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The Lottery in United States v. Edge Broadcasting Co.: Vice or Victim of the Commercial Speech Doctrine

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THE LOTTERY IN UNITED STATES v.
EDGE BROADCASTING CO.: VICE OR VICTIM OF
THE COMMERCIAL SPEECH DOCTRINE?

A Lottery is a Taxation,
Upon all the Fools in Creation;
And Heav’n be prais’d,
It is easily rais’d,
Credulity’s always in Fashion:
For, Folly’s a Fund,
Will never lose Ground,
While Fools are so rife in the Nation.

—Henry Fielding, 1732

I. INTRODUCTION

The language of the First Amendment to the United States Constitution is unqualified: “Congress shall make no law... abridging the freedom of speech.” 2 However, the United States Supreme Court has interpreted the First Amendment to exclude some expressions from the unconditional umbrella of “freedom of speech.” 3


2. The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. Justice Hugo Black, in Smith v. California, wrote, “I read 'no law... abridging' to mean no law abridging.” 361 U.S. 147, 157 (1959) (Black, J., concurring) (emphasis in original).

3. In Chaplinsky v. New Hampshire, the Court established that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words-those which by their very utterance inflict injury....” 315 U.S. 568, 571-72 (1942). In an address on the First Amendment and the freedom of speech at Yale Law School, Justice John Paul Stevens stated:

I emphasize the word “the” as used in the term “the freedom of speech” because the definite article suggests that the draftsmen intended to immunize a previously identified category or subset of speech. That category could not have been co-extensive with the category of oral communications that are commonly described as “speech” in ordinary usage. For it is obvious that the Framers did not intend to provide constitutional protection for false testimony under oath, or for oral contracts that are against public policy, such as wagers or conspiracies among competitors to fix prices. The Amendment has never been
For example, commercial speech, defined as speech which proposes a commercial transaction, has occupied an awkward position in the Court's First Amendment jurisprudence. Indeed, until recently, the Supreme Court maintained that commercial speech was not protected by the Constitution.

In 1976, the Supreme Court closed the gap between protected forms of speech and exempted commercial speech by holding that the government cannot suppress truthful commercial information. In 1980, the Supreme Court decided *Central Hudson Gas & Electric Corp. v. Public Service Commission*, which established a four-step test for determining the constitutionality of regulations imposed on

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understood to protect all oral communication, no matter how unlawful, threatening, or vulgar it may be. Thus, it seems doubtful that the word "speech" was used in its most ordinary sense.


7. The year 1973 marked the start of the Supreme Court’s recognition of constitutional protection for commercial speech. See Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376 (1973) (recognizing importance of distinguishing between commercial speech and other speech forms). In the dictum to *Bigelow v. Virginia*, the Supreme Court extended protection to the area of commercial speech; previously, commercial speech was excluded. 421 U.S. 809 (1975) ("[S]peech is not stripped of First Amendment protection merely because it appears [as paid commercial advertising]."). For a further discussion of *Bigelow v. Virginia*, see *infra* notes 83-85 and accompanying text.

8. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). A Virginia statute made it illegal for licensed pharmacists to advertise the prices of prescription drugs. *Id.* The advertisements were truthful and contained no misleading information, and as such the statute was held unconstitutional for its suppression of truthful commercial activity. *Id.* See also MacLachlan, *supra* note 6, at 29 (categorizing Virginia Pharmacy as "Magna Carta" of commercial speech). For a discussion of the omission of commercial speech from the protection of the First Amendment, see *Note, Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

commercial speech.\textsuperscript{10} The creation of a "definitive" test for commercial speech has not led to consistency in the Court's subsequent commercial speech decisions.\textsuperscript{11} Court observers were, therefore, somewhat apprehensive when the Court granted certiorari in three commercial speech cases in 1993 because of this continuing uncertainty in the commercial speech doctrine.\textsuperscript{12}

One of the cases, \textit{United States v. Edge Broadcasting Co.},\textsuperscript{13} concerned the validity of two federal statutes.\textsuperscript{14} Collectively, the stat-

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\item \textbf{10.} \textit{Central Hudson}, 447 U.S. at 566. Commercial speech coming within the protection of the First Amendment follows a four-step inquiry: (1) it must concern lawful activity and not be misleading; (2) it must be determined whether the asserted governmental interest to be served by the restriction on commercial speech is substantial; (3) whether the governmental regulation directly advances the governmental interest asserted; (4) whether it is not more extensive than is necessary to serve that interest. \textit{Id.} at 561-66. \textit{See} Jonathan Weinberg, \textit{Constitutional Protection of Commercial Speech}, 82 COLUM. L. REV. 720 (1982) (discussing application of \textit{Central Hudson} test). For a further discussion of \textit{Central Hudson}, see infra notes 82-88.

\item \textbf{11.} Felix H. Kent, \textit{Re-affirmation of First Amendment in Commercial Speech}, N.Y.L.J., April 16, 1993, at 8. First Amendment protection of commercial speech has been called a "Supreme Court made roller coaster ride," in reference to the inconsistent treatment of commercial speech cases. \textit{Id.} Examples of the Court's inconsistent treatment of commercial speech cases include: Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 474 (1989) (concluding that fourth prong of commercial speech test requires only that the fit be "reasonable" and narrowly tailored between means and desired objective); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (Ruling it was possible to reduce the demand for gambling through restrictions on truthful advertising, moving away from idea that any lawful restriction on advertising must demonstrate substantial government interest); \textit{Central Hudson}, 447 U.S. 557 (1980) (clarifying \textit{Virginia Pharmacy}'s holding and established four-step test to evaluate commercial speech); \textit{Virginia Pharmacy}, 425 U.S. 748 (1976) (holding commercial speech worthy of First Amendment protection as long as it is truthful speech). For a further discussion of the Court's inconsistent treatment of commercial speech cases in the Court's recent jurisprudence, see Felix H. Kent, \textit{Roundup of 1992}, N.Y.L.J., Dec. 18, 1992, at 3.

\item \textbf{12.} MacLachlan, \textit{supra} note 6, at 29 ("Given the Court's somewhat erratic history in commercial speech cases, business lawyers, civil liberties groups and First Amendment scholars were anxious to see what the Court would do with the three cases . . . "). The three cases decided that year were: \textit{United States v. Edge Broadcasting Co.}, 113 S. Ct. 2696 (1993), Edenfield v. Fane, 113 S. Ct. 1792 (1993) and \textit{City of Cincinnati v. Discovery Network, Inc.}, 113 S. Ct. 1505 (1993).

\item \textbf{13.} 113 S. Ct. 2696 (1993).

\item \textbf{14.} 18 U.S.C. §§ 1304, 1307 (1988). Section 1304 provides in pertinent part: Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme . . . shall be fined . . . or imprisoned not more than one year, or both.

\item \textbf{18 U.S.C. § 1304.} Section 1307 provides in pertinent part: [The provisions of sections 1301, 1302, 1303 and 1304 shall not apply to:] (1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which

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utes prohibit the broadcast of any lottery advertisements, but permit broadcasters to promote state-run lotteries on stations licensed to a state which conducts such lotteries.\textsuperscript{15} The Court reviewed a decision of the United States Court of Appeals for the Fourth Circuit holding the two statutes unconstitutional as applied to the particular parties in the case.\textsuperscript{16} The Supreme Court reversed the Fourth Circuit and found that the statutes were not unconstitutional.\textsuperscript{17} The Court rejected the lower courts' application of the statutes on an individual basis.\textsuperscript{18} It held that there was a "reasonable fit" between the regulations and the governmental purpose and that the restriction was no broader than necessary to achieve the government's ends.\textsuperscript{19} In reaching its conclusion, the Court centered on the interest of nonlottery states in excluding behavior considered "vice activity."\textsuperscript{20} In dissent, Justices Stevens and Blackmun

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\item \textsuperscript{(B)} broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery.
\end{itemize}


15. \textit{Edge Broadcasting}, 113 S. Ct. at 2698. For a full discussion of this case, see infra notes 121-72 and accompanying text. Throughout this Note, states with state-sponsored lotteries will be termed "lottery states" and states without lotteries will be referred to as "nonlottery states."


18. \textit{Id.} at 2706.

19. \textit{Id.} at 2704-08. The Court determined that the "fit" between the government purpose and the statute was not perfect, but was reasonable. \textit{Id.} at 2705. In evaluating commercial speech cases, "reasonable fit" is the standard used. \textit{Id.} See Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (holding governmental restrictions require "reasonable fit" between means and ends); see, e.g., Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 339 (1986), \textit{In re R.M.J.}, 455 U.S. 191, 202 (1982); Metromedia, Inc. v. San Diego, 453 U.S. 490, 505-06 (1981) (plurality opinion); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 565 (1980).

Further, the \textit{Edge Broadcasting} Court looked at the validity of a restriction not by its application to a particular case, but by its general application and the general problem it confronts. \textit{Edge Broadcasting}, 113 S. Ct. at 2704. For a general discussion of the establishment of the reasonable fit test, see David Rownd, \textit{Muting the Commercial Speech Doctrine}: Board of Trustees of the State University of New York v. Fox, 38 WASH. U. J. URB. & CONTEMP. L. 275 (1990) (denouncing restrictions placed on commercial speech as highly paternalistic).

