

## THE MARKETING OF GAMBLING TO THE ELDERLY

Erika Gosker

*In recent years, the majority of states have legalized some form of lottery or casino gambling as an alternative means to raise tax revenues. Competition among the ever-increasing number of players in the gambling industry has resulted directly in the implementation of aggressive advertising tactics in order to maintain a profitable customer base. As such, casinos and lotteries shift much of their focus to their most vulnerable and reliable spenders—the elderly.*

*Ms. Gosker first illustrates the significance of the burgeoning gambling industry in the United States, with an explanation for its acceptance as a legitimate source of entertainment and revenue. Here, the author makes evident that, regardless of state incentives, market demand will dictate the industry's profit potential. This discussion also focuses on specific marketing efforts employed by casinos and lotteries, including strategies aimed toward elderly customers. Ms. Gosker next evaluates the potential to regulate these marketing techniques. In particular, the author analyzes whether the First Amendment of the U.S. Constitution protects the gambling industry's advertisements as "commercial" speech. Ultimately, Ms. Gosker defends the constitutionality of the federal ban on television and radio casino advertisements and calls for Congress to adopt appropriate restrictions to prevent unfair casino and lottery marketing campaigns aimed at the elderly. Furthermore, the note encourages the nursing home industry to take an active role in preventing the gambling industry from targeting its residents.*

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## I. Introduction

Presently, forty-eight states permit some form of gambling activity.<sup>1</sup> Only Utah and Hawaii remain as the two exceptions to the explosive spread of legalized gambling across the states.<sup>2</sup> Two forms of gambling, casinos and lotteries, exemplify the industry's expansion. The increasing availability of these gambling forms directly results in a tremendous rise in the amount of money wagered.<sup>3</sup> As casinos and lotteries seek growth similar to other business entities, casino managers and lottery commissions implement aggressive marketing strategies to attract more gamblers.<sup>4</sup> Perhaps the most significant of these strategies involves marketing casino and lottery gambling to vulnerable segments of the population, specifically the elderly.<sup>5</sup>

This note argues for enforcement mechanisms to prevent the gambling industry from using its marketing efforts to target the elderly. To establish the background and overall importance of this argument, part II of this note discusses the proliferation of the gambling industry and the reasons for its tremendous growth. This discussion includes a brief description of the numerous strategies employed by casinos and lotteries to attract more gamblers. In part III, the analysis focuses on the marketing efforts of casinos and lotteries, including campaigns specifically designed to reach the elderly. Included in this section is an evaluation of the federal ban on casino advertising on television and radio<sup>6</sup> and the gambling industry's vehement opposition to both this ban and the First Amendment interpretation allowing it.<sup>7</sup> Part IV of this note defends the constitutionality of the federal ban and encourages the nursing home industry to adopt further restrictions on campaigns targeting the elderly. Finally, this note proposes that Congress prevent state-sponsored lotteries from continuing their misleading advertising campaigns. To this end, the author challenges

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1. See Blake Hurst, *The Government as Gambling Partner*, AM. ENTER., Mar.-Apr. 1996, at 62; Martin Koughan, *Easy Money*, MOTHER JONES, July-Aug. 1997, at 32, 37; *United States Gaming at a Glance*, INT'L GAMING & WAGERING BUS., Sept. 1998, at 21.

2. See *As Gambling Fever Spreads, Industry Deserves a Look*, USA TODAY, June 18, 1996, at A12; Koughan, *supra* note 1, at 37; *United States Gaming at a Glance*, *supra* note 1, at 21.

3. See *infra* notes 12-14 and accompanying text.

4. See *infra* notes 33-119 and accompanying text.

5. See *infra* notes 120-33 and accompanying text.

6. See Communications Act of 1934, 18 U.S.C. § 1304 (1994).

7. See *infra* notes 197-219 and accompanying text.

nursing homes to take an active role in preventing lotteries from targeting their residents.

## II. Background

### A. Casino and Lottery Expenditures

As recent as 1973, only one state, Nevada, allowed casino operations.<sup>8</sup> Between 1976 and 1989, only Nevada and New Jersey permitted casinos.<sup>9</sup> Today, more than 500 casinos operate in twenty-six states.<sup>10</sup> At the same time, the number of states sponsoring lotteries increased from thirteen in 1976 to thirty-seven today, plus the District of Columbia.<sup>11</sup> As a result, the amount of money wagered has also increased dramatically. In 1982, consumers spent \$4.2 billion in casinos and \$2.2 billion on lottery tickets.<sup>12</sup> These expenditures grew to \$15.3 billion and \$14.1 billion, respectively, in 1994.<sup>13</sup> By 1997, consumers spent slightly more than \$27 billion in casinos and \$16.6 billion on lottery tickets.<sup>14</sup>

### B. Explanations for the Public and Private Interest in Gambling

Experts offer two prevalent reasons to account for the explosive growth in gambling. First, state and local governments view casino gambling as a source of revenue because it attracts tourists, creates jobs, and generates taxes.<sup>15</sup> Second, some believe that society has con-

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8. See Jill Abramson, *As Gambling Issue Moves into the Spotlight, Rival Forces Place Their Bets on U.S. Study*, WALL ST. J., Dec. 30, 1996, at A14.

9. See *As Gambling Fever Spreads, Industry Deserves a Look*, *supra* note 2, at A12; Joseph P. Shapiro, *America's Gambling Fever*, U.S. NEWS & WORLD REP., Jan. 15, 1996, at 53, 56; Gene Sloan, *Casino Gambling Still on a Hot Streak*, USA TODAY, Apr. 12, 1996, at D1.

10. See Abramson, *supra* note 8, at A14; *United States Gaming at a Glance*, *supra* note 1, at 21.

11. See *As Gambling Fever Spreads, Industry Deserves a Look*, *supra* note 2, at 12A; Margot Hornblower, *No Dice: The Backlash Against Gambling*, TIME, Apr. 1, 1996, at 29; *United States Gaming at a Glance*, *supra* note 1, at 21.

12. See Patricia Edmonds, *Gambling's Backers Find It Isn't a Sure Bet*, USA TODAY, Dec. 29, 1995, at A1.

13. See *id.*

14. See William R. Eadington, *Economic Development and the Introduction of Casinos: Myths and Realities*, ECON. DEV. REV., Fall 1995, at 51; Fahrenkopf, *supra* note 16, at A12; Earl L. Grinols, *Bluff or Winning Hand? Riverboat Gambling and Regional Employment and Unemployment*, ILL. BUS. REV., Spring 1994, at 8.

vinced the public that people can obtain and even deserve money without working to earn it.<sup>16</sup> Third, the public demand for gambling is cited as a driving force behind the spread of the gambling industry's casinos and lotteries.<sup>17</sup> Numerous polls indicate that people accept gambling as entertainment,<sup>18</sup> with significant increases in amounts wagered demonstrating its widespread approval.<sup>19</sup>

Despite the apparent public demand for gambling, many academics contend that the gambling industry and government officials, in fact, caused the spread of gambling.<sup>20</sup> Historically, the gambling industry developed its casinos in border locations,<sup>21</sup> attracting residents of the neighboring state.<sup>22</sup> In turn, these neighboring states must choose between competing for these revenues or losing them to the state with the casino.<sup>23</sup> The number of riverboat casinos operating on the Mississippi and Ohio Rivers indicates that many states decided

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16. See BETTER GOV'T ASS'N, STAFF WHITE PAPER: CASINO GAMBLING IN CHICAGO 37 (1992) [hereinafter CASINO GAMBLING IN CHICAGO]; ROBYN GEAREY, *The Numbers Game*, NEW REPUBLIC, May 19, 1997, at 19, 20 (describing a Connecticut Lottery ad suggesting buying lottery tickets was a better investment than saving); Steven D. Gold, *It's Not a Mirage, It's a Mirage*, STATE LEGISLATURES, Feb. 1994, at 28; *Green Eggs & Ham*, WALL ST. J., Apr. 27, 1992, at A14; William G. Ross, *The Enigma of Crime: A Comment on Lawrence M. Friedman's Paper*, 27 CUMB. L. REV. 951, 954 (1997) (stating that the increasing crime rate is linked to society's message that people do not have to work in order to be wealthy).

17. See CASINO GAMBLING IN CHICAGO, *supra* note 16, at 45 (stating that the public's demand for gambling is greater than the supply); Shapiro, *supra* note 9, at 58 (noting that the number of tourists in Las Vegas increased in 1994, suggesting that the spread of gambling has increased demand).

18. See Frank Fahrenkopf, *No, It Helps the Economy*, USA TODAY, Nov. 25, 1996, at A12 (stating a 90% approval rate among the public); Shapiro, *supra* note 9, at 55 (reporting that 89% of the public "approve[s] of casino gambling"); cf. CASINO GAMBLING IN CHICAGO, *supra* note 16, at 2 (attributing the increased acceptability to the legalization of gambling).

19. See CASINO GAMBLING IN CHICAGO, *supra* note 16, at 2 (noting that 71% of the public gambled in 1989, while only 61% gambled in 1974, and "the amount wagered has increased over 1400% from 1974 to 1988"); Koughan, *supra* note 1, at 32 (stating that "[i]n the past five years, the number of Americans visiting casinos has doubled").

20. See ROBERT GOODMAN, LEGALIZED GAMBLING AS A STRATEGY FOR ECONOMIC DEVELOPMENT 16 (Ctr. Econ. Dev., U. Mass.-Amherst 1994) (contending that the gambling industry and public officials, as opposed to the public, have caused the spread of gambling); Earl L. Grinols, *Gambling as Economic Policy: Enumerating Why Losses Exceed Gains*, ILL. BUS. REV., Spring 1995, at 6, 10 [hereinafter Grinols, *Gambling as Economic Policy*] (stating that gambling promoters have caused the spread of gambling).

