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THE INTERSECTION OF FREE SPEECH AND THE LEGAL PROFESSION:
CONSTRAINTS ON LAWYERS' FIRST AMENDMENT RIGHTS

Kathleen M. Sullivan*

INTRODUCTION

LAWYERS' freedom of speech is constrained in many ways that no one would challenge seriously under the First Amendment. Rules of evidence and procedure, bans on revealing grand jury testimony, page limits in briefs, and sanctions for frivolous pleadings, to name a few, are examples of speech limitations that are widely accepted as functional necessities in the administration of justice, much like rules of order in a town meeting. Numerous bar regulations of lawyer speech, however, have provoked First Amendment clashes, and the outcomes in those cases reveal much about competing conceptions of the legal profession.

On the one hand, lawyers are sometimes perceived as classic speakers in public discourse, free of state control and entitled to all the ordinary protections of speech and association available to other speakers. Indeed, in light of their frequent role as representatives of underdogs and challengers to the state and the status quo, lawyers may be perceived to be entitled to extraordinary speech protections. On the other hand, lawyers are sometimes thought of as delegates of state power—officers of the court and professional licensees whose special privileges are conditioned upon foregoing some speech rights that others enjoy. The tension between these two conceptions recurs in cases involving lawyer solicitation, lawyer speech to the press, and lawyer advertising. This Article reviews and analyzes these cases and then attempts to place this tension in a broader First Amendment context.

I. FIRST AMENDMENT LIMITS ON REGULATION OF LAWYERS' ETHICS

Lawyers, as professionals, are subjected to speech restrictions that would not ordinarily apply to lay persons. These restrictions have been particularly prevalent in the areas of solicitation of clients, lawyer interaction with the media, and lawyer advertising. The following sections examine speech limitations in these three areas.

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Solicitation, written or verbal, is of course a speech act, but not all speech acts are constitutionally protected. Solicitation of murder or any other serious crime is unprotected whether viewed as valueless at the threshold or as outweighed by obviously compelling interests in any balance. On the other hand, political party recruitment drives or invitations to attend advocacy group meetings are close to the core of protected speech. In the Supreme Court's several decisions reviewing the constitutionality of regulation of the solicitation of legal business, much has turned on whether the Court identified the litigation efforts at issue as quasi-political.

A successful challenge to a legal solicitation ban provided the occasion for one of the cornerstone decisions in First Amendment freedom of association. In *NAACP v. Button*,¹ the Court held unconstitutional a Virginia prohibition of "the improper solicitation of any legal or professional business" as applied to the efforts of the NAACP legal staff to recruit plaintiffs for desegregation suits.² The state had outlawed running and capping, expanding their definitions to include referrals to an organization that paid lawyers in connection with any judicial proceeding "in which it has no pecuniary right or liability."³ Applying the strictest scrutiny, the Court held six to three that the law failed to serve any compelling interest in these circumstances.

Writing for the Court, Justice Brennan emphasized the considerable element of political expression involved in litigation on behalf of unpopular causes: "Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts."⁴ Moreover, he stated that group litigation efforts are sometimes a particularly effective form of political association. On the other side of the balance, he found little of the traditional conflict-of-interest justification for outlawing solicitation: where "no monetary stakes are involved . . . there is no danger that the attorney will . . . subvert the paramount interests of his client to enrich himself or an outside sponsor."⁵ Moreover, he did not find the NAACP's efforts likely to stir up litigation in the manner traditionally thought to justify solicitation bans: "Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain."⁶

Of course, the majority was concerned in large part that Virginia's effort to police legal professionalism was directed selectively at the NAACP's desegregation lawsuits; Southern states had sought to foil

2. See id. at 428-29.
3. Id. at 423.
4. Id. at 429.
5. Id. at 443.
6. Id.
desegregation efforts with everything in the regulatory arsenal from solicitation bans to parking tickets.\footnote{See id. at 444.} Despite this underlying concern with the context of racial resistance and the vindication of equal protection rights, the opinion was broad enough to lay the basis for a series of decisions holding that labor unions, like ideological advocacy groups, had a First Amendment right to give unsolicited legal advice and referrals to their members.\footnote{See United Transp. Union v. State Bar, 401 U.S. 576, 580 (1971) (invalidating an injunction against a union's legal services fee plan); United Mine Workers of Amer. v. Illinois State Bar Ass'n, 389 U.S. 217, 223 (1967) (invalidating an unauthorized-practice injunction against a union's use of a salaried attorney to assist with workmen's compensation claims); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 8 (1964) (invalidating an injunction against a union for solicitation and unauthorized practice of law for referring members to personal injury attorneys).} As Justice Black summarized these cases, "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment,"\footnote{United Transp. Union, 401 U.S. at 585.} and thus the scope of professional ethics regulation that could be applied to such activity was limited.

