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Advertising Legalized Gambling: A Late Bloomer Under the First Amendment

Larry D. Strate
University of Nevada, Las Vegas, strate@ccmail.nevada.edu

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Abstract
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What do *Edge Broadcasting Co. v. U.S.*[1], the Charity Games Advertising Clarification Act,[2] and the Indian Gaming Regulatory Act 3 have in common?

Separately, they impact the issues of regulating gambling advertising by virtue of being either persuasive federal case law or federal statute which allows legal, privately-run, or charitable activities the same advertising rights as state-conducted lotteries. Together they represent the threshold entry into the 21st Century in the continuing attempt to balance the interests of those seeking to advertise legalized gambling and those seeking to reduce it.

The magnitude of gaming in America, a multi-billion dollar leisure time industry, is impressive. That industry is disseminated among 49 states that offer some forms of gaming. Some 39 states allow interstate betting on horse races,[3] or presently conduct or have legalized lotteries.[4] Some 75 Indian tribes in 20 states operate 150 gaming halls.[5]

The definition of gambling is a matter of individual state interpretation; even the forums of legalized are varied. They include, but are not limited to, casino gambling, lotteries, card rooms, cruise ship gaming, floating river casinos, parimutuel wagering, progressive slots, Indian reservation gaming, multi-casino computer-linked gaming systems, patron slot clubs, sports book facilities, video gaming, high-tech slot machines, bingo parlors, horse racing, and dog racing.

The spread of gambling is not limited to the coastal states; America's heartland also has gambling. Illinois is expected to begin via riverboat gambling; applications have been filed for gaming on the Mississippi, Ohio, Illinois, Des Plaines, and Fox rivers.[6] Indiana approved a bill that would allow casino gambling in Gary, French Lick, and West Baden Springs,[7] and Iowa approved gambling on the Mississippi. Louisiana introduced riverboat gambling.[8] Missouri has approved a bill authorizing riverboat gambling on the Mississippi and

Missouri rivers, subject to voter approval.[9] Casino ships are allowed to operate out of the Gulf Coast in international waters.[10] Pennsylvania recently passed a bill authorizing riverboat gambling.[11] South Dakota began gambling in Deadwood in November 1989, with slot machines, blackjack, and poker.[12] A constitutional amendment would be necessary if Wisconsin[13] were to adopt gaming. Even Nevada has changed. In 1991, the Nevada legislature amended its 1864 constitution to authorize the operation of charitable lotteries.[14]

The acceptability of gaming extends beyond the shores of the United States. There is an increased interest in gaming-related ventures throughout South America, the Caribbean, the Eastern bloc countries of Europe and the Soviet Union, as well as Sweden, Norway, and Finland, with continued expansion in Canada and New Zealand.[15] "International gaming at a glance," published in *Gaming & Wagering Business*, lists 68 countries in addition to the United States which permit activities such as bingo, cock fighting, casinos, greyhounds, horseracing, jai-alai, lottery, pools, off-track betting, slot machines, and others.[16]

The changing technology in the communications industry has contributed to the spread and popularity of gambling as "broadcast signals, as a technological matter, which cannot be confined to political boundaries."[17] The future of gaming and wagering may include interactive television shows and telephone betting.

The Federal Communications Commission was created by the Communications Act of 1934 (15 U.S.C.; 21 U.S.C.; 47 U.S.C. 35, 151) to regulate interstate and foreign communications by wire and radio, reflecting the changing technology. It was assigned additional regulatory jurisdiction via the provisions of the Communications Satellite Act of 1962 (47 U.S.C. 701-744). Its scope now includes radio and television broadcasting; telephone, telegraph, cable television, two-way radio, and radio operators; and satellite communication.

Lottery Statute Dates to 1892

When the lottery statute was enacted in 1892, it was assumed that the government had virtually unlimited authority to regulate the content of commercial advertising. The purpose of the original federal lottery statute–18 U.S.C. #1304, and 1307–was to prevent the advertising of fraud in games of chance, pyramid schemes, fake drawings, and other confidence games. The pertinent section of the lottery statute reads in part:

> Whoever broadcasts by means of any radio 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, and advertisement of or information concerning any lottery, gift enterprise, or similar scheme...shall be fined not more than $1,000, or imprisoned not more than one year, or both...[18]

Corresponding regulations are also contained in 47 C.F.R. part 73.1211. Those regulations state that the FCC... "may revoke any station license...for the violation of section 1304." An additional statute also provides for a civil or forfeiture penalty not to exceed $1,000 in the event of a section 1304 violation.[19]

Reflecting the tenor of time, an early U.S. Supreme Court opinion reasoned as follows:

> Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor, and it plunders the ignorant and simple.[20]

The restrictions contained in the U.S. Code, intending to stifle the threat of fraudulent enterprises via criminal and civil penalties (including jail sentences and fines), applied to those individuals considered nefarious. It also applied to any other person operating a lottery or wagering, such as a church, or philanthropic organization.

