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Section 3: Free Speech and Press

Institute of Bill of Rights Law, William & Mary Law School

A GROWING MARKETPLACE OF IDEAS

BY FLOYD ABRAMS

Legal Times
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The past year has been a remarkably positive one for First Amendment commercial-speech interests before the Supreme Court. Many followers of the fate of commercial speech had feared the worst after the Court granted a writ of certiorari from a strikingly First Amendment-sensitive ruling of the U.S. Court of Appeals for the 6th Circuit. But in its ruling in that case, Cincinnati v. Discovery Network Inc., 113 S. Ct. 1505 (1993), and in another, Edenfield v. Fane, 113 S. Ct. 1792 (1993), the Court not only reaffirmed the value of commercial speech, but also strengthened the protections afforded it in previous decisions. This remained true notwithstanding the Court's far less positive treatment of a third commercial-speech case, United States v. Edge Broadcasting, 61 U.S.L.W. 4759 (1993).

The disparity among the three cases should come as no surprise. In the commercial-speech area, as much as in any other in recent years, Supreme Court opinions often fail to relate to one another at all. It is as if there are two Supreme Courts in commercial-speech cases: one pro and one con. Unfortunately, this split has left both sides of the debate with their own well of precedent from which to draw, thus leaving the area one of continuing unpredictability. This term has been no exception. Justice Byron White's majority opinion in Edge--the last of the three decisions handed down -- simply does not cite Discovery Network at all and refers to Edenfield only once in passing.

Despite this lack of intertextual reference, each of the Court's commercial-speech cases this term, as in years past, involves an application of the same four-part test first set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980). Regarding truthful and non-deceptive commercial speech, that test requires an assessment of the seriousness of the government's interest in regulating commercial speech and a determination that the statute in question both directly advances that interest and is no more extensive than necessary to serve the interest. The final factor of this test was refined in Board of Trustees v. Fox, 492 U.S. 469 (1989), where the Court stated that its decisions do not require the legislature to choose the least restrictive means available to regulate commercial speech, but look instead to whether there is a "reasonable fit" between the legislature's ends and the regulatory means chosen to accomplish those ends.

As a practical matter, it is commonplace in applying this test for the first two elements to be disposed of relatively quickly. Only rarely has the Court been faced with speech it found to be wholly untruthful or inherently misleading and, therefore, outside the scope of First Amendment protection; and there always seems to be some substantial government interest or other behind a statute at issue. Almost without exception, the Court's commercial-speech cases -- including those decided this term -- thus turn on the third and fourth elements of the Central Hudson analysis.

In terms of clarifying the nature and scope of the protection of commercial speech. Discovery Network is of enormous import. Practically every line -- indeed, every footnote -- of Justice John Paul Stevens' majority opinion brings to light some aspect of commercial-speech law that is protective of speech yet had been only half-visible under previous decisions.

Several aspects of the Discovery Network opinion merit particular attention. First, with respect to the level of judicial scrutiny to which commercial-speech regulations ought to be subject, the Court flatly "rejected mere rational basis review," explicitly affirming the application of an intermediate level of scrutiny.

Borrowing extensively from those parts of Fax that offered some promise of future First Amendment protection, the Court also made clear that the burden of proof rests squarely on the state to justify its regulation and that it must "affirmatively establish the reasonable fit" required in the fourth prong of the commercial-speech test. The Court then clarified the nature of this burden by expanding upon what is meant by a "reasonable fit." The Court concluded that, although a given regulation need not be the least restrictive means in order to pass constitutional muster, "if there are numerous and obvious less-burdensome alternatives to the restriction on

commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." This is the first time since Fox set forth the reasonable-fit standard that the Court has provided clear and significant guidance on how to evaluate -- or at least go about disproving -- such a fit.

The Discovery Network decision is no less significant for its sensitivity to First Amendment concerns than for its systematic fine-tuning of the analytic framework applicable to commercial speech. In essence, the Court held in Discovery Network that commercial speech may not be treated differently from non-commercial speech when the distinction between the two "bears no relationship whatsoever to the particular interests" asserted by the state.

