FIRST AMENDMENT—FREE SPEECH—A PROPHYLACTIC BAN ON PERSONAL SOLICITATION BY CERTIFIED PUBLIC ACCOUNTANTS IN A BUSINESS CONTEXT VIOLATES THE FIRST AMENDMENT'S GUARANTEE OF FREEDOM OF SPEECH—*Edenfield v. Fane*, 113 S. Ct. 1792 (1993).

The "commercial speech doctrine" applies the First Amendment's guarantee of free speech[1] to expressions proposing a com-

---

[1] U.S. CONST. amend. I (declaring that "Congress shall make no law . . . abridging the freedom of speech"). The concept of free speech originated in ancient Athens sometime between 800 B.C. and 600 B.C., where some citizens were given a right to speak on most issues without fear of government retribution. THOMAS L. TEDFORD, FREEDOM OF SPEECH IN THE UNITED STATES 4 (2d ed. 1993). Athenian citizens were punished only for slanderous, impious, or seditious speech. *Id.* The Roman Republic granted a similar freedom of speech to its citizens. *Id.* Beginning with the Roman Empire, however, speech in opposition to the government required the approval of the emperor, which gave rise to the long standing exercise of "dissent by permission" in Western society. *Id.* at 4-5.

The signing of the Magna Carta in 1215 by King John of England and the rise of the English Parliament, particularly the House of Commons, triggered a resurgence of the right to free speech for purposes of parliamentary debate. *Id.* at 5; DAVID S. BOGEN, BULWARK OF LIBERTY—THE COURT AND THE FIRST AMENDMENT 8 (1984). Strengthened throughout several centuries, the right to free speech during legislative argument was considered fundamental in both England and its former American colonies by the time the United States Constitution was adopted in 1787. TEDFORD, *supra*, at 9. The fundamental right to freedom of speech in legislative debate was ensconced by the framers of the Constitution, which proclaims that "for any Speech or Debate in either House, . . . [senators and representatives] shall not be questioned in any other Place." *Id.* (quoting U.S. CONST. art. I, § 6).

Seventeenth and eighteenth century social contract theorists, including John Locke, further influenced America's founding fathers with the idea that certain rights were naturally imbued upon all of mankind. *Id.* at 20-21. Such rights included the freedoms of thought and expression. *Id.* at 21 (quoting Cato's Letters, No. 62). Professor Bogen observed that in that era, although legislative debate associated freedom of speech with governmental functions, the doctrine of natural rights expanded the general applicability of free speech and similar rights to all. *Id.* at 20.

The publication of essays known as Cato's Letters, supporting the ideals of natural law, greatly influenced America's founding fathers, including Benjamin Franklin and James Madison. *Id.* at 17. This collection of essays argued that free speech was a natural right, appropriately immune from governmental interference, unless the right's exercise resulted in injury to another. *Id.* at 18. Letter Number 15, entitled "Of Freedom of Speech: That the same is inseparable from Public Liberty," stated:

> Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publick Liberty, without Freedom of Speech: Which is the Right of every Man, as far as by it he does not hurt and controul the Right of another; and this is the only Check which it ought to suffer, the only Bounds which it ought to know. . . . Freedom of Speech is the great Bulwark of Liberty; they prosper and die together . . . .

Id. (quoting Cato's Letters, No. 15).

Legal commentators have argued that the United States Supreme Court's mod-

mercial transaction.[2] Commercial speech has not always received

ern approach to the protection of free speech is founded upon the classic "marketplace of ideas" theory. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7-8, 11-12 (1989) [hereinafter HUMAN LIBERTY] (asserting that the Supreme Court's approach to free speech is premised on an understanding that truth is objective and that people are rationally able to weigh competing ideas to make informed decisions). This modern approach regarding the right to free speech began with Justice Holmes's dissent in *Abrams v. United States*. *Id.* at 7-8 & n.7 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). In *Abrams*, the majority upheld the conviction of a man accused of fostering discontent and anarchy by publishing pamphlets protesting the involvement of American troops in Russia during World War I. *Abrams*, 250 U.S. at 623-24. Justice Holmes, joined by Justice Brandeis, dissented, arguing that the majority's conclusion failed to recognize the importance of debate in a free society. *Id.* at 630-31 (Holmes, J., dissenting). The dissent stated:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by *free trade in ideas*—that the best test of truth is the power of the thought to get itself accepted in the *competition of the market* . . . .

Id. at 630 (Holmes, J., dissenting) (emphasis added).

The Court continued to delineate the parameters of the marketplace of ideas theory in *Roth v. United States*. HUMAN LIBERTY, *supra*, at 8-9 (citing Roth v. United States, 354 U.S. 476, 484-85 (1957)). The *Roth* Court defined protected speech as "[a]ll ideas having even the slightest redeeming social importance." *Roth*, 354 U.S. at 484. The Court, however, narrowed this potentially broad definition of protected speech in *Miller v. California*. *See* DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 829 (1989) (citing Miller v. California, 413 U.S. 15, 24 (1973)); TEDFORD, *supra*, at 153. The *Miller* Court defined unprotected expression as speech lacking "serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24. The *Miller* Court's definition of non-First Amendment speech has continued relevance today, although its application is principally limited to cases involving obscenity. *See* TEDFORD, *supra*, at 153.

Despite the Court's reliance on the marketplace of ideas theory in its analysis of cases involving free speech, commentators have offered alternative methods for justifying the right. *See, e.g.*, HUMAN LIBERTY, *supra*, at 47-51 (arguing for a "liberty" approach to justify free speech). Professor Baker rejected the "marketplace" justification for First Amendment protection, proposing that the marketplace approach is based on an exterior, majoritarian definition of truth. *Id.* at 12, 47. The author instead would draw on the values of individual self-fulfillment and the ability of the individual to participate in change. *Id.* at 47. *But see* Martin H. Redish, *The Value Of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (contending that the right to freedom of speech serves the sole goal of "individual self-realization"). Professor Redish argued that Baker's "liberty" and "self-fulfillment" labels are too narrow in scope and fail to protect commercial speech. *See id.* at 593-94. In contrast, Professor Baker maintained that commercial speech "does not represent an attempt to create or affect the world in a way which can be expected to represent anyone's private or personal wishes." C. Edwin Baker, *Commercial Speech: A Problem In The Theory Of Freedom*, 62 IOWA L. REV. 1, 3 (1976).

[2] *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973) (holding advertisements proposing no more than a commercial transaction to be "classic examples of commercial speech"). In *Pittsburgh Press*, the Court determined that a city ordinance forbidding newspapers from publishing gender-based employment opportunity advertising did not violate the First Amendment.

First Amendment protection, however, and its inclusion with other types of speech that historically have received such protection remains qualified.[3] The qualifications notwithstanding, the commer-

---

Id. at 391. The Court did not reach the ultimate issue of whether commercial speech should receive First Amendment protection. *Id.* at 388. Rather, the majority concluded that the illegality of gender-discriminating advertising rendered the newspaper's activities outside of the purview of protected First Amendment speech. *Id.* at 388, 391.

In a case subsequent to *Pittsburgh Press*, the Supreme Court further designated 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, 572 (1980) (citations omitted) (holding that a complete ban on advertising by an electric utility violates the First Amendment). *But see* Bernadette Miragliotta, *First Amendment: The Special Treatment of Legal Advertising*, 1990 ANN. SURV. AM. L. 597, 597 (1992) (postulating that the commercial speech doctrine is not an application of the First Amendment's guarantee of free speech, but rather represents the Supreme Court's concern for the dissemination of commercial information in the American capitalist system); Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 444 (1992) (arguing that the Court's definition of commercial speech—dealing with advertising, promotion, and solicitation—fails to address the broader category of corporate, business, and securities speech). Professor Eberle argues that the extension of First Amendment protection to commercial speech cannot be justified by any single theory, but instead must be approached pragmatically by utilizing a network of interlocking values. *Id.* at 415.

[3] *See* Eberle, *supra* note 2, at 461. Political, scientific, and cultural expressions, also known as "core speech," are generally recognized as having greater First Amendment value than other types of speech, including commercial speech. *Id.* Professor Eberle contended, however, that commercial speech directly advances values essential to a democracy, such as liberty and autonomy. *Id.* A pragmatic rationale for allowing the regulation of commercial speech derives from the state's function in effectively affirming the truthfulness of commercial speech. *Id.* at 474. Professor Eberle maintained that the state's function is to ensure that "'the stream of commercial information flow[s] cleanly as well as freely.'" *Id.* (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 (1976)). In dictum, the *Virginia Pharmacy* Court stated that the application of the First Amendment to commercial speech was not meant to prohibit the state's continued regulation of the pharmaceutical profession. *Virginia Pharmacy*, 425 U.S. at 771-72. *But see* HUMAN LIBERTY, *supra* note 1, at 196-97 (asserting that commercial speech reflects a profit-based market force which does not further individual liberty but instead involves people exercising power over others).

Some commentators rationalize the government's ability to regulate commercial expression, arguing that such regulation would not result in the chilling of speech. *See, e.g.*, Eberle, *supra* note 2, at 472-73 (insisting that commercial speech is more durable than other types of speech, such as political, due to the importance of commercial speech to the generation of profit). *But see* Redish, *supra* note 1, at 633 (questioning the validity of the distinction between commercial and political speech). Professor Redish, however, contended that a distinction between commercial and political speech incorrectly assumes that facts espoused by a commercial speaker are more easily verified than facts asserted by a political speaker. *Id.* Hypothesizing that the regulation of commercial speech would deter advertisers from making certain assertions about their product, Professor Redish also questioned the conclusion of some legal theorists that commercial speech is hardier than political speech. *Id.*; *see also* Richard A. Posner, *Free Speech In An Economic Perspective*, 20 SUFFOLK U. L. REV. 1,

cial speech doctrine imposes substantial limitations on governmental attempts at restricting commercial speech.[4]

Although the commercial speech doctrine has been enthusiastically received by advertisers,[5] it remains a controversial subject, particularly in the professional community.[6] The controversy stems from the government's communitarian interest in protecting its citizens from harmful commercial speech[7] and the opposing First Amendment interest in disseminating information.[8] The de-

---

10 (1986) (questioning generally the rationale for ranking types of speech and particularly the favoring of political speech over economic speech).

4 David Rownd, Note, *Muting The Commercial Speech Doctrine:* Board of Trustees of the State University of New York v. Fox, 38 WASH. U. J. URB. & CONTEMP. L. 275, 275 (1990). The commercial speech doctrine balances the First Amendment's aim of freely publicizing information with the state's desire to protect its citizens by regulating commerce. *Id.* The author contrasted this modern day balancing test with the rationale used by the Supreme Court in the early case of *Valentine v. Chrestensen. Id.* at 275 & n.3 (citing Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942)). In *Valentine,* the Court afforded no protection at all to pure commercial speech. *Id.* See *infra* notes 43-45 and accompanying text for a more detailed discussion of *Valentine.* The Supreme Court later promulgated a test providing commercial speech with some measure of constitutional protection. *See* Eberle, *supra* note 2, at 480-81 (analyzing the modern four-part requirement for the regulation of commercial speech under *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*). See *infra* notes 75-80 and accompanying text for an analysis of *Central Hudson.*

5 *See* Bruce P. Keller, *The Tension Between the First Amendment and Regulatory Efforts, in* FALSE ADVERTISING AND COMMERCIAL SPEECH 1993, at 7, 9 (PLI Corp. Law & Practice Course Handbook Series No. B-806, 1993) (observing that advertisers rejoiced when the Court extended First Amendment protection to commercial speech in 1976).

