DOCUMENT RESUME

ED 203 365 CS 206 432

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TITLE Unmuzzling America's Corporations: Corporate Speech and the First Amendment.
PUB DATE Aug 81
NOTE 28p.: Paper presented at the Annual Meeting of the Association for Education in Journalism (64th, East Lansing, MI, August 8-11, 1981).

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Advertising: *Business: *Court Doctrines: *Court Litigation: *Federal Regulation: *Freedom of Speech: Organizational Communication: Public Relations
IDENTIFIERS *Corporations: First Amendment: Supreme Court

ABSTRACT

Under the "commercial speech doctrine," corporations were restricted for many years from speaking out on public issues or engaging in certain advertising practices. This "doctrine" was based on a case from the 1940s, in which the court ruled that purely commercial advertising had no constitutional protection from government restraint. Since 1975, however, the Supreme Court has repeatedly expanded the First Amendment protection accorded to "commercial speech." The early decisions focused on the rights of individual consumers to receive information on controversial products and services. Subsequent rulings permitted advertising for prescription drugs and professional and legal services. In 1978, the Court specifically affirmed the right of corporations to speak out on controversial public issues and set down strict guidelines to be used in evaluating any state law or regulation used to restrict corporate freedom of speech. In three rulings, the court recognized the difference between purely commercial speech such as advertising and noncommercial corporate speech such as that used by public relations practitioners. It may still, however, require years of additional court decisions to clearly spell out the rights of corporations under the new rules. (HTH)

Public Relations Division

UNMUZZLING AMERICA'S CORPORATIONS:

Corporate Speech and the First Amendment

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Presented to the Public Relations Division
Association for Education in Journalism
Meeting at Michigan State University

August, 1981

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INTRODUCTION

Between 1975 and 1980, there was a quiet legal revolution that extended First Amendment protection to American corporations. Once saddled with many restrictions on their right to speak out on public issues, corporations now have extensive First Amendment protection. Corporate public relations practitioners are finally beginning to achieve the kind of Constitutional rights enjoyed for 200 years by journalists.

The Supreme Court has repeatedly expanded the Constitutional protection afforded to "commercial speech" in recent years. At first, the decisions focused on the rights of individual consumers to receive commercial information about such controversial products and services as contraceptives and abortions. Then the Supreme Court declared that a state may not prohibit price advertising of prescription drugs, and that professionals such as lawyers may not be forbidden to advertise their services and prices. The high court even held that a city may not outlaw real estate "for sale" signs on homeowners' front lawns.

However, none of this directly affected America's major corporations. Under myriad state and federal regulations, they were clearly second-class citizens when it came to First Amendment rights. But in a landmark 1978 decision, First National Bank v. Bellotti,[1] the Supreme Court specifically affirmed the right of corporations to speak out on controversial public issues. Then in 1980, the Supreme Court handed down two more very important decisions that extended and formalized the

First Amendment rights of corporations: Central Hudson Gas & Electric Corp. v. Public Service Commission[2] and Consolidated Edison Co. v. Public Service Commission.[3] In these cases, the Supreme Court not only said unequivocally that corporations have a right to speak out on controversial issues, but also set down strict guidelines to be used in evaluating any state law or regulation that purports to restrict corporate freedom of speech.

Significantly, the Supreme Court recognized the difference between purely commercial speech (i.e. advertising designed to improve the sales performance of a product or service) and non-commercial corporate speech (such as the kind of idea or image-oriented materials typically produced and disseminated by public relations practitioners). The court extended more First Amendment protection to this non-commercial form of corporate speech than to commercial speech.

Taken as a group, the First National Bank, Central Hudson and Consolidated Edison decisions represent a dramatic victory for corporate public relations practitioners, unshackling them from arbitrary laws in many states. But these victories have attracted surprisingly little attention, considering their impact. For example, even the new 1981 edition of one of the nation's leading media law texts law says almost nothing about these Supreme Court decisions.[4]

This paper traces the evolution of First Amendment protection for corporate speech through its development from the older commercial speech doctrine, and then discusses the three key corporate speech decisions.

