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SYMPOSIUM: UNIVERSAL JURISDICTION: MYTHS, REALITIES, AND PROSPECTS: COMMENT: Greater New Orleans Broadcasting Association v. United States: Broadcasters Have Lady Luck, or at least the First Amendment, on their Side

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SUMMARY:

... In addition to the proliferation of lotteries, "casino gambling is one of the nation's fastest growing industries with more than 175 million household visits to casinos annually. ... The petitioners in this case, a group of Louisiana broadcasters who operate radio and television stations in New Orleans, were seeking to broadcast advertisements for casino gambling, an activity which is legal in Louisiana. ... Because Congress is now encouraging tribal casino gambling, the government would have to prove an even narrower correlation that of compulsive gambling and advertisements for non-tribal casinos. ... These are: (1) reducing the social costs of casino gambling, including compulsive gambling; and (2) "supporting the policy of [non-casino] states, as well as not interfering with the policy of states that permit casinos. ... " As for an interest in reducing the social costs of casino gambling, the government would have to introduce evidence indicating the ban on advertising would play a significant role in reducing compulsive gambling. ... All of the above would be reasonable alternatives to restricting commercial speech, hence there can be no "reasonable fit" between the government's goal and its means to achieve it. ... Gambling Advertisements and the Internet ...

TEXT-1:

[*471]

I. Introduction

Forty-eight of the fifty states have some form of legalized gambling. n1 In 1997, these states spent a collective \$378 million on advertising for government-sponsored lotteries alone. n2 In addition to the proliferation of lotteries, "casino gambling is one of the nation's fastest growing industries with more than 175 million household visits to casinos annually." n3 As Justice White once said: "While lotteries have existed in this country since its founding, states have long viewed them as a hazard to their citizens and to the public interest Congress has, since the early nineteenth century, sought to assist the states in controlling lotteries." n4 [*472]

In 1934, Congress passed the Communications Act n5 to prohibit radio and television broadcasts of lottery information to households in an effort to minimize an activity that was associated with many social ills. n6 Subsequently, states began to rely on revenue generated from lotteries to fund government programs. n7 Likewise, Native American tribes started using gambling as a means to raise public revenue. n8 As a result, Congress enacted several statutes curtailing the advertising prohibition. n9

Following Congress' lead, the United States Supreme Court, in *Greater New Orleans Broadcasting Ass'n v. United States*, n10 found *18 U.S.C. § 1304* unconstitutional as applied to broadcasters in states where gambling is legal, which has further chipped away the prohibitions on the advertising of lottery and casino gambling. n11 Although the Supreme Court has repeatedly said that Congress has a substantial interest in protecting states' rights to choose whether to advocate or prohibit gambling, n12 it is unlikely states will be able to restrict gambling advertisements when other alternatives are available. n13 The Court also found that the inconsistencies in the statutory framework of § 1304 were in direct conflict with the government's asserted interests, and therefore the statute must be unconstitutional with respect to the broadcasters in this case. n14 However, the Court alluded to a different outcome had the government been careful to accommodate the

interests of states where gambling is legal. n15

This Comment contends that if the same analysis used in *Greater New Orleans Broadcasting* were applied to a situation involving the broadcast of gambling information by a company licensed to broadcast in a nonlottery state, the Court should find the ban to be unconstitutional. n16 In [*473] other words, if § 1304 is unconstitutional as applied to broadcasters in Louisiana, where gambling is legal, it must also be unconstitutional as applied to any other state, regardless of whether or not gambling is legal in that state.

Part II.A of this article will discuss the background surrounding *18 U.S.C. § 1304*, the federal statute which prohibits the broadcasting of lottery advertisements, and the one on which *Greater New Orleans Broadcasting* was based. n17 Congress has created some exceptions to the § 1304 advertising ban, covering advertisements for state run lotteries, Native American-sponsored casinos, and non-profit charities. The background surrounding these exemptions will be discussed in Part II.B. n18 Part II.C briefly reviews the relevant aspects of the First Amendment of the United States Constitution, as well as the level of protection afforded commercial speech under the Supreme Court's so-called Central Hudson test. n19 Part II.D discusses *Greater New Orleans Broadcasting*, including both the facts of the case and the Court's reasons for striking down *18 U.S.C. § 1304* as it applied to the broadcasters in that case. n20 Part III.A discusses the impact of *Greater New Orleans Broadcasting* on states where gambling is illegal. n21 Part III.B explains what constitutes lawful conduct in terms of First Amendment analysis, n22 while Part III.C applies Central Hudson to the facts of *Edge Broadcasting* in light of the Court's decision in *Greater New Orleans Broadcasting*. n23 Part III.D explores and rejects the possibility of a "vice exception" to the Central Hudson test. n24 Part III.E discusses the possibility of state regulations on the broadcasting of casino advertisements in the absence of an enforceable federal statute. n25 Part III.E also draws some comparisons between radio and television broadcasting and advertising via the Internet. n26 Part IV provides some policy reasons for allowing casinos to advertise in all states. n27 Part V concludes that § 1304 should be found unconstitutional regardless of whether gambling is legal in each state, and states seeking to control gambling within their borders will have to do so by utilizing non-speech related alternatives. n28 [*474]

II. Background

A. History of *18 U.S.C. § 1304*

In 1934, Congress enacted the Communications Act. n29 This is a criminal statute which prohibits the broadcasting of any advertisement concerning "any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme." n30 The idea behind this statute dates back to the early nineteenth century, when postal restrictions were put in place with respect to state lotteries. n31 At that time, the Louisiana Lottery had taken hold of the nation and was deemed to bring with it many social ills and illegal activity. n32 In an effort to eliminate this lottery and its negative effects, Congress used its Commerce Clause n33 power and prohibited the transport of lottery information in both interstate and foreign commerce. n34 After the invention of the radio, Congress extended the advertising prohibition to that medium for two reasons: "(1) to promote consistency with the postal prohibitions; and (2) to subject broadcasters to the same prohibitions as those in print media so that broadcasters did not enjoy an unfair advertising advantage over newspapers." n35

While an argument can be made that it was not Congress' intention to include casino gambling in § 1304, n36 the courts generally interpret casino [*475] gambling as being included within the scope of the restriction in this statute. n37

B. Exceptions to the Broadcasting Ban: *18 U.S.C. § 1307* and *25 U.S.C. § 2720*

Since 1934, Congress has narrowed the scope of § 1304 by enacting numerous exceptions to the advertising ban, including not-for-profit fishing contests, n38 state-run lotteries if broadcast in a "lottery" state, n39 and Native American-sponsored casinos and lotteries. n40 The Indian Gaming Regulatory Act of 1988 authorized tribes to conduct certain forms of gambling pursuant to tribal-state compacts. n41 It also exempted any gaming conducted by Indian tribes from the postal and transportation restrictions found in *18 U.S.C. §§ 1301-1302*, as well as the broadcasting ban in § 1304. n42 This was done in an effort to advance "tribal economic development." n43 [*476]

By 1975, states began operating lotteries in an effort to raise money for government programs. n44 In an attempt to counter potential prosecution of these states, Congress enacted § 1307, which exempted state-run lotteries from restrictions on advertisements in states that sponsored such lotteries. n45 In 1988, Congress passed the Charity Games Advertising Clarification Act (Charity Games Act), n46 which further exempted from § 1304 broadcasts that advertise lotteries for charitable and governmental organizations, as well as "promotional activity by a commercial organization . . . [that

is] clearly occasional and ancillary to the primary business of that organization." n47 As this Comment argues, these exceptions collectively are what undermine § 1304. n48

C. Commercial Speech and the First Amendment

Commercial speech has historically been treated differently from political speech for the purposes of the First Amendment. n49 Commercial speech has been afforded less First Amendment protection based on the rationale that "it is not essential to the maintenance of a legitimate, viable democracy and an informed, active public," and that it is "capable of objective truth, whereas political speech is ripe with alternative, subjective views." n50 However, technology has made advertising prevalent in our society, and as a result, people tend to rely on these advertisements to obtain important information about the market. n51 This increasing [*477] reliance on commercial speech n52 has in turn prompted an interest in consumer protection by Congress. n53 Prior to *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, n54 commercial speech was historically not given First Amendment protection at all. n55 The Supreme Court left it in the hands of Congress to determine the extent to which commercial advertising should be regulated. n56

Although commercial speech has now been given some level of First Amendment protection, there has been some recent disagreement among members of the Supreme Court as to the degree of that protection. n57 In any event, "the Central Hudson test remains the only conclusive test used to determine whether [a specific] regulation of commercial speech is constitutional." n58 This balancing test provides an analytical framework for [*478] courts to use when reviewing statutory restrictions on speech that are intended to promote social policies. n59

The Court in *Central Hudson* set up a four-part test for First Amendment analysis of commercial speech. n60 In order for commercial speech to receive any First Amendment protection, the communication is required to be about a lawful activity and cannot be misleading. n61 If this is so, the government must then assert a substantial interest in favor of the speech restriction. n62 The third prong requires that the restriction directly and materially advance the government's interest. n63 The final prong requires that the restriction be no more extensive than necessary to achieve the government's asserted interests. n64 If each of these elements has been met, the restriction would not violate the First Amendment. n65 While it is seldom a problem to survive the initial prongs of *Central Hudson*, the challenge comes in passing the third and fourth prongs, where the courts tend to vary in their application. n66 It is this four-part analysis that the Court used in *Greater New Orleans Broadcasting*.

D. *Greater New Orleans Broadcasting Association v. United States*

1. Facts and Procedure

The petitioners in this case, a group of Louisiana broadcasters who operate radio and television stations in New Orleans, were seeking to [*479] broadcast advertisements for casino gambling, an activity which is legal in Louisiana. n67 Fearing sanctions from the Federal Communications Commission (FCC), n68 they brought an action in federal district court, seeking both a declaratory judgment that § 1304 was unconstitutional as applied to them, and an injunction to prevent its enforcement. n69 The court found in favor of the government, n70 and the broadcasters appealed. On appeal, the Court of Appeals for the Fifth Circuit affirmed. n71 While a writ of [*480] certiorari was pending, n72 the Supreme Court decided *44 Liquormart, Inc. v. Rhode Island*, n73 and remanded *Greater New Orleans Broadcasting* to the Court of Appeals. On appeal, the Fifth Circuit affirmed its prior decision, finding the statute constitutional as applied to the petitioners, n74 and the ruling in *44 Liquormart* to have no impact on the result in this case. n75 The case again came to the Supreme Court upon a writ of certiorari, at which point the Fifth Circuit's decision was overturned and *18 U.S.C. § 1304* was found unconstitutional as applied to the Louisiana broadcasters. n76

2. Holding and Reasoning

The United States Supreme Court held that *18 U.S.C. § 1304* "may not be applied to advertisements of private casino gambling . . . broadcast by radio or television stations located in [a state] . . . where such gambling is legal." n77 Finding "no need to break new ground," n78 the Court applied the *Central Hudson* test for commercial speech. n79 The Court found the speech to be truthful communication regarding legal gambling in Louisiana. n80 [*481] Therefore, the communication should receive at least some First Amendment protection. n81 The government presented two interests that it claimed were "substantial" enough to warrant restricting or prohibiting the speech in question. n82 These interests were "(1) reducing the social costs associated with 'gambling' or 'casino gambling,' and (2) assisting states that 'restrict gambling' or 'prohibit casino gambling' within their own borders." n83 The Court found both of these interests to be substantial, n84 but noted that due to the economic benefits of casino gambling, n85 Congress has made various exceptions to the broadcasting ban

in § 1304 despite any associated social ills. n86 As a result, the national policy regarding casino gambling has become one of "balancing the interests of lottery and nonlottery states." n87

Next, the Court considered whether the statute "directly and materially advanced the asserted governmental interest" as required by prong three of the Central Hudson test. n88 The Court did not discuss the application of this prong in any depth, as it is so interrelated with the fourth prong. n89 In order to satisfy the fourth prong of the test, the government must prove a "reasonable fit" between the restriction on speech and the asserted [*482] interest. n90 As to the government's first asserted interest, while the Court acknowledged the possibility of some impact on the demand for gambling, the government simply did not prove the correlation between casino advertising and compulsive gambling. n91 Because Congress is now encouraging tribal casino gambling, n92 the government would have to prove an even narrower correlation than that of compulsive gambling and advertisements for non-tribal casinos. n93 It did not meet these standards. n94

