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## Building the House on a Weak Foundation: Edenfield v. Fane and the Current State of the Commercial Speech Doctrine

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## Building the House on a Weak Foundation: *Edenfield v. Fane* and the Current State of the Commercial Speech Doctrine

### I. INTRODUCTION

When Scott Fane, a certified public accountant (CPA), challenged a Florida anti-solicitation ban<sup>1</sup> on CPAs in the recent Supreme Court case of *Edenfield v. Fane*,<sup>2</sup> he relied on an area of the law fraught with inconsistency: First Amendment<sup>3</sup> protection of commercial speech. Since the 1940s, "the Court has vacillated between refusing to apply the First Amendment,"<sup>4</sup> stopping just short of extending full First Amendment guarantees, and applying moderate First Amendment protection to commercial speech.<sup>5</sup> In light of this history of seemingly unpredictable changes in approach, Scott Fane could only wonder which way the pendulum of commercial speech protection would swing on his day in court.

The Court's struggle in this area of the law is not surprising when one considers that commercial speech is really a hybrid of two completely different legal creatures.<sup>6</sup> The "speech" element embodies the notion of the First Amendment's "freedom of speech" guarantee and the strict scrutiny level of judicial review that accompanies fundamental constitutional rights.<sup>7</sup> The "commercial" element, by contrast, interjects the Court's general deference to state legislatures in regulating matters concerning the economic and social welfare of society and, accordingly, the rational basis standard of review.<sup>8</sup>

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1. See *infra* note 71 for the statutory language of this ban.

2. 113 S. Ct. 1792 (1993).

3. The First Amendment to the United States Constitution guarantees that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

4. Mary B. Nutt, Note, *Trends in First Amendment Protection of Commercial Speech*, 41 VAND. L. REV. 173, 173-74 (1988).

5. *Id.*

6. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-15, at 903 (2d ed. 1988); see also *Edenfield*, 113 S. Ct. at 1798.

7. See, e.g., RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.31, at 181 (2d ed. 1986).

8. *Id.* § 20.30, at 161. For a discussion of the relationship between political and

This Note will focus on two factors that appear to account in large part for the Court's oscillating expansion and contraction of First Amendment protection of commercial speech throughout the last half-century: the Court's continued difficulty in articulating a viable definition of "commercial speech"<sup>9</sup> and its persistent struggle to settle on the appropriate standard of review for commercial speech and to apply the standard consistently.<sup>10</sup>

The purpose of this Note is to highlight the historical background of commercial speech regulation and to determine the status of the commercial speech doctrine in the aftermath of *Edenfield v. Fane*. This Note will demonstrate that while the Supreme Court outlined the approach it will take in analyzing the constitutionality of commercial speech regulation, its unpredictable means of applying the standard both tied the hands of state legislators and pushed the limits of the First Amendment.<sup>11</sup> This Note will also show that the Supreme Court's continually wavering approach to commercial speech resulted in the construction of a weak foundation of precedent in this area of the law and will suggest a means of rebuilding it.

Following this introductory section, section II of this Note provides the historical background of the commercial speech doctrine.<sup>12</sup> Section III lists the relevant facts of the *Edenfield* case.<sup>13</sup> Section IV summarizes the majority, concurring and dissenting opinions.<sup>14</sup> Section V consists of a critical analysis of the Court's opinion including a proposal for rebuilding the commercial speech doctrine.<sup>15</sup> Section VI discusses the impact of the Court's decision.<sup>16</sup> Finally, section VII draws some brief conclusions.<sup>17</sup>

## II. HISTORICAL BACKGROUND

### A. Development of the "Commercial Speech Doctrine"

Prior to the mid 1970s, the Supreme Court relied on traditional legal

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economic rights, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 27.5 (4th ed. 1992).

9. *E.g.*, ROTUNDA & NOWAK, *supra* note 7, § 20.29, at 158.

10. *See* Nutt, *supra* note 4, at 173-74; TRIBE, *supra* note 6, § 12-15, at 89.

11. For a discussion of how the First Amendment and the Bill of Rights have become distorted, see Oscar Handlin, *The Bill of Rights in Its Context*, THE AMERICAN SCHOLAR, Spring 1993, at 177.

12. *See infra* notes 18-70 and accompanying text.

13. *See infra* notes 71-84 and accompanying text.

14. *See infra* notes 85-157 and accompanying text.

15. *See infra* notes 158-99 and accompanying text.

16. *See infra* notes 200-17 and accompanying text.

17. *See infra* notes 218-22 and accompanying text.

principles in determining whether commercial speech was outside the scope of First Amendment protection.<sup>18</sup> As a result, early decisions<sup>19</sup> accorded the states extreme deference in their legislation of commercial speech.<sup>20</sup> These early cases utilized a "primary purpose" test for commercial speech: if the underlying motive of the speech was profit, the speech in question was deemed commercial and therefore not entitled to protection under the First Amendment.<sup>21</sup>

The Court, however, was quick to realize the potential problems created by this primary purpose approach.<sup>22</sup> Gradually, the Court abandoned its motive-based analysis in favor of an approach focused on the content of the speech.<sup>23</sup> The transition to this content-based analysis culminated with the 1976 landmark case of *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council*.<sup>24</sup>

18. See Nutt, *supra* note 4, at 176.

19. For a discussion of early commercial speech decisions, see Kevin R. Knight, Note, *The Life of Riley: Complete First Amendment Protection Versus Deferential Commercial Speech Standards for Professional Fundraising Solicitors*, 23 IND. L. REV. 145, 148-51 (1990); Nutt, *supra* note 4, at 176-79; ROTUNDA & NOWAK, *supra* note 7, § 20.26, at 154-58.

20. See Nutt, *supra* note 4, at 176-77. The Court, in effect, equated commercial speech with purely commercial activity. See Knight, *supra* note 19, at 148. Accordingly, challenges to commercial speech regulations were reviewed at a level of scrutiny strikingly similar to the rational basis review employed in cases involving matters of economics and social welfare. See ROTUNDA & NOWAK, *supra* note 7, § 20.30, at 161.

21. See, e.g., Knight, *supra* note 19, at 148 (discussing *Valentine v. Chrestensen*, 316 U.S. 52 (1942)). In *Chrestensen*, the Court upheld a ban on the distribution of advertising materials despite the fact that the leaflet in question contained otherwise fully protected political expression on one side in addition to an advertisement on the other side. *Id.* The Court found that the primary purpose for distributing the leaflets was the pursuit of "gainful occupation," and that the use of protected speech was "merely a subterfuge to circumvent the ordinance." *Id.*

22. For instance, the fact that speech took the form of a paid advertisement certainly could not remove it from First Amendment protection. This was established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which upheld the right of a newspaper to publish a paid advertisement because its political message qualified it for First Amendment protection. TRIBE, *supra* note 6, § 12-15, at 891-92.

23. See Nutt, *supra* note 4, at 176-77 (citing *New York Times*, 376 U.S. at 266; *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (invalidating an ordinance which prohibited newspapers from carrying "help wanted" advertising in gender-designated columns)).

24. 425 U.S. 748 (1976).

Even after labelling the speech in question as purely commercial,<sup>25</sup> the Court in *Virginia State Board of Pharmacy* invalidated a statute that declared it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs.<sup>26</sup> Justice Blackmun's majority opinion relied heavily on society's "strong interest in the free flow of commercial information."<sup>27</sup> The Court further reasoned that the State's countervailing interest in maintaining the high level of professionalism among licensed pharmacists was not sufficient to justify keeping the public ignorant about drug prices.<sup>28</sup>

In light of developments to come, *Virginia State Board of Pharmacy* and its progeny<sup>29</sup> represent perhaps the Court's most intimate flirtation with extending strict scrutiny review to commercial speech cases.<sup>30</sup>

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25. The advertisements in question communicated the simple idea that "I will sell you the X prescription drug at the Y price." *Id.* at 761. The Court labelled this purely commercial speech as the speaker had no desire to editorialize on any particular matter. The speech conveyed a commercial message and nothing more. *Id.* By conceding that the speech at issue was purely commercial, the Court formally acknowledged that content, not motive, was the proper feature to analyze in distinguishing protected from unprotected speech. *Id.* The Court also attempted to define commercial speech in this case by asserting that there are commonsense differences between speech that does "no more than propose a commercial transaction" and other varieties. *Id.* at 771 n.24.

26. *Id.* at 762-76.

27. *Id.* at 764.

28. *Id.* at 766-70. In reaching its decision, the Court rejected the notion of a balancing test, characterizing the ban as strongly paternalistic and contrary to the preferred policy of allowing consumers to make an informed decision. *Id.* at 769-70. "In effect, the Court adopted a per se approach with respect to content-based restrictions on commercial speech." Nutt, *supra* note 4, at 181-82.

It should be further noted that the Court was careful to point out that commercial speech was not totally immune from regulation, as the state could still establish reasonable time, place and manner restrictions. *Virginia State Board of Pharmacy*, 425 U.S. at 770-71. Justice Blackmun pointed out that the Court often approved content-neutral time, place and manner restrictions as they are justified when they serve a significant governmental interest and "leave open ample alternative channels for communication of the information." *Id.*

29. See Nutt, *supra* note 4, at 183-84 (citing *Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977)) (invalidating an ordinance that prohibited the posting of "For Sale" and "Sold" signs "enacted to stem the flight of white homeowners from a racially integrated community").