> Lotteries and bingo have been authorized in many states for church groups, charities and other qualified nonprofit organizations. Currently, advertising and detailed information concerning these fundraising activities cannot be broadcast or distributed by newspapers send by mail or out-of-state by other means. This significantly decreases the revenues that church and charitable organizations raise.

It is incongruous that the Congress, at a time when churches and charities in the private sector are increasingly assuming the burden of many social programs, should stand in the way of those states which have made a policy determination that churches and charities can use lotteries and raffles as a means of raising desperately-needed revenues.[21]

The inability of the industry to advertise has been a problem for the legitimate gambling interests in the United States for a long time. What has been a problem for the gaming industry has not necessarily been a problem for other legitimate businesses in the United States. As recently as 1984, before a U.S. Senate subcommittee hearing in Washington, D.C., the dilemma facing the gaming industry was summed in testimony:

> It is important to remember, however, that the gaming industry is but one segment of the growing entertainment/ leisure time industry... We are not asking for special treatment, but rather

we are asking for equal treatment. We would like to be able to compete with others for the entertainment dollar.[22]

FCC Can Enforce Prohibitions

The FCC was empowered to enforce the prohibitions on broadcast information on lotteries, and issued regulations prohibiting broadcasters from carrying advertisements of or information concerning any lottery, gift enterprise, or similar scheme[23]

The FCC interpreted those prohibitions to include all forms of gambling, while the Department of Justice and the Postal Service either limited the prohibition to illegal lotteries or questioned the constitutionality of the laws themselves. Confusion seemed to reign because of the inconsistency of FCC interpretation, because it seemed to vary depending on who was doing the interpreting.[24] Legislative history indicated Congress meant to only limit lotteries, whether legal or illegal. They apparently did not intend to limit lotteries by charity, but their good wishes were swept aside by the poorly-worded statute.[25]

The only exception to the otherwise sweeping ban on gaming advertising was created in 1975 as 18 U.S.C. #1307, which permits state-run lotteries to advertise in the state holding the game and in adjacent states that themselves conduct lotteries.

In 1984, the Committee on the Judiciary of the United States Senate held hearings appropriately entitled "Modernizing Federal Restrictions on Gaming Advertising." Despite being sponsored by an influential Nevada Republican who chaired the Judiciary's Criminal Law Subcommittee, S. 1876 - S. Rept. 98-537 advanced no further.[26] Its recommendations would serve as a forerunner to the Charity Games Advertising Clarification Act of 1988.[27]

The committee observed the drastic changes from the time when lotteries and gambling activities were privately run and unregulated, to a time 100 years later when almost all states authorized some form of lottery or gambling activity. In the interest of fairness, legal privately-run or charitable activities should enjoy the same rights as state-conducted lotteries.

Carving another exemption into the old law, this new statute allows advertising in interstate commerce of all legal lotteries, gift enterprises, and similar activities. The bill removes federal restrictions on the advertising of legitimate lotteries and gambling activities in interstate commerce, whether conducted by public, private, or charitable interests.[28]

No attempt was made to limit the rights of the individual states to restrict such advertising under state law. In fact, there was a delay mechanism in order to allow each state time to enact legislation to prohibit this type of advertising within the boundaries of an individual state. The committee made it very clear that illegal gambling activities were not to be advertised.

In the memorandum on the final compromise, because almost all states authorized some form of lottery or gambling activity, the com-

mittee concluded that the federal government "should not necessarily restrict the free flow of information about such lawful activities."[29]

Indian Gaming Regulation Is Issue

The next federal statute represented a new frontier for gaming —that of Indian reservations and gambling. The development of gaming on Indian lands is not surprising as gaming has become more prevalent. Current estimates of revenue generated on Indian lands are over $ 1 billion. Some 300 Indian tribes have 108 gambling facilities on Indian lands within the states' geographical boundaries, and, of those, 104 have bingo, 93 pull-tabs or punch card games, four casino gambling, and 15 other gambling activities.[30]

The regulation of Indian lands has generally been the province of the U.S. Congress. The regulation of gaming-related activities has traditionally been considered within each state's general police power. Although social attitudes and legal proscriptions regarding gambling have seemingly eased in the intervening century, the desire of a state to regulate gambling is still respected by the courts.[31] But because of the potential source of revenue available from gambling on Indian lands, Indian tribes, states, federal regulatory agencies, Congress, and the court system have been on a collision course.[32]

The state of California wanted to regulate the Cabazon Indian bingo games, as did the county of Riverside. In 1987, the decision in *State of California v. Cabazon Indians*[33] barred states from regulating Indian gaming.