The government's second asserted interest was equally unconvincing. n95 "[There was no] reasonable accommodation of competing state and private interests," n96 by Congress when they enacted this statute. n97 The government was encouraging speech which caused the same social harms they sought to prevent, n98 while prohibiting speech which would arguably not be harmful. n99

The Court found the restriction as applied to the petitioners would fail, regardless of any lack of evidence by the government to prove that the restriction directly and materially furthered their interests n100 because "the [*483] flaw in the Government's case was more fundamental." n101 Relying on *Rubin v. Coors Brewing Co.*, n102 the Court was required to view the statutory scheme in its entirety to determine its overall rationality n103 and it found that there were too many exemptions to § 1304 for it to succeed in its purpose. n104 These exemptions included advertisements for tribal casino gambling, state-run lotteries, as well as various other non-profit gaming activities. n105 Furthermore, the FCC's application of the statute appears to be contrary to its proffered interests. n106

The government attempted to justify the exemptions for tribal casino advertising by asserting a separate interest in "protecting the welfare of Native Americans." n107 But this was not enough to justify disparate First Amendment treatment for tribal and non-tribal casino broadcasters. n108 Hence, the government did not "overcome the presumption that the speaker and the audience . . . should be left to assess the value of accurate [*484] and nonmisleading information about lawful conduct." n109 The statute was therefore unconstitutional as applied to the broadcasters in this case. n110

3. Concurring Opinions

In a concurring opinion, Chief Justice Rehnquist stated that "were Congress to undertake substantive regulation of the gambling industry," n111 rather than only banning the speech associated with it, a statute like *18 U.S.C. § 1304* might survive First Amendment scrutiny. Justice Thomas also wrote a concurring opinion in which he reiterated the views he first stated in *44 Liquormart*. n112 "In cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," n113 *Central Hudson* is inapplicable. n114 Justice Thomas asserted that the government's interest is "per se illegitimate," and violative of the First Amendment. n115

How the *Greater New Orleans Broadcasting* case will impact the First Amendment rights of broadcasters in states where gambling is illegal has yet to be addressed by the Court.

III. Analysis

A. Impact of *Greater New Orleans Broadcasting Association on the Broadcasting of Casino Advertising in States Where Gambling is Illegal.*

In *Greater New Orleans Broadcasting Ass'n v. United States*, n116 the Supreme Court decided only the issue of the advertising of casino [*485] gambling in a state where such gambling is legal. n117 What is the effect of this case on broadcasters in states where gambling is illegal? Dictum in the case implies that had the government accommodated the rights of speakers in states that have legalized gambling, the case may have turned out differently. n118 While this issue remains open, it seems unlikely that *18 U.S.C. § 1304* will pass First Amendment muster on these grounds.

In 1993, the Supreme Court decided a similar issue in *United States v. Edge Broadcasting Co.*, n119 with respect to *18 U.S.C. § 1307*. n120 In *Edge Broadcasting*, a broadcaster was licensed to broadcast in North Carolina, where there was no state lottery, and wanted to broadcast advertisements for the legalized Virginia state lottery. n121 The petitioner

argued that *18 U.S.C. § 1304* n122 in conjunction with *18 U.S.C. § 1307* n123 violated his First Amendment rights. n124 Upon applying the Central Hudson test for commercial speech, the Court upheld the constitutionality of the statutes. n125 However, the Edge Broadcasting case was decided three years [*486] before *44 Liquormart*, which has arguably tightened the review for the fourth prong of Central Hudson, n126 and has eliminated the "vice activity" reasoning associated with some of the earlier cases regarding casino advertisements. n127 As this section will indicate, if Central Hudson were applied to Edge Broadcasting today, the statute would have to fail. n128

B. Does the First Amendment Apply to the Advertising of Gambling in a State Where it is Illegal?

First Amendment protection applies to commercial speech when it relates to lawful activity and is not misleading. n129 While it is relatively clear that advertising in states where gambling is legal is afforded the protection of the First Amendment, n130 an argument can be made that such advertising in a state where gambling is illegal would not receive such protection. n131 If Central Hudson is read literally, then, the government can successfully prohibit advertising for casino gambling within the twenty-four states that prohibit casino gambling. n132 However, case law indicates that the first prong of Central Hudson generally has been interpreted [*487] liberally. n133 Therefore, as long as the non-casino state seeks to broadcast information regarding conduct that is legal in a sister state, it should receive the same initial protection as if the broadcast were made in the casino state itself. n134

Whether a particular advertisement is misleading, however, is an issue of fact. n135 The government would be required to show some type of evidence indicating that the advertisement actually "causes consumers to adopt false beliefs" n136 about gambling. Mere information about casino [*488] location, pay-out ratios and the operation of market competitors, provided it is accurate, could not be considered misleading for First Amendment purposes. n137 Even if any broadcasted advertisements would be truthful and not misleading, § 1304 would still not survive constitutional scrutiny under Central Hudson for other reasons illustrated in this Comment. n138

C. Could Edge Broadcasting Survive the Central Hudson Analysis Today?

Assuming the commercial speech in question should be afforded First Amendment protection because it is truthful and not misleading, the second prong of Central Hudson requires the government "assert a substantial interest to be achieved by restrictions on commercial speech." n139 The government has traditionally offered two interests with respect to the regulation of casino advertising, both of which courts have deemed substantial. n140 These are: (1) reducing the social costs of casino gambling, including compulsive gambling; n141 and (2) "supporting the policy of [non-casino] states, as well as not interfering with the policy of states that permit casinos." n142 [*489]

It is ironic indeed that the Court can find the first interest to be substantial, while simultaneously ignoring the same reasoning when applied to a proposed "vice exception" rule to eliminate Central Hudson analysis in these situations. n143 Paternalistic purposes alone cannot justify an infringement on the First Amendment, n144 and Congress cannot use its power to regulate speech if the same result can be reached by regulating conduct alone. n145

If the first interest, reducing social costs, is deemed unsubstantial, then what should happen to the second interest of deferring to the policies of individual states? Although a state may have a legitimate interest in protecting the welfare of its citizens, the interest should not be furthered by withholding information about an activity that is perfectly legal in another state. n146 In *Bigelow v. Virginia*, n147 the Court stated:

A state does not acquire power or supervision over the internal affairs of another state merely because the welfare and health of its own citizens may be affected when they travel to that state. It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, bar a citizen of another state from disseminating information about an activity that is legal in that state. n148

[*490]

Supporting the government's second interest would in effect be permitting the states to do what has been denied the federal government. If the federal government is prohibited from banning certain forms of commercial speech, then "a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes." n149 In other words, just because the state may have an interest in keeping gambling outside of its borders, it cannot "contract the spectrum of available knowledge" n150 surrounding that conduct that is perfectly legal in other states. n151

Other issues surrounding a state's ability to control broadcasting in general will be discussed in Part III.E of this Comment. n152

The Supreme Court has identified a separate congressional interest of balancing the interests of lottery and nonlottery states. n153 However, "enacted congressional policy and 'governmental interests' are not necessarily equivalents for purposes of commercial speech analysis." n154 Because the proffered governmental interests are different from any implied congressional intent, it would be unfair for the Court to analyze restrictions based on hypothetical legislative purposes. Furthermore, "if Congress' true interest was to protect state choice on gambling issues, and this interest was predicated on the ability of a broadcast signal to reach across state borders, then there would be signal restrictions on the exceptions contained in § 1307." n155 Even if the government offered the same interests in balancing the policy of lottery and nonlottery states, it would require "a finding . . . that the competing goals themselves are substantial." n156

"A government's substantial interest in protecting its citizens from certain social ills does not preclude a finding that a regulation infringes upon well-established constitutional principles." n157 Even assuming, *arguendo*, that both of the governmental interests presented are [*491] substantial, neither would be "directly or materially" advanced by this restriction. It is not enough that the restriction provides incidental or miniscule support to the government's interest, it must advance it to a "material degree." n158 As for an interest in reducing the social costs of casino gambling, the government would have to introduce evidence indicating the ban on advertising would play a significant role in reducing compulsive gambling. n159 It has not yet done so. n160

Even if the government could meet the evidentiary requirements, the statute would still violate the First Amendment. n161 It is doubtful a statute can achieve its ends when other portions of the statutory framework "directly undermine and counteract its effects." n162 "Despite its awareness [*492] of the potential social costs, n163 Congress has not only sanctioned casino gambling for Indian tribes through tribal-state compacts but has enacted other statutes that reflect approval of state legislation that authorizes a host of public and private gambling activities." n164 In fact, the holding in *Greater New Orleans Broadcasting* arguably does nothing more than put the nail in the coffin for § 1304. The fact that the Court is willing to disregard "spillover" n165 advertisements into non-casino states n166 further illustrates the irrationality of the statute as it relates to its asserted interests. n167 "It is illogical to believe that non-FCC regulated gaming, including casino gaming, does not promote the same social ills caused by FCC regulated gaming." n168 Furthermore, "decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." n169

Despite theories that tribal casinos are different than nontribal casinos, n170 arguments that they should receive different First Amendment [*493] treatment have failed. n171 If the advertising restriction cannot achieve the federal interest in reducing the demand for gambling, it would be impossible for it to be successful in advancing the same interest at the state level. n172 Even assuming that a state's interests are somewhat stronger than the federal interest, as Justice Stevens notes in his opinion, " § 1304 sacrifices an intolerable amount of truthful speech about lawful conduct when compared to all of the policies at stake and the social ills that one could reasonably hope such a ban to eliminate." n173 In other words, the individual interests in relaying commercial messages to the public outweigh the negative ramifications associated with the conduct of casino gambling.

The Court has generally only required a "reasonable fit" between the government's interest and the restriction in question. n174 In fact, this is the standard used in both *Edge Broadcasting* n175 and *Greater New Orleans Broadcasting*. n176 However, the Supreme Court's method of applying the "reasonable fit" analysis has been somewhat inconsistent. n177 In the years preceding *Edge Broadcasting*, the Court used a rather deferential approach to the fourth prong of *Central Hudson*. n178 The *Edge Broadcasting* Court maintained this deferential approach, and "accepted the government's [*494] argument without relying on a great deal of demonstrable evidence." n179 In 1995, the Supreme Court bolstered the fourth prong by requiring the government to submit more than "anecdotal evidence and educated guesses" in support of their restriction on commercial speech. n180 *Rubin v. Coors Brewing Company* n181 marked a departure from the Court's prior deferential analysis, and required the government to research and implement less restrictive means before making attempts to restrict speech. n182 In its landmark decision in *44 Liquormart*, n183 the Court rejected outright the broad legislative discretion it had once tolerated, n184 and found that the advertising ban in question must fail the "reasonable fit" analysis because less restrictive alternatives existed which could have achieved the same interests. n185 If *Edge Broadcasting* were to come before the Supreme Court, the broadcasting ban would have to survive the stricter "reasonable fit" analysis the Court has most recently been applying. n186 The means chosen should be proportionate to the interest; n187 and if there are other ways to regulate socially undesirable conduct without infringing on the freedom of speech, then there cannot be

a reasonable fit between the end and the means. n188

The Supreme Court itself, in *Greater New Orleans Broadcasting*, lists other non-speech mechanisms that might be effective in regulating [*495] gambling. n189 These include limitations on credit extended to gamblers, and restrictions on casino admissions, location, and licensing. n190 Other approaches the government might take would be to sponsor treatment programs for compulsive gamblers, n191 to provide informational brochures about the effects of gambling, and to organize youth awareness programs. n192 And finally, as technology now welcomes gambling via the Internet, n193 websites could post warnings to minors and residents in states that prohibit gambling. n194 All of the above would be reasonable [*496] alternatives to restricting commercial speech, hence there can be no "reasonable fit" between the government's goal and its means to achieve it. n195 Thus, § 1304 would, in all instances, be unconstitutional under the Central Hudson test.