Justice Harlan, dissenting in \textit{Button}, took a different view of lawyers' roles. Whereas the Brennan opinion treats NAACP lawyers as vindicators of constitutional rights against the state, the Harlan dissent depicts them as closer to the state's own agents, noting that "the regulation of professional standards for members of the bar" is more deeply rooted than regulation of other professionals "since courts for centuries have possessed disciplinary powers incident to the administration of justice."\footnote{Button, 371 U.S. at 456 (Harlan, J., dissenting).} Also, unlike Brennan's account of NAACP lawyers as an integral part of the associational activities of the NAACP, Harlan's dissent paints lawyers as professionally restricted to the role of personal representation of individuals, and thus vulnerable to conflicts of interest even in the context of legal advocacy that is not for profit:

\textbf{[T]he interests of the NAACP go well beyond the providing of competent counsel for the prosecution or defense of individual claims; they embrace broadly fixed substantive policies that may well often deviate from the immediate, or even long-range, desires of those who choose to accept its offers of legal representations.}\footnote{Id. at 463 (Harlan, J., dissenting).}

A similar dichotomy between lawyers as participants in protected speech and association on the one hand and as regulable licensees of the state on the other was drawn in the pair of solicitation cases the Court decided in 1978. \textit{In re Primus}\footnote{436 U.S. 412 (1978).} held invalid under the First Amendment the application of a state anti-solicitation rule to an attorney who wrote a letter to a woman who had been sterilized as a

\begin{itemize}
  \item\footnote{See id. at 444.} See United Transp. Union v. State Bar, 401 U.S. 576, 580 (1971) (invalidating an injunction against a union's legal services fee plan); United Mine Workers of Amer. v. Illinois State Bar Ass'n, 389 U.S. 217, 223 (1967) (invalidating an unauthorized-practice injunction against a union's use of a salaried attorney to assist with workmen's compensation claims); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 8 (1964) (invalidating an injunction against a union for solicitation and unauthorized practice of law for referring members to personal injury attorneys).
  \item\footnote{United Transp. Union, 401 U.S. at 585.} United Transp. Union, 401 U.S. at 585.
  \item\footnote{Button, 371 U.S. at 456 (Harlan, J., dissenting).} Button, 371 U.S. at 456 (Harlan, J., dissenting).
  \item\footnote{Id. at 463 (Harlan, J., dissenting).} Id. at 463 (Harlan, J., dissenting).
\end{itemize}
condition of continued receipt of public assistance, informing her that
the ACLU was willing to represent her free of charge in a lawsuit
against the doctor who had sterilized her. In contrast, *Ohralik v.
Ohio State Bar Ass'n* upheld against First Amendment challenge the
application of a state bar anti-solicitation rule to a stereotypical ambu-
lance chaser—a lawyer who had sought to represent two teenage girls
injured in an auto accident in exchange for a cut of any recovery.

Writing for the Court in both decisions, Justice Powell conceded the
state’s substantial interest in “tak[ing] measures to correct the sub-
stantive evils of undue influence, overreaching, misrepresentation, in-
vansion of privacy, conflict of interest, and lay interference that
potentially are present in solicitation of prospective clients by law-
yers.” But these interests were sufficient to justify sanctions only
against Ohralik, not Primus. Since Primus’ solicitation was motivated
not by hope of pecuniary gain but by the “goal of vindicating civil
liberties,” only a showing of actual harm, not potential harm, would
be sufficiently compelling to justify discipline, and there was no show-
ing of actual harm in the record. The mere potential harm present in
the general run of solicitation cases, however, was enough to justify
the prophylactic rule applied to commercially motivated solicitation
such as Ohralik’s.

By applying more exacting scrutiny in *Primus* than in *Ohralik*, the
Court in effect declared a constitutionally compelled exception to pro-
phylactic anti-solicitation rules for politically motivated nonprofit ad-
vocacy. Legal solicitation without such a political component could be
more readily regulated in large part because of the special interest of
the state in maintaining standards among lawyers, who “are essential
to the primary governmental function of administering justice, and
have historically been ‘officers of the courts.’” Justice Rehnquist,
dissenting in *Primus* and concurring only in the judgment in *Ohralik*,
was the only member of the Court who would have been an equal
opportunity statist in the two decisions, finding the government
equally free to regulate members of the bar regardless of whether they
are politically or commercially motivated.

**B. Lawyers’ Statements to the Press**

Commentary about pending judicial proceedings has often pro-
voked First Amendment clashes with the values of fair trial for the

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13. *See id.* at 439.
15. *See id.* at 468.
17. *Id.* at 430.
The court has long held that press or public commentary is punishable only upon a showing of a "clear and present danger" of harm, rejecting arguments that any mere probabilistic tendency to interfere with the orderly administration of justice was enough to justify suppression. The court, though, has not taken the same approach to lawyer commentary on pending cases.

The court's principal decision on First Amendment protection for lawyer commentary to the press about a pending matter replays the tension that appears in the solicitation cases between the roles of lawyers as political gadflies and as officers of the court. In *Gentile v. State Bar*, the court reviewed a First Amendment challenge to a bar disciplinary sanction leveled against a criminal defense attorney who had given a post-indictment press conference in which he suggested that his client was an innocent scapegoat, that the actual perpetrator was a crooked police detective, and that others likely to testify as witnesses were drug dealers and money launderers. The bar rule at issue prohibited a lawyer from making "an extrajudicial statement ... if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." In a split decision, the court held that the "substantial likelihood" standard was constitutional, because the First Amendment did not require a showing of clear and present danger of actual harm. The sanction against Gentile was unconstitutional, however, because the rule's exemption for speech stating "the general nature of the ... defense"—a safe harbor Gentile thought he was within—was void for vagueness.