6 *See, e.g.,* Al H. Ringleb et al., *Lawyer Direct Mail Advertisements: Regulatory Environment, Economics, and Common Perceptions,* 17 PAC. L.J. 1199, 1199 n.1 (1986) (quoting Chief Justice Warren E. Burger's comment made at the American Bar Association's Commission on Advertising that potential legal clients should be warned to "'never, never, never under any circumstances'" retain an attorney who advertises).

7 *See* Eberle, *supra* note 2, at 470; *see also* HUMAN LIBERTY, *supra* note 1, at 197 (proposing that commercial speech adds nothing to the First Amendment ideal of personal liberty and autonomy); *cf.* Ronald K. L. Collins & David M. Skover, *Commerce and Communication,* 71 TEX. L. REV. 697, 724, 727-28 (1993) (advocating that First Amendment protection should be withdrawn from modern-image based advertising, as opposed to classified-type advertising, because image-based advertising does not disseminate useful information to the consumer and reduces a "citizen democracy" to a "commercial democracy").

But see Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech,* 71 TEX. L. REV. 777, 780, 801 (1993) (arguing, in response to Collins and Skover, that imagistic advertising has not been shown to be inherently harmful and that First Amendment protection should not be withdrawn from commercial speech, in general, without an actual showing of harm or the substantial likelihood that harm will occur).

8 Eberle, *supra* note 2, at 448. Professor Eberle observed that commercial speech disseminates information to the consumer, thereby increasing the consumer's overall knowledge. *Id.* Increased knowledge, the professor continued, adds to an individual's ability to engage in self-realization. *Id.*

Legal commentators have debated over whether commercial speech is truly de-

bate is heightened when the doctrine is applied to professionals because of the palpable disdain traditionally held by the professional community for certain forms of commercial speech.[9] Juxtaposed with that disdain is the increasing need for some professionals, in an ever-crowded and more competitive world, to distinguish themselves in the eyes of the public.[10] The need to balance these legitimate interests is perhaps best demonstrated by the evolution of judicial doctrine in the area of in-person solicitation by professionals.[11]

In a recent case, *Edenfield v. Fane*,[12] the United States Supreme Court held that the personal solicitation of prospective business clients by certified public accountants could not be prophylactically banned.[13] In reaching this conclusion, the Court rejected the

---

serving of First Amendment protection. For example, Professor Baker argued that "[F]irst [A]mendment theory requires a complete denial of [F]irst [A]mendment protection for commercial speech." HUMAN LIBERTY, *supra* note 1, at 196. Professor Redish, however, disagreed with Professor Baker's proposal that commercial speech is not deserving of First Amendment protection. *See* Martin H. Redish, *Self-Realization, Democracy, And Freedom Of Expression: A Reply To Professor Baker*, 130 U. PA. L. REV. 678, 679 (1982). *But see* Posner, *supra* note 3, at 40 (arguing that it is paradoxical to grant First Amendment protection to product advertising when the product itself can be heavily regulated by the government). Professor Redish's disagreement with Professor Baker extends from the professors' respective positions on the relevancy of the receipt, as opposed to the expression, of information. *Id.* (citing C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures And Redish's The Value Of Free Speech*, 130 U. PA. L. REV. 646, 646, 652 (1982)). Although he observed Professor Baker's belief that profit-motivated expressions undermine individual self-realization, Professor Redish posited that the receipt of information also advances the First Amendment. *Id.* at 679. Accordingly, Professor Redish contended that the source of the motivation for expressing ideas is largely immaterial. *Id.*

9 *See* Smolla, *supra* note 7, at 783 (observing that professionals, as members of the intelligentsia, live for the "life of the mind" and naturally harbor disdain for expression, the sole purpose of which is to sell goods and services); *cf.* Judith L. Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine*, 13 HASTINGS CONST. L.Q. 487, 508 (1986) (explaining that professionals regarded solicitation as an even greater threat to professional dignity than advertising because it involved direct contact with potential clients).

10 Miragliotta, *supra* note 2, at 598; *see also* Stephanie W. Kanwit, *Attorneys' Responsibilities to Ensure that Professional Advertising is Truthful and Nondeceptive*, 77 ILL. B.J. 414, 414 (1989) (observing that the application of the commercial speech doctrine to attorneys creates new opportunities for lawyers to advertise their services).

11 *See* Eberle, *supra* note 2, at 503 (arguing that solicitation can be both harmful and beneficial). Professor Eberle rationalized that while solicitation stunts the information-gathering process, thereby reducing the listener's ability to engage in a rational thought process, it also opens an additional path for the exchange of information. *Id.*

12 113 S. Ct. 1792 (1993).

13 *Id.* at 1802. The First Amendment implications at stake in *Edenfield* were not lost on scholars when the Supreme Court decided to hear the case. *See* John C. Coots, Note, *A Missed Opportunity to Definitively Apply the* Central Hudson *Test*: Fane v. Eden-

notion that all professionals could be subject to a per se ban on solicitation.[14] Instead, the Court held that the validity of such bans would be determined by the context of the particular circumstances and the characteristics of both the affected professional and the prospective client.[15]

Scott Fane, a certified public accountant licensed by the State of Florida, endeavored to create an accounting practice in that state.[16] In furtherance of that goal, Fane planned to establish a client base by making unsolicited telephone calls to business executives.[17] During the ensuing conversation, Fane would attempt to arrange for an in-person meeting with the executive to discuss the scope of Fane's practice.[18] Florida, however, broadly proscribed uninvited solicitation of non-clients by accountants.[19] Accordingly, Florida's State Board of Accountancy (Board), charged with en-

---

field, 26 CREIGHTON L. REV. 1155, 1190-91 (1993) (fearing that the Eleventh Circuit's decision—that a ban on in-person solicitation by certified public accountants violated the First Amendment—would be jeopardized on appeal to the Supreme Court because of the circuit court's cursory application of the *Central Hudson* test); *see also* Brian J. King, Note, *Ambulance-Chasing Accountants?: In-Person Solicitation And The Professions*, 34 B.C. L. REV. 561, 563 (1993) (urging the Court to adhere to the balancing test of weighing the cost and benefit of commercial advertising by professionals when it hears *Fane*).

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

15 *Id.* The Supreme Court distinguished between the functions of certified public accountants (CPAs) and other professionals, notably attorneys. *Id.* at 1802-03. The Court further recognized a contextual difference in the solicitation of businesspeople as distinct from private individuals. *Id.* at 1803. CPAs are licensed by the state in which they practice and trained to conduct audits of the financial records of business entities and individuals. WALTER G. KELL & RICHARD E. ZIEGLER, MODERN AUDITING 7 (2d ed. 1983). Although specific requirements vary from state to state, general licensing requirements include passing a written examination and gaining practical experience in the accounting profession. *Id.*

16 Fane v. Edenfield, 945 F.2d 1514, 1516 (11th Cir. 1991), *aff'd*, 113. S. Ct. 1792 (1993); *Edenfield*, 113 S. Ct. at 1796. In addition to being licensed in Florida, Fane was also a licensed CPA in New Jersey. *Fane*, 945 F.2d at 1516. Fane had established his own accounting practice in New Jersey before relocating to Florida in 1985. *Edenfield*, 113 S. Ct. at 1796.

17 *Id.* Fane had used this method of solicitation in New Jersey, where it was legal for him to do so. *Id.* The law in New Jersey that regulates CPAs is silent on the issue of personal solicitation. *See* N.J. STAT. ANN. § 45:2B-23 (West 1991) (defining unlawful acts for public accountants).

18 *Edenfield*, 113 S. Ct. at 1796.

19 *Fane*, 945 F.2d at 1516. Florida's Administrative Code provides that a licensed accountant:

> [S]hall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . 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.

FLA. ADMIN. CODE ANN. r. 61H1-24.002(2)(c) (1992). The code defines the restricted activity as "any communication which directly or implicitly requests an immediate oral

forcing the proscription on accountant solicitation, prevented Fane from executing his plan.[20]

In response to the Board's enforcement of the statute prohibiting accountant solicitation, Fane filed suit in the United States District Court for the Northern District of Florida requesting declaratory and injunctive relief.[21] Fane alleged that the total ban on solicitation violated his constitutional guarantee of free speech.[22] The Board justified the sweeping ban by asserting the state's substantial interest in protecting the public by preserving accountant independence.[23] The district court applied the rationale used by the United States Supreme Court in *Central Hudson Gas and Electric*

---

response from the recipient" and stipulates that "telephone calls to a specific potential client are prohibited." FLA. ADMIN. CODE ANN. r. 61H1-24.002(3) (1992).

20 *Fane*, 945 F.2d at 1516.

21 *Edenfield*, 113 S. Ct. at 1797. Fred H. Edenfield and others were named in the lawsuit in their official capacities as members of the Board of Accountancy. *Fane*, 945 F.2d at 1514, 1516.

22 *Id.* at 1516.

23 *Edenfield*, 113 S. Ct. at 1799-1800. In arguing for the preservation of accountant independence, the Board maintained that the attest function, performed exclusively by CPAs, requires "integrity, independence and objectivity" and that allowing an accountant to solicit new clients could jeopardize those traits. *Fane*, 945 F.2d at 1517; *see also id.* at 1517 n.6 (explaining that the attest function refers to the rendering of an opinion by a public accountant on the financial position of a client based on either a review or audit of a client's financial statements).

Accountants have assigned a special meaning to the word "independence." *See* KOHLER'S DICTIONARY FOR ACCOUNTANTS 552 (6th ed. 1990) (defining independence as "[t]he property of a relation between the accountant and his client (or superior) such that the accountant's findings and/or reports will be influenced and assembled in accord with the rules and principles of his professional discipline"). The American Institute of Certified Public Accountants (AICPA) promulgated rules dealing with actions that would impair accountant independence. *See* AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, CODE OF PROFESSIONAL CONDUCT ET 101.02 (1992) (listing those actions that will impair accountant independence). With particularity, the Code states that accountant independence is impaired if:

> A. During the period of professional engagement or at the time of expressing an opinion, a member [of the AICPA] or a member's firm
>
> 1. Had or was committed to acquire any direct or material indirect financial interest in the enterprise.
> 2. Was a trustee of any trust or executor or administrator of any estate if such trust or estate had or was committed to acquire any direct or material indirect financial interest in the enterprise.
> 3. Had any joint, closely held business investment with the enterprise or with any officer, director, or principal stockholders thereof that was material in relation to the member's net worth or to the net worth of the member's firm.
> 4. Had any loan to or from the enterprise of any officer, director, or principal stockholder of the enterprise . . . .
>
> B. During the period covered by the financial statements, during the

Corp. v. Public Service Commission of New York[24] to the Board's restriction on Fane's speech.[25] The court determined that the blanket restriction of commercial speech violated the First Amendment because the ban did not directly serve the state's asserted interest and, in addition, was more extensive than necessary to serve that interest.[26] Accordingly, the district court granted Fane's request for declaratory relief and issued a broad injunction against the enforcement of Florida's ban on uninvited solicitation of non-clients by accountants.[27]

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the lower court's ruling,[28] noting that blanket restrictions on commercial speech are generally disfavored.[29] The court relied on the *Central Hudson* test to determine that Fane's proposed solicitation was neither false, misleading, nor related to an illegal activity.[30] The court submitted that although the asserted state interest in regulating the accounting profession was substantial, Florida had less restrictive avenues available to serve

---

> period of the professional engagement, or at the time of expressing an opinion, a member or a member's firm
> 1. Was connected with the enterprise as a promoter, underwriter, or voting trustee, as a director or officer, or in any capacity equivalent to that of a member of management or of an employee.
> 2. Was a trustee for any pension or profit-sharing trust of the enterprise.