However, recent case law indicates the Court is somewhat unhappy with the Central Hudson test, and would prefer something a little more strict. n196 It has been said that "the current test does not consistently provide adequate assurance that truthful, non-misleading commercial speech will survive judicial scrutiny." n197 In *44 Liquormart*, the plurality applied Central Hudson, but extensive concurring opinions suggested some alternatives, including: (1) finding any restriction on commercial speech attempting to manipulate consumer choice "per se illegitimate;" n198 and (2) that courts should not so readily defer to the legislature when performing [*497] their analyses. n199 If § 1304 cannot pass the less stringent "reasonable fit" standard, it no doubt could not survive stricter constitutional scrutiny. n200

It should be noted, however, that while *Greater New Orleans Broadcasting* dealt with advertisements for casino gambling, *Edge Broadcasting* dealt with advertisements for state lotteries. The government has recently tried to differentiate the two types of advertisements by arguing that state lotteries fall under a different regulatory scheme, hence the ruling in *Greater New Orleans Broadcasting* would have no impact on cases like *Edge Broadcasting*. n201 This is ironic, considering how extensively the Supreme Court has focused on analyzing §§ 1304 and 1307 as part of the same statutory framework. n202 Furthermore, there are a host of social costs frequently associated with casino gambling that are overlooked when it comes to state lotteries. n203 If state lotteries are in fact less harmful than casino gambling, there would be no rational basis for permitting casino advertisements while prohibiting advertisements for lotteries.

D. Should there be a "Vice Exception" to the Central Hudson Test?

Any attempts to circumvent the Central Hudson test via a "vice exception" should also fail. n204 The "vice exception" stands for the premise that "legislatures have broader latitude to regulate speech that promotes socially harmful activities . . . than they have to regulate other types of speech." n205 It would either mean that courts would not be required to apply the Central Hudson test to restrictions on speech relating to any [*498] activity labeled a vice, or such a test would be "diluted" when applied to communications regarding such activities. n206

Casino gambling, though lawful in twenty-seven states, n207 has generally been labeled a "vice," n208 and therefore implicates no constitutionally protected right. n209 Hence, the act of gambling itself could conceivably be banned altogether n210 via Congress' Commerce Clause power. n211 It would be logical to assume that if you can ban a certain type of conduct entirely, you should be able to ban the speech related to such conduct. n212 However, the courts have rejected this "greater includes lesser" approach. n213 In addition, "the scope of any 'vice' exception to the protection afforded by the First Amendment would be difficult, if not impossible, to define." n214 Permitting such an exception would open up a windfall of activities that the government could label as "vice," so as to control behavior it [*499] selectively deems immoral. n215 This is an unlikely route for the Supreme Court today, given its increased sensitivity to the First Amendment rights of commercial speech. n216 Furthermore, gambling and lotteries are becoming more embraced by society as a whole. n217

Another argument in line with the "vice" exception would impose a slightly different level of First Amendment protection for speech that could be potentially harmful to minors. n218 Studies have indicated that the "impulsive" nature of adolescents makes them more likely to become involved in gambling. n219 However, the Supreme Court has held that when trying to protect children from speech that is potentially harmful, "that burden on adult speech is unacceptable if less restrictive alternatives would at least be as effective in achieving the legitimate purpose that the statute was enacted to serve." n220 In other words, it would be unacceptable for a statute protecting minors to suppress "a large amount of speech that adults have a constitutional right to receive." n221 Furthermore, attempts to categorize advertisements based on their impact on children could potentially lead to the same windfall associated with labeling an activity a "vice." n222 Any attempts to place additional restrictions on the broadcast of casino advertisements for the sole purpose of protecting

minors should therefore be rejected by the courts. [*500]

E. Should States be Allowed to Regulate Gambling Broadcasts Within Their Own Borders?

1. FCC's Decision Not to Enforce *18 U.S.C. § 1304*

"Radio waves cannot ordinarily be stopped at state or even national borders regardless of the best efforts of the governments or the broadcasters involved." n223 It was for this reason that Congress, in response to growing concerns about gambling, exercised its power and implemented the broadcasting ban in § 1304. n224 Ironically, this is a criminal statute, under which no broadcaster has ever been prosecuted. n225 Although prosecution under the statute is unlikely, it still exists as a federal criminal law.

On August 6, 1999, the Department of Justice, in conjunction with the FCC, submitted a brief to the Third Circuit Court of Appeals. n226 In this brief, those two entities indicated that the ruling in *Greater New Orleans Broadcasting* would extend to all fifty states, regardless of whether gambling was legal there or not. n227 In other words, the FCC has decided not to enforce the § 1304 broadcasting ban even in states where casino gambling is illegal. If the FCC will not enforce the statute, then the national policy of protecting the interests of both lottery and nonlottery states will have fallen by the wayside. n228 Does that mean the states will have free reign to regulate broadcasts that would potentially extend into their borders? That is an unlikely outcome as is illustrated in the argument below.

2. Gambling Advertisements and Interstate Commerce.

Gambling activities themselves can usually be contained within state borders while having only a negligible effect on neighboring states. n229 [*501] However, once the activity is combined with communication devices, including the telephone, radio and television, it takes on interstate characteristics. n230 When an activity has the potential to affect interstate commerce, the rules of the game change as far as the ability to regulate goes. Because broadcasting is considered to impact interstate commerce, it implicates the Commerce Clause n231 when reception extends beyond state lines. n232 Therefore, any state regulations attempting to regulate the broadcasting of casino advertisements within their borders will trigger Commerce Clause scrutiny by the courts. n233

Have the states completely lost their rights to regulate radio and television broadcasts on casino advertising in light of Congress' Commerce Clause power? "Even the Commerce Clause . . . does not prevent state regulation of the content of interstate broadcasts when the state interest sought to be protected is sufficiently important to outweigh the burden necessarily imposed in order to protect it." n234 In fact, if Congress wanted to, it could grant the states permission to control broadcasting regulations within their borders. n235 However, permitting [*502] states to regulate commerce in certain areas is "usually the case when the state's ban does not extend specifically to the broadcasting, but rather to the performance of the activity which is broadcast." n236 Clearly, states have an interest in determining whether they will allow gambling inside their borders. n237 This is an area that is traditionally local in nature. n238 Nevertheless, even if Congress were to grant express power to regulate broadcasting to the individual states, that does not mean that all other constitutional limits would disappear. n239 Regulations on broadcasting posed by the states would still be subject to First Amendment scrutiny. n240

While almost every state law has the potential to impact interstate commerce, albeit remotely, "the Framers [of the Constitution] designed the Commerce Clause to prevent laws, particularly those laws regulating communications and effecting the national infrastructure, from hindering the growth of a nation." n241 To determine if an area is of national interest, the courts will look at the impact on commerce if each state were to implement its own diverse laws on the same subject matter. n242 One might [*503] argue that "a state should not always be obliged to suffer the conduct, within its borders, of activity which it deems destructive to the health, safety, or welfare of its citizens, merely because other states receive some benefit from this activity." n243 On the other hand, broadcasts are generally received in more than one state, and one of these receiving states should not be able to interfere with what other states want, and have a right to hear. n244 To hold otherwise would permit one state to exert its policies upon other states whose broadcasts would potentially enter into its borders. n245 If other states were to follow this model, it would impede the purpose of advertisements, which is to bring truthful, nonmisleading information to consumers so they can make informed decisions. It is precisely because of this tension between casino and non-casino states that the broadcasting of casino advertisements should remain under the control of the federal government. The nature of broadcasting renders it an activity that requires uniform, national regulation. n246 Furthermore, individual state regulation of the broadcasting of casino advertisements would encounter enforcement issues. n247 Would the states be able to enforce their statutes against broadcasters whose state of origin is not their own? Put differently, it is one thing to prohibit broadcasters who are [*504] located in the non-casino state

from airing such advertisements, but how would states enforce these provisions against a broadcaster who is located in a neighboring casino state? What type of jurisdiction would be required? n248 All of these uncertainties lend support to the need for federal regulation in the first place.

Even if broadcasting were found not to need national treatment, this would not necessarily result in a green light for states to regulate in the area. Assuming any of the laws posed by the states are facially valid, n249 then a balancing test would be performed by the courts. n250 "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." n251 Again, there is no doubt that a state has a strong interest in the health, welfare, and safety of its citizens. n252 However, prohibitions on certain broadcasts crossing state lines would have more than an incidental impact on interstate commerce. They would function as an impediment on the flow of commercial information between the states. In fact, this is precisely what state-level bans on the broadcasting of casino advertisements would be doing preventing communication about activities that are lawful in other states. n253

3. Gambling Advertisements and the Internet

What happens when casino and lottery operators start advertising on the Internet? n254 Similar to local restrictions on broadcasting, "state [*505] regulations that once existed peacefully within state borders may now, because they impact information entering the state via the Internet, be subject to Commerce Clause scrutiny." n255 The question now arises as to whether the same analysis applied to the broadcasting of casino advertisements should be applied to this new medium as well.

Although radio and television broadcasts are similar to the Internet as far as the ability to carry information across state borders, they typically involve a more passive viewing while the Internet generally requires active participation. n256 One could argue that the impact of a state permitting gambling advertisements over the Internet into a state where such activity is illegal would be no different than what the Supreme Court allowed in Greater New Orleans Broadcasting. That is, gambling advertisements reaching individuals in, for example, Utah, where gambling is illegal, would be no different than allowing radio or television broadcasts in a state like Louisiana to spill over into a state where gambling is illegal. n257

While the Internet is a modern communication medium unlike any other before it, it still encounters the same interstate issues as radio and television broadcasting. Similar to broadcasting, the Internet is the type of commerce that requires consistent treatment at a national level. n258 [*506] "Regulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations." n259 If states enacted their own laws, the development of Internet communication would be inhibited.

As gambling via the Internet becomes more popular, n260 First Amendment issues surrounding the advertisement of these gambling websites are sure to arise. Thus far, the United States' approach to Internet gambling seems to be one of prohibition as opposed to regulation. n261 Recent proposed legislation would prohibit Internet gambling in all but very few instances. n262 If Internet gambling is prohibited, then the advertisement of these websites would logically be prohibited as well. However, this bill would also create additional restrictions on the use of the Internet to advertise non-Internet gambling attractions. n263 If this becomes law, once again, consumers would be prevented from receiving information about an activity that is perfectly legal in another state. For this reason, neither Internet users nor those broadcasting their advertisements via the Internet should be considered "second-class citizens" that receive less First Amendment protection. n264

IV. Policy Reasons for Allowing Casino Advertising in all States

This country has become a "consumer driven society," n265 and there is no dispute that "the increasing influence of commercial information requires a responsive commercial speech jurisprudence . . . that allows states to regulate the dissemination of false or misleading commercial speech and [*507] commercial speech concerning illegal activities." n266 However, "bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms. Instead, such bans often serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech." n267

There are other reasons to allow advertising for casino gambling aside from the surrounding First Amendment justifications. Much like other activities once deemed to be socially harmful, casino gambling has become more widely accepted by the public. n268 The gambling industry has spurred economic gain by creating both jobs and tax revenues. n269

Aside from promoting economic growth in their immediate location, the casinos also provide a source of entertainment for those who choose to participate in games of chance. n270 "Casinos may increase tourism and accommodations, and the jobs resulting from casinos and ancillary facilities may mean new residents or keeping old ones, new income and sales tax revenues, and a measure of regional development or re-development." n271 Revenue monies from lotteries even have helped to finance some of this country's most prestigious universities. n272 [*508]

Opponents of the gambling industry point to allegations of organized crime and a fear of a compulsive gambling outbreak as reasons for placing stricter regulations on gambling. n273 While there is undoubtedly some organized criminal involvement in the illegal gambling business, there is no proof that such involvement exists in the legal gambling business. n274 Furthermore, studies have shown that the operation of a legal gambling facility does not increase crimes against persons or property. n275

The American Psychiatric Association has defined compulsive gambling as "a chronic and progressive failure to resist impulses to gamble and gambling behavior that compromises, disrupts, or damages personal, family, or vocational pursuits." n276 However, the risk of becoming a compulsive gambler is relatively low in comparison to, for example, alcohol and tobacco addictions. n277 In fact, only somewhere between 3.1% and 4.27% of the population is likely to be a compulsive gambler. n278 Furthermore, "not every compulsive or problem gambler is currently and continuously gambling." n279 For example, many compulsive gamblers may already be receiving treatment. n280 There may be a correlation between advertising and an increased demand for gambling, however, no such correlation has been proven that connects advertising to compulsive gambling. n281 While the condition may have negative ramifications for the individual, this can hardly be considered a serious societal issue. n282

Bearing in mind all the positive attributes of gambling activities that arguably outweigh their negative ramifications, any attempt to ban advertisements of gambling facilities should be considered to be a violation of the First Amendment. Those individuals who are not [*509] interested in gambling activities, much like any other activity advertised on the television and radio, could simply change the channel. n283

V. Conclusion

The prohibition in *18 U.S.C. § 1304* "threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." n284 Greater New Orleans Broadcasting has impacted First Amendment protection of commercial speech by chipping away at the broadcasting restrictions in § 1304. Any attempt to uphold the statute against broadcasters in states where casino gambling is illegal should likewise fail under the same rationale used in Greater New Orleans Broadcasting and some of its predecessors. n285 The selective manner in which broadcasting restrictions are enforced, along with exemptions in the statutory scheme itself, make the statute unworkable. n286 Furthermore, difficulty in applying the Central Hudson test for commercial speech will likely lead the Court to develop new tests which will increase overall First Amendment protection of commercial speech. n287 While the fate of the Central Hudson test remains uncertain, one thing is clear: "Congress cannot, consistent with the First Amendment, use protected speech to accomplish its tasks," n288 when the same ends can be achieved by regulating conduct alone.