The holding by the Court was in keeping with its precedents regarding sovereignty, that Indian tribes retain "attributes of sovereignty over both their members and their territory"[34] and that "tribal sovereignty is dependent on and subordinate to only the federal government, not the states."[35]

With judicial fuel added to the volatile issue, the collision of interests culminated when seven proposals to regulate gaming on Indian lands were introduced into the 99th Congress. It was the 100th Congressional session that passed the Indian Gaming Regulatory Act. The issues which Congress sought to resolve with the Indian Gaming Regulatory Act included the practical resolution to the legitimate competing concerns of tribal sovereignty, state burden, and federal interest, as well as how states like Nevada, with a regulated gaming industry, can function with potentially unregulated casino gambling either near or next to existing regulated games.[36]

The act created a three-tiered system whereby tribes would control ceremonial games, the federal government would control bingo, and the state and tribes would negotiate agreements to cover casino games, parimutuel racing, and jai-alai, if such games were legal in that particular state.

According to Anthony J. Hop, chairman of the National Indian Gaming Commission, there are some 150 gambling halls operated by 75 tribes in 20 states, most for bingo, with a combined gross revenue

of $1 billion a year.[37] Since the 1988 law was enacted, 16 casino gambling compacts have been reached in five states, but most of the casinos have not yet opened. More than a dozen other tribes in Washington, New York, Arizona, New Mexico, Florida, Mississippi, and Nevada are negotiating similar compacts.[38]

An important aspect to the development of gaming on Indian reservations has to do with restrictions on advertising. There are none. Any form of gambling available in the state may be offered, and Indians are not bound by any federal or state criminal codes limiting the use of mail, broadcast television, or telephone. As an example, satellite MegaBingo quickly lined up over 20 reservations for its guaranteed $500,000 prize game.[39]

Putting policy questions aside, the last two decades of judicial determination have held that commercial speech is under the protection of the First Amendment, even though to a lesser extent than that protection extended to non-commercial speech. Notwithstanding the Department of Justice's observation that these judicial decisions "cast serious doubt upon the enforceability"[40] of federal criminal statutes prohibiting the mailing or broadcasting of advertisements and information concerning lawful gaming enterprises, the statutes need modification to conform to the mandates of First Amendment commercial speech case law.

Several Cases Impact the Advertising of Gaming

A series of cases begun in 1975 have extended protection of the First Amendment to commercial speech. In 1978 Justice Scalia wrote 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."[41]

Justice White wrote in 1968: "Broadcasting is clearly a medium affected by a First Amendment interest."[42] The Supreme Court indicated that Congress possesses greater latitude to regulate broadcasting than other forms of communication. Justice Marshall observed in 1983: "Our decisions have recognized that the special interest of the federal government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication."[43]

In a 1970 case, the Supreme Court specifically extended to radio coverage the power of Congress constitutionally to restrict the interstate dissemination of lottery materials recognized in *Ex parte Rapier*, 143 U.S. 133, 12 S.Ct. 374, 36 L.Ed. 93 (1892).

Nearly a century ago in *Ex parte Rapier*,[44] Congress enacted a complete ban on the importation, mailing, and advertisement of lotteries, and extended that prohibition to broadcasting by the Communications Act of 1934.[45]

Bigelow v. Virginia[46] is the first case of major interest to legal gambling. *Bigelow* involved an advertisement for abortion services available in New York which was placed in a Virginia publication.

New York had chosen to legalize abortions and was advertising that fact. However, Virginia had not only decided to outlaw abortions, but it passed a statute prohibiting the publication of any information about abortions. The Supreme Court struck down the state law, holding the abortion advertisement protected by the First Amendment.

A second major breakthrough came in a 1976 case. For the first time the Supreme Court held that the First Amendment protects commercial speech from unwarranted governmental regulation. In *Virginia Pharmacy v. Virginia Citizens Consumer Council*,[47] the Court struck down state restrictions on price advertising by pharmacists as unconstitutional.

The next two cases followed quickly: *Carey v. Population Services International*[48] struck down a ban on any "advertisement or display" of contraceptives, and *Central Hudson Gas and Electric Corp. v. Public Services Commission*[49] involved promotional advertising by utilities.