Justice Kennedy, writing for the minority that would have held that the government had failed to demonstrate sufficiently clear and pres-

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22. See id. at 1041-42 (opinion of Kennedy, J.).

23. Id. at 1033 (quoting Nev. Sup. Ct. R. 177(1)) (opinion of Kennedy, J.).

24. See id. at 1062-76.

25. Id. at 1048 (quoting Nev. Sup. Ct. R. 177(3)(a)).

26. This portion of the judgment was set forth in an opinion by Justice Kennedy. See id. at 1048-51. Each portion of the judgment was decided by a vote of five to four, with Justice O'Connor providing the crucial swing vote, joining Chief Justice Rehnquist as to the constitutionality of the "substantial likelihood" standard and Justice Kennedy as to the unconstitutional vagueness of the exemption. See id. at 1081-82 (O'Connor, J., concurring).
ent danger of trial prejudice, echoed the Brennan opinion in *Button*:

"[T]his case involves classic political speech . . . critical of the government and its officials."

27 Under this view, the speech of a criminal defense attorney alleging police corruption and seeking to counter the impression of his client put forward by elected prosecutors is at the core of the First Amendment’s function in checking government power. Precisely because the attorney was close to the administration of justice, he had special insight and ought to be allowed special leeway to make statements that inform the public about that process and criticize the conduct of public officials within it: "[I]n some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts."  

28 Thus, the Kennedy opinion would have applied to pretrial speech by lawyers something close to the strict scrutiny that applies to press coverage of pretrial proceedings.

In sharp contrast, Chief Justice Rehnquist, recalling the Harlan opinion in *Button* and his own dissent in *Primus*, held for the majority that lawyer speech may be penalized on a lesser showing of public interest than press commentary on a pending trial, precisely because lawyers are officers of the court.  

29 Their special privilege of access to information and the special authority conferred on their statements by virtue of their professional license, under this view, impose special obligations of expressive restraint rather than special entitlement to speak freely. As the Chief Justice’s opinion portrayed it, lawyer speech outside the courtroom about a pending proceeding was only a few steps on a continuum away from the “extremely circumscribed” leeway for speech in the courtroom itself.  

30 Moreover, the State ought to be able to protect itself from having its own officers impose the “costs on the judicial system” of protracted voir dire, change of venue, or other devices to offset the effects of their public remarks.  

31 Accordingly, all that the First Amendment required was a balancing, and “the ‘substantial likelihood of material prejudice’ standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State’s interest in fair trials.”  

C. Lawyer Advertising

Advertising is often regulated as part of more comprehensive economic regulation aimed either at protecting consumers from decept-
tion, coercion, and decisions based on insufficient information, or at influencing the supply or demand for goods or services. For just this reason, it has long occupied an uneasy position in the post-New Deal constitutional universe: subject to any minimally rational regulation if thought of as economic activity, but protected by the more exacting requirements of the First Amendment if thought of as speech.33 Once banished from First Amendment protection altogether along with obscenity, fighting words, and libel, commercial speech has been given qualified First Amendment protection ever since the Court's 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,34 which struck down a ban on advertising prices of prescription drugs.35 The qualifications are: that the government may regulate false or misleading commercial speech freely, unlike most other false or misleading speech;36 that advertisements of illegal transactions may be banned even if they fall short of otherwise proscribable incitement;37 and that all commercial speech regulations are subject to a form of intermediate scrutiny,38 even if they are content-based and thus would otherwise trigger strict review.39 The Court has rested these distinctions upon what *Virginia State Board* called "commonsense differences" between commercial speech and other kinds of speech, particularly the "greater objectivity and hardiness" of advertisements, which make them easier to verify and harder to chill.40

The Court's extension of free speech protection to advertising has provoked the criticism that it revives the spirit of *Lochner v. New York*,41 substituting judicial for legislative judgments of what degree of


34. 425 U.S. 748 (1976).

35. See id. at 770.


39. See id. at 564 n.6.

40. *Virginia State Bd.*, 425 U.S. at 771 n.24. These differences have also led the Court to deny commercial speech the protection of the presumption against prior restraint, see id., and the benefit of overbreadth doctrine, *see* *Bates v. State Bar*, 433 U.S. 350, 379-81 (1977).

41. 198 U.S. 45 (1905).
regulation best serves the public’s economic welfare. On the other hand, First Amendment deregulation of commercial speech has also been frankly defended on the ground that it increases consumer welfare. *Virginia State Board* was litigated and won by Alan Morrison and other attorneys for the Public Citizen Litigation Group, a consumer advocacy organization affiliated with consumer rights activist Ralph Nader. They aimed deliberately at undercutting the rents enjoyed by professional monopolies, such as pharmacists, by increasing price competition and lowering barriers to entry. As one scholarly defender of the economic theory of *Virginia State Board* notes: “More information makes consumers better informed; better-informed consumers shop more wisely, which increases price competition; and consumers’ ability to find out more cheaply about sellers and their terms of trade likewise facilitates the entry of new suppliers.”

