The Supreme Court and Commercial Speech: New Words with an Old Message

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The constitutional history of commercial speech\(^1\) has been short but tortured. Only a decade ago, the Supreme Court granted commercial speech first amendment protection.\(^2\) Since then the Court has struggled to define the relative constitutional status of commercial speech. In conferring first amendment protection on commercial speech, the Court intimated that government had no regulatory interest in truthful expression related to lawful activity.\(^3\) Later, however, the Court found content control permissible, even if the speech was truthful and the underlying activity lawful, provided the regulation directly advanced a substantial state interest\(^4\) and minimally

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\(^{2}\) See Virginia Pharmacy, 425 U.S. at 770 (state law prohibiting the advertisement of prescription drug prices violated first amendment). The Court had previously held that commercial speech did not merit first amendment protection. See Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). For a discussion of Chrestensen, see infra notes 18-33 and accompanying text.

\(^{3}\) See Virginia Pharmacy, 425 U.S. at 771 n.24, 773.

burdened first amendment interests.\textsuperscript{5} Under that analytical formula, judicial scrutiny of regulation touching commercial speech, although elevated, was not strict.\textsuperscript{6}

Most recently, in \textit{Posadas de Puerto Rico Associates v. Tourism Co.},\textsuperscript{7} the Court further discounted the constitutional value of commercial speech. \textit{Posadas} concerned regulation restricting casino gambling advertisements directed at Puerto Rican residents but permitting such advertisements directed at tourists.\textsuperscript{8} Although the advertisements related to a lawful activity and were not false or misleading, the Court retreated to a deferential standard of review reminiscent of thinking associated with its abandoned view that commercial expression is unprotected.\textsuperscript{9} Reversion to such analysis mocks the constitutional display of contraceptives)); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 97 (1977) (holding first amendment prohibits municipality from banning "for sale" and "sold" signs on homes when town acted to prevent flight of white homeowners from racially integrated town).

\textsuperscript{5.} Central Hudson, 447 U.S. at 569-72. Despite concluding that commercial speech was constitutionally protected, the \textit{Virginia Pharmacy} Court justified a diminished first amendment status because such expression purportedly is hardier and more easily verifiable than other first amendment speech. 425 U.S. at 777 n.24. That rationale, however, may apply with equal force to other, fully protected forms of expression. See infra notes 44-49 and accompanying text.

\textsuperscript{6.} Courts normally use the strict scrutiny standard when reviewing a regulation that invades a fundamental right or intentionally creates a suspect classification. See J. NOWAK, R. ROTUNDA \& J. YOUNG, CONSTITUTIONAL LAW 531 (3d ed. 1986). Under strict scrutiny government action must be justified by a compelling state interest. Id. at 530. Genuinely strict scrutiny has been characterized as "strict in theory and fatal in fact." Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972). Opposite the strict scrutiny standard is the rational basis test, characterized by judicial deference to legislative judgment. J. NOWAK, R. ROTUNDA \& J. YOUNG, supra, at 530. Between these two poles lies an intermediate level of scrutiny which, since commercial speech was afforded first amendment status, generally has been used to review regulations touching commercial expression. \textit{Central Hudson}, 447 U.S. at 566, 573 (Blackmun, J., concurring). Intermediate review has been described as an ad hoc balancing process that enables each Justice to evaluate the importance of the government's interest and the substantiality of the relationship between legislative means and ends. J. NOWAK, R. ROTUNDA \& J. YOUNG, supra, at 670, 920.

\textsuperscript{7.} 106 S. Ct. 2968 (1986). For a discussion of \textit{Posadas}, see infra notes 63-89 and accompanying text.

\textsuperscript{8.} Id. at 2972.

\textsuperscript{9.} Traditional first amendment analysis requires the government to demonstrate not merely a speculative rational basis, but a real and substantial interest in the regulation. See id. at 2984 (Brennan, J., dissenting). By speculating that the legislature could have found casino gambling harmful to the public's health, safety, and welfare, however, the Court in \textit{Posadas} adopted a
status of commercial speech.\textsuperscript{10}

The devaluation of commercial speech over the last decade has not included any adequate refutation of the compelling rationales for first amendment protection. In affording first amendment protection to commercial speech eleven years ago, the Court recognized the value of the free flow of commercial information in contemporary society.\textsuperscript{11} The first amendment assumes that access to information facilitates personal autonomy in decision making because individuals are free to choose ideas from many, diverse sources.\textsuperscript{12} When the government authoritatively restricts speech, on the other hand, the public has less information and therefore fewer choices.\textsuperscript{13} As a result, the deferential standard reminiscent of rational basis review. \textit{Id.} at 2983 & n.3, 2984.

10. The \textit{Posadas} Court's scrutiny of the Puerto Rican legislation seems more akin to the review associated with other forms of speech that are excluded from the first amendment's ambit than with heightened scrutiny used when protected speech is implicated. The Court subjects unprotected speech, such as obscenity or fighting words, to categorical regulation. \textit{See} Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscenity is unprotected speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding that fighting words are unprotected speech). Courts need not even consider, therefore, whether a compelling, substantial, or even rational basis exists for regulating such speech. \textit{See} Roth, 354 U.S. at 485. While purporting to use a higher level of scrutiny, the Court in \textit{Posadas} actually seemed to apply a rational basis test to the Puerto Rican regulation. \textit{See} 106 S. Ct. at 2976-77; \textit{infra} notes 73-74, 77-81 and accompanying text. In practice such deference is not far removed from the level of review applied to unprotected speech. Regulation normally survives deferential rational basis scrutiny if the Court can construct any conceivable basis for its existence. \textit{See} Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955); International Ass'n of Machinists & Aerospace Workers v. National Mediation Bd., 425 F.2d 527, 540 (D.C. Cir. 1970). Used especially in assessing the constitutionality of economic regulation, rational basis review is so forgiving that since its adoption nearly a half century ago, only one challenged legislative act has succumbed to its application. \textit{See} Morey v. Doud, 354 U.S. 457, 469 (1957) (holding that law regulating issuance of money orders by all currency exchanges except one violated equal protection clause of fourteenth amendment). The Court later overruled even that singular exception to its deferential tendencies. \textit{See} City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976) (per curiam) (overruling \textit{Morey}).