THE FIRST AMENDMENT AND COMMERCIAL SPEECH

For many years, the prevailing rule was that commercial speech had no First Amendment protection. If a particular expression of fact or opinion could be dismissed as "commercial speech," it could be suppressed by law. Even clearly non-commercial speech by corporations could be arbitrarily banned. Under the "commercial speech doctrine," as it came to be known, corporations and others whose speech was classified as "commercial" were at the mercy of every arm of government, without the Constitutional safeguards afforded to most other kinds of speech and publishing. The result, of course, was a variety of state and federal laws restricting corporations that sought to speak out on the issues. For instance, many states banned or severely limited corporate advocacy of ballot issues as well as corporate support for partisan candidates. Moreover, regulators imposed limits on advertising or even pamphleteering by regulated industries, such as privately-owned utility companies.

That all changed in the late 1970s, as the U.S. Supreme Court handed down a series of decisions establishing new First Amendment protection first for commercial speech and then for corporate speech. The cases that produced this dramatic change represent one of the best examples of American law evolving through judicial precedent to be found anywhere in the mass communications field.

The starting point for this summary is a 1942 Supreme Court

decision that denied First Amendment protection to commercial speech, a landmark ruling that stood up for many years. That case is Valentine v. Chrestensen.[5] It stemmed from a bizarre situation. Just before World War II, a man named F.J. Chrestensen acquired a surplus U.S. Navy submarine, and tried to dock it at a city-owned wharf in New York City. City authorities wouldn't let him, and he had to arrange for other dock facilities. Next, he started advertising guided tours of the submarine, but city officials wouldn't let him distribute his handbills on city streets because an anti-litter ordinance banned all but political leaflets. So he added a note criticizing city officials for refusing him dockage to the back of the handbill. Then he took the city to court for denying his right to distribute literature. The Supreme Court had just recognized that right in the Jehovah's Witness cases.[6]

When his case reached the Supreme Court, Chrestensen was in for a surprise. The high court said his back-of-the-handbill political statement was really a ruse to justify a purely commercial advertisement. That was different from the Jehovah's Witness cases, the court said. Where purely commercial advertising is involved, there are no Constitutional restraints on government regulation, the court ruled.

For many years, Valentine v. Chrestensen was regarded as the prevailing judicial precedent on commercial speech. The Constitutional rights of America's corporations had been dealt a severe blow in a case where no corporation was even before the court, a case in which the court focused on the bizarre behavior of an eccentric individual. Much could be said of the unfairness

of this, but it was the law of the land. In fact, when the landmark New York Times v. Sullivan[7] libel decision was announced in 1964, the court went to some length to explain why the Valentine rule didn't apply (the Sullivan libel suit resulted from an advocacy advertisement placed by a civil rights group). The court said the ad involved in the Sullivan case was an idea advertisement by a non-profit political group, not a profit-seeking ad for a commercial product or service as in Valentine. Thus, the Valentine rule still denied First Amendment protection to commercial advertising and other forms of corporate speech for another decade, despite New York Times v. Sullivan.

In 1973, the Supreme Court again stood by that view, this time in a case involving the "help wanted" ads in a large newspaper. In Pittsburgh Press v. Pittsburgh Commission on Human Relations,[8] the human relations commission ordered the newspaper to stop classifying its employment ads as "Jobs - Male Interest" and "Jobs - Female Interest." The newspaper contended that there were editorial judgments inherent in the decision to classify job openings that way, and that those judgments were protected by the First Amendment.

The Supreme Court disagreed, and ruled that the classified ads are not only commercial speech, but commercial speech promoting an illegal form of discrimination as well. The court had no difficulty in ruling that whatever First Amendment considerations might be involved were secondary to the city's right to outlaw advertising for an illegal commercial practice such as sex discrimination.

