A SUPREME COURT RETRENCHMENT OF COMMERCIAL SPEECH PROTECTION: IMPLICATIONS FOR THE FUTURE AND SOME POTENTIAL PARADIGMS

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"The natural progress of things is for liberty to yield and government to gain ground."

------ Thomas Jefferson

"The history of liberty is the history of resistance ... [it is a] history of the limitation of government power."

----- Woodrow Wilson

I. INTRODUCTION

The legal doctrine of commercial speech is an issue that is growing in importance for those in the advertising arena. Technology is advancing with great strides and marketers are utilizing all media available to them. As a result, the scope of Constitutional protection afforded commercial speech is ripe for review. The United States Supreme Court has recently decided the current Constitutional standing of commercial speech with *United States v. Edge Broadcasting Company.*[1] The decision in *Edge,* which significantly erodes freedom of speech guarantees, comes somewhat as a surprise given the dicta

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The authors would like to acknowledge the invaluable assistance of Ronald Lau for the contribution in the development of this paper.
1.113 S. Ct. 2696(1993).

iterated in two other recent Supreme Court decisions, *Cincinnati v. Discovery Network Incorporated*[2] and *Edenfield v. Fane*[3], both of which appeared to have expanded First Amendment guarantees when applied to the commercial speech doctrine. The Supreme Court has been somewhat inconsistent in its treatment of these issues over the past few terms. To that end it can be argued that *Edge* really has not answered the central issues attendant to the application of the First Amendment as it relates to commercial speech.

This article reviews the history of commercial speech in America, including a comprehensive analysis of the *Edge* opinion, attempts to illuminate many of the inconsistencies of *Edge,* as well as to place it in its proper position with other recent Supreme Court decisions that directly relate to the commercial speech doctrine. The article hypothesizes that the restrictions enunciated by the Court in *Edge* have significant jurisprudential implications for the future, including the restriction of advertising for products such as tobacco and alcohol, which are otherwise legal to sell. This type of application, if carried forward, could seriously erode the right to free speech as it is presently understood today. As a result of *Edge* it will be necessary for those who cherish the strong tradition of civil liberties in America to be ever more vigilant with regard to future Supreme Court decisions concerning commercial speech.

II. The Doctrine Of Commercial Speech And First Amendment Guarantees

A. Genesis

"Congress shall make no law ... abridging the freedom of speech."[4] This Constitutional pronouncement is one of the most honored freedoms of the American people. Elegant in its simplicity of purpose, this prohibition on authority has been a subject of much philosophical, political, and judicial debate over the course of our history. Traditionally the courts have not viewed this right as being absolute. One calls to mind the *dicta* established by Justice Holmes that free speech does not give one the right to shout fire in a crowded theater.[5] But Justice Holmes also warned that a free society should be vigilant

[2]113 S. Ct. 1505(1993).
[3]113 S. Ct. 1792(1993).
[4] U.S. Const, amend. I.
5. United States v. Schenck, 249 U.S. 47, 52 (1919).

to resist the temptation to use censorship as a means to achieve what, in other circumstances, might be a perfectly worthwhile social good.[6]

Generally the Court has ruled in favor of preserving open and free public debate. In *Central Hudson Gas & Electric Corporation v. Public Service Commission,"* the Court provided four district and independent tests by which the validity of government restrictions on commercial speech could be judged. Courts have concluded that in effect all speech is not subject to the same protection. Religious and political speech have been accorded the broadest possible latitude of protection. Further down the scale is social, academic, and artistic speech which are accorded somewhat limited protection under the First Amendment.[8]

The debate among jurists as to the extent of coverage follows two basic lines of reasoning. Some jurists have concluded that the *marketplace of ideas* is best served by an unfettered exchange of thought, and that only a few exceptional situations would permit limitation of the free flow of ideas.[9] Another line of scholarly reasoning has held that only *political* speech is protected because the essential purpose of the First Amendment was designed to further self-governance and the social agenda.[10] Adding texture to the debate is the fact twentieth century technology, for example, which includes televisions, computers, and fax machines, adds a dimension to the communication process never remotely envisioned by the farmers of the Constitution. For a variety of philosophical justifications, such as *the public ownership of the airwaves,* courts have generally provided far more protection to the print media than to the electronic media.[11]

6. United States v. Abrams, 250 U.S. 616, 630 (1919).

7. 447 U.S. 557 (1980) [hereinafter *Central Hudson*].

8. See Miller v. State of California, 413 U.S. 15 (1973). Essentially this case rejected the "utterly without redeeming social value" Constitutionality test of United States v. Roth, 354 U.S. 476 (1957), substituting instead the test "does not have serious literary, artistic, political or scientific value." It also established that the contemporary com munity standards, against which the jury is to measure prurient appeal and patent offensiveness, were to be standards of the state or local community. As such, *Miller* ended the trend toward permissiveness which had begun almost two decades earlier under the Warren court.

[9] See Thomas Emerson, The System of Freedom of Expression (1970). Emerson's basic tenet is that unrestricted access to political information is necessary to have a fully informed electorate, and that in turn will assume a properly functioning democracy.

10. See generally Alexander Meiklejohn, Free Speech and Its Relation to Self- Government (1948).

[11] *See generally* Douglas Ginsburg, Regulation of Broadcasting (1978); D. Gillmor, J. Barron, Mass Communication Law (1984).