Specifically, the Court found that Cincinnati's ban on newsracks containing commercial handbills -- but not those containing newspapers -- was an impermissible response to the city's "admittedly legitimate interests" in aesthetics. Citing the fact that "[each] newsrack, whether containing [non-commercial] 'newspapers' or 'commercial handbills,' is equally unattractive," the Court found that the only reason the city's regulation failed to reach non-commercial speech was the city's misperception that since commercial speech was of lesser value than non-commercial speech, it could be separately regulated on grounds unrelated to the commercial aspects of its message. In response, the Court made clear that it was "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.'"

Preliminary to its consideration of the particular commercial/non-commercial dichotomy in Cincinnati's newsrack ordinance, the Court also addressed the troubling question of how commercial speech should be defined, concluding that "[this] very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." Significantly, the Court revisited its previous attempts to define commercial speech and made clear that its much-debated decision in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) -- which concluded that certain informational pamphlets discussing the virtues of prophylactics were properly viewed as commercial speech because they were "conceded to be advertisements," "made reference to a specific product," and were disseminated for profit -- did not establish any easily applied three-part test to determine if speech should be deemed commercial. Instead, the Court in Discovery Network found "noteworthy" the fact that, in Bolger, it "did not simply apply" its then-current definition of commercial speech in a mechanistic fashion, but rather conducted a careful examination of the speech at issue "to ensure that speech deserving of greater constitutional protection [was] not inadvertently suppressed."

Finally, Discovery Network is as noteworthy for its celebratory tone as it is for the substance of its analysis. Any decision that quotes from historian Daniel Boorstein's The Americans: The Colonial Experience to demonstrate that commercial speech is a historically important means of "[enlarging] and [enlightening] the public mind" can only be described as a paean to commercial speech. Discovery Network may well be the single most important decision in this area of First Amendment law since the landmark Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748 (1976), first expressly recognized the need for constitutional protection of even purely commercial speech.

The second of the three commercial-speech cases this term, Edenfield v. Fane, involved a constitutional challenge to a Florida statute banning in-person, uninvited solicitation by certified public accounts. The decision continued the supportive tone set by Discovery Network and, along with Edge,M furnished new insight into what is meant by Central Hudson's third requirement that a regulation must directly advance the state's interest.

Again the Court hailed the virtues of commercial speech and, significantly, found the free flowing marketplace of ideas at home in the marketplace of commerce. As Justice Anthony Kennedy wrote for the 8-1 majority, "[the] commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." Moreover, he added, even though that marketplace contains ideas "of slight worth" in addition to those that are "vital," "the general rule is that the speaker and the audience, not the government, assess the value of the information presented."

Consistent with this approach, Justice Kennedy focused more pointedly on the state's burden in Edenfield than the Court has ever done before. Specifically, the Court provided bite for the notion that "[the] party seeking to uphold a restriction on commercial speech carries the burden of justifying it"

by making clear that "[this] burden is not satisfied by mere speculation or conjecture" on by the conclusory statements of government officials. "[Rather]," Kennedy wrote, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

Applying this standard, the Edenfield majority struck down Florida's statute, citing the state's failure to demonstrate that the law directly advanced its interests in preventing fraud and overreaching and in maintaining "the fact and appearance of CPA independence."

If commercial speech was afforded broad protection in Discovery Network and Edenfield, it was dealt a blow in Edge. In that case, a slim 5-4 majority led by retiring Justice White upheld a federal statute forbidding radio and television stations from airing lottery advertisements in states where lotteries are illegal.

Edge represents a setback for First Amendment interests in at least three respects. First, the Court's analysis of the requirement that the regulation "directly advance" the state's interests leaves much to be desired -- particularly after Edenfield, which was decided only two months earlier. In fact, there is no mention of the state's burden and no citation to Edenfield in the third-prong analysis. Far from requiring hard evidence, the Court struck a deferential pose, contenting itself with stating that it had "no doubt that the [challenged] statutes directly advanced the governmental interest."