Id.

[24] 447 U.S. 557, 566 (1980). In *Central Hudson*, the Court formulated a four-part test to be applied in commercial speech cases. *Id.* The Court articulated:

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

Id. See *infra* notes 75-80 and accompanying text for a detailed discussion of *Central Hudson.*

[25] *Fane*, 945 F.2d at 1517.

[26] *Id.* at 1517-18.

[27] Fane v. Edenfield, No. 88-40264, slip op. at 12-13 (N.D. Fla. Sept. 13, 1990); *Edenfield*, 113 S. Ct. at 1797.

[28] *Fane*, 945 F.2d at 1520.

[29] *Id.* at 1517 (citing Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 476 (1988)). In *Shapero*, the Supreme Court held that states could no longer prohibit profit motivated attorneys from soliciting potential clients with truthful, non-deceptive letters pertaining to particularized legal problems. *Shapero*, 486 U.S. at 479. The *Fane* court also noted that the mere potential for random harm did not justify a blanket ban of commercial speech. *Fane*, 945 F.2d at 1517 (citing *Shapero*, 486 U.S. at 476).

[30] *Id.* at 1517-19; *see supra* note 24 (reciting the *Central Hudson* test).

that interest.[31] Moreover, the court rejected the Board's alternative argument that all professionals, including accountants, could be prophylactically banned from engaging in personal solicitation.[32] Affirming the lower court's ruling, the Eleventh Circuit distinguished the ban on accountant solicitation from similarly restrictive, but lawful, bans on solicitation involving other professions.[33]

The United States Supreme Court granted certiorari[34] to determine whether Florida's proscription of in-person solicitation by accountants violated the First Amendment's guarantee of free speech, given the Supreme Court's prior approval of a similar ban

---

[31] *Fane*, 945 F.2d at 1518-19. The court asserted that Florida has laws in place to regulate accountants and alleviate the harms expressed by the Board of Accountancy without need to resort to a total ban on solicitation. *Id.* For instance, accountants are prohibited from the "[p]erformance of any fraudulent act while holding a license to practice public accounting." FLA. STAT. ANN. § 473.323(1)(k) (West 1991). Moreover, accountants are proscribed from giving "an opinion on the financial statements of an enterprise unless he and his firm are independent with respect to such enterprise." FLA. STAT. ANN. § 473.315(1) (West 1991).

The Court also repudiated the Board's alternative assertion that the ban on solicitation was a reasonable restriction on the time, place, or manner of accountants' right to free speech. *Fane*, 945 F.2d at 1519. The court of appeals noted that while content-based restrictions are generally unconstitutional, the Supreme Court has held that reasonable, content-neutral restrictions on the time, place, and manner of speech survive First Amendment scrutiny. *Id.* (citations omitted); *see, e.g.*, Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 48-49 (1983) (holding that public school teachers' mailboxes do not constitute a public forum and that selective access to outside organizations may be engaged in by the school district); *see also* Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46 (1986) (finding that a city's zoning restriction on the location of an adult movie theater did not constitute a content-based time, place, or manner restriction). The *Fane* court determined that Florida's total proscription of accountant solicitation went further than a reasonable time, place, or manner restriction. *Fane*, 945 F.2d at 1519. Specifically, the majority found that the ban was a focussed proscription of a particular category of expression. *Id.*

[32] *Id.* at 1520. The Board's rationale for making such an argument was based on the actual and perceived role of professionals in society and the state's particular interest in regulating them. *Id.* at 1518-19.

[33] *Id.* at 1519-20. The *Fane* court distinguished the present facts from those at issue in *Ohralik v. Ohio State Bar Ass'n* and *National Funeral Services, Inc. v. Rockefeller*. *Id.* (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 468 (1978); National Funeral Servs., Inc. v. Rockefeller, 870 F.2d 136, 146 (4th Cir.), *cert. denied*, 493 U.S. 966 (1989)). In *Ohralik*, the Supreme Court upheld a ban on personal solicitation of accident victims by lawyers. *Ohralik*, 436 U.S. at 468. In *National Funeral*, the Fourth Circuit upheld a ban on personal solicitation by morticians selling pre-need funeral contracts. *National Funeral*, 870 F.2d 136, 140, 146 (4th Cir.), *cert. denied*, 493 U.S. 966 (1989). Confining its analysis to the funeral services profession, the *National Funeral* court considered the potential harm relative to the solicitation of potential clients of pre-need funeral services. *Id.* at 142-45. The *Fane* court determined that a ban on accountant solicitation, unlike the bans upheld in *Ohralik* and *National Funeral*, was not necessary. *Fane*, 945 F.2d at 1520 (citations omitted).

[34] Edenfield v. Fane, 112 S. Ct. 2272 (1992).

affecting attorney solicitation.[35] The majority affirmed the Eleventh Circuit, rejecting the Board's argument that all professions could be subject to bans on personal solicitation without distinction.[36] Whether a total ban on commercial speech engaged in by professionals satisfies constitutional requirements, the Court held, will depend upon the context of each case and the characteristics of both the professional and the targeted client.[37] Applying the *Central Hudson* analysis, the Court determined that, in this case, the blanket prohibition on accountant solicitation did not directly further the state's substantial interests.[38]

The commercial speech doctrine, applied by the Court in *Edenfield*, is a relatively new constitutional creation[39] that has led to much controversy among American legal commentators and scholars.[40] There is strong evidence to suggest, however, that earlier

---

35 Edenfield v. Fane, 113 S. Ct. 1792, 1796 (1993). The Court had previously upheld a ban on in-person attorney solicitation of accident victims in *Ohralik v. Ohio State Bar Ass'n*. *See Ohralik*, 436 U.S. at 468. See *infra* notes 68-73 and accompanying text for further discussion of *Ohralik*.

36 *Edenfield*, 113 S. Ct. at 1802, 1804.

37 *Id.* at 1802.

38 *Id.* at 1800.

39 *See* Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 756 (1993) (proposing that familiarity with the term "commercial speech" is not the result of a long history of use by the courts, and expressing that "it comes as a shock to discover that the earliest use of the phrase in any published opinion of any court was only two decades ago"); *see also* Business Executives' Move for Vietnam Peace v. F.C.C., 450 F.2d 642, 658 n.38 (D.C. Cir. 1971) (using the term "commercial speech" for the first time in holding that such expression fails to communicate ideas and therefore falls outside of the ambit of the First Amendment), *rev'd sub nom.* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); *cf.* Maute, *supra* note 9, at 494 (arguing that because of the recent promulgation of the commercial speech doctrine, the Supreme Court is still in the process of formulating the doctrine's parameters).

40 *Compare* HUMAN LIBERTY, *supra* note 1, at 196 (advocating "complete denial of [F]irst [A]mendment protection for commercial speech" because commercial speech is "logically and intrinsically connected to the structurally enforced requirements of the market" and not to "anyone's substantive values or personal wishes") *and* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27-28 (1971) (arguing that the First Amendment is appropriately applied only to political speech relating to the government's actions, policy, or personnel and not to expressions concerning science, education, commerce, or literature) *and* Posner, *supra* note 3, at 40 (maintaining that it is paradoxical to afford First Amendment protection to the advertising materials of a product when the product itself is subject to extensive government regulation) *with* Eberle, *supra* note 2, at 415, 475-76 (arguing the necessity of a pragmatic approach in applying First Amendment protection to commercial speech by proposing varying standards that would direct government regulation, depending upon whether the commercial speech at issue is truthful, deceptive, or a mixture of both) *and* Redish, *supra* note 1, at 630 (promoting the extension of First Amendment protection to commercial speech because the dissemination of information, whether or not profit-motivated, furthers the First Amendment value of self-

American courts may have approached advertising and solicitation not as speech issues, but as facets of commerce.[41] Treating commercial expression as a part of commerce allowed the government to regulate such speech.[42] Thus, in the early case of *Valentine v.*

---

realization) *and* Smolla, *supra* note 7, at 780 (promoting the appropriateness of granting First Amendment protection to commercial speech by contending that commercial speech should be afforded full First Amendment protection absent a reason for otherwise disqualifying it from such protection). *See also* Collins & Skover, *supra* note 7, at 745-46 (proposing that commercial speech advances no value worthy of First Amendment protection but concluding that the Court's application of the First Amendment to commercial speech was an inevitable result of rampant consumerism in America).

41 *See* Kozinski & Banner, *supra* note 39, at 756-57 (noting that no reported case prior to *Valentine v. Chrestensen* considered advertising or soliciting to be potential First Amendment speech). Professors Kozinski and Banner related that in *Valentine*, the Court treated the speech at issue as "advertising" rather than "commercial speech." *Id.* at 757 (citing Valentine v. Chrestensen, 316 U.S. 52, 54 (1942)). The authors hypothesized that it was the juxtaposition of the word "speech" with commercial matters that eventually led the Court to grant First Amendment protection to commercial speech in *Virginia Pharmacy*. *Id.* at 755, 757. Specifically, the professors contended that the change in the conception of "advertising" as a facet of business to "commercial speech," protected by the First Amendment, indicates a subtle deviation in the way lawyers and judges considered modern advertising. *Id.* at 757. The authors lent further support to their thesis by pointing out that in a case pre-dating *Valentine*, the Court referred to "soliciting and canvassing" without considering the acts in question to be a form of speech. *Id.* (citing Schneider v. New Jersey, 308 U.S. 147, 165 (1939)). Prior to 1931, the First Amendment had not been definitively applied to the states where most regulations that might have raised a First Amendment issue were found. *Id.* at 759-60 (citation omitted). In 1931, however, the Court decided *Stromberg v. California*, asserting clearly for the first time that the First Amendment was incorporated to the states by the Fourteenth Amendment. *Id.* at 759-60 (citing Stromberg v. California, 283 U.S. 359, 368 (1931) (citations omitted)). Prior to *Valentine*, the Court was confronted with at least five cases challenging state regulation of advertising. *Id.* at 763. In each, the challenge to the law was brought on grounds other than free speech. *Id.* at 764; *see* Packer Corp. v. Utah, 285 U.S. 105, 108, 110-12 (1932) (ruling that a statute prohibiting cigarette advertising on billboards and streetcars did not violate the Equal Protection Clause by allowing the same advertising in newspapers, did not violate the substantive due process right to property, and, finally, did not place an impermissible burden on interstate commerce in violation of the Commerce Clause); St. Louis Poster Advertising Co. v. City of St. Louis, 249 U.S. 269, 272, 274-75 (1919) (reiterating that an ordinance regulating the size of billboards did not violate the advertiser's Fourteenth Amendment rights to liberty and property); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 528-29, 531 (1917) (holding that an ordinance regulating the maintenance and control of billboards did not violate the advertiser's substantive due process rights of liberty or property); Fifth Ave. Coach Co. v. City of N.Y., 221 U.S. 467, 476-77, 483-84 (1911) (holding that a local ordinance proscribing advertising on the sides of coaches did not violate the advertiser's Fourteenth Amendment rights to property and equal protection); Halter v. Nebraska, 205 U.S. 34, 39, 45-46 (1907) (holding that a statute barring the use of the American flag on beer bottles did not deny the bottler's Fourteenth Amendment liberty interest).