The trend in America over the past two hundred years has been to provide for an ever-broadening right to the free expression of thought as it relates to ideas which concern political, religious, and social issues. However, expressions of thoughts that relate to purely economic or *commercial* ideas have not fared as well. This is particularly true with ideas that are generated by paid communication such as advertising. This form of communication has had important and significant limitations placed upon it beginning with the landmark case of *Valentine v. Chrestensen.*[12] It has been advanced that commercial speech should be accorded less protection because it does not directly relate to self-governance or the marketplace of ideas.[13] Concomitant with that argument is that idea that commercial speech is more capable of enduring government limitation that might be placed upon it.[14] On the other hand, there are those who favor *full* protection for commercial speech, reasoning that the efficient functioning of our economy has a direct impact upon the efficient functioning of our democracy as a whole.[16] They further argue that if speech can be suppressed in one area of society, that is, the economic sphere, then this partial suppression could lead to further suppression in another area of society, that is, the political sphere.

B. COMMERCIAL SPEECH DECISIONS OF THE SUPREME COURT

Commercial speech is a form of expression traditionally viewed as being outside the penumbra of First Amendment protection. The evolution from no protection to some First Amendment protection began with the landmark decision of *Valentine v. Chrestensen,*[16] which expounded the traditional view of First Amendment protection for commercial speech. In this case, the communications in question were handbills advertising a submarine attraction. To circumvent a sanitation ordinance forbidding such advertising except for purely informational or public protest purposes, Chrestensen protested the sanction on the back of the handbill. The Court held the sanction to be Constitutional because the ordinance was not intended to restrict anything other than commercial and business advertising matter.[17] The act of printing a protest on the back of the handbill did not dis-

12. 316 U.S. 52 (1942). See *infra* notes 16-19 and accompanying text.
[13]See John Stuart MILL, On Liberty (1859).
14. Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). See *also infra* notes 25-30 and accompanying text.
[15]*Id.* at 765.
16. 316 U.S. 52(1942).
[17]*Id.* at 53.

suade the Court from deciding that the protest was only used to avoid the ordinance.[18] However, the Court made clear that the "Constitution imposes no ... restraints on government as respects (regulation of) commercial advertising."[19]

Bigelow v. Virginia[20] further expanded the definition of constitutionally protected speech. In this case a Virginia newspaper published an advertisement of an organization in New York that promoted abortion services which were legal under New York law. Virginia law, however, made it illegal to encourage or promote abortions. The newspaper argued that prosecution under this statute was a violation of its First Amendment rights which attached through the Fourteenth Amendment.[21] The Supreme Court upheld the argument of the newspaper reasoning, that (1) viewed in its entirety, the advertisement disseminated information of potential interest and value to a diverse audience,[22] (2) a state does not acquire power or supervision over another state's internal affairs simply because its own citizens' health and welfare may be affected when they travel to the state,[23] and (3) Virginia's declared interest in regulating what a Virginian may hear or read regarding services provided in New York, should be entitled to little weight because Virginia's police power does not extend beyond its own borders.[24]

In *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council Incorporated*,[25] a case decided the same year as *Bigelow,* the Court formally changed its view of Constitutional protection for commercial speech. The issue in the case involved a pharmacist's advertisement of prescription drug prices. In analyzing the character of the First Amendment, the Court concluded that the protection of free speech also "necessarily protects the right to receive"[26] speech. A right to receive information and ideas was as imperative as the right to communicate information and ideas. Even though the pharmacist's advertisement was economic in nature, that did not disqualify him from First Amendment protection.[27] The court concluded that the First Amendment applied to even purely commercial speech. As a matter of public interest, consumers decisions should be intelligent

[18] *Id.* at 55.
[19] *Id.* at 54.
[20] 421 U.S. 809
[21] *Id.* at 814.
[22]*Id.* at 822.
[23]*Id.* at 824.
[24] *Id.*
[25] 425 U.S.
[26]*Id.* at 757.
[27]*Id.* at 762.

and well-informed. In this respect, the free flow of commercial information was found to be indispensable.[28] The State of Virginia argued that allowing this type of advertisement could have harmful effects on the public because of the potential decreased quality resulting from price competition. Such an interest was a valid one; however, the Court found the position too paternalistic and stated that Virginia could, if concerned about the quality of its pharmacies, impose state standards and regulations for that industry.[29] This case did not confer absolute First Amendment protection for commercial speech; the Court left open the possibility that commercial speech could be regulated in some way.[30]

The opportunity for the Court to elaborate and further define the parameters of government regulation was presented in the seminal case of *Central Hudson Gas & Electric Corporation v. Public Service Commission.*[31] In December 1973, the Public Service Commission of the State of New York, ordered electric utilities in New York to cease all advertising that promoted the use of electricity.[32] The order was based upon the commission's finding that " 'the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-74 winter.'"[33] The order was challenged on the basis that the commission had restrained commercial speech in violation of the First and Fourteenth Amendments. The Court ruled that even though the need to conserve energy was of great importance, this need did not justify the suppression of information about electric devices or services that would cause no net increase in total energy use. The four-part test developed by the Court to determine the Constitutionality of such a law examines whether or not (1) the expression is protected by the first amendment,[34] (2) the commercial speech concerns a lawful activity,[36] (3) the governmental interest in regulating the speech is substantial,[36] and (4) the commercial speech in question advances the asserted governmental interest.[37]

Bates v. State Bar of Arizona[36] also dealt with commercial speech as it related to advertising. In *Bates* a committee of the Arizona

[28] *Id.* at 765.
[29] *Id.* at 770.
[30] *Id.*
[31] 447 U.S. 557(1980).
[32] *Id.* at 558.
[33] *Id.* at 559 (citing findings made by the Public Service Commission of New York).
[34] *Id.* at 566.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] 433 U.S. 350(1977).