21. See Eadington, *supra* note 18, at 53; Grinols, *Gambling as Economic Policy*, *supra* note 20, at 10-11.

22. See Eadington, *supra* note 18, at 53; Grinols, *Gambling as Economic Policy*, *supra* note 20, at 10-11.

23. See Eadington, *supra* note 18, at 53; Grinols, *Gambling as Economic Policy*, *supra* note 20, at 10-11.



to compete for these revenues.<sup>24</sup> In addition to simply allowing the gambling industry to conduct activity within their states, government officials actively seek gambling revenues as an alternative to raising taxes.<sup>25</sup> In fact, the increase in the number of state lotteries stems from state governments in search of additional revenues.<sup>26</sup> Overall, gambling has become more accessible and acceptable, as governments endorsed gambling through legalization and promoted it by sponsoring lotteries.<sup>27</sup>

Regardless of the cause of the explosive growth in gambling availability, the impact of such growth generates much debate. While the gambling industry continues to claim that it provides great economic benefits,<sup>28</sup> many academics attempt to demonstrate otherwise.<sup>29</sup> In 1996, Congress passed legislation to form the National Gambling Impact Study Commission to study the socioeconomic impact of legalized gambling.<sup>30</sup> Unfortunately, the gambling industry contributed heavily to political campaigns, thereby influencing the formation of the National Gambling Impact Study Commission Act.<sup>31</sup> Consequently, Congress limited the federal commission's subpoena powers and, most significantly, appointed people tied to the gambling industry to serve as members of the commission.<sup>32</sup>

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24. See Eadington, *supra* note 18, at 53 (noting that Iowa, Illinois, Mississippi, Louisiana, Missouri, and Indiana permit riverboat casinos).

25. See CASINO GAMBLING IN CHICAGO, *supra* note 16, at 3 (stating that the need for tax revenue and economic development make "the legalization of gambling . . . more politically viable"). Politicians are reluctant to raise taxes because doing so would hurt their chances of being reelected. See *id.* at 37. In addition, many politicians rely on political contributions from the gambling industry to fund their election campaigns. See Koughan, *supra* note 1, at 35; Shapiro, *supra* note 9, at 55.

26. See CASINO GAMBLING IN CHICAGO, *supra* note 16, at 3 (stating that the need for tax revenue and economic development make "the legalization of gambling . . . more politically viable"). Politicians are reluctant to raise taxes because doing so would hurt their chances of being reelected. See *id.* at 37.

27. See *id.* at 2, 7.

28. See Eadington, *supra* note 18, at 51; Fahrenkopf, *supra* note 16, at A12; Shapiro, *supra* note 9, at 53.

29. See GOODMAN, *supra* note 20; Gold, *supra* note 19, at 28; Grinols, *Gambling as Economic Policy* *supra* note 20, at 6; John Warren Kindt, *Legalized Gambling Activities as Subsidized by Taxpayers*, 48 ARK. L. REV. 889 (1995) [hereinafter Kindt, *Subsidized by Taxpayers*].

30. See National Gambling Impact Study Commission Act, 18 U.S.C. § 1955 (1996); Abramson, *supra* note 8, at A14.

31. See Koughan, *supra* note 1, at 32.

32. See *id.*

### C. Obtaining Market Share and Enlarging the Market

#### 1. CASINOS

Whether the demand for gambling or the industry itself has caused the proliferation of gambling, casinos need to continuously attract gamblers in order to increase their market share.<sup>33</sup> Two ways of attracting gamblers include entering new markets and marketing.<sup>34</sup>

*a. New Markets* By entering a new market, a casino seeks to attract those people in the area who are willing to gamble. States which refuse to permit such gambling activities create the most substantial barrier to establishing new markets. Between 1994 and 1996, twenty-three states rejected proposals to legalize some form of gambling.<sup>35</sup> Such rejections can be attributed to citizen groups that initiate strong opposition to gambling initiatives<sup>36</sup> by arguing that the social costs of gambling exceed the tax revenues collected.<sup>37</sup> In Florida, for example, the citizens rejected a proposal to open forty-seven casinos.<sup>38</sup> The state estimated that casino gambling would generate between \$320 million to \$470 million in tax revenues.<sup>39</sup> Studies, however, projected the social costs of these casinos to be \$2.16 billion.<sup>40</sup> Thus, the pressure from citizen groups to maintain prohibitions against gambling, in addition to the nearly saturated existing markets, decreases the potential success of a casino to enter a new market.<sup>41</sup>

*b. Marketing* Without the possibility of market expansion, casinos must, in the alternative, rely on marketing tactics to obtain a greater

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33. See John Warren Kindt, *Legalized Gambling Activities: The Issues Involving Market Saturation*, 15 N. ILL. U. L. REV. 271, 274-75 (1995) [hereinafter Kindt, *Market Saturation*] (arguing that the need for expansion of gambling activities results in consumers spending less on other goods and services).

34. See ILLINOIS ECON. & FISCAL COMM'N, *WAGERING IN ILLINOIS: A REPORT UPDATING THE ECONOMIC IMPACT OF GAMBLING ACTIVITIES* 4 (1994) [hereinafter *WAGERING IN ILLINOIS*] (noting that wagering in Illinois will increase in the short term because of the granting of additional river gambling boat licenses); Kindt, *Market Saturation*, *supra* note 33, at 280 (stating that marketing techniques are used to expand gambling).

35. See Hornblower, *supra* note 11, at 30.

36. See *id.*

37. See *id.* at 31.

38. See *id.* at 33 (discussing the 1994 referendum which defeated the plan).

39. See *id.*

40. See *id.*

41. See *id.* at 30; Rita Koselka & Christopher Palmeri, *Snake Eyes*, FORBES, Mar. 1, 1993, at 70, 72.

share of *existing* markets from competing casinos.<sup>42</sup> Although a federal statute prohibits casinos from advertising on television and radio,<sup>43</sup> this ban only applies to broadcast advertisements depicting gambling activities.<sup>44</sup> Most significantly, it does not include any print promotions or billboards, nor does it extend to broadcast advertisements showing nongambling activities or amenities.<sup>45</sup>

Although land-based casinos tend to offer amenities in addition to gambling activities, riverboat casinos typically do not.<sup>46</sup> Thus, the riverboats must rely on billboard advertisements that emphasize the total amount of money paid to gamblers.<sup>47</sup> These advertisements, however, fail to mention that the casino typically wins back the money it initially pays out.<sup>48</sup>

Not unlike other business ventures, casinos conduct market research, which includes the use of tracking systems.<sup>49</sup> These systems utilize membership cards,<sup>50</sup> in which gamblers receive benefits from the accumulation of points on the card "redeemable for casino merchandise, meals and even cash."<sup>51</sup> The cards record the amount of money the member has wagered<sup>52</sup> and transfer this information to a database file.<sup>53</sup> Casinos also purchase name lists from credit card

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42. See David Hayes, *Casino Payout Seen, Not Earned*, KAN. CITY STAR, Mar. 17, 1996, at A1, A10 (stating that casinos are in an "advertising war").

43. See Communications Act of 1934, 18 U.S.C. § 1304 (1994); see also Tony Batt, *Lawmakers Deal Blow to Gaming Industry*, LAS VEGAS REV.-J., Dec. 7, 1996 at 3A (noting that Native American owned casinos and state lotteries are allowed to advertise on television and radio). The lottery exception is in 18 U.S.C. § 1307(a)(1). The exception for Native American casinos is in the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2720 (1994). See *infra* notes 192-96 and accompanying text.

44. See Janet Plume, *Ad Ruling Breaks Ground, Opens Abyss*, CASINO J., Jan. 1999, at 66, 66-68.

45. See *id.*; Hayes, *supra* note 42, at A10.

46. See Hayes, *supra* note 42, at A10.

47. See *id.* (noting that billboard advertisements for a casino focus on the payout to gamblers).

48. See *id.* (explaining how a gambler uses the money paid out to continue gambling and the casino still counts those replayed dollars as a payout).

49. See Rick Alm, *Casinos Track Players to Find and Woo Big Spenders*, KAN. CITY STAR, Mar. 10 1997, at A10; see also S.C. Gwynne, *How Casinos Hook You*, TIME, Nov. 17, 1997, at 68, 68-69; Bruce Orwall, *Like Playing Slots? Casinos Know All About You*, WALL ST. J., Dec. 20, 1995, at B1.

50. See Alm, *supra* note 49, at A10; Gwynne, *supra* note 49, at 68-69; Orwall, *supra* note 49, at B1.

51. Alm, *supra* note 49, at A10; see Gwynne, *supra* note 49, at 68-69; Orwall, *supra* note 49, at B1.

52. See Alm, *supra* note 49, at A10; Gwynne, *supra* note 49, at 68-69; Orwall, *supra* note 49, at B1.

53. See Orwall, *supra* note 49, at B1.

companies<sup>54</sup> that provide information regarding a person's income and spending habits.<sup>55</sup> The casino adds this information to its database, allowing the casino to conduct direct mail marketing campaigns to people who may not have visited the casino at all.<sup>56</sup>

Yet another method of adding customers and their gambling habits to the consumer database involves direct machine monitoring.<sup>57</sup> If the monitoring system detects heavy usage on a gambling machine, the casino dispatches an employee "to greet the gambler, offer him or her a drink and recommend slots-club membership."<sup>58</sup> This greeting serves two purposes: (1) to encourage the gambler to become a member, adding another customer to the casino's database,<sup>59</sup> and (2) to establish a rapport with the customer by offering free drinks and giving the customer attention.<sup>60</sup> Quite simply, the casino wants to build customer loyalty so that gamblers return to *that* casino.

After attracting the gamblers to the casino, other marketing tactics entice them to stay.<sup>61</sup> Examples of such tactics include free meals during slow gambling times, entertainment, drink specials, and hotel stays.<sup>62</sup> Casino operators study the effects of lighting, aroma, and color on the amount wagered.<sup>63</sup> Even the layout of a casino is designed to keep the gamblers there and to encourage them to gamble more.<sup>64</sup> It has even been suggested that the obnoxious carpeting causes people to avert their eyes, look up, and see the slot machines.<sup>65</sup>

## 2. LOTTERIES

Like casinos, lotteries must attract more participants to reach their objective of revenue maximization<sup>66</sup> and to remain operational.<sup>67</sup>

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54. See Gwynne, *supra* note 49, at 69.

