From contract to speech: the courts and CPA licensing laws
1921–1996

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Abstract

This paper explores the ways in which accounting, licensing legislation and the courts have intersected over time, shaping and reshaping the contours of the CPA’s economic jurisdiction and thereby restricting and/or enhancing competition between CPAs and the uncertified. While much attention has focused on the use of legislation and favorable interpretations of these statutes as a means of obtaining and expanding exclusive areas of work, little work has considered the role of the courts as a forum in which to contest and thereby limit the expansion activities of CPAs. The courts have played an important role in deciding issues such as who can be called a CPA, who can be called an accountant and when can a CPA be called a CPA. In deciding these issues, the courts have relied upon shifting constitutional arguments to advance and curb the jurisdiction building activities of CPAs. Early arguments called upon notions of the freedom of contract to challenge legislatively imposed limits on who might perform accounting work. Such arguments were later supplemented and eventually supplanted by those based upon freedom of speech, a freedom only recently held to extend to commercial speech. These shifting arguments are traced in the paper which concludes with some observations about the changing significance of the CPA designation. © 1999 Elsevier Science Ltd. All rights reserved.

Occupational groups in the US have relied to a large extent on the law as a means by which to achieve their professional aims. Through statutory certification and licensing, these groups have sought to restrict entry into their trade or craft, to secure control over self-defined core areas of activity and to diminish the effect of market relations and market competition on their members’ lives and livelihoods. Among the earliest professional groups to pursue this kind of occupational monopoly were accountants in New York who secured passage in 1896 of the first CPA licensing law in the US. This law established a state examination to certify the professional competency of accountants and reserved use of the title “certified public accountant” to those certified as competent and licensed by the state. Other states soon followed New York’s example in granting statutory protection to public accountants. Within 10 years of passage of the New York law, nine other states had enacted public accounting statutes,1 with all 48 states enacting such statutes by 1922.

1These states were PA (1899), MD (1900), CA (1901), WA (1903), IL (1903), NJ (1904), FL (1905), MI (1905), and RI (1906).

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Like other occupational groups that have established exclusive rights to particular work and/or specific titles by legislation, certified public accountants have not been content with the restrictions imposed in their favor by these initial licensing laws. Instead, they have sought to expand their jurisdictional claims and endeavored to expand their area of exclusivity through sporadic demands for a legislatively mandated expansion of their economic jurisdiction. These activities were direct attempts by CPAs to bar the unlicensed and uncertified from conducting accounting activity. CPAs, however, have more frequently attempted to accomplish such expansions through favorable and broad interpretations of the existing licensing legislation. In so doing, they have sought to secure their formal control over certain words and phrases, particularly those words and phrases used to describe the tasks at issue and the practitioners who perform these. Through this means, the profession has also attempted to expand its exclusive areas of work by seeking to impose on both the public and competing (albeit unlicensed) professionals its definitions of who can be called an accountant and who can be said to practice accounting (Abbott, 1988, pp. 60–62).

Certain actors within the US legal system, specifically legislatures and state licensing boards, have often assisted CPAs in their efforts to exclude others from the practice of accounting. The use of licensing legislation (Lubell, 1980), ethics codes (Preston et al., 1995) and other means to restrict the competition faced by CPAs has been previously studied. Indeed, much attention has been accorded the jurisdiction building activities of CPAs (e.g. Miranti, 1991). Less studied, however, have been the efforts of the unlicensed to resist the restrictions imposed by legislation and the rules created by state licensing boards. The courts, as another significant actor within the legal arena, have acted as an important forum for these efforts and have often been less favorably disposed towards the jurisdiction building activities of CPAs than have state legislature or licensing boards. It is the courts that enforce those legislatively granted rights which do not conflict with constitutional rights and overturn and disallow legislation which does conflict with constitutional rights. Thus, the courts may be seen as an arena in which the boundaries of loose legislative mandates are tested and specified (Abbott, 1988, p. 63). These boundaries may be tested by both the certified and the uncertified. Indeed, uncertified, or differently certified, practitioners acting individually, in small groups or collectively as a professional association have often contested and sought relief in the courts from the actions, definitions and claims forwarded by CPAs and state licensing boards. Through the courts, these parties have at times overturned legislation and state board rules and, at other times, been told to adhere to such rules. State boards have also applied to the courts, asking for injunctions against certain activities of uncertified practitioners; obtaining injunctions at times but being ordered to eliminate specific rules at other times. In a sense, a certain precariousness of outcome accompanies any application to the courts for relief or enforcement. Today, as in the past, the courts (with some exceptions) have played an important role in limiting the exclusive jurisdiction of certified public accountants and thereby their monopoly over the performance of certain accounting activities. Yet, the contribution of the courts in establishing and limiting the exclusivity of the accounting jurisdiction has received relatively little attention in the accounting literature. Instead, the courts have often been placed on the periphery of or ignored in studies about professional jurisdictions.

In the following sections, we analyze developments in the accounting licensing case law and consider the constitutional issues raised in leading cases. This analysis has been undertaken in an effort to redress the frequent omission of the role of the courts in studies of professional jurisdictions. We also hope that an historical perspective with its emphasis upon the changing contexts in which the various court cases have been tried will enable a better understanding of recent cases and the potential for change which they represent. To this end, the paper examines the changing constitutional arguments used to advance and curb the jurisdiction building efforts of CPAs and documents the shift from challenges based upon the abridgement of contract rights to those based on the abridgement of freedom of commercial
speech. Further, in examining these historical materials, we also wish to explore further the uneasy and often inconsistent relationship between CPAs and regulation. While accounting as a profession is “largely a by-product of the law and its processes” (Napier & Nokes, 1992, p. 5), CPAs have generally denigrated and decried state intervention into business and accounting processes and have consistently opposed proposals advocating governmental regulation of their activities or the formation of a federal standard-setting body. In doing so, they have often appealed to models derived from neoclassical economics that stress the efficiencies inherent in freely functioning markets and the inefficiencies inherent in regulation. However, even as CPAs have opposed unwanted intervention into their own activities, they have also sought government regulation to limit the activities of their competitors. In this regard, state regulation has often been seen as a means by which to evade or ameliorate the effects of market competition between themselves and unlicensed competitors. Market competition, it appears, is desirable only as it pertains to others.

In the next section, we examine occupational licensing in general and the judicial treatment of licensing laws during the period 1890–1910 when occupational licensing first became established in the US. This section relies heavily on the work of the legal historian, Lawrence Friedman, and is intended as a background for the subsequent discussion of the accounting case law, which spans the period 1921 to 1996. In the remaining sections, we consider the intersection of the courts with accounting licensing boards and professional groups. Initially, the courts were called upon to decide whether accounting licensing laws might properly limit who could refer to him/herself as a certified public accountant. The courts upheld such legislation on the grounds that it did not restrict the livelihoods of or contractual possibilities for nonCPAs. The courts were later asked to rule on who might refer to him/herself as an accountant. CPAs and state licensing boards had attempted to expand their jurisdictions by controlling not only the term CPA but also who might use the more general word, “accountant”. During this phase of contestation, we note a shift in the arguments — from freedom of contract to freedom of speech — used to limit the jurisdiction building efforts of certified public accountants. The most recent litigation and court rulings consider the issue of when may a certified public accountant refer to him/herself as a certified public accountant. In these cases, new and potentially more formidable disputants have emerged — national business and financial service firms — which provide an ever expanding array of accounting, tax and business advisory services and employ large numbers of CPAs and others to provide these services. One of these entities, the Tax and Business Division of American Express, has mounted and apparently won an important judicial challenge to the local accounting establishment, as represented by state boards of accountancy and state CPA societies. This challenge as well as other recent court cases seem to suggest a loosening of control over professional titling and a new era of heightened competition for CPA firms. Again, freedom of speech arguments have been employed to prevent licensing boards from silencing those CPAs employed in nontraditional venues. The final section contains some concluding comments about the significance of the recent cases.