Second, Edge seems rooted in the very sort of informational protectionism that is contrary to deeply rooted First Amendment values. As Justice Stevens (who wrote for the majority in Discovery Network) points out in his dissent, the holding of Edge brings into question the principle established in Bigelow v. Virginia, 421 U.S. 809 (1975) -- where the Court struck down a Virginia law prohibiting ads for abortion-related services in New York City -- that a state may not, under the guise of protecting its citizens' welfare outside its borders, suppress truthful information within its borders regarding a legal activity in another state.

Gambling Ties

Third among the setbacks in Edge is Justice White's attempt to breathe life into Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986), the much-criticized commercial-speech decision in which the Court's majority put forth the view that "the [state's] greater power to completely ban [certain conduct] necessarily includes the lesser power to ban advertising" related to such conduct. That view -- turning on its head standard First Amendment jurisprudence, which views limitations on speech as far more dangerous than limitations on commercial conduct -- was repeated in Edge. Although the Court's dictum in Edge makes only a few loose references to similar dictum in Posadas without sustaining any meaningful analysis, its citation of the case (in lieu, for example, of Discovery Network) is troubling.

Fortunately, the Court was also quick to point out that Posadas, like Edge, involved advertisements concerning gambling -- an activity that, in the Court's view, "falls into a category of 'vice' activity that could be, and frequently has been, banned altogether." Paired in this fashion, the coupling of Edge and Posadas may have more to do with their relationship to a common "vice" that continues to stir historically paternalistic impulses than with the Court's desire to signal a broad retreat from existing commercial-speech protections.

In terms of advancing commercial-speech jurisprudence. Edge offers a single important clarification concerning the proper focus of the last two steps of commercial-speech analysis. The Court explained that in conducting an inquiry into whether a given regulation directly advances the state's interests, "the question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity." Instead, the inquiry must focus on whether a general application of the statute will advance the asserted interests. The Court concluded by stating that, although a statute's application to individual litigants is not irrelevant, it should be dealt with under the fourth factor of the Central Hudson test.

Finally, the tone of Edge is markedly different from that of both Discovery Network and Edenfield. In Edge, there are no celebratory refrains lauding the value of commercial speech. There is instead the crabbed tone all too typical of the Court when it disdains commercial speech. Indeed, if Edge were the only commercial-speech opinion one read, one would be struck by nothing so much as the ease with which the state can trump even a presumptive constitutional right.

And yet, Discovery Network and Edenfield outweigh Edge in importance. Significant commercial-speech protection is here to stay; so, it seems, is a continuing battle within the Court that adds little to its jurisprudential luster.

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AD LIMITS GET HARDER TO ENACT

BY CLAUDIA MACLACHLAN, National Law Journal Staff Reporter

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STATE AND federal attempts to restrict advertising of such so-called vices as tobacco, alcohol and gambling are not likely to get any easier in the wake of three inconsistent rulings by the U.S. Supreme Court on commercial speech, experts say.

Since 1976, when the Supreme Court first put teeth into First Amendment protection of commercial speech, there has been widespread dissension among scholars, lawmakers and jurists concerning exactly what kinds of commercial speech deserve protection and how much regulation, if any, is constitutional.

Not surprisingly, the deep-seated ambivalence that seems to characterize this debate extends to the Supreme Court, which this term handed down three commercial-speech decisions with two conflicting messages. Two of the high court's rulings are regarded as strongly protective of commercial-speech rights. But the third generally is viewed as a setback by advertisers and other proponents of unfettered commercial speech.

"It has been very difficult for 15 years to square one Supreme Court commercial-speech opinion with another," said noted First Amendment litigator Floyd Abrams of New York's Cahill Gordon & Reindel.

Already in the fray are Congress, some of whose members are eager to regulate the advertising of food, tobacco and other products, and even billboards in outer space; state legislatures, some of which are worried about the effects of alcohol and gambling on their citizens; and the Federal Trade Commission, whose official rechartering by Congress has been blocked for more than a decade because of commercial-speech concerns.