State Bar ruled that two of its member attorneys had violated a rule prohibiting advertising by lawyers and accordingly imposed disciplinary sanctions. The Court ruled that (1) the Sherman Act was not applicable to the restraint of trade placed upon the attorneys imposed by the State of Arizona,[39] and (2) since the advertising was not misleading, it was thus protected under the First Amendment.[40]

Another case involving advertising caused the Court to further expand its protection of First Amendment rights, as they relate to commercial speech. *Bolger v. Youngs Drug Products Corporation*[41] involved a situation in which a manufacturer of contraceptives (Youngs Drug Products Corporation) proposed mailing unsolicited advertisements promoting its products which also discussed venereal disease and family planning. The Postal Service notified the manufacturer that such mailings would be illegal under federal law.[42] The Court held that the mailings constituted commercial speech even though they contained information concerning venereal disease and family planning. As a result of this determination, the Court also concluded that the advertising for contraceptives constituted "substantial individual and societal interests, thus affording protection under the First Amendment."[43] The Court further reasoned that even though protected speech may be offensive to some persons, this fact does not justify its suppression despite the fact that there may be marginal state interest in protecting children from access to such materials.[44]

The first major retrenchment of commercial speech protection occurred in *Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico.**[5] Although this case did not overrule the reasoning of previous cases it did *narrow* the scope of First Amendment protection afforded certain forms of advertising, and concomitantly, significantly expanded the government's ability to regulate commercial speech. Under Puerto Rican law, which legalizes various types of casino gambling, ... "[n]o gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico. Advertising outside Puerto Rico was permitted on a restricted basis. A partnership operating a casino in Puerto Rico challenged this law on the basis that this was an infringement of commercial speech rights that emanate from the First Amendment.[46] The Supreme Court held that

[39] *Id.* at 363.
[40] *Id.* at 381.
41. 463 U.S. 60(1983).
42. See 39 U.S.C. § 3001(e)(2) (1980).
[43] *Id.* at 69.
[44] *Id.* at 72.
45. 478 U.S. 328(1986).
[46] *Id.* at 333.

the statute in question did not facially violate the First Amendment. The Court felt that the four-part *Central Hudson* test[47] had been met. First, the gambling in casinos was a lawful activity.[48] Second, Puerto Rico's interest in reducing demand for this activity to protect the public interest was substantial.[49] Third, the specific restriction in question directly advanced the government's asserted interest.[50] Finally, the restrictions were no more extensive than necessary to achieve the government's specific interest.[51] The Court made a point of rejecting the argument, alleged by the casino operators, that having chosen to legalize casino gambling for Puerto Rican residents, the legislature was therefore prohibited by the First Amendment from using restrictions on advertising to accomplish its goal of reducing demand for such gambling.[52]

The next significant Supreme Court case involving the First Amendment rights as they relate to government intervention was *Board of Trustees of the State University of New York v. Fox.*[53] In this case, American Future Systems, Incorporated (AFS) was charged with violating a resolution by the State University of New York (SUNY) prohibiting private commercial enterprises from operating in SUNY facilities. AFS was specifically charged with demonstrating and selling its housewares at a party hosted in a student dormitory. It was argued by a student that this resolution violated First Amendment guarantees.[54] The Supreme Court determined that the activities involved in dorm parties constituted commercial speech. Relying heavily on *Posadas*[55] the Court argued that so long as the means are narrowly tailored to achieve the desired state objective, it is for governmental decisionmakers to judge what manner of regulation may be employed.[56] The Court also alluded to *Central Hudson*[57] and other decisions which contained statements suggesting that government limitations on commercial speech must constitute the least restrictive means of achieving the government's asserted interests.[58] The Court concluded that these types of decisions require only a *rea*

47. 447 U.S. 557 (1980). *See also supra* notes 31-37 and accompanying text.
[48]*Posadas*, 478 U.S. at 340.
49. Id.
[50]*Id.* at 341.
[51]Id.
[52]*Id.* at 346.
53. 492 U.S. 469 (1989).
[54]. Id. at 472.
[55] 478 U.S. 328 (1986). *See also supra* notes 45-52 and accompanying text.
[56]*Fox,* 492 U.S. at 480.
[57] 447 U.S. 557 (1980). *See also supra* notes 31-37 and accompanying text.
58. Fox, 492 U.S. at 479. It is important to note, however, that those decisions never required the restriction to be absolutely the *least severe* to achieve the desired end. *Id.*

sonable fit between the government's ends and the means necessary to achieve those ends.[59]

The recent Supreme Court decision in *Cincinnati v. Discovery Network Incorporated*[60] further defined the application of *reasonable fit* to commercial speech doctrine. In that case an ordinance prohibited distribution of *commercial handbills* on public property within the city of Cincinnati. This ordinance formed the basis for ordering removal of news racks from public streets.[61] Writing the majority opinion, Justice Stevens reasoned that a ban on news racks containing *commercial handbills,* which was not applicable to news racks containing newspapers, was not a *reasonable fit* between the city's legitimate interests in safety and aesthetics and the means selected to achieve that interest.[62] Justice Stevens further concluded that enforcement did not constitute a valid time, place, and manner restriction on protected speech.[63]