42 Kozinski & Banner, *supra* note 39, at 758. The Commerce Clause gives the government broad authority to regulate commerce, providing that "Congress shall have

Chrestensen,[43] the United States Supreme Court unanimously upheld a New York City ordinance proscribing the dissemination of advertising handbills as an entirely proper governmental regulation of commercial advertising.[44] The Court rejected Chrestensen's First Amendment claim, revealing the prevailing philosophy of the time: commercial speech was not within the ambit of First Amendment protection.[45]

After *Valentine*, however, the prevailing presumption that the First Amendment was inapposite to commercial speech began to wither.[46] The Supreme Court, although not prepared to announce First Amendment protections for commercial speech or its subset, professional solicitation, reached an analogous result in *NAACP v. Button*.[47] In *Button*, the Court considered Virginia's application

---

Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

43 316 U.S. 52 (1942). *See generally* Kozinski & Banner, *supra* note 39, at 756-59 (discussing the Court's characterization of advertising as non-speech at the time of the *Valentine* decision). See *supra* note 41 for a further discussion of Kozinski & Banner's hypothesis regarding the Court's holding in *Valentine*.

44 *Valentine*, 316 U.S. at 53-54. Chrestensen owned a submarine that he brought to New York City for the purpose of charging fees from curious spectators. *Id.* at 52-53. In furtherance of that design, Chrestensen proceeded to print advertising handbills until he was warned by the Police Commissioner, Valentine, that the disbursement of such advertisements would violate a city ordinance. *Id.* at 53. The Court quoted the New York Sanitation Code, which provided in pertinent part:

> No Person shall throw, cast or distribute, or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever . . . . This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter.

Id. at 53 & n.1 (citation omitted). Valentine also told Chrestensen, however, that handbills devoted to "'information or a public protest'" were not within the purview of the ordinance. *Id.* at 53. Armed with this advice, Chrestensen printed two-sided circulars, one side containing a protest to the City's refusal to allow him to dock his submarine at city facilities and the other containing an advertisement for the public to visit his ship. *Id.* Chrestensen's arrest followed. *Id.*

45 *Id.* at 54; *see* Kozinski & Banner, *supra* note 39, at 758. Kozinski and Banner postulated that in 1942, the *Valentine* decision "was easy not because the Court thought of commercial speech as a category of speech deserving no protection, but because the Court didn't treat the case as involving speech at all." *Id.*

46 *See* Cammarano v. United States, 358 U.S. 498, 513-14 (1959) (Douglas, J., concurring) (declaring that the ruling in *Valentine* was "casual, almost offhand," adding that "it has not survived reflection"). Justice Douglas further declared that the actor's intent to make a profit was irrelevant to whether speech could come under the protection of the First Amendment. *Id.* at 514 (Douglas, J., concurring).

47 371 U.S. 415, 444-45 (1963); *see* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 897 (1991) (arguing that the Court's holding in *Button*—that a statute prohibiting attorney solicitation was unconstitutionally overbroad—would have been inappropriate unless the Court had found the chargeable conduct to have been arguably constitutional). Professor Munneke remarked that *Button* gave

and enforcement of an anti-solicitation law to proscribe certain methods engaged in by NAACP[48] attorneys in their solicitation of minorities as potential plaintiffs for civil rights litigation.[49] The Court determined that the NAACP and its lawyers did not engage in commercial solicitation, forbidden by Virginia's law, but rather in political speech.[50] Consequently, the Court held that Virginia's restrictions on the methods used by the NAACP's attorneys violated the rights to free speech and association.[51] Further, the Court rejected Virginia's contention that its restriction on attorney solicitation was justified by a substantial interest in regulating the legal profession.[52] Finding no pecuniary interest on the part of the NAACP attorneys, or any other strong potential for a conflict of interest, the Court explained that Virginia had not even established a rational basis to support its restriction of the attorneys' solicitation efforts.[53] As a result, the Court preserved the NAACP attorneys' freedom of speech without deciding whether commercial solicitation by professionals should receive First Amendment

---

lawyers the right to associate with potential clients in an effort to create and employ legal service delivery systems that would effectively serve the needs of the potential clients. Gary A. Munneke, *Dances With Nonlawyers: A New Perspective On Law Firm Diversification*, 61 FORDHAM L. REV. 559, 604 (1992).

48 The NAACP, National Association for the Advancement of Colored People, is a non-profit organization whose "basic aims and purposes . . . are to secure the elimination of all racial barriers which deprive Negro citizens of the privileges and burdens of equal citizenship rights in the United States." *Button*, 371 U.S. at 419.

49 *Id.* at 419-22. The controversy in *Button* resulted from a Virginia law that provided "[i]t shall be unlawful for any person, corporation, partnership, or association to act as a runner or capper . . . to solicit any business for an attorney at law." *Id.* at 423 (citation omitted). The Virginia court held the NAACP and its lawyers to be in violation of the regulation in question due to their practice of attending community meetings and recommending that the audience retain them for matters pertaining to civil rights litigation, such as school desegregation. *Id.* at 417-18, 421.

50 *Id.* at 429. The Court considered the First Amendment's application to the NAACP's attorneys' practice of soliciting civil rights clients, deliberating whether solicitation falls outside of the First Amendment's protection of speech. *Id.* The Court avoided resolving this contention, however, concluding that the state's labelling of the NAACP's attorneys' actions as solicitation did not automatically remove the attorneys' actions from First Amendment protection. *Id.* Rather, the Court concluded that the NAACP had engaged in constitutionally protected political speech. *Id.* In dictum, the Court hypothesized that theoretical discourse without action did not represent the outer limit of First Amendment protected speech. *Id.* To the contrary, the Court postulated that the First Amendment protects advocacy of lawful goals from government interference. *Id.*

51 *Id.* at 437. The Court arrived at its conclusion by incorporating the First Amendment's rights of freedom of speech and association to Virginia through the Fourteenth Amendment. *Id.*

52 *Id.* at 438-44.

53 *Id.* at 442-43.

protection.[54]

The ultimate issue over whether commercial speech should receive First Amendment protection was conclusively decided in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.*[55] In *Virginia Pharmacy*, the United States Supreme Court formulated the modern commercial speech doctrine by decisively ruling that the First Amendment protects commercial speech.[56] Specifically, the Court considered a Virginia statute that forbade pharmacists from advertising the prices of prescription drugs.[57]

The Supreme Court rejected the board's arguments that the ban would lead to decreased professionalism by licensed pharmacists,[58] holding instead that the First Amendment's preference for

---

54 *Id.* at 429.

55 425 U.S. 748, 770 (1976); *see* Eberle, *supra* note 2, at 440-41 (labeling *Virginia Pharmacy* the "seminal" case in the formation of the commercial speech doctrine).

56 *Virginia Pharmacy*, 425 U.S. at 770. The *Virginia Pharmacy* Court recognized that "the notion of unprotected 'commercial speech' all but passed from the scene" in the wake of *Bigelow v. Virginia*, decided by the Court in the previous term. *Id.* at 759 (citing Bigelow v. Virginia, 421 U.S. 809, 829 (1975)). In *Bigelow*, the Court reversed the conviction of a Virginia newspaper editor who had allowed the publication of advertising announcing the availability of abortion services in New York City. *Bigelow*, 421 U.S. at 811-14, 829. In reversing the editor's conviction, the *Bigelow* Court reflected that the purpose of the First Amendment is to foster the dissemination of opinions and information. *Id.* at 829. Cognizant that the subject matter of *Bigelow*, which bordered on a political issue, may have left "some fragment of hope" for the continued exclusion of commercial speech from First Amendment protection, the Court resolved to clarify the issue. *Virginia Pharmacy*, 425 U.S. at 760.

57 *Id.* at 749-50. The challenged law provided in pertinent part:

> Any pharmacist shall be considered guilty of unprofessional conduct who . . . publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.

VA. CODE ANN. § 54-524.35 (Michie 1974).

The controversy arose when consumers challenged the statute, believing they would benefit from the competition that would result from the publication of prescription drug prices. *Virginia Pharmacy*, 425 U.S. at 753. Stipulated facts at trial revealed that drug prices had a great deal of variance. *Id.* at 754 n.11. The parties further stipulated that in some cities prices for the same drug could vary by as much as 1200%. *Id.*

58 *Id.* at 766, 770. Virginia defended its statute, claiming that removal of the ban would lead to decreased professionalism by licensed pharmacists which, in turn, could lead to consumer harm. *Id.* at 766-67. The Virginia Board of Pharmacy feared that increased competition between pharmacists would have several negative effects on both the profession and on consumers. *Id.* at 767-68. For example, the board postulated, as customers abandoned their regular pharmacists in search of the lowest prices, pharmacists would lose their ability to monitor their customers' health problems. *Id.* at 768. The board contended, in addition, that lifting the ban on advertising would lower the quality of customer service as conscientious pharmacists would be forced to sacrifice the availability of professional services in the handling,

the flow of information extended generally to commercial advertising.[59] The Court, while expressly granting First Amendment protection to commercial speech, nevertheless declined to foreclose limitations on that protection.[60] As a final caveat, the Supreme Court constrained a uniform application of the commercial speech doctrine to professionals, resolving instead that the constitutionality of restrictions on professional commercial speech would be determined by the characteristics of the affected profession.[61]

Scarcely a year later, the Supreme Court confronted the application of the First Amendment to attorney advertising in *Bates v. State Bar of Arizona*.[62] The *Bates* Court contemplated whether lawyers should be allowed to advertise their fees for standard services with First Amendment impunity.[63] Arizona's highest court cen-

---

compounding, and dispensing of prescriptions. *Id.* at 767-68. Finally, the board argued that advertising prices would reduce the public image of a pharmacist from a "skilled and specialized craftsman" to "that of a mere retailer." *Id.* at 768. Such a result, the board maintained, would impair the profession from attracting new talent and, further, would weaken the professional practices of current members. *Id.* The Court labelled the board's arguments "paternalistic," asserting that the State's method of protecting its citizens was to keep them in ignorance. *Id.* at 769, 770; *see* Eberle, *supra* note 2, at 455 (maintaining that public ignorance does not promote First Amendment values, such as the furtherance of knowledge, veracity, and individualism).

59 *Virginia Pharmacy*, 425 U.S. at 770. The Court pointed out that while there are dangers both in suppressing and in misusing information that is freely available, the First Amendment prefers the free flow of information to the alternative. *Id.*

60 *Id.* at 771-72 & n.24. The Court qualified the protection given to commercial speech, stating in a footnote that there are "commonsense differences between speech that does 'no more than propose a commercial transaction' . . . and other varieties." *Id.* at 772 n.24 (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)).