12. \textit{See} Associated Press v. United States, 326 U.S. 1, 20 (1944). The Court noted that the first amendment assumes that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." \textit{Id.}

[t]he dissemination of news from as many different sources, and with as many different facets and colors as is possible . . . is closely akin to, if indeed it is not the same as, the interest protected by the First
first amendment favors autonomous rather than authoritative selection of information and assumes that intelligent decisions are more likely when the decision maker's access to information is at its greatest.\textsuperscript{14} By providing constitutional protection to commercial speech, the Court recognized society's interest in ensuring that private economic decisions are well informed.\textsuperscript{15} The Court underscored its protection of economic information by noting that commercial expression is as important for many people as political expression.\textsuperscript{16}

The Court's opinion in \textit{Posadas} undercuts these rationales. Insofar as the Court defers to legislative judgment, commercial speech does not rise much above its previous unprotected status. In addition, the Court intimated in \textit{Posadas} that the constitutional status of commercial speech is tied to the constitutional status of the underlying activity.\textsuperscript{17} That linkage suggests an even greater departure from traditional first amendment emphasis on autonomous rather than authoritative selection of information.

The \textit{Posadas} decision thus represents a perceptible and significant devaluation of commercial speech. The \textit{Posadas} Court reduced the protection of commercial speech to a level not seen since the era when commercial speech was excluded from the first amendment's ambit. This Article questions that analytical drift. Part I describes the elevation of commercial speech to constitutionally protected status and discusses subsequent limitations on that status. Part II examines \textit{Posadas} and demonstrates its resemblance to earlier decisions holding that commercial speech was unprotected. While offering a principled basis for distinguishing commercial expression from fully protected speech, Part III nevertheless recommends use of existing constitutional tools to require the least restrictive regulatory alternative that in turn would emphasize the marketplace remedy of competing speech.

\textsuperscript{14} \textit{Id.} The framers of the first amendment contemplated the possibility that people might be unable to evaluate the merits of conflicting arguments. \textit{See} First Nat'l Bank v. Bellotti, 435 U.S. 765, 791 & n.31, 792 (1978).

\textsuperscript{15} \textit{Id.} at 765.

\textsuperscript{16} \textit{Id.} at 763.

\textsuperscript{17} \textit{Id.} at 2968, 2979 (1986).
I. COMMERCIAL SPEECH: A CONVOLUTED CONSTITUTIONAL HISTORY

Until the 1970s the level of protection afforded commercial speech attracted little discussion because the Court placed economic expression outside the first amendment's ambit. In 1942 the Court determined in Valentine v. Chrestensen18 that the first amendment did not preclude governmental regulation of "purely commercial advertising."19 Chrestensen is generally regarded as a relic because the Court has since abandoned its holding and conferred first amendment protection on commercial speech.

The abandonment of Chrestensen began with three decisions during the 1970s that evinced movement toward a more solicitous view of commercial speech. In Capital Broadcasting Co. v. Mitchell,20 the Court upheld a congressional ban on the broadcasting of cigarette advertising.21 By so holding, the Court intimated that a legislature may restrict truthful advertising of legal activities it considers merely harmful.22 In Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,23 the Court upheld an ordinance prohibiting a newspaper's grouping of help-wanted advertisements by gender.24 The Court appeared to retreat, however, from Capital Broadcasting's expansive interpretation of the commercial speech doctrine by holding that states may prohibit the advertising of only illegal activities.25 That holding led to the corollary princi-

18. 316 U.S. 52 (1942).
19. Id. at 54.
21. Id. at 584. The diminished constitutional protection of the electronic media further disposed the Court to uphold the ban. See id. at 584, 586 (noting that "[t]he unique characteristics of electronic communication make it especially subject to regulation in the public interest").
22. See id. at 585-86. The Court has recently resurrected the Capital Broadcasting notion that a legislature may ban advertising merely because it considers the subject harmful. See Posadas de Puerto Rico Assocs. v. Tourism Co., 106 S. Ct. 2968, 2978-79 (1986). The Posadas Court's advertance to the Capital Broadcasting reasoning may suggest that the constitutional status of commercial speech is waning. See also infra notes 62-94 and accompanying text.
24. Id. at 391.
25. Id. at 388-89. Taking a much more expansive view, the Posadas Court said that if a legislature may prohibit an otherwise lawful activity, it may also ban advertisement of that activity even if the activity itself is not actually declared illegal. See Posadas, 106 S. Ct. at 2979.
pie, in *Bigelow v. Virginia*, that government may not prohibit touting of a lawful activity. The Court asserted in *Bigelow* that *Chrestensen* had merely affirmed a reasonable time, place, and manner restriction and had not immunized all regulation of commercial speech from constitutional challenge.