"The great difficulty in commercial speech is, how safe can you really make advertising," said Robert S. Peck, legislative counsel to the American Civil Liberties Union. First Amendment law, he explained, rejects notions of safety in political speech, the most protected of all speech. The question is, he asks, "How much of that can we import into commercial speech regulations?"

Short Shrift

Commercial speech -- speech proposing an economic transaction -- historically has been given short shrift under the First Amendment. For example in 1942 the Supreme Court held that ads were not entitled to First Amendment protection.

But by 1976, the court had changed its mind, holding that consumers had an interest in commercial information that "may be as keen, if not keener by far, than their interest in the day's most urgent political debate." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748.

Since that ruling, which one lawyer called commercial speech's "Magna Carta," lawyers say they have seen a slight but steady erosion of commercial-speech rights. The low point, according to commercial-speech advocates, was reached in 1986, when the court held that Puerto Rico could ban some types of gambling advertising, based on its right to bar casino gambling entirely. Posadas de Puerto Rico v. Tourism Co., 478 U.S. 328.

Two for Three

Given the court's somewhat erratic history in commercial-speech cases, business lawyers, civil liberties groups and First Amendment scholars were anxious to see what the court would do with the three cases it had this term. In the end, advocates of commercial speech rights went two for three.

* In City of Cincinnati v. Discovery Network, 91-1200, the court held that Cincinnati officials could not force the publishers of advertising circulars to remove their newsracks from crowded city streets while allowing other publications to remain. "The city's selective and categorical ban on the distribution, via newsrack, of 'commercial handbills' is not consistent with the dictates of the First Amendment," the court said.

* In Edenfield v. Fane, 91-1594, the court said that certified public accountants had a right to solicit clients. "In denying CPAs and their clients the

considerable advantages of solicitation in the commercial context, Florida's law threatens societal interests in broad access to complete and accurate commercial information that the First Amendment is designed to safeguard," the court held.

* In the most controversial case of the term -- U.S. v. Edge Broadcasting Co., 92-486 -- the court ruled that a radio station licensed in North Carolina could not broadcast Virginia lottery advertisements because North Carolina prohibits lotteries and lottery advertising. The Edge station is a few miles from the Virginia-North Carolina border, and 92 percent of its listeners are in Virginia.

On Edge

In a four-part opinion, the majority of it written by now-retired Justice Byron R. White, the court held that commercial-speech rights sometimes had to give way to "legislative judgments" -- and that in this case, North Carolina's right to ban gambling advertising within its state was paramount.

But the language in Edge that really worries commercial-speech advocates, and which they envision being used by those who want to ban alcohol and tobacco advertising, deals with advertising and demand:

"If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced."

First Amendment lawyer P. Cameron DeVore, who represented Dow Jones & Co., Gannett Co. and the American Civil Liberties Union in an amicus brief supporting Edge, said the doctrinal divide between cases such as Discovery and cases such as Edge has produced two lines of arguments.

Mr. DeVore said Edge undoubtedly will be cited by opponents of alcohol and tobacco advertising to bolster their argument that those products are not entitled to speech protection.

However, Mr. DeVore believes Edge is too narrow and too peculiar to the federal laws regulating state lotteries to permit extrapolation to tobacco or other products. "I feel confident that a Congressional ban on tobacco advertising does not pass muster under the First Amendment," he said.

Disagreeing with Mr. DeVore is George Washington University National Law Center Prof. Ronald K. L. Collins, who says that Edge puts both alcohol and tobacco advertising at risk of being banned.

"Tobacco and alcohol advertising are clearly within the purview of reasonable government regulation, which would include even banning them," he said. Professor Collins, co-founder of the Washington, D.C.-based Center for the Study of Commercialism, said the Edge decision stunned the advertising community, which he said was hoping the court would use the case to overturn the Posadas case.

Posadas scares even those who would support some restriction of tobacco advertising, such as Ralph Nader's Public Citizen Litigation Group in Washington, D.C.