30. In his concurring opinion in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'r of New York*, 447 U.S. 557 (1980), Justice Blackmun asserted his belief that the *Virginia State Board of Pharmacy* decision promised a higher standard of review than intermediate scrutiny in cases involving restraints on commercial speech. *Id.* at 575-77 (Blackmun, J., concurring).

### B. *The Early Lawyer Advertising Cases*

One type of commercial speech particularly prevalent in the development of the commercial speech doctrine is attorney advertising. Less than a year after the *Virginia State Board of Pharmacy* decision, the Supreme Court heard the first in a series of cases concerning regulation of advertising by attorneys in *Bates v. State Bar of Arizona*.<sup>31</sup>

In *Bates*, the Court considered the claim of two attorneys who placed a newspaper advertisement offering "legal services at very reasonable fees" and quoting the fees for specific services in violation of a state ban on advertising legal fees.<sup>32</sup> Once again relying on *Virginia State Board of Pharmacy*,<sup>33</sup> the Court in *Bates* found that the State of Arizona failed to articulate reasons sufficient to support its ban on lawyer advertising.<sup>34</sup> In upholding an attorney's right to advertise routine legal services at "very reasonable rates," however, the Court recognized that objections to "advertising claims as to the quality of services . . . might justify restraints on in-person solicitation," but excluded consideration of that issue.<sup>35</sup>

The in-person solicitation issue was the subject of two decisions issued on the same day during the following term in 1978. *In re Primus*<sup>36</sup> concerned an American Civil Liberties Union (ACLU) attorney who was disciplined for violating an anti-solicitation rule when she wrote a letter offering the ACLU's services to a woman whose civil

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31. 433 U.S. 350 (1977).

32. *Id.* at 354-55.

33. See *supra* notes 24-30 and accompanying text.

34. *Bates*, 433 U.S. at 381. The Court analyzed the following justifications set forth by the State of Arizona: 1. "The Adverse Effect on Professionalism;" 2. "The Inherently Misleading Nature of Attorney Advertising;" 3. "The Adverse Effect on the Administration of Justice;" 4. "The Undesirable Economic Effects of Advertising;" 5. "The Adverse Effect of Advertising on the Quality of Service;" and 6. "The Difficulties of Enforcement." *Bates*, 433 U.S. at 368-79. In *In re R.M.J.*, 455 U.S. 191, 206-07 (1982) (upholding an attorney's right to list all of the jurisdictions in which he was admitted to practice despite it being in "bad taste"), the Court affirmed that the *Bates* decision was a narrow ruling that should not be construed to forbid state regulation of advertisements. Raymond S. Sokolowski, Note, *Did You Use This IUD? Legal Advice in Lawyer Advertising: Zauderer v. Office of Disciplinary Counsel*, 36 DEPAUL L. REV. 133, 147-48 (1986).

35. *Bates*, 433 U.S. at 383-84. For an in-depth analysis of state and federal court attorney advertising decisions which remain viable after the *Bates* decision, see generally Gregory G. Sarno, Annotation, *Advertising as Ground for Disciplining Attorneys*, 30 A.L.R. 4TH 742 (1984).

36. 436 U.S. 412 (1978).

rights had been violated when she was sterilized as a precondition to receipt of further Medicaid benefits.<sup>37</sup> The Court held that the attorney could not constitutionally be punished as restrictions on solicitation were designed to prevent undue influence or overreaching, neither of which was present in this case.<sup>38</sup>

The Court reached the opposite result, however, in the companion case *Ohralik v. Ohio State Bar Association*.<sup>39</sup> In this case, the State Bar disciplined Ohralik, an attorney who solicited two accident victims, one of whom was still in the hospital, shortly after the occurrence of the accident.<sup>40</sup> During these meetings, Ohralik induced the two victims to allow him to represent them on a contingent fee basis.<sup>41</sup>

The Court distinguished *Ohralik* from both *Primus* and *Bates*, focusing on two major points. First, Justice Powell's majority opinion in *Ohralik* found that "Ohralik's actions were primarily for the benefit of his own pecuniary interests,"<sup>42</sup> while *Primus* was engaged in "associational activity" for the "advancement of beliefs and ideas."<sup>43</sup> Second, the Court distinguished the advertisement in *Bates* from Ohralik's in-person solicitation by pointing out that Ohralik exerted pressure for "an immediate response."<sup>44</sup>

In reaching its decision, the *Ohralik* Court enunciated that it was irrelevant whether fraud was actually present, as the state was entitled to enact a prophylactic rule<sup>45</sup> to restrict a lawyer's in-person sollicita-

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37. *Id.* at 414-21.

38. *Id.* at 421. In granting full First Amendment protection to *Primus*' speech, the Court relied on the rights to political expression and associational freedom, both of which have been traditionally protected as fundamental rights under the Constitution. Justice Powell's majority opinion found *Primus*' actions were both an expression of her political beliefs and an exercise of her associational right of affiliation with the ACLU. *Id.* at 426-38.

39. 436 U.S. 447 (1978). This is one of only a small number of modern commercial speech cases that has upheld the statute in question; *see also* *Posadas de Puerto Rico Ass'n v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 347-48 (1976) (upholding a casino regulatory scheme); *Guardian Plans Inc. v. Teague*, 870 F.2d 123, 127-28 (4th Cir.) (upholding a funeral profession license requirement), *cert. denied*, 493 U.S. 882 (1989).

40. *Ohralik*, 436 U.S. at 449-51.

41. *Id.*

42. Nutt, *supra* note 4, at 186.

43. *In re Primus*, 436 U.S. 412, 438 n.32 (1978). Justice Powell articulated that although "this does not remove the speech from the protection of the First Amendment, it lowers the level of appropriate judicial scrutiny." *Ohralik*, 436 U.S. at 457.

44. *Ohralik*, 436 U.S. at 467. This hampered the accident victims' ability to engage in the "critical comparison of the 'availability, nature and prices'" of alternate counsel, contrary to the societal interest in "facilitating 'informed and reliable decisionmaking'" expressed in *Bates*. *Id.* at 457 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)).

45. Ohralik was disciplined under Disciplinary Rules (DR) 2-103(A) and 2-104(A) of

tion of employment.<sup>46</sup> This power to enact such a rule grew out of the State of Ohio's compelling interest in preventing the potential for "fraud, undue influence, intimidation, overreaching and other forms of 'vexatious conduct'" that the state felt was inherent in attorney solicitation.<sup>47</sup>

By recognizing a state's interest in regulating solicitation of a lawful service, the Court effectively retreated "from the broad first amendment protection conferred upon commercial speech in *Virginia [State] Board*."<sup>48</sup> Thus, the *Ohralik* decision laid the groundwork for *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>49</sup> in which Justice Powell's majority opinion set forth the proper degree of protection to be afforded commercial speech under the Constitution.<sup>50</sup>

### C. *The Central Hudson Commercial Speech Test*

In *Central Hudson*,<sup>51</sup> the Court developed a four part test to deter-

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the Ohio Code of Professional Responsibility. *Id.* at 453.

DR 2-103(A) of the Ohio code provides: "A lawyer shall not recommend employment as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." OHIO REV. CODE ANN., PROFESSIONAL RESPONSIBILITY DR 2-103(A) Baldwin (1970).

DR 2-104(A)(1) of the Ohio code provides:

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one who the lawyer reasonably believes to be a client.

OHIO REV. CODE ANN., PROFESSIONAL RESPONSIBILITY 2-104(A)(1)(1970); *see also* Nutt, *supra* note 4, at 186.

46. *Ohralik*, 436 U.S. at 453.

47. *Id.* at 462. The State was not allowed to employ prophylactic measures in *Primus* because of the strength of the First Amendment interests of freedom of political expression and freedom of association present in the facts. Unlike *Ohralik*, the attorney in *Primus* could only be disciplined if there was a showing that fraud or some other type of deception actually occurred. *Primus*, 436 U.S. at 438.

48. Nutt, *supra* note 4, at 186.

49. 447 U.S. 557 (1980).

50. *See* Nutt, *supra* note 4, at 186. It should be noted that in *Ohralik*, the Court reiterated that it had "not discarded the 'commonsense' distinction between speech proposing a commercial transaction . . . and other varieties of speech." *Ohralik*, 436 U.S. at 455-56; *see also supra* note 25 and accompanying text.

51. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S.



mine whether an expression is protected by the First Amendment.<sup>62</sup> First, the commercial speech must “concern lawful activity and not be misleading.”<sup>63</sup> Once this preliminary criterion is met, the court next must ask “whether the asserted governmental interest is substantial.”<sup>64</sup> If this inquiry yields a positive answer, the court must “determine whether the regulation directly advances the government interest asserted.”<sup>65</sup> Finally, the court must consider whether the regulation “is not more extensive than is necessary to serve [the government’s] interest.”<sup>66</sup>

The Court in *Central Hudson* also introduced two new definitions of commercial speech, thereby building on the “commonsense” distinction that had been relied on to that point.<sup>67</sup> The first definition offered was “expression related solely to the economic interests of the speaker and its audience.”<sup>68</sup> The Court also offered what it felt to be an equally viable alternate definition—“speech proposing a commercial transaction.”<sup>69</sup> Justice Stevens highly criticized both of these definitions in his concurring opinion.<sup>60</sup>

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557 (1980). In *Central Hudson*, the Court struck down a prohibition on promotional advertising by an electric utility company. *Id.* at 572. Specifically, the ban forbade all promotional advertising intended to stimulate the purchase of utility services, while allowing informational advertising designed to shift consumption. *Id.* at 558-60. The ban was originally enacted in response to concerns that the State did not have sufficient fuel to meet consumer demands for the 1973-74 winter in light of the energy shortage of the early 1970s. *Id.* Although the fuel situation became less critical by the time of this case, the Commission elected to keep the ban in place. *Id.* In voiding the prohibition, the Court found the Commission’s order failed the fourth prong of the test, as defined in the text corresponding to this Note, because the prohibition was not the least restrictive means of serving the State’s interest. *Id.* at 572.

