

CITIZENS UNITED AND THE THREAT TO THE REGULATORY STATE

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INTRODUCTION

Although *Citizens United*¹ has been roundly criticized for its potential effect on elections and its display of judicial immodesty (or “activism”), the effect of the case which may be both most profound and perhaps most pernicious is its effect on the commercial speech doctrine. This is an aspect of the case which has been largely overlooked. Most people seem to be unaware of any connection between election law and the commercial speech doctrine—except, that is, those who have been working long and hard to accomplish the change it foreshadows. They are keenly aware of its implications.

The opinion in *Citizens United* is replete with rhetoric identifying corporations as “citizens,” as if they were real persons. This characterization bolsters arguments for treating commercial speech like fully protected speech because it trains the analysis on the speaker instead of the listener. The majority of the Court is sympathetic to the argument for more protection for commercial speech and *Citizens United* reflects that sympathy. It suggests that with the proper case, there is an increased likelihood the Supreme Court will either do away with the commercial speech doctrine altogether and declare that commercial speech should be treated as fully protected speech, or it will nominally retain the doctrine but apply strict scrutiny review. Either development (and they are really the same) would likely strangle in their infancy recent and proposed regulatory reforms such as the new tobacco regulation,² the financial reform act which includes changes intended to protect consumers from abusive or misleading credit marketing practices³ and the Interagency Agency Working Group on Foods

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1. *Citizens United v. Federal Election Comm’n*, 130 S. Ct. 876 (2010).
2. Family Smoking Prevention and Tobacco Control Act, Pub. L. 111-31, 123 Stat. 1776 (2009).
3. See H.R. Rep. No. 111-517, Title X, § 1031.

Marketed to Children⁴ proposing minimal nutritional standards for foods marketed to children, to name just a few. If that claim seems somewhat alarmist, it isn't. If you cannot regulate commercial speech, you cannot regulate commerce. Period.

I. THE CONNECTION BETWEEN COMMERCIAL AND CORPORATE SPEECH

To the uninitiated, commercial speech law and campaign finance reform law seem unrelated. Yet the two are closely linked. The commercial speech doctrine was established in 1976 by *Virginia Pharmacy*.⁵ It provided for limited protection of truthful commercial speech (a category previously not protected at all) on the grounds that truthful commercial speech was important to consumers and thus critical to market function. Only two years later the Supreme Court decided *First National Bank of Boston v. Bellotti*.⁶ *Bellotti* involved a law prohibiting certain types of corporate political advertising. The Court struck down the Massachusetts law at issue and in so doing announced, “The inherent worth of the speech in terms of its capacity for informing the public *does not depend upon the identity of its source, whether corporation, association, union, or individual.*”⁷ It was not long before this language (and similar formulations) in *Bellotti* began appearing in arguments in favor of full First Amendment protection for commercial speech, including the 2003 *Nike v. Kasky* case.⁸

Use of the *Bellotti* rhetoric, with its focus on the speaker and antidiscrimination principles, turns the commercial speech doctrine on its head. The doctrine started as a modest extension of First Amendment protection for some commercial speech due to its value to consumers and listeners. It was accompanied by deferential judicial review. But over the years the doctrine has been subtly refashioned, with allusions to *Bellotti*, as protection for commercial speech based on its intrinsic value as “speech.” As this framing gained ground it was accompanied by increased judicial skepticism toward regulation. In just a few decades, governmental regulation of commercial speech has gone from an unremarkable aspect of Congress’s power to regulate commerce to an almost presumptively illegitimate abridgment of freedom of expression, with regulators on the defensive against aggressive First Amendment attacks. This shift is of a piece with the embrace of dere-

4. The interagency group is made up of the Federal Trade Commission (“FTC”), Centers for Disease Control and Prevention (“CDCP”), Food and Drug Administration (“FDA”), and U.S. Department of Agriculture (“USDA”). INTERAGENCY WORKING GROUP ON FOOD MARKETED TO CHILDREN, TENTATIVE PROPOSED NUTRITION STANDARDS (2009), http://ftc.gov/bcp/workshops/sizingup/SNAC_PAC.pdf.

5. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

6. First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

7. *Id.* at 777 (emphasis added).

8. Brief of Amicus Curiae Center for Individual Freedom in Support of Petitioners at 23, 539 U.S. 654 (2003) (No. 02-575) (per curiam), 2003 WL 835292.

gulation generally in the latter part of the twentieth century. In the wake of spectacular corporate failures and malfeasance, deregulation is less appealing today. There is renewed interest in greater governmental oversight with respect to areas like food and product safety, securities and banking, the environment, and others where the unfettered market appears to be inadequate to protect the public interest. Yet the intellectual and legal apparatus that created the commercial speech doctrine and led to *Citizens United* may prop up the laissez-faire approach to regulation even as its shortcomings become manifest.

II. ORIGINS

Virginia Pharmacy, the decision which created the commercial speech doctrine, was issued after Justice Powell joined the Court. Powell had served as legal counsel to some of America's largest businesses. He felt strongly that the free enterprise system in America was under assault. In his view this assault required a coordinated defense. To this end, in 1971 he wrote a memo to the chairman of the educational committee of the U.S. Chamber of Commerce entitled "Confidential Memorandum: Attack on American Free Enterprise System."⁹ In the memo Powell outlined a multipronged plan by which American business could improve its standing with society. He advised industry to fund research, lobby, sponsor discussions in university settings, shape the representations of business in the media through public relations, fund strategic litigation, and offer proposed drafts of legislation which would be more hospitable to business.

Now, almost forty years later, it seems that industry followed all of Powell's recommendations. Certainly cases like *Nike v. Kasky* illustrate this strategy in full flower. In *Nike*, numerous amicus briefs were submitted by industry lobbying organizations like the Association of National Advertising and the National Association of Manufacturers, as well as by some of the world's largest corporations like Exxon-Mobil and Microsoft. They all cited *Bellotti*. Similarly, many of the scholarly articles arguing for more protection for commercial speech were written by practicing lawyers, suggesting that in some cases, firms have underwritten the cost in attorney billable hours needed to write these articles to advance clients' strategic interests. Alas, there are fewer clients paying for advocacy on behalf of the public. And those which exist (except the government itself) have far fewer resources.

These efforts have "moved the ball," making freedom of commercial expression seem both inevitable and necessary when it is neither. Perhaps because *Virginia Pharmacy* was a case brought by a consumer group, its holding seemed "proconsumer" and the doctrine's enormous benefits to

9. Robert A.G. Monks, *Corporacy: How CEOs and The Business Roundtable Hijacked the World's Greatest Wealth Machine—and How to Get it Back* 43-54 (2008); see also *The Powell Memo: Text and Analysis*, RECLAIMDEMOCRACY.ORG, Apr. 23, 2004, http://reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html.

business were not so apparent. They are today. The commercial speech doctrine gave constitutional cover to a wealth of commercial propaganda that cannot sensibly be described as “informational,” even as it purported to protect the government’s power to regulate commercial speech for its truth. Consumers have much to fear from misleading or false commercial speech. Yet under the onslaught of the antidiscrimination rhetoric, government power to protect them from it has been slowly eroded.

III. THE CORPORATION AS SPEAKER

Some of commercial speech’s defenders argue that intermediate scrutiny of commercial speech represents viewpoint discrimination. But this claim turns the rationale for extending protection on its head. *Virginia Pharmacy* focused on listeners’ interest in the information, not the speaker’s desire to communicate it. In contrast, the viewpoint discrimination argument foregrounds the speaker; it presumes, albeit indirectly, a human subject who as a moral actor should be protected from discriminatory suppression of his or her self-expression. It treats the speech rights as “belonging” to the *speaker*—not as protected on behalf of the *listener*.