That revisionist formulation of the *Chrestensen* doctrine set the stage for rejection of the notion that commercial expression was beyond the first amendment’s pale. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court recognized the public’s interest in the unfettered flow of commercial speech and therefore granted it first amendment protection. By 1976 *Chrestensen*’s exclusion of commercial speech from the first amendment’s purview was officially discredited.

Still, a significant feature of *Chrestensen* has endured. The *Chrestensen* Court affirmed the conviction of a commercial exhibitor who, in violation of a municipal ordinance, distributed a handbill advertising the public display of a former Navy submarine on one side and protesting the city’s denial of docking facilities on the other. The Court classified the handbill in singular terms as commercial speech, even though it had both commercial and political content. The inclination toward singular classification has not diminished despite the loftier status

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27. *Id.* at 822. The Court in *Bigelow* invalidated a state statute banning advertisements that “encourage or prompt the procuring of abortion.” *Id.* at 812-13, 822. The Court found that the advertisements at issue went beyond proposing a commercial transaction and contained factual material of public interest. *Id.* at 822.
28. *Id.* at 819-20.
30. *Id.* at 763 (“As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”).
31. *Id.* at 770, 773 (conferring first amendment protection upon the free flow of truthful commercial information concerning lawful activity).
33. 316 U.S. at 52-53, 55 (refusing to “indulge nice appraisal based upon subtle distinctions”). The Court reacted to the inclusion of a political message in the leaflets as an attempt to circumvent the commercial speech doctrine. Previous ordinances that sought to regulate the distribution of political handbills had been invalidated. See *Schneider v. New Jersey*, 308 U.S. 147, 162, 164 (1939) (holding that three ordinances banning handbill distribution in streets and one ordinance establishing burdensome process to acquire permits violated first amendment). The Court in *Chrestensen*, however, viewed the political message accompanying the commercial advertisement as contrived and thus incidental and irrelevant to a determination of the constitutionality of the speech. See *Chrestensen*, 316 U.S. at 55.
since afforded commercial speech. Expression containing manifestly political dimensions, for example, has been characterized as commercial and therefore more vulnerable to regulation. Since Chrestensen the Court has classified speech according to its perception of the primary purpose of the expression. Equal or important but secondary dimensions of expression thus may be essentially disregarded.

Courts classify multidimensional speech as commercial if in their view it predominantly invites a commercial transaction or relates to the economic interest of the speaker and audience. Noneconomic functions of the speech thus may be ignored. An investment newsletter, for example, may reflect multiple dimensions of speech by propagating political as well as economic and financial information. Nevertheless, if the newsletter serves primarily to assess investment opportunities and attract clients, it may be classified as commercial speech. Expression, however, does not lend itself to such neat labels. Even if an investment newsletter is classified as commercial speech, the editorial process that produced the newsletter may merit utmost first amendment protection. The Court’s ability to devalue expression it may conveniently characterize as commercial is disquieting.


35. For example, although a state could not ban promotion of electricity consumption altogether, it could “require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future.” Central Hudson, 447 U.S. at 571. Such regulation is modeled after the fairness doctrine which governed broadcasting until the Court recently abandoned it. See F.C.C. Votes Down Fairness Doctrine in a 4-0 Decision, N.Y. Times, Aug. 5, 1987, at 1, col. 6.


37. See infra notes 42-43 and accompanying text.


40. Id. at 896-97, 902.

Both in *Chrestensen* and in modern analysis, the Court has demonstrated that classifying speech is a perilous if not futile exercise. Because categories of expression are often intertwined, the line-drawing process invites procrustean efforts to force multidimensional speech into one arbitrary category. Such a process results in insensitive distinctions and a diminished status for complex expression. Despite having abandoned the holding of *Chrestensen*, the Court has retained speech classification methodology as a troublesome force in contemporary commercial speech analysis.

Notwithstanding the explicit conferral of constitutional status on commercial speech, the Court in *Virginia Pharmacy* refused to afford commercial speech first amendment parity. Instead, the Court justified stricter regulation of otherwise protected commercial speech because it assumed commercial speech to be a harder breed of speech, the truth of which "may be more easily verifiable by its disseminator."

Reliance on hardiness and verifiability to justify disparate constitutional standing is unsatisfactory, however, because those rationales are subject to numerous exceptions. The hardiness rationale underestimates the resiliency of political speech. Campaign rhetoric, for example, is at least as hardy as commercial expression. Although the profit motive is often a persistent impetus for commercial speech, the desire to be elected is a potent motivating force for political expression. If first amendment status hinges on resiliency, campaign rhetoric

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42. *See Central Hudson*, 447 U.S. at 580-81 (Stevens, J., concurring); SEC *v. Lowe*, 725 F.2d at 907 (Brieant, J., dissenting).
43. In *Lowe v. SEC*, for example, an investment newsletter addressed commercial, political, social, and economic matters. 472 U.S. 181, 185 & n.7 (1985). The SEC urged the Court to classify the newsletter as commercial speech, while the publisher asked the Court to characterize it as noncommercial speech. *Id.* at 233-34 (White, J., concurring). The Court did not reach the classification issue. *Id.* at 208-09.
44. 425 U.S. at 771 n.24. The Court, referring to "commonsense differences" between commercial and other forms of speech, concluded "that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." *Id.*
45. The Court observed, for example, that government might insist on warnings, disclosure, or disclaimers, and that commercial speech might be more vulnerable to prior restraint. *Id.*
46. *Id.* at 772 n.24.
47. Political advertisements, like commercial advertisements, are delivered persistently and effectively to the individual. *See Branti v. Finkel*, 445 U.S. 507, 528 n.9 (1980) (Powell, J., dissenting) ("Television and radio enable well-financed candidates to go directly into the homes of voters far more effectively than even the most well-organized 'political machine.' ").
should be afforded diminished protection. The hardiness rationale thus fails to draw a satisfactory distinction between commercial and other types of speech. Moreover, even assuming commercial speech is more resilient than other types of expression, regulation might neutralize its hardiness by effectively deterring otherwise durable types of commercial speech.\footnote{48}