52. *Id.* at 566.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. See *supra* note 25 and accompanying text.

58. *Central Hudson*, 447 U.S. at 561.

59. *Id.* at 562.

60. *Id.* at 579-81 (Stevens, J., concurring). In criticizing the first definition, Justice Stevens asserted that neither a labor leader’s exhortation to strike, nor an economist’s dissertation on a national economic issue should receive any lesser protection simply because the subject matter concerns only the economic interests of the audience. *Id.* at 579-80. Justice Stevens likewise asserted that the second definition was too broad as it encompassed the entire range of communication within the term promotional advertising. *Id.* at 580. He listed several examples of speech that could be improperly regulated under this definition, including a salesman’s solicitation, a broker’s offer, and a manufacturer’s publication of a price list. *Id.* at 580-81.

#### D. Post Central Hudson Developments

In 1985, the Supreme Court once again chose to address the regulation of commercial speech by attorneys in *Zauderer v. Office of Disciplinary Counsel*.<sup>61</sup> The Court in *Zauderer* focused on whether a state could discipline an attorney for running nondeceptive newspaper advertisements targeting specific legal problems and potential defendants and also whether a state could require attorneys to disclose fee arrangements in their advertisements.<sup>62</sup>

Relying on *Bates*,<sup>63</sup> the Court upheld an attorney's right to run targeted advertisements as long as they are non-deceptive.<sup>64</sup> However, as to the second issue, the Court felt there were "material differences between disclosure requirements and outright prohibitions on speech"<sup>65</sup> and required attorneys who advertise on a contingent-fee basis to disclose potential costs in the event of an unsuccessful lawsuit.<sup>66</sup>

In *Shapero v. Kentucky Bar Association*,<sup>67</sup> the Court relied on *Zauderer* to strike down a state prohibition against attorneys sending letters to potential clients known to face particular legal problems.<sup>68</sup> The Court refused to differentiate between various modes of written advertising and held that a state may not ban such targeted advertising by mail any more than it could ban that same type of advertising by newspaper.<sup>69</sup>

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61. 471 U.S. 626, 656-57 (1985). This action stemmed from two advertisements placed in Ohio newspapers by Zauderer, an attorney practicing in Ohio. *Id.* The first advertisement stated that his firm would represent defendants charged with drunk driving and would refund the legal fees if the client was convicted. *Id.*

The second advertisement included a drawing of the Dalkon Shield Intrauterine Device accompanied by the caption "Did you use this IUD?" and advised the public of Zauderer's willingness to represent women injured through their use of that particular contraceptive device. *Id.*

62. *Id.* at 629.

63. See *supra* notes 31-35 and accompanying text.

64. *Zauderer*, 471 U.S. at 647.

65. *Id.* at 650. The court pointed out that the State had "not attempted to prevent attorneys from conveying information to the public," but rather only "required them to provide somewhat more information than they might otherwise be inclined to present." *Id.*

66. *Id.*

67. 486 U.S. 466 (1988).

68. *Id.* at 473.

69. *Id.* at 466-67.

After *Zauderer* and *Shapiro*, it appeared that the commercial speech pendulum had once again swung back in the direction of more protection for commercial speech. The *Ohralik* case aside, the Court effectively limited regulation of commercial speech to that which was either false or misleading. Reminiscent of the decisions in *Virginia State Board of Pharmacy* and its progeny,<sup>70</sup> the Court again extended virtually full First Amendment protection to commercial speech.

### III. FACTS OF THE CASE

The statute<sup>71</sup> at issue in *Edenfield* prohibited direct, in-person<sup>72</sup> so-

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70. Sokolowski, *supra* note 34, at 152; *see supra* notes 24-30 and accompanying text for a discussion of the impact of *Virginia State Board of Pharmacy* and its progeny on commercial speech regulation.

71. FLA. ADMIN. CODE ANN. r. 21A-24.002 (1993). Rule 21A-24.002 Solicitation provides:

(1) A licensee may respond to any request for a proposal to provide public accounting services and may provide such services to those requesting same.

(2) A licensee shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services: if (a) the communication would violate Rule 21A-24.001 if it were a public communication; or (b) by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct; or (c) where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such a communication.

(3) For purposes of this rule, the term "direct, in-person, uninvited solicitation" shall be deemed and construed to be any communication which directly or implicitly requests an immediate oral response from the recipient. Uninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited. Indirect forms of solicitation such as giving speeches, conducting educational seminars, distributing professional literature by mail or other forms of delivery that are not "in-person," writing books and articles, etc., are permitted.

(4) Any form of written communication to a potential client, invited or not, is permissible under this rule provided such communication conforms to the advertising guidelines of Rule 21A-24.001.

*Id.*; *see also* FLA. ADMIN. CODE ANN. r. 21A-24.001 (1993)(listing the Florida Administrative Code Annotated advertising guidelines); *Florida Accountants Ass'n v. Dandelake*, 98 So. 2d 323 (Fla. 1957)(challenging an advertising guideline for non-certified accountants).

For examples of state statutes which regulate CPA conduct but make no reference to in-person solicitation, *see* N.J. STAT. ANN. § 45:2B-23 (West 1991); CAL. BUS. & PROF. CODE § 5122 (Deering 1993).

It is also important to note that Rule 21A-24.002 was modified and replaced with Rule 61H1-24.002 in December 1993 as a result of this case. Similarly, Rule 21A-24.001 was replaced with Rule 61H1-24.001.

72. The criterion for in-person solicitation was "any communication which directly or implicitly request[ed] an immediate oral response from the recipient," and was defined to include all "uninvited visits whether they be in-person conversations or tele-

licitation by certified public accountants (CPAs). This rule, established by the Florida Board of Accountancy (the Board), prohibited CPAs from soliciting business from any person or entity not already a client unless the person invited the communication.<sup>73</sup>

The respondent, Fane, a CPA licensed to practice in the State of Florida, alleged that this rule posed a significant obstacle to his establishing a new practice as the majority of businesses are content to continue employing the services of their current accountants in the absence of solicitation from competitors.<sup>74</sup> It was Fane's experience that "persuading a business to sever its existing accounting relations . . . require[d] the new CPA to contact the business and explain the advantages" he could provide.<sup>75</sup>

Prior to his 1985 move to Florida, Fane operated his own CPA practice in New Jersey.<sup>76</sup> He built a significant portion of his client base there "by making unsolicited telephone calls to . . . executives" of small and medium-sized businesses and "arranging meetings to explain his services and expertise."<sup>77</sup> Fane claimed that "but for the Florida prohibition, he would seek clients through personal solicitation and would offer fees below prevailing rates" as he had done in New Jersey, which permitted such solicitation.<sup>78</sup>

Accordingly, Fane filed suit against the Board in the United States District Court for the Northern District of Florida, where he sought declaratory and injunctive relief based on the fact that the ban on in-person solicitation violated the First and Fourteenth Amendments.<sup>79</sup> After rejecting the Board's contention that the anti-solicitation rule was necessary to preserve the independence of CPAs performing the attest function on a firm's financial statements,<sup>80</sup> the district court granted

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phone calls to a potential client." See *supra* note 71 for the statutory language of FLA. ADMIN. CODE ANN. r. 21A-24.002.

73. FLA. ADMIN. CODE ANN. r. 21A-24.002(2)(c)(1992); see *supra* note 71 for the specific statutory language.

74. *Edenfield v. Fane*, 113 S. Ct. 1792, 1796 (1993).

75. *Id.*

76. *Id.*

77. See *id.*

78. *Id.* at 1797. The applicable statute in New Jersey makes no reference to in-person solicitation. N.J. STAT. ANN. § 45:2B-23 (West 1991).

79. *Edenfield*, 113 S. Ct. at 1797.

80. *Id.* In its response to Fane's allegations, the Board relied on the affidavit of Louis Dooner its former chairman, who asserted that "a CPA who solicits clients 'is obviously in need of business and may be willing to bend the rules'" and "that the

summary judgment to Fane and further enjoined the enforcement of the statute “as it applied to CPAs who seek clients through in-person, direct, uninvited solicitation in the business context.”<sup>81</sup>

A divided panel for the Court of Appeals for the Eleventh Circuit subsequently affirmed the district court’s decision.<sup>82</sup> The Supreme Court granted certiorari<sup>83</sup> to “test” CPA solicitation and “nothing more,” to determine whether it was entitled to First Amendment protection.<sup>84</sup>

#### IV. SUMMARY OF THE COURT’S OPINION

##### A. *Majority Opinion*

A majority<sup>85</sup> of the Supreme Court ruled that the Florida Board of Accountancy’s CPA anti-solicitation rule<sup>86</sup> infringed upon Fane’s right to speak as guaranteed by the Constitution.<sup>87</sup> Accordingly, Justice Kennedy, writing for the majority, affirmed the lower court’s decision enjoining enforcement of the Florida rule “in the business context.”<sup>88</sup>

At the outset of his majority opinion, Justice Kennedy acknowledged that Fane did not seek to communicate anything more than “truthful, non-deceptive information proposing a lawful commercial transaction.”<sup>89</sup> Relying on the decision in *Virginia State Board of Pharmacy*

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ban was therefore necessary to prevent ‘overreaching and vexatious conduct by the CPA.’” *Id.* (citations omitted).