While it is unlikely that either the Department of Justice or the FCC will continue to enforce *18 U.S.C. § 1304*, n289 any regulations imposed on the broadcasting of casino advertisements by the individual states would likely fall victim either to the Commerce Clause or the First Amendment. n290 If states would like to protect their policies on gambling, they will have to do so through alternatives other than the suppression of [*510] commercial speech. For as First Amendment jurisprudence teaches us, it is "the speaker and the audience, not the Government, who should be left to assess the value of accurate and nonmisleading information about lawful conduct." n291

FOOTNOTES:

n1 See Erika Gosker, Note, *The Marketing of Gambling to the Elderly*, 7 *Elder L.J.* 185, 186 (1999) (arguing the federal broadcast ban on casino advertisements should be upheld to protect the elderly). Utah and Hawaii currently have no form of legalized gambling. See *id.* One of the most common forms of legalized gambling is state-sponsored lotteries. See *id.* at 187. The number of states sponsoring such lotteries has increased from thirteen to thirty-seven since 1976. See *id.* at 187. There are also states which now permit riverboat casinos, most of which are along the Mississippi and Ohio Rivers. See *id.* at 188-89. Finally, Native American tribes operate casinos and high stakes bingo on tribal lands within several states. See Nicholas S. Goldin, Note, *Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the*

Scope of High Stakes Indian Gaming, 84 *Cornell L. Rev.* 798, 800 (1999) (arguing that Congress should restrict Indian casino gambling to the types of gambling specifically permitted by the individual states).

n2 See Gosker, *supra* note 1, at 193.

n3 Goldin, *supra* note 1, at 808.

n4 *United States v. Edge Broad. Co.*, 509 U.S. 418, 421 (1993) (holding it is not a violation of the First Amendment to prohibit broadcasting of lottery advertisements in states where gambling is illegal).

n5 Now codified as 18 U.S.C. § 1304 (1994).

n6 For a list of the purported social ills surrounding casino gambling, see *infra* note 163.

n7 See *Petitioner's Brief at 5, United States v. Players Int'l, Inc.*, 525 U.S. 1094 (1999) (No. 98-721).

n8 See *id.* at 6.

n9 See *infra* notes 38-48 and accompanying text.

n10 527 U.S. 173 (1999) (holding that where gambling is legal, states may not prohibit the broadcasting of advertisements for private casino gambling).

n11 See 18 U.S.C. § 1304 (1994).

n12 See, e.g., *Edge Broad. Co.*, 509 U.S. at 426; *Greater New Orleans*, 527 U.S. at 185-86.

n13 See *Greater New Orleans*, 527 U.S. at 192; see also *infra* notes 188-93 and accompanying text (listing other alternatives to speech restrictions).

n14 See *Greater New Orleans*, 527 U.S. at 190; see also *infra* notes 100-10 and accompanying text.

n15 See *Greater New Orleans*, 527 U.S. at 195. "Had the Federal Government adopted a more coherent policy, or accommodated the rights of speakers in states that have legalized the underlying conduct, . . . this might be a different case." *Id.* (citation omitted).

n16 See *infra* notes 139-202 and accompanying text.

n17 See *infra* notes 29-37 and accompanying text.

n18 See *infra* notes 38-48 and accompanying text.

n19 See *infra* notes 49-66 and accompanying text.

n20 See *infra* notes 67-115 and accompanying text.

n21 See *infra* notes 116-28 and accompanying text.

n22 See *infra* notes 129-38 and accompanying text.

n23 See *infra* notes 139-203 and accompanying text.

n24 See *infra* notes 204-22 and accompanying text.

n25 See *infra* notes 223-53 and accompanying text.

n26 See *infra* notes 254-64 and accompanying text.

n27 See *infra* notes 265-83 and accompanying text.

n28 See *infra* notes 284-91 and accompanying text.

n29 The Act is now codified as 18 U.S.C. § 1304 (1994).

n30 *Id.*

n31 See Richard Shawn Oliphant, Note, Prohibiting Casinos From Advertising: The Irrational Application of 18 U.S.C. § 1304, 38 *Ariz. L. Rev.* 1373, 1377-78 (1996) (arguing the application of 18 U.S.C. § 1304 has been irrationally applied to casino gambling).

n32 See *id. at 1377*.

n33 See *infra* note 211 and accompanying text.

n34 See Oliphant, *supra* note 31, at 1379.

n35 *Id.* Prior to the Communications Act of 1934, the radio industry relied on a voluntary Code of Fair Competition in which broadcasters agreed not to broadcast lottery information and advertisements on the air. See John Crigler et al., *Why Sparky Can't Bark—A Study of the Ban on Broadcast Advertisements for Lotteries*, 2 *CommLaw Conspectus* 43, 50, 60–62 (1994) (arguing that the current application of § 1304 is discriminatory by favoring tribal, state and charitable gambling advertisements over those of private casino operators).

n36 See Oliphant, *supra* note 31, at 1380–83. Congress did not use any specific words in the statute to indicate an intention to include casino gambling under § 1304, even though they were well aware that other forms of gambling existed. See *id.* at 138283. Furthermore, the Federal Communication Commission (FCC) has determined that betting on certain sporting events is not considered a "lottery" because they involve some level of skill. See *id.* at 1381–82. Casino gambling activities such as poker include some level of skill as well, and therefore should not be considered a "lottery" under § 1304. See *id.* at 1382.

n37 See *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 177 (1999); *FCC v. American Broad. Co.*, 347 U.S. 284, 290–91 (1954). In *American Broadcasting*, the Court set up three elements to be used in determining whether § 1304 is applicable: "(1) distribution of prizes; (2) according to chance; (3) for a consideration." *Id. at 290*.

n38 See 18 U.S.C. § 1305 (1994) (exempting from § 1304, "any fishing contest not conducted for profit wherein prizes are awarded for the specie, size, weight, or quality of fish caught by contestants in any bonafide fishing or recreational events").

n39 See 18 U.S.C. § 1307 (1994). There have been three waves of legalized gambling. In 1612, the first wave of legalized gambling began when the British Crown authorized lotteries to support the Jamestown Settlement. See Oliphant, *supra* note 31, at 1377. This wave ended with the beginning of the Civil War. See *id.* The second wave started shortly after the Civil War, in an effort by the South to raise much-needed funds. See *id.* State run lotteries began the third wave of legalized gambling in the United States. See *id.* at 1379. New Hampshire was the first state to sponsor such a lottery in 1963, and other states were quick to follow. See *id.*

n40 See 25 U.S.C. § 2720 (1994). "Title 18 shall not apply to any gaming conducted by an Indian tribe pursuant to this chapter." *Id.*

n41 See 25 U.S.C. § 2701 (1994). The Indian Gaming Regulatory Act (IGRA), "not only represented a break with the federal government's historical deference to states in the area of gambling regulation, but it marked the first time in U.S. history that the federal government expressly approved of casino gambling." Goldin, *supra* note 1, at 817. Congress' intent was to allow certain types of gaming on Indian land including social/religious gaming, bingo-type gaming, off track betting, and the lottery. See Mike Roberts, *The National Gambling Debate: Two Defining Issues*, 18 *Whittier L. Rev.* 579, 587–88 (1997).

n42 See 25 U.S.C. § 2720 (1994).

n43 Goldin, *supra* note 1, at 819 (quoting 18 U.S.C. § 2702 (1994)).

n44 See Crigler, *supra* note 35, at 51.

n45 See 18 U.S.C. § 1307(a)(1) (1994).

n46 See 18 U.S.C. § 1307(a)(2)(A) (1994).

n47 18 U.S.C. § 1307(a)(2)(B) (1994).

n48 See *infra* notes 100–10 and accompanying text.

n49 See Dana M. Shelton, *Greater New Orleans Broadcasting Association v. United States: The Fifth Circuit Upholds the Federal Ban on Casino Gambling Advertising Against a First Amendment Challenge*, 70 *Tul. L. Rev.* 1725 (1996). The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. Const. amend. I. "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right

to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach" *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (internal citations omitted) (finding a statute which prohibited the use of contraceptives to be unconstitutional).

n50 Shelton, *supra* note 49, at 1726.

n51 See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (holding that statutes which ban liquor prices in advertisements are unconstitutional). "In this age of mass information and communication, commercial expression greatly influences both national developments and the daily lives of Americans." Commercial Speech—Advertising, 110 *Harv. L. Rev.* 216, 224 (1995).

n52 Commercial speech, defined as speech that does "no more than propose a commercial transaction," is entitled to First Amendment protection. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)).

n53 See 44 *Liquormart*, 517 U.S. at 496. "In accord with the role that commercial messages have long played, the law has developed to ensure that advertising provides consumers with accurate information about the availability of goods and services." *Id.*

n54 425 U.S. 748 (1976). In striking down a ban on price advertising for prescription drugs, the Court said:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 765.

n55 See *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993).

n56 See David Jones, Note, Gambling With First Amendment Rights: Playing the Cards Dealt by Valley Broadcasting Co. v. United States, 5 *Vill. Sports & Ent. L.J.* 397, 405-06 (1998) (arguing that the broadcast ban does not violate the First Amendment).

n57 See, e.g., 44 *Liquormart*, 517 U.S. at 517, 518 (Scalia, J. & Thomas, J., concurring). While the Court agreed as to the result of the case, there were extensive concurring opinions with respect to the reasoning that should be applied. See *id.* Justice Scalia argued that *Central Hudson* had "nothing more than policy intuition to support it." *Id.* at 517. Justice Thomas argued that *Central Hudson* should not be applied to situations where the government is keeping legal users of a product in the dark. See *id.* at 518.

n58 Jones, *supra* note 56, at 408 (alteration from original).

n59 See Andrew S. Gollin, Comment, Improving the Odds of the Central Hudson Balancing Test: Restricting Commercial Speech as a Last Resort, 81 *Marq. L. Rev.* 873, 875 (1998) (recommending a more strenuous standard than "reasonable fit" under the fourth prong of the *Central Hudson* test).

n60 See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980) (finding a regulation which banned the electric company from advertising to promote the use of electricity to be a violation of the First Amendment).

n61 See *id.* "There can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Id.* at 563.

n62 See *id.* at 566.

n63 See *id.* "The Court has declined to uphold regulations that only indirectly advance the state interest involved." *Id.* at 564.

n64 See *id. at 566*. "The regulatory technique may extend only as far as the interest it serves. The state cannot regulate speech that poses no danger to the asserted state interest, . . . nor can it completely suppress information when narrower restrictions on expression would serve its interest as well." *Id. at 565*.

n65 See, e.g., *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (upholding a prohibition on direct-mail solicitation of clients by lawyers within thirty days of personal injury or wrongful death). But see *Edenfield v. Fane*, 507 U.S. 761 (1993) (finding a law banning personal solicitation by certified public accountants to be a violation of the First Amendment).

n66 See Gollin, *supra* note 59, at 876 n.14.