1. Occupational licensing, 1890–1910

Occupational licensing laws appeared early in US history. For example, licenses were required of innkeepers, lawyers and peddlers from colonial times, and in the state of New York, steamboat and boarding house operators were licensed before the Civil War. Such laws had been extended to a wide variety of trades and occupations, including physicians, lawyers, school teachers, innkeepers, hawkers and peddlers, insurance salesmen and barbers. The motivation underlying the imposition of state licensing was also varied. Some licensing laws required only the payment of a fee and were probably enacted more in an effort to raise

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2The material in this and the following section is abstracted from Friedman (1965).
revenues for the State than in an attempt to regulate the activities of a particular occupational group. Others like the peddler laws were hostile in intent and were imposed upon this group by state or local governmental officials in an effort to restrict or eliminate competition by itinerant peddlers with small-town tradespeople. So-called friendly licensing laws stand in contrast to such peddler laws. These laws were sought and framed not by the state but by groups within the occupation that was to be licensed. Once enacted, friendly licensing laws typically vested the state's power to license (i.e., to certify competency and to prosecute unlicensed practice) in a "state board" composed of established practitioners. Friendly licensing thus afforded the affected occupational group with a high degree of regulatory autonomy. By allowing this group to control entry into the regulated trade or occupation, competition with those excluded from it might be limited. Through legislation, these groups sought to carve out a specific economic jurisdiction in which they would define the tasks to be included in this jurisdiction as well as who would be construed as qualified or fit to perform these tasks (Abbott, 1988). Towards the end of the nineteenth century, the incidence of "friendly" licensing was more and more frequent, becoming the model for the regulation of professions in the US, including public accounting.

Occupations that pursued such legislation tended to share a similar socioeconomic position. Members were often self-employed and relatively few distinctions existed between these individuals and their workers beyond that of occupational experience. Moreover, members usually perceived themselves as suffering from "unfair" competition arising from the activities (or encroachments) of "less qualified" practitioners of their craft. Although their work was often relatively skilled, these groups also usually thought themselves to suffer from a lack of professional prestige associated with the nature of their work (e.g., undertakers, barbers, and accountants). Under these circumstances, such groups tended to see occupational licensing as the surest and quickest means by which to obtain professional status and also to restrict trade. Their efforts to secure such legislation were eased by the absence of powerful employer groups who might have opposed licensing legislation and the monopoly it afforded the benefitted group.

While the absence of these employer groups no doubt eased the path to licensing, the presence of a determined and well-organized group within the occupation such as a trade association or professional society was also crucial in obtaining friendly licensing legislation. These associations and societies were not unique to the trades and professions but were elements of a wider associational movement that began to permeate American life after the Civil War. Although a complex social phenomenon, the associational movement has been described as a response to the surge in industrial concentration and the increasing fractionalization of social life, conditions which characterized the late nineteenth century. These conditions were thought to have provided the "fertile soil for the creation of associations, particularly economic ones," (Friedman, 1965, p. 503). Trusts, trade associations, labor unions, professional societies, farmers' organizations and many other groups proliferated (Hofstadter, 1955). Confronted with rapid economic change, these associations attempted to carve out exclusive economic jurisdictions for their members and to hold these against individuals defined as nonmembers. Legislation was one means of obtaining such exclusivity and associations and societies provided a critical underpinning for the expansion of occupational licensing. They were often the driving force behind legislative proposals and provided the contacts needed to secure the legislation's introduction into and passage by state legislatures. Among US accountants in 1896, this role was filled by two rival organizations, the American Association of Public Accountants, founded in 1887 to further the professional interests of American public accountants (and a forerunner of the AICPA), and the American Institute of Accounts that represented privately employed accountants and bookkeepers.3

3Miranti (1991) and others have charted the formation and subsequent history of professional accounting organizations in the US, and that story will not be retold here.
By the end of the nineteenth century, a spate of state and federal laws aimed at the economy and associations emerged amidst the economic and social conditions that spawned the associational movement. Some of these laws such as the Sherman Act were efforts to restrain association. Others such as the occupational licensing statutes were intended to promote it. Although lacking in consistency with respect to promoting or impeding association, this legislation reflected a common belief that the concentration of economic power in large corporations was inimical to the well-being of the nation and had to be countered by other more benign associations or by the state. With legislation such as the Sherman Act, the principle of freedom of contract began to encounter opposition and to diminish somewhat in importance. It was argued that unrestrained freedom of contract might facilitate the emergence of economic trusts, so while still honored in the abstract, freedom of contract was not to reign absolutely since "...unfettered [it] it led to the amalgamation of excess power, the 'curse of bigness' " (Friedman, 1965, p. 507).

1.1. Judicial responses to occupational licensing

The majority of early occupational licensing laws escaped judicial challenge as “freedom of occupational choice lacked champions” not only in the legislatures that enacted these laws but also in the courts. Existing practitioners rarely opposed licensing statutes during this early period as most laws made generous provision for them by licensing examinations or “grandfathering” them in as reputable practitioners at work when the legislation was passed. Nevertheless, many licensing laws enacted around the turn of the century — and other parts of the associational legislation — were opposed in the courts and most of these challenges were heard in state courts. The US Supreme Court showed relatively little interest in the issue of occupational licensing except in the instance of the licensing of physicians which it invariably upheld. Thus, “in the critical period of the development of trade restriction through licensing, the United States Supreme Court did not build up a guiding body of constitutional doctrine” (Friedman, 1965, p. 511). Even at the level of the state courts, there was some haphazardness about this body of constitutional litigation. Indeed, it was infrequent that a statute was challenged purely on constitutional principles. Instead, challenges to occupational licensing might arise years after the passage of the original law and be based on issues peripheral to the basic legislation. Challenges might also be indirect. Constitutional questions often arose in the context of challenging the legality of actions taken by regulatory boards in exercising their delegated police powers to enjoin “unlawful” practices by an unlicensed individual or group rather than as a consequence of a direct effort by excluded groups.4

In those cases in which the courts upheld the constitutionality of a licensing law, the usual reason given was that the statute was a proper exercise of police power by the state. In employing this line of reasoning, the court sought a “proper” balance between the rights of individuals to pursue any trade or profession they chose and the responsibility of the state to limit this freedom in order to protect its citizenry. This balancing of rights and protection was well illustrated in the 1888 US Supreme Court decision in Dent v. West Virginia (1888). Frank Dent had been convicted of practicing medicine without a license under the West Virginia licensing statute. In upholding this conviction, the Supreme Court reaffirmed the right of every citizen to pursue any lawful trade or profession, subject to the same conditions as all other individuals. Moreover, the Court stipulated that this right could not be taken away arbitrarily, and closely likened it to a property right. The state, however, also had the power to provide for the general welfare and where the practice of a particular trade or profession affected the public interest, the state could limit practice to those individuals who had evidenced their competence. Using this reasoning, state intervention was

4This experience contrasts with wage and hour legislation. Here, the constitutionality of laws designed to limit the work hours of specific occupational groups such as bakers, children or women was directly challenged by employer groups. These laws were struck down by the courts as an unwarranted interference of state government into the “freedom” of the employer and worker to reach an employment contract.
constructed as appropriate in complicated fields such as medicine, where the public was thought to be unable to judge the competence of practitioners.