81. *Id.* (citing Civ. Case No. 88-40264-MNP (N.D. Fla., Sept. 13, 1990) (App. 88)).

82. *Id.* (citing *Fane v. Edenfield* 945 F.2d 1514 (11th Cir. 1991), *aff’d* 113 S. Ct. 1792 (1993)).

83. *Edenfield v. Fane*, 112 S. Ct. 2272 (1992) (granting petition for certiorari).

84. *Edenfield*, 113 S. Ct. at 1797. The Court did not address proposed communications not included in the solicitation. *Id.*

85. Justice Kennedy delivered the majority opinion, joined by Chief Justice Rehnquist and Justices White, Blackmun, Stevens, Scalia, Souter, and Thomas. *Id.* at 1796. Justice O’Connor filed a dissenting opinion. *Id.*

It is interesting to note that while Chief Justice Rehnquist agreed with the application of an intermediate level standard of review in *Edenfield*, he has advocated a rational basis approach in commercial speech cases in the past. *E.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 583-606 (1980) (Rehnquist, J., dissenting).

86. See *supra* note 71 for specific statutory language of FLA. ADMIN. CODE ANN. r. 21A-24.002.

87. *Edenfield*, 113 S. Ct. at 1804.

88. *Id.* at 1797. Ratifying in-person solicitation in this specified context, the Court implicitly declined to consider a state’s power to regulate solicitation by a CPA seeking to provide public accounting services to an individual regarding his personal affairs. *Id.*

89. *Id.* at 1797. Justice Kennedy spelled out that “commercial speech . . . is ‘linked inextricably’ with the commercial arrangement that it proposes, so that the State’s

*v. Virginia Citizen's Consumer Council*,<sup>90</sup> Justice Kennedy enunciated that such lawful communication was clearly commercial expression entitled to First Amendment protection.<sup>91</sup> This declaration eliminated the need to analyze Fane's proposed communication to determine whether "some parts [were] entitled to greater protection than the solicitation itself."<sup>92</sup> Justice Kennedy emphasized that this case was before the Court to test the solicitation and nothing more.<sup>93</sup>

Having established that personal solicitation by CPAs is commercial speech, the Court next articulated the crucial role played by solicitation in the commercial marketplace<sup>94</sup> and pointed to the "general rule" that

interest in regulating the underlying transaction" effectively gives the State an interest in regulating the expression as well. *Id.* at 1798 (quoting *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979)); see also *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978) (discussing this "concomitant interest" of the State).

"For this reason," Justice Kennedy explained, "laws [regulating] commercial speech, unlike laws [restricting] other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest . . . to survive First Amendment scrutiny." *Edenfield*, 113 S. Ct. at 1798 (citations omitted).

90. 425 U.S. 748 (1976); see *supra* notes 24-30 and accompanying text for further discussion of this case.

91. *Edenfield*, 113 S. Ct. at 1797. *Cf. Ohralik*, 436 U.S. at 447 (upholding a ban on in-person solicitation by lawyers). Justice Kennedy pointed out that although *Ohralik* did not extend First Amendment protection to the attorney solicitation in that case, the opinion did not hold that all personal solicitation falls outside of the First Amendment. *Edenfield*, 113 S. Ct. at 1797 (citing *Ohralik*, 436 U.S. at 457).

Justice Kennedy further explained that although there are detrimental aspects to personal solicitation in some circumstances, these detriments are "not so inherent" as to entirely exclude in-person solicitation from First Amendment protection. *Id.* at 1797; see also *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2711 (1992) (upholding a ban on personal solicitation at an airport terminal because of its non-public forum status, but striking down a complete ban on distribution of literature as a violation of the First Amendment).

92. *Edenfield*, 113 S. Ct. at 1797.

93. *Id.*

94. *Id.* at 1797-98. The Court explained that solicitation is unique in that it "allows direct and spontaneous communication between the buyer and the seller" that is mutually beneficial. *Id.* at 1797. It allows the seller to exercise his "financial incentive to educate the market and stimulate demand for his product." *Id.* at 1797. Permitting the seller to initiate the communication also enables the seller to target those consumers most likely to be interested in his product or services. *Id.* at 1798. Solicitation also benefits buyers because they can compare the item or services with others in the market. *Id.* Both parties further benefit from the opportunity to negotiate the most mutually beneficial terms for the transaction. *Id.* In general, solicitation allows greater communication between parties than traditional business practices where the buyer seeks out the seller. *Id.* at 1797. In enumerating these advantages of solici-

the speaker and the audience, not the government, must determine the value of the speech involved in a solicitation situation.<sup>96</sup> Justice Kennedy further pronounced that by prohibiting solicitation by CPAs, the Florida statute<sup>96</sup> compromised the public interest by “threaten[ing] societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard.”<sup>97</sup>

### 1. Application of the *Central Hudson* Analysis

Having made the necessary threshold determinations that Fane’s proposed communications were neither fraudulent nor misleading, the majority asserted that the case was subject to an intermediate level of scrutiny.<sup>98</sup> More specifically, Justice Kennedy called upon the *Central Hudson* test, modified into a three prong analysis, as it was clear that this CPA solicitation was entitled to at least partial First Amendment protection.<sup>99</sup>

To determine whether the *Central Hudson* test forbids personal solicitation by CPAs, the Court considered the following three prongs<sup>100</sup> of the test individually: (1) “[W]hether the State’s interests in proscribing it are substantial;” (2) “[W]hether the challenged regulation advances these interests in a direct and material way;” and (3) “[W]hether the extent of the restriction on protected speech is in reasonable proportion to the interests served.”<sup>101</sup> This Note will consider the Court’s analysis of each of the three prongs in turn.

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tion, Justice Kennedy effectively asserted that society has strong economic and constitutional interests in maintaining the commercial marketplace as a “forum where ideas and information flourish.” *Id.*

95. *Id.* at 1798.

96. See *supra* note 71 for the statutory language of FLA. ADMIN. CODE ANN. r. 21A-24.002 (1992).

97. *Edenfield*, 113 S. Ct. at 1798 (citations omitted).

98. *Id.*

99. *Id.*

100. Although the original version of the *Central Hudson* test had four prongs, the majority in *Edenfield* eliminated the first prong. See *id.*; *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980). This is consistent with the Court’s prior treatment of the *Central Hudson* test in *Zauderer*. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638, 657-64 (1985) (Brennan, J., concurring).

101. *Edenfield*, 113 S. Ct. at 1798. The version of the final prong used by the *Edenfield* majority is different than that established in *Central Hudson*. See *supra* notes 52-56 and accompanying text for the original language. This is consistent with the *Zauderer* decision that also substituted a reasonable relation test for the least restrictive means approach originally employed in *Central Hudson*. See *Zauderer*, 471 U.S. at 651 n.14.

*a. The "first prong" analysis*

In justifying its statute, the State claimed that the ban on solicitation protected two separate substantial interests.<sup>102</sup> The first interest was to protect consumers from fraud or overreaching by CPAs.<sup>103</sup> Relying on precedent<sup>104</sup> that the State may prohibit commercial speech that is "fraudulent or deceptive without further justification," the Court agreed that prevention of fraud was a substantial state interest.<sup>105</sup>

The second state interest asserted was the necessity of maintaining both "the fact and appearance of CPA independence" in auditing a business and attesting to its financial statements.<sup>106</sup> The Court again agreed on the basis of past decisions<sup>107</sup> recognizing the "State's important interests in maintaining standards of ethical conduct in the licensed professions."<sup>108</sup>

*b. The "second prong" analysis*

Having found that the Board satisfied the first prong of the *Central Hudson* test, Justice Kennedy turned to the "penultimate prong" of the analysis to determine whether the "blanket prohibition" advanced the substantial state interests in a "direct and material way."<sup>109</sup> As to this issue, the majority agreed with the court of appeals that the Board failed to meet its burden of proof that the harms it alleged were real and that its restriction would "alleviate them to a material degree."<sup>110</sup> The Court reached this conclusion based primarily on the Board's in-

102. *Edenfield*, 113 S. Ct. at 1799.

103. *Id.*

104. *Id.* (citations omitted). See generally *Central Hudson*, 447 U.S. at 563-64; *In re R.M.J.*, 455 U.S. at 203; *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507 (1981) (plurality opinion).

Justice Kennedy also noted that "[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely." *Id.* (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council*, 425 U.S. 748, 771-72 (1976)).

105. *Edenfield*, 113 S. Ct. at 1799.

106. *Id.*

107. *Id.* at 1800 (citing *Ohralik v. Ohio Bar Ass'n*, 436 U.S. 447, 460-61 (1978)); *Virginia State Board of Pharmacy*, 425 U.S. at 766; *National Society of Professional Eng'rs v. United States*, 435 U.S. 679, 696 (1978)).

108. *Id.* at 1799-80.

109. *Id.* at 1800.