Another recent case, *Edenfield v. Fane/'4* also expanded the application of First Amendment guarantees to forms of advertising the Court believed to be classified as commercial speech. The facts of *Edenfield* involved a Certified Public Accountant (CPA), licensed to practice by the Florida Board of Accountancy, who sued the Board on the ground that its rule prohibiting CPAs from engaging in direct, in-person uninvited solicitations" to obtain new clients violated his rights under the First and Fourteenth Amendments. The Court agreed with the accountant that the type of personal solicitation in question was in fact commercial expression and, as such, Florida s ban could not be sustained.[66] The Court determined in part that the Florida Board had failed to demonstrate that the prohibition advanced its interest in protecting consumers from fraud in any direct or material way.[67] It was deduced that the Board's suppositions regarding the *dangers* of personal solicitation by CPAs could not be validated.[68] Finally, the Court pointed out that the burden of proof was with the state to demonstrate that its restrictions on speech addressed a serious problem and contributed in a material

[59] *Id.*
60. IIS S. Ct. 1505(1993).
[61] *Id.* at 1509.
[62]*Id.* at 1510.
[63]*Id.* at 1517.
64. 113 S. Ct. 1792(1993).
[65]*Id.* at 1796.
66. *Id.* at 1798.
[67]*Id.* at 1800.
[68] *Id.*

way to redressing that problem. The Court concluded that this burden was not met by the State of Florida.[69]

In yet another case involving a Florida CPA, *Ibanez v. Florida Department*,™ the Supreme Court seems to have attempted a further, although not final, elaboration on state restrictions as they relate to commercial speech. Silvia Ibanez, a licensed CPA, Certified Financial Planner (CFP), and attorney was permitted to advertise her credentials in the yellow pages and include them on her business stationery.[71] It was the contention of the Florida Board of Accountancy that the listing of these credentials was misleading and deceptive.[72] The Court, however, reasoned that due to the vagueness of just what constitutes accounting skills, the test required centers on whether there was a holding out as a CPA.[73] Therefore, when an individual advertises that he or she has a CPA certificate in connection with the practice of law, the legal activities become also part of the practice of public accountancy. The Florida Board defined advertising as essentially anything that would further the sale of public accounting services.[74] Thus, Ibanez was not holding herself out as a CPA and the ability of Florida to regulate such advertisements was denied.[76] This reasoning therefore tends to expand the commercial speech doctrine, and again shines a spotlight on the Supreme Court's rather inconsistent rulings in this area.

IV. UNITED STATES V. EDGE BROADCASTING COMPANY

In *United States v. Edge Broadcasting Company,*[16] the Supreme Court once again reviewed First Amendment commercial speech protection. Looking at the prior history of commercial speech, it is apparent that commercial speech is entitled to at least some protection. *Edge* refined the limits that may be taken in protecting a government interest. Writing for the majority, Justice White held that the validity of a regulation restricting commercial speech depended on the *fit* between the restriction and the government interest protected, following the line of cases preceding *Edge.*"[1] The Court

[69] *Id.*
[70]114 S. Ct. 2084(1994).
[71] *Id.* at 2086.
72. Id.
[73]*Id.* at 2087.
[74]/d. at 2088.
[75]*Id.* at 2095.
[76]113 S. Ct. 2696(1993).
[77]*Id.* at 2703.

relaxed the test by analyzing the relationship a regulation in issue bears to the overall problem and not to an individual case. Moreover, the Court found that the lower court erred even as to the test applied to Edge itself, discounting the lower court's rationale for deciding in favor of Edge.[78]

A. CASE BACKGROUND

Edge Broadcasting Company owned and operated a radio station licensed by the Federal Communications Commission (FCC) with the call letters WMYK, better known as *Power 94.* The station broadcasted its signal from Moyock, North Carolina, approximately three miles from the Virginia-North Carolina border. The majority of its listeners were Virginia residents, with only 7.8 percent of the listening audience residing in nine North Carolina counties. Since Edge was licensed to serve a North Carolina community, it was found to be in violation of federal statutes prohibiting the broadcast of Virginia lottery advertisements because of North Carolina's status as a nonlottery state.[79]

A suit was brought in federal court for the eastern district of Virginia, alleging a violation of the First Amendment to the Constitution and the Equal Protection Clause of the Fourteenth Amendment. Edge sought injunctive relief against the enforcement of the federal statutory prohibitions so that Edge could continue to carry the Virginia lottery advertisements.[80] The district court entered judgment for Edge, holding that the statutes as applied to Edge did not directly advance the asserted governmental interest of the *Central Hudson* test.[81] The court of appeals affirmed the lower court decision in all respects.[82] The Supreme Court granted certiorari because of the constitutional consequences resulting from the lower court holdings.[83]

[78]**Id**
[79]*Id.* at 2702.
[80] The statute includes a general rule banning the broadcast of lottery information. 18 U.S.C. § 1304 (Supp. 1994). It also lists exceptions allowing for state-run lottery advertisements by broadcasters licensed in, or publications published in, a state which conducts a lottery. 18 U.S.C. § 1307 (1984 & Supp. 1994).
81. Edge, 113 S. Ct. at 2703. *See also supra* notes 31-37 and accompanying text.
82. Id.

[83]id. at 2703.

B. ANALYSIS USING THE CENTRAL HUDSON TEST

In reversing the lower court decision, the Supreme Court analyzed the facts of *Edge* using the four-part *Central Hudson* test for determining whether or not the regulations could ban Edge's lottery advertisements without offending the First Amendment.

> [A]t the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must *concern lawful activity and not be misleading*. Next we ask whether the *asserted governmental interest is substantial*. If both inquiries yield positive answers, we must determine whether the *regulation directly advances the governmental interest asserted,* and whether it is *not more extensive than is necessary to serve that interest*.[M] (Emphasis added).