The second rationale, that commercial speech is more easily verifiable and therefore more easily regulated, is equally misguided. A false and misleading commercial advertisement is not necessarily more verifiable than a false and misleading political campaign promise. Promoters in either category can misrepresent the nature of their services. To the extent that either shortchanges the truth to obtain money or votes, the authentication problems are comparable.

Despite the weaknesses of the hardiness and verifiability rationales, the Court has relied on them to relegate commercial speech to a diminished first amendment status. Although the Court refused to allow a state to ban advertising by electric utilities, for example, it did so using an intermediate level of review.\footnote{49} Moreover, the Court noted that states could require advertisements to include information concerning relative efficiency and cost.\footnote{50} Such balancing of competing first amendment and regulatory interests\footnote{51} has yielded fluctuating, divergent results.\footnote{52} Devaluing commercial speech by labeling it

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\footnote{48}{Regulations that dictate the content of speech may enforce their requirements with penalties that destroy any resilient efforts to defy the regulation. The offer and sale of securities, for example, are conditioned on approval by the SEC of the content of offering materials. \textit{See} Securities Act of 1933 § 5(a), (c), 15 U.S.C. § 77e(a), (c) (1982) (prohibiting offer and sale of securities unless a registration statement has been filed). Until the editorial content of filing and promotional materials complies with official demands, the securities may not be offered or sold. \textit{See} T. Hazen, \textit{The Law of Securities Regulation} 67-69 (1985) (discussing “requirements of full disclosure and accuracy that can prevent a registration statement from becoming effective”).}

\footnote{49}{Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 566 (1980) (invalidating state regulation that banned all public utility advertising which promoted the use of electricity). Justice Blackmun, in his concurring opinion, explicitly characterized the Court’s review as an intermediate level of review. \textit{Id.} at 573.}

\footnote{50}{\textit{Id.} at 571.}

\footnote{51}{\textit{See} J. Nowak, R. Rotunda & J. Young, \textit{supra} note 6, at 820 (noting that “the Court . . . will engage in a series of \textit{ad hoc} decisions as to the permissible scope of regulation of commercial speech”).}

\footnote{52}{For example, balancing of first amendment and regulatory interests has led to divergent results in cases involving attorney advertising. In Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978), the Supreme Court held that the}
according to its dominant purpose might produce consistency, if carried far enough, but only if courts apply an even more deferential standard of review that regularly favors legislative judgment.

The constitutional recognition of commercial speech was accompanied by the limiting principle that commonsense differences exist between it and other forms of expression. Those differences, however, seem rooted more in some inexplicable common wisdom than in verifiable reality. The Court has

53. The Court, for example, has noted that trade names have a "strictly business" purpose and convey no real information. Friedman v. Rogers, 440 U.S. 1, 11 (1979) (finding that trade names are a "form of commercial speech that has no intrinsic meaning"). In adopting this deferential approach, however, the Friedman Court ignored the function of trade names in conveying information about the quality of the products and services offered. Id. at 22-23 (Blackmun, J., dissenting). The Court's view gives government more power to regulate commercial speech. See id. at 15.

54. The Court in Posadas de Puerto Rico Assocs. v. Tourism Co., for example, applied a deferential approach to uphold a ban on advertising of an activity that the legislature could have determined was harmful, even though the government had not proved it was harmful. 106 S. Ct. 2968, 2977 (1986). In dissenting Justice Brennan criticized the majority's deferential approach as an unwarranted departure from first amendment jurisprudence, which traditionally requires elevated review. See id. at 2984; supra note 9.

55. Ohralik, 436 U.S. at 455-56 (noting that although first amendment protection has been extended to commercial speech, the Court recognizes commercial speech is different from other forms of speech in ways that may limit its protection); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976) (noting that commercial speech is "more easily verifiable" and "more durable" than other forms of speech); supra note 44.

used purported attributes of commercial speech such as hardi-
ness and verifiability\textsuperscript{57} to insist on disclosure or disclaimers\textsuperscript{58} and to negate the traditional presumption against prior re-
straint.\textsuperscript{59} The differences between commercial and other forms of speech relied on to limit constitutional protection of com-
mercial speech are neither convincing nor satisfying.\textsuperscript{60} The Court's most recent statement on commercial speech augments those inadequacies with an even more troubling regulatory premise.

