

bling, because of its economic benefits, makes it more difficult for the government to demonstrate that its restriction on commercial speech materially advances its asserted interest and constitutes a reasonable “fit.”¹⁰⁷⁴ In this case, “[t]he operation of [18 U.S.C.] § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.”¹⁰⁷⁵ Moreover, “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.”¹⁰⁷⁶

In *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, the Court asserted that “the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.”¹⁰⁷⁷ Subsequently, however, the Court eschewed reliance on *Posadas*,¹⁰⁷⁸ and it seems doubtful that the Court would again embrace the broad principle that government may ban all advertising of an activity that it permits but has power to prohibit. Indeed, the Court’s very holding in *44 Liquormart, Inc. v. Rhode Island*,¹⁰⁷⁹ striking down the state’s ban on advertisements that provide truthful information about liquor prices, is inconsistent with the general proposition. A Court plurality in *44 Liquormart* squarely rejected *Posadas*, calling it “erroneous,” declining to give force to its “highly deferential approach,” and proclaiming that a state “does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate.”¹⁰⁸⁰ Four other Justices concluded that *Posadas*

¹⁰⁷⁴ 527 U.S. at 186–87.

¹⁰⁷⁵ 527 U.S. at 190.

¹⁰⁷⁶ 527 U.S. at 195.

¹⁰⁷⁷ 478 U.S. 328, 345–46 (1986). For discussion of the case, see P. Kurland, *Posadas de Puerto Rico v. Tourism Company: “’Twas Strange, ’Twas Passing Strange; ’Twas Pitiful, ’Twas Wondrous Pitiful,”* 1986 SUP. CT. REV. 1.

¹⁰⁷⁸ In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (invalidating a federal ban on revealing alcohol content on malt beverage labels), the Court rejected reliance on *Posadas*, pointing out that the statement in *Posadas* had been made only after a determination that the advertising could be upheld under *Central Hudson*. The Court found it unnecessary to consider the greater-includes-lesser argument in *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 427 (1993), upholding through application of *Central Hudson* principles a ban on broadcast of lottery ads.

¹⁰⁷⁹ 517 U.S. 484 (1996).

¹⁰⁸⁰ 517 U.S. at 510 (opinion of Stevens, joined by Justices Kennedy, Thomas, and Ginsburg). Stevens’ opinion also dismissed the *Posadas* “greater-includes-the-lesser argument” as “inconsistent with both logic and well-settled doctrine,” pointing out that the First Amendment “presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct.” *Id.* at 511–512.