However, there are limits to the Pittsburgh Press rule. In 1979, the Pennsylvania Supreme Court ruled against the Pittsburgh Commission on Human Relations when it tried to stop the Pittsburgh Press from accepting "help wanted" ads from individuals indicating the age, sex, race, or religion of the job seeker. The commission objected to such language as, "salesman age 30," "born again Christian seeks work in Christian business," or "white woman" seeks domestic work. The state high court said a job seeker has a First Amendment right to communicate such information as this, even though most employers may not lawfully consider it in making a personnel decision. The U.S. Supreme Court declined to review this second Pittsburgh Press decision.[9]

THE BREAKTHROUGH

Only two years after the original Pittsburgh Press decision, the Supreme Court handed down the first of its major rulings extending First Amendment protection to commercial speech. That happened in Bigelow v. Virginia.[10] The Bigelow case stemmed from a chain of events that hardly marked it as the precursor of new First Amendment rights for major corporations. In fact, Jeffrey Bigelow might never have pursued his case had he realized it would eventually lead to a great victory for corporate speech.

The case arose in 1971 when Bigelow published an ad in The Virginia Weekly, an underground newspaper, for an abortion service in New York, where abortions were legal at that time. The Supreme Court's decision allowing abortions in all states did not come until 1973, and both abortions and abortion advertising were illegal in Virginia at that point.[11]

Bigelow was prosecuted for violating the Virginia law, and he appealed his conviction to the U.S. Supreme Court after it was upheld in the state courts. The result was a dramatic shift in the commercial speech doctrine. The high court emphasized that the service in question was not illegal where it was offered, and said the readers had a First Amendment right to receive this information. The court distinguished this case from Pittsburgh Press by pointing out that the commercial activity in question there was illegal. But above all, the Supreme Court in Bigelow decided the mere fact that this information appeared in the form of an advertisement did not deprive it of the First Amendment protection it would otherwise have. The high court said that henceforth if a valid purpose can be found for commercial speech, a state must be able to demonstrate a compelling state interest to justify prohibiting it.

Then in 1976, the Supreme Court took a giant additional step toward protecting commercial speech under the First Amendment. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,[12] the Supreme Court overturned Virginia's state laws against advertising the prices of drugs. Many other states had similar prohibitions on drug price advertising, but the Supreme Court emphasized the First Amendment right of consumers to receive the information in overturning the state regulations.

Again, the court said the fact that the information in question was commercial did not deny it First Amendment protection. At this point, it seemed clear the old Valentine v. Chrestensen doctrine was dead: commercial speech did have

Constitutional protection. However, while the court recognized the importance of price advertising to the free enterprise system, it also emphasized that this ruling in no way affected the right of governments to control false and misleading advertising. Nor was it immediately apparent that this decision would affect state laws restricting non-commercial corporate speech.

In 1977, the Supreme Court handed down three more decisions strengthening the First Amendment protection of commercial speech. First, in Linmark Associates v. Willingboro,[13] the Supreme Court said homeowners have a First Amendment right to place "for sale" signs in front of their homes. The town of Willingboro, New Jersey, had outlawed "for sale" signs at a time when the area's racial composition was changing. There was considerable "white flight," and city officials wanted to discourage panic selling by white homeowners. One way to do this, the city felt, was to keep it from appearing that entire neighborhoods were for sale. A real estate firm challenged the constitutionality of the ordinance.

In defending the ordinance, city officials pointed to the social importance of racial integration and the evils of "white flight." Also, they said, homeowners who really need to sell their homes have other ways to advertise (by listing their homes with realtors or using newspaper classified ads, for instance). Nevertheless, the Supreme Court ruled against the city. In an opinion written by Justice Thurgood Marshall, the only Black on the high court, the majority said the city could not Constitutionally deprive its residents of the information that a

for sale sign offers. "If the dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality...," Marshall wrote.