II. THE SUPREME COURT'S EMERGING VIEW OF
COMMERCIAL SPEECH: REHABILITATING
DISCREDITED DOCTRINE

The Supreme Court's most recent observations are remi-
niscent, at least in critical part, of the disregard for commercial speech reflected in \textit{Valentine v. Chrestensen}\textsuperscript{61} and its progeny. For the first time since the shelving of \textit{Chrestensen}, the Court, in \textit{Posadas de Puerto Rico Associates v. Tourism Co.}\textsuperscript{62} encouraged official restraint of truthful information regarding a lawful activity.\textsuperscript{63} The Court held that a legislature may ban ex-
pression concerning an activity it considers harmful, even if not made illegal, because "the greater power to completely ban ca-
sino gambling necessarily includes the lesser power to ban ad-
vertising of casino gambling."\textsuperscript{64}

\textsuperscript{57. See} \textit{Virginia Pharmacy}, 425 U.S. at 771 n.24; \textit{supra} text accompanying notes 46-47.
\textsuperscript{58. See} \textit{Virginia Pharmacy}, 425 U.S. at 771 n.24; \textit{supra} note 45.
\textsuperscript{59. See} \textit{Virginia Pharmacy}, 425 U.S. at 771 n.24.
\textsuperscript{60. See} \textit{supra} notes 46-49 and accompanying text.
\textsuperscript{61. 316 U.S. 52 (1942). For a description of \textit{Chrestensen}'s approach to com-
mercial speech, see \textit{supra} notes 18-33 and accompanying text.}
\textsuperscript{62. 106 S. Ct. 2968 (1986).}
\textsuperscript{63. \textit{Id.} at 2981 (Brennan, J., dissenting). The \textit{Posadas} approach to truthful information regarding a lawful activity reflects the disregard for commercial speech that preceded the \textit{Virginia Pharmacy} recognition of constitutional protection. See, e.g., Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 584 (D.D.C. 1971), \textit{aff'd mem. sub nom.} Capital Broadcasting Co. v. Acting Attor-
ney Gen., 405 U.S. 1000 (1972) (upholding a ban on cigarette advertising and suggesting legislature may restrict truthful advertising of legal, harmful activity); \textit{supra} notes 20-22 and accompanying text.}
\textsuperscript{64. \textit{Id.} at 2979. The \textit{Posadas} Court also suggested that it would be a "Pyrrhic victory for casino owners" to gain a first amendment right "only to thereby force the legislature into banning casino gambling by residents alto-
The *Posadas* opinion presented a new predicate for diminishing the constitutional security of commercial expression. In upholding a ban on advertisement of legal activity, the *Posadas* Court distinguished its holding from earlier decisions invalidating bans on contraceptive and abortion advertisements on the ground that abortion and the use of contraceptives were constitutionally protected but gambling was not. By making that distinction, the Court introduced the newly restrictive notion that the first amendment bars official abridgment of advertising only when the underlying activity is not constitutionally protected. Few products, services, or activities are without potential for harm. Many are not constitutionally protected. Measuring first amendment protection according to the constitutional status of the underlying activity, therefore, represents a check on legislative power that may prove illusory. In any event the Court has significantly departed from its earlier holding treating commercial speech differently only to the extent necessary to facilitate an unimpaired flow of truthful and legitimate information.

The *Posadas* Court also diluted the standard for judicial

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68. 106 S. Ct. at 2979.
69. The Court referred to the constitutionally protected liberty to use contraceptives or have an abortion as "a crucial distinction." *Id.*
70. The premise that first amendment protection of advertising depends on whether the underlying activity is constitutionally safeguarded would seem to enable government to prohibit not only advertising of liquor, cigarettes, chain saws, snowmobiles, and other harmful products, but also advertising with political dimensions, such as promotion of nuclear power. Because education is not a fundamental right, *see* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35-39 (1973), prohibition of advertising by schools that are unaccredited, for example, might be justified.
scrutiny of commercial speech. The Court professed loyalty to an elevated standard of review requiring that the regulation directly advance a substantial state interest and restrict speech no more than necessary.\textsuperscript{72} While purportedly applying this constitutional standard, the Court concluded that the legislature could decide which regulatory alternative would best serve its end.\textsuperscript{73}

The Court thus appeared to adopt a deferential posture toward legislative judgment in addition to overlooking less restrictive alternatives available to the commonwealth. If genuinely concerned with social harm from casino gambling, Puerto Rico could monitor casino operations to guard against infiltration by organized crime, aggressively enforce relevant criminal statutes, and promulgate competing speech calculated to discourage participation by residents.\textsuperscript{74} The availability of less restrictive alternatives led the Court just a few years earlier to conclude that government could not completely suppress commercial speech even if acting to further "an imperative national goal."\textsuperscript{75} The \textit{Posadas} Court's refusal to insist on less restrictive alternatives thus represents a step backward in commercial speech doctrine.

The deference to legislative judgment apparent in \textit{Posadas} seems closer in spirit to \textit{Chrestensen} and its progeny than to later decisions that discredited them.\textsuperscript{76} During the \textit{Chrestensen} era, commercial speech was not constitutionally protected. Absent a fundamental constitutional interest, the Court normally applied a rational basis test that deferred to legislative policy.\textsuperscript{77}