The first and second elements of the test were not factors in the outcome of *Edge*. The Supreme Court, like the courts below, assumed that the first prong of the *Central Hudson* test would be met. Edge's advertisements pertaining to the Virginia lottery were assumed to be nonmisleading.[86] As for the second *Central Hudson* factor, the Court also did not contradict the findings of the courts below. The Supreme Court supported the conclusion that the government had a substantial interest in supporting nonlottery states as well as not interfering with lottery states.[86] *Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico*[87] held that there was no constitutionally protected right of gambling, and that as a *vice* activity, it may be banned. That was the seminal issue in this case; the focus of the lottery advertisements was to encourage gambling via participation in the Virginia lottery. However, the Court made clear that lotteries fell within the domain of state regulation.[88] Throughout the history of jurisprudence in this country, states have believed lotteries to be a hazard to their citizens, and have attempted to control them through legislative initiatives. Justice White listed a number of congressional actions supporting a substantial governmental interest in controlling lotteries, which led to the development of

[84] *Central Hudson,* 447 U.S. 557, 566 (1979).

[85] *Edge,* 113 S. Ct. at 2703.

[86] *Id.*

[87] 478 U.S. 328 (1986). For a discussion of this case *see supra* notes 45-52 and accompanying text.

[88] *Edge*, 113 S. Ct. at 2700.

the statutes at issue.[89] It is important to recall that in 1975, Congress allowed the advertisement of state-run lotteries if a newspaper was published in, or a broadcast station was licensed in, a state which conducted a state-run lottery.[90]

The district court's analysis of the third *Central Hudson* factor was the point of conflict between the lower courts and the Supreme Court. The court of appeals affirmed the district court's holding that the statutes, as applied to Edge, did not "directly advance the asserted governmental interest."[91] In support of that conclusion, the court emphasized that the 127,000 North Carolina residents served by Edge received most of their information from Virginia-based media.[92] Therefore, Edge's North Carolina listeners were already bombarded with Virginia's lottery advertisements and as a result, the prohibition on Edge's Virginia lottery advertisements were "ineffective in shielding North Carolina residents from lottery information."[93] The district court concluded that the statutes were unconstitutional because *ineffective or remote* measures to support North Carolina's non-lottery posture could not justify an infringement upon commercial speech.[94]

As for the Supreme Court's analysis of the third factor, Justice White declared that there was no doubt the statutes directly advanced the governmental interest at issue.[95] Although the Court dismissed the *applied to* standard used by the lower court,[96] it upheld the statutes under the *Central Hudson* test as applied to Edge itself, because they directly advanced the governmental interest concerning lotteries.[97] After a lengthy discussion about how Congress could balance the interests of both lottery and nonlottery states, the Court undertook a statistical analysis of the statutes' effect.

[89] *Id.* at 2700-01. The Supreme Court lists the following legislation supporting Congress' assistance with helping states control lotteries: banning the depositing of lottery information in the mail regardless of a chartered or illegal lottery; disallowing lottery advertisements in newspapers through the Anti-Lottery Act of 1890; outlawing the transportation of lottery tickets through interstate or foreign commerce; prohibiting the broadcast of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme." *Id.*

[90] *See* 18 U.S.C. §§ 1307(a)(1)(A) & (B) (Supp. 1994).

[91] *Edge,* 113 S. Ct. at 2702.

[92] *Id.* at 2703.

[93] *Id.* at 2704.

[94] *Id.*

[95] *Id.*

[95] *Id.*

96. Id.

[97] *Id.* at 2705. "We judge the validity of the restriction in this case by the relation it bears to the general problem ... not by the extent to which it furthers the Government's interest in an individual case." *Id.*

Edge's potential listening audience in North Carolina consisted of 127,000 persons in nine counties, with eleven percent of this population's listening time belonging to Edge.[98] The Court considered this fact alone to be evidence of a direct advancement of federal policy. To counter the holding of the lower courts, Justice White hypothesized that even if Edge's North Carolina audience listened to Virginia radio broadcasters eighty-nine percent of the time, eleven percent of the time would nonetheless be free of lottery advertisements, sufficiently advancing North Carolina's anti-gambling interests.[99] White went even further using findings from the district court, and concluded that even including other media, there were many people in the nine county area who were exposed to little or no lottery advertising. Hence, even with the statutes applied to Edge in this situation, the Court determined there was direct advancement of a governmental interest.[100]

The Court followed prior decisions applying the last two *Central Hudson* steps as an analysis of the "fit between the legislature's ends and the means chosen to accomplish those ends."[101] A *reasonableness* standard for defining *fit* in commercial speech cases was initiated in *Board of Trustees of the State University of New York v. Fox.*[102] It is clear the Court strongly believed there was a reasonable *fit* between the statutes and the government's policy of balancing lottery and nonlottery interest. North Carolina would be able to protect its nonlottery interests, but Virginia's policy of supporting lotteries was in no way hampered by the restriction on a North Carolina broadcaster; it was free to promote lotteries as much as it wanted in its domain.[103] In the lower courts, the fourth part of *Central Hudson* was deemed to be met, and only the third part, examining *directness* as applied to Edge, was inadequate. The Court believed the statutes, as applied to Edge, should have been properly addressed in the fourth part of the test and not the third. Although the lower court's ruling on this issue was rejected using its own analysis, the Court relied on *Ward v. Rock Against Racism*[104] to dispose of the *applied to* analysis of the lower court. The Court reasoned that *Ward* described the validity of a restriction as being judged, not by the extent to which the governmental interest is furthered in an individual case, but "by the relation it bears to the general problem of accommodating the policies of both lottery and nonlottery states."[105]

[98] *Id.* at 2706.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 2707 (citing *Posadas,* 478 U.S. 328, 344 (1986)).

