government's substantial interest in the health, safety, and welfare of its citizens," \textit{and} that in doing so, they "are no more extensive than necessary to serve the government's interest," and thus meet the Court's \textit{own} First Amendment, \textit{Central Hudson} "commercial speech" test,\textsuperscript{54} just as a

\textsuperscript{53} See discussion supra, note 52.

\textsuperscript{54} Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980) (emphasis added)

In \textit{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 \textit{commercial} speech to come \textit{within} that provision, it . . . must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is \textit{substantial}. If both inquiries yield positive answers, we must determine whether the regulation \textit{directly} advances the governmental interest asserted, \textit{and} whether it is \textit{not more extensive than is necessary to serve that interest}." If the restriction meets these requirements, it is to be upheld.

\textit{Id.}

So, here, specifically in respect to our motorcycle advertising ban, applying the specific word formula of \textit{Central Hudson}, may it be said that the state has a "substantial" interest in the good health of its citizens, 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 \textit{may} be so "said," just as the Virginia legislature, alert to the test, can be expected to take due care so to declare.) 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 who 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 \textit{for what}? Surely a \textit{total} ban on motorcycle advertising would have much greater effect than some \textit{half-way} measure, would it not?

So, thus applying the "test," if, indeed, this, the \textit{Central Hudson} formula, \textit{is} to supply the formula, though it is (superficially) quite different from, and more demanding than, the mere economic substantive due process "test," what does it 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 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 \textit{Central Hudson} test. Rather, one may expect it will say nothing about wanting to protect automobile dealers and will cite a concern for "public safety," so to meet the "substantial" interest part of the \textit{Central Hudson}}
majority of the Court likewise also found in *Posadas*, in keeping with what has since been quite rightly described as an *alternative* basis for the holding in that case.

Or is it the case, rather, that *this ought to fail as well*, so that whether or not motorcycles (or some other goods or services, whether margarine, muslin, or mopeds) could be outlawed, heavily taxed, or otherwise restricted, 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,"

---

55. "[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." *Posadas*, 478 U.S. at 344. The argument in this branch of *Posadas* does not rely on the "greater-and-lesser" reasoning, rather, it is independent, i.e., it stands on its own. It is much the same 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 newsworthy event (e.g., the kind of case discussed at *supra* note 14). "The state," obviously, "has a substantial interest in protecting each person's 'right to be left alone,'" such a court might declare, in applying a *Central Hudson* standard of First Amendment review, to meet its first requirement. And "the restriction placed on the newspaper," it might then proceed to say, is "no more extensive than necessary" to secure that particular right, which it does, and "directly" so. (Query, however, even accepting the argument here, whether the analogy fits: truthful information on the availability of a lawful product, one might note, prejudices no one's "rights," and wherein does the government presume to assert it has a substantial interest in keeping consumers uninformed in respect to the relative cost, relative advantages, availability, etc., of one kind of lawful product or lawful service vis-a-vis others they may in fact not prefer?)


57. See discussion *supra* notes 52, 53 respecting the manner in which a literal *Posadas*-style of applying *Central Hudson* standards would appear to work out.

58. See, e.g., McCray v. United States, 195 U.S. 27, 30 (1904) (ten cent per pound tax imposed on colored margarine, none on butter (whether artificially colored or not), sustained on basis that colored margarine could be outlawed (thus, 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.

59. See *Posadas*, 478 U.S. at 349 (Brennan, J., dissenting) ("I do not believe Puerto Rico constitutionally may suppress truthful commercial information in order to discourage its
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 decide so to do? In brief, that both Posadas and Central Hudson (to the extent Posadas relied on Central Hudson in its alternative holding) simply in error in suggesting the contrary?

For, 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), 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) is 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 be reminded still again?) the First Amendment does speak to restrictions on speech, the immediate, indeed the sole, target of the Virginia law put into challenge in this case.61

And, at the next step, moreover, the First Amendment provides no general exception the Court would recognize as such just because the speech in question supplies 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, or information about tomorrow's election, or information about yesterday's smashup of cars on some local road).62 Nor (and here perhaps we reach a

---

60. See cases and discussion at supra note 5. See also Carolene Products 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, an Act of Congress successfully lobbied by the dairy industry to totally forbid defendant's lower cost product was sustained. Furthermore, the Fifth Amendment Due Process Clause would provide no ground for relief.) 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).

61. See Martin Redish, Tobacco Advertising and The First Amendment, 81 IOWA L. REV. 589, 599 (1996) ("[I]t is beyond dispute that the First Amendment provides greater protection to speech than the Fifth Amendment's Due Process clauses provides to the sale of a product.")