Supreme Court Covers Commercial Speech

The Supreme Court explained its reasons for expanding protections of the First Amendment to cover commercial speech. The Court "rejected the highly paternalistic view that government has complete power to suppress or regulate commercial speech. People will perceive their own best interests if only they are well enough informed, and the best means to that end is to open the channels of communications, rather than to close them."[50]

While commercial advertising is entitled to less protection under the First Amendment than non-commercial speech, it nonetheless has been afforded significant First Amendment safeguards since it "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."[51]

In a prelude to the case enunciating a four-part analysis for determining the constitutionality of a restriction on commercial speech, *Zaurder v. Office of Disciplinary Counsel*,[52] the Supreme Court insisted that a state must identify a direct link between the interest asserted and the regulation at issue. "Commercial speech that is not false or deceptive and does not concern unlawful activity...may be restricted only in the service of substantial governmental interest, and only through means that directly advance the interest." The Court concluded: "But as we stated above, broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force."[53]

In *Central Hudson Gas & Electric Corp.*,[54] Justice Powell enunciated that traditional four-part analysis for determining the constitutionality of a restriction on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial free speech to come within the provision, it must at least 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 the interest.[55]

Four-Part Test Provides Framework

This four-part test has been accepted as the analytical framework for determining the constitutionality of restrictions upon commercial speech.[56] This test was used in *Posadas de Puerto Rico Assoc. v. Tourism Co.*,[57] where the Court dealt with the ability of the legislature to allow the advertising of casino gambling directed toward tourists, yet prohibited similar advertising toward residents.

The threshold determination was whether or not the advertising concerned a lawful activity, and was not misleading. The gaming was a lawful activity and not misleading.[58] The next step was to determine whether the Puerto Rican government's interest in reducing the demand for casino gambling by residents was related to the health, safety, and welfare of its citizens. The second test was valid.[59]

The third part of the test was whether or not the challenged restrictions directly advanced the government's interest. Advertising of casino gambling aimed at the residents of Puerto Rico would tend to increase the demand for the product advertised. The third test was reasonable.[60]

The fourth part of the test was whether the restrictions were no more extensive than necessary to serve the government's interest. The narrow construction announced by the Puerto Rican court via legislative fiat would not affect the advertising of casino gambling aimed at tourists, but would apply to such advertising only when aimed at the residents of the Commonwealth. The restrictions were held to be no more extensive than necessary.[61]

The legislative history of the Puerto Rican Act reads as follows:

> Excessive casino gambling among residents...would produce serious harmful effects on the health, safety, and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption and the infiltration of organized crime. [Brief for Appellee 33.]

This is the same legislature that sought to protect horseracing, cockfighting, "picas" or small games of chance at fiestas, and the lottery on the grounds that they had been traditionally part of Puerto Rican roots.

It is important to note the impressive dissenting opinions. Justice Brennan, in his minority opinion, flatly stated: "I do not believe that Puerto Rico constitutionally may suppress truthful commercials engag-

ing in lawful activity. While tipping its hat to these standards, the Court does little more than defer to what it perceives to be the determination by Puerto Rico's legislature that a ban on casino advertising aimed at residents is reasonable." The Court totally ignored the fact that commercial speech is entitled to substantial First Amendment protection, giving the government unprecedented authority to eviscerate constitutionally-protected expression.[62] Justice Brennan described *Posadas* as "dramatically shrinking the scope of First Amendment protection available to commercial speech."[63]

An equally strong dissent was written by Justice Stevens:

> Whether a State may ban all advertising of an activity that it permits but could prohibit—such as gambling, prostitution, or the consumption of marijuana or liquor—is an elegant question of constitutional law. It is not, however, appropriate to address that question in this case because Puerto Rico's rather bizarre restraints on speech are so apparently forbidden by the First Amendment.[64]

In 1989, another case addressed the more specific issue of the fourth part of the *Central Hudson* test, whether or not government restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end. In *Board of Trustees of the State University of New York v. Fox*,[65] the Court decided that the least restrictive means test is no longer applicable.

The least restrictive test is not to be applied in the determination of the validity of restrictions on commercial speech under the free speech provisions of the Constitution's First Amendment. The Court reasoned 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 non-commercial expression. The ample scope of regulatory authority suggested by such doctrines would be illusory under a least-restrictive-means requirement, and while the free flow of commercial information is valuable enough to justify imposing on would-be regulators the cost of distinguishing the harmless from the harmful, prior cases have not imposed the burden of demonstrating that the distinguishing is 100 percent complete, or by the manner of restriction is absolutely the least severe that will achieve the desired ends; instead, what is required is a fit between the legislature's ends and the means closest to accomplish those ends that is not necessarily perfectly reasonable, or represents not necessarily the single best disposition, but one whose scope is in proportion to the interests served, and employs not necessarily the least restrictive means, but a means narrowly tailored to achieve the desired objective within such bounds. It is for governmental decision makers to judge what manner of regulation may best be employed; the narrowly-tailored-means test is not overly permissive of government regulation.[66]

Current Cases Explore Restrictions

Edge Broadcasting Corporation [Edge], with its principal place of business in Virginia, operated WMYK-FM (aka Power 94), licensed by the FCC, and broadcasting from Moyock, North Carolina. Power 94 is one of 24 commercial radio stations serving the Hampton Roads, Virginia, metropolitan area.