20. \textit{Edge Broadcasting}, 113 S. Ct. at 2706-08. \textit{See} Jerome L. Wilson, \textit{Commercial Speech Approaches Full Protected Status}, N.Y.L.J., Dec. 27, 1993, at 1, 5. "Vice activity" is that undertaking which includes gambling, alcoholic beverages, tobacco and prostitution. Peter J. Tarsney, \textit{Regulation of Environmental Marketing: Reassessing the Supreme Court's Protection of Commercial Speech}, 69 NOTRE DAME L. REV. 538, 546 (1993-94). "Vice activity" has traditionally received special treatment by the Court. \textit{Id.} The Court has relied on the idea that the trafficking of the so-called "vices" may be a danger to the public health, morals and welfare. M. David LeBrun, An-
questioned the continuing conception of lotteries as “vices,” reasoning that widespread state support and statistical evidence indicated that lotteries were no longer out of the societal mainstream.21

This Note discusses the Court’s decision in Edge Broadcasting in light of the development of the contemporary lottery system and the evolution of the commercial speech doctrine. Section II describes the factual background of the Edge Broadcasting dispute. Section III provides the legal and historical framework for analyzing the Edge Broadcasting opinion, tracing the historical development of lotteries and tracking the evolution of the commercial speech doctrine. Section IV considers the Edge Broadcasting opinion. It sets forth the Court’s reasoning and identifies the major features of the opinion. Section V examines the role played by the modern commercial speech doctrine in the Edge Broadcasting decision. Section VI discusses the impact of Edge Broadcasting on the future of the Court’s commercial speech jurisprudence.

II. FACTS

POWER 94 is an FM radio station,22 owned and operated by the Edge Broadcasting Corporation (Edge) and licensed to broadcast from Elizabeth City, North Carolina.23 POWER 94 carries the dual city identification of Elizabeth City and Virginia Beach, Virginia, but broadcasts from Moyock, North Carolina, a town located three miles south of the Virginia and North Carolina border.24

Because of its proximity to the Virginia border, the vast majority (92.2%) of POWER 94’s listeners are in Virginia, with the remaining 7.8% residing in nine northern North Carolina counties.25

22. Id. at 2702. POWER 94 is a 100,000 watt radio station and utilizes the call letters WMYK-FM. Id.
24. Edge Broadcasting, 113 S. Ct. at 2702. Edge Broadcasting’s (Edge) corporate offices are located in Virginia Beach, Virginia. Id.
25. Id. In the nine North Carolina counties reached by POWER 94, less than two percent of the entire population of the state reside there. Edge Broadcasting Co. v. United States, 5 F.3d 59, 60 (4th Cir. 1992), rev’d, 113 S. Ct. 2696 (1993).
Edge estimates that nearly 95% of its advertising revenues come from the state of Virginia.\textsuperscript{26} Edge desired to enhance its advertising revenues by broadcasting Virginia lottery commercials.\textsuperscript{27} Virginia has a state-sponsored lottery,\textsuperscript{28} and aggressively seeks promotional avenues for its lottery.\textsuperscript{29} In contrast, North Carolina statutes expressly prohibit the advertising of, and participation in lotteries, making non-compliance a misdemeanor.\textsuperscript{30} The applicable federal statutes collectively prohibit a radio station licensed in a nonlottery state from broadcasting lottery information.\textsuperscript{31}

The North Carolina area reached by POWER 94’s broadcasts is not isolated from other forms of Virginia-based media.\textsuperscript{32} Virginia television stations and Virginia newspapers are accessed by North Carolinians and all display lottery advertisements on a regular basis.\textsuperscript{33}

In 1990, Edge brought suit in the United States District Court for the Eastern District of Virginia.\textsuperscript{34} Edge challenged the two federal statutory provisions regulating lottery broadcasts and sought a declaratory judgment that, as applied to Edge, the statutes were violative of the First Amendment and the Equal Protection Clause of

\textsuperscript{26} Edge Broadcasting, 113 S. Ct. at 2702.

\textsuperscript{27} Id. Due to its inability to air lottery advertisements, Edge “estimates that it has lost and will continue to lose advertising revenues totalling in the millions of dollars.” Edge Broadcasting Co. v. United States, 732 F. Supp. 633, 635 (E.D. Va. 1990), aff’d, 5 F.3d 59 (4th Cir. 1992), rev’d, 113 S. Ct. 2696 (1993).

\textsuperscript{28} Va. Code Ann. §§ 58.1-4001-4028 (Michie 1991). Section 58.1-4001 “establishes a lottery to be operated by the Commonwealth which will produce revenue consonant with the probity of the Commonwealth and the general welfare of its people, to be used for the public purpose.” Id. at § 58.1-4001.

\textsuperscript{29} Edge Broadcasting, 732 F. Supp. at 635. “In 1988, the Commonwealth paid $1,285,141 in advertising costs to the media. In 1989, the Virginia Lottery Board estimated that those expenditures would reach $2.3 million in that year, including advertising over seven Hampton Roads radio stations.” Id.


\textsuperscript{32} Edge Broadcasting, 113 S. Ct. at 2706. The residents of the nine North Carolina counties who may listen to POWER 94 may also listen to television stations and read newspapers that display Virginia lottery advertisements. Id.

\textsuperscript{33} Edge Broadcasting, 732 F. Supp. at 635. The Lottery Board purchases advertising on four Hampton Roads television stations which broadcast to POWER 94 listening areas, as well as, other parts of North Carolina not reached by the radio station’s broadcast. Id. Two major Hampton Roads newspapers have advertising space dedicated to the lottery and these papers also circulate in the North Carolina counties touched by POWER 94’s signal. Id. Circulation for Virginia newspapers in Edge’s broadcast area was 10,400 daily and 12,500 on Sundays. Edge Broadcasting, 113 S. Ct. at 2707.

\textsuperscript{34} Edge Broadcasting, 732 F. Supp. at 633.
the Fourteenth Amendment. The district court held that the statutes were unconstitutional as applied to Edge and granted Edge the requested relief.

The Federal Communications Commission (FCC), which exercises jurisdiction over radio licensing, sought review of the district court's decision in the United States Court of Appeals for the Fourth Circuit. In a per curiam opinion, the Fourth Circuit affirmed the lower court's ruling that the statutes were unconstitutional. The United States Supreme Court granted certiorari, questioning the manner in which the lower courts had applied prior Supreme Court decisions on commercial speech. The Supreme Court reversed the Fourth Circuit's decision, holding that the statutes in question passed constitutional muster.

III. BACKGROUND

The Supreme Court examined two areas of law in determining whether the federal statutes in question were constitutional. In order to understand the Court's opinion, it is essential to look at the history of lotteries on both the national and state levels, as well as the development of the doctrine of commercial speech.

35. Id. at 635. For the full text of the federal statutes, see supra note 14. The lower courts, as well as, the Supreme Court, did not address the Fourteenth Amendment aspect of Edge's challenge. Edge Broadcasting, 113 S. Ct. at 2696-2703.

36. Edge Broadcasting, 732 F. Supp. at 635. The district court denied motions to dismiss and motions for summary judgment filed on behalf of the United States, and after facts were agreed upon, counsel presented their written and oral arguments. Id. The court determined that the federal statutes did not advance the nonlottery states' interests to justify infringement on commercial speech as a whole. Id. at 641.


38. Id. at 63. The Fourth Circuit held that: "(1) government had substantial federal interest in permitting nonlottery states to discourage gambling, but (2) federal regulatory scheme did not sufficiently advance government's federalism interest to justify infringement of First Amendment protection for commercial speech." Id. at 59-63. Judge Widener, in dissent, asserted Congress' "undoubted right to enact the legislation which it did." Id. at 63 (Widener, J., dissenting). "The fact that the legislation does not uniformly succeed in all instances is no reason to hold it unconstitutional." Id. (Widener, J., dissenting).


40. Id. at 2708. The Central Hudson four-part analysis was utilized in determining the constitutionality of the applicable federal statutes. Id. at 2702-06. For an explanation of Central Hudson analysis, see infra notes 94-98 and accompanying text.

41. Edge Broadcasting, 113 S. Ct. at 2696.
A. The Lottery

1. The National Perspective

Contemporary lotteries are seen as great sources of revenue. Historically, however, lotteries have had a vast number of functions and have been used in a variety of circumstances, from the election of public officials, to the drafting of soldiers for combat. Lotteries, as a form of entertainment, have not always been accepted as a revenue raiser.

On this continent, lotteries were an early part of the American colonies. In fact, the English authorized the holding of lotteries to support the Virginia Company's Jamestown Settlement in 1612. During early colonial times, Americans did not have an organized lottery system because of the challenging nature of their existence; they had neither the money nor the leisure time to gamble.

Colonial and eighteenth-century lotteries did exist, however, at rudimentary levels and Americans "wove more simpler and more frequent schemes into the fabric of daily business and local government." In the colonial era, their use was primarily to finance public projects.