Leaving lawyer advertising aside for the moment, the path of commercial speech decisions after *Virginia State Board* has been somewhat uneven. In one series of cases, the Court appeared to retreat from the key premises of *Virginia State Board*. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, which involved a First Amendment challenge to a ban on promotional advertising by an electric utility, the Court found that government had a substantial interest in reducing demand for electricity and that the advertising ban directly advanced that interest. Whereas *Virginia State Board* had labeled any effort to keep consumers ignorant in order to influence their consumption decisions as impermissibly “paternalistic,” *Central Hudson* appeared to suggest that government could indeed do just that.

Following similar logic, *Posadas de Puerto Rico Associates v. Tourism Co.* upheld a ban on the advertisement of casino gambling to residents of Puerto Rico, reasoning that the greater power to ban gambling entailed the lesser power to suppress gambling advertising in order to reduce demand. Furthermore, in *United States v. Edge*...
Broadcasting Co., the Court upheld against First Amendment challenge a federal law prohibiting a radio station licensed to a non-lottery state from broadcasting ads for another state's lottery—again presuming that banning advertising would reinforce non-lottery states' substantial interest in lowering demand and hence consumption. Some observers attempted to read cases such as Posadas and Edge as implying a "vice" exception to commercial speech protection. Since the demise of Lochner, however, government may ban not only vice but nearly any economic transaction; that is, it may ban all transactions that are not independently constitutionally protected. Therefore, Posadas seemed to suggest a far wider berth for permissible advertising regulation than Virginia State Board had allowed.

In more recent terms, however, the Court has granted repeated victories to advertisers in First Amendment challenges. It has struck down a ban on the placement of commercial newsracks on city streets, a ban on cold calls to potential customers by certified public accountants, a restriction on the professional designations that accountants may use in their advertising, and a federal law barring beer makers from stating the alcohol content of their beer on their labels. Along the way, the Court noted that commercial speech may not be given an automatic discount in the scale of First Amendment values. And most recently, in 44 Liquormart, Inc. v. Rhode Island, the Court largely returned to the premises of Virginia State Board in unanimously striking down a state ban on the truthful advertisement of liquor prices. While the Justices were divided as to the appropriate standard of scrutiny, all expressed strong skepticism toward the state's use of advertising regulation to reduce information about a product in

50. See id. at 431-36.
51. See Philip B. Kurland, Posadas de Puerto Rico v. Tourism Company: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful," 1986 Sup. Ct. Rev. 1, 12-13 (noting that, if "advertising of any economic activity that was not itself constitutionally protected activity, however legal that activity might be, was properly subject to government censorship . . ., then, under Posadas, there is no advertising that is not subject to government censorship").
56. See Discovery Network, 507 U.S. at 428 ("In the absence of some basis for distinguishing between 'newspapers' and 'commercial handbills' . . ., we are unwilling to recognize Cincinnati's bare assertion that the 'low value' of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing 'commercial handbills'.").
order to induce consumers not to buy it—the very rationale that had been accepted in *Central Hudson*, *Posadas*, and *Edge*.58

Advertising by lawyers has occupied something close to the position occupied by the advertising of vice—that is, it has been held only equivocally protected by the First Amendment.59 In its opinion in *Bates v. State Bar*,60 the Court struck down a total ban on price advertising by lawyers in a decision largely tracking the libertarian premises of *Virginia State Board*. In allowing lawyers to advertise a fee schedule for services at a legal clinic for the poor, Justice Blackmun's opinion for the Court rejected arguments that a prophylactic total ban on lawyer advertising could be justified by state interests in preserving professional integrity, ensuring accurate information, preventing burdens on the judicial system, or preventing an increase in the price or a decrease in the quality of legal services.61 In later cases, the Court struck down a bar against the use of pictures in a legal advertisement62 and a ban on soliciting legal business by mailing targeted advertisements.63 But it also, as discussed earlier, upheld a ban on the in-person solicitation of legal business for pecuniary gain,64 and upheld state sanctions for lawyers' misleading omissions in advertisements.65 Most recently, in *Florida Bar v. Went For It, Inc.*,66 the Court narrowly upheld a state bar rule prohibiting lawyers from sending targeted direct-mail solicitations to accident or disaster victims or their families within thirty days of the accident or disaster to seek their legal business, or from receiving referrals from anyone who made such contact.