61 *Id.* at 773 & n.25. The Court noted that there are historical and functional differences between professions, necessitating varying considerations and analyses in the application of First Amendment protections. *Id.* at 773 n.25. The Court specifically mentioned physicians and lawyers as candidates for lower First Amendment protection because of the variety of services they offer and the increased potential for confusion and deception that could arise from advertising, if such advertising was permitted. *Id.*

62 433 U.S. 350, 353 (1977). *Bates* is considered to be the "single most important case" in the area of attorney advertising. Gregg R. Brown, Comment, *Advertising in the "Learned Professions": The Case for Price Comparisons and Testimonials*, 11 S. ILL. U. L.J. 1205, 1217-18 (1987). As a result of the *Bates* decision, regulations affecting attorney advertising took two forms. Miragliotta, *supra* note 2, at 601. The "narrow" reading of *Bates* led some states to adopt the Model Code of Professional Responsibility, which includes a "'laundry list'" of the types of information allowed in attorney advertising. *Id.* at 601-02. Alternatively, a "broad" reading of *Bates* led other states to adopt the Model Rules of Professional Conduct, which merely proscribe false or deceptive advertising. *Id.* at 601; *see also* Maute, *supra* note 9, at 500 (describing the controversy that erupted in the wake of *Bates* in the various state bar associations).

63 *Bates*, 433 U.S. at 367-68.

sured two attorneys for violating state law by placing advertisements concerning their firm in a local newspaper.[64] The United States Supreme Court rejected the state bar association's argument that lifting the ban on attorney advertising would result in harm to both the legal profession and the public.[65] Instead, the Court concluded that except where actual or inherent harm is involved, the First Amendment prevents states from enforcing blanket bans on attorney advertising.[66] The *Bates* Court recognized, however, the difficulty in identifying, in every situation, speech that is inherently harmful, but suggested that in-person solicitation might belong in that category of unprotected expression.[67]

---

[64] *Id.* at 358. The order of censure affected two law partners, John Bates and Van O'Steen. *See In re* Bates, 555 P.2d 640, 646 (Ariz. 1976). The disciplinary rule provided in pertinent part that "[a] lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper . . . advertisements." *Bates*, 433 U.S. at 355 (citation omitted).

[65] *Id.* at 368. The state bar association asserted that lifting the ban on advertising would negatively affect the public's perception of the importance of the legal profession, affect attorneys' own sense of professional dignity, and result in a loss of trust by clients for their attorney. *Id.* The bar also argued that lifting the ban on attorney advertising would lead to a public perception of lawyers as profit-oriented. *Id.* The Court rejected that argument, referring to other professionals, namely bankers and engineers, who advertise without a loss of dignity. *Id.* at 369-70.

The state bar association further contended that legal advertising was inherently misleading. *Id.* at 372. The bar's basis for this contention was that attorney services are specifically honed to the particular client and case, making an accurate quote of a standard fee impossible. *Id.* In addition, the board argued, a lay client cannot discern or monitor what services the client's case may require. *Id.* Finally, the board posited, attorney advertising would focus on extraneous factors brought out in advertisements rather than on the attorney's skills. *Id.* The Court dismissed each of these assertions as well, declaring that uncontested actions were fungible enough to justify a single fee quote. *Id.* at 372-73.

In addition, the Court summarily rejected as "dubious at best" the bar's arguments that advertising would result in increased legal fees to pay for advertising. *Id.* at 377. Likewise, the Court found no merit in the state bar association's concerns over clients receiving a standardized package of legal services not attuned to the client's needs. *Id.* at 378. The Court hypothesized that attorneys who produce shoddy work will continue to do so regardless of advertising rules. *Id.* Finally, the Court dismissed the state bar association's concerns over the difficulty of policing attorney advertising. *Id.* at 379. Instead, the Court chose to believe that most lawyers would "abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system." *Id.*

[66] *Id.* at 383. Some commentators argue that although other types of speech, such as political and cultural expression, should be protected regardless of their veracity, the purpose of granting First Amendment protection to commercial speech is to provide reliable information about products and services to consumers. *See, e.g.*, Collins & Skover, *supra* note 7, at 737, 739-40 (arguing that commercial information, not image, should receive First Amendment protection). See *supra* note 1 for a discussion of the tests used by the Court to determine whether First Amendment protection extends to a particular expression.

[67] *Bates*, 433 U.S. at 384. While the Court was unable to give a definitive answer as

Although the *Bates* Court first hinted that in-person solicitation by attorneys might fall outside of the First Amendment's protection of commercial expressions, the Supreme Court formally announced this exception to the commercial speech doctrine in *Ohralik v. Ohio State Bar Ass'n.*[68] In *Ohralik*, the Supreme Court considered whether the enforcement of a regulation[69] banning attorney solicitation was constitutional in light of the Court's recent expansion of the First Amendment to include commercial speech.[70] Affirming the suspension of an attorney convicted of violating Ohio's Administrative Code, the Court declared that the rule did not infringe upon the First Amendment.[71] In reaching its decision, the Court weighed the competing interests and concluded that society's interest in preventing a lawyer's solicitation of accident victims outweighed Ohralik's interest in engaging in protected commercial speech.[72] Furthermore, the Court agreed with the state's justification for the prophylactic ban on attorney solicitation, noting the compelling nature of the state's interest in preventing potentially harmful activity.[73]

---

to what constitutes misleading commercial speech by attorneys, the majority stated that non-verifiable claims of attorney quality or questionable communications made during an in-person solicitation by the attorney might justify restrictions. *Id.*; *see also* Eberle, *supra* note 2, at 470 (positing that "[c]ommercial speech can be verified").

68 436 U.S. 447 (1978). At least one commentator disagreed with the Court's holding in *Ohralik*, describing the decision as a shift from the clear application of the First Amendment in *Bates* to an ad hoc approach. Maute, *supra* note 9, at 510 & n.140.

69 The law, DR 2-103 of the Rules Governing the Courts of Ohio, 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 . . . ." RULES GOVERNING THE COURTS OF OHIO § DR 2-103(A) (1970). Additionally, section DR 2-104(A) adds: "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 . . . ." RULES GOVERNING THE COURTS OF OHIO § DR 2-104(A) (1970).

70 *Ohralik*, 436 U.S. at 454. Ohralik, an attorney, learned of an automobile accident and travelled to the hospital where the teenage victims had been taken. *Id.* at 449. Although Ohralik was able to meet only one of the two victims at the hospital, he eventually met with both and convinced them to retain him for personal injury claims. *Id.* at 450-51. Ohralik filed breach of contract actions against one of the teenagers after the teen discharged him and refused to pay Ohralik's legal fees. *Id.* at 452 & n.7. Both victims filed grievance complaints against Ohralik with the county bar association. *Id.* at 452. The case eventually reached the state supreme court where Ohralik was suspended indefinitely from the practice of law in Ohio for violating Ohio's ban on attorney solicitation. *Id.* at 453-54.

71 *Id.* at 468.

72 *Id.* at 457-68; *see also* Eberle, *supra* note 2, at 502 (arguing that in *Ohralik*, the government's interests were of such a compelling nature that the Court subordinated the usual favoritism of free speech over government regulation).

73 *Ohralik*, 436 U.S. at 464-67. The *Ohralik* Court submitted that the state law banning attorney solicitation was especially justified due to the inherently coercive situa-

The Supreme Court's decisions from *Virginia Pharmacy* through *Ohralik* failed to define precisely the scope of the Court's protection of commercial speech.[74] When the Court considered *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*,[75] however, the Justices explicated the specific factors to be considered in determining whether a particular expression of commercial speech would receive First Amendment protection.[76]

In *Central Hudson*, the Court was presented with a challenge by Central Hudson Gas & Electric Corporation (Central Hudson) to a regulation imposed by the Public Service Commission of the State of New York (Commission) prohibiting advertising by energy utilities.[77] The Court recognized the particularly substantial interest asserted by New York in restricting the utility's encouragement of energy consumption during the "energy crisis" of the mid-1970s.[78] Nevertheless, the Court found the total restriction on utility adver-

---

tion of "a professional trained in the art of persuasion" soliciting an "unsophisticated, injured, or distressed lay person." *Id.* at 465. The mainstream American legal community had long rejected solicitation as a method of attracting clients partly because of the inherent harm involved. Maute, *supra* note 9, at 508.

74 *See The Supreme Court, 1979 Term—Freedom of Speech, Press and Association, Scope of Protection for Commercial Speech*: Central Hudson Gas & Electric Corp. v. Public Service Commission, 94 HARV. L. REV. 159, 159 (1980) [hereinafter *Scope of Protection*].

75 447 U.S. 557 (1980).

76 *Scope of Protection*, *supra* note 74, at 159 (citing *Central Hudson*, 447 U.S. at 566). The *Central Hudson* Court announced four specific factors to be weighed in determining whether the First Amendment applies to a particular commercial expression. *Id.* First, the Court mandated that the commercial speech in question be truthful and concern a legal activity. *Central Hudson*, 447 U.S. at 566. Second, the Court required that the government's interest be substantial if the restriction of commercial speech is sought. *Id.* Third, the *Central Hudson* majority announced that the government's restriction of speech must directly advance the government's interest. *Id.* Finally, the Court required that the restriction be no more extensive than necessary. *Id.* The Court's balancing test in *Central Hudson* can be compared to the Court's traditional approach to weighing time, place, or manner restrictions on other types of speech. *See, e.g.*, Elisabeth A. Langworthy, Note, *Time, Place, Or Manner Restrictions On Commercial Speech*, 52 GEO. WASH. L. REV. 127, 128-29 (1984) (arguing that the similarity in the approaches taken by the Court in speech restriction cases is not surprising, because government interests in restricting speech—whether by commercial content or by time, place, or manner restrictions—are unrelated to the unambiguous language of the First Amendment).

77 *Central Hudson*, 447 U.S. at 558-61.

78 *Id.* at 568. The regulation was propounded during the period of time in the mid-1970s which was characterized by the "energy crisis." *Id.* at 559, 572 n.15; *see Scope of Protection*, *supra* note 74, at 164 (referring to the "severity of the energy crisis" at the time of the Commission's restriction on utility advertising). The *Central Hudson* Court labeled the connection between the advertising prohibition and the reduction in off-peak power usage "highly speculative." *Central Hudson*, 447 U.S. at 569. Based on the lack of a strong possibility for the ban on advertising to affect power consumption, the Court declined to find justification for the curtailment of Central Hudson's advertising. *Id.*

tising to be more extensive than necessary to serve New York's interest.[79] Consequently, the Court held the Commission's comprehensive proscription of utility advertising to be an unconstitutional infringement of speech.[80]

With *Central Hudson* providing a guideline to cases involving the commercial speech doctrine, *National Funeral Services, Inc., v. Rockefeller*[81] furnishes a recent example of the limited application of the First Amendment to commercial solicitation by professionals.[82] In *National Funeral*, the United States Court of Appeals for the Fourth Circuit considered the constitutional implications of a West Virginia statute banning certain telephonic or in-person solicitation of pre-need funeral services.[83] The court of appeals applied the Supreme Court's *Central Hudson* analysis and determined that the statute directly served a substantial state interest and was not more extensive than necessary.[84] Accordingly, the circuit court af-

---

79 *Id.* at 569-70.

80 *Id.* at 572.

81 870 F.2d 136 (4th Cir.), *cert. denied*, 493 U.S. 966 (1989).

82 *See* R. George Wright, *Free Speech and the Mandated Disclosure of Information*, 25 U. RICH. L. REV. 475, 488 n.85 (1991) (maintaining that *National Funeral* represents a rationale for increased government regulation of groups that engage in certain types of solicitation).