55. See *id.*

56. See *id.* at 68-69.

57. See Alm, *supra* note 49, at A10.

58. Orwall, *supra* note 49, at B1.

59. See *id.*

60. See *id.*

61. See James Popkin, *Tricks of the Trade: The Many Modern Ways Casinos Try to Part Bettors from Their Cash*, U.S. NEWS & WORLD REP., Mar. 14, 1994, at 48.

62. See *id.* at 50-51.

63. See *id.* at 48-51.

64. See *id.* at 48.

65. See Alm, *supra* note 49, at A10.

66. See CHARLES T. CLOTFELTER & PHILIP J. COOK, *SELLING HOPE: STATE LOTTERIES IN AMERICA* 186 (1989).

67. See *id.* at 5-7, 11, 154; Brad Edmondson, *Demographics of Gambling*, AM. DEMOGRAPHICS, July 1986, at 39, 41.

Each state lottery operates as a monopoly within that state.<sup>68</sup> Unlike a casino that increases sales by enlarging its market share, the lottery can increase revenues only by "enlarging the size of the market itself."<sup>69</sup> To accomplish this increase, the lottery must entice more people to buy tickets or encourage the current players to buy a greater number of tickets.<sup>70</sup>

*a. Advertising Lotteries* The need for a substantial player-base forces states to aggressively advertise their lotteries.<sup>71</sup> As such, the advertising expenditures for lotteries have increased substantially.<sup>72</sup> In 1992, states with lotteries spent a combined total of \$286 million on advertising.<sup>73</sup> By 1995, this expenditure climbed to over \$382 million.<sup>74</sup> Currently, advertising expenditures remain relatively constant, with 1997 totals at \$378 million.<sup>75</sup> These expenditures make government-sponsored lotteries one of the top advertisers in the United States.<sup>76</sup> Ironically, the increase in advertising expenditures coincides with a general decline in sales of lottery tickets.<sup>77</sup> In 1993, more than one-fourth of the states reported declining revenues for their lotteries.<sup>78</sup> The cause of the declining sales is uncertain; however, the two most prevalent possibilities include: (1) the competition among the various forms of gambling and (2) the maturation of the lottery sales market.<sup>79</sup>

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68. See CLOTFELTER & COOK, *supra* note 66, at 187.

69. *Id.*

70. See *id.* at 187-88.

71. See *id.* at 172; Koughan, *supra* note 1, at 35; Edmondson, *supra* note 67, at 41.

72. There are numerous reasons for this increase. It has been suggested that the competition between the lottery and other forms of gambling may cause lottery sales to decrease. See WAGERING IN ILLINOIS, *supra* note 34, at 9; Penny Wise, *Pound Foolish*, INT'L GAMING & WAGERING BUS., Aug. 1996, at 50. Another explanation provides that the lottery has reached maturity as a product. See WAGERING IN ILLINOIS, *supra* note 34, at 17.

73. See Iris Cohen Selinger, *The Big Lottery Gamble*, ADVERTISING AGE, May 10, 1993, at 22.

74. See Koughan, *supra* note 1, at 35; Penny Wise, *Pound Foolish*, *supra* note 72, at 50.

75. See Derrick DePledge, *Federal Panel to Scrutinize State Lotteries*, SAN DIEGO UNION-TRIB., Mar 16, 1998, at A3.

76. See Koughan, *supra* note 1, at 35; Penny Wise, *Pound Foolish*, *supra* note 72, at 50; Selinger, *supra* note 73, at 22.

77. See WAGERING IN ILLINOIS, *supra* note 34, at 17; Edmondson, *supra* note 67, at 41 (discussing New York's attempt to stop the declining lotter ticket sales by advertising).

78. See Kindt, *Market Saturation*, *supra* note 33, at 287 (citing Koselka & Palmeri, *supra* note 41, at 71-72).

79. See WAGERING IN ILLINOIS, *supra* note 34, at 9, 17.

Whatever the cause of the decline, states attempt to increase lottery sales by relying on sophisticated marketing techniques.<sup>80</sup> States, for example, conduct market research to reach citizens willing or likely to gamble.<sup>81</sup> States also schedule lottery advertisements to coincide with typical paydays, such as the first and fifteenth of the month, and with the release of Social Security payments.<sup>82</sup>

**b. Creating New Lottery Games** Another method of attracting players involves creating additional lottery games.<sup>83</sup> Illinois, for example, expanded its lottery offerings in an effort to increase sales when the revenues of existing games remained flat.<sup>84</sup> Illinois started its lottery in 1974 and an instant game in 1975.<sup>85</sup> The stagnant sales resulted in the creation of a new lottery game, "daily numbers," in 1979.<sup>86</sup> Thereafter, the state introduced new games in 1981, 1982, and 1987.<sup>87</sup>

### III. Analysis

#### A. The Overall Marketing Efforts of Casinos and Lotteries

After all is said and done, casinos and states direct their marketing efforts at the 52% of the U.S. population that is willing to gamble.<sup>88</sup> This 52% includes recreational gamblers (42%) and "problem economic gamblers" (PEGs) (10%).<sup>89</sup>

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80. See Gearey, *supra* note 19, at 20.

81. See CLOTFELTER & COOK, *supra* note 66, at 189; Edmondson, *supra* note 67, at 39-40; Joshu Wolf Shenk, *Everyone's a Loser: How Lottery Advertisements Entice the Wrong People to Gamble*, WASH. MONTHLY, Jul.-Aug. 1995, at 22, 23.

82. See CLOTFELTER & COOK, *supra* note 66, at 202-03.

83. See *id.* at 114-15, 172; WAGERING IN ILLINOIS, *supra* note 34, at 17 (providing a table which illustrates the variety of lottery games in Illinois); Edmondson, *supra* note 67, at 41.

84. See Nancy Millman, *A Little Lotto Means a Lot in Hard-Sell Campaign*, CHI. TRIB., Aug. 2, 1992, at C1.

85. See WAGERING IN ILLINOIS, *supra* note 34, at 17 tbl.4A (Table 4A displays the fiscal year data from 1975-93 (the fiscal year ending in 1975 includes 1974 data)); see also CLOTFELTER & COOK, *supra* note 66, at 5-6.

86. See CLOTFELTER & COOK, *supra* note 66, at 5-6; WAGERING IN ILLINOIS, *supra* note 34, at 17 tbl.4A.

87. See WAGERING IN ILLINOIS, *supra* note 34, at 17 tbl.4A.

88. See CLOTFELTER & COOK, *supra* note 66, at 92-94; John Warren Kindt, *The Economic Impacts of Legalized Gambling Activities*, 43 *DRAKE L. REV.* 51, 77 (1994) [hereinafter Kindt, *The Economic Impacts*]. The Better Government Association claims that 71% of the population gambled in 1989. See *CASINO GAMBLING IN CHICAGO*, *supra* note 16, at 2.

89. See Kindt, *The Economic Impacts*, *supra* note 88, at 77. The "PEGs are gamblers who are in the process of becoming problem or probable compulsive gamblers, or who are already compulsive gamblers." *Id.*

Compulsive gambling afflicts certain members of every segment of the population, regardless of sex, race, socioeconomic status, or age.<sup>90</sup> In a community that prohibits gambling, 0.77% of the population meets the definition of compulsive gambler.<sup>91</sup> This percentage increases to between 1.5% and 5% of the population when gambling is legalized.<sup>92</sup>

The elderly are no exception to pathological gambling problems.<sup>93</sup> In fact, life-changing factors, such as retirement or the death of a spouse, make the elderly particularly vulnerable to problem gambling.<sup>94</sup> Additionally, gambling losses may seriously affect the standard of living of senior citizens living on fixed incomes.<sup>95</sup> Moreover, a senior citizen who suffers a financial loss does not have the time or the earning potential to recoup the loss.

#### 1. HOW THE CASINOS TARGET THE GAMBLING POPULATION

As explained above, the market research and tracking systems used by casinos identify their target customers.<sup>96</sup> The combination of direct mail campaigns and databases of information allows casinos to reach their best customers.<sup>97</sup> This targeting results in one-fifth of all gamblers generating 80% of the earnings of the gambling industry.<sup>98</sup> Without a doubt, compulsive gamblers fall into this category,<sup>99</sup> generating between 30% and 40% of those earnings.<sup>100</sup> Thus, the use of these institutional marketing techniques successfully leads pathological gamblers "back to the table."<sup>101</sup>

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90. See VALERIE LORENZ, NATIONAL CTR. FOR PATHOLOGICAL GAMBLING, AN OVERVIEW OF PATHOLOGICAL GAMBLING 3 (1990). The approximate number of compulsive gamblers is calculated by multiplying the population by the appropriate percentage of compulsive gamblers. See Kindt, *The Economic Impacts*, *supra* note 88, at 64-66.

91. See CLOTFELTER & COOK, *supra* note 66, at 124.

92. See John Warren Kindt, U.S. National Security and the Strategic Economic Base: *The Business/Economic Impacts of the Legalization of Gambling Activities*, 39 ST. LOUIS UNIV. L.J. 567, 581-82 (1995).

93. See LORENZ, *supra* note 90, at 3.

94. See Marianne Jacobbi, *How It Is Destroying Both Young and Old*, FAMILY CIRCLE, Feb. 1, 1996, a 78, 80.

95. See *Gambling Among Older Minnesotans*, BEYOND THE ODDS (Minnesota Institute of Public Health), Spring 1997, ¶ 4, available at <<http://www.miph.org/btospr97/older.htm>>.