n67 See *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 183 (1999). "The Greater New Orleans Broadcasting Association . . . is a non-profit trade association representing member television and radio stations in the New Orleans, Louisiana area in matters affecting the broadcast industry." Petitioner's Brief at 3, *Greater New Orleans* (No. 98387).

n68 The FCC is the administrative body that regulates the broadcasting of lottery and casino gambling information. See generally *FCC v. American Broad. Co.*, 347 U.S. 284 (1954) (finding giveaways by radio and television broadcasters to their listeners do not fall under § 1304). The Federal Communications Act of 1934 gives the Commission the power to issue, revoke, renew and suspend licenses in an effort to control radio and television programming. See *State Regulation of Radio and Television*, 73 *Harv. L. Rev.* 386, 389 (1959). "Indeed, the Commission would be remiss in its duties if it failed . . . to aid in implementing [§ 1304] . . ." *American Broad. Co.*, 347 U.S. at 289. The FCC's version of § 1304 can be found in regulation 47 C.F.R. § 73.1211 (1999). Accounting for the same exceptions as in § 1304, § 73.1211, states in part that "no licensee of an AM, FM, or television broadcast station . . . shall broadcast any advertisement of or information concerning any lottery, gift enterprise, or similar scheme . . ." 47 C.F.R. § 73.1211(a) (1999).

n69 See *Greater New Orleans Broad. Ass'n v. United States*, 866 F. Supp. 975, 977 (E.D. La. 1994).

n70 See *id. at 977-78*.

n71 See *Greater New Orleans Broad. Ass'n v. United States*, 69 F.3d 1296, 1298, 1302 (5th Cir. 1995) (holding that § 1304 is not a violation of the First Amendment as applied to the broadcasters in this case).

n72 See *Greater New Orleans Broad. Ass'n v. United States*, 519 U.S. 801 (1996).

n73 517 U.S. 484 (1996).

n74 See *Greater New Orleans Broad. Ass'n v. United States*, 149 F.3d 334, 341 (5th Cir. 1998) (holding that § 1304 is not a violation of the First Amendment as applied to the broadcasters in this case).

n75 See *id. at 337*. The Appeals Court noted the Supreme Court's divided interpretation of the Central Hudson test in 44 *Liquormart* left unclear "the level of proof . . . required to demonstrate that a particular commercial speech regulation directly advances the state's interest." *Id.*

n76 See *Greater New Orleans*, 527 U.S. at 183. Certiorari was granted the second time because the Fifth Circuit's decision was in conflict with both the Ninth Circuit's decision in *Valley Broad. Co. v. United States*, 107 F.3d 1328 (9th Cir. 1998), and a New Jersey Federal District Court in *Players Int'l, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997). See *id.* In *Valley Broadcasting*, the court found that various exceptions to § 1304 prevent it from achieving the government's interest in protecting non-casino states from the reach of casino advertisements. See *Valley Broad.*, 107 F.3d at 1336. The government also failed to provide adequate evidence that the restriction would in fact further their interests. See *id.* In *Players*, the court found that other reasonable alternatives to the speech restriction exist and, therefore, § 1304 fails First Amendment analysis as applied in 44 *Liquormart*. See *Players*, 988 F. Supp. at 506.

n77 *Greater New Orleans*, 527 U.S. at 176.

n78 *Id. at 184*. "It is . . . an established part of our constitutional jurisprudence that we do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground." *Id.* The Court meant that it was unnecessary at this time to develop a new test for commercial speech because *Central Hudson* and the cases that followed provided an adequate framework. See *id.* But see generally Gollin, *supra* note 59, for a discussion on the inadequacies of the current *Central Hudson* test as well as suggestions and alternatives for its improvement or replacement.

n79 See *Greater New Orleans*, 527 U.S. at 184; see also supra notes 60–66 and accompanying text (discussing the elements examined during the Central Hudson analysis).

n80 See *Greater New Orleans*, 527 U.S. at 184.

The content [of the broadcasts] is not misleading and concerns lawful activities, i.e., private casino gambling in Louisiana and Mississippi. As well, the proposed commercial messages would convey information—whether taken favorably or unfavorably by the audience—about an activity that is the subject of intense public debate in many communities. In addition, petitioners' broadcasts presumably would disseminate accurate information as to the operation of market competitors, such as pay-out ratios, which can benefit listeners by informing their consumption choices and fostering price competition.

Id. at 184–85.

n81 See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). While the commercial speech in question may or may not contain useful information, i.e., "advertising in a 'noncompetitive market,'" it does not mean it is not protected by the First Amendment. *Id.* at 566–67. The expression would have to be inaccurate or reference unlawful activity to be afforded no protection. See *id.* at 566.

n82 See *Greater New Orleans*, 527 U.S. at 185.

n83 *Id.*

n84 See *id.* at 186. The broadcasters argued that these interests were not substantial because "the Government had not provided one scintilla of evidence connecting broadcast advertising of casino gaming and compulsive gambling." Petitioner's Brief at 11, *Greater New Orleans* (No. 98–387). In addition, the broadcasters argued there was insufficient evidence to indicate the ban effectively protected the interests of states where gambling is illegal. See *id.*

n85 For a discussion on the economic benefits associated with casino gambling, see infra notes 269–72 and accompanying text.

n86 See *Greater New Orleans*, 527 U.S. at 186–87.

n87 *Greater New Orleans*, 527 U.S. at 187 (quoting *United States v. Edge Broad. Co.*, 509 U.S. 418, 428 (1993)). In other words, Congress has made an effort not to favor the policies of either lottery or nonlottery states, but rather will attempt to protect the interests of both. See *Edge Broad. Co.*, 509 U.S. at 428.

n88 *Greater New Orleans*, 527 U.S. at 188.

n89 See *id.* In determining whether a regulation directly and materially advances the government's interest under the third prong of Central Hudson, the Court should make their analysis based on the effect of the statute on speech in general. See *Edge Broad. Co.*, 509 U.S. at 427. Its effect on the case at hand should be analyzed under the fourth prong. See *id.* These two prongs collectively are what make up the "reasonable fit" analysis under Central Hudson. See *id.* at 427–28.

n90 See *Greater New Orleans*, 527 U.S. at 188. The fit should be one that "represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Id.* (quoting *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989)).

n91 See *id.* at 189. "While it is no doubt fair to assume that more advertising would have some impact on overall demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another." *Id.*

n92 See 25 U.S.C. § 2720 (1994) (exempting tribal casino owners from the broadcasting bans in § 1304). See also supra notes 38–48 and accompanying text.

n93 See *Greater New Orleans*, 527 U.S. at 188–89.

n94 See *id.* at 188. The Court noted that the government could not prove an adequate correlation exists between advertising and compulsive casino gambling in general, not to mention the more specific correlation between advertising

by nontribal casino owners and compulsive gambling. See *id. at 189*.

n95 See *id. at 194*. The second interest the government asserted was assisting states with their anti-lottery policies. See *id.* The Court responded to this interest by stating: "we cannot see how this broadcast restraint, ambivalent as it is, might directly and adequately further any state interest in dampening consumer demand for casino gambling if it cannot achieve the same goal with respect to the similar federal interest." *Id.*

n96 *Id. at 195*.

n97 See *id.*

n98 Social harms commonly associated with casino gambling include compulsive gambling, criminal behavior and erosion of the family unit. See Goldin, *supra* note 1, at 835.

n99 See *Greater New Orleans, 527 U.S. at 195*. "The regulation distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all." *Id.*

n100 See *id. at 190*.

n101 *Id.*

n102 *514 U.S. 476 (1995)* (holding a ban that prohibits beer labels from displaying alcohol content violative of the First Amendment).

n103 See *Greater New Orleans, 527 U.S. at 192-93*.

n104 See *id. at 193*. The law, as it stood, would allow tribal casino operators to advertise regardless of what state the casino was located in, while prohibiting the very same broadcasts by non-tribal casino operators. See *id. at 190*. The broadcasters argued that what started out as a blanket ban on lottery advertisements by Congress had become "a punitive regulatory scheme, undermined by a hodgepodge of congressionally mandated exceptions These exceptions gut any remaining vestiges of the ban's purpose and any constitutional validity it may have had, by permitting, and indeed encouraging, what the original regulatory scheme explicitly forbade, namely the broadcast of lottery advertising." Petitioner's Brief at 4, *Greater New Orleans* (No. 98-387).

n105 See *Greater New Orleans, 527 U.S. at 187, 190*; see also, e.g., *18 U.S.C. § 1307* (1994) (exempting state-run lotteries and charitable organizations from the broadcasting ban in § 1304); *25 U.S.C. § 2720* (1994) (exempting tribal casino operators from postal and broadcasting prohibitions including § 1304).

n106 See *Greater New Orleans, 527 U.S. at 190-91*. The FCC has permitted casinos to advertise their amenities, and has allowed captions such as "Vegas-style excitement," while frowning upon the promotion of the actual gaming activities. See *id. at 190*.

n107 *Id. at 193*.

n108 See *id.* The government contended that the speech ban on non-Indian casino gambling should be given different First Amendment treatment than Indian casino gambling because the latter generates net revenues to be used for the welfare of the tribes. See *id. at 191*. However, as the Court pointed out, there is no reason why a state cannot tax private casinos and use the revenue generated for the welfare of that state. See *id.* But see Jones, *supra* note 56, at 426. There is at least some support for the argument that Indian and non-Indian casino gaming should be treated differently. See *id.* The Indian "Gaming Act ensures that the revenues derived from Indian gambling, unlike those of private casino gambling, are used solely for public purposes." *Id.* (footnote omitted).

n109 *Greater New Orleans, 527 U.S. at 195*.

n110 See *id. at 195-96*.

n111 *Greater New Orleans, 527 U.S. at 196* (Rehnquist, C.J., concurring).

n112 *517 U.S. 484, 518-28 (1996)* (finding a ban on price advertising for alcoholic beverages to be a violation of the First Amendment).

n113 *Greater New Orleans, 527 U.S. at 197* (Thomas, J., concurring) (quoting his prior concurring opinion in 44

Liquormart v. Rhode Island, 517 U.S. 484, 518 (1996)).

n114 See *id.*

n115 See *id.* Justice Thomas has identified two rationales the Court has used to justify treating commercial speech differently from political speech. See 44 *Liquormart*, 517 U.S. at 523 n.4. They are: "(1) that the truth of 'commercial' speech is supposedly more verifiable, and (2) that 'commercial speech, the offspring of economic self-interest,' is supposedly a 'hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation.'" *Id.* (internal citations omitted). Justice Thomas argues that these rationales are insufficient to justify withholding information from people, thus preventing them from making informed choices in the marketplace. See *id.* at 522–23.

n116 527 U.S. 173 (1999). For additional background information on the Greater New Orleans case, see *supra* notes 67–115 and accompanying text.

n117 See *Greater New Orleans*, 527 U.S. at 176. The Court distinguished its holding in *Greater New Orleans* from its holding in *Edge Broadcasting* where the radio station seeking to broadcast lottery advertisements was located in a state where gambling is illegal. See *id.*

n118 See *id.* at 195. "Had the Federal Government adopted a more coherent policy, or accommodated the rights of speakers in states that have legalized the underlying conduct, . . . this might be a different case." *Id.* (internal citation omitted).

n119 509 U.S. 418 (1993).

n120 See *supra* notes 44–48 and accompanying text.

n121 See *Edge Broad. Co.*, 509 U.S. at 424.

n122 For background information on this statute, see *supra* notes 29–37 and accompanying text.

n123 For background information on this statute, see *supra* notes 44–48 and accompanying text.

n124 See *Edge Broad. Co.*, 509 U.S. at 424. The broadcasters argued that "a statute which silences one speaker out of many is unconstitutional if it directly advances no governmental interest whatsoever," and "even if Congress has the power to regulate gambling advertising, this does not mean that Congress has the power to prevent one similarly situated broadcaster from broadcasting that which all others are broadcasting." Respondent's Brief at 8–9, *Edge Broad. Co.* (No. 92–486).

n125 See *Edge Broad. Co.*, 509 U.S. at 436. The Court found that the government had a substantial interest in balancing the interests between lottery and nonlottery states, see *id.* at 426, and that this interest was directly advanced by the broadcasting ban, "even if, as applied to *Edge Broadcasting*, there was only marginal advancement of that interest." *Id.* at 429. Because gambling is not a constitutionally protected right, the Court noted that the activity could be banned altogether, and therefore, there would be no problem banning the speech surrounding it. See *id.* at 426. Not placing a limit on state borders would provide no means of protection for nonlottery states seeking to prevent these types of broadcasts. See *id.* at 435.

n126 See *infra* notes 183–85 and accompanying text.

n127 See, e.g., *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986) (upholding a statute which prohibited the advertising of casinos within Puerto Rico, while allowing it outside of Puerto Rico). The "vice activity" argument consists of an extension of the government's right to regulate socially harmful activities to the speech surrounding such activities. See *id.* at 346. It is argued that because states have a substantial interest in the health, welfare, and safety of their residents, see *id.* at 341, they should be able to regulate speech regarding certain conduct by placing restrictions on advertisements relating to it. See *id.* at 346.