The kind of speech Linmark protected was closer to typical corporate speech than anything protected in the previous cases, but the court still failed to specifically endorse corporate speech. Even though the case was initiated by a real estate firm, the court emphasized the First Amendment rights of individual homeowners rather than the rights of brokers in its ruling.

Next, the Supreme Court handed down a commercial speech decision that was not at all surprising in view of its ruling in Bigelow v. Virginia. In Carey v. Population Services International,[14] the court overturned a variety of New York laws that restricted advertising of contraceptive devices. Even though these devices were not illegal in New York, state laws prohibited advertising, in-store displays and even the sale of these products except by licensed pharmacists. Even pharmacists could not sell them to anyone younger than age 16. The Supreme Court found First Amendment violations in these laws, and said there was no compelling state interest to justify them, as required in Bigelow.

In mid-1977, the Supreme Court announced one of its most far-reaching commercial speech decisions, Bates v. Arizona State Bar.[15] That case overturned Arizona's rule against advertising by lawyers, a rule similar to those found in nearly every other

state. The case involved a legal clinic run by two young lawyers. The lawyers were disciplined by the State Bar for advertising the prices of routine legal services, prices that were far below the "going rate" charged by other lawyers. In ruling against the state bar, the Supreme Court again emphasized the First Amendment right of consumers to receive commercial information. The court said advertising by lawyers (and presumably other professionals) could not be prohibited unless it was misleading or fraudulent. However, the court expressed reservations about ads that speak to the quality of the services offered ("we're the best lawyers in town"), because such ads could well be misleading.

That warning about misleading advertising by professionals foreshadowed two more Supreme Court rulings, Ohralik v. Ohio State Bar Association[16] and Friedman v. Rogers.[17] In Ohralik, the Supreme Court affirmed sanctions against a lawyer for soliciting new clients in a fashion that is sometimes called "ambulance chasing." The court said the First Amendment does not preclude rules against that sort of conduct.

In Friedman, the court went a step further, upholding Texas' ban on the use of trade names by optometrists. The court said a trade name could be misleading, and that it did not provide consumers any important information, as did the commercial advertising in question in earlier cases. The court said a trade name could be misleading because there could be a change of optometrists (and thus a change in the quality of service offered) without the name changing. Therefore, a state does not violate the First Amendment by requiring an optometrist to

practice under his own name rather than a trade name, the court ruled. This case was viewed as a slight retreat by some, and critics pointed out that it was customary and completely legal for law firms, for instance, to continue to use the names of the founding partners long after their deaths. The Los Angeles law firm of Gibson, Dunn and Crutcher, for instance, is a prestigious firm employing more than 200 lawyers, but Messrs. Gibson, Dunn and Crutcher have long since passed away. Isn't such a name really a tradename at some point? Couldn't that also be misleading? The court didn't address that issue.

Nevertheless, by the late 1970s, the old Valentine v. Chrestensen rule, which denied First Amendment protection to commercial speech, was clearly dead. In its place, the Supreme court had created a new rule that extended considerable protection to commercial speech. However, in these cases the focus was on the First Amendment rights of individuals to receive the information much more than on the right of corporations to communicate it. Corporations were still not emancipated from the morass of restrictive laws and regulations that effectively muzzled them in so many important contexts.

THE FIRST NATIONAL BANK v. BELLOTTI CASE

In 1978, the Supreme Court took its first major step toward extending separate First Amendment protection to corporations. The court finally ruled that, in the marketplace of ideas, corporations like individuals have a right to be heard on important issues.

In First National Bank v. Bellotti, the Supreme Court overturned a Massachusetts law that forbade corporate advertising for or against ballot measures except when such a measure might "materially affect" a company's business. In reaching this conclusion, the court emphasized the importance of a free flow of information, even when some of that information comes from corporations rather than individuals. The decision raised doubts about the Constitutionality of limits on corporate advertising for ballot issues in about 30 other states.