96. See Alm, *supra* note 49, at A10; Gwynne, *supra* note 49, at 69.

97. See Gwynne, *supra* note 49, at 68-69.

98. See Gwynne, *supra* note 49, at 69 (citing Henry Lesieur).

99. See Alm, *supra* note 49, at A10; Gwynne, *supra* note 49, at 69.

100. See Gwynne, *supra* note 49, at 69 (citing Henry Lesieur).

101. See *id.*

## 2. HOW LOTTERIES TARGET THE GAMBLING POPULATION

Given that a state cannot expand its lottery into new markets,<sup>102</sup> the state must encourage current players to buy more tickets to increase the size of the market.<sup>103</sup> One extreme example involves the state of Colorado.<sup>104</sup> The Colorado lottery paid for a study that examined the human brain to determine "how to manipulate player behavior."<sup>105</sup> Both the Governor and the Lottery Commissioner expressed concern regarding the appropriateness of this study because this information could be used to encourage pathological gamblers to buy more tickets.<sup>106</sup> Although an extreme example, efforts to encourage players to purchase more tickets illustrate the potential dangers of gambling advertisements "geared to impulse spending, instant gratification, and fantasy—all components of compulsive gambling."<sup>107</sup>

Unfortunately, states continue to use questionable marketing efforts.<sup>108</sup> While private advertisers must abide by the truth-in-advertising laws, state advertisers are immune from such standards.<sup>109</sup> For example, private sweepstakes must meet the truth-in-advertising laws which require marketers to disclose the odds of winning.<sup>110</sup> In contrast, state governments advertising their lotteries do not need to follow such laws and can create a "fantasy [of winning that] is sustained . . . by ignorance and delusion."<sup>111</sup> This delusion evolves by creating advertisements that focus on the prize money and rarely mention the minuscule odds of winning.<sup>112</sup> Such advertisements mislead the pub-

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102. See *supra* notes 66-70 and accompanying text.

103. See CLOTFELTER & COOK, *supra* note 66, at 187-88.

104. See Ann Carnahan, *Lottery's Brainstorm Draws Fire: State Pays \$25,000 for Brain Study That Seeks to Lure Players*, ROCKY MOUNTAIN NEWS (Denver), Jul. 8, 1997, at A5.

105. *Id.*

106. See *id.*

107. LORENZ, *supra* note 90, at 2; see also SHENK, *supra* note 81, at 22-23 (noting that lottery advertisements encourage "the poor and the addicted" to buy tickets).

108. See generally SELINGER, *supra* note 73.

109. See Federal Trade Commission Act, 15 U.S.C. § 52(a) (1994) (limiting the prohibition against false advertising to "any person, partnership, or corporation"); CLOTFELTER & COOK, *supra* note 66, at 243; GEAREY, *supra* note 19, at 19; SHENK, *supra* note 81, at 22, 24.

110. See CLOTFELTER & COOK, *supra* note 66, at 209; SHENK, *supra* note 81, at 24.

111. CLOTFELTER & COOK, *supra* note 66, at 119.

112. See SELINGER, *supra* note 73, at 22; see also CLOTFELTER & COOK, *supra* note 66, at 60, 209 (noting that, in most states, the odds of winning are rarely publicized; but, the probability of winning must be included in lottery advertisements in certain states); EDMONDSON, *supra* note 67, at 41 (noting that Ohio focuses on the fun and recreation of playing the lottery as opposed to emphasizing the amount of the



lic as to the odds of winning by utilizing catchy phrases, such as "the odds are with you."<sup>113</sup> Furthermore, the media attention given to the lottery winners fascinates the public.<sup>114</sup> This gives the public a distorted view as to the probability of winning<sup>115</sup> as "the vast majority of those who play will never see a return on their investment, . . . the lotteries feed illusions, not dreams."<sup>116</sup> By stressing the amount of revenues generated, rather than admitting that those revenues are actually losses suffered by ticket purchasers, state advertisements lure consumers to purchase lottery tickets.<sup>117</sup> States have long been criticized for targeting lottery advertisements to segments of the population that cannot afford to gamble<sup>118</sup> and enticing others "to gamble more than they can afford."<sup>119</sup>

## B. Marketing to the Elderly

### 1. CASINOS

Even those elderly people who are not and will not become compulsive gamblers are vulnerable to casino advertisements targeting the elderly. Quite simply, retired persons have the time to visit cas-

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jackpot; but, New York lottery advertisements focus on the amount of money at stake); Hurst, *supra* note 1, at 62 (noting that the odds of winning the jackpot in Missouri's Powerball game are fifty-four million to one); Shenk, *supra* note 81, at 22.

113. See, e.g., Millman, *supra* note 84, at C1, C2 (describing an ad for the Illinois Little Lotto which depicts a wizard who states the odds are with you, the player); Shenk, *supra* note 81, at 24 (describing an ad for the lottery in West Virginia which states that if a person continues to purchase tickets, he or she will eventually win).

114. See CLOTFELTER & COOK, *supra* note 66, at 121.

115. See *id.* at 243.

116. Vicki Abt, *Is Gambling Fiscally Respectable?*, CHI. TRIB., July 21, 1990, at 11.

117. See *id.*; Gearey, *supra* note 19, at 22 (describing lottery advertisements in New York which focus on the revenues being used to fund schools). In addition, the lottery advertisements do not explain the manner in which the winnings are disbursed. See CLOTFELTER & COOK, *supra* note 66, at 117. Usually, the winnings are paid as a 20-year annuity that has a present value equal to about half of the announced jackpot. See *id.* at 121-22, 208-09; Shenk, *supra* note 81, at 24. Furthermore, the winner must pay federal income tax on the disbursements. See CLOTFELTER & COOK, *supra* note 66, at 122. Thus, the advertisements mislead the public as to the actual size of the jackpots. See *id.* at 208-09, 243; Shenk, *supra* note 81, at 24.

118. See CLOTFELTER & COOK, *supra* note 66, at 7-8, 190 (noting that some states do target poor minority groups; Illinois passed a nonbinding resolution designed to stop targeting poor neighborhoods in 1986); Hurst, *supra* note 1, at 62 (describing a billboard in a poor neighborhood in Chicago which claimed that a lottery ticket can be the ticket out); Shenk, *supra* note 81, at 22.

119. CLOTFELTER & COOK, *supra* note 66, at 117.

nos.<sup>120</sup> Casino outings may be the only recreational activity available to bored and lonely senior citizens.<sup>121</sup> Enticements that cater to the elderly include casino bus services, buffet discounts, and discounts for other amenities.<sup>122</sup> These specials often coincide with the receipt of pension and Social Security checks.<sup>123</sup> In fact, the industry invented a term, "third-of-the-month club," to describe elderly gamblers who gamble once they have received their Social Security checks.<sup>124</sup>

## 2. LOTTERIES

States similarly target their lottery campaigns at the elderly—a population that tends to buy a large percentage of lottery tickets.<sup>125</sup> In Maryland, for example, the lottery conducted giveaway promotions at nursing homes and at malls where senior citizens walk for exercise.<sup>126</sup> It chose to target the elderly because that segment of the population purchases more than 20% of the \$1 billion in lottery tickets sold in the state.<sup>127</sup> Due to criticism leveled at the lottery, Maryland discontinued both of these programs.<sup>128</sup>

Overall, lottery marketing programs focus on the size of the jackpot, not on the long odds of winning.<sup>129</sup> In regard to the elderly, focusing on the jackpot seems particularly cruel considering that nursing home residents, for the most part, believe that winning is a means for them to return to their homes and former independent life.<sup>130</sup> Such promotions prey on the dreams of the elderly without much hope of actually fulfilling them.<sup>131</sup> Considering that large prizes tend to be distributed as twenty-year annuities, winning the lottery

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120. See Rekha Basu, *A Gamble for Senior Citizens*, DES MOINES SUNDAY REG., Apr. 30, 1995, at 3; Ted Gregory, *Casinos' Boom Is Gamblers' Bus: Service Raises Ethical Questions*, CHI. TRIB., Aug. 25, 1996, at C1, C2.

121. See Gregory, *supra* note 120, at C2; see also Basu, *supra* note 120, at 3; Jacobbi, *supra* note 94, at 80.

122. See Jacobbi, *supra* note 94, at 80; Gregory, *supra* note 120, at 1.

123. See Jacobbi, *supra* note 94, at 80; Gearey, *supra* note 19, at 20.

124. See Popkin, *supra* note 61, at 51.

125. See Edmondson, *supra* note 67, at 39 (stating that people with low incomes and the elderly buy the most lottery tickets).

126. See Paul W. Valentine, *Md. Halts Lottery Program for Elderly*, WASH. POST, Aug. 10, 1997, at B4.

127. See Jonathan Yardley, *Not-So-Winning Ways*, WASH. POST, Aug. 11, 1997, at D2.

128. See *id.*

129. See *id.*

130. See *id.*

131. See *id.*

will be of little help in fulfilling these dreams.<sup>132</sup> In addition, the inheritance tax "on the annuity value of the remaining payments at the time of the winner's death . . . must be paid in a lump sum."<sup>133</sup> Thus, the beneficiaries of the prize may have difficulty paying the inheritance tax.

### C. The Elderly Customer

#### 1. VULNERABLE TO GAMBLING

Although the elderly represent only a small percentage of compulsive gamblers, this percentage is increasing<sup>134</sup> because the elderly "are a growing segment of the casinos' market."<sup>135</sup> In fact, the casinos' sales managers believe that 95% of the people going to the casinos during the week on tour buses "are middle-income, retired or senior citizens."<sup>136</sup> Today's elderly are especially vulnerable because they have started gambling later in life and may not realize the potential dangers.<sup>137</sup> Furthermore, as the baby boom generation ages, the problem of pathological gambling may increase among senior citizens because the baby boomers tend to be more accepting of gambling as a form of entertainment than are the current elderly.<sup>138</sup> As legalized gambling spreads, the general public gradually accepts it as a legitimate form of entertainment.<sup>139</sup> As the stigma dissipates, the percentage of people willing to gamble, including the elderly, will continue to rise.<sup>140</sup>

#### 2. VULNERABLE TO MARKETING

Many of the characteristics that cause the elderly to become attracted to gambling are also displayed in their vulnerability to marketing efforts. For example, many senior citizens gamble at casinos because they are bored and lonely.<sup>141</sup> Loneliness represents the most common characteristic among the elderly that direct marketers cite as

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132. See *id.*

133. CLOTFELTER & COOK, *supra* note 66, at 122.

134. See Jacobbi, *supra* note 94, at 80.

135. Gregory, *supra* note 120, at 1.

136. *Id.* at 2.