It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.

Id.

n128 See *infra* notes 139–203 and accompanying text.

n129 See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). "If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed." *Id.* at 564.

n130 See *supra* note 81 and accompanying text.

n131 See Gosker, *supra* note 1, at 208. "In the remaining twenty-four states, where prohibitions against the operation of casinos are maintained, speech discussing such illegal activities does not receive the protection of the First Amendment." *Id.*

n132 See *id.*

n133 See *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993) (stating that a broadcast in North Carolina regarding a legal lottery in Virginia would be protected by the First Amendment provided it was not misleading); see also *Bigelow v. Virginia*, 421 U.S. 809, 822–23 (1975). In *Bigelow*, the Court found an advertisement about abortion services in New York to be within the realm of First Amendment protection even though the advertisement was made in a Virginia newspaper, where abortions were illegal. See *id.*

n134 See David G. Savage, High Court Trims Ban on Gaming Ad Broadcasts Law: Justices Base Ruling on 1st Amendment Protections of Free, Truthful Speech. Clinton Administration Sought to Maintain Prohibition, L.A. Times, June 15, 1999, at A12 (noting that while the Supreme Court has not gone so far as to find the entire broadcasting ban to be unconstitutional, lawyers are predicting that this will be the case). But see 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509 (1996). In 44 *Liquormart*, the Court distinguished the alcohol labelling ban in that case from the casino broadcasting ban in *Edge Broad. Co.*, 509 U.S. 418 (1993):

In *Edge Broadcasting*, we upheld a federal statute that permitted only those broadcasters located in states that had legalized lotteries to air lottery advertising. The statute was designed to regulate advertising about an activity that had been deemed illegal in the jurisdiction in which the broadcaster was located. Here, by contrast, the commercial speech ban targets information about entirely lawful behavior.

44 *Liquormart*, 517 U.S. at 509 (internal citations omitted).

n135 See Erik Bierbauer, Liquid Honesty: The First Amendment Right to Market the Health Benefits of Moderate Alcohol Consumption, 74 *N.Y.U. L. Rev.* 1057, 1087 (1999) (arguing that the government's paternalistic attitude towards alcohol consumption is in direct conflict with the First Amendment). Courts have distinguished between speech that is "inherently" misleading as opposed to only "potentially" misleading. See, e.g., *Western States Med. Ctr. v. Shalala*, 69 *F. Supp.2d* 1288, 1298 (*D. Nev.* 1999) (striking down a statute that prohibited pharmacists from advertising certain compounded drugs). While "inherently" misleading speech is not entitled to First Amendment protection, "potentially" misleading speech, speech that may or may not be misleading, is entitled to a complete analysis under *Central Hudson*. See *id.*

n136 Bierbauer, *supra* note 135, at 1087. In his article, Bierbauer talks about misleading speech in the context of labels and advertisements relating to alcoholic beverages. See *id.* This is analogous to casino gambling in that both would provide consumers with market information that they can sit back and absorb at their own pace. See *id.* at 1091. Applying the rationale used for alcohol labels, in order to show that casino advertisements were misleading, the government would have to provide evidence that a significant number of listeners were actually misled by the advertisements. See *id.* at 1087.

n137 See *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184–85 (1999).

n138 See *infra* notes 139–203 and accompanying text.

n139 *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). The government bears the burden of proving that its interests in the proposed speech restriction are substantial. See *Greater New Orleans*, 527 U.S. at 183. The government also bears the burden of proving that the restriction advances its interest in a "direct and material way." See *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993).

n140 See *Greater New Orleans*, 527 U.S. at 185–86; *Edge Broad. Co.*, 509 U.S. at 426.

n141 See *Greater New Orleans*, 527 U.S. at 185.

No one seriously doubts that the Federal Government may assert a legitimate and substantial interest in alleviating the societal ills [of gambling] . . . or in assisting like-minded states to do the same. But in the judgment of both the Congress and many state legislatures, the social costs that support the suppression of gambling are offset, and sometimes outweighed, by countervailing policy considerations, primarily in the form of economic benefits.

Id. at 186 (internal citations omitted). See also *Players Int'l, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997).

n142 *Edge Broad. Co.*, 509 U.S. at 426. In *Edge Broadcasting*, the Court recognized a substantial interest in balancing the interests between lottery and nonlottery states, see *id.*, and noted that the validity of the speech restriction should be examined in light of its impact on that congressional interest, rather than its impact in the particular case at issue. See *id.* at 430–31. However, in *Greater New Orleans*, the Court noted that a congressional interest is not necessarily the same as a governmental interest. See *Greater New Orleans*, 527 U.S. at 187. Additionally, the interest presented in *Edge Broadcasting* has also been interpreted as one protecting only nonlottery states, and not a balancing of interests between states. See *Valley Broad. Co. v. United States*, 107 F.3d 1328, 1333 (9th Cir. 1997) (finding a substantial interest in protecting states that do not permit casino gambling).

n143 See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514 (1996). In 44 *Liquormart*, the Court rejected the deferential and paternalistic approach the Court used in *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986), and found that the *Posadas* Court erred in allowing the ban on casino advertising merely out of fear that advertising would create a greater urge to gamble. See 44 *Liquormart*, 517 U.S. at 509.

n144 See 44 *Liquormart*, 517 U.S. at 519–20 (Thomas, J., concurring).

n145 See *infra* notes 204–22 and accompanying text.

n146 See *Edge Broad. Co.*, 509 U.S. at 437 (Stevens, J., dissenting). "Suppressing truthful advertising regarding a neighboring state's lottery, an activity which is, of course, perfectly legal, is a patently unconstitutional means of effectuating the Government's asserted interest in protecting the policies of nonlottery states." *Id.*

n147 421 U.S. 809 (1975) (finding a statute that prohibited the advertising of abortion clinics in Virginia to be a violation of the First Amendment).

n148 *Id.* at 824–25. The Court found that Virginia's police powers did not reach New York, and therefore, any interest it had in protecting its citizens from activities in a neighboring state carried little weight. See *id.* at 827–28.

n149 44 *Liquormart*, 517 U.S. at 510.

n150 *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

n151 See, e.g., *Bigelow*, 421 U.S. at 824–25. However, some argue that the rule in *Bigelow* does not apply to products like alcohol, tobacco, and gambling, which are used for recreational purposes only. See *Lorillard Tobacco Co. v. Reilly*, 84 F. Supp.2d 180, 184 (D. Mass. 2000). *Bigelow*, on the other hand, dealt with abortion, which is also a fundamental privacy right under the United States Constitution.

n152 See *infra* notes 223–53 and accompanying text.

n153 See *supra* note 87 and accompanying text.

n154 *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 187 (1999).

n155 See *Oliphant*, *supra* note 31, at 1402.

n156 *Western States Med. Ctr. v. Shalala*, 69 F. Supp.2d 1288, 1302 (D. Nev. 1999).

n157 *Players Int'l, Inc. v. United States*, 988 F. Supp. 497, 504 (D.N.J. 1997).

n158 See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (stating the government would have to prove its

ban on alcohol advertising would "significantly reduce alcohol consumption"). In *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), the Supreme Court found that a ban on direct mail solicitation by attorneys "directly and materially" advanced the state Bar's interest in protecting Florida lawyers from negative reputations as a result of these solicitations. See *id.* at 628-29. The Bar presented a plethora of empirical evidence it collected via studies on this type of solicitation, including its effects on the family members of victims, and the Court concluded that this evidence was sufficient to satisfy the third prong of Central Hudson. See *id.* at 627-28. But see *Edenfield v. Fane*, 507 U.S. 761 (1993). In *Edenfield*, the Court found a statute that prohibited in person solicitation by CPAs did not "directly and materially" advance the state's interest. See *id.* at 771. The Florida Board of Accountancy did not provide information on studies or other concrete evidence that its restriction could further their interests in a substantial way. See *id.* (emphasis added).

n159 See 44 Liquormart, 517 U.S. at 505. The government would have to show the advertisement actually enticed more compulsive gambling and did not just "channel gamblers to one casino rather than another." *Greater New Orleans*, 527 U.S. at 189. The broadcasters in *Greater New Orleans Broadcasting* argued that it is the

lower courts that must engage in an independent and searching judicial inquiry when evaluating commercial speech restrictions imposed by the government, and can only uphold such bans where the government demonstrates in court with convincing evidence that they directly and materially advance a substantial governmental interest and are no more extensive than necessary in order to do so.

Petitioner's Brief at 17, *Greater New Orleans* (No. 98-387).

n160 See generally *Greater New Orleans*, 527 U.S. at 189. "The Government fails to 'connect casino gambling and compulsive gambling with broadcast advertising for casinos' - let alone broadcast advertising for non-Indian commercial casinos." *Id.* (internal citations omitted).

n161 See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995). Any evidence presented would have to overcome "the irrationality of the regulatory scheme" surrounding the speech restriction. See *id.* at 489-90.

n162 *Id.* at 489. In *Rubin*, the Court struck down a statute that banned the disclosure of alcohol content on beer. See *id.* at 491. The statute exempted malt liquor, wine and other spirits from the ban, making it inconsistent with the state's interest in preventing "strength wars." See *id.* at 488-89.

n163 The social costs commonly associated with casino gambling can be broken down into four categories: compulsive gambling, erosion of family cohesion, diminished quality of life, and criminal behavior. See Goldin, *supra* note 1, at 835. Gambling is alleged to have increased criminal activity ranging from prostitution to loan sharking, as well as decreased the quality of life in areas where casinos are located. See *id.* at 83637.

n164 *Greater New Orleans*, 527 U.S. at 187. In addition to exempting non-tribal casinos from the broadcasting ban, Congress has also exempted state-run lotteries and gaming activities of charitable organizations. For additional background on these exceptions to § 1304, see *supra* notes 38-48 and accompanying text.

n165 "Spillover" refers to the broadcasts from one state that happen to carry over the airwaves to a neighboring state in the same proximity. See *United States v. Edge Broad. Co.*, 509 U.S. 418, 435 (1993)

n166 See *Greater New Orleans*, 527 U.S. at 194-95.

n167 It would seem irrational to allow broadcasts about casino gambling into a nonlottery state via "spillover," while preventing the broadcasters in the nonlottery state from advertising themselves. "If an area is already saturated with a message, it is irrelevant how saturation occurs, and preventing one speaker from carrying advertising accomplishes nothing." *Respondent's Brief at 17, United States v. Edge Broad. Co.*, 509 U.S. 418 (1993) (No. 92-486).

n168 *Players Int'l, Inc. v. United States*, 988 F. Supp. 497, 503 (D.N.J. 1997).

n169 *Greater New Orleans*, 527 U.S. at 194.

n170 See Paul H. Brietzke & Teresa L. Kline, *The Law and Economics of Native American Casinos*, 78 *Neb. L. Rev.* 263, 344 (1999). It is alleged that "net social costs are somewhat lower, developmental potentials are somewhat more favorable, and distributive effects are much more equitable." *Id.* "For tribes, the relevant rights concern sovereignty and

international human rights to self determination and development." *Id. at 345*. This is the policy the United States has endorsed since the 1960s, and institutional safeguards are needed to protect it. See *id.*

n171 See *supra* note 108 and accompanying text.