110. *Id.* at 1800-02.



ability to support its contentions with any specific evidence, and the presence of various literature that contradicted the Board's claims.<sup>111</sup>

The only support for the state's position under this part of the analysis was an individual's affidavit that provided conclusions without authority.<sup>112</sup> Further, the Board itself provided the Court with a report that undermined its position.<sup>113</sup> The report had been prepared by the American Institute of Public Accountants (AICPA) in 1981.<sup>114</sup> The AICPA report refuted the affidavit by noting the illogic of associating solicitation with desperate overreaching when most CPA firms continually want new clients.<sup>115</sup> Perhaps even more detrimental to the Board's position was the AICPA's pronouncement that it was unaware of any data supporting the theories that CPAs tend to compromise their independence when a client is "obtained by direct uninvited solicitation" or that "CPAs do not maintain their independence in mental attitude toward those clients" subjected to such solicitation by other CPAs.<sup>116</sup>

*c. The "third prong" analysis*

Having determined that the Board failed to pass the second prong of the *Central Hudson* test, the Court was not required to consider the third prong. Justice Kennedy, however, indirectly addressed the third prong as part of his analysis of the State's alternative argument that the anti-solicitation ban was a reasonable time, place, or manner restriction on speech.<sup>117</sup>

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111. *Id.* The Board did not supply any studies, anecdotal evidence or examples of Fane's own conduct that might have supported its assertions about the dangers of personal solicitation by CPAs in the business context. *Id.* at 1800. The only support for the State's position under this part of the analysis was former Board Chairman Louis Dooner's affidavit which provided conclusions without authority. *Id.* Further, the Board itself provided the Court with a report that undermined its own position. *Id.*

112. *Id.* at 1800-01.

113. *Id.* at 1801.

114. *Id.*

115. *Id.*

116. *Id.* Justice Kennedy implicitly demonstrated that the AICPA's report was not an aberration as it was consistent with other literature on the accounting profession. *Id.* In his summary of this literature, Justice Kennedy noted that it suggested that, contrary to the Board's submission, the "dangers of compromised independence" are more likely to occur in the context of a CPA firm which is "too dependent upon or involved with a long-standing client," rather than at the solicitation stage. *Id.* at 1801 (citations omitted).

117. *See id.* at 1801-02.

i. Reasonableness in the context of time, place, or manner restrictions

As an alternative to its argument that the prohibition was constitutional as a blanket ban, the State argued the anti-solicitation rule was a reasonable restriction on the manner in which CPAs could communicate with potential clients, not a direct regulation of commercial speech itself.<sup>118</sup> To illustrate his point, Justice Kennedy assumed arguendo that a "flat ban on commercial solicitation could be regarded as a content-neutral time, place or manner restriction on speech."<sup>119</sup> This type of restriction is still subject to an intermediate standard of review requiring the regulation serve a substantial state interest in "a direct and effective way."<sup>120</sup>

The State's alternative argument failed for the same reason as its first argument.<sup>121</sup> Although the State established substantial interests, the prohibition did not serve these purposes in a direct and material way.<sup>122</sup> Justice Kennedy concluded his analysis of this alternative argument by noting that a restriction on speech that lacks this direct and material relation to the asserted governmental interest cannot, by definition, be a reasonable time, place, or manner restriction.<sup>123</sup>

ii. Reasonableness requirement not met

The third prong of *Central Hudson*, as modified by Justice Kennedy, requires that the restriction be in reasonable proportion to the interests served.<sup>124</sup> Because the anti-solicitation ban was declared unreasonable in the context of time, place, or manner restrictions, it can be inferred that the State failed the third prong in the *Central Hudson* analysis as well.<sup>125</sup>

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118. *Id.* at 1801.

119. *Id.* For a discussion of why this proposition is open to considerable doubt, see *Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council*, 425 U.S. 748, 771 (1976).

120. *Edenfield*, 113 S. Ct. at 1801 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)).

121. *See id.* at 1801-02.

122. *Id.*

123. *Id.* at 1802.

124. *See supra* note 56 and accompanying text.

125. *See Edenfield*, 113 S. Ct. at 1801-02.

## 2. Prophylactic Rule Analysis

Having rejected the first two arguments put forth by the Board, the majority turned its attention to the State's final argument that the CPA solicitation ban was justified as a prophylactic rule.<sup>126</sup> Relying on *Ohralik*,<sup>127</sup> the State contended that although Fane's conduct may not have involved misconduct, all in-person solicitation by CPAs must be proscribed because this communication usually occurs in private offices and is thus difficult to regulate.<sup>128</sup> The Court rejected this analogy to *Ohralik* because, unlike the attorney solicitation in *Ohralik*, the circumstances of CPA solicitation are not "inherently conducive to overreaching and other forms of misconduct."<sup>129</sup>

Specifically, Justice Kennedy noted that an attorney is "trained in the art of persuasion," while CPAs are trained in a manner that "emphasizes independence and objectivity" rather than advocacy.<sup>130</sup> Furthermore, an attorney may be soliciting an unsophisticated, injured, or distressed lay person, while CPAs generally solicit more sophisticated business executives who understand the services offered by a CPA and often have an existing business relationship with an accountant as a basis for comparison.<sup>131</sup>

The Court further distinguished CPA solicitation by indicating that there is no pressure for an immediate response or for the "uninformed acquiescence" that accident victims face.<sup>132</sup> A CPA's prospective client is not expected to retain the CPA's services immediately.<sup>133</sup> Rather, the potential CPA client ordinarily exercises more rational decision-making that includes time for checking references and deliberation before making a decision.<sup>134</sup>

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126. *Id.* at 1802-04.

127. See *supra* notes 39-48 and accompanying text for a discussion of the *Ohralik* case.

128. *Edenfield*, 113 S. Ct. at 1802.

129. *Id.*; see also *Ohralik v. Ohio Bar Ass'n*, 436 U.S. 447, 464 (1978).

130. *Edenfield*, 113 S. Ct. at 1802-03.

131. *Id.* at 1803.

132. *Id.*

133. *Id.*

134. *Id.* The majority concluded its analysis of the Board's prophylactic rule argument by noting that the State appeared to have misunderstood what the Court in *Ohralik* meant when it approved the use of a prophylactic rule. *Id.* The rule was prophylactic in the sense that it proscribed conduct which was conducive to deception at the outset, rather than punishing it after its occurrence. *Id.* Justice Kennedy explained that *Ohralik* does not divest the State from the duty of showing both that it is regulating speech to address a real problem and that the regulation "will contribute in a material way" to the resolution of that problem. *Id.* This is precisely the task which the State was unable to perform under the second prong analysis of the *Central Hudson* test. See *supra* note 55 and accompanying text.

*B. Concurring Opinion Written by Justice Blackmun*

Justice Blackmun wrote a concurring opinion<sup>135</sup> in which he expressed his support for the Court's decision to strike down the in-person anti-solicitation ban as it applied to CPAs in the business context, but took exception to the intermediate level standard of review which the majority employed in reaching that decision. He further expressed his desire to "disengage himself from any . . . inference that commercial speech that is free from fraud or duress or the advocacy of unlawful activity" should be reviewed only at this intermediate level.<sup>136</sup> In making this assertion, Blackmun implicitly advocated a strict scrutiny level of review for such cases.<sup>137</sup>

*C. Dissenting Opinion Written by Justice O'Connor*

Justice O'Connor wrote a dissenting opinion<sup>138</sup> in which she disagreed with both the decision and the approach taken by the majority.<sup>139</sup> In voicing her disagreement, Justice O'Connor emphasized the importance of maintaining high standards of professionalism in such learned professions as law and public accounting.<sup>140</sup> Justice O'Connor also asserted her belief that the States have extensive authority to regulate commercial speech inconsistent with membership in such professions and ultimately damaging to society at large.<sup>141</sup> Justice O'Connor appeared to advocate a rational basis standard of review comparable to

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135. *Edenfield*, 113 S. Ct. at 1804 (Blackmun, J., concurring). Justice Blackmun was not joined in his concurring opinion by any other justices.

136. *Id.* (Blackmun, J., concurring). The main fact upon which Justice Blackmun based his opinion was that the First Amendment prohibits all laws abridging the freedom of speech. *See id.*

137. Blackmun's advocacy of strict scrutiny review in cases involving commercial speech free of fraud and illegal activity is consistent with his prior opinions. *E.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 573-74 (1980) (Blackmun, J., concurring).

138. *Edenfield*, 113 S. Ct. at 1804 (O'Connor, J., concurring in part and dissenting in part). The ideas expressed in Justice O'Connor's dissent are consistent with her opinions in prior commercial speech cases. *See Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 488-91 (1988) (O'Connor, J., dissenting); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 676-77 (1985) (O'Connor, J., concurring in part and dissenting in part).

139. *Edenfield*, 113 S. Ct. at 1804-06 (O'Connor, J., dissenting).

140. *Id.* at 1804 (O'Connor, J., dissenting).