83 *National Funeral*, 870 F.2d at 137-38. The law provided, in pertinent part, that a seller of contracts for pre-need funeral services shall not:

> (a)(1) Directly or indirectly call upon individuals or persons in hospitals, rest homes, nursing homes or similar institutions for the purpose of soliciting pre-need funeral contracts or making funeral or final disposition arrangements without first having been specifically requested by such person to do so; . . .
>
> (3) Solicit relatives of persons whose death is apparently pending or whose death has recently occurred for the purpose of providing funeral services, final disposition, burial or funeral goods for such person; . . .
>
> (5) Solicit by telephone call or by visit to a personal residence, unless such solicitation has been previously requested by the person solicited or by a family member residing at such residence.

W. VA. CODE § 47-14-10 (a) (1), (3) & (5) (1992).

84 *National Funeral*, 870 F.2d at 142-45. The court found that the state had a substantial interest in protecting its citizens from a situation charged with the potential for overreaching and coercion due to the delicate subject matter involved. *Id.* at 142. The court further determined that the law, which prohibited solicitation only to those most susceptible of being swayed by emotion, directly served the state's interest without being more extensive than necessary. *Id.* at 144-45 (citations omitted). In finding the fourth prong of *Central Hudson* to be satisfied, the Fourth Circuit rejected the "least restrictive" interpretation of the "not more extensive than is necessary" language of the fourth prong of *Central Hudson*. *Id.* (citations omitted). Instead, the Fourth Circuit applied a "reasonable relation" approach, asking whether the state's ban of pre-need funeral services solicitation reasonably furthered the government's interests. *Id.* at 145 (citation omitted).

Before the Supreme Court ultimately decided the issue, various federal circuits analyzed the fourth prong of *Central Hudson* differently. *See* Todd J. Locher, Com-

firmed the district court's judgment that the law did not violate the First Amendment.[85] In addition to finding that the statute satisfied the *Central Hudson* standard, the court of appeals further justified the law by declaring the supremacy of the fundamental right to privacy over the First Amendment's protection of commercial speech.[86]

With the above line of cases providing a judicial landscape for

---

ment, Board of Trustees of the State University of New York v. Fox: *Cutting Back on Commercial Speech Standards*, 75 IOWA L. REV. 1335, 1341 & nn.59-60 (1990) (comparing, for example, the dissimilar results achieved by the Second and Third Circuits in Fox v. Board of Trustees of the State Univ. of N. Y., 841 F.2d 1207, 1214 (2d Cir. 1988) (applying a "least restrictive" analysis) and American Future Sys. v. Pennsylvania State Univ., 752 F.2d 854, 865 (3d Cir. 1984) (rejecting the "least restrictive" interpretation of the fourth prong of *Central Hudson*)). In *Board of Trustees of the State University of New York v. Fox*, the Supreme Court rejected the "least restrictive" approach utilized by the Second Circuit, effectively easing the government's burden of justifying a restriction on commercial speech. Locher, *supra*, at 1347 (citing *Fox*, 492 U.S. at 477).

In *Fox*, the State University of New York at Cortland's campus police prevented American Future Systems, Inc. (AFS) from conducting "Tupperware parties" in a student's dormitory room because such activity violated a university resolution. *Fox*, 492 U.S. at 471-72. The resolution stated:

> No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events.

Id. (citation omitted). Fox, along with other students, sued the University, claiming that the resolution violated the First Amendment. *Id.* at 472. The district court found for the University, declaring *inter alia* the reasonableness of the university's restriction of commercial speech. *Id.* (citations omitted). The Second Circuit reversed and remanded for a finding of whether the restriction on the AFS representative's speech was the least restrictive means available to fulfill the state university's asserted interest. *Id.* at 472-73 (citing *Fox*, 841 F.2d at 1214). Reversing the Second Circuit, the Supreme Court declared that the fourth prong of *Central Hudson* did not require a perfect fit between the state's asserted interest and the restriction imposed by the state. *Id.* at 480, 486. Rather, the *Fox* Court required that the restriction on commercial speech be reasonably tailored to serve the state's substantial interest. *Id.* at 480. The Supreme Court found a substantial interest in the state's desire to promote an educational rather than a commercial atmosphere on state university campuses. *Id.* at 475. The Court remanded the case, however, for a determination of the validity of the state's restrictions on AFS's commercial speech under the reasonable fit standard. *Id.* at 486.

[85] *National Funeral*, 870 F.2d at 146. The district court held that the restriction on solicitation represented a legitimate content-neutral time, place, and manner regulation. *Id.* The Fourth Circuit disagreed, finding instead that the regulations were content-based. *Id.* Nonetheless, the Fourth Circuit ruled that the inherent harm in soliciting potential customers of pre-need funeral services justified the state's restriction of that form of speech. *Id.* at 142. *But see* Eberle, *supra* note 2, at 445-46 (discussing the First Amendment principle that content-based restrictions on speech are strongly disfavored).

[86] *National Funeral*, 870 F.2d at 146. The court refused to "consign the privacy of the home to the second chair." *Id.*

the commercial speech doctrine, the United States Supreme Court decided *Edenfield v. Fane*.[87] In *Edenfield*, the Court considered whether certified public accountants could be completely banned from personally soliciting prospective clients.[88] Justice Kennedy, writing for a seven Justice majority, stressed that the Court would not consider whether certain aspects of Fane's speech were more deserving of First Amendment protection than others, but instead would consider only the constitutionality of the blanket ban on accountant solicitation.[89]

Beginning its review of the case, the Court categorized Fane's proposed solicitation as commercial speech and recognized such speech to be generally deserving of First Amendment protection.[90] The Court noted that the subject matter of Fane's proposed solicitation was truthful and did not pertain to an illegal act.[91] Having satisfied *Central Hudson*'s first prong, Justice Kennedy recognized that the relationship of commercial speech to commercial transac-

---

87 113 S. Ct. 1792 (1993). *Edenfield* represented the Court's first review of commercial professional solicitation since *Ohralik*. *See generally* Coots, *supra* note 13, at 1188-89 (discussing the reliance of the Eleventh Circuit Court of Appeals on *Ohralik* in its consideration of *Fane v. Edenfield*). The Supreme Court decided an additional case involving attorney solicitation prior to deciding *Edenfield*. *See In re* Primus, 436 U.S. 412, 414 (1978). In *Primus*, an American Civil Liberties Union attorney solicited an indigent woman who was forced to undergo sterilization to keep her welfare benefits. *Id.* at 415-16. The *Primus* Court held that the state's application of its anti-attorney solicitation law to the attorney's non-profit motivated solicitation of a prospective client violated the First Amendment. *Id.* at 433, 439. The *Edenfield* majority confined the scope of its analysis to cases involving commercial solicitation by professionals and therefore made no reference to *Primus*. *Edenfield*, 113 S. Ct. at 1796-1804.

88 *Id.* at 1796. Implicit in the framing of the issue by Justice Kennedy was the need for the Court to determine whether the constitutionality of a ban on attorney solicitation could be extended to cover a similar ban on accountant solicitation. *Id.* *See generally* King, *supra* note 13, at 562 & n.13 (recognizing that while the *Virginia Pharmacy* Court had granted First Amendment protection to professional advertising, the *Ohralik* Court had not extended such protection to attorney solicitation).

89 *Edenfield*, 113 S. Ct. at 1796-97. Justice Kennedy asserted that the controversy concerned the constitutionality of the ban on solicitation and "nothing more." *Id.* at 1797.

90 *Id.* (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)). *But see* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 389 (1973) (holding that the illegal nature of running gender specific advertising rendered the First Amendment inapplicable). Recognizing personal solicitation to be a form of commercial speech, the Court explained that *Virginia Pharmacy* did not expressly remove personal solicitation from the realm of protected commercial speech. *Edenfield*, 113 S. Ct. at 1797. The Court further observed that focusing only on the harms that can result from personal solicitation ignores the positive First Amendment attributes of this type of communication, such as allowing a broader exchange of information between a buyer and seller. *Id.* at 1797-98.

91 *Id.* at 1797.

tions, which the state has a right to regulate, removed such speech from the highest level of First Amendment protection.[92] Accordingly, the Court determined that *Central Hudson* provided the appropriate analysis for reviewing the constitutionality of the challenged law.[93]

Continuing its application of *Central Hudson*, the Court articulated that Florida and its Board of Accountancy satisfied *Central Hudson*'s second prong—that the state establish a substantial interest in support of the restriction of speech.[94] Specifically, the majority recognized that the state's concern for protecting its population from exposure to fraud, duress, or other harmful speech made by soliciting accountants represented a substantial interest.[95] In addition, Justice Kennedy observed, Florida's concern with protecting the privacy of its citizens also qualified as a substantial interest.[96] Finally, the Court noted that Florida had a substantial interest in maintaining the independence of certified public accountants in an effort to keep them free from potential conflicts of interest.[97]

The majority next considered the third prong of *Central Hudson*—whether the restriction of speech directly served the substantial interests asserted by the state through its Board of Accountancy.[98] Justice Kennedy, agreeing with the circuit court,

---

92 *Id.* at 1798. The Court referred to *Ohralik* to demonstrate that the state's interest in regulating an underlying commercial transaction can justify the state's regulation of the commercial speech associated with the transaction. *Id.* (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978)); *see also* Eberle, *supra* note 2, at 502 (proposing that the state's heightened interest in the underlying transaction in *Ohralik* was so compelling that it overwhelmed, in that specific circumstance, the First Amendment's protection of commercial speech).

93 *Edenfield*, 113 S. Ct. at 1798. As a threshold matter, the Court accepted that Fane's proposed solicitation involved only the dissemination of true information that was not misleading or concerning an illegal matter. *Id.* at 1797. Utilizing the *Central Hudson* test, including the Court's interpretation of the fourth prong in *Board of Trustees v. Fox*, the *Edenfield* Court required that the law restricting Fane's speech be based on a substantial government interest, directly further that interest, and do so in a manner reasonably related to that interest. *Id.* at 1798. See *supra* note 19 for a recitation of the regulation at issue in *Edenfield*.

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

95 *Id.*

96 *Id.*; *cf.* National Funeral Servs., Inc., v. Rockefeller, 870 F.2d 136, 146 (4th Cir.) (holding that the right to privacy supersedes the right to free speech when the speech in question merely concerns a commercial transaction), *cert. denied*, 493 U.S. 966 (1989).

97 *Edenfield*, 113 S. Ct. at 1800. Although the majority recognized the state's interest in preserving accountant independence, Justice Kennedy doubted the state board's assertion that accountants who solicit are more likely to participate in ethical misconduct. *Id.*

98 *Id.* Justice Kennedy described *Central Hudson*'s third hurdle to be "the penultimate prong" of the analysis. *Id.*

found that the law was unable to withstand this strict requirement insofar as the solicitation of business clients was concerned.[99] Specifically, the Justice declared, the state board had not supplied any proof, other than an affidavit of negligible evidentiary value, that harm in the business community would result from lifting the ban on in-person accountant solicitation.[100] In the absence of such proof, the Court held, the State Board could not sustain its argument that the ban on solicitation directly advanced the state's substantial interests.[101] Further, the Court summarily rejected the Board's alternate contention that the restriction was content-neutral.[102] Justice Kennedy doubted that a total ban on speech could be considered content-neutral.[103] The Justice held, however, that a content-neutral designation would not alleviate the law's failure to directly and materially further the state's interest.[104]

Next, the majority discarded the Board's interpretation of *Ohralik* as providing justification for a preventative ban on solicitation by all professionals, including certified public accountants.[105] Rather, the Court found the Board's reliance on *Ohralik* to be misplaced because restrictions on solicitation are determined by the relationship of the parties to each other in the context of the solicitation.[106] Ruling that *Ohralik* did not apply to accountant solicita-

---

99 *Id.* The Court found it settled law that for a state to restrict speech, the state must demonstrate an identifiable harm that the restriction would fundamentally alleviate. *Id.* (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648-49 (1985); *In re* R.M.J., 455 U.S. 191, 205-06 (1982); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 569 (1980); Friedman v. Rogers, 440 U.S. 1, 13, 15 (1979); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 95 (1977)); *see also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71 n.20 (1983) (citations omitted) (ruling that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it").