The State of North Carolina does not sponsor a lottery and its statutes make participating in and the advertising of non-exempt raffles and lotteries a misdemeanor.[67] The Commonwealth of Virginia, however, does authorize a lottery, and since 1988 has conducted lottery games.[68]

Edge challenges the constitutionality of the two provisions of the federal lottery statute, as well as seeks clarification of its position of liability in North Carolina.

According to one survey, approximately 92.2 percent of the population of the listening audience reside in Virginia and 7.89 percent reside in North Carolina.[69] Virginia authorizes a lottery. Edge estimates that it derives more the 95 percent of its local advertising revenues from sources in the State of Virginia, but fearful of being subject to criminal or civil penalties, it has not broadcast any advertisements promoting the Virginia lottery. As a result, it estimates lost advertising revenue in the millions of dollars. For example, in 1988, Virginia paid $1,285,141 in media advertising; in 1989 expenditures were estimated at $2,300,000.[70] Advertising space was also purchased in the area's two largest newspapers, both of which circulate in the North Carolina counties also reached by Power 94's signal. It was estimated that 75 percent of all television viewing in these same nine counties is directed to Virginia television stations which carry lottery advertising.[71]

Utilizing the four-part *Central Hudson* test, and incorporating *Board of Trustees of SUNY's* test— "a narrowly tailored-means test," *Edge Broadcasting Co. v. U.S.*[72] reflects current First Amendment protection of commercial speech based on the information function of advertising, the social recognition that "broadcast signals, as a technological matter, cannot be confined to political boundaries"[73] as American habits show that adults spend 29 percent of their media consumption listening to the radio and 60 percent watching television.[74]

Commercial Speech Must Be Informational

The principle that the First Amendment's concern for commercial speech is based on the informational function of advertising is the focal point of the first part of the *Central Hudson*[75] test. It examines whether the activity spoken of its lawful, and whether the information imparted is truthful. "There can be no constitutional objection to the suppression of commercial messages that does not accurately inform the public about lawful activity."[76] The legality of advertising about the Virginia lottery was undisputed. It was lawfully created by the state's voters in a November 3, 1987, referendum and established by Virginia.[77]

The second part of the test is concerned with the substantiality of government intent. The interest served by Sections 1304 and 1307 is the furtherance of fundamental interest of federalism enabling non-lottery states to discourage gambling.[78] These interests are similar to other "substantial" interests which have been accepted as complying with *Central Hudson's* second standard. For example, a state statutory prohibition of liquor advertising—a restriction designed to reduce consumption of alcohol—has been upheld,[79] and a state law restriction on utility advertising designed to reduce energy consumption has been recognized as valid.[80] Congress may assist states in inhibiting activities considered by a state to be contrary to public policy by regulating the promotion by radio broadcasting.[81] The "substantial interest" standard is not a strict one.[82] In *Posadas*, the Supreme Court recognized Puerto Rico's substantial interest in the reduction of gambling, even though the regulation at issue only restricted selected forms of advertising of casino gambling, while permitting advertising of other forms of gambling.[83]

The third part of the *Central Hudson* test requires that a restriction on protected commercial speech directly advance the interest of the jurisdiction where the legislation is being challenged. If a prohibition provides only "ineffective or remote support" for such objectives, it fails under the First Amendment.[84]

The disputed section noted #1304 and 1307 (at footnote eight) constitutes ineffective means of reducing lottery participation by North Carolina residents, because they receive most of the radio, newspaper, and television communication from Virginia's local media. It is probably true that a relatively small number of North Carolina listeners may hear significantly less lottery advertising because of their allegiance to one station and that other North Carolinians may hear slightly less lottery advertising because they occasionally listen to Power 94. However, these possibilities do not sufficiently constitute "direct advancement" of the state's interest under the third part of *Central Hudson* test which makes it clear that "conditional and remote eventualities simply cannot justify silencing...promotional advertising."[85]

The application of section 1304 to Edge can only speculatively advance the goals of the state of North Carolina. Moreover, to the extent that that provision does reduce lottery participation by North Carolina residents, that reduction is necessarily so slight as to be kind of "remote" support rejected in *Central Hudson* as not "directly advancing" either interests of federalism or limitations on lottery sales.[86] Thus, the application of sections #1304 and 1307 to Edge's operation of Power 94 is constitutionally invalid.