141. *Id.* (citations omitted).

that used to scrutinize regulations affecting the economic or social welfare of society.<sup>142</sup>

Justice O'Connor pointed to the line of Supreme Court cases concerning attorney advertising and asserted that the Court has erred "by finding increasingly unprofessional forms of attorney advertising to be protected speech."<sup>143</sup> In her view, this trend is due to the Court's continued "focus on whether the challenged advertisement directly harms the listener."<sup>144</sup> Justice O'Connor expressed particular concern for the potential negative impact of commercialization and asserted that the Court should shift its focus to the effect of advertising on professional culture and consumer welfare in general.<sup>145</sup>

As an alternative argument, Justice O'Connor stated that even if she agreed that "States may target only professional speech that directly harms the listener," she would still dissent in *Edenfield* because it cannot be reconciled with *Ohralik*.<sup>146</sup> In her view, in-person CPA solicitation is equally susceptible to fraud and deception as attorney solicitation.<sup>147</sup> Justice O'Connor declined to accept the majority's assertion that it is an attorney's training in the art of persuasion that enables him to coerce naïve clients.<sup>148</sup> Rather, Justice O'Connor suggested that like a CPA, it is an attorney's certified expertise in a complex subject matter that "empowers the attorney to overawe inexpert clients."<sup>149</sup>

Justice O'Connor found further error in the majority's failure to analyze the CPA anti-solicitation ban, itself, under the *Central Hudson* test.<sup>150</sup> She argued that *Edenfield* was not an "as applied" challenge, contrary to the majority's treatment of it.<sup>151</sup> By failing to state otherwise, according to Justice O'Connor, the majority implied that the ban

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142. *Id.* at 1804-07 (O'Connor, J., dissenting).

143. *Id.* at 1804 (O'Connor, J., dissenting). Justice O'Connor cited several cases in support of her proposition. See generally *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

144. *Edenfield*, 113 S. Ct. at 1804 (O'Connor, J., dissenting). Justice O'Connor pointed to *Shapero* as a case which exemplified this notion. In *Shapero*, the Court focused on whether the challenged communication, a letter containing an attorney advertisement, was false or misleading, or amounted to "overreaching, invasion of privacy, [or] the exercise of undue influence." *Id.* (quoting *Shapero*, 486 U.S. at 475).

145. *Id.*

146. *Id.* at 1804-05 (O'Connor, J., dissenting).

147. See *id.*

148. *Id.* at 1805 (O'Connor, J., dissenting).

149. *Id.*

150. *Id.* at 1806 (O'Connor, J., dissenting).

151. *Id.*; see also *id.* at 1798.

itself satisfied *Central Hudson*.<sup>152</sup> She further articulated that this gave rise to a highly questionable "underlying assumption that a commercial speaker can claim first amendment protection for particular instances of proscribed commercial expression even where the prohibitory law satisfies *Central Hudson*."<sup>153</sup>

Finally, Justice O'Connor criticized the remedy granted by the majority, asserting that it was overly broad in comparison to the findings used to justify it.<sup>154</sup> The majority emphasized that Fane's proposed speech was apparently harmless and concluded that the Florida ban could not "be sustained as applied to Fane's proposed speech" because of the speech's innocuous nature. Nevertheless, after analyzing the case as an "as applied"<sup>155</sup> challenge, the Court upheld an injunction against the enforcement of the rule against all CPAs in the "business context,"<sup>156</sup> not just Fane.<sup>157</sup>

## V. CRITICAL ANALYSIS OF THE COURT'S OPINION

The Court's decision in *Edenfield* may leave Americans wondering whether the highest court in the land truly believes in the doctrine of freedom of speech. It has been asserted by some of the greatest legal minds that "[y]ou really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous."<sup>158</sup> However, all three opinions in *Edenfield* seem to have over-

152. *Id.* at 1806 (O'Connor, J., dissenting).

153. *Id.* at 1805 (O'Connor, J., dissenting).

154. *See id.* at 1805-06 (O'Connor, J., dissenting).

155. *Id.* at 1798.

156. Justice O'Connor pointed out that the narrowing of the focus of the decision by enjoining enforcement only in the business context, does not salvage the district court's remedy. *Id.* at 1806 (O'Connor, J., dissenting). Justice O'Connor based her rationale on the fact that "small businesses comprise the vast majority of business establishments in the United States." *Id.* In her view, legislators could "reasonably have believed that the average small businessman is no more sophisticated than the average individual who is wealthy enough to hire a CPA for his personal financial affairs." *Id.* Here, again, Justice O'Connor implicitly advocated a rationale basis approach. *See supra* note 142 and accompanying text.

157. *Edenfield*, 113 S. Ct. at 1797.

158. *Whitney v. California*, 274 U.S. 357, 377 n.4 (1927). Justice Brandeis quoted Lord Justice Scrutton's comment in *King v. Secretary of State for Home Affairs ex parte O'Brien*, 2 K.B. 361, 382 (1923). Justice Stevens also referred to this language in his concurring opinion in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 582 (1980) (Stevens, J., concurring).

looked this crucial principle. Although the Court fortuitously arrived at the proper result, its haphazard approach accomplished nothing more than to proliferate the existing confusion surrounding the freedom of speech doctrine, especially in the area of so-called commercial speech.<sup>159</sup>

In determining where the Court erred, it is crucial to understand the underlying principle of the right to free speech as enumerated in the First Amendment.<sup>160</sup> Although written in a different context, the celebrated words of Justice Holmes perhaps best summarize this principle:

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.<sup>161</sup>

In *Edenfield*, there is clearly no such justification for proscribing Scott Fane's proposed speech. However, because commercial speech is traditionally subject to government regulation, the Court systematically pigeon-holed its analysis into the intermediate level of scrutiny established in *Central Hudson*.<sup>162</sup> While the Court's approach would have been satisfactory if this tradition were based on sound precedent, that simply is not the case.<sup>163</sup> By failing to engage in a thorough analysis of the validity of the *Central Hudson* test, the Supreme Court has further complicated the so-called commercial speech doctrine.

In effect, the Court has continued its trend of building the commercial speech doctrine on a weak foundation that is incapable of supporting

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159. See generally *supra* notes 18-70 and accompanying text.

160. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

161. *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting). Although Justice Holmes articulated this "clear and present danger test" in a dissenting opinion, it was later incorporated into the *Brandenburg* test which is currently the standard for determining whether a particular instance of political speech warrants First Amendment protection. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (reversing the defendant's conviction under Ohio's criminal syndicalism statute because his speech at a Ku Klux Klan rally did not advocate immediate action as required under the Court's newly established test). The *Brandenburg* test also called upon then Judge Learned Hand's "incitement" test to establish the new two prong *Brandenburg* approach. See *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917); see also *Schenck v. United States*, 249 U.S. 47, 52 (1919) (where Justice Holmes first articulated his "clear and present danger" theory in the majority opinion).

162. *Ohralik v. Ohio Bar Ass'n*, 436 U.S. at 455-56 (1978) ("We have not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."); see also *Central Hudson*, 447 U.S. at 579 (Stevens, J., concurring) ("[C]ommercial speech' is afforded less constitutional protection than other forms of speech . . .").

163. See generally *supra* notes 18-70 and accompanying text.

sound legal reasoning. Beginning with *Valentine v. Chrestensen* in 1942 and culminating with *Edenfield* in 1993, the court has employed not only varying approaches to commercial speech, but varying definitions of commercial speech.<sup>164</sup> Although the Court attempted to unify its approach to commercial speech in *Central Hudson*,<sup>165</sup> as demonstrated by *Edenfield*, this effort proved to be unsuccessful.

A. *The Court's Failure to Formulate a Viable Definition of Commercial Speech*

What all the post commercial speech cases fail to recognize is that there are multiple types of commercial speech, each deserving of a differing level of protection. By fashioning the intermediate test in *Central Hudson*, the Court backed itself into a corner. This is especially true because the Court has not yet satisfactorily defined commercial speech.<sup>166</sup> Instead, the *Edenfield* Court utilized a "back door" approach whereby they first decided whether the speech regulation at issue was proper, and then forced the facts within the parameters of the *Central Hudson* test.<sup>167</sup>

This back door approach does not even attempt to define commercial speech.<sup>168</sup> In *Edenfield*, Justice Kennedy began his analysis by acknowledging the ambiguities<sup>169</sup> surrounding the definition of commercial speech.<sup>170</sup> Despite this admission, Justice Kennedy further stated that the personal solicitation issue in *Edenfield* is clearly the type of commer-

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164. See *supra* notes 18-70 and accompanying text.

165. See *supra* notes 51-60 and accompanying text.

166. See *infra* note 170.

167. See generally *supra* notes 85-134 and accompanying text.

168. See *infra* note 172 and accompanying text.

169. *Edenfield v. Fane*, 113 S. Ct. 1792, 1797 (1993) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 384-88 (1973)).

170. *Central Hudson* was the most recent attempt to define this term. In *Central Hudson*, the Court first defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). Then, almost as a red flag to its indecision, the Court further recognized "the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech." *Id.* at 562. Even if these definitions were used alternatively, depending on the speech being considered, serious problems still exist. Justice Stevens, in his concurring opinion in *Central Hudson*, raises this point. *Id.* at 579-81 (Stevens, J., concurring).



cial expression that deserves some First Amendment protection.<sup>171</sup> The form of this protection is the *Central Hudson* intermediate standard of review.<sup>172</sup> In effect, the Court first decided that the ban in *Edenfield* failed to pass constitutional muster. Then, the Court forced the personal solicitation into the commercial speech arena so the ban would clearly be struck down.