The decisions upholding professional ethics regulations against First Amendment challenges are difficult to square with the Court's other advertising decisions. *Ohralik*, which permitted states to bar personal solicitation of new business by lawyers in order to prevent "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct,'"67 stands in direct contrast to *Edenfield v. Fane*,68

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59. Also, vice advertising is arguably doing much better now, as the Court has expressly rejected the notion that "legislatures have broader latitude to regulate speech that promotes socially harmful activities, such as alcohol consumption, than they have to regulate other types of speech." *Rubin*, 514 U.S. at 482 n.2. *Liquormart* implicitly reaffirmed this point. See *Liquormart*, 517 U.S. at 484.
61. See id. at 368-79.
64. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 448 (1978); see also supra notes 14-19 and accompanying text (discussing *Ohralik*).
65. See *Zauderer*, 471 U.S. at 636.
67. *Ohralik*, 436 U.S. at 462 (citation omitted).
which held by a vote of eight to one that a state may not bar certified public accountants from personal solicitation of prospective clients. Writing for the Court, Justice Kennedy did not overrule but rather distinguished Ohralik. Kennedy suggested that because lawyers are more skillful manipulators than accountants, and accounting clients are more sophisticated consumers than those who need legal services, the state's interests in accuracy, client privacy, and professional integrity are more directly served by limiting lawyer solicitation than by limiting accountant solicitation. In other words, the difference in outcomes turned solely on broad generalizations about the professional attributes of lawyers and accountants.

Florida Bar similarly contrasts sharply with other advertising decisions. Justice O'Connor, who is generally the Justice most willing to uphold government regulation of professional advertising, wrote the opinion for the five-Justice majority. She found that the thirty-day waiting period closely served substantial interests in protecting the "flagging reputations of Florida lawyers" by preventing them from engaging in conduct publicly perceived as crass, and in protecting "the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers." This holding raised considerable tension with Shapero v. Kentucky Bar Ass'n, which had invalidated a ban on direct-mail solicitation by lawyers "targeted" to specific recipients known to need legal services of a particular kind, distinguishing Ohralik on the ground that mail is easier to ignore or discard than a live lawyer. In Florida Bar, Justice O'Connor sought to distinguish Shapero by stressing that a limited

69. See id. at 767-77.
70. See id. at 774-75.
72. Florida Bar, 515 U.S. at 625.
73. Id. at 624.
waiting period was less restrictive than a total ban, and that targeted
mail intrudes more upon privacy interests than mail to the world at
large. But Florida Bar is the first decision of the Court to extend the
rationale of protecting privacy (or, more specifically protecting a
"captive audience" from intrusive communications that would be
costly to avoid) to restrictions on the receipt of mail. In previous mail
regulation cases, including one invalidating a ban on the mailing of
unsolicited advertisements for condoms, the Court had held that the
government may not protect homeowners by preempting offensive
mail when they had the ready and less restrictive alternative of taking
the "short, though regular, journey from mail box to trash can."77

II. DIFFERENTIAL TREATMENT OF LAWYER SPEECH

The advertising cases repeat a pattern observed earlier in the solici-
tation and lawyer commentary cases: the Court gives greater defer-
ence to state interests in regulating lawyer speech than the
comparable speech of others. Accountants are freer than lawyers to
cold-call client prospects, and condom advertisers are freer to blanket
mailboxes with condom ads than lawyers are to do so with offers of
legal services.

Even assuming that there are substantial state interests in prevent-
ing consumers from fraud and overreaching, and that these interests
may be served by regulation falling somewhere along a spectrum be-
tween leaving advertising wholly unregulated or wholly banned, the
question remains why the Court would allow government to strike the
balance for lawyers closer to prohibition than it does for other busi-
nesses. Even assuming that all commercial speech may be regulated
for being misleading, the question remains why government may more
readily presume that lawyer representations are misleading than it
may in other markets.

There is no obvious economic reason why this should be so. Law-
yers are members of a regulated profession, but so are pharmacists
and accountants. Lawyers hold a license attesting to particular com-
petence but so do plumbers and landscape architects. Lawyers enjoy
the competitive advantages of regulated monopoly but so do holders
of taxi medallions and operators of public utilities. Lawyers know far
more about law than their clients, but information asymmetry creates
moral hazards (such as the incentive to lie about the gravity of a prob-
lem) for auto mechanics as well. Indeed, market failures lead to gov-
ernment intervention in many markets in which the Court has
nonetheless held that advertising restrictions are unconstitutional.

75. See Florida Bar, 515 U.S. at 629-30.
77. Id. at 72 (citation omitted); see also Florida Bar, 515 U.S. at 643 (Kennedy, J.,
dissenting) (noting that any problem of offensiveness is "largely self-policing: Poten-
tial clients will not hire lawyers who offend them").
forcing the substitution of other regulatory means. Forced disclosure
is an obvious alternative remedy to information asymmetry; ordinary
consumer protection provisions, such as cooling off periods after en-
tering into an agreement, are obvious alternatives to suppressing ad-
vertising or solicitation at the threshold.