[102] 492 U.S. 469 (1989). For a discussion of this case *see supra* notes 53-58 and accompanying text.

[103] *Edge,* 113 S. Ct. at 2705.

[104] 491 U.S. 781(1989).

[105] *Edge,* 113 S. Ct. at 2705.

IV. IMPLICATIONS OF APPLYING GOVERNMENT INTEREST TO COMMERCIAL SPEECH

The holding of *Edge* finds the statutes regulating commercial speech not violative of the First Amendment. However, Part III-D of Justice White's analysis was not the opinion of the Court. This portion of the opinion dealt with Justice White's view that if Edge's position was taken, the legal regime of Virginia would extend into North Carolina. There would be no logical stopping point, and as a result, North Carolina's policy against lotteries would be seriously jeopardized. Using this slippery slope rationalization, Justice White decided against Edge, as he was "unwilling to start down that road." [106] Justice Souter, along with Justice Kennedy, filed a separate opinion, concurring in part with the judgment and the *Central Hudson* analysis as applied to Edge itself. They declined, however, to apply the test on a general level. Justice Souter went on to say he felt it unnecessary to decide whether or not the appropriate level of review extended to a general analysis.[107] Additionally, there was a dissent filed by Justice Stevens, with which Justice Blackmun joined. Relying on *Cincinnati v. Discovery Network Incorporated*[108] they reasoned that a selective ban on lottery advertisements was not proportionate to the asserted federal interest, and that the means chosen to protect the policies of nonlottery states went beyond the bounds of permissible regulation protecting the anti-lottery policies of nonlottery states.[109] Stevens concluded that the statutes were overbroad as compared to the federal government's asserted interest.[110] Justice Stevens believed there was only a *derivative* federal interest in assisting nonlottery states in their efforts to discourage participation in lotteries.[111] Stevens concluded that there was no general interest in restricting state lotteries, evidenced by the removal of advertising restrictions on lotteries. He felt that the federal interest asserted derived from "tying the right to broadcast advertising regarding a

[106] *Id.* at 2708.

[107] *Id.* (Souter, J., and Kennedy, J., concurring).

[108] 113 S. Ct. 1505 (1993). For a discussion of this case *see supra* text accompanying notes 60-63.

[109] *Edge,* 113 S. Ct. at 2710 (Stevens, J., and Blackmun, J., dissenting).

[110] *Id.* at 2710.

[111] *Id.* at 2709.

state-run lottery to whether the state in which the broadcaster is located itself sponsors a lottery."[112] Stevens was further unconvinced that the interest asserted was a valid interest to be protected by the federal government.

Even assuming a valid federal interest existed, the dissent argued that suppression of information pertaining to a legal lottery was unconstitutional because of *Bigelow v. Virginia.*[113] The Court reasoned that advertising about abortion was to be protected because of its informational content as well as the fact that abortion was a constitutionally protected activity.[114] Instead of utilizing other means of ensuring nonmisleading advertisements or distributing warnings and educational information about lotteries, the federal government implemented extreme measures to assist the nonlottery states in shielding their citizens from the perceived dangers of lotteries.[115]

The dissent also questioned whether or not the government interest in this case was *substantial* assuming there was, in fact, a valid federal interest in the first place.[116] The dissent characterized the majority's analysis of the second *Central Hudson* factor as merely a cursory examination of the significance of the governmental interest. Because of the historical context of lotteries, the majority categorized gambling as "a 'vice' activity that could be, and frequently has been, banned altogether."[117] Justice Stevens believed that the historical hostility to lotteries was no longer the case. He cited the fact that thirty-four states and the District of Columbia sponsored lotteries, three states planned to initiate lotteries in 1993, and at least five of the remaining thirteen states were considering the establishment of a lottery.[118] Moreover, even North Carolina, the state the statutes were supporting in this case, was considering the establishment of a lottery.[119]

In contrast to *Edge,* both *Discovery*[120] and *Edenfield,*[121] which were decided the same term, appear to be positive pronouncements towards the expansion of protection for commercial speech. In *Discovery,* the Court asserted that it was "unwilling to recognize Cincinnati's base assertion that the 'low value' of commercial speech is a sufficient justification for its selective and categorical ban on

[112] *Id.*

[113] 421 U.S. 809 (1975). *See also supra* notes 20-24 and accompanying text.

[114] *Edge,* 113 S. Ct. at 2709.

[115] *Id.* at 2710.

[116] Id.

[117] *Id.* at 2703.

[118] *Id.* at 2711.

[119] *Id.*

[120] 113 S. Ct. 1505 (1993). *See also supra* notes 60-63 and accompanying text.

[121] 113 S. Ct. 1792 (1993). *See also supra* notes 64-69 and accompanying text.

news racks dispensing 'commercial handbills'."[122] The *Discovery* case "... illustrates the old difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category."[123] This contrast alludes to the problems that the Court has had historically in defining commercial speech. The Court revisited its prior efforts to define commercial speech by citing *Bolger v. Youngs,*[124] which held that informational handouts promoting the use of prophylactics could be viewed as commercial speech. The Court found *noteworthy* that *Bolger* did not try to mechanically define commercial speech, but rather addressed the specific facts of the case at bar to determine what could be constitutionally protected.[125] This *dicta,* as enunciated in *Bolger,* gives the Court tremendous latitude in determining the areas sheltered in future decisions, and opens the door for the restrictive, and apparently contradictory, conclusions in *Edge.*