62 See also 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495, 1510-12 (1966)(Stevens, J., joined in this part of the Opinion (Part VI), by Kennedy, Thomas, and 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.***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
critical juncture in this essentially tendentious essay) does the First Amendment 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.\textsuperscript{63}

That 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 any 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 public library copy, of Consumer Reports (where we can be quite sure it would be fully protected by the First Amendment). 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 association who differ solely in that they may personally have less economically at stake in doing so, would appear to provide very little by way of distinction between them, moreover, in respect to the proper measure of protection each may be due, so far as the First Amendment is concerned.\textsuperscript{64}

To press the point, not inappropriately, merely consider variations on the unprepossessing case immediately at hand, even as modeled on Posadas itself. A legislature may not regard it as a 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, chock full of unexceptionably accurate casino information as it may be, dislike it for such reasons as they may. Nor will it

\textsuperscript{63.} We also cannot accept the State's second contention, which is premised entirely on the 'greater-includes-the-lesser' 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.

matter whether the feature is carried partly, or even principally, or even wholly, because the newspaper thinks it conducive to the newspaper's own commercial success so to provide that feature, rather than for some reason more sublime.\textsuperscript{65}

So, too, the legislature may see no value, but only a public disservice, to a news story bringing to public attention the datum that the state's official lottery (which state lottery, moreover, the state allows itself to advertise, as indeed most state lotteries do)\textsuperscript{66} offers a payout much inferior by far to any of the commercial casinos in the state.\textsuperscript{67} 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.\textsuperscript{68} But it is also quite beside the point. For though it may be true, one may with full confidence predict that the legislature may not on that account seek to prevent a newspaper from publishing just such information insofar as it is true. Nor may it seek to subject the newspaper to some penalty (e.g., some fine) for what it has presumed to do.\textsuperscript{70}

\textsuperscript{65} 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) ("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.").


\textsuperscript{67} Cf. Posadas, 478 U.S. at 353-54 (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.").

\textsuperscript{68} For, to be sure, it may at once result in a switch of consumer interest more toward casinos and away from the state lottery, the entire 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 "compelling" legislative concern).

\textsuperscript{69} Or, rather, may not successfully seek, for who knows what the legislature may try to do.

\textsuperscript{70} To be sure, the legislature, one may 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 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 mere 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). But see 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.
Nor is it obvious on what basis it should feel entitled to hope for any better result just because it "merely" forbids any casino (though not "any newspaper") to publish those differences such as they are or, indeed, to forbid it to publish any information whatever respecting its location, lawful services, and its ordinary business hours, such as they may be. For it would, now to quote Justice Rehnquist against himself, be "a strange constitutional doctrine" (a strange First Amendment doctrine) which would hold that it is up to the newspapers (governed by such interests as may varyingly motivate their publishers) 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.

To be sure, as we now turn toward some closure on this essay, insofar as a commercial enterprise offers a lawful service which, however, it also


72. Cf. Posadas, 478 U.S. at 346. It would . . . be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.

73. Consider merely the description of the case at hand regarding the "motives" of Thomas Jeffries as publisher: one part "altruistic" and public-spirited (i.e., he believes that 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 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 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, for example, 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 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 euche the credulous, i.e., "merely to make money" by "stimulating" a wholly "artificial" demand). "Altruism" (in the larger sense of the word) 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"). Cf C. Edwin Baker, Commercial Speech: A Problem in The Theory of Freedom, 62 IOWA L. REV. 1 (1976); Randall Bezanson, Institutional Speech, 80 IOWA L. REV. 735, 781-816 (1995).
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 expense\textsuperscript{74}, it is no doubt quite true that neither we or any legislature can have some sought-after assurance that people will make "good" choices ("good choices," of course, as we, or as some legislature, regard such "good" choices to be). While it, the activity, remains lawful\textsuperscript{75}, however, and within the boundaries that it is lawful, however, perhaps it is a fairer 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 the First Amendment, may not require the government to support any kind of commerce,\textsuperscript{76} or for that matter, even to support any particular kind of speech, but it firmly sets its countenance against regimes of government censorship to deny, or 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 would prefer they not so freely be allowed to know. So, at least, one may believe the First Amendment is better understood, indeed, so much as this in keeping with but the most ordinary understanding of freedom of speech, rather than anything peculiar, arcane or strained.\textsuperscript{77}

\textsuperscript{74} Merely in the same manner as any other producer or retailer may likewise do

\textsuperscript{75} 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.


\textsuperscript{77} See also Vincent Blasi, Milton's Areopagitica and the Modern First Amendment, YALE LAW SCHOOL OCCASIONAL PAPERS, Second Series, No. 1 (1995). Indeed, the Canadian Supreme Court has accepted this view of the matter, as well, 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 provides, and even in respect to commercial products of no notable distinction as such. See RJR-MacDonald Inc. v. Canada (Attorney General) [1995] 127 D.L.R. 4th 1 (aff'g judgment declaring void large portions of the Tobacco Products Control Act of 1988, 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, prohibited the marketing of derivative products displaying the trade marks of tobacco companies (exempting principally only use of such trade marks in identifying financial benefactors of various public interest programs, e.g., acknowledgments of sponsorship of "a cultural or sporting activity or
Moreover, even as others have suggested, including several from within the Court itself, neither Posadas or Central Hudson (so far as Central
Hudson figured as an alternative ground in Posadas) yields any convincing
reason for some other conclusion for one to reach. 78