137. See Jacobbi, *supra* note 94, at 80.

138. See *Gambling Among Older Minnesotans*, *supra* note 95, ¶ 4.

139. See *CASINO GAMBLING IN CHICAGO*, *supra* note 16, at 2.

140. See Kindt, *Subsidized by Taxpayers*, *supra* note 29, at 924.

141. See Basu, *supra* note 120, at 3; Jacobbi, *supra* note 94, at 80.

a reason to target the age group.<sup>142</sup> In addition, casinos target the elderly because they have the time to visit casinos.<sup>143</sup> Similarly, direct marketers target the elderly because they have time to listen to the marketers' promotions.<sup>144</sup>

The elderly have traditionally fallen victim to investment scams conducted by direct marketers.<sup>145</sup> Such victimization stems from the fear shared by many elderly people that they do not have sufficient financial resources.<sup>146</sup> State-sponsored lotteries similarly prey on this fear by conducting misleading advertising campaigns that focus on the jackpot and fail to disclose the slim odds of winning.<sup>147</sup> Perhaps this explains why the elderly tend to buy such a large percentage of lottery tickets.<sup>148</sup>

#### D. The First Amendment and Commercial Speech

##### 1. THE NATIONAL GAMBLING IMPACT STUDY COMMISSION

As noted previously, Congress created the National Gambling Impact Study Commission to study the socioeconomic impact of the proliferation of gambling.<sup>149</sup> The marketing tactics of casinos and lotteries may receive consideration during this study. Furthermore, the National Gambling Impact Study Commission may recommend stricter regulations on marketing efforts employed by the gambling industry. Although Congress prohibits certain types of commercial speech including speech concerning marketing efforts,<sup>150</sup> courts have questioned the constitutionality of such regulation.<sup>151</sup>

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142. See Hebe R. Smythe, Note, *Fighting Telemarketing Scams*, 17 HASTINGS COMM. & ENT. L.J. 347, 366 (1994).

143. See Basu, *supra* note 120, at 3; Gregory, *supra* note 120, at 2.

144. See Patrick Michela, "You May Have Already Won . . .": *Telemarketing Fraud and the Need for a Legislative Solution*, 21 PEPP. L. REV. 553, 574 (1994).

145. See *id.* at 574-75.

146. See *id.* at 574; see also Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 CAL. L. REV. 627, 661 n.108 (1996).

147. See *supra* notes 108-19 and accompanying text.

148. See Edmondson, *supra* note 67, at 39 (stating that people with low incomes and the elderly buy the most lottery tickets).

149. See *supra* notes 30-32 and accompanying text.

150. See, e.g., Communications Act of 1934, 18 U.S.C. § 1304 (1994). See *infra* notes 192-96 and accompanying text.

151. See *infra* notes 176-219 and accompanying text.

## 2. THE CENTRAL HUDSON TEST

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>152</sup> the Supreme Court created a four-part test analyzing the constitutionality of prohibiting commercial speech.<sup>153</sup> Essentially, in deciding if the speech in question is commercial, the Court relies on a commonsense approach.<sup>154</sup> The first prong of the four-part test determines whether First Amendment protections should apply to the commercial speech at issue.<sup>155</sup> While the First Amendment does not protect either misleading advertisements<sup>156</sup> or advertisements for an illegal activity,<sup>157</sup> it protects all other forms of commercial speech.<sup>158</sup> This protection assures that commercial speech will provide consumers with information that will assist them when making purchasing decisions.<sup>159</sup> The second prong requires the government to show "a substantial interest to be achieved by restrictions on commercial speech."<sup>160</sup> To fulfill the third prong, the court must determine that the restrictions directly advance that substantial state interest.<sup>161</sup> Finally, the fourth prong requires that the restriction on the commercial speech "be in proportion to that interest."<sup>162</sup> This proportionality test means that a restriction that is too broad will not pass the test when a narrower restriction would adequately meet the government's interest.<sup>163</sup>

## 3. THE CENTRAL HUDSON TEST AFTER 44 LIQUORMART

Courts applied the *Central Hudson* test without hesitation until 1996 when the Supreme Court decided the case of *44 Liquormart, Inc. v. Rhode Island*.<sup>164</sup> The central issue of *44 Liquormart* focused on

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152. 447 U.S. 557 (1980).

153. See *id.* at 562-66. The restriction on commercial speech must meet all four parts of the test to survive a constitutional challenge.

154. See *id.* at 562 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)).

155. See *id.* at 564. If the First Amendment does not apply, restrictions on the commercial speech at issue are permissible.

156. See *id.* at 563.

157. See *id.* at 563-64.

158. See *id.*; see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 42 U.S. 748, 762 (1976) (holding that commercial speech should be afforded some protection under the First Amendment).

159. See *Central Hudson*, 447 U.S. at 567.

160. *Id.* at 564.

161. See *id.* at 566.

162. *Id.*

163. See *id.* at 564-66.

164. 517 U.S. 484 (1996).

whether statutes banning liquor prices in advertisements unduly restricted constitutionally protected commercial speech.<sup>165</sup> Although the decision to declare the statutes in question unconstitutional was unanimous,<sup>166</sup> the law in this area cannot be considered settled due to the widely varying reasoning employed in the Justices' plurality opinion.<sup>167</sup> Although there was no majority opinion, three distinct views of the *Central Hudson* test emerged.<sup>168</sup> Justices Scalia and Thomas stated their complete dissatisfaction with the *Central Hudson* test.<sup>169</sup> In contrast, Justices O'Connor, Souter, Breyer, and Chief Justice Rehnquist adhered to the *Central Hudson* test.<sup>170</sup> Finally, although Justices Stevens, Kennedy, and Ginsberg applied the *Central Hudson* test, they implied that complete bans on a type of commercial speech would not survive a challenge under the First Amendment.<sup>171</sup>

In light of the split among the Justices, 44 *Liquormart* presumably adds an extra element to the *Central Hudson* test.<sup>172</sup> The element requires courts to presume that a complete ban on "the dissemination of a type of truthful, nonmisleading consumer information" violates the First Amendment.<sup>173</sup> Less than complete restrictions on commercial speech are analyzed under the *Central Hudson* test.<sup>174</sup> Despite the differing views within the Supreme Court, lower courts continue to apply the original test set forth in *Central Hudson*.<sup>175</sup>

#### 4. THE CENTRAL HUDSON TEST AND THE BAN ON BROADCAST ADVERTISEMENTS FOR CASINOS

Prior to 44 *Liquormart*, the Supreme Court upheld a ban on casino advertising in *Posadas de Puerto Rico Associates v. Tourism Co. of*

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165. See *id.* at 489-92.

166. See *id.* at 516, 518, 528, 534.

167. See *Greater New Orleans Broad. Ass'n v. United States*, 149 F.3d 334, 336-37 (5th Cir. 1998) (*Greater New Orleans III*), *cert. granted*, 119 S. Ct. 863 (1999); see also Arlen W. Langvardt & Eric L. Richards, *The Death of Posadas and the Birth of Change in Commercial Speech Doctrine: Implications of 44 Liquormart*, 34 AM. BUS. L.J. 483 (1997).

168. See 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, 495 (1997).

169. See 44 *Liquormart*, 517 U.S. at 517-28 (Scalia & Thomas, JJ., concurring).

170. See *id.* at 528-34 (O'Connor, J., concurring).

171. See *id.* at 502-03.

172. See Garner & Whitney, *supra* note 167, at 497.

173. *Id.*

174. See *id.*

175. See, e.g., *Players Int'l, Inc. v. United States*, 988 F. Supp. 497, 500 (D.N.J. 1997); *Rushman v. City of Milwaukee*, 959 F. Supp. 1040, 1043 (E.D. Wis. 1997).

*Puerto Rico*.<sup>176</sup> Here, the Court allowed the local government's ban of casino advertisements directed at Puerto Rican citizens.<sup>177</sup> It is important to note, however, that the restriction on advertising did not apply to advertisements directed at tourists.<sup>178</sup> Instead, the Puerto Rican government limited its interest to restricting casino gambling by its own citizens.<sup>179</sup> Puerto Rico's proffered reasons included maintaining the moral and cultural stability of its citizens, thwarting the infiltration of organized crime, and preventing an increase in local crime rates.<sup>180</sup> In applying the *Central Hudson* test, the Supreme Court suggested that the government could restrict the commercial speech because the activity could have been outlawed altogether.<sup>181</sup>

This analysis represented a broad application of the *Central Hudson* test,<sup>182</sup> one in which the dissent accused the majority of giving too much deference to the government.<sup>183</sup> Today, it is unlikely that the Supreme Court would grant such deference to the plaintiffs in *Posadas*, in light of the subsequent *44 Liquormart* decision.<sup>184</sup>

**a. Vice Activities and the First Amendment** The Supreme Court, in suggesting that a government can restrict the commercial speech of an activity that it could have outlawed altogether,<sup>185</sup> caused state governments to generalize that commercial speech for vices would be given less protection than other commercial speech.<sup>186</sup> To the contrary, because the *Posadas* language appears in dictum, a proper interpretation of the Supreme Court opinion discounts this argument.<sup>187</sup> Furthermore, in *44 Liquormart*, four of the Justices rejected such reasoning as a dangerous opportunity for governments to label any potentially harmful product or activity a vice, even if those products and activi-

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176. 478 U.S. 328 (1986).