100 *Edenfield*, 113 S. Ct. at 1800-01. The affidavit of Louis Dooner, a former chairman of the Florida Board of Accountancy, asserted that if the ban on solicitation by accountants was lifted, certified public accountants would lose the necessary independence to perform the "attest function" which could lead to harmful and unethical conduct. *Id.* at 1797. See *supra* note 23 for an explanation of the attest function. In response to Dooner's affidavit, Justice Kennedy observed that a report of a committee of the American Institute of Certified Public Accountants contradicted Dooner's assertions. *Edenfield*, 113 S. Ct. at 1801. Particularly, the Justice recognized, the report noted the absence of any data suggesting that the solicitation of clients by accountants had led to a loss of accountant independence. *Id.* (citation omitted).

101 *Id.* at 1800.

102 *Id.* at 1801.

103 *Id.*

104 *Id.*

105 *Id.* at 1802. The Court reaffirmed that "a preventative rule was justified only in situations 'inherently conducive to overreaching and other forms of misconduct.'" *Id.* (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464 (1978)).

106 *Id.*; *see* Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council,

tion, Justice Kennedy distinguished attorneys from accountants based upon the nature of their respective training.[107] In particular, the Justice propounded that an attorney's training as an advocate imparts skills that, when combined with a financial interest, can greatly lend themselves to overreaching or coercion.[108] Conversely, the Justice recognized that certified public accountants receive training in objectivity that does not entail the same likelihood of harm.[109]

As a final matter, the Court distinguished the context of the solicitation in *Ohralik* from the present facts.[110] The majority posited that the attorney's solicitation of injured teenagers in *Ohralik* differed greatly from Fane's solicitation of savvy corporate executives.[111] Justice Kennedy noted that while the *Ohralik* victims were naive and inexperienced in hiring an attorney, Fane's prospective clients had the necessary expertise to make an informed decision on the selection of a certified public accountant.[112] Unlike the situation in *Ohralik*, the majority concluded that the risk of harm to Fane's prospective clients was not inherent.[113] Accordingly, the Supreme Court affirmed the court of appeals, having determined that there was no justification for a prophylactic ban on certified public accountant solicitation because the restriction did not di-

---

Inc., 425 U.S. 748, 773 n.25 (1976) (maintaining that "the distinctions, historical and functional, between professions, may require consideration of quite different factors").

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

108 *Id.* at 1802. Specifically, Justice Kennedy quoted *Ohralik* which explained that a great potential for harmful overreaching exists "'when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person.'" *Id.* (quoting *Ohralik*, 436 U.S. at 465). Further, the Justice hypothesized that potential legal clients may entrust their cases to a soliciting attorney without regard to the attorney's ability to handle the particular controversy and without opportunity to reflect upon the necessity of representation. *Id.* (citation omitted).

109 *Id.* at 1802-03. The Justice also noted that a typical prospective client of a CPA is less easy to manipulate than the naive accident victims in *Ohralik*. *Id.* at 1803.

110 *Id.*

111 *Id.* Justice Kennedy recognized that Fane's method of solicitation encourages rational and considerate decisionmaking by prospective clients of CPA services, in marked divergence to the immediate, unconditional acquiescence of the *Ohralik* accident victims to legal representation. *Id.*

112 *Id.* The Court also noted that unlike the accident victim Ohralik met personally in the hospital, Fane's proposed solicitation would take place over the telephone, giving the executive the ability to terminate the solicitation by simply hanging-up. *Id.* Therefore, the Court dismissed the right to privacy as a viable issue. *Id.* *Contra* National Funeral Servs., Inc., v. Rockefeller, 870 F.2d 136, 144 (4th Cir.) (finding that telemarketing, like in-person solicitation, contains elements that threaten a consumer's privacy), *cert. denied*, 493 U.S. 966 (1989).

113 *Edenfield*, 113 S. Ct. at 1803.

rectly and materially serve the state's substantial interests.[114]

In a concurring opinion, Justice Blackmun reiterated the position espoused in the Justice's *City of Cincinnati v. Discovery Network, Inc.* concurrence.[115] While the concurrence agreed with the result reached by the majority in the present case, Justice Blackmun ex-

---

114 *Id.* at 1803-04.

115 *Id.* at 1804 (Blackmun, J., concurring) (citing City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1517-21 (1993) (Blackmun, J., concurring)). The dispute in *Discovery Network* began when the City of Cincinnati notified two distributors of promotional materials that it had revoked their permits to dispense advertisements on city property. *Discovery Network*, 113 S. Ct. at 1508. Accordingly, the City ordered the distributors to remove their newsracks from public property within thirty days. *Id.* The ordinance at issue stated:

> No person shall throw or deposit any commercial or non-commercial handbill in or upon any sidewalk, street or other public place within the city. Nor shall any person hand out or distribute or sell any commercial handbill in any public place. Provided, however, that it shall not be unlawful on any sidewalk, street or other public place within the city for any person to hand out or distribute, without charge to the receiver thereof, any non-commercial handbill to any person willing to accept it, except within or around the city hall building.

CINCINNATI, OHIO, MUNICIPAL CODE § 714-23 (1992). The city justified the ordinance on its interest in public safety and aesthetics. *Discovery Network*, 113 S. Ct. at 1507. Cincinnati posited that its ban on the distribution of commercial flyers, but not on the distribution of traditional newspapers, represented a constitutionally permissible method for the city to serve its asserted interest. *Id.* at 1509 (citation and footnote omitted). In so arguing, the city highlighted the Court's application of a lower standard of First Amendment protection to commercial speech. *Id.* (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 562-63 (1980) (citation omitted)). Justice Stevens, writing for the *Discovery Network* majority, affirmed the Court's grant of lesser constitutional protection to commercial speech. *Id.* at 1507, 1513 (citations omitted). The Court found, however, that Cincinnati's ordinance did not meet the "reasonable fit" requirement of *Board of Trustees v. Fox*. *Id.* at 1513-14. Specifically, the Court determined that the city's distinction between the distribution of commercial and noncommercial publications bore no relationship at all to its stated interests, finding that Discovery Network's newsracks presented "no greater an eyesore" than those newsracks not affected by the ordinance. *Id.* at 1514. The Court ruled, accordingly, that Cincinnati's ban on the dispersal of commercial advertisements on city property violated Discovery Network's First Amendment right of free speech. *Id.* at 1517.

Justice Blackmun, concurring in the result, disagreed with the Court's continued reliance on a lower standard of First Amendment protection for nondeceptive commercial speech relating to lawful activities. *Id.* at 1517 (Blackmun, J., concurring). Instead, the Justice argued that no reason exists for treating truthful commercial speech as having less First Amendment value than other types of speech. *Id.* at 1518 (Blackmun, J., concurring). The Justice concluded that the Court's continued bias against commercial speech, regardless of the veracity of the commercial speech at issue, made it appear to Cincinnati that the city "had *no choice* under this Court's decisions but to burden commercial newsracks more heavily." *Id.* at 1520 (Blackmun, J., concurring) (citation omitted). For a more detailed analysis of the Supreme Court's decision in *City of Cincinnati v. Discovery Network, Inc.*, see Scott S. Servilla, Note, 24 SETON HALL L. REV. 1089 (1993).

pressed dissatisfaction with only affording middle-tier protection to commercial speech that does not contain harmful elements.[116]

Justice O'Connor authored the sole dissenting opinion.[117] The Justice fundamentally disagreed with the extension of First Amendment protection to learned professionals engaging in commercial speech.[118] Rather than restricting professional advertising on grounds that it is harmful, false, or misleading, Justice O'Connor advocated granting states the authority to proscribe commercial speech that is incongruous with the status ascribed to learned professions.[119] The dissent premised this position on the ground that competition between professionals in search of financial gain leads to the abandonment of professional altruism.[120]

Justice O'Connor also disagreed with the Court's distinction between attorneys and certified public accountants who engage in solicitation.[121] The dissent contended that the professional's certified status and specialized expertise in a sophisticated area—not rhetorical training as the majority maintained—create the opportunity for undue captivation of potential clients.[122] Justice O'Connor maintained that such captivation could too easily lead to a professional's use of coercion or other harmful speech to the benefit of the professional and the detriment of the client.[123] Ac-

---

116 *Edenfield*, 113 S. Ct. at 1804 (Blackmun, J., concurring). *Compare id.* (continuing to eschew a middle-tier analysis of truthful commercial speech) *with* Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977) (declaring that "the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue").

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

118 *Id.* at 1804 (O'Connor, J., dissenting) (arguing that the "Court took a wrong turn with *Bates v. State Bar of Arizona*").

119 *Id.* The Justice stated that post-*Bates* cases that expanded the rights of attorneys to advertise expounded the diminishment of professional status begun by *Bates*. *Id.* (citations omitted). The Justice cited, for example, *Zauderer v. Office of Disciplinary Counsel*, where the Court struck down an Ohio law insofar as it prohibited attorneys from engaging in certain forms of print advertising. *Id.* (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 650, 655 (1985)). In *Zauderer*, the advertising at issue included an attorney's dissemination of generic legal advice and use of illustrations in newspaper advertisements. *Zauderer*, 471 U.S. at 629. Justice O'Connor dissented to the *Zauderer* majority's declaration that Ohio violated the First Amendment by restricting attorney advertising. *Id.* at 673, 676-77 (O'Connor, J., concurring in part, concurring in the judgment & dissenting in part).

120 *Edenfield*, 113 S. Ct. at 1804 (O'Connor, J., dissenting) (observing that "[c]ommercialization has an incremental, indirect, yet profound effect on professional culture, as lawyers know all too well").