The final step and fourth part of the *Central Hudson* test is that a restriction on commercial speech may be no more extensive than necessary to further the "state's interest."[87] *Central Hudson's* "least restrictive alternative" is replaced by and interpreted according to the "narrowly tailored test of *Board of Trustees of SUNY*. Justice Scalia

interpreted this part of the test as establishing "something short of a least restrictive standard, and described it as based on 'reasonable' legislative judgment,[88] necessitating a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means."

The statutory scheme put in place is not unreasonable. Presumably in many instances, broadcasters located in non-lottery states will serve substantial populations in those states. Under such circumstances, there may be a "fit" between the statue and its objectives. Accordingly, these sections do pass under *Board of Trustees of SUNY's* relaxation of the fourth *Central Hudson's* standard.

The question has been raised by commentators with regard to what they believe is an inconsistency between Justice Rehnquist's approach in *Posadas* and the standards of *Central Hudson.*[89] Based upon the dissenting opinions of Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, during recent hearings concerning section 1304 and related statutory provisions, a Justice Department representative stated that the *Posadas* analysis "certainly contrasts with the approach in *Central Hudson*, and that "it remains to be seen whether the Court in future cases will take the established *Central Hudson* approach, or rely on *Posadas'* blank deference to the legislature."[90]

Two federal statutes and one federal case serve as the threshold for entering the next century in the continuing attempt to balance the interests of those seeking to advertise legalized gambling and those seeking to reduce it. The growth of gaming in the last century makes it a billion dollar industry and a source of revenue for state and local entities. With the exception of Indian gaming on reservations, some 49 states offer some form of gaming they regulate; 39 states allow betting on horses; 33 states have legalized lotteries. Some 75 Indian tribes of the 300 existing in 20 states operate 150 gaming halls. Gaming extends along the shores of the U.S. and gaming interest extends to 68 countries in addition to the U.S. The future of the gaming industry is inextricably linked to advertising.

Recognizing that broadcast signals, as a technological matter, cannot be confined to political boundaries, this decade sees continuing technological development in cable and satellite communication. In 1975, one exception to the prohibitive federal statutes was created permitting state-run lotteries to advertise in the state or in adjacent ones that also permitted lotteries. In 1988, the Charity Games Advertising Clarification Act removed federal restrictions on the advertising of legitimate lotteries and gambling activities in interstate commerce, whether conducted by public, private, or charitable interests.

Gambling is a late blooming legal business; it was also late in gaining access to the courts to collect legal obligations, and late in gaining recognition of commercial speech protection. The *Central Hudson* test was modified to replace the least restrictive means by

the *Fox* narrowly-tailored-means tests. *Edge Broadcasting Corp.* found protection for its broadcasting of lottery information and other advertising, even though it operated from Virginia where lotteries were legal, but broadcast from and into North Carolina where lotteries were not legal. The Supreme Court found that restriction of the statutes speculatively advanced the goals of the state of North Carolina, and the reduction was so slight as to be the kind of remote support not directly advancing either interests of federalism or limitations on lottery sales. The strong dissents in *Posadas* pose future questions as it remains to be seen whether the Court in future cases will take the established approach in *Central Hudson* or rely on *Posadas'* blank deference to the legislature.

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[17]Letter of FCC Chairman Richard E. Wiley, H.Rep. at 7021, also cited in *Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633, 645 (E.D. Va 1990).

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[19]47 U.S.C. #503(b)(1)(E).

[20]*Phalen v. Virginia*, 49 U.S. (8 How.) 163, 168 (1850).

[21]"Modernizing Federal Restrictions on Gaming Advertising;" Report of the Committee on the Judiciary, United States Senate on S. 1876, June 28, 1984, pp. 2-3.

[22]"Modernizing Federal Restrictions on Gaming Advertising," Report of the Committee on the Judiciary, United States Senate on S. 1876, 1883. Testimony of Steve Wynn.

[23]18 U.S.C. c. 61, ##1301 to 1307; 39 U.S.C. #3005, 12 U.S.C. ##339, 1829a, 1730c.

[24]Subcommittee Hearings on S. 1876 at (20). Statement of Mark Smith.

[25]26 Cong. Rec. 4313 (1894). Remarks of Mr. Gorman.

[26]1984 *CQ Almanac*, p. 261.

[27]Public Law 100-625 (H.R. 3146), November 7, 1988.

[28]The Charity Games Advertising Clarification Act of 1988. 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 is contained in a publication published in the state or in a state which conducts such a lottery; or broadcast by a radio or television station licensed to a location or (2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph 1 that is authorized or not otherwise prohibited by the state in which it is conducted and which is conducted by a not-for-profit organization or a government organization; or conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of the organization. Section b and c, defined not-for-profit and amended Title 39, Section 3005(d) Paragraph 1 of the United States Code, regarding postal service regulations of lotteries.