177. See *id.* at 348.

178. See *id.* at 334-35.

179. See *id.* at 341.

180. See *id.* The Supreme Court noted that these are the reasons that most states also prohibit casinos. See *id.*

181. See *id.* at 345-46 (dicta). This analysis is no longer valid. See generally Langvardt & Richards, *supra* note 166.

182. See *Posadas*, 478 U.S. at 348-63 (Brennan, Marshall & Blackmun, JJ., dissenting); see also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509 (1996); Langvardt & Richards, *supra* note 166, at 484.

183. See *Posadas*, 478 U.S. at 352 (Brennan, J., dissenting).

184. See *44 Liquormart*, 517 U.S. at 509-12, 531 (O'Connor, J., concurring).

185. See *Posadas*, 478 U.S. at 345-46 (dicta). This analysis is no longer valid. See generally Langvardt & Richards, *supra* note 166.

186. See Langvardt & Richards, *supra* note 166, at 541.

187. See *id.*

ties are legal.<sup>188</sup> Accordingly, "a 'vice' label . . . unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity."<sup>189</sup> Although the Supreme Court characterized gambling as a vice,<sup>190</sup> that characterization alone will not be sufficient to uphold the federal ban on broadcast advertising.<sup>191</sup>

**b. The Federal Ban** As noted previously, a federal statute prohibits casinos from advertising gambling activities on television and radio.<sup>192</sup> Specifically, the Communications Act imposes fines and possible imprisonment on "[w]hoever broadcasts by means of any radio or television station . . . any advertisement . . . concerning any lottery, gift enterprise, or similar scheme, offering prizes depending in whole or in part upon lot or chance."<sup>193</sup> Without question, the gambling activities offered by casinos fall within the application of this statute.

Since the enactment of the Communications Act, however, Congress created various exceptions to its application. Congress excluded state-sponsored lotteries and nonprofit organizations from the broadcast advertising ban.<sup>194</sup> Furthermore, Congress exempted Indian Tribes that operate casinos.<sup>195</sup> Because of these exclusions, broadcasting companies and gambling interests contend that the Communications Act violates the First Amendment.<sup>196</sup>

**c. The Fifth Circuit** *Greater New Orleans Broadcasting Ass'n v. United States* represents the first attack on the federal statute banning radio and television broadcasts of casino-gambling advertisements.<sup>197</sup> Although this decision upholds the statute in question, the case was vacated and remanded by the Supreme Court due to the *44 Liquormart* ruling.<sup>198</sup> Nonetheless, on remand, the Fifth Circuit affirmed its hold-

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

189. *Id.* at 514.

190. See *id.* at 513 (citing *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993)); Langvardt & Richards, *supra* note 166, at 542.

191. See *44 Liquormart*, 517 U.S. at 514.

192. See Communications Act of 1934, 18 U.S.C. § 1304 (1994).

193. See *id.*

194. See § 1307(a).

195. See Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2720 (1994).

196. See *infra* notes 197-219 and accompanying text.

197. 69 F.3d 1296 (1995) (*Greater New Orleans I*), *vacated and remanded*, 117 S. Ct. 39 (1996) (*Greater New Orleans II*).

198. See *Greater New Orleans Broad. Ass'n*, 117 S. Ct. at 39 (*Greater New Orleans II*).



ing that the Communications Act was a constitutionally permissible restriction of commercial speech.<sup>199</sup>

After addressing the impact of 44 *Liquormart* on the application of the *Central Hudson* test,<sup>200</sup> the Fifth Circuit referred to its analysis in the first opinion regarding the first three prongs of the *Central Hudson* test.<sup>201</sup> In its original opinion, the Fifth Circuit first declared that, as commercial speech, the constitutionality of the advertising ban for gambling at casinos necessarily turns on a *Central Hudson* test analysis.<sup>202</sup> The court noted that, under *Central Hudson*'s first prong, the parties did not dispute that the casino advertisements discussed a legal activity<sup>203</sup> in a nonmisleading manner.<sup>204</sup> Next, the court agreed with the government in finding the government's articulated interests substantial,<sup>205</sup> including: (1) protecting states which have not legalized gambling from casino advertisements in broadcasts that cannot be regulated by that state and (2) limiting the amount of casino gambling done by the public in an effort to minimize the social costs associated with gambling.<sup>206</sup> As for the third element of the *Central Hudson* test, the Fifth Circuit held that the ban on broadcast advertisements for casinos directly advanced both of the interests asserted by the government.<sup>207</sup> On remand, the court added that the effectiveness of the federal statute in advancing "the government's policies must be evident from the casinos' vigorous pursuit of litigation to overturn it."<sup>208</sup>

Most significantly, the Fifth Circuit ruled in its original decision that the ban was not more extensive than necessary to meet the government's interests.<sup>209</sup> On remand, however, the court reexamined the fourth element of the *Central Hudson* test because the 44 *Liquormart*

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199. See *Greater New Orleans Broad. Ass'n v. United States*, 149 F.3d 334, 335, 341 (5th Cir. 1998) (*Greater New Orleans III*), cert. granted, 119 S. Ct. 863 (1999).

200. See *id.* at 336-37.

201. See *id.* at 338.

202. See *Greater New Orleans Broad. Ass'n*, 69 F.3d at 1299 (*Greater New Orleans I*).

203. Casinos are legally operated in Louisiana. See *United States Gaming at a Glance*, *supra* note 1, at 21.

204. See *Greater New Orleans Broad. Ass'n*, 69 F.3d at 1299 (*Greater New Orleans I*).

205. See *id.* at 1301 (relying on *Posadas*).

206. See *id.* at 1299.

207. See *id.* at 1301.

208. *Greater New Orleans Broad. Ass'n v. United States*, 149 F.3d 334, 338 (5th Cir. 1998) (*Greater New Orleans III*), cert. granted, 119 S. Ct. 863 (1999).

209. See *Greater New Orleans Broad. Ass'n*, 69 F.3d at 1302 (*Greater New Orleans I*).

decision created “a tougher standard for the state to satisfy.”<sup>210</sup> As the court noted, the Supreme Court in *44 Liquormart* expressed a “will[ingness] to scrutinize more carefully whether the state’s chosen regulation of commercial speech is closely enough tailored to serve the governmental interests without unduly burdening free speech.”<sup>211</sup> Under this standard, the Fifth Circuit maintained its decision that the federal advertising ban on casinos was not broader than necessary because the restriction was limited to television and radio broadcasts, and the limitation of such “advertising directly influences consumer demand.”<sup>212</sup> Furthermore, the court emphasized that states that have not legalized casinos could not protect themselves from the broadcast messages of casinos operating in the states that permit such gambling activities.<sup>213</sup>

*d. The Ninth Circuit* Prior to the Fifth Circuit opinion on remand, the Ninth Circuit ruled on the constitutionality of the federal ban on radio and television broadcasts of casino advertisements. Unlike the Fifth Circuit, in *Valley Broadcasting Co. v. United States*,<sup>214</sup> the court applied the *Central Hudson* test and held that the prohibition did, in fact, violate the First Amendment.<sup>215</sup> As in *Greater New Orleans Broadcasting Ass’n*, the government asserted its interests to limit the participation of the public in commercial lotteries in an effort to minimize the social costs associated with gambling and to prevent the advertisements from being broadcast in states that had not legalized casinos.<sup>216</sup> The Ninth Circuit acknowledged that these government interests are substantial.<sup>217</sup> This court, however, pointed to several exceptions to the federal statute that failed to advance these interests.<sup>218</sup> Although the statute prohibits casinos from advertising on the radio or television,<sup>219</sup> state lotteries,<sup>220</sup> casinos operated by Indian Tribes,<sup>221</sup> and nonprofit

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210. *Greater New Orleans Broad. Ass’n*, 149 F.3d at 338 (Greater New Orleans III).

211. *Id.* at 337.

212. *Id.* at 340.

213. *See id.* at 340-41.

214. 107 F.3d 1328 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998).

215. *See id.* at 1336; *see also* *Players Int’l, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997) (This note focuses on the Ninth Circuit’s decision as opposed to the district court decision from New Jersey.).

216. *See Valley Broad. Co.*, 107 F.3d at 1331.

217. *See id.* at 1332-33.

218. *See id.* at 1334.

219. *See* Communications Act of 1934, 18 U.S.C. § 1304 (1994).

220. *See* § 1307(a)(1).

organizations<sup>222</sup> escape such restrictions. The court ruled that these exceptions to the advertising ban undermine the government's interests of limiting participation in commercial lotteries<sup>223</sup> and protecting states that have not legalized casinos.<sup>224</sup>

## IV. Resolution

### A. Casinos

In order to protect the welfare of the elderly and other vulnerable citizens, it is imperative that Congress maintain the federal ban on television and radio advertisements for casinos. In addition, to effectively shield the elderly from specific marketing tactics, regulators should prevent the casino industry from operating bus services between nursing homes and casinos.

#### 1. THE FEDERAL BAN ON CASINO ADVERTISING

Some legal experts speculate that, where the casinos are legal in the state in which the advertisements are broadcast, the 44 *Liquormart* decision makes any federal ban on television and radio advertisements for casinos unconstitutional under the First Amendment.<sup>225</sup> Already, the Ninth Circuit holds the federal ban unconstitutional even in states that have not legalized such gambling activities.<sup>226</sup>

#### 2. APPLYING THE CENTRAL HUDSON TEST

*a. Does the First Amendment Apply?* The first step in the *Central Hudson* test instructs courts to determine whether the First Amendment applies to the commercial speech in question.<sup>227</sup> In twenty-six states, where casinos operate legally,<sup>228</sup> the First Amendment protections ap-

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221. See Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2720 (1994).