The Massachusetts law in question[18] applied to a variety of corporations, including banks, insurance companies, utilities, and all other firms incorporated under the state's laws. It imposed fines of up to $50,000 on corporations, and $10,000 on their officers, for illegally spending money to speak out on ballot issues. It narrowly defined ballot issues affecting corporations to exclude many tax issues that would clearly affect the business prospects of a bank, for instance. The law specifically prohibited corporations from spending money to campaign for or against any proposal for a graduated individual income tax.

The First National Bank case arose during a 1976 election campaign, when a measure establishing a graduated individual income tax was on the ballot. The First National Bank and a number of other corporations wanted to express their views on this issue, but Attorney General Bellotti declared that he would prosecute if they did so. The bank challenged the law as unconstitutional and the Massachusetts Supreme Judicial Court upheld its Constitutionality. The bank appealed to the U.

Supreme Court.

Massachusetts tried to defend its ban on corporate political advertising by arguing that corporations have so much money they could drown out other viewpoints if allowed to advertise. However, there was no evidence presented to prove that, and the court wasn't persuaded. The state also claimed that corporations, as creatures of the state, had only such rights as the state chose to give them. Hence, corporations had far fewer rights than natural persons, and were not entitled to any First Amendment protection, the state contended. Again, the Supreme Court rejected that argument.

The Supreme Court noted that the Massachusetts law allowed corporations engaged in mass communications (newspapers, television stations, etc.) to say anything they pleased on political issues, but denied that freedom to other corporations. The Supreme Court said that, if anything, banks and other financial institutions might be better informed on economic issues than the mass media. "...(T)he press does not have a monopoly on either the First Amendment or the ability to enlighten," the five-member majority wrote.[19] The court added:

> "We thus find no support in the First or Fourteenth Amendment, or in the decisions of this court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property."[20]

Massachusetts also argued that the law was necessary to prevent corporations from taking positions not supported by all of their shareholders. Such a law is necessary to protect

minority interests among shareholders, the state contended. The court dismissed this argument by pointing out that the law did not apply to many other types of organizations that also have potentially disenchanged minorities among their members or shareholders: labor unions and business trusts, for instance. Also, the court noted that the law did not prohibit lobbying or other political activities by corporations, activities sure to offend disenchanted minorities among stockholders.

The court also took note of the state's apparent intention in writing such a law. Seemingly, the idea was to tip the scales of public opinion in one direction as opposed to another, by giving those on one side of an issue full freedom to speak out while denying the same privileges to the other side:

> "If a legislature may direct business corporations to 'stick to business', it also may limit other corporations--religious, charitable or civil--to their respective 'business' when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment. Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended."[21]

In short, the Supreme Court said corporations have a right to speak on public issues, even if their financial resources would enable them to be "eloquent" and convincing, perhaps through good public relations practices.

Thus, First National Bank v. Bellotti was a major victory for corporate speech. The high court said a state law that abridges corporate freedom of speech must be justified by a compelling state interest, and that Massachusetts had not identified any such interest to justify its law. As a result,

the law was held unconstitutional.

However, the Supreme Court's First National Bank decision was not an absolute vindication of corporate speech rights. For example, the majority made it clear they were not overturning state or federal laws limiting or forbidding corporate contributions to candidates in partisan elections. In that instance, there is potential for political influence peddling and the creation of political debts--dangers that governments have a right to prevent by legislation, the court said.

Moreover, the First National Bank decision did nothing to create a corporate right of access to the mass media. Broadcasters may still turn down corporations that seek to express opinions instead of selling products--and many routinely do so.[22] All the decision said was that, if the media are willing to publish or broadcast them, corporate statements on public issues cannot be prohibited just because they come from corporations rather than from individuals, churches or labor unions.

Despite its limitations, the First National Bank case was a major victory for corporations. It settled, hopefully once and for all, the question of whether the First Amendment protects corporate speech on non-product-oriented topics. It does.