The *Edenfield* case also supported the expansion of commercial speech as worthy of First Amendment protection.[126] Justice Kennedy noted that "the general rule is that the speaker and the audience, not the government assess the value of the information presented."[127] He concluded that the "commercial marketplace, like other spheres of our social and cultural life, provide a forum where ideas and information flourish."[128] Kennedy observed that "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harm it recites are real and that its restriction will in fact
alleviate them to a material degree."[129]

Interestingly, in *Edge* the Court took a much more retrenched position. Using *Central Hudson*[130] as its Rosetta Stone the Court determined that state's interests were *directly advanced* in this matter. The 5-4 opinion noted that the Court had no doubt that the challenged statutes directly advanced the governmental interest. This logic turns upside down the essence of the First Amendment. Protecting the dissemination of ideas as a matter that is only *of public interest* is certainly not what the founding fathers had in mind when they adopted the Bill of Rights. *Bigelow v. Virginia*[1)1] would certainly support the notion that a state may not present the dissem-

[122] *Discovery,* 113 S. Ct. at 1516.

[123] *Id.* at 1520.

[124] 463 U.S. 60 (1983). *See also supra* notes 41-44 and accompanying text.

125, 113 S. Ct. at 2706.

[126] 113 S. Ct. 1797 (1993). *See also supra* notes 64-69 and accompanying text.

[127] *Id.* at 1798.

[128] *Id.*

[129] *Id.* at 1800.

[130] 447 U.S. 557 (1980). *See also supra* notes 31-37 and accompanying text.

[131] 421 U.S. 809 (1975). *See also supra* notes 20-24 and accompanying text.

ination of truthful information within its borders regarding a legal activity in another state by claiming it is for the general welfare. In referencing *Posadas,* the Court attempted once again to support the paternalistic notion that activities that are viewed as a vice may be suppressed, even at the expense of the First Amendment.[132]

None of this thinking is particularly useful in attempting to grasp how far states can go in limiting commercial speech. *Edge* appears to be in somewhat of a collision with *Discovery* and *Edenfield,* which leads the observer to wonder if the Supreme Court is reading its own opinions. When all the distractions of *Discovery, Edenfield, and Posadas* are cleared away, whatever remains is the question of whether or not the government can use a sledge hammer to kill a gnat. Is the limitation of free speech for the avowed purpose of manipulating public behavior an appropriate remedy to further the federal government's interest in protecting the anti-lottery policies of nonlottery states? Indeed, it can be argued that perhaps the federal government has no legitimate interest in intruding into matters of public and social policy, and that in fact, these matters would be best left to the states to determine.

What bugle calls the Court to battle here? Might it not have been simply more judicious to permit the broadcasts to continue and allow the states, through their own legislative process, to attempt to address the perceived vice of lottery playing? Is there in fact a *bona fide* government interest? Certainly the states have the authority to raise taxes and the use of the lottery is a subtle form of taxation that has become acceptable by a broad spectrum of American society. However, the issue remains whether or not the Court should intrude upon a state's legal right to levy taxes, even in a situation where that tax may take the form of a state-supported lottery. The decision in *Edge* would suggest that, not only does the Court possess such right but it can restrict the First Amendment in the process.

With a wave of the hand, the Court concludes that surely the interest in question here is *substantial.* What is the basis for such a conclusion? Is it, as the Court suggests, that gambling is a vice that must be curtailed even at the cost of free expression? This is a subjective analysis without a shred of support. The potential significance of *Edge* is therefore profound. This opinion goes beyond the limitation of free speech; it also affects how far the government can go in regulating business, and it permits the federal government to involve itself significantly in a state's ability to legislate social policy.

The dilemma before the Court then is to provide broad protection for commercial speech, understanding that such protection can never

[132] 478 U.S. 328 (1986). *See also supra* notes 45-52 and accompanying text.

be absolute, without being overly burdensome on the free expression of ideas. Striking this balance has been a concern of the Court from the inception of the commercial speech doctrine and is clearly evident in *Edge.* What the Court in effect has concluded is that a state can regulate the *advertising* for an activity that it also can regulate *legally.* That in turn would infer that government can restrict, or ban altogether, advertising for such regulated activities as alcohol and tobacco consumption. For that matter *any* product which is regulated, and which is also legal to manufacture and distribute, could have its right to advertise significantly curtailed or even eliminated altogether.

In a century periodically punctuated with attempts by governments to limit civil liberties, this decision leads us towards a less open and more constrained arena of debate. It can only be hoped that *Edge* will be interpreted very narrowly in the future. If the *dicta* enunciated in this decision is used as a commercial speech precedent, we will encounter an America less able to encourage free thought. That event will only serve to erode traditions men like Jefferson fought a revolution to establish and men at Normandy fought a world war to preserve.

V. A PARADIGM For The Future: Counterspeech

It would appear that there are several alternatives which could be implemented that would address the concerns of the parties to these types of commercial speech controversies in general and the dispute generated by *Edge* in particular.

A. LEGISLATE

In theory North Carolina could attempt a legislative rather than a judicial solution to the grievance of *Edge.* This could be accomplished either by North Carolina adopting a state-run lottery of its own or by Congress enabling the FCC to allow broadcasters to air broadcasts which might violate specific state law. Congress at this juncture has chosen a more restrictive approach, but it is not beyond the pale of reason that they would reconsider their present position and implement a more liberal approach which would permit the lottery broadcasts to be aired without threat of legal challenge.

Although this is not a likely set of remedies, it does have practical appeal and would appear to decisively settle the matter. Whether or not Congress would have the political will to reenter the arena is a matter of conjecture, and would in fact be unnecessary should North

Carolina decide to inaugurate its own lottery. Of course, for purposes of future adjudication, the issue would remain unresolved.