In instances in which the constitutionality of a statute was denied, the court usually held that the statute inappropriately covered a “common vocation” or established a far-reaching “monopoly”. Some state courts considered the licensing of “ordinary” trades such as horse-shoeing to be prima facie unconstitutional. In reaching this conclusion, the courts maintained that in the absence of compelling public welfare issues the state had no power to abridge the individual’s freedom either to pursue a “common vocation” or to contract with a particular tradesperson. Courts also declared invalid those statutes which they considered blatantly monopolistic in intent and as going too far in granting an exclusive economic jurisdiction to an occupational group. Such statutes were seen to interfere too blatantly with the freedom of contract and with the right to pursue a vocation or occupation.

The courts were, thus, another forum in which both the scope of and level of exclusivity within an economic jurisdiction were decided. At times, the courts held that legislation had encroached upon the established jurisdiction of another occupational group taking from them their “common-law right to engage in lawful business” (Friedman, 1965, p. 513). Often “opposition [to licensing legislation] was a sign that the statute — unwittingly or unwittingly — encroached on the economic territory of another group of ‘professionals’”, “a subsegment of the licensed occupation” or “businessmen with different training and career patterns” (Friedman, 1965, p. 512) and thereby threatened the economic interests of people with some social status and professional standing. At other times, as licensing boards interpreted the statutes and defined the set of tasks to be included within their jurisdiction, the courts maintained that such boards had gone too far in attempting to stop “unauthorized practices”. In hearing and deciding various cases, the courts as well as the legislatures and occupational group played an important role in establishing and defining the jurisdictional boundaries of licensed trades and professions. In the remaining sections, we consider the impact of the courts upon establishing and defining an accounting jurisdiction and the changing constitutional arguments invoked in the relevant cases as well as their implications.

2. Who can be called a CPA?

The constitutional issues raised in litigation involving state accountancy laws were similar in many respects to those invoked in litigation involving other occupational licensing laws. The accounting case law — both early and late — was generated almost exclusively at the state court level, reflecting the local nature of US accounting regulation, which was and still is largely within the purview of state and territorial legislatures. Although appeals had been lodged with the US Supreme Court over the years, it was not until 1994 (almost 100 years after the first licensing laws were enacted) that this highest court heard a case involving the licensing of public accountants. As with many other licensing statutes, the original accounting acts were unchallenged for several years after their passage. Questions concerning the constitutionality of the New York law (enacted in 1896) did not reach the courts until 1923. Importantly, much of the litigation surrounding accounting licensing laws that raised constitutional issues grew out of actions which had been initiated by state boards of accountancy, or by other state officials on their behalf that were then appealed in the courts. The ostensible purpose of the state actions was to enjoin unlawful practice, but they (along with the subsequent consideration of the courts) also had the effect of testing and refining the limits of legislative mandates and probing the contours of the accounting jurisdiction.


As with “friendly” licensing more generally, the courts have shown little resistance to accounting licensing laws over the last century (although as we will see there were and continue to be limits to the courts’ favor). Nevertheless, questions have been raised in various courts concerning the constitutionality of these statutes, and that of the state board rules which implemented or interpreted them. An important factor in the development of this case law was the peculiar nature of the original public accountancy acts. With the exception of a 1917 Oklahoma law, the statutes initially enacted followed the guidelines of the 1896 New York law and provided only for control by the state of the professional accounting title.7 As such, these early laws sought only to limit who could “properly” use the title of certified public accountant rather than to restrict who might engage in the practice of public accounting.8 Much of this constitutional litigation has focused on issues of language, particularly the language that might be used by accounting practitioners (both licensed and unlicensed) to describe themselves and the services they provide to the public.

2.1. A balancing of police powers and freedom of contract

By the early 1920s when accounting licensing laws began to be challenged, the courts had already decided that state legislatures had the power to regulate trades or professions in the interest of the general welfare, notwithstanding the rights of citizens to pursue lawful occupations.9 Thus, the question considered by the courts in the accounting cases was not whether the state could properly enact licensing laws but whether its police power might be appropriately and properly extended to enact such laws for accountants. The courts responded to this question with a resounding “yes”, holding that the regulation of accountants was a valid rather than arbitrary exercise of state power.10 In considering this question, judges

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7The relatively permissive nature of the first CPA law may have been the result of the political confusion which preceded and attended passage of the legislation. In 1895 two accounting associations, the American Association of Public Accountants and the Institute of Accounts, introduced competing licensing bills into the New York legislature. The American Association’s bill provided for restriction of public accounting practice to licensed practitioners but not for state control of the new professional title. Instead, control of title was to be vested in the professional accounting societies, following the British model of accounting regulation. The Institute’s bill limited title but not practice, and became the basis of the legislation that was eventually passed. For details concerning political aspects of the bill’s passage, see Miranti (1991).

8In many of the early statutes, even attest services might be performed by any individual. Rather than relying only upon legislative actions to establish exclusive jurisdictional claims, CPAs have also had to convince the public that their license was of value in providing accounting services. However, during the period 1924–1943 and again in 1945–1977 revised statutes were enacted to limit the provision of independent attestation services to CPAs (Lubell, 1980, p. 146). By 1936, 14 states had enacted such restrictive statutes. Two other states enacted in 1943, and the remaining states followed only during the period 1945–1977. Lubell (1980, pp. 162–164) ascribes the early hiatus in the passage of restrictive legislation to the demise in 1933 of the National Association of Certified Public Accountants, the leading national organization representing noncertified practitioners. With the NACPA gone, and the consequent lull in occupational conflict, Lubell speculates that CPAs in many states no longer felt the need to secure passage of restrictive legislation. Noncertified accountants formed a successor organization, the National Society of Public Accountants, in 1945. By the early 1920s when accounting licensing laws began to be challenged, the courts had already decided that state legislatures had the power to regulate trades or professions in the interest of the general welfare, notwithstanding the rights of citizens to pursue lawful occupations. Thus, the question considered by the courts in the accounting cases was not whether the state could properly enact licensing laws but whether its police power might be appropriately and properly extended to enact such laws for accountants. The courts responded to this question with a resounding “yes”, holding that the regulation of accountants was a valid rather than arbitrary exercise of state power. In considering this question, judges

9See Friedman (1965) for citations to the relevant case law.

looked primarily to the degree of skill and learning needed to practice accounting and concluded that public accounting was sufficiently “highly skilled and technical” (State of Louisiana, Appt., v. E. J. De Verges, 1923) to warrant state regulation. In later cases, judges also considered the growth of this field and its increasing significance for economic matters by noting the involvement of accountants in the sale of securities, the establishment of public utility rates, the regulation of banks and insurance companies, and the reporting of income, payroll and other taxes (Wangerin v. Wisconsin State Board of Accountancy, 1936).

While the courts conceded early on that public accounting was not an activity that “however incompetent a person may be” would threaten the public’s morals, health or safety by its practice, they also held that the state’s police powers were not limited to “professions involving such consequences.” A state could also act and regulate “whenever the general welfare requires to protect the public in the skilled trades and professions against ignorance, incompetence, and fraud” (State of Louisiana, Appt., v. E. J. De Verges, 1923).