43. Marvin v. Trout, 199 U.S. 212, 224 (1905). "For a great many years [the lottery] has been very generally in this country regarded as a vice, to be prevented and suppressed in the interest of the public morals and the public welfare." Id.
44. CLOTFELTER & COOK, supra note 1, at 34-35.
45. JOHN M. FINDLAY, PEOPLE OF CHANCE 12 (1986). Due to the dire situation of the early settlers at Jamestown, the lotteries sponsored by the Virginia Company in England provided "the real and substantial food, by which Virginia [was] nourished, referring to the men and provisions that had been shipped . . . with funds raised through lotteries." Id. at 14. See also JOHN S. EZELL, FORTUNE'S MERRY WHEEL 4 (1960) (discussing role of lottery in colonies).
46. FINDLAY, supra note 45, at 29. But cf. DAVID JOHNSTON, TEMPLES OF CHANCE 24 (1992) (as American settlements spread, so did opportunities for gambling); EZELL, supra note 45, at 12 (American lottery transplanted itself into colonies because of European lottery customs, economic pressures and lack of moral opposition to practice).
47. FINDLAY, supra note 45, at 32. The American lotteries, born of English parents, developed as simpler entities than their European counterparts. Id. Following the further settlement of the colonies, the lotteries evolved from separate individual efforts, to the cumulative effects of many. EZELL, supra note 45, at 12-13.
48. FINDLAY, supra note 45, at 31-32. Colonists in early America used lotteries to finance public, as well as, private business. Id. at 30. Harvard, Yale, Princeton and King's College all used lottery proceeds to pay for university buildings. JOHNSTON, supra note 46, at 24. Lottery monies were also earmarked to public infrastructure development such as paving roads, constructing bridges, buildings and wharves, although the line between public and private was traditionally blurred. CLOTFELTER & COOK, supra note 1, at 34.
Increasing complaints of fraud and disorganization in these smaller entities led to the regulation of lotteries in many of the colonies. In 1777, the Continental Congress created the “United States Lottery,” a device used to raise one and a half million dollars to fund the war with Britain.

In the nineteenth century, the scale and organization of lotteries drastically changed. Private enterprise entered the scene on a grand scale as dealers, manufacturers and sponsors of lotteries. Subsequently, there were frequent instances of fraud and dishonesty. Long time lottery opponents began to use these examples as clear support of the uselessness and evil nature of the lottery.

The culmination of anti-lottery groups' activity and the change in American sentiment was evidenced by the enactment of the Anti-Lottery Act of 1890 in which Congress banned all lottery materials from the mails. Lottery activity was later excluded by forbidding the transportation of lottery materials in interstate or foreign commerce through congressional exercise of the Commerce Clause in
1895. 56 Champion v. Ames, 57 known as "The Lottery case," affirmed congressional use of the Commerce Clause for regulation of lotteries. 58 In Champion, a man was arrested and indicted for violation of the Federal Lottery Act, which prohibited the mailing, importation, or interstate transit of lottery tickets. 59 The issue before the Court was whether this Act was an unconstitutional infringement by the federal government over areas that had been controlled by state authority. 60 The Champion Court established that the exercise of the Commerce Clause did not infringe unconstitutionally upon powers conferred to the states. 61 While the exercise of federal powers helped foster anti-lottery efforts in the late nineteenth century, such power did not keep states from establishing their own state-sponsored lottery programs sixty years later. 62

2. The State Perspective

In response to bleak fiscal conditions, many states resorted to using lotteries as revenue generators. 63 Despite numerous methods of producing revenue, states nonetheless experienced continued difficulty meeting the increased demands on state and municipal


The Commerce Clause provides in pertinent part: "[T]he Congress shall have Power ... To regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

57. 188 U.S. 321 (1903).


if, in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the States any article, commodity or thing ... no matter with what motive ... It will be time enough to consider the constitutionality of such legislation when we must do so.

Champion, 188 U.S. at 362.

59. Champion, 188 U.S. at 322-23. In Champion, the accused was under indictment in the United States District Court for the Northern District of Illinois for a conspiracy under the Lottery Act. Id. at 322.

60. Id.

61. Id. at 357. The magnitude of the Court's decision is evidenced in part by the fact that the Court heard oral arguments three times before issuing its decision. Id. at 357-58.


funds. For example, in 1963, New Hampshire desperately needed another source of revenue for its flagging school system. New Hampshire's Governor asserted that the duty of the state's political representatives was to initiate lottery programs such as the New Hampshire "Sweepstakes" to alleviate the economic burden on the population.

Unfortunately, New Hampshire's experiment with the revival of the lottery was not as fruitful as expected; the economic goal of the program was not fully realized. New Hampshire's state-sponsored lottery did not produce an immediate explosion of lotteries nationwide. Later, however, the infusion of modern technology into lottery systems helped to tailor the lottery to the needs and wants of the public and created instant success for states such as New Jersey. By 1975, ten other states joined the lottery movement.

64. CLOTFELTER & COOK, supra note 1, at 140. Lotteries are viewed as a way to forestall tax increases. The lottery is seen as a "painless tax," even though lawmakers plainly state that there are more efficient and productive ways of generating funding for state needs. Id.; see also NAT'L INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776-1976, 680-84 (1977) [hereinafter DEVELOPMENTS] (discussing notion of "painless tax").

65. WEINSTEIN & DEITCH, supra note 58, at 15. "New Hampshire's local governments and schools were almost totally dependant on property taxes, which had been pushed to an oppressive level." Id. Often the strongest argument in favor of implementing lottery programs is the effect they will have on public education, but lottery programs, critics argue, are not the panacea for public education that some states would have its citizens believe. Robert Gnaizda, Commission Bets Its Advertising Claims Aren't Deceiving, LOS ANGELES DAILY J., Apr. 20, 1987, at 4.

66. WEINSTEIN & DEITCH, supra note 58, at 15.

67. MARY O. BORG ET AL., THE ECONOMIC CONSEQUENCES OF STATE LOTTERIES 3 (1991). "Although the lottery began with great fanfare, the revenue expectations were never met, and more importantly, after the first year, revenues actually declined for several years before again inching upward." Id. See DEVELOPMENTS, supra note 64, at 700-02 (detailing New Hampshire's lottery experience).

68. BORG, supra note 67, at 3. New York became the second lottery state in 1968, but once again problems plagued the system, essentially, the lottery was not the panacea the lawmakers had hoped that it would be. Id. See also CLOTFELTER & COOK, supra note 1, at 3. See, e.g., New York State Broadcasters Ass'n v. United States, 414 F.2d 990, 991 (2d Cir. 1969) (providing background information on New York lottery), cert. denied, 396 U.S. 1061 (1970).

69. CLOTFELTER & COOK, supra note 1, at 53. In an effort to reduce opportunities for fraud and forgery and expedite sales, New York computerized its entire system. DEVELOPMENTS, supra note 64, at 703. See WEINSTEIN & DEITCH, supra note 58, at 16.

70. DEVELOPMENTS, supra note 64, at 703. In the first six months, New Jersey netted $30 million from its lottery. BORG, supra note 67, at 3. New Jersey's innovations included "low priced tickets, instant winners, and heavy promotion" all of which were easily facilitated through modern technological advances. Id. New Hampshire and New York followed New Jersey's example and other states became interested in following New Jersey's lead. WEINSTEIN & DEITCH, supra note 58, at 16.

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and Congress, acknowledging the need to aid states in their legal sponsorship of state run lotteries, amended the standing statutory provisions by enacting 18 U.S.C. § 1307, exempting states from the ban on advertising for intrastate lottery programs.\(^{71}\) By 1988, sixty-six percent of the country's population lived in lottery states\(^ {72} \) and by the close of 1994, thirty-seven states had lotteries.\(^ {73} \) One commentator noted, "[i]t has been projected that nearly every state will have a lottery by the end of this decade."\(^ {74} \)

A great handicap to state lotteries throughout much of this century has been the federal statutory prohibition contained in 18 U.S.C. § 1304 against radio advertisements of lottery materials.\(^ {75} \) In 1976, Congress realized the need to alter existing law to make room for the wave of state lotteries and enacted 18 U.S.C. § 1307, exempting state-authorized lotteries from the prohibitions of section 1304.\(^ {76} \)

**B. Commercial Speech**

The First Amendment prohibits governmental interference with speech.\(^ {77} \) However, the Supreme Court has recognized a "‘common sense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."\(^ {78} \)

\(^{71}.\) For the full text of § 1307, see supra note 14. In adopting § 1307, the House Judiciary Committee recognized that this provision was a flawed resolution, but nonetheless, Congress decided to promote "protection of the policies and the interests of the States which do not provide for such lotteries." H.R. REP. No. 1517, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 7007, 7011.

\(^{72}.\) CLOTFELTER & COOK, supra note 1, at 144. See Rychlack, supra note 54, at 45 (noting lotteries are popular forms of gambling in 33 states and District of Columbia). See generally DEVELOPMENTS, supra note 64, at 704-54.


\(^{74}.\) Rychlack, supra note 54, at 45-46.


In its first analysis of commercial speech, the Supreme Court refused to extend First Amendment protection, primarily because of the advertiser's interest in financial gain. In 1951, the Court held in *Breard v. City of Alexandria*, that an ordinance banning the selling of products door-to-door was valid and did not violate the salesman's First Amendment rights. The Court reasoned that commercial speech was distinguishable from otherwise protected speech because speech for a commercial purpose had less constitutional "weight."