B. ADMINISTRATE

The FCC could, on its own initiative, promulgate rules and regulations which would specifically address such issues. This of course would be subject to judicial review by the courts but there is a high likelihood that eventually a compromise could be reached.[133] This process would no doubt be time consuming, and might result in solutions not totally satisfactory to the various stakeholders involved, but it would afford at least a measure of resolution.

C. COUNTERSPEECH

The previous two proposals are essentially political in nature. There is a third, not so obvious possibility, which does not rely entirely on governmental fiat to redress the problems of the conflicting interests. This alternative involves the utilization of *counterspeech*— messages whose function is to deter people from the vice of gambling. This is similar in concept to the anti-smoking *public service* announcements that were frequently carried on television as a result of the ruling in *Banzhaf v. Federal Communications Commission.*[134] Yet, for counterspeech to have an impact it has to be first disseminated. With only a few very specific exceptions, the mass media has not been required to disseminate these messages unless they voluntarily so chose.[135] A seminal question is how likely

[133] This hypothesis assumes some modification of present law by Congress.

[134] 405 F.2d 1082 (D.C. Cir. 1968), *cert, denied,* 396 U.S. 842 (1969). The final and absolute death knell for the Fairness Doctrine was Syracuse Peace Council, et. al., v. Federal Communications Commission, 867 F.2d 654 (D.C.Cir. 1987), in which the court held that the FCC's determination that the Fairness Doctrine no longer served the public interest was neither arbitrary nor capricious. Counterspeech however, while similar to the Fairness Doctrine in objective, would not be implemented under the guise of being sanctioned as a Fairness Doctrine requirement.

[135] See Miami Herald v. Tornillo, 418 U.S. 241 (1974) (print media). Note, however, that some forced access to *broadcast* media *is* permitted, although there are some limitations. Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367 (1969). See *also* Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973) (broadcasters *not* obligated to accept paid advertisements).

would the media be to carry such messages? [136] Other important questions to be resolved are (1) if in fact the only way to guarantee the carrying of a message is to pay for it, who would pay? (2) how much money would it take to counter advertise given the tremendous resources of a state government? (3) would it be constitutional to force an individual, a company, or a governmental entity to pay for speech against itself? and (4) what would be the long-term consequences of such legislation? These significant questions which cannot be answered within the confines of this analysis. Counterspeech undoubtedly would be challenged in the courts, and it is impossible to determine the final outcome.

However, it is reasonable to observe that counterspeech would be a less restrictive alternative than placing limitations on the ability of broadcasters to disseminate information which the government feels it has an *interest* in restricting. Counterspeech, it can be argued, holds true to the ideas of John Stuart Mill which have become the foundation of twentieth century judicial thinking for such jurists as Holmes and Brandeis.[137] The basic thrust of Millian thinking was that the way to deal with ideas with which one disagrees is to have more debate rather than less.[138] Mill concluded that individuals could make intelligent choices only in situations where they were provided enough information in order to review the broadest possible range of thought. Counterspeech then would fit nicely into Mill's theory. In the case presented by *Edge* it would serve the interests of both Virginia and North Carolina while simultaneously allowing the citizens of both states to reach their own individual conclusions regarding the social propriety of a state-run lottery.[139] It is important not to lose focus and to consider the use of counterspeech within the narrow confines of the facts that surround *Edge.* The real significance of counterspeech is that it can be applied to many areas of commercial speech that run headlong into the wall of censorship. To the extent that counterspeech advances the course of free expression, this option becomes a paradigm which should be routinely considered and frequently applied.

[136] These are largely carried gratuitously, and there would no doubt be pressure applied by some segments of the community, including perhaps other advertisers, not to broadcast such announcements.

[137] United States v. Abrams, 250 U.S. 616 (1919).

[138] John Stuakt Mill, On Liberty (1859).

[139] It can be posited that these are the very people the states ostensibly represent in the first place.

VI. CONCLUSION

The premise of limiting certain types of expression, such as commercial speech, is that the government may have a *substantial interest*[140] in restricting some ideas which it feels would be repugnant to the common well being of its citizens and that, *a fortiori,* such restriction is not an unconstitutional abuse of First Amendment freedoms. The argument infers that individuals can sometimes be best served by a paternalistic, infallible, and morally certain government. Such a postulation is patently erroneous. The needs of citizens in a free society can best be served by a full range of information. Anything that limits access to knowledge by the very entities which guarantee its dissemination runs contrary to fundamental American traditions, traditions which are the very essence of any democratic society. The impact of *Edge* therefore goes far beyond the relatively unimportant commercial interests of a private enterprise or even the rights of a single state.

The case presented has been an attempt to focus sharply on this increasingly complicated debate concerning commercial speech. *Edge* was made more difficult by a situation in which two important competing interests were in variance with one another, that is, free speech and the government's interest in reducing vice in society.[141] These competing forces present long-term implications for the role of government in managing society and suggest alternatives which profoundly affect people's emotions. In conclusion, there are viable solutions[142] which would provide the maximum availability of information while allowing all interested parties to pursue their own specific social and commercial goals. It is significant to note that a purely judicial remedy was not proposed. Such an approach would almost certainly lead to confusion, uncertainty and, as we have witnessed in a recent term of the Supreme Court, *dicta* which fundamentally satisfies no interest entirely.

[140] *Central Hudson,* 447 U.S. at 566. *See also supra* notes 31-37 and accompanying text.

[141] *Edge,* 113 S. Ct. at 2703 (1993).

[142] *See supra* Part V.