The courts did not, however, find that the states had unlimited power to regulate professions and trades through licensing legislation. Instead, the courts circumscribed the reach of such legislation and in so doing helped to define the professional jurisdiction of accountants as well as the regulatory jurisdiction of the state. In several early decisions, judges favorably commented upon the limited scope of the accountancy acts. These acts had created state regulatory boards and authorized these boards to conduct examinations and issue certificates. They had also enjoined the uncertified from holding themselves out to the public as certified public accountants and from using the professional designation “C.P.A.” However, the accountancy acts did not empower the state boards to punish those who practiced accounting without a certificate. In effect, it was lawful for anyone to work as an accountant as long as they did not represent themselves to be certified public accountants. These early acts did not establish an exclusive economic jurisdiction but rather created an exclusive appellation. As such, they did not prevent businesses or individuals from contracting with the uncertified nor were the uncertified prevented from pursuing an accounting career. In emphasizing the limited scope of the accountancy acts, the courts were not simply abiding by or reiterating legislative intent. Instead, they were letting it be known that the state could regulate public accounting only within proper limits, limits which the courts would help to delineate. To prohibit uncertified accountants from engaging in practice was to exceed the court designated limits and, where those limits were transgressed, the statute was declared unconstitutional and void.

These limits were forcefully outlined in the case of State ex rel. Short v. Riedell (1924), which considered the validity of the 1917 Oklahoma accountancy act. In enforcing this act, the Oklahoma Attorney General and the state board of accountancy had commenced an action to enjoin the defendants from holding themselves out as and practicing as “expert” or “professional” public accountants or auditors for compensation without having taken the state examination and without possessing a certificate from the Board. However, this action had unexpected consequences as...
the court overturned the state accounting act. Although the Oklahoma court noted that every state in the US had a statute regulating public accountancy and that the validity of these acts had been upheld by various courts, it also indicated that the Oklahoma act was different in that it explicitly prohibited the uncertified from engaging in practice. This difference was construed as significant enough to warrant declaring the law unconstitutional, a finding based primarily on three grounds. First, it tended to create a monopoly in the field of accounting. As Judge Ray wrote, "there is no suggestion that there has ever been any demand for such regulation by any one other than accountants. The effect of the act is that ... power is given a board in which accountants have control, to restrict their number..." It also denied to the uncertified equal protection of the laws and the "enjoyment of the gains for their own industry guaranteed to them by the Bill of Rights, in that it denies to them the right to follow the occupation for which they have qualified themselves by the expenditure of time and toil" (American Law Reports, 42 ALR, p. 776).

Most importantly, the Oklahoma law was seen to have curtailed freedom of contract in a purely private matter, by denying to businesses the right to contract for an audit with uncertified accountants. Unlike other trades, which "touch all the people generally" and thus, must be restricted to licensees, accounting touched a "particular class as a justification for striking down a state statute which prohibited business enterprises, innocent in their nature, so affect the public welfare by success or failure as to justify their regulation to the extent of limiting them in their right to contract ..." (American Law Reports, 42 ALR, pp. 770, 775).

State ex rel. Short v. Riedell (1924) sent a warning to the profession that the courts would strike down accountancy acts which limited the performance of all public accounting services to the certified. Importantly, this admonition was reiterated in two other cases which followed closely upon State ex rel. Short v. Riedell (1924). In 1926 the Illinois Supreme Court used arguments similar to those forwarded in State ex rel. Short v. Riedell (1924). In 1926 the Illinois Supreme Court used arguments similar to those forwarded in State ex rel. Short v. Riedell (1924). In 1926 the Illinois Supreme Court used arguments similar to those forwarded in State ex rel. Short v. Riedell (1924). In 1926 the Illinois Supreme Court used arguments similar to those forwarded in State ex rel. Short v. Riedell (1924). In 1926 the Illinois Supreme Court used arguments similar to those forwarded in State ex rel. Short v. Riedell (1924). In 1926 the Illinois Supreme Court used arguments similar to those forwarded in State ex rel. Short v. Riedell (1924). In 1926 the Illinois Supreme Court used arguments similar to those forwarded in State ex rel. Short v. Riedell (1924). In 1926 the Illinois Supreme Court used arguments similar to those forwarded in State ex rel. Short v. Riedell (1924). In 1926 the Illinois Supreme Court used arguments similar to those forwarded in State ex rel. Short v. Riedell (1924). In 1926 the Illinois Supreme Court used arguments similar to those forwarded in State ex rel. Short v. Riedell (1924). In 1926 the Illinois Supreme Court used arguments similar to those forwarded in State ex rel. Short v. Riedell (1924). In 1926 the Illinois Supreme Court used arguments similar to those forwarded in State ex rel. Short v. Riedell (1924). In 1926 the Illinois Supreme Court used arguments similar to those forwarded in State ex rel. Short v. Riedell (1924).

In these rulings the courts consistently imposed limits on both the State’s power to regulate and upon the exclusivity of the economic jurisdiction occupied by CPAs. The narrow view initially adopted by the courts concerning the societal effects of accounting and business enterprise was subsequently modified to allow an exclusive which had been repealed under pressure from an influential organization of uncertified accountants. A new accountancy act, which restored the CPA title and restricted the third-party audit function to CPAs, was passed in 1927. The legislative conflict in Illinois was part of a wider occupational struggle, which began early in the century, between CPAs and various societies of uncertified practitioners for control of accounting services. For further details, see Lubell (1980), p. 158 and passim.

jurisdiction in the instance of restricting independent attestation to CPAs.\textsuperscript{16} However, an exclusive jurisdiction over all services described as public accounting would not be achieved through legislative enactment of restrictive licensing laws. As late as 1957, the courts' attitudes on this issue were unchanged when the Florida Supreme Court, citing the opinion in State ex rel. Short v. Riedell (1924), struck down a provision of the state accountancy act which appeared to forbid uncertified accountants from performing "routine accounting work in their own offices" for more than one employer (Florida Accountants Association et al. v. George W. Dandelake et al., 1957).

3. Who can be called an accountant?

The courts from an early date had proven entirely supportive of statutory prohibitions which restricted the use of terms such as "certified public accountant" and "public accountant," as well as the abbreviation "C.P.A." solely to licensees.\textsuperscript{17} They had also upheld the constitutionality of legislation that enjoined "holding oneself out" as qualified under state accountancy acts without possessing a certificate. It was further well established in common law that state statutes which prohibited the performance of nonattest accounting services by the uncertified would be ruled unconstitutional. In balancing the police powers of the state with the rights of individuals to pursue an occupation or to contract with the unlicensed, the courts had adamantly refused to extend the exclusive jurisdiction of CPAs beyond the provision of attest services. While independent attestation was limited to CPAs in many jurisdictions, individual CPAs and CPA firms did not enjoy an exclusive jurisdiction over the myriad of other accounting services (including tax and consulting work) which they also offered to the public. These judicial findings had impressed upon CPAs the significance of the language contained in the licensing statutes\textsuperscript{18} and CPAs redirected their efforts to restrict competition within their jurisdiction by controlling the statutory definition of words such as "accountant". Many state laws and rules of State Boards attempted to preclude the uncertified from describing themselves as accountants. Rather than barring them from providing accounting services, the uncertified were to be denied use of the term, "accountant".Where such bans were adopted, the ostensible rationale was the necessity for preventing confusion and deception in the public mind. It was argued that the public would mistakenly believe that uncertified practitioners were certified if both the certified and uncertified were allowed to describe themselves as accountants. To the extent that bookkeepers are seen as less technically qualified than accountants, success in limiting the use of "accountant" to describe CPAs might have had the effect of expanding their exclusive jurisdiction. This control of words was another means by which to limit competition and to exclude the uncertified from the practice of accounting. However, whether state boards could enjoin uncertified practitioners from referring to themselves ("holding out") as "accountants" remained undecided. The courts were asked to rule on the validity of restricting the use of the more general appellation of "account-

\textsuperscript{16}The precedent-setting case was Wangerin v. Wisconsin State Bd of Accountancy, 233 Wis 179, 270 NW 57 (1936), in which the Supreme Court approved a 1935 Wisconsin law restricting independent attestation to CPAs. This suit had been initiated by non-CPAs in an effort to enjoin the enforcement by the State Board of this accounting law.