Viewpoints don’t matter in a vacuum. There are only two reasons to be concerned about regulation of content or viewpoint. One is that the content is valuable to listeners. The other is that suppression offends the dignity of the speaker. If content is harmful to the listener, protection cannot be justified by reference to the listener’s interests. And if the speaker is not a moral subject, protection cannot be justified on the grounds of his (its) expressive interests. Yet this is a consequence of the sleight-of-hand involved in focusing on content—it treats the corporate speaker as if it were a moral subject which possesses rights as an attribute of personhood, and it frames restrictions on communication based on the speaker’s identity as invidious discrimination.

While the Court has not yet explicitly grounded protection for commercial speech in the speaker’s rights, it has gotten perilously close in *Bellotti* and again in *Citizens United*, with the suggestion that distinctions between corporations and persons (or between different types of corporations) are discriminatory. But if a for-profit corporation is entitled to full First Amendment protection when it engages in political speech—speech which is in some sense peripheral to its existence—then it would seem full protection for its *core* expressive activity should follow. The core expressive activity of a for-profit corporation is commercial speech. If the Court wants to avoid distinguishing between high- and low-value speech, and is inclined to treat for-profit corporations as speakers with full First Amendment rights, then full protection for commercial speech seems virtually inevitable.

IV. TOBACCO LITIGATION AND REGULATION

Predictably, *Citizens United* has already cropped up in some commercial speech cases. In *United States v. Philip Morris USA, Inc.*,¹⁰ the government sued several tobacco companies, alleging a pattern of racketeering based on activities taken in concert to conceal information about the health consequences of smoking, secondhand smoke, and the addictive properties of nicotine; deceptive marketing practices; marketing to children; and several other deceptive, fraudulent or harmful practices. After a long bench trial the judge issued a lengthy opinion, containing exhaustively documented findings of fact and conclusions of law, largely in favor of the government. The decision was affirmed in 2009.¹¹

The defendants unsuccessfully petitioned the Supreme Court for review claiming, among other things, that the prosecution violated the companies' First Amendment rights. The gist of their argument, as echoed in an amicus brief filed by the Washington Legal Foundation,¹² was that much of the misleading speech at issue was released in the form of editorials, op-eds, and press releases. These are forms of expression which are traditionally protected by the First Amendment, and, because they involved issues of "public concern," the tobacco companies argued that the statements should be treated as fully protected speech. *Citizens United* was cited as support for the proposition that the government could not "discriminate" against corporate speakers.

Consider what this means. The government alleged and the trial court found that much of this "information" was knowingly false and misleading. The press releases and other so-called informational pamphlets (some of which were sent to schoolchildren), purported to educate the public about the "debate" on the health consequences of smoking. In fact they did no such thing. They were disseminated to *manufacture* a controversy. There is scientific consensus about the premise that smoking causes serious health problems. The defendants' strategy in attacking this premise, succinctly captured in one internal memo, was to sow doubt and confusion, rather than to educate and inform: "*Doubt is our product* since it is the best means of competing with the 'body of fact' that exists in the mind of the general public."¹³ In short, the tobacco companies asserted a constitutional right to *obfuscate* public information about a product for which there is no safe level

10. 449 F. Supp. 2d 1 (D.D.C. 2006).

11. *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 78 U.S.L.W. 3501, 78 U.S.L.W. 3759 & 78 U.S.L.W. 3762 (U.S. 2010).

12. Brief of Washington Legal Foundation and National Association of Manufacturers as Amici Curiae in Support of Petitioners, *Philip Morris USA, Inc. v. United States*, 78 U.S.L.W. 3501, 78 U.S.L.W. 3759 & 78 U.S.L.W. 3762 (U.S. 2010) (Nos. 09-976, 09-977, 09-1012), 2010 WL 1130087.

13. *Phillip Morris*, 449 F. Supp. 2d at 191-92, ¶ 726 (D.D.C. 2006) (emphasis added) (quoting internal Brown & Williamson document).

of use. It is difficult to conceive of a construction by which the right to sow confusion about such a product is founded on the interests of the *listeners*.