"We would be very uncomfortable to see the Posadas rationale applied to the sale of pharmaceuticals," said David C. Vladeck, an attorney with the litigation group. "One of the reassuring things about Edge is that even though the solicitor general urged the court to decide it on Posadas grounds and presented it as a Posadas case, the court decided it on other grounds," Mr. Vladeck said.

Waiting for Congress

Instead, the court turned to the four-part test it designed in 1980 for assessing the constitutionality of commercial-speech regulation, a test articulated in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557.

Professor Collins said, "The point is that Edge was the case they were all watching because they wanted to kill Posadas." Professor Collins" center favors restrictions on computer-generated telephone advertising and some advertising aimed at children. He added that neither Edge nor Posadas will amount to much if Congress continues to stall on restrictive legislation.

For years Congress has been considering various bills aimed at curtailing tobacco and alcohol advertising. Some would disallow tax deductions for tobacco advertising, while other measures, such as this year's Sensible Advertising and Family Education Bill sponsored by Rep. Joseph P. Kennedy II, D-Mass., and Sen. Strom Thurmond, R-S.C., would force alcohol ads to contain health and safety warning messages.

The advertising community watches these bills closely, using the familiar "slippery slope" argument that legislation to restrict the so-called vices could be used to regulate other products.

"First it was tobacco, then it was alcohol, which is unquestionably good for you in small amounts; and next it could be high-fat foods, high-sugar foods, and you don't know where it stops," said Daniel E. Troy of Washington, D.C.'s Wiley, Rein & Fielding. Mr. Troy helped to draft amicus briefs in two of the court's commercial-speech cases this year for several media and advertising clients, including the American Advertising Federation.

Pending Cases

The issue of whether advertising has any impact on behavior -- some studies say it doesn't, particularly with tobacco use -- is one that state and local governments are wrestling with as they impose a variety of restrictions on advertising of the so-called vices -- tobacco, alcohol and gambling -- as well as try to exert some control over food labelling and nutrition claims.

Many First Amendment lawyers regard food labeling as the next generation of commercial-speech cases and are watching a California case, heading for the 9th U.S. Circuit Court of Appeals, that Cahill Gordon's Mr. Abrams is handling for a large group of advertisers and food industries. The case, Association of National Advertisers v. Lungren, 93-15644, challenges California's labeling laws, which require products to meet specific standards before advertisers can claim that they are "ozone-friendly" or "biodegradable."

Another California case pending before the 9th Circuit also is being watched because of its commercial-speech implications. That case, Johnson v. State Board of Accountancy, 92-16433, challenges California's law that prohibits certified public accountants who advertise from getting commissions on selling financial products such as mutual funds or annuities. Many states have similar prohibitions, but some, such as Texas and Florida, are not enforcing them, said Donald B. Verrilli, a partner in the Washington, D.C., office of Chicago's Jenner & Block, Mr. Verrilli is co-counsel for the plaintiff, Ross Johnson.

Good Shape

Despite widespread attempts to regulate advertising at both the state and local levels -- particularly tobacco advertising -- most First Amendment scholars agree that commercial-speech protections are in pretty good shape.

The case that has exhilarated the First Amendment bar is Discovery. "Discovery is probably the single most supportive decision of commercial speech since [Justice Harry A.] Blackmun wrote the Virginia pharmacy case," said Mr. Abrams, referring to the 1976 case that protected commercial speech, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748.

"It honors commercial speech," Mr. Abrams said. He added that knowing who wrote the decisions has become important in Supreme Court commercial-speech cases, noting that Justice White wrote Edge, while Justice John Paul Stevens wrote Discovery.

"Justice White has never been enamored of commercial speech," said Mr. Abrams, making a point that almost every lawyer interviewed for this article mentioned.

For that reason, speech advocates have been plowing through Supreme Court nominee Judge Ruth Bader Ginsburg's opinions, and they say they are pleased with the results.