\textsuperscript{17}Landmark cases were People v. National Ass’n, 204 App. Div. 288, 197 NY Supp. 775 (1923); People v. Marlowe, 40 NY Crim. Rep. 448, 203 NY Supp. 474 (1923); and Henry v. State, 97 Tex. Crim. Rep. 67, 260 SW 190 (1924). Notwithstanding its title, the National Association of Certified Public Accountants was an organization of uncertified practitioners, formed in Washington DC in 1920. Among other activities, it conducted examinations for the degree of certified public accountant and sold CPA certificates (Lubell, 1980, pp. 144–145). In People v. National Ass’n, a New York court ordered the group to desist, reserving the right to issue CPA certificates to the state. In Marlow and Henry, the court found that the defendants had violated the law by advertising themselves as certified public accountants when they had not received a certificate from the state but only a certificate from the National Association. On the issue of restricting the CPA title, see also Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 ALR 2d 1425 (1949).

\textsuperscript{18}This significance was also conveyed by two other early cases, in which licensing statutes were attacked for the vagueness and indefiniteness of particular provisions. See Constam v. Darby, 95 NJL 318, 112 Atl. 498 (1921); and Lehman v. State Bd. of Public Accountancy, 208 Ala. 185, 94 So. 94 (1922).
tant” to the certified and on whether only the certified could be permitted to describe the services they offered to the public as “accounting”.

Florida Accountants Association et al. v. George W. Dandelake et al. (1957) was the first case in which other “designations” became an important issue. The Florida board of accountancy had sought, and initially won, an injunction by a lower court against the Florida Accountants Association, a group of unlicensed practitioners. This injunction was to stop the unlicensed from “invading the field” restricted to CPAs and public accountants and from holding themselves out as accountants contrary to the intent of the state accountancy act. The Florida law had authorized only those individuals holding certificates from the state board to engage in the practice of public accounting and had defined “practice” quite broadly to include “any person who holds himself out to the public as skilled in the knowledge, science and practice of accounting” or “who maintains an office for the transaction of business as a public accountant, or who, except as an employee of a public accountant, practices accounting, as distinguished from bookkeeping for more than one employer” (Florida Accountants Association et al., 1957, p. 324). Moreover, the state board had adopted a rule which in effect prohibited all uncertified practitioners from using the term “accountant” to describe themselves. This rule provided that among other facts, the listing of oneself as an accountant in telephone or business directories tended to show that the listed individual was engaged in the practice of public accounting, a practice the statute had explicitly prohibited to the uncertified (Florida Accountants Association et al., 1957, p. 324). By restricting the use of the word, accountant, to CPAs, the Florida Board was apparently attempting to reduce competition between CPAs and uncertified individuals who were not employed by CPAs. It would have been very difficult (if not impossible) for an uncertified individual to advertise the availability of accounting services without referring to him/herself as an accountant or mentioning the word “accounting”.

The defendants, in their turn, lodged an appeal with the Florida supreme court in an effort to overturn the injunction. They simply wanted to be left alone, “to do ordinary accounting work without... being relegated to the position of “enslaved laborers” in the offices of certified public accountants” (Florida Accountants Association et al., 1957, p. 326). As we saw previously, this court held invalid that part of the statute which prohibited nonlicensees from doing “routine accounting work in their own offices”. Importantly, the court also ruled that the statute could not constitutionally prohibit uncertified practitioners from designating themselves as “accountants” rather than “bookkeepers”, the designation the state board appeared to require.19 While use of the term “accountant” could not be limited to the certified, the court did find it permissible to distinguish between the certified and uncertified. It ruled that the Florida board of accountancy could require uncertified practitioners who advertised themselves as members of the Florida Accountants Association to include the disclaimer, “not certified by the state Board of Accountancy” so as not to “mislead the public.” The enforcement action initiated by the Florida State Board had unexpected and undesired consequences for it. Rather than upholding restrictions on who might use the word “accountant”, it could now be used by any accounting practitioner in Florida.

Florida Accountants Association et al. (1957) was a pivotal case in the history of the accounting licensing case law. While it reiterated the courts’ distaste for legislation and board rules which attempted to limit public accounting work to the certified, the Florida justices had also broached one of the more important regulatory issues of the coming decades — the validity of restricting the term “accountant” and similar designations for use only by the certified. In Florida Accountants

19One factor in the Court’s decision was its sense that there was no sharply discernible difference between accounting and bookkeeping work. As Justice Roberts wrote in the court’s opinion, “but what is the dividing line between bookkeeping and accounting? Every accountant must do some form of work that is also done by bookkeepers, and every bookkeeper must perform acts of accounting” (Florida Accountants’ Association Appts. v. George W. Dandelake, 98 So. 2d 323, 70 ALR 2d 425 (1957), pp. 326–327).
Association et al. (1957), the court found such restrictions objectionable. Although this court had refused to limit use of the words “accounting” and “accountant” to the certified, its decision was still based upon the freedom of contract and right of private property principles that had been employed in deciding the 1924 Short case. Future courts would continue to hear cases regarding who could legally refer to themselves as “accountants”. Their opinions would be mixed initially, with some judges upholding and others striking down the use of this term by the uncertified. The constitutional arguments relating to freedom of contract and private property would continue to appear in these subsequent cases. However, these arguments would be supplemented and later supplanted by those based upon freedom of speech as guaranteed by the First Amendment of the US constitution.

3.1. An emerging emphasis on freedom of speech

During the fourteen years from 1965 to 1979, the issue of who could be called an accountant was a central feature in at least six cases heard at the state supreme and appeals court levels. In Tom Welch Accounting Services v. Walby (1965), Burton v. Accountants Society of Virginia (1973), and Comprehensive Accounting Service Company v. The Maryland State Board of Public Accountancy (1979) the court upheld the use of the terms “accountant” and “accounting” by the uncertified. The courts in Texas State Board v. Public Accountancy v. Fulcher (1974), People v. Hill (1977), and Fulcher v. Texas State Board of Public Accountancy (1978) held their use to be unlawful. In People v. Hill, the judges based their decisions on whether they considered the use of “accountant” or similar words by uncertified practitioners to be misleading and confusing and thus, injurious to the public interest. This question also arose in Fulcher v. Texas State Board and Comprehensive Accounting Service Company. Nevertheless, in both the latter cases, the issue of freedom of speech was also considered and Comprehensive Accounting Service Company was disposed of entirely on First Amendment grounds — presaging future cases.

The constitutional issues raised by the cases discussed earlier in this paper addressed whether licensing statutes and/or their implementation by state boards of accountancy had achieved a “proper” balance between the freedom of contract of individuals and the use of the state’s police powers to protect its citizenry. Now, however, in cases heard during and after the 1970s, the constitutional issue of whether such laws or rulings abridged freedom of speech would be increasingly more important. This switch in the basis on which the cases were argued and decided was reflective of the changing relationship between commercial speech and First Amendment guarantees. For much of the post World War II period, a 1942 Supreme Court ruling, Valentine v. Christensen (1942), had held that commercial speech was “different” than other types of speech and thereby unprotected by the first amendment (Rome & Roberts, 1985). During the 1970s, the US Supreme Court reconsidered this exception and narrowed it in several rulings, thereby according limited first amendment protections to commercial speech. For example, in Virginia Pharmacy Board v. Virginia Consumer Council (1976), this court emphasized that the free flow of truthful information was essential in order for consumers to form intelligent decisions.