n172 See *Greater New Orleans*, 527 U.S. at 194. "We cannot see how this broadcast restraint, ambivalent as it is, might directly and adequately further any state interest in dampening consumer demand for casino gambling if it cannot achieve the same goal with respect to the similar federal interest." *Id.*

n173 *Id.*

n174 See *United States v. Edge Broad. Co.*, 509 U.S. 418, 429 (1993) (stating "commercial speech cases require a fit between the restriction and the government interest that is not necessarily perfect, but reasonable").

n175 509 U.S. at 429.

n176 527 U.S. at 188.

n177 See Gollin, *supra* note 59, at 884–907 (analyzing in–depth the Court's application of the Central Hudson balancing test over the years, and suggesting that stricter First Amendment protection should be afforded to commercial speech).

n178 See *id.* at 884–85. In 1989, the Court decided *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469 (1989). In *Fox*, the Court abandoned a "least restrictive means approach" and required only a "'fit' between the legislature's ends and the means chosen to accomplish those ends." *Id. at 480* (quoting *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 341 (1986)). "Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may be best employed." *Id.* The Court strengthened the fourth prong somewhat in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), when it stated that "if there are numerous and obvious less-burdensome alternatives to the restriction . . . that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *Id. at 417 n.13*.

n179 Gollin, *supra* note 59, at 891. "Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments." *Edge Broadcasting*, 509 U.S. at 434.

n180 See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995). In *Rubin*, the Court found that the government neglected to provide convincing evidence that the labeling ban actually advanced its interest in inhibiting strength wars between brewers. See *id.*

n181 514 U.S. 476 (1995).

n182 See Gollin, *supra* note 59, at 893.

n183 See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

n184 See *id. at 510*. "We conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes . . ." *Id.*

n185 See *id. at 507*. Some alternatives to the price–advertising ban that the Court mentioned were taxation, purchase limitations, and educational programs. See *id.*

n186 This assumes that the Supreme Court continues to apply the Central Hudson balancing test, despite recent misgivings about its application. See *supra* note 57 and accompanying text.

n187 See *United States v. Edge Broad. Co.*, 509 U.S. 418, 436 (1993) (Stevens, J., dissenting); see also *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999).

n188 See *Players Int'l, Inc. v. United States*, 988 F. Supp. 497, 504 (D.N.J. 1997) (interpreting 44 *Liquormart*, 517 U.S. at 486). "[The Court] rejects those regulations imposing speech constraints, particularly where alternatives exist which satisfy the same needs and achieve the same end." *Id.*

n189 See *Greater New Orleans*, 527 U.S. at 192.

n190 See *id.*

n191 See, e.g., Gamblers Anonymous Homepage (visited Aug. 13, 2000)

<<http://www.gamblersanonymous.org/index.html>>.

n192 See Petitioner's Brief at 32, *Greater New Orleans* (No. 98-387) (stating that the many alternative approaches to serving the government's interests are "readily available" and should be used in lieu of a speech restriction). A youth gambling prevention model was initiated in 1991 by the North American Training Institute. See Elizabeth M. George, Testimony: On the Issue of Youth and Adolescent Wagering, National Gambling Impact Study Commission (visited Aug. 13, 2000) <<http://www.nati.org/ngisctestimony.htm>>. The program provides training videos and other materials, including an on-line magazine geared toward teens that have potential gambling problems, and this service is currently used in

more than 15 states. See *id.* The on-line magazine is located at <<http://www.wannabet.org/>>.

n193 See Stevie A. Kish, *Betting on the Net: An Analysis of the Government's Role in Addressing Internet Gambling*, 51 *Fed. Comm. L.J.* 449, 452 (1998). "It was economically inevitable that an activity with this level of demand would be combined with a medium such as the Internet, which has the capacity to reach an audience of millions throughout the United States alone." *Id.* It was estimated that on-line gambling would be a billion-dollar business by the year 2000. See *id.* It is at least arguable that Internet gambling is distinguishable from broadcasts over the television and radio because of its impact on unwilling viewers. See *id.* at 459. In other words, while advertisements broadcast on radio and television can reach individuals in their homes regardless of whether they would like them to or not, gambling websites would have to be actively sought out by a consumer in order to be viewed. See *id.* But see *infra* note 256 and accompanying text (pointing out that gambling websites may advertise on other sites, thus subjecting Internet users to unsolicited gambling advertisements).

n194 See Kish, *supra* note 193, at 464. Posting a warning on a website is a rather simple matter. These sites could contain information regarding the laws of states in which gambling is illegal, as well as links to other websites where individuals can find helpful information on who they can contact if they are concerned about their gambling habits. See, e.g., *Tropical Bet Sportsbook & Casino* (visited Feb. 14, 2000) <<http://www.fatladycasino.com>>. This website contains a section on rules and regulations which includes the following:

Laws regarding gambling vary throughout the world and it is the responsibility of the player to ensure they understand and fully comply with any laws and regulations relevant to themselves in their own country or state. All members of Fat Lady Sportsbook & Casino must be at least 18 years of age.

Id.

n195 Some courts have found that other reasonable alternatives to regulations on speech do not necessarily prohibit speech restrictions from being a "reasonable fit" for the purposes of First Amendment analysis. See *Lorillard Tobacco Co. v. Reilly*, 84 *F. Supp.2d* 180, 189-90 (*D. Mass.* 2000) (finding advertising regulations on smoking to be narrowly tailored to a government interest of reducing underage smoking). There the Court stated: "There will always be alternatives to regulating speech," and that cannot possibly mean that if a social harm can be addressed both directly and indirectly, then all modes of direct regulation must be exhausted before indirect modes, such as advertising regulations, can be implemented. See *id.* at 190.

n196 See generally 44 *Liquormart, Inc. v. Rhode Island*, 517 *U.S.* 484 (1996). In response to difficulties in applying *Central Hudson*, "certain judges, scholars, and amici curiae have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." *Greater New Orleans Broad. Ass'n v. United States*, 527 *U.S.* 173, 184 (1999). Justice Stevens calls the *Central Hudson* approach "misguided," and notes that "the borders of the commercial speech category are not nearly as clear as the Court has assumed, and its four-part test is not related to the reasons for allowing more regulation of commercial speech than other speech." *Rubin v. Coors Brewing Co.*, 514 *U.S.* 476, 493 (1995) (Stevens, J., concurring). It should be noted, however, that there is no way to know for sure how the Supreme Court will advance with respect to *Central Hudson* given their "two-steps-forward, one-step-back" approach of the past. Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from Greater New Orleans Broadcasting*, 37 *Am. Bus. L.J.* 587, 648 (2000).

n197 Gollin, *supra* note 59, at 876. "[The Central Hudson test] is an ad hoc balancing test that is susceptible to manipulation, particularly when applied to legislation designed to restrict 'vice' activities such as gambling, smoking, and alcohol consumption." *Id.*

n198 44 *Liquormart*, 517 U.S. at 518 (Thomas, J., concurring).

n199 See 44 *Liquormart*, 517 U.S. at 509-10. The Court now takes a closer look at the third and fourth prongs of Central Hudson. See *id.* at 531-32. In her concurring opinion, Justice O'Connor noted that the Court has recently begun to scrutinize more closely a state's proffered interest in restricting speech. See *id.* at 531.

n200 See, e.g., 44 *Liquormart*, 517 U.S. at 507-08. The Court found the labeling ban at issue had failed to meet the less stringent "reasonable fit" analysis, and would therefore not be able to survive more stringent constitutional scrutiny. See *id.* It would be logical to assume then that since § 1304 would fail under the current Central Hudson test, it also could not survive a more rigid form of scrutiny.

n201 See Supplemental Brief by the Dept. of Justice and FCC at 9, *United States v. Players Int'l, Inc.* (3d Cir. 1999) (No. 985127).

n202 See *Greater New Orleans*, 527 U.S. at 190-93.

n203 See *supra* note 163 and accompanying text.

n204 See 44 *Liquormart*, 517 U.S. at 513.

n205 *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 n.2 (1995). In *Rubin*, the Court rejected a "vice exception" to Central Hudson when finding a statute that banned alcohol content on beer labels to be unconstitutional. See *id.*

n206 See P. Cameron Devore, First Amendment Protection of "Vice" Advertising: Current Commercial Speech Hot Buttons, 15 *Comm. Law.*, Fall 1997, at 3.

n207 See Goldin, *supra* note 1, at 808.

n208 See generally Roberts, *supra* note 41. "Gambling . . . [has historically been] lumped into the category of volitional criminal conduct and skewered with allegations that gaming, even when entirely legal and voluntary, was destroying civilization." *Id.* at 590.

n209 See *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993); see also Devore, *supra* note 206, at 3. The Devore article discusses in greater detail the vice exception and how it applies to alcohol, tobacco and gambling respectively. See *id.*

n210 See *Edge Broad. Co.*, 509 U.S. at 426. There is no enumerated right to gamble in the Constitution. See *id.* Courts have generally agreed that the act of gambling itself could be prohibited. See, e.g., *Edge Broad. Co.*, 509 U.S. at 426; *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 345-46 (1986); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996) (inferring a state's power to bar the sale of alcohol altogether).

n211 See U.S. Const. art. I, § 8, cl. 3. The Commerce Clause states that "the Congress shall have power . . . to regulate commerce . . . among the several states." *Id.* Congress can regulate via the Commerce Clause when the activities they seek to regulate impact interstate commerce, as gambling does. See *Players Int'l, Inc. v. United States*, 988 F. Supp. 497, 504 (D.N.J. 1997). Therefore, if gambling in state A has an economic impact on states B and C, Congress can potentially intervene. See Kish, *supra* note 193, at 457.

n212 See *Edge Broad. Co.*, 509 U.S. at 426; *Posadas*, 478 U.S. at 345-46.

n213 See 44 *Liquormart*, 517 U.S. at 510. The "greater includes lesser" rationale was used in *Posadas*, 478 U.S. at 345-46. In *Posadas*, the Court upheld a ban on casino advertising finding "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Id.*

n214 44 *Liquormart*, 517 U.S. at 514. Nearly any activity that poses some potential hazard to public health or social mores could be deemed a vice, and this becomes "anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market." *Id.*

n215 See *id.* Other areas where the "vice" exception has become predominant include litigation surrounding advertisements for tobacco and alcoholic beverages. See generally Devore, *supra* note 206 (discussing concurrent themes found

in the government's arguments pertaining to increases in demand resulting from advertisements for alcohol, tobacco, and gambling).

n216 See generally, Commercial Speech, *supra* note 51, at 22425.

n217 See M. Neil Browne et al., The Role of Ethics in Regulatory Discourse: Can Market Failure Justify the Regulation of Casino Gaming?, *78 Neb. L. Rev. 37, 41 (1999)* (stating that casino gambling regulations should be viewed with respect to ethical considerations and not merely economic supply and demand); Goldin, *supra* note 1, at 807-08; Kish, *supra* note 193, at 452.

n218 See generally Donald W. Garner & Richard J. Whitney, Protecting Children From Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation, *46 Emory L.J. 479 (1997)* (arguing that the government should have greater deference to control speech that promotes products that are illegal to sell to children or are especially harmful to them).

n219 See George, *supra* note 192. Other reasons associated with adolescent gambling include problems at home, low self-esteem, the desire to win, and avoidance of pain and grief. See *id.*

n220 *Reno v. ACLU, 521 U.S. 844, 874 (1997)*.

n221 *Id.*

n222 See *supra* notes 212-15 and accompanying text.

n223 State Regulation of Radio and Television, *supra* note 68, at 386.

n224 For additional background information on *18 U.S.C. § 1304*, see *supra* notes 29-37.

n225 See Crigler, *supra* note 35, at 51; see also *supra* note 69 and accompanying text.

n226 See Supplemental Brief for United States and FCC, *Players Int'l, Inc. v. United States* (3d Cir. 1999) (No. 98-5127).

n227 See *id.* at 1. Although this brief was submitted on behalf of the FCC, spokespersons for the Commission are not yet indicating a "green light" on casino broadcasts. See Richard E. Wiley, *Developments in Communications Law: Competition, Consolidation and Convergence*, 554 *Practicing Law Institute* 153, 214 (1999).

n228 See *supra* note 87. In the absence of support from the federal government, states, being unable to control interstate broadcasts, would be unable to defend their individual gambling policies. See *Valley Broad. Co. v. United States, 107 F.3d 1328, 1333 (9th Cir. 1998)*.

n229 See Kish, *supra* note 193, at 457.

n230 See *id.*

n231 See *supra* note 211 and accompanying text. Dormant Commerce Clause analysis refers to "the limitations placed upon state commerce power by the mere existence of federal commerce power, even though that power has not been invoked by Congress." Kristen D. Adams, Comment, *Interstate Gambling: Can States Stop the Run for the Border?*, *44 Emory L.J. 1025, 1047-48 (1995)* (discussing the Commerce Clause issues surrounding interstate lottery ticket messenger services).

n232 See *National Broad. Co. v. Pub. Util. Comm'r, 25 F. Supp. 761, 763 (D.N.J. 1938)*. In this case, the Court found unconstitutional a state statute regulating radio broadcasting, as the field had been preempted by federal regulation via Congress' Commerce Clause power. See *id.* "Virtually all radio and television broadcasting, by its very nature, is in or affects interstate commerce." State Regulation of Radio and Television, *supra* note 68, at 386.

n233 See *id.*

n234 *Id.* at 391. Congress has already acted in accordance with its Commerce Clause power by placing restrictions on broadcasting. Cases in which a state has been allowed to regulate activities despite interstate commerce implications usually arise when Congress has not yet passed a regulation in that area. See, e.g., *Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945)* (finding the national interest in free interstate commerce outweighed a state interest in limiting the cars on trains as a safety measure in reducing accidents).

n235 See *Cooley v. Board of Wardens*, 53 U.S. 299, 319 (1851) (finding that Congress can in fact permit states to regulate conduct that is local in nature even though it would normally fall within Congress' power under the Commerce Clause in the Constitution).