Although the Supreme Court denied review of this case, the issue will arise again in litigation over the new law giving the Food and Drug Administration (“FDA”) jurisdiction over tobacco.¹⁴ For example, in *Commonwealth Brands v. FDA*,¹⁵ several tobacco companies (and related businesses) challenged the law, claiming its restrictions on tobacco advertising and packaging violated the First Amendment. The district court held that the law’s ban on color and graphics in packaging and advertisements, and on references to the FDA (which might imply governmental assurances of safety), *did* violate the First Amendment because they were overbroad. *Citizens United* and the judicial philosophy toward corporate interests which it reflects will undoubtedly be invoked in subsequent appeals of this ruling and in future cases involving other products which may present a hazard to the public, such as soft drinks, junk food, pharmaceuticals, and alcohol. Tobacco is a product which wreaks havoc on public health, particularly when advertising is either aimed at or peripherally affects children, but that does not mean that prohibition is the right response. Nevertheless, it does not follow from a rejection of prohibition that we are compelled to permit completely unrestrained promotion of dangerous products.

V. THE CONSEQUENCES OF STRICT SCRUTINY

As the *Commonwealth* case demonstrates, even under the current intermediate scrutiny test for commercial speech, a great deal of advertising which is arguably of little, or even negative, informational value will be protected. And some claim that increasing First Amendment protection for commercial speech will not affect the government’s ability to regulate *false* speech. But this is not true for two reasons. First, many advertisements do not offer factual claims that may be tested for their truth, but they may still be misleading—for example, when cigarette ads portray smokers as uniformly young, attractive, and healthy. The government has a legitimate interest in regulating misleading as well as false commercial speech. Second, high procedural and evidentiary barriers, like those imposed in *New York Times v. Sullivan*,¹⁶ will likely leave the government with a *theoretical* power to regulate, backed up by little in the way of *practical* ability to litigate. As prominent First Amendment scholar Fred Schauer recently observed, facts matter in the First Amendment. But where judges are hostile to the general proposition of regulation, facts are also susceptible to being dismissed or minimized. This happened in *Citizens United* when the Court rejected the argument about the appearance of corruption of the electoral

14. Family Smoking Prevention and Tobacco Control Act, Pub. L. 111-31, 123 Stat. 1776 (2009).

15. *Commonwealth Brands, Inc. v. FDA*, 678 F. Supp. 2d 512 (W.D. Ky. 2010).

16. 376 U.S. 254 (1964).

process, where multinational corporations are permitted to participate on the same terms as individual citizens.¹⁷

CONCLUSION

The *Citizens United* opinion, with its rhetorical framing of corporations as “citizens,” provides ammunition for those arguing that commercial speech ought to receive full First Amendment protection. The antidiscrimination rhetoric is troubling because it provides cover for the Court’s use of its countermajoritarian power *on behalf* of the powerful rather than against them. Full protection for commercial speech would threaten many of the regulatory initiatives of the last couple of years.

Given the disastrous corporate collapses of the last few years, it is evident the market cannot always be relied upon to protect the public. False and misleading commercial speech poisons the informational environment. Like an out-of-control oil well, large corporate interests inject vast amounts of “noise” (false and misleading speech) into the public sphere, every day, virtually unchecked. As we have seen with tobacco, this informational pollution can have significant negative consequences for public health, safety, and economic stability. Full First Amendment protection of this speech seems likely to make things worse. Can it really be the case that respect for freedom of expression makes the government powerless to combat informational pollution? In another First Amendment case, Justice Jackson famously warned the Court not to turn the Bill of Rights into “a suicide pact.” But constitutional protection for commercial speech might do just that.

17. This decision is in some tension with the Court’s holding in *Caperton v. A.T. Massey Coal Co.*, that millions of dollars in campaign contributions from a litigant required a judge to recuse himself because “the probability of actual bias” rose to an unconstitutional level. 129 S. Ct. 2252 (2010).