\begin{footnotes}
\item[72.] \textit{Posadas}, 106 S. Ct. at 2976; see \textit{Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n}, 447 U.S. 557, 571 (1980). In determining that reducing the demand for gambling would promote the commonwealth's valid interests in protecting its citizens from crime and the disruption of moral and cultural patterns, 106 S. Ct. at 2977, the Court applied a diminished standard of review.
\item[73.] \textit{Posadas}, 106 S. Ct. at 2977.
\item[74.] See id. at 2985 (Brennan, J., dissenting). Requiring dissemination of information discouraging casino gambling would have been a less restrictive alternative similar to the alternative required in \textit{Central Hudson}, 447 U.S. at 570 (requiring that advertisements include information about relative efficiency and expense of offered service). The \textit{Posadas} Court did not require such an alternative, even though it purportedly relied on \textit{Central Hudson}, which stands for the first amendment requirement of less restrictive alternatives. See \textit{Posadas}, 106 S. Ct. at 2976 (citing \textit{Central Hudson}, 447 U.S. at 566).
\item[75.] \textit{Central Hudson}, 447 U.S. at 570-71 (public interest in energy conservation insufficient to ban advertising by electric utility because less restrictive alternatives available).
\item[76.] See supra notes 18-31 and accompanying text.
\item[77.] See supra note 10.
\end{footnotes}
That approach contrasts with the intermediate level of review used in later commercial speech cases in which the Court demanded proof of a substantial state interest.\footnote{78} In affirming the ban on casino gambling advertising, and particularly by concluding that Puerto Rico could have found the underlying activity harmful to the citizenry and thus prohibited it,\footnote{79} the Posadas Court seems to have retreated to a rational basis level of review. Speculation concerning legislative purpose denotes use of the rational basis test.\footnote{80} The Court’s reliance upon its own conjecture and surmise is especially glaring, because the Puerto Rican legislature expressed no concern that the underlying activity would harm local citizens.\footnote{81}

The Court’s present posture toward commercial speech, as expressed in Posadas, deviates from first amendment standards that are designed to prevent “highly paternalistic” intrusions by the state which would limit information available to the public.\footnote{82} Until Posadas the Court was unwilling to tolerate laws reflecting government concern that the public might act irrationally on truthful information concerning a lawful activity.\footnote{83} First amendment jurisprudence traditionally holds the public

\footnote{78. See, e.g., Zauderer v. Office of Disciplinary Council, 471 U.S. 626, 638 (1985) (finding state interests insufficient to justify prophylactic rule banning use of legal advice in advertisements by attorneys); In re R.M.J., 455 U.S. 191, 205-06 (1982) (finding state interests insufficient to reprimand attorney for truthful advertisements that deviated from precise listing of areas of practice allowed by state); Central Hudson, 447 U.S. at 566 (holding that although state had substantial interest in conserving energy and reducing electric rates, banning all utility advertisements did not advance those interests); Friedman v. Rogers, 440 U.S. 1, 15 (1979) (holding that state had substantial interest in preventing misleading practices tending to arise from trade names).

79. Posadas de Puerto Rico Assocs. v. Tourism Co., 106 S. Ct. 2968, 2979 (1986). The majority speculated on legislative concerns about gambling, even though the legislature legalized gambling for tourists and residents. See id. at 2983 (Brennan, J., dissenting). The “Statement of Motives” prefacing the challenged gambling law asserted only an interest in fostering tourism and creating a revenue source for the state. Id. at 2983 n.2 (citing Games of Chance Act of 1948, P.R. LAWS ANN. tit. 15, § 71 (1972)). No suggestion was made in the “Statement of Motives” that gambling by residents was undesirable or would subvert the stated purposes of the Act. See P.R. LAWS ANN. tit. 15, § 71.

80. See Posadas, 106 S. Ct. at 2984 (Brennan, J., dissenting).

81. See id. at 2983 & n.2; supra note 80.


83. See Posadas, 106 S. Ct. at 2981 (Brennan, J., dissenting). See also Bellotti, 435 U.S. at 791-92 n.31 (“Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves.”); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 95-97 (1977) (holding ordinance prohibiting posting of “For Sale” signs unconstitutional, even though municipality acted to prevent perceived flight of white homeowners from racially integrated community).}
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responsible for evaluating information\textsuperscript{84} and for making decisions by means of autonomous rather than authoritative selection.\textsuperscript{85} \textit{Virginia Pharmacy} integrated that principle into modern commercial speech doctrine.\textsuperscript{86} The Court later recognized that the first amendment accepts the risk that the public might exercise poor judgment or even be deceived.\textsuperscript{87} Nevertheless, the holding in \textit{Posadas} allows states to regulate commercial speech to protect the public from itself.\textsuperscript{88} The Court thus has constructed a premise for undoing many of the constitutional gains made for commercial speech during the past decade.

Experience suggests that bans on commercial speech may harm not only constitutional but regulatory interests. In 1967 the Federal Communications Commission, for example, ordered broadcasters to balance the airing of cigarette advertisements with competing programming focusing on the dangers of smoking.\textsuperscript{89} Most broadcast licensees complied with the requirement by airing messages that graphically delineated the risks of smoking.\textsuperscript{90} The agency’s competing speech requirement facilitated autonomous decision making\textsuperscript{91} and, because of the “devastating effect [of antismoking messages] on cigarette con-

\textsuperscript{84} See, e.g., \textit{Bellotti}, 435 U.S. at 791 (“[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.”).

\textsuperscript{85} See supra notes 11-15 and accompanying text. The Court in \textit{Cohen v. California} noted that “[t]he constitutional right of free expression . . . is designed and intended to . . . [place] the decision as to what views shall be voiced largely into the hands of each of us.” 403 U.S. 15, 24 (1971) (overturning conviction for breach of the peace based on defendant’s wearing a jacket, bearing an expletive, in a courthouse).

\textsuperscript{86} In recognizing commercial speech as a constitutionally protected form of expression, the Court in \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council} observed that the first amendment contemplates that “people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them.” 425 U.S. 748, 770 (1976).

\textsuperscript{87} \textit{Bellotti}, 435 U.S. at 792 (“If there be any danger that the people cannot evaluate the information and arguments advanced [to them], it is a danger contemplated by the Framers of the First Amendment.”).

\textsuperscript{88} See supra notes 63-72 and accompanying text.


\textsuperscript{90} Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 588 (D.D.C. 1971) (Wright, J., dissenting) (noting that the nature of antismoking advertisements had a “devastating effect on cigarette consumption”).