The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter. If they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the states.

Id. at 318. In brief, the Cooley doctrine allows states to diversify their regulations for interests that are local in nature, while reserving those interests requiring national, uniform attention for Congress. See H. Joseph Hameline & William Miles, *The Dormant Commerce Clause Meets the Internet*, 41 Boston B.J. 8, 9 (1997) (arguing that technology will resurrect the Dormant Commerce Clause as states seek to regulate the type of information entering into their borders).

n236 State Regulation of Radio and Television, *supra* note 68, at 391.

n237 See Adams, *supra* note 231, at 1040. "Because gambling is a matter of peculiar local interest, state legislatures, rather than Congress, are the proper forums for most gambling issues. Therefore, states may legislate in this area, so long as they do not violate the United States Constitution and, most importantly, the Commerce Clause." *Id.*

n238 See *id.*

n239 See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996). In 44 *Liquormart*, the Court acknowledged that the Twenty-First Amendment granted commerce power to the states that they would not otherwise have, by allowing them to control the sale of alcoholic beverages within their borders. See *id.* "We now hold that the Twenty-First Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." *Id.* at 516.

n240 See *id.* The First Amendment requires stricter scrutiny be applied to state restrictions on speech than on similar restrictions impacting commerce alone. See *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 193 (1999). "When a state entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review the First Amendment generally demands." 44 *Liquormart*, 517 U.S. at 501.

n241 Hameline & Miles, *supra* note 235, at 20.

n242 See *id.* at 19-20. "If such regulations would cause unworkable interferences with that aspect of interstate commerce, the Court sets aside that aspect for Federal regulation only." *Id.* at 20; see also, e.g., *Wabash, St. Louis and Pacific Ry. Co. v. Illinois*, 118 U.S. 557 (1886) (holding a statute that charged railway fees for goods coming from or going to another state burdened interstate commerce by hindering the growth of the railroad).

n243 State Regulation of Radio and Television, *supra* note 68, at 393 (arguing that states should retain some power to regulate radio and television broadcasts because the FCC is often too overwhelmed in its duties to deal with issues that trouble individual states until the problem reaches a national level).

n244 See *id.* at 393-94. If state regulations governing broadcasting were encouraged, "every station would be obliged to comply with the laws of all the states which receive its signal." *Id.* at 394.

n245 See, e.g., *Bigelow v. Virginia*, 421 U.S. 809, 828-29 (1975). "The burdens thereby imposed on publications would impair, perhaps severely, their proper functioning." *Id.* at 829.

n246 While states may have the power to regulate what is local to them, they do not have the power to "regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945).

n247 Cf. Hameline & Miles, *supra* note 235, at 22. Broadcasting of casino advertising is analogous to communication via the Internet in that both deal with issues involving transmissions over state borders. In their article, Hameline & Miles note that potential Commerce Clause concerns arise when a state places regulations on certain advertisements (i.e. advertisements by individual attorneys or law firms), and but for the advertisement being posted on a website that is

accessible to other states, the advertiser has no intention of advertising in that particular state. See *id.*

n248 It is at least arguable "that jurisdiction might attach if advertising rates charged by a station are determined with reference to the forum state's audience." *State Regulation of Radio and Television*, *supra* note 68, at 396 (citing *WSAZ, Inc. v. Lyons*, 254 F.2d 242 (6th Cir. 1958)).

n249 If a statute is facially discriminatory against other states, it will be presumed *per se* invalid. See *Hameline & Miles*, *supra* note 235, at 20. It is assumed, for the purposes of this article, that any state regulations implemented to regulate the broadcasting of casino advertisements would apply equally to broadcasts originating both inside and outside of the state imposing that restriction.

n250 See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (holding a statute that required cantaloupe farmers in Arizona to package them within the state to be an unconstitutional violation of the Commerce Clause).

n251 *Id.*

n252 See *supra* note 237 and accompanying text.

n253 While state regulation in the area of the broadcasting of casino advertisements may not be completely out of the question, further discussion on the issue is beyond the scope of this article.

n254 Simply put, the Internet is a network of computers that communicate with each other electronically, at work, at home, or around the world. See *Reno v. ACLU*, 521 U.S. 844, 849 (1997). The World Wide Web is one of the most popular aspects of the Internet. See Joshua A. Marcus, *Commercial Speech on the Internet: Spam and the First Amendment*, 16 *Cardozo Arts & Ent. L.J.* 245, 245 n.4 (1998). It can be used for searching and retrieving all sorts of information from remote computers. See *Reno*, 521 U.S. at 852. It is also "the most commercial and advertising-friendly place on the Internet." Joshua A. Marcus, *Commercial Speech on the Internet: Spam and the First Amendment*, 16 *Cardozo Arts & Ent. L.J.* 245, 245 n.4 (1998).

n255 *Hameline & Miles*, *supra* note 235, at 22.

n256 See *id.* at 8. "Unlike television and radio advertisements, Internet gambling Web sites do not reach unwilling listeners and viewers, but only those people who actively seek out such sites." *Kish*, *supra* note 193, at 459. However, a situation could arise where an Internet user becomes a passive recipient of unwanted advertisements. For example, casinos could pay to have their advertisements posted on high traffic non-gambling websites, or there may even be a potential for "spamming." See Marcus, *supra* note 254, at 247. "Spamming" is a form of intrusive advertising that occurs when companies flood Internet users with advertisements by sending ads to multiple newsgroups or mailing lists. See *id.* For a lengthy discussion regarding the First Amendment issues surrounding the more intrusive methods of advertising via the Internet, see Marcus, *supra* note 254.

n257 See *Kish*, *supra* note 193, at 459.

n258 See *Hameline & Miles*, *supra* note 235, at 21. Recently, the Court has acknowledged that the Internet is a communication affecting commerce at a national level. See generally *Reno v. ACLU*, 521 U.S. 844 (1997) (holding the Communications Decency Act to be an unconstitutional violation of the First Amendment as it regulated more speech than was necessary to achieve its purpose).

n259 *Hameline & Miles*, *supra* note 235, at 22.

n260 It is estimated that there are somewhere between 250 and 700 Internet gambling websites in existence. See Joseph M. Kelly, *Internet Gambling Law*, 26 *Wm. Mitchell. L. Rev.* 117, 118 (2000).

n261 See generally Kelly, *supra* note 260, at 134-50 (discussing different approaches to the growing Internet gambling trend).

n262 See *Internet Gambling Prohibition Act of 1999*, S. 692, 106th Cong. § 2 (1999).

n263 See *Internet Gambling Prohibition Act of 1999*, S. 692, 106th Cong. § 2 (b)(1)(B) (1999). "It shall be unlawful for a person engaged in a gambling business knowingly to use the Internet or any other interactive computer service . . . to send, receive, or invite information assisting in the placing of a bet or wager." *Id.*

n264 See *Kish*, *supra* note 193, at 460; Marcus, *supra* note 254, at 289. "No type of Internet communication should be

given less First Amendment protection than the broadcast media." *Id.*

n265 Comment, Commercial Speech – Advertising, 110 *Harv. L. Rev.* 216, 224 (1996) (indicating that because commercial speech has risen to such a level, it should be afforded the same First Amendment protection as political speech).

n266 *Id.* at 225 n.81.

n267 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502–03 (1996) (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980)).

n268 See Browne, *supra* note 217, at 41. "Citizens and consumers manifest a demand for gaming." Roberts, *supra* note 41, at 606. In fact, Las Vegas has become a greater tourist attraction than Disneyworld in Orlando, Florida. See *id.* at 605. Other behaviors once deemed to be socially harmful have since become acceptable. These include interracial marriages and the use of contraception. See *Loving v. Virginia*, 388 U.S. 1 (1967) (finding a state statute prohibiting interracial marriages to be a violation of the Constitution); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding a state law which prohibited the use of contraceptives was a violation of the federal constitutional right to privacy).

n269 See Browne, *supra* note 217, at 65. But see John Warren Kindt, The Negative Impacts of Legalized Gambling on Businesses, 4 U. Miami Bus. L.J. 93 (1994) (encouraging businesses to avoid locating in legalized gambling states). Kindt argues that while legalized gambling may have some short-term economic benefits, the long-term impact is social and economic dysfunction, exploitation of low-income minority groups, and increased taxation. See *id.* at 102–03. Kindt further argues that continuous future economic benefits are "illusory" and that "since legalized gambling leaves the local community and state with increased social welfare costs, inordinate pressures are placed on government officials to raise real estate taxes, state income taxes, and business taxes." *Id.*

n270 See Roberts, *supra* note 41, at 606.

n271 Brietzke & Kline, *supra* note 170, at 272 (emphasis in original).

n272 See Browne, *supra* note 217, at 65. Universities whose construction was partially funded by lottery revenues include: Yale, Harvard, Princeton, Dartmouth, and Columbia. See *id.*

n273 See Roberts, *supra* note 41, at 588, 601.

n274 See *id.* at 593. States have implemented their own regulations on the legalized gambling industry, and the various financial reporting requirements imposed by the Securities and Exchange Commission provide additional obstacles against the infiltration of organized crime in the industry. See *id.* at 593–94.

n275 See *id.* at 597. A study by the Senate Committee in 1994 concluded that "property crimes and crimes of violence against persons were no more likely to occur at casinos than at other locations such as mass transit or shopping malls." *Id.* at 598. For a discussion of several other studies of the impact of casinos on crime rates, see Roberts, *supra* note 41, at 596–600.

n276 Darren Gowen, Pathological Gambling: An Obscurity in Community Corrections?, *Fed. Probation*, June 1996, at 3.

n277 See Roberts, *supra* note 41, at 607.

n278 See *id.* at 602. These statistics are found in *Gambling in America: Final Report of the Commission on the Review of the National Policy Toward Gambling* 63 (1976).

n279 Roberts, *supra* note 41, at 602.

n280 See *id.* at 603.

n281 See *Greater New Orleans*, 527 U.S. at 189.

n282 See Roberts, *supra* note 41, at 602.

n283 See *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 475 (1988). In a situation involving a written advertisement, the Shapero Court found "a letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded." *Id.* at 475–76. Similarly, a person receiving an unwanted advertising broadcast

could ignore it, change the channel, or turn off their television or radio.

n284 *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) (finding a law which banned personal solicitation by certified public accountants to be a violation of the First Amendment).

n285 See supra notes 139-203 and accompanying text.

n286 See supra notes 161-73 and accompanying text.

n287 See supra notes 196-200 and accompanying text.

n288 *Western States Med. Ctr. v. Shalala*, 69 F. Supp.2d 1288, 1309 (D. Nev. 1999).

n289 See supra notes 226-28 and accompanying text.

n290 See supra notes 229-53 and accompanying text.

n291 *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 195 (1999) (citing *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)).

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