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20The different positions taken by the courts are reflected in the lack of uniformity among state laws on this issue. At present, twenty-six of the fifty states restrict the use of the term “accountant” to licensees. Among these jurisdictions, some states permit use of the term if a required disclaimer is used. For further details, see National Society of Public Accountants, 1994, Appendix E.

21In People v. Hill, 66 Cal. App. 3d 320, 136 Cal. Rptr 30 (1977), the court apparently considered the use of such terms by unlicensed practitioners so misleading that it prohibited Hill from using them in conjunction with his business title even though the state statute contained no express prohibition against unlicensed practitioners referring to themselves as “accountants” or their services as “accounting”. The court did not consider constitutional issues in deciding this case. For a different perspective on the same issue, see Volin v. Board of Public Accountancy, 422 Mass. 175, 661 NE 2d 639 (1996), discussed below.

opinions and to facilitate the proper allocation of resources. Truthful commercial information, therefore, could not be totally suppressed. However, false, misleading or deceptive information could be quashed as “untruthful speech, commercial or otherwise has never been protected for its own sake” (425 US at 771, 96 S. Ct. at 1830).

The issue in cases like Comprehensive Accounting Service Company (1979) was whether the rules implemented by state boards impeded the free-flow of truthful commercial speech. Comprehensive was a nationwide company that offered accounting, systems and tax services primarily to small and medium-sized enterprises. The company had been enjoined by the Maryland Board from holding itself out to the public as “accountants” and from describing its services as “accounting” under a provision of the state statute which restricted the use of these terms to holders of certificates. Comprehensive challenged this statute in the courts. In doing so, the company argued that the statute violated its freedom of speech, as the provision “restricted the dissemination of accurate information to the public.” This law thereby created “an anomaly” of permitting uncertified practitioners to perform accounting services, even as they were prohibited from holding themselves out as accountants or describing their services as accounting services (Comprehensive Accounting Service Company, pp. 1192–1193). Like the court in Fulcher v. Texas State Board, the trial court had dismissed this claim, observing that the right of free speech was not unlimited, but could “on occasion” be “subordinated to other values and considerations” (Comprehensive Accounting Service Company, p. 1193). Specifically, Comprehensive’s right to describe its services as accounting could be limited in the interest of not misleading the public. The appeals court believed otherwise. The justices reminded the parties that “Because the free flow of truthful information is protected by the first amendment, the courts require remedial relief for proved deceptions to be as narrow as possible” (Comprehensive Accounting Service Company, p. 1199). Accordingly, the Maryland Board was required to show that there was a “compelling need” to elect the “most drastic remedy” — in order to protect the public from confusion and fraud. The state had made no such demonstration; therefore, the statute violated Comprehensive’s First Amendment rights.

In Virginia Pharmacy Bd (1996), the terms “misleading” and “deceptive” had not been defined and lower court interpretations of this Supreme Court case have varied. A Texas court which also followed this precedent found the use of “accountant” by an uncertified practitioner to be misleading and consequently unprotected by the first amendment (Fulcher v. Texas State Board, 1978).23 Following Comprehensive Accounting Service Company (1979), the courts have tended to overturn “unreasonable” restrictions placed on the use of the words, “accounting” and “accountants”.24 Judges in two recent cases (Bonnie Moore et al. v. California State Board of Accountancy, 1992, and David R. Volin and Massachusetts Society of Independent Accountants, Inc. v. Board of Public Accountancy, 1994) have also refused to endorse outright bans on the use of these words by the uncertified.

The California State Board of Accountancy had ordered Bonnie Moore, an unlicensed practitioner and president of the Accounting Center to cease using the terms “accountant” and “accounting” in describing herself, her company or the services she offered to the public. Ms. Moore and the California Association of Independent Accountants filed suit in 1986 seeking declaratory relief and a permanent injunction against the California board. In 1992, the California Supreme Court upheld an earlier appeals court decision, which had been based largely on First Amendment grounds. Citing US Supreme Court decisions on commercial speech, the appeals court had concluded that to satisfy the First Amendment, use of the generic term “accountant” and “accounting” must be permitted “if they are qualified by a warning or disclaimer that avoids their misleading

23In this case, the Texas State Board had sought and won an injunction against an unlicensed practitioner.

impact.” Thus, unlicensed practitioners were entitled to use these terms as long as they added a modifier explaining they were not licensed by the state. In contrast, the California board had argued that any use of these terms, “whether qualified or standing alone”, was statutorily prohibited and “likely to be confused” with the CPA title.

A Massachusetts superior court judge reached similar conclusions in another closely watched case, David R. Volin and Massachusetts Society of Independent Accountants, Inc. v. Board of Public Accountancy (1994).25 The Massachusetts licensing statute did not prohibit nonlicensees from preparing financial statements which were not reviews or compilations or which did not contain a report. The state board, however, had interpreted the statute to preclude use by the uncertified of the terms “accountant” and “accounting”. Volin, an unlicensed accountant, and a society of unlicensed accountants had brought suit seeking relief from this interpretation. The court disagreed with the state board and ruled that unlicensed practitioners could hold themselves out as accountants and as providing accounting services. This decision was based on the absence in the statute of prohibitions against use of these terms by nonlicensees. The court also reaffirmed limits on the terms that might be used by the unlicensed. It found that Volin could be barred from referring to himself and his firm as “expert accountants” and as describing their services as “the very best” or advertising themselves as fulfilling “all accounting needs”.26 Referring to Comprehensive Accounting Service Company (1979) and Bonnie Moore et al. (1992) the court ruled that these limits did not violate freedom of speech but instead struck an appropriate balance between the need for the Massachusetts commonwealth to protect “the public from substandard accounting practices” by barring deceptive speech and the First Amendment rights of accounting practitioners.

Controversy over use of the word, accountant, has settled somewhat from when the issue was first raised in Florida Accountants Association et al. (1957). As one recent case noted: “every jurisdiction but one that has considered the issue... has held, on either statutory or unconstitutional grounds, that the use of the term ‘accountant’ or ‘accounting’ by unlicensed persons is proper” (Bonnie Moore et al., 1992). In reaching these decisions, the courts have refused to endorse the jurisdiction building efforts of CPAS and have placed use of the word accountant under the protections of the first amendment.

4. When can a CPA be called a CPA?

Even though use of the word, accountant, may no longer be controversial, the war of words continues having recently been joined on another front. The issue now concerns who may properly use the designation CPA. Previously, the uncertified had been forbidden to use any designation including CPA which might be interpreted to suggest they had been licensed by the state. This abridgement of freedom of speech was deemed necessary to “…protect the public against fraud, deception [and] the consequences of ignorance or incompetence in the practice of most professions” including public accountancy which “…now embraces many intricate and technical matters dealing with many kinds of tax laws, unfair trade practices, rate regulations, stock exchange regulations, reports required by many governmental agencies, financial statements and the like” (Texas State Board v. Fulcher, cited in Bonnie Moore et al. v. California State Board of Accountancy, 1992, p. 809). Many CPAs, however, are neither employed by public accounting firms nor practice as sole practitioners.27 They are instead working in

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25The case was of particular interest in that relevant sections of the Uniform Accountancy Act, which was written jointly by the AICPA and the National Association of State Boards of Accountancy and which forms the basis of many state accountancy laws, were construed by the courts for the first time.