The Court began reexamining the First Amendment protection afforded commercial speech in the early 1970's and made a conscious effort to further extend such protection. In *Bigelow v. Virginia*, the Court invalidated a state statute that outlawed advertising of abortion services. The Court determined that "[a state]

79. Valentine v. Chrestensen, 316 U. S. 52 (1942). In Valentine, the Court addressed First Amendment protection of a handbill advertising a submarine tourist attraction. *Id.* at 54. Because the papers were primarily commercial, the Court asserted that it was "clear the Constitution imposes no ... restraint on government as respects purely commercial advertising." *Id.*


81. *Id.* at 645. The ordinance at issue in *Breard* prohibited "solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise" from soliciting private homes absent an invitation or a request by the owner(s) of the residence. *Id.* at 624-25. The Court found that the regulation did not curtail the salesman's First Amendment rights and had the legitimate purpose of regulating an "obnoxious" type of solicitation. *Id.* at 644-45. For a further discussion of *Breard* and its effect in the realm of privacy issues, see Ken Gormley, *One Hundred Years of Privacy*, 1992 Wis. L. Rev. 1335, 1377 (1992) (detailing clash between undaunting solicitor and unwilling homeowner). For a discussion of *Breard* in the commercial speech context, see Brent P. Copenhaver, Comment, *Zauderer v. Office of Disciplinary Counsel: Refining the Regulation of Attorney Advertising*, 88 W. Va. L. Rev. 265, 270 (1985) (discussing *Breard* as part of commercial speech exception to First Amendment protections).

82. *Breard*, 341 U. S. at 644-45 (1951). See Howell A. Burkhalter, *Advertorial Advertising and the Commercial Speech Doctrine*, 25 Wake Forest L. Rev. 861, 863 (1990) (commercial speech has inherent hardiness exempting it from typical First Amendment protections). The Court's decision in *Breard* has come under harsh scrutiny. "[S]ince the decision in *Breard*, however, the Court has never denied protection on the ground that the speech in issue was 'commercial speech.' That simplistic approach, ... had come under criticism or was regarded as of doubtful validity by Members of the Court." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U. S. 748, 759 (1976).


84. 421 U. S. 809 (1975).

85. *Id.* at 829. A Virginia based newspaper published a New York company's advertisement announcing that the company would arrange economical solutions for women with unwanted pregnancies in New York where abortions were legal and there was no residency requirement. *Id.* at 811-12. Bigelow, the managing editor of the newspaper, was convicted of a misdemeanor for his violation of a state
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."{86}

In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, the Court held, as presaged by Bigelow, that commercial speech must get some First Amendment protection. Virginia Pharmacy represented the first time that the Supreme Court acknowledged the consumer’s right to an uninhibited flow of commercial information and that government generated ignorance was to be avoided. Virginia Pharmacy did not establish the full extent of First Amendment protection of commercial speech, but rather served as a landmark case, providing the possibility of broader protection in subsequent cases.90

In 1980, the Court clarified its Virginia Pharmacy holding and developed a four-part test that has been used as the benchmark for determining the constitutionality of any restriction on commercial speech.91 This four-part test, the Central Hudson test, was established by statute barring the sale or printing of any publication supporting abortions. Id. at 812.

86. Id. at 824-25. The majority opinion, authored by Justice Blackmun, stated that the lower courts erred in assuming that advertising was not entitled to First Amendment protection. Id. at 825. The opinion noted that speech concerning a commercial transaction is not automatically deprived of constitutional protection. Id. at 818-19.


88. Id. at 762. Virginia Pharmacy extended First Amendment protection to commercial speech. Id. Prior to Virginia Pharmacy, some commercial speech issues had been addressed in Bigelow. Bigelow, 421 U.S. at 809. The Bigelow opinion advocated a balancing approach weighing the interests of the First Amendment rights against the police power advanced by the interest. Id. at 821. The Bigelow holding was seen as more narrowly tailored to prohibit states from restraining advertisements about activities which were constitutionally guaranteed. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.31, at 1019 (4th ed. 1991). Indeed, Justice Blackmun, writing for the Court, limited his holding stating that it was unnecessary for the Court to decide the First Amendment issue in the case. Bigelow, 421 U.S. at 825. See Jonathan Weinberg, Note, Constitutional Protection of Commercial Speech, 82 COLUM. L. REV. 720 (1982) (arguing strict scrutiny protection for commercial speech).

89. Virginia Pharmacy, 425 U.S. at 764, 766. The Court stated, “[a]s to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.” Id. at 763.

90. In footnote 24 of the Virginia Pharmacy decision, the Court laid the groundwork for the subsequent shaping of the commercial speech doctrine by making two arguments: (1) that false commercial speech has no value and deserves no constitutional protection and (2) the existence of such speech should not exclude the mass of valuable correct advertising from getting the constitutional protection it was due. Virginia Pharmacy, 425 U.S. at 771-72 n.24.

lished in *Central Hudson Gas & Electric Corp. v. Public Service Commission.* Under consideration was the issue of whether a regulation which proscribed an electric utility from advertising to promote the use of electricity violated the Constitution. Based on the four-part test articulated, the Court determined that the ban violated the Constitution.

The *Central Hudson* test begins with a determination of whether the speech is truthful and not misleading. The court must then evaluate whether the asserted governmental interest served by the restriction on commercial speech is substantial. If both questions are answered affirmatively, the test's third prong requires the court to assess whether the regulation directly advances the asserted governmental interest. Finally, the test requires that the regulation not be more extensive than is necessary to serve the applicable state interest. The *Central Hudson* test remains the only definitive test used in evaluating the constitutionality of restrictions imposed on commercial speech.

speech, see supra note 10. The creation of a four-part test "was significant both for the nature of the test itself and because the Court's creation of the test implicitly admitted that states could regulate even some truthful commercial speech." McGowan, supra note 5, at 872.

93. *Id.* at 558-61. *Central Hudson* involved the Court's consideration of a New York Public Service Commission rule banning electrical utilities, subject to its jurisdiction, from running advertisements that encouraged or advocated electricity consumption. *Id.* at 559. The Commission's reasoning for promulgating the rule was in keeping with the national trend toward conservation of energy. *Id.* at 559-60. Excessive advertising of energy sources, the Commission feared, would send mixed signals to the public about energy conservation. *Id.* at 560.

94. *Id.* at 561-72. After applying the test, the Court held the Commission's order unconstitutional on two grounds. *Id.* at 561. First, the order prohibited all advertising, including promotion of products and services that use energy as or more efficiently than alternatives. *Id.* Second, the Commission failed to demonstrate that a more limited restriction would not adequately further the interest in energy conservation. *Id.* The restriction on the promotion of electricity was, therefore, unconstitutional under the First Amendment. *Id.*

95. *Id.* at 562-64. Therefore, the government has the ability to quash misleading or deceptive advertising and commercial speech related to illegal activity. *Id.* at 563 (citing Friedman v. Rogers, 440 U.S. 1 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)).

96. *Id.* at 564.
97. *Central Hudson,* 447 U.S. at 564.
98. *Id.* at 565.
In 1986, the Court applied the Central Hudson analysis in Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico. In Posadas, the Court approved a statutory ban on casino gambling advertising, stating that the ban was not facially unconstitutional or vague. The Court stated that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." The Posadas dissenters criticized the majority’s reliance on Central Hudson because of the vague nature of the Central Hudson test and they advocated a more narrowly defined procedure for determining what prohibition on speech is permitted.

The focus of the Posadas dissent, the generalized and broad nature of the Central Hudson test, surfaced in the majority opinion in Board of Trustees of the State University of New York v. Fox. At issue in Fox was whether a state university could regulate a product demonstration in campus dormitory rooms when the presentation was requested by the residing student. After university officials applied definitive”). Commentators have criticized the Central Hudson “definitive test” stating, “[the test] enshrined as it was for . . . years into the fundamental law of the land, is a mechanism for the generation of random results.” Christopher C. Faillé, Spinning the Roulette Wheel: Commercial Speech and Philosophical Cogency, 41 Fed. B. News & J., Jan. 1994, at 60. It has been noted:

It is child’s play for any professional advocate to produce a pair of arguments of equal strength around [the] fourth [prong] given any particular fact pattern. If the advocate needs to argue that there was a least restrictive alternative, he/she will describe the substantial state interest in general terms, and advance a variety of other means that might have been employed to achieve that general good. If the advocate needs to argue that there was no less restrictive alternative available, he/she will list particular effects the system in place does achieve, which other systems, described with equal particularity, would not or at least might not achieve.

Id.

100. 478 U.S. 328 (1986).

101. Id. at 329. The statute at issue concerned a Puerto Rico gambling restriction banning the advertisement of gambling to local residents, but permitting advertisements aimed at American tourists. Id. at 330.

102. Id. at 345-46. The Court stated that “it is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct but reducing the demand through restrictions on advertising.” Id. at 346.

103. Id. at 350-51 (Brennan, J., dissenting). The dissent criticized the majority’s application as not narrowly tailored thereby ensuring arbitrary and random results. Id. at 351 (Brennan, J., dissenting). Additionally, the dissent stated that when “the government seeks to suppress the dissemination of nonmisleading commercial speech relating to legal activities, . . . such regulations should be subject to strict judicial scrutiny.” Id. (Brennan, J., dissenting).