"To my knowledge, she has not written an opinion in a significant case where a free-speech claim has been denied," said Mr. Troy, who has been researching Judge Ginsburg. "As a result, those of us who are strong supporters of commercial speech are mightily encouraged by her nomination."

HATE CRIME LEGISLATION MUZZLES FREE SPEECH

BY STANLEY FEINGOLD

The National Law Journal
July 12, 1993

THE SUPREME COURT on June 11 unanimously upheld Wisconsin's penalty enhancement law, Wis. Stat. 939.645, which imposes harsher penalties on a criminal who "intentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person." Twenty-six other states and the District of Columbia have similar laws.

In upholding hate crimes laws, the court has recognized the threat that prejudice poses to the public peace, but ignored the threat that such laws pose to our liberty. It is possible to combat bigotry without compromising liberty, but hate crimes laws are not the way to do it.

Justice William H. Rehnquist's opinion in Wisconsin v. Mitchell, 93=515 (1993), goes counter to the high court's tendency in recent decades to restrict the extent to which offensive expression can be punished. In almost every area of controversial expression, including political advocacy, obscenity and libel, the Supreme Court has defined more narrowly the extent to which governments may punish speech and expression.

This has even been true in the area of hate speech. In response to increasing bigotry on campuses, many colleges adopted speech codes that went beyond what the Supreme Court had characterized as "fighting words" in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

These restrictions prompted outcries that "political correctness" was stifling the expression of unpopular ideas. Lower federal courts voided anti-discrimination speech codes at the universities of Michigan and Wisconsin as overbroad and vague, calling into question the similar codes at other public and private institutions.

Any doubts as to where the Supreme Court stood appeared to have been resolved last year when, in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), it voided a city ordinance as overbroad, because it punished nearly all controversial characterizations likely to arouse "resentment" among defined protected groups, and under-inclusive, because the government must not selectively penalize fighting words directed at some groups while not prosecuting those addressed to others.

Increased Penalty

The famous dictum of Justice Oliver Wendell Holmes Jr. in which he defended "freedom for the thought that we hate" has been repeatedly invoked by the court in defending obnoxious expressions of opinion. Although the punishment of hate speech gained no support from the St. Paul decision, the court has now concluded that hate crimes are something else, and the penalty for criminal conviction may be increased when an identifiable group hatred inspired the crime. The distinction is thus erased between motive (what the perpetuator believes) and intent (what the perpetrator wants to do).

The wanton brutality of Todd Mitchell and his friends, who were all black, in assaulting an innocent young man, who was chosen as their target because he was white, deserved the full penalty of the law, as would have any racially motivated crime. However, increasing the penalty because of the beliefs of the assailants opens a Pandora's box of proscribed hates and presumed motives that will not easily be closed. The logical next step will be to examine the conversations, correspondence and other expressions of the accused persons to determine whether a hate motive prompted the crime.

To be consistent, legislatures must now includes other hate categories, including sex, physical characteristics, age, party affiliation, anti-Americanism or position on abortion. If a hate speech law that enumerated some categories is invalid because, in Justice Antonin Scalia's opinion in St. Paul, "government may not regulate use based on hostility -- or favoritism -- toward the underlying message involved," how can a hate crimes law be upheld that increases the penalty for crimes motivated by some hates but not those motivated by other hates?

Majority Can Be Wrong

The effort to compel belief is not only wrong; it is futile. There is no evidence that hatred is reduced by laws forbidding beliefs or by punishing more severely crimes committed by those professing these beliefs. Those who disagree with the court's decision and would punish only criminal actors and not hateful speakers should take heart in recalling that other unanimous and near-unanimous Supreme Courts have been wrong, and later set right. Decisions have denied the right of free expression with only one or two dissents; often there would have been none but for the presence of a few libertarian justices from Mr. Holmes and Louis D. Brandels to William J. Brennan and Thurgood Marshall. But no such uncompromising champions of free expression now sit on the U.S. Supreme Court.