It is logical that a prerequisite to determining the proper standard of review for commercial speech and ensuring its consistent application is defining commercial speech. How can one determine what level of protection to give to something when it is unknown what that thing is? Nevertheless, the Supreme Court has done just that; beginning with *Central Hudson*, the Court has applied an intermediate level of scrutiny, without agreeing on a viable definition of commercial speech.<sup>173</sup>

### B. *Inconsistent Application of the Commercial Speech Doctrine*

The absence of a viable definition of commercial speech is only the beginning of the Court's flawed foundation. The Court's inability to define commercial speech has led to an intermediate level review of any speech that remotely relates to a commercial transaction, as evidenced by the *Edenfield* decision. This dangerously sets the stage for inadvertent suppression of speech that should be held to a higher level of protection.<sup>174</sup> In *Edenfield*, the Court's implicit recognition of this danger led to an inconsistent application of the *Central Hudson* test.

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171. *Edenfield*, 113 S. Ct. at 1798.

172. *Id.* at 1797-98. By not explaining why this solicitation is commercial speech entitled to a lesser level of First Amendment protection, the Court used the "I know it when I see it" rationale which has been explicitly rejected in another line of cases.

In *Jacobellis v. Ohio*, 378 U.S. 184 (1964), in an attempt to define obscenity, Justice Stewart candidly remarked that, "I know it when I see it, and the motion picture involved in this case is not that." *Id.* at 197 (Stewart, J., concurring). A definition of obscenity was subsequently agreed upon in *Miller v. California*, 413 U.S. 15, 24 (1973). The Court did not utilize Justice Stewart's subjective approach, but rather developed a three prong test. *See id.* (holding that obscene broadcasts are those that: (1) "the average person, applying contemporary community standards' would find . . . taken as a whole, appeal[] to the prurient interest"; (2) "depict[] or describe[], in a patently offensive way, sexual conduct"; and (3) "taken as a whole, lack[] serious literary, artistic, political or scientific value") (citations omitted). It is reasonable to assume that if the Court can formulate a definition of obscene speech, it should be able to do the same for commercial speech.

173. *See supra* notes 60 and 164 and accompanying text.

174. "[I]t is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed." *Central Hudson*, 447 U.S. at 579 (Stevens, J., concurring).

Despite labeling Fane's speech as commercial,<sup>175</sup> the Court noted that CPA solicitation in the business context posed none of the "clear and present dangers" that justify regulation of speech.<sup>176</sup> Although the Court asserted that it was applying the intermediate standard of review,<sup>177</sup> in reality it applied strict scrutiny under the guise of the *Central Hudson* test.<sup>178</sup>

### C. *A Modest Proposal to Rebuild*

Rather than continuing to contort the commercial speech doctrine into the requisite form necessary to accomplish the desired result, now is the time for the court to abandon this fundamentally flawed "plastic" doctrine. Demonstrated most recently in *Edenfield*, the Court has proven time and time again that the commercial speech doctrine is built on a weak foundation.<sup>179</sup> Continuing to build on this foundation will do nothing but further complicate future decisions.

The Court has had difficulty determining the proper standard of review for commercial speech and applying it consistently because no single definition of commercial speech exists.<sup>180</sup> This is because there are different types of commercial speech, each of which is entitled to different levels of constitutional protection based on precedent in other areas of law.

The Court in *Edenfield* missed a golden opportunity to abandon the attempt to set one standard for what to date has been lumped into the category of commercial speech. Because *Edenfield* involved such a specific area of commercial speech, CPA solicitation in the business con-

175. See *supra* note 94 and accompanying text.

176. See *supra* note 161 and accompanying text.

177. See *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993) ("Even under this intermediate standard of review . . . Florida's blanket ban on direct, in-person, uninvited solicitation by CPAs cannot be sustained . . .").

178. Although the Court in *Edenfield* confirmed the reduction of the third and final prong of the modern *Central Hudson* test from a least restrictive means to a mere reasonableness standard, *id.* at 1804, this only gives the test a more deferential appearance on the surface. See *supra* note 124 and accompanying text. By requiring states to provide empirical evidence proving whether the activity sought to be regulated creates danger of fraud or deception, the second prong of *Central Hudson* becomes a "least restrictive means" test. Effectively, the second prong no longer means what it says.

179. See *generally supra* notes 18-70 and accompanying text.

180. See *supra* notes 18-70 and accompanying text.

text,<sup>181</sup> the time was right to break this category down into smaller, more manageable, and most importantly, easily defined subcategories. If we are ever to have consistent analysis of speech concerning commercial transactions, the foundation must be torn down and rebuilt .

Using *Edenfield* as a starting point, there are two distinguishable areas of in-person solicitation that, if treated separately, would resolve the enigma of commercial speech analysis in this area: in-person solicitation in the business context and in-person solicitation in the individual context.<sup>182</sup> The Court rightfully expressed a varying level of concern for each subcategory.<sup>183</sup> While *Edenfield* deals specifically with the behavior of CPAs, this proposal also applies equally in other contexts such as attorney solicitation.

### 1. CPA Solicitation in the Business Context

Turning first to CPA solicitation in the business context, there is no reason why this type of speech fails to receive full First Amendment protection as there is no "clear and present danger" involved.<sup>184</sup> Even if Justice O'Connor is correct in asserting that the potential for CPA overreaching derives from the expertise in a complex subject matter,<sup>185</sup> surely this is not a concern with the business context. Quite to the contrary, a CPA who solicits a business will be dealing with a person who has some expertise in accounting, or at the very least is a business person accustomed to similar solicitations.<sup>186</sup> Even small businesses can re-

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181. *Edenfield*, 113 S. Ct. at 1797.

182. *See id.* at 1802-06.

183. Although they disagree in their conclusions, both the majority and dissenting opinions express concern that in-person solicitation may be "inherently conducive to overreaching and other forms of misconduct." *Id.* at 1802-05 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978)). The majority agreed with the decision in *Ohralik* that because of an attorney's training in the art of persuasion, this danger is present with an in-person solicitation by attorneys. *Id.* at 1802. Therefore, there should be some form of regulation. *Id.* The Court then properly concluded that CPA solicitation does not pose this same threat as CPAs are not trained in the art of persuasion. *Id.* Rather, "[a] CPA's training emphasizes independence and objectivity, not advocacy." *Id.* at 1802-03.

In her dissenting opinion, Justice O'Connor expressed that the potential for overreaching by professionals had little to do with training or lack thereof in the art of persuasion. *Id.* at 1805 (O'Connor, J., dissenting). Rather, Justice O'Connor proffered that the potential for deception by both attorneys and CPAs stemmed from their ability to overawe inexperienced clients with their knowledge of a complex subject matter. *Id.*

184. *See supra* note 161 and accompanying text; *see also infra* note 222 and accompanying text.

185. *See supra* note 149 and accompanying text.

186. Furthermore, it should be noted that Fane wanted merely to obtain business

spond to solicitation by the likes of attorneys, insurance salesmen and CPAs.<sup>187</sup>

Furthermore, the very principle of a free market society,<sup>188</sup> as well as various pieces of well-grounded legislation<sup>189</sup> encourage professionals like CPAs to engage in activities such as those proposed by Fane. Allowing States to regulate solicitation in the business context would hinder the ability of CPAs to compete with each other, contrary to the principles of such legislation as the Sherman Act<sup>190</sup> and the Clayton Act,<sup>191</sup> both constitutional acts instituted to promote competition.<sup>192</sup>

Based on the considerations that in-person solicitation in the business context present no imminent dangers and that other areas of the law support such behavior by professionals, there is no reason why this type of commercial speech should not receive full constitutional protection.<sup>193</sup> Furthermore, the Court in *Edenfield* has already afforded this protection by applying strict scrutiny analysis under the guise of intermediate level review.<sup>194</sup> By failing to challenge convoluted precedent, however, the Court has done the commercial speech doctrine a disservice.

clients by "making unsolicited telephone calls to their executives and arranging meetings to explain his services and expertise." *Edenfield*, 113 S. Ct. at 1796. It would be difficult to imagine any danger of overreaching in this scenario. Businesses are certainly equipped to handle this type of everyday solicitation.

187. It is also important to note that the Court previously held that allowing for the free flow of information is preferable to keeping people in ignorance. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764 (1976) ("Generalizing, society also may have a strong interest in the free flow of commercial information."). This seems to ring particularly true, especially when the people or businesses in this situation can receive such information through solicitation.

188. See generally PETER W. LOWE ET AL., *GOVERNMENT REGULATION: FREE ENTERPRISE AND ECONOMIC ORGANIZATION* (1985).

189. See, e.g., *infra* notes 190-91 and accompanying text.

190. See 15 U.S.C. §§ 1-7 (1973). "An act to protect trade and commerce against unlawful restraints and monopolies." Sherman Antitrust Act, ch. 647, §1, 26 Stat. 209 (1890).

191. See 15 U.S.C. §§ 12-27 (1973). "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes." Clayton Antitrust Act, ch. 323, § 1, 38 Stat. 730 (1914).

192. Both the Sherman Act and the Clayton Act were enacted under the authority of the commerce clause to the Constitution of the United States. U.S. CONST. art. I, § 8, cl. 3.

193. See *supra* note 134 and accompanying text.

194. See *supra* notes 167-72, 177-78 and accompanying text.

Accordingly, with regard to in-person solicitation by CPAs in the business context, Justice Blackmun's concurring opinion in *Edenfield* is more on the mark.<sup>195</sup> The principle of free speech mandates that expression not be subject to proscription where there is no danger present.<sup>196</sup> With regard to this subcategory, there is no such danger, and as such it should be afforded strict scrutiny review as suggested by Justice Blackmun, so long as no fraud or deception is involved.