Nor is there any unique economic feature of legal services that
make it more likely in this than in other markets that increased com-
petition will dilute quality. At the time *Bates v. State Bar* was de-
cided, there were already empirical studies suggesting that the amount
of advertising bore an inverse relationship to price levels in markets
for goods such as eyeglasses and retail drugs, which the Court noted
in rejecting the argument that advertising restrictions served as price
controls. Since then, various empirical studies have suggested that ad-
vertising is not correlated with any reduction in the quality of services
provided, whether by optometrists or lawyers.80

If not economic differences, what else might explain the Court’s rel-
atively more deferential evaluation of the reasons to regulate attorney
speech? The first and least attractive explanation has to do with self-
interest and regulatory capture. Under this view, restrictions on solic-
itation and advertising serve a collective professional interest in pre-
serving monopoly rents, keeping fees for lawyers artificially high by
increasing information costs to consumers, suppressing price competi-
tion, and erecting barriers to entry. Since lawyers are in charge of
their own regulation, the tendency to adopt regulations reflecting self-
interest is unchecked.81 Justice Blackmun hinted at this possibility in-
directly in *Bates* in rejecting the State’s argument that the lawyer ad-
vertising ban reduced overhead costs that might otherwise be passed
along to clients. To the contrary, he wrote, increasing the price of
legal services through a “ban on advertising serves to increase the dif-
ficulty of discovering the lowest cost seller of acceptable ability, . . .
[reducing attorneys’] incentive to price competitively . . . .”82 While
Blackmun did not directly attribute any self-serving motives to the
bar, he negated the possibility that its motives were altruistic.

A second explanation, again unflattering, might focus on intrabar
factionalism. Under this view, the elite lawyers who tend to dominate
the organized bar—high-priced attorneys who operate through the so-
cial networks of corporate boards and suburban country clubs, ob-
taining clients by discrete referrals, family ties, and long-term
relationships—are willing to impose ethical restrictions that in prac-
tice discriminate against nouveaux legal upstarts. Justice Marshall

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79. See id. at 377 & n.34.
81. See id. at 87-90 (describing data supporting the protectionist thesis that adver-
tising barriers raise prices to consumers).
hinted at such an account in his concurring opinion in *Ohralik*, referring to studies suggesting that "the rules against solicitation were developed by the professional bar to keep recently immigrated lawyers, who gravitated toward the smaller, personal injury practice, from effective entry into the profession." A more benign variant on this view would recast the issue less as professional snobbery than as professional myopia. If bar elites and Supreme Court Justices are drawn mainly from sectors of the legal market where lawyers compete primarily on results, not price (because price is such a small percentage of the worth of a transaction) they may not realize how important price competition, and hence solicitation and advertising, is with respect to many kinds of routine legal claims brought by persons of low and middle income.

A third explanation would identify the relatively lesser protection of lawyer speech with professional image preservation. According to this view, it is important that lawyers perceive themselves, and/or that the public perceive lawyers, as involved in the pursuit of a higher calling. Moreover, any commercial practice by lawyers runs the risk of spillover effects, or negative externalities, on other lawyers or the administration of justice as a whole. Advertising may in some cases be the tool of qualified entrepreneurs who in fact improve the availability of affordable legal services. But, by this logic, if the marketing techniques of even a few bottom-feeding ambulance chasers inspire popular revulsion, then the costs of allowing advertising may erase the benefits. Courts upholding professional regulation of lawyer speech may be concerned that such negative impressions will dilute respect for the authority of judges, prosecutors, and other justice officials as well. The concern here is not with the actual quality of service provision so much as with attitudes held by consumers and observers of legal services.

The third explanation, aside from being more ethically attractive than the first two, accords most closely with the rhetoric of opinions that would uphold lawyer speech regulation against First Amendment challenge. For example, Justice O'Connor, writing for the dissent in *Shapero v. Kentucky Bar Ass'n*, noted that membership in the bar "entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct," and that promotional restrictions are valuable devices for reminding "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." This, of course, is one of the very rationales the Court had previously rejected

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85. *Id.* at 488 (O'Connor, J., dissenting).
86. *Id.* at 490 (O'Connor, J., dissenting).
in Bates, which assumed that the public knew well that lawyers "earn their livelihood at the bar" and found "the postulated connection between advertising and the erosion of true professionalism to be severely strained." Advocates of deference to professional regulation, however, argue that there is nonetheless something to be gained by maintaining an image of private lawyers as public servants, or keeping the public ignorant of the more competitive aspects of law as a business. For example, Justice O'Connor wrote for the majority in Florida Bar that a ban on the solicitation of personal injury business in the wake of accidents was justified by interests in shoring up the reputation of lawyers or at least preventing further "erosion of confidence in the profession."

But if the reason to repress lawyer speech is to impress the public, then it is an empirical question whether the public is indeed impressed. On this subject, the empirical evidence in favor of solicitation and advertising bans is severely wanting. The evidence relied on in Florida Bar, for example, was a summary of data commissioned by the state bar, which the Court credited as proving that targeted solicitation letters decreased respect for lawyers. But the survey responses cited by the Court were at best equivocal: for example, Justice O'Connor found it significant that "27% of direct-mail recipients reported that their regard for the legal profession and for the judicial process as a whole was 'lower' as a result of receiving the direct mail," without saying why it was not more significant that seventy-three percent viewed advertising as neutral or positive in relation to the reputation of the legal profession. In his dissent, Justice Kennedy savaged the report as junk science.