THE CENTRAL HUDSON AND CON EDISON DECISIONS

In 1980, the Supreme Court handed down two more very important decisions expanding the First Amendment protection available to corporations. In these two cases, the court upheld

the right of large privately-owned utilities to advertise for more business or to enclose public relations material with utility bills.

Decided the same day but separately, Central Hudson Gas and Electric Corp. v. Public Service Commission of New York and Consolidated Edison Co. v. Public Service Commission of New York represent significant victories for corporations seeking to speak out on the issues.

Both cases stemmed from rules the Public Service Commission adopted in 1977. The commission prohibited advertising that encouraged more consumption of utility services, a rule intended to foster energy conservation. Second, the commission told utilities not to insert any written material in billing envelopes that discussed "political matters" or "controversial issues of public policy." The two large utility companies challenged the new rules, but they lost in the New York state courts. The state's highest court found the ban on inserts with bills to be a reasonable regulation of the time, place and manner of speech, and said the ban on pro-consumption advertising was justified because the need to conserve outweighed the slight free speech issue involved. The New York court said advertising had limited value in "the non-competitive market in which electric corporations operate."[23]

The U.S. Supreme Court reversed the New York courts on both points. The majority said the ban on promotional advertising would have only a "highly speculative" effect on energy consumption or utility rates, and thus a total ban was going too far. The court said the ban on bill inserts was an excessive

restriction of corporations' First Amendment rights.

These two decisions would appear significant for several reasons. First, at least seven of the nine Supreme Court justices agreed with the result this time. The First National Bank decision, by comparison, came on a narrow 5-4 vote. But in addition, the court set forth legal guidelines that can be used to determine whether future restrictions on either commercial or non-commercial corporate speech are valid. Thus, the Supreme Court has now written Constitutional standards for the kinds of materials corporate public relations personnel are likely to generate--non-advertising materials that nonetheless constitute "corporate speech." In fact, the Supreme Court has now extended more Constitutional protection to the kinds of materials p.r. practitioners produce ("non-commercial corporate speech") than to purely commercial corporate speech.

The Central Hudson case involved the regulatory agency's ban on advertising "intended to stimulate the purchase of utility services." The Consolidated Edison case involved the ban on bill inserts discussing "controversial issues of public policy" such as "the desirability of future development of nuclear power." The two cases gave the Supreme Court an opportunity to clarify the differences between the Constitutional protection available when a corporation advertises and when it engages in non-commercial speech.

In separate opinions deciding the two cases, Justice Lewis Powell said corporate speech is Constitutionally protected if it concerns "lawful activity" and is not misleading or fraudulent.

Any state law or regulation that abridges corporate speech rights must be narrowly drawn and justified by compelling state interests.

When the speech in question is purely commercial corporate speech, the court in Central Hudson set down a four-part test to determine whether government restrictions are permissible. First, the speech must be lawful and truthful. If that requirement is met, government restrictions are permissible only if three additional requirements are satisfied: 1) the claimed government interest that justifies the restrictions is substantial; 2) the regulation directly advances the governmental interest in question; and 3) the regulation is not more broad than needed to fulfill the governmental interest.[24]

Where non-commercial corporate speech is involved (e.g. issue-oriented materials mailed with a utility bill), the court in Consolidated Edison suggested an even tougher scrutiny of government restrictions. In this case, government restrictions are justified only if one of these three conditions is met: 1) the restriction in question is a "precisely drawn means of serving a compelling state interest;" 2) the restriction is required to fulfill a "significant government interest" and merely regulates time, place and manner, leaving open "ample alternate channels for communication;" or 3) there is a narrowly drawn restriction on speech under a few special circumstances where disruption of government activities must be avoided, such as at a military base.[25]

What does all of this mean? It means the standards are slightly different for commercial advertising than they are for

non-commercial corporate speech. Commercial advertising was afforded slightly less constitutional protection than idea-oriented or image-oriented editorial materials of the type often written by p.r. practitioners. When a corporation wishes to speak out by preparing a brochure and mailing it to one of its publics, government censorship will no longer be permitted in most instances.