[29]1988 *CQ Almanac*, p. 116.

[30]Lavole and Rosenthal, *op. cit.*

[31]*Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633, 639 (E.D. VA. 1990).

[32]Larry D. Strate and Ann M. Mayo, "Federal Control of Indian Lands v. State Control of Gaming," *Journal of Gambling Behavior*, (Spring 1990), p. 64.

[33]*The State of California v. Cabazon Indians*, 408 U.S. 262, 97 L.Ed. 244 (1987).

[34]*U.S. v. Mazurie,* 419 U.S. 554, (1975). Also cited in Strate and Mayo, *op. cit.*

[35]*Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S. Ct. 2069. (1980). Also cited in Strate and Mayo, *op. cit.*

[36]Strate and Mayo, *op. cit.*

[37]Denise Lavole and Larry Rosenthal, "Gaming Leaders Launch Effort Against Casino," *Las Vegas Review Journal/Sun*, (March 31, 1991), p. 4A.

[38]*Ibid.*

[39]Strate and Mayo, *op. cit.*

[40]*Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 [98 S.Ct. 1912, 1918, 56 L.Ed.2n 444(1978)]. *Board of Trustees of the State Univ. of New York v. Fox*, 109 S.Ct. 3028, 3033, 106 L.Ed.2d 388, 402 (1989), also cited in *Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633 (E.D. Va. 1990).

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[42]*Red Lion Broadcasting Co. V. FCC*, 395 U.S. 367, 386, 89 S.Ct. 1794, 1804, 23 L.Ed.2d 371 (1968), also cited in *Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633, 636 (E.D. Va. 1990).

[43]*Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74, 103 S.Ct. 2875, 2884, 77 L.Ed.2d 469 (1983). Also cited in *Edge Broadcasting Co. v. U.S.*, 732 F.Supp 633, 636 (E.D. Va. 1990).

[44]*Ex parte Rapier*, 143 U.S. 130, 133, 12 S.Ct. 374, 36 L.Ed. 98 (1892).

[45]*FCC v. American Broadcasting Co.*, 347 U.S. 284, 289, 74 S.Ct 593, 597, 98 L.Ed. 699 (1954).

[46]*Bigelow v. Virginia*, 421 U.S. 809 (1976).

[47]*Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976).

[48]*Carey v. Population Services, Int'l.*, 432 U.S. 678 (1977).

[49]*Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1990).

[50]*Ibid.*, at p. 562. Also cited in *Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633, 638 (1990).

[51]*Ibid.*, at pp. 561-562. Also cited in *Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633, 638 (1990).

[52]*Zaurder v. Office of Disciplinary Counsel*, 471 U.S. 626, 638, 105 S.Ct. 2265, 2275, 85 L.Ed.2d 652 (1985), also cited in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1990), and cited in *Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633, 638 (E.D. Va. 1990).

[53]*Ibid.*

[54]*Central Hudson Gas & Electric Corp.,* 447 U.S. 557, 562-63, 100 S.Ct. 2343, 2349-50, 65 L.Ed.2d 341 (1980), cited also in *Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633, 638, (1990).

[55]*Ibid.*

[56]*Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340, 106 S.Ct. 2968, 2976, 92 L.E.2d 266 (1986); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507, 101 S.Ct. 2882, 2892, 69 L.Ed.2d 800 (1981); *Oklahoma Broadcasters Ass'n. v. Crisp*, 636 F.Supp. 978, 980-81 (W.D. Okla. 1985). Also cited in *Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633, 638 (E.D. Va. 1990).

[57]*Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.E.2d 266 (1986).

[58]*Ibid.*, p. 269.

[59]*Ibid.*

[60]*Ibid.*

[61]*Ibid.*

[62]*Ibid.*, p. 285, also cited in "A Status Report on Gaming Advertising," Larry D. Strate, William Quain and J. Kent Pinney, *Hotel Law Letter*, (March, 1987), p. 76. See also, *Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633, 643 (1990).

[63]*Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 358-59, 92 L.Ed.2d 266, 293-94, 106 S.Ct. 2968, 2985-86 (1986). Also cited in *Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633, 642, at footnote 8. (1990).

[64]*Posadas de Puerto Rico Assoc. v. Tourism Co.,* 478 U.S. 328, 359, 92 L.Ed.2d 266, 293-94, 106 S.Ct. 2968, 2986 (1986). Also cited in *Edge Broadcasting Co. v. U.S.,* 732 F.Supp. 633, 643, (1990). See also Strate, Quain, Pinney, *op. cit.*

[65]*Board of Trustees of the University of the State University of New York v. Fox, U.S.* 109 S.Ct. 3028, 106 L.Ed. 2d 388 (1989), cited in *Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633, 641, (1990).