105. Id. at 488-89. The State University of New York instituted regulations banning the operation of any commercial enterprise for any purpose, other than those specifically exempted in the regulation. Id. at 471-72. A company selling
peared, demanding the conclusion of the meeting, the sponsoring students filed suit.\textsuperscript{106} Fox asserted the availability of "less intrusive" or "less restrictive" means by which the university administration could have exercised its authority to maintain order on campus.\textsuperscript{107} Justice Scalia, writing for the Court, clarified the fourth prong of the \textit{Central Hudson} test stating that "the decisions require only a reasonable 'fit' between the government's ends and the means chosen to accomplish those ends."\textsuperscript{108} In the aforementioned decisions, the Court "has emphasized that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'"\textsuperscript{109}

Several recent decisions have created conflicting notions as to the direction of the commercial speech doctrine.\textsuperscript{110} In 1993, the Court decided \textit{City of Cincinnati v. Discovery Network, Inc.},\textsuperscript{111} which invalidated a city ordinance that banned commercial newsracks from the city streets.\textsuperscript{112} In \textit{Discovery Network}, the Court noted the absence of a "reasonable fit" between the newsrack ban and the

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\textit{Schiller: The Lottery in United States v. Edge Broadcasting Co.: Vice or Victim of the Commercial Speech Doctrine?} Published by Villanova University Charles Widger School of Law Digital Repository, 1995
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city's legitimate interest in safety and aesthetics.\textsuperscript{113} The Court also staunchly defended the constitutional protections of commercial speech when Cincinnati tried to assert that "the 'low value' of commercial speech \[was\] a sufficient justification for its selective and categorical ban."\textsuperscript{114} The Court declared that they were unwilling to accept Cincinnati's "bare assertion that the 'low value' of commercial speech \[wa\]s a sufficient justification for its selective and categorical ban on newsracks dispensing 'commercial handbills.' "\textsuperscript{115} The dissent in \textit{Discovery Network} argued that the Court's previous decisions only afforded commercial speech limited protection. The dissent, therefore, asserted that the majority's opinion was contrary to precedent and undermined a uniform application of the commercial speech doctrine.\textsuperscript{116}

In \textit{Edenfield v. Fane},\textsuperscript{117} a Certified Public Accountant (CPA) sued the Florida Board of Accountancy, asserting the unconstitutionality of a rule requiring, in part, that a CPA "shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . ."\textsuperscript{118} In striking down the Florida rule, the Court stated:

The type of personal solicitation prohibited here is clearly commercial expression to which First Amendment protec-

\textsuperscript{113} \textit{Discovery Network}, 113 S. Ct. at 1510. The Court stressed that Cincinnati failed to offer an adequate justification for treating commercial newspapers differently from other printed material. \textit{Id.} at 1516.

\textsuperscript{114} \textit{Id.} at 1516.

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.} at 1521 (Rehnquist, C.J., dissenting). The Chief Justice, joined by Justices White and Thomas, emphasized the need to adhere to a uniform interpretation of the commercial speech doctrine and that the doctrine's application should yield limited constitutional protections. \textit{Id.} at 1521-22. (Rehnquist, C.J., dissenting). The \textit{Discovery Network} dissent stated that the Court's jurisprudence has emphasized a subordinate position for commercial speech in the First Amendment realm along with limited protection for such speech. \textit{Id.} at 1522 (Rehnquist, C.J., dissenting) (citing Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989)). The durability of commercial speech, according to Rehnquist, justifies treating it differently. \textit{Id.} (Rehnquist, C.J., dissenting). The dissent asserted further that "[c]ommercial speech is also 'less central to the interests of the First Amendment than other types of speech, such as political expression.' \textit{Id.} (Rehnquist, C.J., dissenting) (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985) (Powell, J., opinion))). Further, the dissent characterized the majority's opinion as "offer[ing] little in the way of precedent \[to\] support its new rule," in other words, the majority did not follow applicable precedent and rather cited cases that did not involve the regulation of commercial speech in support of its holding. \textit{Id.} at 1524 (Rehnquist, C.J., dissenting).

\textsuperscript{117} 113 S. Ct. 1792 (1993).

\textsuperscript{118} \textit{Id.} at 1796 (quoting \textit{Fla. Admin. Code Ann. v. 21A-24(3)} (1992)).
tions apply . . . In denying CPA’s and their clients the considerable advantages of solicitation in the commercial context, Florida’s law threatens societal interests in broad access to complete and accurate commercial information that the First Amendment is designed to safeguard.

However, commercial speech is “linked inextricably” with the commercial arrangement that it proposes, so that the State’s interest in regulating the underlying transaction may give it a concomitant interest in the expression itself. Thus, Florida’s rule need only be tailored in a reasonable manner to serve a substantial state interest.119

*Discovery Network* and *Edenfield* both seemed to suggest that the Court was moving toward a more commercial-friendly view of the notion that commercial speech is “‘less central to the interests of the First Amendment’ than other types of speech, such as political expression.”120

### IV. Narrative Analysis

#### A. The Majority Opinion

Justice White, writing for the majority in *Edge Broadcasting*,121 reviewed the constitutionality of two federal statutes that collectively prohibit the broadcast of lottery promotions in nonlottery states.122 Using the *Central Hudson* four factors test, the district court concluded that the statutes, as applied to Edge, did not directly ad-

119. *Id.* at 1798 (emphasis added).

120. *Id.* at 1522 (quoting Dun & Bradstreet, 472 U.S. at 758 n.5; see also, Kent, *supra* note 110, at 3 (current Supreme Court makeup supports commercial speech protection).

121. Justice White wrote the majority opinion of the Court as to Parts I, II, and IV in which Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, Souter and Thomas joined. The opinion of the Court with respect to Parts III-A and III-B was joined by Chief Justice Rehnquist and Justices O’Connor, Scalia and Thomas. Part III-C of the Court’s opinion was joined by Chief Justice Rehnquist, Justices Kennedy, Souter and Thomas. Part III-D of the opinion was joined by Chief Justice Rehnquist and Justices Scalia and Thomas. Justice Souter filed an opinion concurring in part, in which Justice Kennedy joined. Justice Stevens filed a dissenting opinion in which Justice Blackmun joined.

122. *Edge Broadcasting*, 113 S. Ct. at 2700. For the full text of the federal statutes at issue, see *supra* note 14.
vance the asserted governmental interest. The court of appeals affirmed on the same grounds.

The Supreme Court began its analysis with the history of the lottery in both the judicial and the legislative branches of government. The Court noted that significant changes occurred when broadcasting entered into the lottery equation, resulting in the adoption of 18 U.S.C. § 1304. After lotteries turned into virtual state "public policy," Congress adopted 18 U.S.C. § 1307, an "exception [that] was enacted 'to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery states.' " The Court also took note of Virginia's current status as a lottery state and North Carolina's nonlottery state status.

The Court dismissed the government's assertion that the Central Hudson analysis should not be used because of the lottery's acknowledged status as a "vice." The government wanted the Court to follow Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, and conclude that "the greater power to prohibit gambling necessarily includes the lesser power to ban its advertisement." 

123. Edge Broadcasting, 113 S. Ct. at 2702. The district court held that the federal statutes which were enacted to further federalism by permitting nonlottery states to discourage gambling, do not advance the goals of the nonlottery states sufficiently to justify the infringement on commercial speech; the statutes could not be given a narrowing construction. Edge Broadcasting Co. v. United States, 732 F. Supp. 633 (E.D. Va. 1990), aff'd, 5 F.3d 59 (4th Cir. 1992), rev'd, 113 S. Ct. 2696 (1993).

124. Id. at 2702-03. The United States Court of Appeals for the Fourth Circuit held that: "(1) government had substantial federalism interest in permitting nonlottery states to discourage gambling, but (2) federal regulatory scheme did not sufficiently advance government's federalism interest to justify infringement of First Amendment protection for commercial speech." Edge Broadcasting Co. v. United States, 5 F.3d 59 (4th Cir. 1992), rev'd, 113 S. Ct. 2696 (1993).

125. Id. at 2700-02.

126. Id. at 2701 (citing 18 U.S.C. § 1304 (1988)). For the text of the code, see supra note 14.

127. For a detailed discussion of the state movement to sponsor lotteries, see supra notes 54-75 and accompanying text.


129. Id. at 2701-02.

130. Id. at 2703. The Court noted that the Fourth Circuit did not address the issue of the lottery's position as a "vice" and the idea that the greater power to prohibit gambling necessarily includes the lesser power to ban its advertisement. Id. Therefore, the Court also did not address the issue. Id.


132. Edge Broadcasting, 113 S. Ct. at 2703. See also Posadas, 478 U.S. at 344 (Puerto Rican legislature has power to ban casino gambling, thus, greater power to
Rather, the Court, like the courts below, initiated the four prong analysis under *Central Hudson*.\(^{133}\) Under the first factor in *Central Hudson*, the Court assumed that Edge would air nonmisleading advertisements about the Virginia lottery, a legal activity.\(^{134}\) Adhering to the lower courts’ reasoning in applying the second *Central Hudson* factor, the Court affirmed the substantial governmental interest in supporting nonlottery states’ policies, as well as not interfering with states that sponsor lotteries.\(^{135}\) The Court disagreed with the lower courts’ holdings regarding the third and fourth *Central Hudson* factors.\(^{136}\)

The Court cautioned that the third step of the analysis cannot be simply limited to questioning how the governmental interest is advanced as applied to a single person or entity.\(^{137}\) Quoting its holding in *Posadas*, the Court narrowed the third and fourth steps of *Central Hudson* stating, “[t]he last two steps of the *Central Hudson* analysis basically involve a consideration of the ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends.”\(^{138}\) This requirement for narrow tailoring is met “‘so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.’”\(^{139}\)

In the Court’s opinion, the constitutionality of the statutes had to be measured by their general application to “all other radio and television stations in North Carolina and countrywide” and not just

\(^{133}\). *Edge Broadcasting*, 113 S. Ct. at 2703. For a discussion of all four factors in the *Central Hudson* analysis, see supra notes 94-98 and accompanying text.