However, it may require years of additional court decisions to clearly spell out the rights of corporations under the new rules. What is clear is that both commercial and non-commercial corporate speech now enjoy substantial Constitutional protection, something that was not true until recently.

UNRESOLVED ISSUES IN CORPORATE SPEECH

In the aftermath of the Central Hudson and Consolidated Edison decisions, a number of key issues are still unresolved. Perhaps the most important--and most difficult--is exactly what the terms "commercial speech" and "non-commercial corporate speech" mean. In a concurring opinion in Central Hudson, Justice John Paul Stevens criticized the majority for not defining these terms adequately. Powell first described commercial speech as "expression related solely to the economic interest of the speaker and its audience" and then called it "speech proposing a commercial transaction."[26] Stevens said the first definition was too broad, the second too narrow. It may take years for the courts to develop an adequate definition of commercial speech. Perhaps commercial speech, like obscenity, is a legal term so

amorphous as to defy definition in the long run.[27]

Also, of course, these two Supreme Court decisions give us only the bare outlines of the test to be applied to laws and regulations that apparently abridge corporations' First Amendment rights. Filling in the specifics will have to be done on a case by case basis, perhaps over many years.

In mid-1981, the Supreme Court handed down still another commercial speech decision that created more questions than it answered, Metromedia v. San Diego.[28] In that case, the high court invalidated an ordinance in the city of San Diego, Calif., that prohibited virtually all billboards along highways. Six of the nine justices agreed that the San Diego ordinance was unconstitutional, but no more than four justices could agree on the reasoning.

Four justices joined in an opinion by Byron White that said the ordinance was merely too broad because it banned political as well as commercial billboards. They suggested that a more narrowly drawn ordinance merely forbidding commercial billboards would be acceptible. Only two justices (Harry Blackmun and William Brennan) took the position that commercial billboards as well as political ones were fully protected by the First Amendment. The three remaining justices said they felt even an ordinance banning political billboards would be constitutional.

Thus, while San Diego's anti-billboard ordinance was overturned, the decision was no great victory for the advocates of corporate freedom of speech. It may be that the high court will now uphold other anti-billboard laws that are more narrowly drawn. It seems clear that a majority of the justices would

support a corporation's right to express its views on a public issue by means of billboards, but perhaps not its right to deliver a commercial message in that medium.

Another unresolved problem will be determining just when it is Constitutionally permissible for laws and regulations to single out corporations, forbidding them to do things that fall within the Constitutional rights of individuals. We already have some guidance from the courts in connection with contributions to political campaigns. In Buckley v. Valeo,[29], the Supreme Court overturned a federal law that prohibited individual contributions to political candidates in excess of $1000 per candidate in a given election campaign. However, the courts have repeatedly upheld restrictions on corporate contributions to partisan campaigns, and the Supreme Court spoke approvingly of such restrictions in First National Bank.[30]

There are undoubtedly other times when corporations may be treated differently than individuals in the First Amendment arena. For example, one of the problems with including corporate p.r. materials with utility bills, cited by the New York Public Service Commission in Central Hudson, is that those who receive the bills are something of a captive audience. The Supreme Court suggested that, just as those who encounter offensive political materials on a street corner may look away or walk away, ratepayers may avoid objectionable material by "transferring the bill insert from envelope to wastebasket."[31] However, that doesn't solve the problem as readily as it does when individuals are proselytizing on street corners, because important

information about pending rate increases or service changes may be contained in a circular that some consider offensive. It may be that this "captive audience" problem will someday be used to justify court decisions allowing corporate speech to be abridged when individual speech may not be.