222. See 18 U.S.C. § 1307(a)(2)(A).

223. See *Valley Broad. Co.*, 107 F.3d at 1334-36.

224. See *id.* at 1336. The Ninth Circuit did not address the fourth prong of the *Central Hudson* test. See *id.*

225. See *Greater New Orleans Broad. Ass'n v. United States*, 149 F.3d 334, 340 (5th Cir. 1998) (*Greater New Orleans III*), *cert. granted*, 119 S. Ct. 863 (1999); Paul Farhi, *Odds makers as . . . Adsmakers? A Six-Decade Ban on Casino Commercials Comes Under Assault*, WASH. POST, Mar. 5, 1998, at E1.

226. See *Valley Broad. Co.*, 107 F.3d at 1336.

227. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980).

228. See *United States Gaming at a Glance*, *supra* note 1, at 21.

ply to the advertising messages of these casinos,<sup>229</sup> so long as these messages are not misleading.<sup>230</sup> 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.<sup>231</sup> Thus, prohibitions against advertisements for casinos within these twenty-four states do not violate the Constitution.

*b. Is the Government's Interest Substantial?* If the First Amendment protections apply in a given state, the second criterion must be considered. The second criterion requires the government to show "a substantial interest to be achieved by restrictions on commercial speech."<sup>232</sup> The government interest in prohibiting television and radio casino advertisements specifically lies in keeping social costs down.<sup>233</sup> This interest means more than just discouraging gambling at casinos within their state. It relates to (1) controlling the number of compulsive gamblers and (2) preventing increases in the costs of police protection incurred to counter crime, including organized crime, associated with the casinos.<sup>234</sup>

A far more expansive interest articulated by the government involves protecting states that have not legalized casino gambling from broadcast advertising for casinos.<sup>235</sup> This interest cannot be denied in light of the casino industry's strategy of locating the casinos on the borders between states.<sup>236</sup> The neighboring states that elect to prohibit casino operations rely on the federal broadcasting ban to prevent

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229. See *Central Hudson*, 447 U.S. at 563-64; see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (holding that commercial speech should be afforded some protection under the First Amendment).

230. See *Central Hudson*, 447 U.S. at 563.

231. See *id.* at 566.

232. *Id.* at 564.

233. See *Greater New Orleans Broad. Ass'n v. United States*, 149 F.3d 334, 338 (5th Cir. 1998) (*Greater New Orleans III*), *cert. granted*, 119 S. Ct. 863 (1999); *Valley Broad. Co. v. United States*, 107 F.3d 1328, 1331 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998); *Greater New Orleans Broad. Ass'n v. United States*, 69 F.3d 1296, 1299 (1995) (*Greater New Orleans I*), *vacated and remanded*, 117 S. Ct. 39 (1996) (*Greater New Orleans II*); *Players Int'l, Inc. v. United States*, 988 F. Supp. 497, 501 (D.N.J. 1997).

234. See Kindt, *Subsidized by Taxpayers*, *supra* note 29, at 894-99; see also *Greater New Orleans Broad. Ass'n*, 149 F.3d at 338-39 nn.9, 10 (*Greater New Orleans III*).

235. See *Greater New Orleans Broad. Ass'n*, 149 F.3d at 338 (*Greater New Orleans III*); *Valley Broad. Co.*, 107 F.3d at 1331; *Greater New Orleans Broad. Ass'n*, 69 F.3d at 1299 (*Greater New Orleans I*); *Players Int'l, Inc.*, 988 F. Supp. at 504.

236. See *supra* notes 21-24 and accompanying text.

those messages from airing within their borders.<sup>237</sup> Currently, no technology exists to contain television and radio broadcasts within individual states.<sup>238</sup>

States further hold an interest in protecting the elderly from the effects of gambling. Senior citizens who suffer monetary losses, regardless of the cause of those losses, cannot recover financially.<sup>239</sup> As with any segment of the population, a certain percentage of the elderly will become problem gamblers when they are exposed to that activity.<sup>240</sup> In light of the growing elderly population, their inability to recover financially will inevitably cause the government to incur substantial costs.<sup>241</sup>

Courts, thus far, have consistently held that these government interests are substantial.<sup>242</sup> In *Posadas*, the Supreme Court addressed the Puerto Rican government's interest of limiting the demand for casino gambling among its citizens to avoid the social problems associated with the activity.<sup>243</sup> In doing so, the Court acknowledged that the Puerto Rican government's "interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest."<sup>244</sup> Relying on *Posadas*, the Fifth Circuit found a substantial government interest in limiting the social costs associated with gambling.<sup>245</sup> The Fifth Circuit further declared that the government held a substantial interest in protecting states that do not allow gambling from broadcast advertising for that activity.<sup>246</sup> The Ninth Circuit, in turn, recognized both of these asserted government interests as substantial.<sup>247</sup>

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237. See *Valley Broad. Co.*, 107 F.3d at 1333.

238. See *id.*

239. See Jacobbi, *supra* note 94, at 78, 80.

240. See *supra* notes 89-92 and accompanying text.

241. If many senior citizens incur financial losses, their inability to recover financially will result in government support through welfare.

242. See *Greater New Orleans Broad. Ass'n v. United States*, 149 F.3d 334, 338 (5th Cir. 1998) (*Greater New Orleans III*), *cert. granted*, 119 S. Ct. 863 (1999); *Valley Broad. Co.*, 107 F.3d at 1332-35; *Greater New Orleans Broad. Ass'n v. United States*, 69 F.3d 1296, 1301 (1995) (*Greater New Orleans I*), *vacated and remanded*, 117 S. Ct. 39 (1996) (*Greater New Orleans II*); *Players Int'l, Inc. v. United States*, 988 F. Supp. 497, 502, 504 (D.N.J. 1997).

243. See *Posadas de P.R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986).

244. *Id.*

245. See *Greater New Orleans Broad. Ass'n*, 149 F.3d at 338 (*Greater New Orleans III*); *Greater New Orleans Broad. Ass'n*, 69 F.3d at 1301 (*Greater New Orleans I*).

246. See *Greater New Orleans Broad. Ass'n*, 149 F.3d at 338 (*Greater New Orleans III*); *Greater New Orleans Broad. Ass'n*, 69 F.3d at 1301 (*Greater New Orleans I*).

247. See *Valley Broad. Co.*, 107 F.3d at 1333.

c. *Does the Limit on the Commercial Speech Advance the Government Interest?* The third element of the *Central Hudson* test mandates that "the restriction must directly advance the . . . [government] interest."<sup>248</sup> The Fifth Circuit maintained, on remand, that the federal statute banning casino advertisements on television and radio fulfilled this element of the *Central Hudson* test.<sup>249</sup> The court noted that the exceptions to the statute for lotteries and casinos operated by Indian Tribes represent valid legislative determinations that these gambling activities "include social benefits as well as costs and . . . often have dramatically different geographic scope."<sup>250</sup> In addition, the Fifth Circuit contended that the nationwide application of the advertising ban "reinforces the policy of states . . . which do not permit casino gambling."<sup>251</sup>

In contrast, the Ninth Circuit ruled that exceptions to the federal statute prevents the ban from meeting the third requirement of the *Central Hudson* test.<sup>252</sup> The court characterized one of the government's interests as "reducing public participation in all commercial lotteries."<sup>253</sup> Because the government permitted other commercial gambling operations, such as Indian Tribe casinos, to advertise on television and radio, the court ruled that the federal statute does not directly advance the interest.<sup>254</sup> This analysis, however, fails to address the distinguishing characteristic between casinos operated by Indian Tribes and those operated by private businesses. Indian Tribes, for example, may operate casinos only on their reservations.<sup>255</sup> Another restriction on Indian Tribes operating casinos requires that the activity be legal in the state in which the reservation is located.<sup>256</sup> Clearly, the Tribes do not have the option of choosing a location or expanding beyond their borders. Because Indian lands tend to be located in nonpopulous states or in the more rural areas of populous states, most consumers need to travel to the casinos operated by Indian Tribes.<sup>257</sup> The cost associated with traveling prevents many citi-

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248. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980).

249. See *Greater New Orleans Broad. Ass'n*, 149 F.3d at 338 (Greater New Orleans III).

250. *Id.*

251. *Id.*

252. See *Valley Broad. Co.*, 107 F.3d at 1334-36.

253. *Id.* at 1335 (emphasis omitted).

254. See *id.* at 1336.

255. See Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701(5) (1994).

256. See *id.*

257. See Hornblower, *supra* note 11, at 31.

zens from undertaking such a venture regardless of whether broadcast advertisements reach them.

On the other hand, private businesses place their casinos strategically. Again, a common strategy for expansion involves placing a casino on the border between a state that allows casino gambling and one or more states that do not.<sup>258</sup> The choice of location and the ability to expand into new markets allows the private casinos to move within driving distance of most Americans. The significance of this difference is realized when the government's interest is characterized properly. The Ninth Circuit characterized the government's interest as "reducing public participation in all commercial lotteries."<sup>259</sup> In actuality, the government interest lies in limiting the public's participation in gambling in an attempt to minimize the social costs associated with gambling.<sup>260</sup> Because of their ability to select border locations and expand into new markets, private businesses operating casinos pose a much greater risk to the population as a whole in comparison to casinos operated by Indian Tribes. Also, because the privately run casinos generally operate in or near cities, casinos reach larger segments of the population. As the size of the population exposed to legalized gambling grows, so does the number of problem gamblers.<sup>261</sup> These gamblers must reside relatively close to the casinos in order to gamble frequently. This accessibility accounts for the estimate that one-fifth of all gamblers generate 80% of the earnings of the gambling industry.<sup>262</sup> The geographic differences between Indian casinos and privately run casinos also account for the disparity in revenues between these casino operations. In 1997, casinos operated by Indian Tribes earned approximately \$6.7 billion.<sup>263</sup> During the same year, privately owned casinos generated approximately \$20.5 billions in revenues.<sup>264</sup>

The Ninth Circuit also held that the exceptions to the federal statute prevent the statute from directly advancing the government interest of protecting those states that have not legalized casino gambling from broadcast advertisements of casinos.<sup>265</sup> Once again, the court focused on the exception provided to Indian Tribes operating

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258. See *supra* notes 21-24 and accompanying text.