26This decision was affirmed by the Massachusetts Supreme Judicial Court in February 1996 (Volin & Another v. Board of Public Accountancy, 422 Mass. 175, 661 NE 2d 639,1996).

27In 1986, 49% of AICPA members were in public accounting while almost 40% were employed by business and industry (AICPA web site-member information, accessed September 1997).
“nontraditional venues” such as law practices and large financial services companies. In an important 1994 US Supreme Court case, Silvia S. Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy (1994), the issue was raised as to whether a state licensing board could prohibit CPAs who work in these nontraditional venues from using their professional title.

Silvia Ibanez, a Florida attorney and CPA licensed by the Florida Board of Accountancy, was censured by the board for using her CPA and CFP (“Certified Financial Planner”) designations in advertising and on business cards and stationery. The board considered the advertising “false, deceptive and misleading” because it told “the public that she is subject to the provisions of [the Accountancy Act], and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not” (Silvia S. Ibanez, 1994, p. 2089). In effect, the board argued that only CPAs who were members of registered CPA firms could hold themselves out as titled professionals. Ibanez appealed this decision in a Florida appeals court which ruled against her. She then sought a review with the US Supreme Court. Justice Ginsburg, in delivering the unanimous opinion of the Supreme Court declared the Florida board’s position to be “insubstantial” and incompatible with First Amendment restraints. The board had failed to show that Ibanez had violated specific regulations or professional standards, and “as long as Ibanez holds an active CPA license from the Board we cannot imagine how consumers can be misled by her truthful representation to that effect” (Silvia S. Ibanez, 1994, p. 2089).

One legal observer remarked that the board’s action “might be viewed as an attempt by more traditional elements of the accounting profession to maintain the status quo in the face of new commercial arrangements and patterns of competition” (Hansen, 1994, p. 275). Indeed, the Supreme Court alluded to such ends when it stated: “To approve the Board’s reprimand of Ibanez would be to risk toleration of commercial speech restraints in the service of ... objectives that could not themselves justify a burden on commercial expression.” (Silvia S. Ibanez, 1994, p. 2092).

Competition within the market for accounting services has intensified as the audit market has matured and prohibitions on advertising and client solicitation have been dropped or revised. The “sheltered environment” and “pattern of prosperity to which accountants have become pleasantly accustomed” (Burton & Fairfield, 1982, p. 1) are no more. The demand for write-up work and the preparation of individual tax returns (market niches for many smaller CPA firms or individual practitioners) have been impacted by the widespread availability of personal computers and accounting software packages as well as the franchising of commercial tax preparers and other accounting services. With a decline in the importance of the attest function, CPAs located within public accounting firms have continued to expand the types of services offered to clients. For example, the AICPA revised its position in the late 1980s to allow members to sell securities, insurance and other financial services. Larger CPA firms have expanded ever more aggressively into management consulting and tax counseling (“Mergers on hold...”, 30 December 1984) with some firms offering services as varied as litigation support, outsourcing of accounting departments and even “rent-an-executive”.

A new competitor has recently entered into this market. In 1990, American Express Corporation established a new unit, now called Tax and Business Services (TBS), to provide accounting and related consulting services to small and mid-size businesses. TBS has expanded rapidly in the accounting market by purchasing existing accounting practices, adding the customer bases of these practices to its business and their former partners and employees to the ranks of AmEx employees. In purchasing these practices, TBS offered the capital needed to purchase costly information technologies and the ability to provide an expanded array of services to clients via other units of American Express such as credit

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28Some CPA firms (especially smaller ones) have voluntarily decreased the number of audits performed, a trend often attributed to perceived liability risks (Wall Street Journal, 1992). Also see Mednick (1996).
opportunities and travel-related services. While TBS was seen to compete primarily with small CPA practitioners who also provide accounting write-up and tax preparation services for small business clients and individuals, it is now described as the 11th largest accounting firm in the US (Beltran, 1997). However, in contrast to other accounting firms on this list, TBS is a subsidiary of a major US corporation. As such, under the laws of most states, TBS offices are precluded from providing attest services. These services over which the CPA has enjoyed a monopoly may be offered only by those CPAs located in the more “traditional” organizational structure of CPA firms or sole proprietorships.

Prior to the Silvia S. Ibanez (1994) decision, employees of AmEx had not held themselves out as CPAs. However, in the wake of this decision, AmEx filed suit against the Florida board seeking to prevent enforcement of the state statute that required CPAs holding themselves out as titled professionals to practice in licensed firms. Under the state’s public accountancy act, only entities in which all partners or shareholders are CPAs qualify for registration. IDS (which is now called TBS) asserted that the statute would prevent it from disclosing that the tax and business services it offers are provided by CPAs, thus infringing the licensees’ rights to engage in commercial speech and also violating anti-trust laws. Further,

None of the so-called “Big Six” accounting firms can meet Florida’s standard of 100% CPA ownership. The American Institute of Certified Public Accountants has concluded on the basis of a careful study that these firms have hundreds of non-CPA owners. The Nebraska Board of Accountancy has reached the same conclusion after an extensive investigation ... Nevertheless, the State has taken no action to revoke the licenses of these firms or to discipline CPAs within them who hold out, despite the clear violation of state law. Instead, the State has focused its energies on restraining IDS (quoted in State Board Report, December 1994, p. 2).

Late in 1995, the US District court struck down the Florida statute, now permitting Stephen Miller, a TBS employee, to hold himself out to his clients as a CPA. This decision was later upheld by the US Appeals court which also directed a lower Court to consider the First Amendment claims of AmEx. (Stephen M. Miller v. George Stuart, 1997).

5. Concluding comments

This paper has explored the ways in which accounting, licensing legislation and the courts have intersected over time, shaping and reshaping the contours of the CPA’s jurisdiction and thereby restricting or enhancing competition between CPAs and the uncertified. CPA licensing laws arose from the “associational, anti-competitive urge” common among occupational groups in the US at the turn of the century (Friedman, 1965, p. 526). As with the regulation of other occupational groups, neither the courts nor the legislatures showed much resistance to state regulation of accounting. The early licensing legislation which had been sought and framed by public accounting groups did not prevent the uncertified from providing accounting services but rather from using the designation CPA. As such, the licensed and unlicensed remained in direct competition with each other after the passage of these laws. The courts often described such accounting licensing laws as protective of the public welfare and as a valid exercise of the state’s police power. While the courts had no difficulty in restricting use of this exclusive designation to the licensed, they...
consistently refused to reserve specific types of work to CPAs in the early years of accounting licensing. Judges routinely struck down statutes and board rules which prohibited uncertified accountants from performing accounting work, declaring these monopolistic in intent and unwarranted impairments of contract rights. While the courts later upheld the constitutionality of licensing legislation that reserved attest services solely for CPAs, they continued to balance a perceived need to protect the public with that of protecting the freedom of contract in assessing whether licensing legislation was too restrictive. Thus, the courts played an important role in defining and limiting the contours of the exclusive jurisdiction to be enjoyed by CPAs.