Only three years after the court upheld Pennsylvania's compulsory flag salute law, in the 1940 case Minersville School District v. Gobitis, 310 U.S. 586, the sole dissenter was joined by a new member and three switch justices, leading to the rejection of a similar law in West Virgina. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

The new justice, Robert H. Jackson, wrote the opinion in language that is pertinent now: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

A Supreme Court that maintains it is not punishing disapproved belief when it enhances criminal punishment because of that belief can also argue that it does not seek to compel approved belief. However, we are still free not to believe it.

Special to The National Law Journal; Mr. Feingold, for many years on the political science faculty at City College of New York, now teaches at Westchester Community College in Valhalla, New York.

HIGH COURT RULES BUSINESS SOLICITATION IS A RIGHT FREE SPEECH: JUSTICES STRIKE DOWN A FLORIDA LAW FORBIDDING ACCOUNTANTS FROM SEEKING OUT NEW CLIENTS IN PERSON.

By DAVID G. SAVAGE, TIMES STAFF WRITER

Los Angeles Times
April 27, 1993

The Supreme Court, in a ruling that extends free-speech rights to certain business practices, on Monday struck down a Florida law that barred accountants from soliciting new clients in person.

On an 8-1 vote, the justices said that accountants, like other professionals, have a constitutional right to convey "truthful, non-deceptive information" about their businesses.

The ruling likely invalidates similar laws from Texas, Minnesota and Louisiana. These measures are based on the view that, because accountants must make objective judgments about a company's finances, they should not be permitted to aggressively sell themselves to clients.

But in recent years, the justices have insisted that the First Amendment
protects advertising and solicitations, as well as traditional political speeches and pamphlets. Just last month, the court struck down a Cincinnati ordinance that banned sidewalk news racks containing magazines loaded with real estate ads.

The court opinion rejected the city's defense that advertising always should be accorded a "lesser protection" under the First Amendment.

In Monday's opinion, Justice Anthony M. Kennedy expressed strong support for what lawyers label "commercial speech."

"The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth," Kennedy said. "But the general rule is that the speaker and the audience, not the government, assess the value of the information presented."

But the court stopped short of overturning a 1978 decision that upheld an Ohio law forbidding lawyers from directly soliciting business from victims of an auto accident.

Unlike the classic ambulance chaser, accountants will be speaking to "sophisticated and experienced business executives" who are "far less susceptible to manipulation than the young accident victim" in the 1978 case, Kennedy said.

The case decided Monday began in 1985 when Scott Fane, a New Jersey certified public accountant, moved to Florida.

He specialized in providing tax advice to small businesses and had built his practice by soliciting clients in person.

But the Florida Board of Accountancy prohibited CPAs from "any direct, in-person, uninvited solicitation" of customers. Believing that his free-speech rights had been violated, Fane filed a suit in federal court seeking to have the regulation struck down.

A federal judge agreed and invalidated the rule, as did an appeals court in Atlanta. The Justices agreed to hear the case (Edenfield vs. Fane, 91-1594), but only Justice Sandra Day O'Connor sided with the state. In her view, the government may regulate "pure profit seeking" by business persons.

In his opinion concurring with the majority, Justice Harry A. Blackmun chided his colleagues for not going further and ruling that commercial speech is entitled to the same constitutional protection as speech about public affairs.

92-1450 WATERS v. CHURCHILL

Employees—Retaliatory dismissal—Comments on matter of public concern—First Amendment—Immunity.

Ruling below (CA 7, 977 F2d 1114):

Public hospital that fired employee for criticism, later found to be protected under First Amendment, of hospital's cross-training program for nurses may be liable for violating employee's free-speech rights, even if hospital had insufficient knowledge about precise content of employee's speech because of inadequate investigation of employee's conduct.