\textsuperscript{91} See supra notes 11-15 and accompanying text.
sumption, also furthered regulatory interests. The less restrictive alternative to a complete ban was so successful that the tobacco industry itself supported a ban on radio and television advertising of its product. The cigarette advertising episode, therefore, suggests that the Court's new posture not only devalues first amendment rights but also undercuts regulatory interests.

III. DIFFERENTIATING COMMERCIAL SPEECH: PRINCIPLED BUT PROBLEMATICAL DISTINCTIONS

The Court has observed that the commonsense differences between commercial speech and other forms of expression justify diminished first amendment protection of commercial speech. The curtailed first amendment status of commercial speech until recently was based on the assumptions that economic expression is harder and more verifiable than other speech. The Court has since justified limited scrutiny of commercial speech regulation because of the government's broader power to control the underlying activity. At least the hardiness and verifiability rationales are based on the Court's instincts regarding differences in the forms of expression rather than on verifiable evidence. If commercial speech is entitled to first amendment security, limits placed upon that protection should rest upon more satisfactory grounds than the Court so far has articulated.

The Court has constructed a first amendment value system largely reflecting Alexander Meiklejohn's theory that political expression is most deserving of constitutional protection.

93. "With the cigarette smoking controversy removed from the air, the decline in cigarette smoking was abruptly halted . . . Whereas the . . . require[ment] that both sides of the controversy [be aired] significantly depressed cigarette sales, . . . ban[ning] the controversy from the [air] had the reverse effect." Id. at 589. The advertising ban thus constituted a "legislative coup for the tobacco industry." Id.
94. See supra notes 56-60 and accompanying text.
95. See supra notes 45-47 and accompanying text.
96. See supra notes 63-71 and accompanying text.
97. See supra notes 45-49, 56-61 and accompanying text.
98. See A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 73-75 (1960) [hereinafter POLITICAL FREEDOM]. According to Meiklejohn, the purpose of the first amendment is "to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal." Id. at 75. See also Mieklejohn, The First Amendment is an Absolute,
Placing speech relating to self-government at the top of the first amendment hierarchy is consistent with the importance that the Court places on personal and property rights. Modern constitutional analysis employs a deferential standard of review to legislation touching commercial interests while reserving more exacting scrutiny for legislation affecting individual rights.

If a distinction between commercial and other forms of speech is desired, therefore, first amendment theory tied to general constitutional jurisprudence affords one. Commercial speech might be differentiated because, unlike political expression, it generally pertains less directly to self-government and is associated with matters evoking less constitutional concern. That basis for distinction might require de-emphasis of the Court's observation that for many people commercial speech may be more valuable than political expression. The Court could probably discount that notion readily, however, because it is already apparent that practical value does not necessarily translate into constitutional value.

Another basis for differentiating commercial from political

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100. During the early part of this century, the Court used a form of judicial review known as Lochnerism to strike down federal and state social and economic regulation. See Lochner v. New York, 198 U.S. 45 (1905). In Lochner and its progeny, the Court found that such legislation violated the liberty component of the fourteenth amendment's due process clause. See, e.g., id. at 53.


103. The Court affords commercial speech less protection than political speech even if the former may have greater practical value. See supra notes 16, 44 and accompanying text.
expression, at least to the extent either is false, is that harm attributable to commercial speech may be less avoidable and more damaging than harm attributable to political expression. A commercial message is more likely to be delivered face-to-face than a political message. Unlike a political lie, which competing candidates or media scrutiny may flesh out, a deceptive sales pitch may be less public and therefore less subject to competing expression.

Injury from a false commercial advertisement affecting an individual decision to purchase, moreover, generally will be more direct than harm from a false political promise affecting group decisions to vote. As with any rule, however, exceptions exist. A false campaign promise not to engage in foreign hostilities or raise taxes may translate into direct harm for persons who relied on the representation and voted for the candidate. Unlike harm resulting from individual reliance on a commercial misrepresentation, however, the injury resulting from a false campaign promise stems from the combined voting preference of other citizens. Those individuals may have been influenced by factors other than the misrepresentation. In addition, public reliance on the false statement may have been insufficient to affect election results. Because the collective action of voting is subject to more diverse influences than an individual decision to purchase, the linkage between cause and harm is weaker in the political than the commercial context.

Political speech also may differ from commercial speech because false political statements, as opposed to untrue commercial statements, may have more value in informed decision making. In propounding his developmental theory of democracy, John Stuart Mill noted that competition among ideas, whether true or false, strengthened truth, compelled the continuous reevaluation of ideas, and facilitated principles based on reason rather than prejudice. Even false political statements

104. See generally Lively, The Supreme Court's Emerging Vision of False Speech: A First Amendment Blind Spot, 38 RUTGERS L. REV. 479, 494-97 (1986) (arguing that false or excessive rhetoric in a political campaign may strengthen political process by capturing attention and engendering discussion).

105. See C. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY 51 (1977) (summarizing Mill's model of a society of "exerters and developers of their human capacities"). John Stuart Mill theorized that democracy would "make people more active, more energetic; it would advance them in intellect, in virtue, and in practical activity and efficiency." Id. (describing Mill's version of democracy).

may have inherent value in promoting informed decision making. Commercial speech seems less likely to facilitate any of those ends. Requiring more accuracy in commercial expression thus might be less offensive to the first amendment value placed on competition among ideas in a democracy.