\(^{134}\). *Edge Broadcasting*, 113 S. Ct. at 2703. The lower courts also followed this assumption. *Id.*

\(^{135}\). *Id.* at 2702-03. The district court and the Fourth Circuit found that under the third prong of the *Central Hudson* test, whether a substantial governmental interest was asserted and advanced by the regulation, the statutes failed to advance the governmental interest supporting them. *Id.* at 2702. They concluded that because of the other types and quantities of media with lottery advertisements that reach North Carolina residents, prohibiting Edge from broadcasting would not “shield[ ] North Carolina residents from lottery information.” *Id.* at 2703-04. The lower courts held that “this ineffective or remote measure to support North Carolina’s desire to discourage gambling cannot justify infringement upon commercial free speech.” *Id.* at 2704.

\(^{137}\). *Id.* at 2704.

\(^{138}\). *Id.* (quoting *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986)).

to Edge’s broadcast area.\textsuperscript{140} Thus, as the statutes are applied nationwide, the Court ruled that they substantially further the government interest in supporting those states that discourage lottery participation as well as those states that sponsor lotteries.\textsuperscript{141} In support of this proposition, the Court noted the absence of any case it had decided that held to the contrary.\textsuperscript{142}

Further, the Court mentioned that congressional intent behind section 1304 was to “support the anti-gambling policy of a state like North Carolina by forbidding stations in such a state from airing lottery advertisements.”\textsuperscript{143} Therefore, because POWER 94 was based out of Moyuck, North Carolina, and licensed as a North Carolina station, enforcing the statute would eliminate at least some of the lottery advertising infused into the state.\textsuperscript{144}

The Court held that the examination of the statutes, as applied to Edge Broadcasting, was a consideration appropriate to the fourth prong of the \textit{Central Hudson} test.\textsuperscript{145} Citing its decision in \textit{Board of Trustees of the State University of New York v. Fox},\textsuperscript{146} as support, the Court asserted that only a reasonable fit was necessary, not a perfect one, between the restriction and the governmental interest in commercial speech cases.\textsuperscript{147} The Court said that although ninety-two percent of POWER 94’s listeners are in Virginia, allowing the sta-

\begin{itemize}
\item \textsuperscript{140} \textit{Id.} at 2704.
\item \textsuperscript{141} \textit{Id.} at 2705-06. The \textit{Edge Broadcasting} Court rejected Edge Broadcasting Co.’s assertion that \textit{Fane} stood for an “as applied” standard of review by stating that “[w]hile treating \textit{Fane’s} claim as an applied challenge to a broad category of commercial solicitation, [the Court] did not suggest that \textit{Fane} could challenge the regulation on commercial speech as applied only to himself or his own acts of solicitation.” \textit{Id.} at 2706. \textit{Fane} also illustrates the general problem of accommodating both lottery and nonlottery states, not just accommodating commercial speech in relation to Edge Broadcasting’s isolated example. \textit{Id.} at 2706.
\item \textsuperscript{142} \textit{Id.} at 2706 (quoting \textit{Ohralik v. Ohio State Bar Ass’n}, 436 U.S. 447 (1978)).
\item \textsuperscript{143} \textit{Id.} at 2704.
\item Congress surely knew that stations in one state could often be heard in another . . . . Congress plainly made the commonsense judgment that each North Carolina station would have an audience in that State, even if its signal reached elsewhere and that enforcing the statutory restriction would insulate each station’s listeners from lottery ads and hence advance the governmental purpose of supporting North Carolina’s laws against gambling. \textit{Id.}
\item \textsuperscript{144} \textit{Edge Broadcasting}, 113 S. Ct. at 2706. For background on POWER 94, see \textit{supra} note 22 and accompanying text.
\item \textsuperscript{145} \textit{Id.} at 2704-05. “[T]he fourth \textit{Central Hudson} factor is . . . whether the regulation is more extensive than necessary to serve the governmental interest.” \textit{Id.}
\item \textsuperscript{146} 492 U.S. 469 (1989).
\item \textsuperscript{147} \textit{Edge Broadcasting}, 113 S. Ct. at 2705 (citing \textit{Board of Trustees of the State Univ. of N.Y. v. Fox}, 492 U.S. 469, 480 (1989)). For a further discussion of \textit{Fox}, see \textit{supra} notes 104-09 and accompanying text.
\end{itemize}
tion to broadcast lottery advertisements from North Carolina would derogate the substantial federal interest in supporting North Carolina laws that discourage public participation in lotteries.\textsuperscript{148} The Court, therefore, found that the restriction as applied to Edge was reasonable, and the fit was no broader than was necessary to serve the governmental interest.\textsuperscript{149} The Court further stated that commercial speech restrictions should not be judged by standards more stringent than those applied to expressive conduct entitled to First Amendment protection.\textsuperscript{150}

After validating the constitutionality of the statutes in their general application, the Court noted that even if an "as applied" standard was utilized, the statutes would still be upheld.\textsuperscript{151} The Court concluded that Edge's broadcasts would have neither an "ineffective" or "remote" result in its broadcast of lottery advertisements to North Carolina.\textsuperscript{152} Significant facts included that the 127,000 North Carolinians reached by Edge's signal also received Virginia radio and television broadcasts as well as newspapers already carrying the lottery advertisements.\textsuperscript{153} The Court found that if Edge was allowed to advertise, then the airing time of lottery advertisements would increase from thirty-eight percent to forty-nine percent, a fact of considerable significance to the Court.\textsuperscript{154}

The Court also rejected the lower courts' finding that the federal statutes must "effectively shield" North Carolina residents from lottery information to advance the purpose of the statutes.\textsuperscript{155} Responding to criticism that the statutes were not eradicating lottery advertising from the airwaves of North Carolina, the Court re-

\begin{itemize}
  \item \textsuperscript{148} Id. at 2702-04.
  \item \textsuperscript{149} Id. at 2705-07.
  \item \textsuperscript{150} Id. at 2705. \textit{United States v. O'Brien}, 391 U.S. 367 (1968), is the benchmark case that defined the standards for expressive conduct. JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 296 (1991). \textit{O'Brien} involved the prosecution of a draft card burner in the 1960's, in which the defendant argued that his use of symbolic speech was a complete First Amendment defense to his prosecution for draft card burning. \textit{O'Brien}, 391 U.S. at 369. In \textit{O'Brien}, the Court established that when speech and nonspeech are combined in conduct, an incidental restriction of expression resulting from regulating the nonspeech element could be justified only if certain requirements were fulfilled. \textit{Id.} at 376. These requirements include: (1) the regulation must further an important governmental interest; (2) the government interest must be unrelated to the suppression of free expression; and (3) the incidental restriction on alleged freedom must be no greater than is essential to the furtherance of that interest. \textit{Id.} at 377.
  \item \textsuperscript{151} Edge Broadcasting, 113 S. Ct. at 2707-08.
  \item \textsuperscript{152} Id. at 2706.
  \item \textsuperscript{153} Id.
  \item \textsuperscript{154} Id.
  \item \textsuperscript{155} Id. at 2707.
\end{itemize}
sponded that there is no requirement for the government to "make progress on every front before it can make progress on any front." The Court reasoned:

If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated.

A plurality of the Court noted that Edge made the choice to broadcast from a North Carolina city. Justices Rehnquist, Scalia, Thomas and White rejected Edge's contention that Edge should be allowed to air broadcasts of lottery advertisements because of the "spillover" that extends into Virginia from its broadcasts. By granting the radio station's argument, the Court would "effectively [be] extending the legal regime of Virginia inside North Carolina." Furthermore, the plurality intimated that rendering the statutes invalid as applied only to Edge would cause a tidal wave of litigation and claims of other broadcasters that the statute was invalid as applied to them and their individual circumstances. In addition, the plurality expressed concern that Edge's approach has "no logical stopping point once state boundaries are ignored," and thought that claims of other broadcasters in North Carolina would create so many exceptions as to render the State's lottery ban worthless.

B. The Dissent

Justice Stevens, writing for the dissent, opposed the majority's construction of the "fit" between the statutes and the government's interests as being reasonable. Justice Stevens believed that the federal government's selective ban on advertising acts to manipulate public behavior through the suppression of truthful informa-

156. *Edge Broadcasting*, 113 S. Ct. at 2707.
157. *Id.*
158. *Id.* at 2708 (Rehnquist, C.J., Scalia, J., Thomas, J.).
159. *Id.* (Rehnquist, C.J., Scalia, J., Thomas, J.).
160. *Id.*
162. *Id.*
163. *Id.* at 2708-09 (Stevens, J., dissenting).
tion regarding a neighboring state's policies. Justice Stevens wrote that the real issue in *Edge Broadcasting*, as it was in *Bigelow v. Virginia*, was "information protectionalism...[meaning,] one State's interference with its citizens' fundamental constitutional right to [not] travel in a state of...government-induced ignorance." In Justice Stevens' opinion, a government imposed ban that is not justified by a truly substantial governmental interest acts to exclude truthful information from the public and manipulate the consumer choice of its citizenry. Charging the majority with not fully dissecting the case and using "barely a whisper of analysis," Justice Stevens said there was no substantial governmental interest in supporting nonlottery states' antigambling policies. Justice Stevens believed that the federal interest in supporting North Carolina's policy of discouraging public participation in lotteries does not justify suppressing commercial speech. Justice Stevens wrote that while the federal government and the states may have an interest in promoting antigambling policies, this interest was undercut by the "sea [of] change in public attitudes toward state-run lotteries that this country has witnessed in recent years." "[H]ostility to state-run lotteries is the exception rather than the norm" and this fact, coupled with the national trend toward acceptance of and institution of lotteries, does not give the federal government "an overriding...interest in seeking to discourage what virtually the entire country is embracing...." Justice Stevens cited numerous statistics in support of his position. Because of an absence of a substantial governmental inter-

164. *Id.* (Stevens, J., dissenting). Justice Stevens further asserted that the governmental interest in this case was "entirely derivative." *Id.* at 2709 (Stevens, J., dissenting). He felt that the government has no duty to restrict state-run lotteries. *Id.* (Stevens, J., dissenting).