Questions presented: (1) May public employer that terminates employee based on credible, substantiated reports of unprotected, insubordinate speech be held liable for retaliatory discharge under First Amendment if it is later shown that reports were inaccurate and that employee actually spoke on protected matters of public concern, when employer's ignorance of protected speech is result of incomplete investigation? (2) Were public officials, in January 1987, immune from liability for discharging employee based on credible, substantiated reports of unprotected, insubordinate speech that were later shown to be inaccurate—because (a) it was clearly established that insubordinate speech was not protected by First Amendment and (b) it was not clearly established that public officials had duty to investigate beyond interviewing reporter of speech three times and recipient of speech once and allowing discharged employee opportunity to discuss speech in question?

Petition for certiorari filed 3/8/93, by Donald J. McNeil, Lawrence A. Manson, Dorothy Voss Ward, Janet M. Kyte, and Keck, Mahin & Cate, all of Chicago, Ill.

CABLERS TURN TO HIGH COURT ON MUST-CARRY

Brooks Boliek

The Hollywood Reporter
July 6, 1993, Tuesday

The nation's cable industry urged the U.S. Supreme Court to grant it full First Amendment status last week when the cablers appealed a lower court's ruling upholding the meat of the 1992 Cable Act.

"The basic principals of the First Amendment -- the belief that government should not decide who may speak or what they may say -- are no less applicable to new forms of speech than to old forms," the appeal, filed late Friday, read. "The (lower court's decision) marks a serious departure from those principles and warrants plenary review by this Court."

Cablers told the high court that there is really no distinction between what they do and what newspapers, broadcasters, film studios and book publishers do.

"There is no difference between cable television and those media given full protection that would justify allowing the government to dictate the content of speech that must be provided by cable television to its subscribers," the appeal states.

The appeal, filed by 17 cable entities including Time Warner Entertainment, Turner Broadcasting Systems, Daniels Cablevision, USA Network and the National Cable Television Assn., contends that a three-judge panel erred when it upheld the " must-carry" provisions of the law this spring.

"The district court clearly got off on the wrong foot by treating must-carry law as 'simply an industry-specific antitrust and fair trade regulatory legislation,' " cable attorneys argued.

In 1992, Congress approved, over then-President George Bush's veto, the cable law, which, among other things, allows broadcasters to demand that cable companies carry their signal or to negotiate for payments to allow cablers to retransmit that signal.

In April, a three-judge panel here on a 2-1 vote decided that the law was constitutional because it regulated economic activity rather than speech. The major cable companies in May filed notice that they would ask the Supreme Court to decide whether the lower court is wrong and filed their appeal last week.

Fallout from approval of the act continued to take its toll in Washington as NCTA chief Jim Mooney resigned last week (HR 7/2). And while he rejected the notion that it forced him out, it has been widely speculated that the bill's approval was a major factor.

In its appeal, cable television claims it was wrongly singled out by Congress, contending that lawmakers decided to restrict their speech.

Using the lower court's logic, the cablers argue that the earlier ruling could allow the government to "direct every newspaper to commit a section of its pages to the publication of material submitted by particular writers, or compel bookstores to carry a specified amount of works published by 'local' authors, or movie theaters to show films produced by designated movie studios."

They reject the contention that the regulations are economic in nature contending that the government is making cable a second-class citizen by saying broadcasters are a preferred speaker.

"(I)t is simply not the business of the government to reorder the private marketplace for speech, commanding that certain speakers be left to fend for themselves," the attorneys wrote. "Whether the government legislates discrimination because it prefers certain speech, or just because it prefers certain speakers, does not change the illegitimate nature of the intrusion."

Broadcasters have benefited from the advent of cable, blowing the argument that cable is a "bot-tleneck" that can choke off broadcasters access to viewers, they argue.

"Far from being imperiled, in fact broadcasting has flourished," the cablers contend, noting that there are now 1,118 commercial broadcast stations, a 22 percent jump since 1986, and 363 educational stations, a 15 percent increase over the same time.

"This significant expansion took place at least partially because of the growth of cable television, " the appeal states.

The Supreme Court will decide whether it will hear the case sometime this year. If it does, it will likely take the court until next year to hear the case. Meanwhile the FCC has already begun implementing the act, having approved its rules governing must-carry and retransmission consent earlier in the year.