The existence of a more principled basis for distinguishing the value of speech forms, however, does not necessarily merit its employment. A theoretical premise that more satisfactorily measures comparable worth of speech does not, for example, eliminate the treacheries of labeling speech. In addition to complicating or preventing analysis of the worth of speech in its context, singular labeling overlooks the multidimensional nature of much speech. Political fundraising, for instance, would remain susceptible to denomination as political or commercial expression.

The dangers of an arbitrary or singular labeling process are enhanced by the Court's inclination to establish a hierarchy of speech rights reflecting its perception of the social utility of expression. That disposition makes first amendment protection largely a function of the majority's first amendment dogma. The Court's decision in Posadas, for example, is a triumph for

107. See Lively, supra note 105, at 494-97.
108. But see id. at 492-93 (noting that the banking system's integrity may depend on false statements that a bank is sound and will remain in business).
110. See supra notes 33-43 and accompanying text.
111. See, e.g., Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 641-42 (1980) (Rehnquist, J., dissenting). In Schaumburg the Court invalidated an ordinance banning door-to-door solicitation by charitable organizations that did not use at least 75% of their receipts for charitable purposes. Id. at 636-38. The Court distinguished charitable solicitation from purely commercial speech because such solicitation "does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services." Id. at 636. Justice Rehnquist warned that the decision would require courts to make impossible decisions regarding what is and is not of public concern. Id. at 641-42.

In addition, official lines drawn between political and commercial speech are as subject to gerrymandering as those between political and indecent speech. The Court, for example, classified a social satire as indecent speech and thus subjected it to stricter regulation. See FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (upholding power of FCC to regulate radio broadcast that is indecent but not obscene).

112. The Court's preference for one value system over another defines the contours of first amendment rights. For example, in reaffirming the validity of fairness regulation in broadcasting but denying a public right of access to radio and television, the Court predicated its decision on society's interest in informed decision making. See CBS v. Democratic Nat'l Comm., 412 U.S. 94, 122 (1973) (quoting Political Freedom, supra note 99, at 26). A preference
Chief Justice Rehnquist’s previously rejected views that if commercial speech merits any constitutional protection, the standard of judicial review should be minimal. Imposing a rigid value system on first amendment analysis, however, endangers diversity interests traditionally associated with the first amendment. An exclusive labeling process forces some expression into the category of commercial speech even though it shapes a person’s view of the world and thus contributes to the collective knowledge from which decisions are made. Even the value of a patently commercial appeal may depend on a person’s perspective. Experience suggests that the Court should be wary of reflexively using seemingly commonsense or convenient categorical distinctions that may be subjectively or insensitively drawn.

Rather than persisting with overly simplistic categorical line drawing, the Court should craft standards that give due regard to both first amendment and regulatory interests. That objective can be facilitated with existing constitutional tools. Risk assumption models premised on opportunity for response, for example, have demonstrated utility in various speech contexts. Imminence, likelihood, and irreparability of harm, tied to activity that itself is unlawful, have been appropriate focal

for individual self-fulfillment presumably would have led to a result in favor of access.

113. See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 783-84 (1976) (noting that public interest in the free flow of commercial information is a concern of the state legislature and not a constitutional concern).


115. Television commercials in France, for example, are valued for artistic reasons. Consequently, a significant segment of the audience values them more highly than the programming that they sponsor. Smart, French Commercials—Something to Savor, Even in Theaters and a Museum, Christian Sci. Monitor, May 13, 1985, at 1, col. 1.

116. See In re Primus, 436 U.S. 412, 438 n.32 (1978) (noting that the line between commercial and other forms of speech “will not always be easy to draw” and may be “based in part on the motive of the speaker and the character of the expressive activity”).

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The competing interests in cases concerning commercial speech are amenable to like evaluation. Instead of employing misplaced notions of durability, verifiability, or power to regulate an underlying activity, a more constitutionally sensitive test should consider the opportunity to counter false, misleading, or harmful expression. Regulation should be prohibited if competitors, critics, or government are available to present a contrasting viewpoint. If the Puerto Rican legislature were truly concerned about adverse effects of gambling on local citizens, for example, the Court could have insisted that the legislature facilitate competing speech rather than ban expression. Only if a timely response was impossible would regulatory action be appropriate. Even then, any government action would have to consider less restrictive alternatives to prohibition.

CONCLUSION

Commercial speech has never received the same degree of first amendment protection granted other forms of protected speech. Although the Supreme Court eventually recognized the public’s interest in commercial information, the Court has qualified the constitutional protection afforded such expression pursuant to rationales that are unconvincing. The Court’s subsequent devaluation of commercial speech in \textit{Posadas de Puerto Rico Associates v. Tourism Co.}, moreover, seems a regression toward an era when commercial speech was excluded entirely from the first amendment’s ambit.

To minimize the dangers inherent in line drawing and avoid ascribing a singular label to expression that may possess multiple dimensions, the Court should refrain from translating perceived practical differences between commercial and political speech into constitutional distinctions. Consistent with traditional first amendment analysis, regulation should be permitted only if less restrictive alternatives, including competitive speech, are not workable. Such thinking is more consistent with particularized scrutiny of speech value than with overbroad categorical assumptions of worth. It also recognizes that

\textsuperscript{118} See \textit{Ohralik v. Ohio State Bar Ass’n}, 436 U.S. 447, 457 n.13 (1978) (noting that the “immediacy of particular communication and the imminence of harm . . . have made certain communications less protected than others”).
the pursuit of state concerns can proceed coextensively with, rather than at the expense of, the protection of first amendment interests.