165. 421 U.S. 809 (1975). For a full discussion of *Bigelow*, see *supra* notes 84-88 and accompanying text.

166. *Edge Broadcasting*, 113 S. Ct. at 2710 (Stevens, J., dissenting).

167. *Id.* at 2709 (Stevens, J., dissenting).

168. *Id.* at 2711 (Stevens, J., dissenting).

169. *Id.* (Stevens, J., dissenting).

170. *Id.* at 2711 (Stevens, J., dissenting).

171. *Edge Broadcasting*, 113 S. Ct. at 2710-11 (Stevens, J., dissenting). Justice Stevens noted, "[t]he fact that the vast majority of the States currently sponsor a lottery, and that soon virtually all of them will do so, does not, of course, preclude an outlier State from following a different course and attempting to discourage its citizens from partaking of such activities." *Id.* at 2711 (Stevens, J., dissenting).

172. *Id.* at 2710-11 (Stevens, J., dissenting). Thirty-four states and the District of Columbia now sponsor a lottery. *Id.* at 2711 (Stevens, J., dissenting). The *Edge Broadcasting* opinion was written in 1993 and Justice Stevens acknowledged that three more states in that year alone would be adding state-run lotteries. *Id.* (Stevens, J., dissenting). Five of the 13 remaining states were considering implement-
est in the action to be taken, the dissenters found the majority had erred in upholding the constitutionality of sections 1304 and 1307.\textsuperscript{173}

V. CRITICAL ANALYSIS

\textit{Edge Broadcasting} was the last of three commercial speech decisions decided by the Supreme Court in 1993. In deciding \textit{Edge Broadcasting}, as in every commercial speech case, the Court applied the four-factor \textit{Central Hudson} analysis.\textsuperscript{174} Regarding the second factor of the test, Justice White wrote that "we are quite sure that the Government has a substantial interest in supporting the policy of nonlottery States, as well as, not interfering with the policy of States that permit lotteries."\textsuperscript{175} The majority opinion relied on federal and state efforts dating back to the nineteenth century to support federal restrictions on lotteries and their "substantial interest" in imposing them.\textsuperscript{176} In doing so, however, Justice White overlooked the current status of lotteries.\textsuperscript{177}

Without citing evidence of contemporary lottery practices, the majority simply stated that the federal government has a substantial interest in maintaining its established policy of prohibiting lottery advertisements in states that do not have lotteries.\textsuperscript{178} The dissent noted that this antiquated "no lottery" policy has been seriously called into question by the growth in state-sponsored lotteries.\textsuperscript{179}

\textsuperscript{173} Id. at 2710-11 (Stevens, J., dissenting). Justice Stevens was joined by Justice Blackmun. \textit{Id.} at 2708.

\textsuperscript{174} Id. at 2702. For a discussion of the \textit{Central Hudson} test, see supra notes 10, 91-99 and accompanying text.

\textsuperscript{175} Id. at 2703.

\textsuperscript{176} \textit{Edge Broadcasting}, 113 S. Ct. at 2700-01. Justice White wrote: 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, and have long engaged in legislative efforts to control this form of gambling. Congress has, since the early 19th century, sought to assist the States in controlling lotteries. \textit{Id.} at 2700.

\textsuperscript{177} For a general discussion of lotteries, see supra notes 42-76 and accompanying text. For the number of state sponsored lotteries in the United States, see supra notes 72-73 and accompanying text.

\textsuperscript{178} \textit{Edge Broadcasting}, 113 S. Ct. at 2703-04. Justice Stevens wrote that the majority, in contending that nonlottery states desired the assistance of the federal government, made "an assumption . . . without any supporting evidence." \textit{Id.} at 2709 (Stevens, J., dissenting). For a discussion of the federal government’s involvement in lottery regulation, see supra notes 42-62 and accompanying text.

\textsuperscript{179} Id. at 2711 (Stevens, J., dissenting). For a discussion of the contemporary status of state lotteries, see supra notes 171-72.
Indeed, 1994 statistics indicate a three state growth in state lotteries since *Edge Broadcasting* was decided in 1993, bringing the total of state lotteries to thirty-seven. The Court's opinion relied on pre-existing concepts of state interest in the lottery area. Noticeably absent was any re-evaluation of state interest in light of widespread acceptance of lotteries.

The Court did acknowledge the importance of the federal government's accommodation of the decision of a state to discourage lottery participation, as well as, its accommodation of those states sponsoring lotteries. An important distinction, however, must be drawn between a government's ability to discourage a certain activity and a government's power to eliminate the information presented to its citizenry. As in *Bigelow v. Virginia*, in which the Court invalidated a Virginia statute that regulated what Virginians could see or read about New York services, *Edge Broadcasting* involved what North Carolinians could hear about lawful Virginia activities. Moreover, the nine county area reached by POWER 94's broadcasts receives much, if not all, of its media from Virginia-based sources, all regularly advertising Virginia lottery promotions.

Critics of the *Edge Broadcasting* majority argue this demonstrated futility of applying the statutes to *Edge Broadcasting*. North Carolinians know of the Virginia lottery and have had ample opportunity to obtain information about the lottery from Virginia media. POWER 94 was just one more alternative for listeners. The

182. *Id.* at 2711 (Stevens, J., dissenting).
183. *Id.* at 2703. The government can "discourage" any behavior it wishes, but when the governmental interest becomes "substantial," then the government, under the framework in *Central Hudson*, has the power to establish regulation banning commercial materials from reaching their population. The Supreme Court, 1983 Term-Leading Cases, 100 Harv. L. Rev. 100, 180 (1986) (stating banning is appropriate when state demonstrates substantiality of interest).
184. 421 U.S. 809 (1975). For a detailed discussion of *Bigelow*, see *supra* notes 84-86 and accompanying text.
185. *Edge Broadcasting*, 113 S. Ct. at 2710 (Stevens, J., dissenting).
188. *Edge Broadcasting Co. v. United States*, 5 F.3d 59, 62 (4th Cir. 1992), *rev'd*, 113 S. Ct. 2696 (1993). The court of appeals wrote that POWER 94's potential audience was "inundated with Virginia lottery advertisements." *Id.* This border region of North Carolina relies substantially on Virginia media consisting of
enforcement of the statutes succeeded only in making Edge less profitable by forcing the station to forfeit millions of dollars in profits derived from Virginia lottery advertisements.\textsuperscript{189}

In its holding, the Court cited \textit{Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico}.\textsuperscript{190} The Court found similarities in \textit{Edge Broadcasting} and \textit{Posadas} because both cases concerned the restriction of gambling advertisements and the established status of gambling as a "vice" activity.\textsuperscript{191} In \textit{Posadas}, the Court wrote that "the disruption of the moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime" have compelled the vast majority of the fifty states to prohibit gambling.\textsuperscript{192} The government's interest in protecting its citizens' well being, according to the Court, unquestionably comprises a "substantial" governmental interest.\textsuperscript{193}

The fact that thirty-seven states currently sponsor lotteries diminishes the Court's position that North Carolina's policy against gambling is worthy of protection at the expense of truthful commercial speech. The United States does not have a general interest in restricting state-run lotteries. It is a North Carolina policy to discourage lottery participation.\textsuperscript{194} The Court should not recognize North Carolina's policy of discouraging lottery participation because it is not a substantial federal interest.

Addressing the third factor of the \textit{Central Hudson} test, the Court concluded that the regulation did directly advance the government's substantial interest.\textsuperscript{195} Because of the unique facts of \textit{Edge Broadcasting}, the Court's determination appears to questionably serve the governmental interest.\textsuperscript{196} The Court concluded that because the 127,000 North Carolinians who reside in the broadcast area will not be able to hear lottery advertisements, the government-

\begin{footnotesize}
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\item[\textsuperscript{189}]{Edge Broadcasting, 5 F.2d at 62.}
\item[\textsuperscript{190}]{478 U.S. 328 (1986). For a further discussion of Posadas, see supra notes 100-03 and accompanying text.}
\item[\textsuperscript{191}]{Edge Broadcasting, 113 S. Ct. at 2703.}
\item[\textsuperscript{192}]{Posadas, 478 U.S. at 341 (citation omitted).}
\item[\textsuperscript{193}]{Id.}
\item[\textsuperscript{194}]{See supra note 29 and accompanying text.}
\item[\textsuperscript{195}]{Edge Broadcasting, 113 S. Ct. at 2704.}
\item[\textsuperscript{196}]{Id.}
\end{itemize}
\end{footnotesize}
tal interest was fulfilled. However, allowing POWER 94 to air lottery advertisements would increase the amount of radio time containing lottery advertisements in the affected region by only eleven percent. In fact, the court of appeals went so far as to say that Edge’s potential audience was “inundated with Virginia’s lottery advertisements.”