Another difference between corporate speech and individual speech that courts must address in delineating the dimensions of corporate freedom is the question of who pays the bill. When an individual engages in political activity on a street corner, the price tag for the public is minimal. But when a corporation engages in either advertising or public relations activity, the cost may well be passed along to the consumer or perhaps to government. This problem led to a notable New York Court of Appeals decision in November, 1980, Rochester Electric and Gas Co. v. Public Service Commission.[32] In that case, New York's highest court refused to allow a utility company to pass along to ratepayers some $270,000 in costs for corporate public relations activities. The court said consumers' funds could be used for "informational" materials, but not for materials to promote the company's image. Should this state court decision be followed widely, it will put the courts in the position of having to evaluate public relations materials to determine which are Constitutionally protected and which are not.

These kinds of problems place obvious limitations on the First Amendment rights of corporations. Perhaps corporations will never have rights co-extensive with those of individuals. But after an era when corporations had no First Amendment rights whatsoever, the last few years have brought a dramatic

improvement. It has been just three years since corporations were emancipated by the landmark First National Bank v. Bellotti decision. Although many important questions remain unresolved, corporate public relations practitioners today have Constitutional rights their predecessors a decade ago could only dream of.

REFERENCES

1. First National Bank v. Bellotti, 435 U.S. 765 (1978).

2. Central Hudson Gas & Electric Corp. v. Public Service Commission, 100 S.Ct. 2343 (1980).

3. Consolidated Edison Co. v. Public Service Commission, 100 S.Ct. 2326 (1980).

4. See Pember, Don, Mass Media Law, 2nd Ed., Dubuque: Wm. C. Brown Co., c. 1981. While this new text cites First National Bank v. Bellotti, it does not summarize its holding regarding First Amendment protection for corporations, and it does not mention the 1980 decisions, although it does discuss over mid-1980 Supreme Court rulings.

5. Valentine v. Chrestensen, 316 U.S. 52 (1942).

6. See, for instance, Lovell v. City of Griffin, 303 U.S. 444 (1938); Schneider v. New Jersey, 308 U.S. 147 (1939).

7. New York Times v. Sullivan, 376 U.S. 254 (1964).

8. Pittsburgh Press v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973).

9. Pennsylvania v. Pittsburgh Press, 4 Med.L.Rptr. 2109 (1979).

10. Bigelow v. Virginia, 421 U.S. 809 (1975).

11. See, for instance, Roe v. Wade, 410 U.S. 113 (1973).

12. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

13. Linmark Associates v. Township of Willingboro, 431 U.S. 85 (1977).

14. Carey v. Population Services International, 431 U.S. 678 (1977).

15. Bates v. Arizona State Bar, 433 U.S. 350 (1977).

16. Ohralik v. Ohio State Bar, 436 U.S. 447 (1978).

17. Friedman v. Rogers, 440 U.S. 1 (1979).

18. Massachusetts Gen. Laws Ann. Ch. 55, Sec. 8.

19. 3 Med.L.Rptr. at 2111.

20. 3 Med.L.Rptr. at 2112.

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21. 3 Med.L.Rptr. at 2112-2113.

22. All three major networks currently refuse to accept advertising that expresses opinions on controversial issues. For a discussion of the right of broadcasters to reject advertising, see CBS v. Democratic National Committee, 412 U.S. 94 (1973).

23. 390 N.E.2d at 757.

24. 6 Med.L.Rptr. at 1501.

25. See 6 Med.L.Rptr. 1521-23.

26. 6 Med.L.Rptr. at 1499.

27. See, for instance, Justice Potter Stewart's admission that he couldn't define obscenity, to which he added: "I know it when I see it," in Jacobellis v. Ohio, 378 U.S. 184 (1964).

28. Metromedia v. City of San Diego, ? U.S. ? (1981) (recent case: citation not yet available).

29. Buckley v. Valeo, 424 U.S. 1 (1976).

30. See footnote 26 in First National Bank v. Bellotti, supra.

31. 6 Med.L.Rptr. at 1524.

32. Rochester Electric and Gas Co. v. Public Service Commission, ? N.E.2d ? (1980).