The state boards, created to administer the licensing legislation, often enacted rules which had the effect of limiting competition within the accounting jurisdiction. In an apparent effort to circumvent judicial objections to exclusionary legislation, state statutes and board rules were reworked so as to restrict use of the terms “accountant”, “accounting”, and “practice” to licensees. Nonlicensees were thus denied the full means of identifying themselves and their services to the public. While state boards of accountancy justified these bans as a way of protecting the public from confusion and fraud, such restrictions on the use of “accountant” and “accounting” have been struck down by the courts in every state (except Texas) in which they were challenged. In striking down these restrictions and justifying their decisions, the courts have shifted from freedom of contract arguments to those based upon freedom of speech. However, whether justified on freedom of contract or freedom of speech grounds, these judicial decisions have called upon broad public values to limit the monopoly over the provision of accounting services by CPAs.

The significance of the CPA as a designation and as a profession was attained in part by legislation and regulation. By the time of the Florida Accountants Association et al. (1957) decision, the certified had secured both the exclusive use of the designation CPA and, in most jurisdictions, the exclusive right to perform attest services. The exclusivity of this title, the requirement that its holder meet state regulations, and the monopoly over attest services were seen to define what it was to be a CPA. Furthermore, the CPA was one who operated within a particular organizational context by practicing public accountancy in a licensed firm which was owned and managed by licensed individuals [National Association of State Boards of Accounting in amicus brief as reported in State boards (1996)]. However, attest services are increasingly less significant to the revenues of accounting firms which offer an expanding array of non-attest services to their clients. More and more CPAs are employed within “nontraditional venues” including organizations such as AmEx rather than by public accounting firms. With these and many other changes in the markets confronted by CPAs, the significance of the CPA designation is slipping away as are conceptions of the niche into which the CPA fits.

The actions of the Florida state board to preclude the use of the CPA title within nontraditional venues may be interpreted as an effort to exclude large business and financial services firms from the accounting arena. Regulation was to be employed once again to benefit the “traditional” CPA and to resist the impetus of changes in the market place. For as one commentator has noted, the CPA profession has been “... very effective at creating a regulatory structure that allows CPAs to stray far afield while blocking non-CPAs from posing a threat” (Telberg, 1996a). However, in the decisions reached in Silvia S. Ibanez (1994) and Stephen M. Miller (1997), the courts have again drawn upon public values, specifically freedom of speech, to block the efforts of the state board to limit competition through the restriction of commercial speech. In so doing, the CPAs in traditional venues are increasingly subject to the whims and demands of the marketplace and are less protected by the state regulatory apparatus.

In the past, regulation was often seen as a boon to the profession. Yet, with their emphasis upon the freedom of commercial speech, the courts have further delimited the exclusivity of the CPA jurisdiction. These limits suggest that CPAs can no longer rely upon regulation to expand (or
maintain) the range of services reserved to them.\footnote{However, efforts to limit competition through regulation will continue. As an example, the Texas State Board of Accountancy sued AmEx for practicing public accounting without a license. The case followed on recent changes in the state’s licensing requirements, which were made in light of the Silvia S. Ibanez (1994) decision. While any licensed individual may employ the designation of CPA, only CPAs practicing in firms which are one hundred per cent owned by CPAs and also registered with the state board can perform audits, reviews, and compilations of financial statements. A Texas court ruled that CPA employees of AmEx may prepare financial statements but cannot indicate that they followed AICPA professional standards in doing so. However, Texas CPAs must follow AICPA guidelines, a requirement that AmEx CPAs can no longer acknowledge (Hock, 1996a–c). The Texas Board later sued three AmEx CPAs for not following professional requirements. AmEx closed its Texas office and petitioned a state court to resolve whether CPAs employed by a non-CPA firm may prepare financial statements in Texas (Beltran, 1997).} Increasingly, CPAs are also the object of the free market rhetorics which seem to permeate the US in the closing decades of the twentieth century\footnote{Governor Wilson of California has proposed deregulating accounting and questioned the relevance of continuing professional education requirements and the uniform CPA examination (Telberg, 1996b).} and some professional leaders maintain that they must “broaden the AICPA’s and profession’s base economically rather than through regulation” (Mednick, 1996, p. 38). The regulation so avidly sought by CPAs in the past is now seen by some to impede their ability to compete in the changing marketplace. Rules restricting non-CPA ownership of CPA firms are thought to limit the ability of these entities to raise the capital needed to acquire information technologies as well as to add partners with specialties in non-attest areas.\footnote{Most state statutes require both firms and individuals to be licensed; and in order for a firm to be licensed, all of its owner must be CPAs. Under the AICPA code of professional conduct (as amended in AICPA, 1994), only two-thirds ownership is now required for firm membership. This rule accommodates the largest accounting firms with their many non-CPA partners. Smaller local accounting firms, however, are usually owned entirely by CPAs and have had a stake in preserving the 100% ownership rule as a defense against local law firms, cut-rate tax and bookkeeping services, and now the big financial services firms. However, this stance may be changing as the Florida Society of CPAs which had been battling AmEx is now pushing for non-CPA ownership (Florida CPAs, 1997).} Further, this regulation often covers not only the attest services reserved to CPAs but also non-attest services, thereby placing more stringent requirements upon the CPA than upon his/her unregulated competitors. Some prominent CPAs (primarily those from the largest public accounting firms) argue that only attest services should continue to be regulated. In other words, state based regulation should be replaced by market-driven schemes in order to “…recognize that we are, today, multidisciplinary professional service firms’ that perform both regulated and non-regulated services” (quoted in Telberg, 1996b). In this way, CPAs would be unleashed with new and unregulated activities and the “…future structure and regulation of the profession [would be] decided by the marketplace” (Get out of the way, the attest services reserved to CPAs but also non-CPA employees of AmEx may prepare financial statements but cannot indicate that they followed AICPA professional standards in doing so. However, Texas CPAs must follow AICPA guidelines, a requirement that AmEx CPAs can no longer acknowledge (Hock, 1996a–c). The Texas Board later sued three AmEx CPAs for not following professional requirements. AmEx closed its Texas office and petitioned a state court to resolve whether CPAs employed by a non-CPA firm may prepare financial statements in Texas (Beltran, 1997).}

31Nevertheless, efforts to limit competition through regulation will continue. As an example, the Texas State Board of Accountancy sued AmEx for practicing public accounting without a license. The case followed on recent changes in the state’s licensing requirements, which were made in light of the Silvia S. Ibanez (1994) decision. While any licensed individual may employ the designation of CPA, only CPAs practicing in firms which are one hundred per cent owned by CPAs and also registered with the state board can perform audits, reviews, and compilations of financial statements. A Texas court ruled that CPA employees of AmEx may prepare financial statements but cannot indicate that they followed AICPA professional standards in doing so. However, Texas CPAs must follow AICPA guidelines, a requirement that AmEx CPAs can no longer acknowledge (Hock, 1996a–c). The Texas Board later sued three AmEx CPAs for not following professional requirements. AmEx closed its Texas office and petitioned a state court to resolve whether CPAs employed by a non-CPA firm may prepare financial statements in Texas (Beltran, 1997).

32Governor Wilson of California has proposed deregulating accounting and questioned the relevance of continuing professional education requirements and the uniform CPA examination (Telberg, 1996b).
to the AmEx web site directs the reader to call +1-800-328-8300 ext. CPAs (2727) to receive more information about their tax and business services. For others, such as Microsoft, CPAs or more specifically CPA firms are “one of the last untapped marketing channels”. In any event, the recent judicial decisions in Silvia S. Ibanez (1994) and Stephen M. Miller are likely to have far-reaching effects on the regulation of accounting practices and “Issues such as the definition of public accounting will all be on the table for change” (Melancon, AICPA President) — a perhaps profound restructuring of the accounting jurisdiction lies in the future.

Acknowledgements

The authors thank two anonymous reviewers and Alistair Preston for their helpful comments.

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