## 2. In-Person Solicitation of Individuals

In-person solicitation by a CPA in the individual context may well be a different matter. Justice O'Connor's concern that an individual may be overawed by a person with expertise in a complex subject matter may be well founded when applied to a lay person.<sup>197</sup> In this situation, there is justification for regulation as there is a potential danger that a person without a business background may fall victim to undue pressure by a sophisticated professional.<sup>198</sup> As a result, this subcategory is the proper place for the *Central Hudson* intermediate test.

Unlike professionals, ordinary individuals approached by a CPA or attorney do not usually have experience with the sophisticated subject matter being solicited. Here, there is a danger. Therefore, in accordance with the principles underlying First Amendment protection,<sup>199</sup> this type of commercial speech should be subject to some form of proscription.

## VI. IMPACT OF THE COURT'S DECISION

The *Edenfield* decision proliferates the trend of chipping away at the *Central Hudson* test and diminishing the states' power to regulate commercial speech. The Court issued the *Central Hudson* decision on the heels of *Virginia State Board of Pharmacy*, a time when commercial speech enjoyed its most broad protection.<sup>200</sup> The Court applied an intermediate level test in *Central Hudson* to decrease this high level of protection.<sup>201</sup> Building on the *Zauderer* and *Shapero* decisions, the *Edenfield* Court elevated the level of review for commercial speech to

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195. See *supra* notes 135-37 and accompanying text.

196. See *supra* note 161 and accompanying text; see also *infra* note 222 and accompanying text.

197. See *supra* note 149 and accompanying text.

198. See, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 467-68 (1978) (upholding an anti-solicitation ban when an attorney exerted pressure on an accident victim in a hospital to retain him as counsel).

199. See *supra* note 149 and accompanying text; see also *infra* note 209 and accompanying text.

200. See *supra* note 30 and accompanying text.

201. See *supra* notes 49-56 and accompanying text.

just short of the strict scrutiny applied to such categories of expression as political speech.<sup>202</sup>

This elevated standard of review does not become problematic until the courts are faced with a variant of commercial speech such as CPA solicitation of individuals. If courts apply the *Central Hudson* test to that type of commercial speech in the same manner as the Supreme Court applied it to CPA solicitation of businesses, states will be unnecessarily deprived of their right to protect their citizens.<sup>203</sup> In such a situation, the Court's more likely approach would be to reform the *Central Hudson* test back to a true intermediate test, thereby allowing proscription of CPA solicitation of individuals. Until the commercial speech doctrine is broken down into its component parts, the Court resigns itself to an uneven application of *Central Hudson*. The following analysis considers the impact of the *Edenfield* Court's proliferation of the foundationally flawed commercial speech doctrine in the judicial, legislative and social contexts.

#### A. *Judicial Impact*

Although the Court in *Edenfield* confirmed the reduction of the third and final prong of the modern *Central Hudson* test from a "least restrictive means" to a mere reasonableness standard,<sup>204</sup> by all appearances this change is only skin deep. By requiring that the states provide empirical evidence that the activity sought to be regulated creates the danger of fraud or deception,<sup>205</sup> the Court in effect elevated the second prong of *Central Hudson* to a least restrictive means test.<sup>206</sup> Thus, the second prong no longer means what it says, but rather supplants the third prong by effectively reinstating a disguised least restrictive means test.

This perplexing application of *Central Hudson*, combined with the Court's refusal to apply a prophylactic rule in CPA solicitation cases,<sup>207</sup> places the states at the mercy of the Supreme Court. As Justice O'Connor suggested, under the *Edenfield* rationale, one need only show that a regulation is unenforceable against one person's proposed speech

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202. See *supra* notes 175-78 and accompanying text.

203. See *supra* notes 197-99 and accompanying text.

204. See *supra* notes 101, 124 and accompanying text.

205. See *supra* note 114 and accompanying text.

206. See *supra* notes 170-72 and accompanying text.

207. See *supra* notes 127-30 and accompanying text.

to get an injunction on the enforcement of a rule against an entire group.<sup>208</sup>

Although the Court's interpretation of the *Central Hudson* test leads to the proper result in cases involving solicitation in the business context, the Court's refusal to label its approach as strict scrutiny promises to create one of two problems. First, if the decision is read strictly as written, the Court has reviewed speech which appears to be entitled to full First Amendment protection,<sup>209</sup> at the intermediate level. Alternatively, if the decision is read as applying strict scrutiny, though not coming right out and saying it, the *Edenfield* Court potentially deprives individuals of protection from overreaching professionals such as CPAs and attorneys.<sup>210</sup>

### B. Legislative Impact

Although the Court made it virtually impossible for a state to regulate commercial speech, even in the context of in-person solicitation of individuals, it did furnish the blueprint for how to escape judicial invalidation.<sup>211</sup> Assuming that the commercial speech to be regulated does not fit the *Ohralik* prophylactic rule model, a state has two means of escaping judicial invalidation of its regulation. One way is to forbid solicitation only under circumstances that would render it fraudulent, deceptive or coercive.<sup>212</sup> The other means is to regulate commercial speech only when the state possesses empirical data showing that the activity creates the danger of fraud.<sup>213</sup> Either of these enable the prohibition to survive a second prong analysis.<sup>214</sup>

Neither of these means, however, is acceptable in the context of in-person solicitation of individuals. Under the first approach, states can only protect unsophisticated individuals from fraudulent solicitation, leaving CPAs to take advantage of lay persons by intimidation. The second requires data that may be unavailable or impractical to gather, and may indeed be scientifically impossible to demonstrate. Therefore, neither sufficiently addresses the issue of in-person solicitation of individuals. Accordingly, legislators' hands are tied in the context of in-person solicitation of individuals.

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208. *Edenfield v. Fane*, 113 S. Ct. 1792, 1805-06 (1993) (O'Connor, J., dissenting).

209. See *supra* notes 174-78 and accompanying text.

210. See *supra* text accompanying notes 197-99.

211. *Id.*

212. *Edenfield*, 113 S. Ct. at 1799.

213. See *supra* notes 112-14 and accompanying text.

214. *Id.*

### C. *Social Impact*

The *Edenfield* majority's refusal to acknowledge the maintenance of high standards of professionalism as a substantial state interest<sup>215</sup> in the individual solicitation context could have a negative impact on society. Specifically, a lack of regulations could encourage professionals to challenge the state to see just how far the courts will expand First Amendment protection of commercial speech.

Excess litigation aside, this would lead to increasingly questionable advertising practices aimed at helpless individuals. This is especially true in light of the Court's reluctance to apply a prophylactic rule to any professional group other than attorneys.<sup>216</sup> This reluctance exists notwithstanding Justice O'Connor's warning of the "incremental, indirect, yet profound effect" that commercialization can have on a professional culture.<sup>217</sup>

Furthermore, the Court's reluctance to establish subcategories of commercial speech, each entitled to a different standard of review, presents problems in light of technology. If the Court refuses to recognize subcategories of commercial speech, the commercial speech doctrine will become further convoluted with each technological advance.

## VII. CONCLUSION

It seems that the commercial speech pendulum has again swung too far to the left, just as it did following *Virginia State Board of Pharmacy* and its progeny.<sup>218</sup> The Supreme Court's rebalancing solution in 1980 was the *Central Hudson* intermediate level test.<sup>219</sup> However appropriate this test may be for some types of commercial speech, it is not the answer. To ensure consistent application of a commercial speech doctrine, the Court must build a new foundation, taking into consideration the various subcategories of commercial speech.

The level of protection currently enjoyed by commercial speech is excessive for a "right" not specifically enumerated in the Constitution.

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215. See *supra* notes 140-41 and accompanying text.

216. See *supra* note 126-34 and accompanying text; see also *Edenfield*, 113 S. Ct. at 1804 (O'Connor, J., dissenting).

217. See *supra* note 145 and accompanying text; see also *Edenfield*, 113 S. Ct. at 1804 (O'Connor, J., dissenting).

218. See *supra* note 24-38 and accompanying text.

219. See *supra* notes 51-56 and accompanying text.



While some types of speech the Court has labelled as “commercial” are certainly entitled to full constitutional protection,<sup>220</sup> commercial speech aimed at individuals certainly is not. This is especially true in light of the fact that true commercial speech is “linked inextricably” with the commercial transaction that it proposes, effectively giving the States a concomitant interest in regulating it.<sup>221</sup>

The time has come for the Court to reevaluate the traditional definitions of commercial speech. In many situations, as in *Edenfield*, that which the Court labels as commercial speech should not be subject to government regulation. The commercial speech doctrine has become muddled to the point that the only viable option appears to be to return to fundamentals and to start over by constructing a new foundation. In deciding whether a particular variant of speech is subject to government regulation, the Court should be mindful of Justice Brandeis’ words:

[A]lthough the right[] of free speech . . . [is] fundamental, [it is] not in [its] nature absolute. [Its] exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled.<sup>222</sup>

One thing is certain: as presently “defined,” commercial speech is an overbroad concept not capable of being analyzed under a single standard of review.

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220. See, e.g., *supra* text accompanying notes 184-94.

221. *Edenfield*, 113 S. Ct. at 179.

222. *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring); see also *Schenck v. United States*, 249 U.S. 47, 52 (1919).