[66]*Ibid.*

[67]N.C. Gen. Stat. 714.289 and 14.31 (1983).

[68]Va. Code Ann. #58.1-4001 (1987).

[69]*Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633, 634 (E.D. Va. 1990).

[70]*Ibid.*, p. 635.

[71]*Ibid.*

[72]*Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633 (E.D. Va. 1990).

[73]*Ibid.*, p. 645, footnote 14, see also Letter of FCC Chairman Richard E. Wiley, H.Rep. at 7021.

[74]*Edge Broadcasting Co. v. U.S.*, 732 F. Supp. 633, 641 (E.D. Va. 1990) at footnote 6.

[75]*Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557, 563, 100 S.Ct. 2343, 2350 (1980), cited also in *Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633, 639 (E.D. Va. 1990).

[76]*Ibid.*

[77]*Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633, 638 (E.D. Va. 1990).

[78]Ibid., pp. 638-639.

[79]*Oklahoma Broadcasters Ass'n. v. Crisp*, 636 F.Supp. 978, 982 (W.D. Okla. 1985). Also cited in *Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633, 639 (E.D. Va. 1990).

[80]*Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557, 568-69 100 S.Ct. 2343, 2352-53 (1980), also cited in *Edge Broadcasting Co. v. U.S.*, 732 F.Supp. 633, 639 (E.D. Va. 1990).

[81]New York State Broadcasters Ass'n., Inc. v. United States, 414 F.2d 990, 996-97 (2d Cir. 1969), cert. denied, 396 U.S. 1061, 90 S. Ct. 752, 24 L.Ed.2d 755 (1970); *Banzhaf v. FCC*, 405 F.2d 1082, 1101 (D.C. Cir. 1968), also cited in *Edge Broadcasting Co. v. U.S.*, 733 F.Supp. 633, 639, (E.D. Va. 1990).

[82]*Edge Broadcasting Co. v. U.S.*, 733 F.Supp. 633, 639 (E.D. Va. 1990).

[83]*Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 344, 92 L.Ed.2d 266, 281, 106 S.Ct. 2968, 2978 (1986), also cited in *Edge Broadcasting Co. v. U.S.*, 733 F.Supp. 633, 639 (E.D. Va. 1990).

[84]*Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557,

564, 100 S.Ct. 2343, 2350 (1986), also cited in *Edge Broadcasting Co. v. U.S.*, 733 F.Supp 633, 639 (E.D. Va. 1990).

[85]*Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557, 569, 100 S.Ct. 2343, 2353 (1986), also cited in *Edge Broadcasting Co. v. U.S.*, 733 F.Supp 633, 639 (E.D. Va. 1990).

[86]*Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557, 564, 100 S.Ct. 2343, 2350 (1986), also cited in *Edge Broadcasting Co. v. U.S.*, 733 F.Supp 633, 640 (E.D. Va. 1990).

[87]*Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557, 569-70, 100 S.Ct. 2343, 2353-54 (1986), also cited in *Edge Broadcasting Co. v. U.S.*, 733 F.Supp 633, 641 (E.D. Va. 1990).

[88]*Board of Trustees of the State University of New York v. Fox*, ——U.S. ——, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), also cited in *Edge Broadcasting Co. v. U.S.*, 733 F.Supp. 633, 641 (E.D. Va. 1990).

[89]D. Lively, "The Supreme Court & Commercial Speech," 72 Minn. L. Rev. 289 (1987); M. Nutt, "Recent Developments in First Amendment Protection of Commercial Speech," 41 Vanderbilt Law Review 173, 205 (1988); F. Schauer, "Commercial Speech and the Architecture of the First Amendment," 56 U.Cinn.L.Rev. 1811, 1182 (1988): "The Supreme Court—Leading Cases," Leading Cases,", 100 Harvard Law Review 100, 177-78 (1986) ("Had Justice Rehnquist applied the Central Hudson test with vigor, he would have struck down Puerto Rico's law on the ground that it was enacted in pursuit of too insubstantial a purpose to justify the interference with individual choice".) Also cited in *Edge Broadcasting Co. v. U.S.*, 733 F.Supp. 633, 643 in footnote 10. (E.D. Va. 1990).

[90]Testimony of Douglas W. Kmiec, Deputy Assistant Attorney General, Dept. of Justice, Hearings before the House Judiciary Comm., House Report 100-577, Lottery Advertising Clarification Act of 1988, 100th Cong., 2d Sess. (1988), p. 11-12. Also cited in *Edge Broadcasting Co. v. U.S.*, 733 F.Supp. 633, 643 at footnote 9.

Larry D. Strate is an associate professor in the Department of Finance, College of Business and Economics, at the University of Nevada-Las Vegas.