259. *Valley Broad. Co.*, 107 F.3d at 1335.

260. See *id.* at 1331.

261. See *supra* notes 89-92 and accompanying text.

262. See Gwynne, *supra* note 49, at 68, 69 (citing Henry Lesieur).

263. See *The United States Gross Annual Wager 1997*, *supra* note 14, at 9 tbl.4.

264. See *id.*

265. See *Valley Broad. Co.*, 107 F.3d at 1336.

casinos.<sup>266</sup> Unfortunately, the court's failure to address the differences between casinos operated by Tribes and those operated by private businesses affected the outcome of its analysis. Again, Indian Tribes can operate casinos only if casinos are legal in the state in which the reservation is located, and, even then, Indian Tribe casinos must be located on the Tribes' reservations.<sup>267</sup> Indian lands tend to be located away from population centers and require people interested in this form of entertainment to travel to the casinos operated by Indian Tribes.<sup>268</sup> The expenses required to reach these destinations are prohibitive to many citizens, making the lure provided by broadcast advertisements ineffective. Although people will be able to afford the traveling expenses and will choose to visit a casino located on a reservation, this option is not unlike the ability of residents who live in states that have not legalized casino gambling from vacationing in places that offer casino-gambling opportunities, such as Las Vegas or Atlantic City.

This situation stands in sharp contrast to the economic siphoning that occurs when a neighboring state legalizes casino gambling.<sup>269</sup> Privately run casinos frequently choose to place a casino on the border between a state that allows casino gambling and one or more states that prohibit this form of entertainment.<sup>270</sup> In turn, the casinos operating on the state's border attract the daily and weekly recreational dollars of the neighboring states' citizens.<sup>271</sup> The proximity of the casino increases the social costs associated with gambling in these states even though these states prohibit gambling.<sup>272</sup> These states deserve the protection from television and radio advertisements designed to entice more of their citizens to visit the casinos of the neighbor state.

*d. Is the Restriction Proportionate to the Interest?* Finally, the restriction on the commercial speech "must be in proportion to that interest."<sup>273</sup> In other words, a restriction will not pass the *Central Hudson*

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266. See *id.*

267. See Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701(5) (1994).

268. Casinos operated by Indian Tribes tend to be located in relatively nonpopulous states, such as Washington, Oregon, Nevada, New Mexico, and the Dakotas. See Hornblower, *supra* note 11, at 28, 31.

269. See *supra* notes 21-24 and accompanying text.

270. See *supra* notes 21-24 and accompanying text.

271. See *supra* notes 21-24 and accompanying text.

272. See *supra* notes 21-24 and accompanying text.

273. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980).



test where a narrower application would adequately meet the government's interest.<sup>274</sup>

In the Fifth Circuit's analysis of this fourth prong, the federal prohibition in question survived the constitutional test because the ban applied only to television and radio.<sup>275</sup> The court justified its conclusion by explaining that limiting "advertising directly influences consumer demand, as compared to the indirect market effect criticized" by the Supreme Court in *44 Liquormart*.<sup>276</sup> Furthermore, the Fifth Circuit noted that *44 Liquormart* did not "disturb the series of decisions that has [sic] found a commonsense connection between promotional advertising and the stimulation of consumer demand for the products advertised."<sup>277</sup> The court added that a lesser restriction would fall short of meeting this government interest.<sup>278</sup>

The Fifth Circuit also addressed the nationwide application of the advertising prohibition.<sup>279</sup> Although the broadcasters and gambling interests contended that the ban should apply only to states that have not legalized casinos, the court refused to accept this argument, finding that no other means exist to protect the states that maintain a prohibition against casino operations.<sup>280</sup> Furthermore, if the courts lift the ban entirely, the television and radio advertisements promoting gambling in privately owned casinos will reach the residents of states where such activities are illegal.<sup>281</sup>

In *Players International, Inc. v. United States*,<sup>282</sup> the district court in New Jersey agreed with the Ninth Circuit, holding the federal ban on television and radio advertising by privately owned casinos unconstitutional.<sup>283</sup> Unlike the Ninth Circuit, however, the court completed the analysis of the fourth element of the *Central Hudson* test.<sup>284</sup> The district court believed that the federal ban failed to pass the fourth prong because the asserted government interests could be "implemented without regulating speech."<sup>285</sup> One example of an alternative

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274. See *id.* at 564-66.

275. See *Greater New Orleans Broad. Ass'n v. United States*, 149 F.3d 334, 338-41 (5th Cir. 1998) (*Greater New Orleans III*), cert. granted, 119 S. Ct. 863 (1999).

276. *Id.*

277. *Id.* at 337.

278. See *id.* at 340.

279. See *id.* at 340-41.

280. See *id.* at 340.

281. See *id.*

282. 988 F. Supp. 497 (D.N.J. 1997).

283. See *id.* at 507.

284. See *id.* at 504-07.

285. *Id.* at 506-07.

method to implement the government's interests includes taxing casinos in order to fund educational programs to discourage casino gambling.<sup>286</sup> According to the *Players International* court, "the government may not promote legislation which infringes upon the First Amendment, as a means of suppressing conduct it permits, rather than finding [alternative] ways to restrict the conduct."<sup>287</sup>

This reasoning, however, fails to adequately protect the states that continue to prohibit casino gambling. These governments should not be forced to counter casino advertisements with an educational campaign, regardless of where the funds to support such a campaign are generated. As argued by the Fifth Circuit in *Greater New Orleans Broadcasting Ass'n*, if privately owned casinos are able to broadcast their advertisements in any state, "[n]o local prohibition of gambling will be meaningful."<sup>288</sup> If additional courts find this application of the *Central Hudson* test unpersuasive and agree with the Ninth Circuit and the district court in New Jersey that the federal statute violates the First Amendment, Congress should modify the Communications Act by eliminating the exceptions to the prohibition. The magnitude of the government interests clearly requires the continued prohibition of casino-gambling advertisements on television and radio.

### 3. NURSING HOMES AND CASINOS

Nursing homes must take an active role to prevent casinos from exploiting their residents. Although an occasional outing to a casino may provide entertainment to the residents of the nursing home, repeated trips scheduled to coincide with the receipt of Social Security checks<sup>289</sup> should raise the suspicion of nursing home administrators. In addition, senior citizen advocate groups should educate the elderly and nursing home administrators as to the possible dangers of gambling as well as the signs of problem gambling.

#### B. Lotteries

As noted previously, many lottery advertisements seriously mislead the elderly.<sup>290</sup> Thus, Congress should pass legislation requiring

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286. See *id.* at 505.

287. *Id.* at 507.

288. *Greater New Orleans Broad. Ass'n v. United States*, 149 F.3d 334, 341 (5th Cir. 1998) (*Greater New Orleans III*), cert. granted, 119 S. Ct. 863 (1999).

289. See Jacobbi, *supra* note 94, at 78, 80; Gearey, *supra* note 19, at 19.

290. See *supra* notes 102-19 and accompanying text.

lottery advertisements to comply with the truth-in-advertising laws.<sup>291</sup> Vulnerable groups, such as the elderly,<sup>292</sup> deserve protection from state-sponsored advertisements that distort the odds of winning the lottery.<sup>293</sup> This change requires congressional action because state governments are unlikely to restrict their own commercial speech due to their dependence on lottery revenue.<sup>294</sup> In addition, nursing homes should work to prevent the states from sponsoring programs that target senior citizens, such as the campaigns tried by Maryland.<sup>295</sup> Senior citizen advocate groups must educate the elderly as to the slim odds of winning the lottery.<sup>296</sup> Although buying a few lottery tickets may seem harmless, this form of gambling can become as addictive as other forms of gambling.<sup>297</sup>

## V. Conclusion

The proliferation of gambling has emerged as a recent phenomenon.<sup>298</sup> As such, the economic and social impact of this activity has surfaced only recently as a topic of study. The magnitude of the dollars spent in casinos and on lotteries signifies the need for additional analysis.<sup>299</sup> Because the elderly spend a considerable amount of money on both forms of gambling,<sup>300</sup> are particularly vulnerable to marketing efforts,<sup>301</sup> and can easily fall prey to the social harms of gambling,<sup>302</sup> this segment of the population should be the focus of future study.

The results of completed studies indicate that substantial problems associated with casino gambling and lotteries exist.<sup>303</sup> Thus, these studies provide the government with the evidence required by the courts to prove the government's interest in regulating the commercial speech of casinos.<sup>304</sup> The Supreme Court should uphold the

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291. See *supra* note 109 and accompanying text.

292. See *supra* notes 134-47 and accompanying text.

293. See *supra* notes 108-19 and accompanying text.

294. See *supra* notes 11-14 and accompanying text.

295. See *supra* notes 126-28 and accompanying text.

296. See *supra* notes 112-16 and accompanying text.

297. See *supra* notes 88-95 and accompanying text.

298. See *supra* notes 8-14 and accompanying text.

299. See *supra* notes 12-14 and accompanying text.

300. See *supra* notes 120-27 and accompanying text.

301. See *supra* notes 141-47 and accompanying text.

302. See *supra* notes 93-95, 134-40 and accompanying text.

303. See *supra* note 29; see also *supra* notes 88-95 and accompanying text.

304. See *supra* notes 233-48 and accompanying text.

federal ban on television and radio broadcasts of casino advertisements in order to protect all citizens, including the elderly, from the social costs related to gambling<sup>305</sup> and to protect the rights of citizens in states which have chosen not to legalize casino gambling.<sup>306</sup> The information collected regarding lotteries illustrates the need to apply the truth-in-advertising laws to the promotions of this state-sponsored gambling.<sup>307</sup>

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305. See *supra* notes 252-73 and accompanying text.

306. See *supra* notes 264-71 and accompanying text.

307. See *supra* notes 295-98 and accompanying text.