By upholding the ban on POWER 94’s ability to broadcast lottery advertisements, the Court only “marginally” advanced the State’s interests. The marginal advancement of the governmental interest contravened the Court’s statement in Central Hudson that “conditional and remote eventualities simply cannot justify silencing . . . promotional advertising.”

However, in Edge Broadcasting, the Supreme Court stated that it does not “require that the Government make progress on every front before it can make progress on any front.” Seemingly, the Court disregarded the language of Central Hudson and allowed “limited incremental support for the [government’s asserted] interest,” here a minimal decrease in the amount of lottery advertising, to justify its infringement upon basic First Amendment rights.

In acknowledging that North Carolinians were exposed to, and aware of, lottery activities in Virginia, the Court analogized the lottery situation to the issues surrounding cigarette advertisement. Cigarette advertising is banned, but as the Court stated, “it could hardly have [been] believed that this regulation would keep the public wholly ignorant of the availability of cigarettes.”

197. Id. at 2706-07. Enough residents of the nine county area in North Carolina listen to POWER 94 so as to account for 11% of all radio time in the broadcast area. Id. at 2706.

198. Edge Broadcasting Co. v. United States, 5 F.3d 59, 62 (4th Cir. 1992), rev’d, 113 S. Ct. 2696 (1993). This border region of North Carolina relies substantially on Virginia media consisting of two large Virginia newspapers, as well as, four Virginia television stations.


200. Edge Broadcasting, 113 S. Ct. at 2707.


203. Edge Broadcasting, 113 S. Ct. at 2707.
The majority stressed that under the Constitution, commercial speech that promotes a legislatively determined undesirable activity can be restricted because "[i]f there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for [the activity] is correspondingly advanced."\textsuperscript{204} Because the Court did not provide a substantive test for the evaluation of whether certain regulations actually advanced a substantial state interest, the Court left commercial speech proponents unsure of their First Amendment standing.

The \textit{Edge Broadcasting} Court stated that there was "no doubt that the fit in the case [between the regulation and the state interest] was a reasonable one."\textsuperscript{205} Allowing POWER 94 to broadcast Virginia lottery advertisements into North Carolina would erode the policy of North Carolina, the nonlottery state, in effectuating its practice of discouraging gambling.\textsuperscript{206} The approach mandated by the statutes is a "bright line" test: because POWER 94 broadcasts from a North Carolina location, it is not permitted to air lottery advertisements.\textsuperscript{207} The statutes rely on the geographic boundaries of the states, "under which a station's right to broadcast lottery advertisements hinge on the State [in which] it is licensed."\textsuperscript{208}

The statutes suffer from not being narrowly tailored to the government's purpose. The statutes focus only on the state in which the station is licensed, without considering the physical location of the entity broadcasting the advertisements, the reach of its signal or the audience receiving the broadcasts.\textsuperscript{209} The audience receiving the station's broadcasts is 92.2\% Virginia residents, with only 7.8\% of the potential listeners of the radio station from North Carolina.\textsuperscript{210} The bright line character of the statutes make them more conducive to application, but they fail the narrow tailoring requirement of the \textit{Central Hudson} fourth prong. Broadcasting, where a

\textsuperscript{204} Id.
\textsuperscript{205} Id. at 2705.
\textsuperscript{206} Id. at 2704-05.
\textsuperscript{207} In bright line analysis, a Justice advocates the party who has proved a set of facts putting them within certain boundaries of the rule. James G. Wilson, \textit{The Morality of Formalism}, 33 UCLA L. REV. 431, 435 (1985). Bright line rules are hard to alter, requiring an overruling, a strained distinction, or a constitutional amendment. Id.
\textsuperscript{208} Brief for the Petitioner at 2, United States v. Edge Broadcasting Co., 113 S. Ct. 2696 (1993) (No. 92-486).
\textsuperscript{210} \textit{Edge Broadcasting}, 113 S. Ct. at 2702.
signal located in one city may be directed primarily toward one city or area, does not recognize the definite lines of state boundaries; it involves transmissions that cross boundaries and borders regularly.211

The Court determined that the federal statutes reasonably satisfy the interests of lottery and nonlottery states without infringing upon the interests of either one.212 In the broader context, however, the Court must consider the First Amendment protection afforded commercial speech.213 Banning a truthful, nonmisleading advertisement of a legal activity goes against the Constitution's presumption in favor of more, rather than less, speech and the established theory that an educated, informed populous is more desirable than one traveling in a state of "government-induced ignorance."214

In making its determination, the Court rejected what it characterized as "the piecemeal approach" utilized by the lower courts in deciding Edge Broadcasting. Rather, it determined the validity of the restriction as it applied on the national level.215 This approach was dictated by the Court's desire to avoid any station-by-station analysis of the reasonableness of the congressional scheme.216 Looking at each case would require courts to employ a heightened level of scrutiny in determining the reasonableness and fit of the rule to each individual set of facts.217 According to the Court, the "stepchild" status of commercial speech rebuts the appropriateness of heightened scrutiny in any commercial speech context.218

212. Edge Broadcasting, 113 S. Ct. at 2705-06.
213. See Faille, supra note 99, at 58 (Court's recent jurisprudence guarantees random results).
214. Edge Broadcasting, 113 S. Ct. at 2710 (Stevens, J., dissenting). In Whitney v. California, Justice Brandeis stated:
To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify such repression.
274 U.S. 357, 377 (1927).
215. Edge Broadcasting, 113 S. Ct. at 2707-08.
217. Id. at 40.
218. Edge Broadcasting, 113 S. Ct. at 2703. In Edge Broadcasting, the Court discussed the lesser protection afforded commercial speech. Id. In First Amendment
This notion of commercial speech's secondary status was not supported in another 1993 Court decision, *Discovery Network*, which made it more difficult for the government to regulate advertising, sending a message of strong protectionism over commercial speech rights.²¹⁹ In his *Edge Broadcasting* dissent, Justice Stevens noted that the Court overlooked *Discovery Network*.²²⁰ An earlier Supreme Court decision in *Bigelow v. Virginia*,²²¹ which struck down a state ban on the dissemination of truthful information of another state's activities and rejected informational protectionism, was also overlooked by the *Edge Broadcasting* majority.²²²

VI. IMPACT

The Supreme Court's three decisions regarding commercial speech in the 1993 term suggest inconsistency in the application of the commercial speech doctrine. The two decisions prior to *Edge Broadcasting* imply increased protection in the Supreme Court's First Amendment protection of commercial speech. *Edge Broadcasting*, however, is viewed as a "setback to unfettered commercial speech."²²³ *Edge Broadcasting* sharply curtailed the augmented commercial protections advanced by the Court in both *Discovery Network* and *Fane*.²²⁴

The Court's broad application of the statutes at issue has serious implications. Such analysis could justify regulating advertising of activity that may be considered to be hazardous to its consumers. The *Edge Broadcasting* Court determined that a commercial activity, carrying with it some negative societal implications such as gambling, deserves less protection than other forms of speech.²²⁵ Extending this line of reasoning, it would therefore seem possible that

²¹⁹. MacLachlan, supra note 6, at 1 (noting recent Court cases add to commercial speech protection). See also High Court Strikes Down Cincinnati News-Rack Ban, STAR TRIB., Mar. 25, 1993, at A6.


²²². *Edge Broadcasting*, 113 S. Ct. at 2709 (Stevens, J., dissenting).

²²³. MacLachlan, supra note 6, at 1.


the Court, in the future, may go so far as to permit bans on the advertising of high fat or high sugar foods, the consumption of which may be viewed negatively by a more health conscious public.

As one scholar notes, "[t]he ultimate question here actually goes to the very heart of the First Amendment: To what extent can the government assume people are better off with less speech and thus less information?"\textsuperscript{226} The most disturbing aspect of the Court's opinion is that it allows a sweeping ban on truthful information regarding legal activities in a neighboring state. Strong convictions regarding lotteries and their effects on communities may have prompted the Court to decide \textit{Edge Broadcasting} in the manner in which it did.

In supporting a ban on lottery advertisements in \textit{Edge Broadcasting}, the Supreme Court relied less on significant factors of the \textit{Central Hudson} test and comparable precedent, but more on the traditional view of the regulated activity.\textsuperscript{227} Elected officials have no claim to a unique brand of wisdom that enables them to determine what constitutes information that is suitable for public consumption. In \textit{Edge Broadcasting}, the Court allowed the government to act as "educator for the masses, able to determine the thoughts, feelings, desires, preferences and dreams of the people."\textsuperscript{228} Government exercised paternalism has no position in a society that is constantly bombarded with information, both positive and negative. In \textit{Edge Broadcasting}, not only the lottery lost, but more importantly, protections afforded commercial speech lost.

\textit{Laura J. Schiller}

\textsuperscript{226} Chemerinsky, \textit{supra} note 110, at 66.
\textsuperscript{227} \textit{Edge Broadcasting}, 113 S. Ct. at 2700-01.
\textsuperscript{228} Bourguignon, \textit{supra} note 187, at 148.