Other empirical studies suggest that there is little reason to suppose that specific bans on legal self-promotion improve the public image of lawyers. The Court has held that the First Amendment prohibits restrictions on accountant solicitation, and yet polls suggest that the public has a higher opinion of CPAs than of attorneys. While a high percentage of lawyers tend to blame lawyer advertising for negative attitudes toward the legal profession, only minute percentages of the public attribute negative views of lawyers to advertising. And one

89. See id. at 626-28.
90. Id. at 627.
92. See Florida Bar, 515 U.S. at 640-41 (Kennedy, J., dissenting).
94. See id. at 71.
ABA-commissioned study suggested that television commercials may have neutral to positive effects upon consumers' images of the lawyers in the ad and the legal profession in general.95

Even if there were greater empirical support for the claim that restricting promotional activities by lawyers improves lawyers' public reputation, the question remains why such an enhanced image should qualify as a substantial government interest, or indeed, as an interest of the government at all. The answer circles back to the Harlan opinion in Button, and the proposition that lawyers are officers of the court, or agents of the state. What makes the image of lawyers an interest of the government is that they participate in the administration of justice. When they do business they are not simply private commercial venturers but delegates of state power. Justice O'Connor's opinion in Florida Bar, echoing Harlan, emphasizes that "the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States."96

Of course, even ordinary business corporations are delegates of state power in some sense; state charters give corporations the advantages of perpetual life, limited liability, and other benefits of the corporate form. The Court, however, has expressly rejected arguments that the extension of such privileges entitles the state to the quid pro quo of placing greater conditions on corporate than on individual speech.97 The lawyer speech cases have provided only more qualified deregulation. The view that speech restrictions are a corollary of state-created privilege has been more tenacious in the legal than in the corporate context.

III. Parallels from Government Sponsorship Cases

The lawyer speech cases reflect a dichotomy between the Court's treatment of lawyers as participants in ordinary public or commercial discourse on a par with other speakers in those realms, and its treatment of lawyers as subject to some additional speech restrictions by virtue of their ties to state power. This dichotomy can now be related to broader First Amendment themes. It has been a recurring problem for First Amendment law that government restrictions on speech arise sometimes from its role as sovereign, with the coercive power to jail and tax, and sometimes from its role as property owner, educator, em-

95. See id. at 81-86.
96. Florida Bar, 515 U.S. at 635.
97. See First Nat'l Bank v. Bellotti, 435 U.S. 765, 784 (1978) (rejecting "the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation"). But see id. at 828 (Rehnquist, J., dissenting) (arguing that the right of political speech is not "incidental to the purposes for which the Commonwealth permitted these corporations to be organized"). Chief Justice Rehnquist is quite consistent in viewing both corporations and professions as creatures of the state and subject therefore to greater speech restrictions than are individuals.
ployer, or patron. In these latter capacities, government is in some sense sponsoring the speech it seeks to limit, by affording it space or subsidy. The question, then, is whether government has greater leeway to limit the speech of those it sponsors than it does when imposing coercive rules of general applicability to all citizens.

There are two possible polar positions on this question. One is that the government is never bound by the First Amendment when it acts in its proprietary capacities, but has complete allocative discretion in this realm. On this view, the First Amendment bars only the "abridgment" of speech, not its selective sponsorship, or its sponsorship upon a speech-restrictive condition. This view is epitomized by Justice Oliver Wendell Holmes's famous epigram that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." The opposite position is that constitutional limits extend to government in proprietary capacities as completely as they do to government in its sovereign capacity, because the government's monopoly of force means that it is never the mere equivalent of a private actor.

The Supreme Court has rejected both these polar positions, tending to steer between them by using threshold categorizations to divide the turf of government sponsorship into public components that are subject to First Amendment limits and private components that are not. When speech activity is identified as public in these cases, its restriction by the sponsoring government is treated as akin to the exercise of sovereign power and subject to constitutional constraints; when it is identified as private, its restriction is treated as closer to the mere exercise of managerial prerogative, to which constitutional constraints do not apply.

For example, consider conditions upon speech on public property, speech by public school students, speech by public employees, and speech by recipients of public funds. Under a long line of decisions recognizing certain public property as public forums, government may not condition speakers' access to public streets or parks on submission to government content control or excessive time, place, or manner regulation. But the Court has exempted a range of government property other than streets and parks from such First Amendment limitations by categorizing it as effectively private. For example, government may exclude speakers from placing circulars in public school teachers' mailboxes, soliciting funds for charitable fund drives in public workplaces, demonstrating or petitioning on sidewalks abutting post offices, soliciting donations in airport terminals, or

participating in a candidate debate broadcast on public television—
even though similar exclusion would not be allowed toward speakers
in streets and parks. Each of these locations within the vast realm of
government property has been deemed a “nonpublic forum,” in which
government may condition access as selectively as it likes so long as it
acts reasonably and avoids discrimination on the basis of viewpoint.

Public school students obviously have their speech greatly con-
strained when they participate in the school’s own curriculum; no one
may mount a soapbox in the middle of math class. But the Court has
held that students do not “shed their constitutional rights to freedom
of speech or expression at the schoolhouse gate,” and thus may
wear black armbands to class or speak freely as public citizens “in the
cafeteria, or on the playing field, or on the campus.” This public
status does not extend to student speech in the school’s curricular or
quasi-curricular settings: articles may be censored in the school-spon-
sored student newspaper and speakers may be edited for lewdness
in school assemblies. The Court suggested in these cases that the
government may dissociate itself from speech that might reflect badly
on it, even though it could not censor the speech of individuals acting
outside the scope of its sponsorship for such reasons.