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

122 *Id.* Justice O'Connor asserted that the Florida legislature could rationally believe that CPAs, like attorneys, could easily overwhelm unsophisticated clients. *Id.*

123 *Id.* Justice O'Connor proffered that many instances of in-person solicitations contain elements which inherently may cause harm to the prospective client. *Id.* A

cordingly, Justice O'Connor agreed with Florida's decision to proscribe accountant solicitation in order to prevent harmful activity before it could occur.[124]

Likewise, Justice O'Connor disapproved of the majority's approach to the scope of Fane's challenge to Florida's law.[125] Particularly, the Justice disagreed with the majority's analysis of the controversy as an "as-applied" rather than a facial challenge.[126] The dissent argued that under a facial challenge, Florida's law would satisfy *Central Hudson* because the analysis would call on the Court to give broad deference to Florida's legislature.[127] Additionally, Justice O'Connor opined, the Court's application of *Central Hudson* to Fane's applied challenge represented an implicit finding by the majority that Florida's law was facially constitutional.[128] The Justice, accordingly, questioned the majority's unstated assumption that First Amendment protection could be invoked for specific expressions of commercial speech, even where the underlying proscriptive law facially satisfies the four-part *Central Hudson* test.[129] As a final matter, Justice O'Connor insisted that the injunctive remedy prohibiting enforcement of the law to all certified public accountants was improperly broad and therefore inconsistent with the narrow scope of an as-applied challenge.[130] Moreover, the Justice

---

reasonable legislator, the Justice continued, could believe that these potentially harmful solicitations are impossible to isolate preemptively, justifying a prophylactic ban. *Id.*

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

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

126 *Id.* Justice O'Connor argued that the majority carefully avoided addressing the plaintiff's dispute of the ban as a facial challenge by treating Fane's suit as an as-applied challenge. *Id.* Unlike a facial challenge, where the Court will seek to find any reasonable rationale to uphold a contested statute, a successful as-applied challenge will merely invalidate the law in a specific application. CRUMP, *supra* note 1, at 813. Justice O'Connor asserted that the majority's affirmance of the district court's broad injunction against enforcement of Florida's statute was inconsistent with the Court's treatment of the case as an as-applied challenge. *Edenfield*, 113 S. Ct. at 1805-06 (O'Connor, J., dissenting). Specifically, the dissenting Justice declared the Court's determination—that this particular respondent's proposed solicitation would not target vulnerable clients—to be inconsistent with the district court's broad injunction. *Id.*

127 *Id.* at 1805, 1806 (O'Connor, J., dissenting).

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

129 *Id.* at 1805 (O'Connor, J., dissenting) (citations omitted). Citing *Board of Trustees of State University of New York v. Fox*, Justice O'Connor argued that the *Fox* Court's reasonable fit clarification of the fourth prong of *Central Hudson* appears to denote that although the state's restriction may impede some non-objectionable commercial speech, if the law fulfills *Central Hudson* it is valid without exception. *Id.* (citing Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 476-86 (1989)).

130 *Id.* at 1805-06 (O'Connor, J., dissenting). Justice O'Connor proposed that lifting the solicitation restriction extended far beyond Fane's proposed speech. *Id.* at

disagreed that the majority's limitation of the injunction to non-business contexts provided a sufficient basis for validating the district court's broad remedy.[131] The dissent theorized that the Florida legislature could have rationally based a restriction on accountant solicitation in the business community on its belief that many small businesses are owned by individuals no more urbane than private citizens with the means to hire a certified public accountant.[132] Based on the aforementioned grounds, Justice O'Connor would have reversed the court of appeals.[133]

Edenfield v. Fane represents the Supreme Court's recognition that in-person commercial solicitation is not in and of itself an insidious occurrence.[134] In fact, lower courts had already recognized this principle to some extent several years prior to the *Edenfield* decision.[135] In *Edenfield*, the Supreme Court retreated from its reactionary holding in *Ohralik* to its revolutionary extension of First Amendment protection to commercial speech in *Virginia Pharmacy* and *Bates*.[136]

1805 (O'Connor, J., dissenting). Additionally, Justice O'Connor argued, the district court's finding that Fane's proposed speech would be harmless did not justify striking down the ban. *Id.* at 1805-06 (O'Connor, J., dissenting). Rather, the Justice declared, such a result would have been proper only in a successful facial challenge. *Id.*

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

132 *Id.* Justice O'Connor recognized that the majority of enterprises in the United States are considered small businesses. *Id.* (citing U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 526 (112th ed. 1992)).

133 *Id.*

134 *See* Eberle, *supra* note 2, at 504. In this passage, referring to the analogous prophylactic ban on solicitation in *Ohralik*, the author stated:

> [T]he preferred position of free speech in our value structure demands that such a ban apply only in those situations where one-sided, badgering, imminently coercive and harmful conduct is likely to occur . . . . Certainly, in-person communications with respect to . . . fundamental rights are permissible. There may even be room for truthful, noncoercive, nondeceptive in-person proposals of . . . commercial transactions if those qualities could be ensured.

Id.

135 *See, e.g.*, Project 80's, Inc., v. City of Pocatello, 942 F.2d 635, 639 (9th Cir. 1991) (ruling that in situations where door-to-door solicitation disseminates information in the most efficient manner, courts should not curtail that mode of expression); Optimist Club of North Raleigh v. Riley, 563 F. Supp. 847, 848-49, 850 (E.D.N.C. 1982) (holding that a complete ban on telephonic solicitation impinges the First Amendment rights of professional solicitors). *But see* United States v. State Bd. of Certified Public Accountants of La., No. CIV.A.83-1947, 1987 WL 7905, at *7 (E.D. La. Mar. 11, 1987) (ruling that a restriction on accountant advertising and solicitation is allowed when the challenged regulation furthers state policy).

136 The Court is still not free of the *Ohralik* mentality which accepted a preventative rule to justify the curtailment of free speech rather than require an actual showing of harm. *See Edenfield*, 113 S. Ct. at 1802 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464 (1978)) (affirming the position taken in *Ohralik* that "a preventative rule

By expanding the scope of the First Amendment to include accountant solicitation, however, the Court once again entered the thicket of controversy over the degree of First Amendment protection afforded to professionals engaging in solicitation.[137] The boundaries of the controversy surrounding the application and scope of First Amendment protection to professional solicitation are illustrated by the opposing stances taken by Justices O'Connor and Blackmun in *Edenfield.* Whereas Justice O'Connor would give states the absolute authority to restrict the speech and behavior of its professionals,[138] Justice Blackmun would grant absolute First Amendment protection to non-harmful commercial speech, regardless of the professional status of the speaker.[139] However diametrically Justices O'Connor and Blackmun approached the commercial speech controversy at issue in *Edenfield,* the analyses of both the concurrence and dissent are more unfailing and forthright than that of the majority. The majority's seemingly ad hoc application of the First Amendment to certified public accountants, in the face of the Court's prior denial of the same right to attorneys in *Ohralik,*[140] suggests inconsistency and perhaps bias

---

was justified only in situations 'inherently conducive to overreaching and other forms of misconduct'"); *see also* Redish, *supra* note 1, at 630 (postulating that commercial speech is only slightly more protected today than it was before *Virginia Pharmacy*). *See generally* Miragliotta, *supra* note 2, at 632 (maintaining that a showing of actual deception should be required before any type of ban on advertising is allowed); Maute, *supra* note 9, at 511 (claiming that the presumption of injury standard allowed in *Ohralik* is inconsistent with the commercial speech doctrine because it presumes, per se, that speech causes harm).

137 *See, e.g.*, Eberle, *supra,* note 2, at 485-86 (maintaining that professionals should be allowed to solicit clients, but with a higher degree of government regulation that would promote the state's significant interest in protecting vulnerable lay people from undue influence). *But see* Maute, *supra* note 9, at 524 (arguing that there should be no restrictions on professional advertising and solicitation unless such activity involves undue influence, fraud, or unconscionability).

138 *Edenfield,* 113 S. Ct. at 1804 (O'Connor, J., dissenting); *see also* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 488-91 (1988) (O'Connor, J., dissenting) (disagreeing with the majority's continued application of the commercial speech doctrine to attorney advertising). In the *Shapero* dissent, Justice O'Connor maintained that state restrictions "act as a concrete, day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other." *Id.* at 490 (O'Connor, J., dissenting).

139 *Edenfield,* 113 S. Ct. at 1804 (Blackmun, J., concurring). Without reference to whether the speech in question is commercial, Justice Blackmun would grant full First Amendment protection to expressions that do not contain elements of fraud or duress or advocate unlawful activity. *Id.*; City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1517-21 (1993) (Blackmun, J., concurring). See *supra* note 115 for a discussion of Justice Blackmun's concurrence in *Discovery Network.*

140 Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 468 (1978). The Court preserved high professional standards in *Ohralik* for members of the legal community after re-

against the legal profession.[141] As the Court noted in *Bates*, each Justice is a licensed attorney.[142] That fact may provide a subtext to the Court's holding in *Ohralik* that is not present when the Court considers the adverse effects of solicitation on the dignity of professions other than the bar, such as public accountants.

Litigation in this area will almost certainly continue due to the variability intrinsic to the majority's reliance on context[143] in determining whether the commercial speech doctrine protects commercial expressions made by professionals.[144] The approaches taken by Justices O'Connor and Blackmun would foreclose the need to answer unresolved issues such as whether the First Amendment offers protection to attorney solicitation of prospective business clients.[145] Justice O'Connor's strict approach is untenable, however, because it ignores the potential benefits professional solicitation can afford to prospective clients.[146] Therefore, while *Edenfield* achieves an ideal First Amendment result by liberalizing the potential for the dissemination of information, its arbitrary methodology for doing so does not yield the type of consistency and security to

---

fusing to legitimize the same argument made on behalf of the pharmacy profession in *Virginia Pharmacy*. *Compare id.* (upholding a prophylactic ban on in-person solicitation by attorneys) *with* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976) (positing that commercial speech—the advertisement of prescription drug prices—is protected by the First Amendment).

141 *See* Maute, *supra* note 9, at 502 (labelling the Court's application of the commercial speech doctrine as an ad hoc approach). Professor Maute contended that the Court's approach to commercial speech cases involving professionals will create "doctrinal confusion and multiple tiers of scrutiny for commercial and other forms of protected speech . . . [that] will inevitably affect the degree of protection given to core First Amendment speech." *Id.*

142 Bates v. State Bar of Ariz., 433 U.S. 350, 368 (1977).

143 *See, e.g.*, *Edenfield*, 113 S. Ct. at 1802 (proclaiming that "the constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation").

144 *See* BOGEN, *supra* note 1, at 100 (contending that the Court's application of a balancing test in commercial speech cases continues to be a source of litigation).

145 In *Edenfield*, the Court declared that accountants cannot be restricted from soliciting prospective clients in a business context, and distinguished *Ohralik* without addressing why a similar caveat would not have been appropriate in *Ohralik*. *Edenfield*, 113 S. Ct. at 1803.

146 *See* Eberle, *supra* note 2, at 503 (arguing that solicitation opens up a line of communication from the seller to the buyer supplementing the traditional method of information being exchanged only after the buyer initiated contact with the seller); *see also* Smolla, *supra* note 7, at 785 (proposing that commercial speech provides "color and life and quality" to people's lives); *cf.* Redish, *supra* note 1, at 595 (arguing that "the Supreme Court should not determine the level of constitutional protection by comparing the relative value of different types of speech"). *But see* HUMAN LIBERTY, *supra* note 1, at 224 (postulating that market forces disconnect commercial speech from furthering individual choices).

professionals that Justice Blackmun's succinct and straight forward analysis would provide.[147] The Supreme Court should abandon the balancing test of *Central Hudson*[148] and instead adopt the simplified requirement espoused by Justice Blackmun: that truthful commercial speech not pertaining to an illegal act should receive absolute First Amendment protection.[149]

David P. Kalm

147 *See* Maute, *supra* note 9, at 502 (lamenting the Court's unfortunate ad hoc analysis of commercial speech restrictions). Professor Maute observed the present lack of unanimity among jurisdictions in the area of regulating attorney advertising and solicitation. *Id.* at 514. Although adding to economic inefficiency, the author pragmatically advises that given the unsettled nature of the law in the commercial speech area as applied to professionals, practitioners would do well to look into the local regulatory climate of the jurisdiction in which they choose to establish their practice. *Id.*

148 *See supra* note 76 (providing the four-prong balancing test of *Central Hudson*).

149 *Edenfield*, 113 S. Ct. at 1804 (Blackmun, J., concurring).