The Court has divided claims against speech-restrictive conditions
on public employment along similar lines. On the one hand, public
employees do not shed their First Amendment rights at the workplace
gate, and government may not without strong justification condition
retention of their jobs on silence in their public capacities as citizens.
A public school teacher may criticize a school board for spending too
much on athletics, a clerical worker in a sheriff’s office may express
disappointment that an attempted assassination of the President was
unsuccessful, and civil servants may receive honoraria for their off-
duty speeches or articles—all without job sanction unless the gov-
ernment can make a particularized showing that such speech will dis-
rupt the workplace or impair government efficiency. On the other
hand, public employees may be freely discharged or demoted for ex-
pressing mere labor grievances internal to their workplace, such as by
fomenting office insurrection against the boss. The government is
held to have considerable latitude as a manager in these “private”

(1992); International Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672
105. Id. at 512-13.
speech settings, partly out of the functional concern that the efficient
operation of the government sector is incompatible with uninhibited,
robust, and wide-open debate. The question is how far this manage-
ment function extends; for example, Justice Scalia, dissenting in the case
of the assassination hyperbole, wrote that the government should not
have been forced "to permit one of its employees to 'ride with the
cops and cheer for the robbers.'"\textsuperscript{112}

\textbf{Conclusion}

In challenges to the selective allocation of public funds to some
speakers and not others, the Court has invalidated use of the leverage
of government funding to alter what the speaker would otherwise say
as a public citizen with his or her own resources, but has held that
government's mere refusal to subsidize speech of particular content is
constitutional, unless aimed at the suppression of a particular view-
point. For example, government may not condition a public broad-
casting subsidy on a station's foregoing all editorializing even if
funded with member contributions.\textsuperscript{113} But government may withhold
a subsidy in the form of tax benefits from the lobbying efforts of a
nonprofit organization when the withholding does not affect the non-
lobbying speech or advocacy of the organization,\textsuperscript{114} and may withhold
family planning funds from health care entities that advocate or coun-
sel women about abortion.\textsuperscript{115} These cases again express concern that
the First Amendment not be read to force government, as an entail-
ment of funding some speech, to place an imprimatur of approval
upon other speech that will reflect badly on its policies. As Chief Jus-
tice Rehnquist wrote for the Court in one of these decisions, "when
the Government appropriates public funds to establish a program it is
entitled to define the limits of that program."\textsuperscript{116}

Returning now to lawyer speech, it is evident that the Court en-
gages in a similar bifurcation of speakers' public and private status in
relation to the government that grants lawyers their professional li-
cense. When speaking in clearly public capacities—for example, when
helping the NAACP to recruit plaintiffs, representing criminal defend-
ants, or setting price schedules in legal clinics—lawyers receive rela-
tively robust free speech protection. When speaking in capacities that
might adversely implicate the administration of justice or perception
of administration of justice by the government—for example, when
chasing ambulance occupants into hospital rooms or soliciting acci-
dent victims by mail—the Court has regarded the government as freer
to place conditions on its sponsorship. It would plainly be untenable

\textsuperscript{112} Rankin, \textit{483 U.S.} at 394 (Scalia, J., dissenting).
\textsuperscript{114} See \textit{Regan v. Taxation with Representation, \textit{461 U.S.} 540 (1983).}
\textsuperscript{116} \textit{Id.} at 194.
for the Court to treat lawyers as entirely the agents of the state, for part of their very job description within the administration of justice is to challenge the state—for example, in the capacities of criminal defense lawyer or civil rights litigator. Moreover, lawyer speech may have special authority and importance to public judgment precisely because of the special knowledge and insight that comes with professional training.

The danger to free speech in such settings arises when government is permitted to define its functional interests too broadly. For example, if an attorney general defines the “efficient” operation of his office as requiring “public confidence” in the ability of all his employees to respect and enforce the law, then an otherwise excellent assistant attorney general who proclaims her same-sex relationship in a state that bans sodomy might well be fired. But it is certainly open to question whether irrational public prejudice toward gay people ought to count as a functional consideration or as the kind of majoritarian ideological preference that is usually unable to trump a speech right. Similarly, it is hardly clear that broad assumptions about public regard for the legal profession—especially if only weakly empirically demonstrated—ought to provide the basis for limiting lawyer promotional practices that cannot be shown to cause clients demonstrable material harm.

Of course, even under general First Amendment principles, speech may be regulated as to time, place, and manner or for a variety of content-neutral ends. The question in lawyer solicitation and advertising cases is whether lawyer-specific speech regulations are really needed to serve these ends or whether problems of fraud, misrepresentation, and overreaching may be adequately controlled by generally applicable background consumer protection laws, such as post-contractual cooling off periods, forced disclosure rules, and prohibitions on commercial fraud.

117. See, e.g., Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (en banc) (finding no First Amendment violation where the Attorney General withdrew an applicant’s job offer upon learning of her lesbian marriage).