HOW CORPORATE CONSTITUTIONAL RIGHTS HARM YOU, YOUR FAMILY, YOUR COMMUNITY, YOUR ENVIRONMENT, AND YOUR DEMOCRACY

Part II: Corporate constitutional rights allowing corporations “right” not to speak and commercial speech “rights” conceal important information from consumers and employees, and expose children to tobacco

Starting in the 1880s, the Supreme Court hijacked many parts of our constitution—including the First, Fourth, Fifth and Fourteenth Amendments—-to invent so-called corporate constitutional rights (CCRs).

Part One of this educational series illustrated--with real case law examples--how the so-called corporate constitutional rights doctrine enables corporations to undemocratically impose toxic waste, environmental destruction, and workplace safety violations on unwilling local communities and individuals in derogation of local control and democracy itself. It also explained why corporations do not need constitutional rights and how this doctrine was founded on false pretenses. This educational series is provided by Move to Amend’s Law and Research Committee’s volunteer lawyers. If you missed part one you can access it at https://movetoamend.org/sites/default/files/how_corporate_constitutional_rights_harm.pdf.

Since most people, including many legislators, are only aware of the money in politics problem a resulting from the application of the CCR doctrine in First Amendment cases like *Citizens United*, we created this series to educate the public about the equally destructive application of this doctrine in non money as speech cases.

This second part provides summaries of actual First Amendment cases that do not concern money in politics. These cases are premised on the false assumption that artificial entities like corporations are entitled to the same free speech *opinion* rights and *rights not to speak* as natural persons, even when the result is against the public interest. Here are some real case-law examples.

First Amendment Right Not to Speak

- **2013 *National Association of Manufacturers:*** National Labor Board prohibited from requiring corporate employers to post lawful labor rules that informed workers of their rights based on “right” not to speak.
- **1996 *Amestoy:*** Vermont prohibited from requiring the labeling of the ingredient rBST in dairy products due to the ruling that dairy producers have a “right not to speak” in their labels.

Posting of Labor Board rule in workplace prohibited

National Assoc'n of Mfrs. v. NLRB, 717 F.3d 947 (2013)

The National Labor Relations Board declared in a rule that employers under its jurisdiction who did not post on their properties and on their websites a notice of employee rights would be guilty of an unfair labor practice. This rule would have applied to "nearly 6 million" employers. Trade associations and other organizations representing employers sued.

Citing several First Amendment cases the court stated "(t)he right to disseminate another's speech includes the right to decide not to disseminate it." The court's ruling against the NLRB gave no explanation or rationale for why employer corporations should have a right not to post a notice of employee rights (a right not to speak). Instead, the court merely cited prior cases (precedent) that had 'found' a constitutional right not to speak for corporations. This reflects the approach of the Supreme Court which has never explained or justified why artificial entities should have the same constitutional rights as natural persons.

The effect of this ruling is to make it more difficult for the NLRB to inform workers of their rights. At the same time, employers are free to post any notices or other information, however biased, about labor issues, unions, and union organizing with only a few limitations such as a statutory provision barring employer posts that threaten reprisal or force, or make a promise of benefit.

But even conservative Justice Rehnquist disagreed that corporations should have the right not to speak. "Nor do I believe that negative free speech rights, applicable to individuals and perhaps the print media, should be extended to corporations generally." *PG&E v. PUC,* 475 U.S. 1, 26 (diss. opin.)

Labeling of potentially harmful additive to milk prohibited
International Dairy Foods Association MIF v. Amestoy, 92 F.3d 67 (2d Cir. 1996)

In November, 1993, the Federal Food and Drug Administration (FDA) pre-approved commercial use of a synthetic growth hormone (rBST) based on its study concluding that rBST posed no health or safety risk for human beings. In 1994, Vermont passed a statute requiring that products containing rBST be labeled.

In 1996, a Federal Appellate Court, relying on a so-called First Amendment corporate constitutional right 'not to speak' held that Vermont's law could not constitutionally require milk producers to label milk products as containing rBST. The Dairy Association had originally asked the Federal District Court to enjoin enforcement of Vermont's labeling law. On appeal from the denial of the preliminary injunction, the Appellate Court reversed, finding that the District Court had "abused its discretion" in refusing the injunction. There was a strong dissent.

Analysis: The majority claimed the labeling law required dairy manufacturers to make "an involuntary statement" when marketing their products, and held that the district court did not give sufficient weight to the "serious" harm Vermont's law did to the dairy producers' First Amendment right not to speak. The dissent disputed the majority's view that the regulations issued in accordance with Vermont's labeling law required dairy manufacturers to speak. The manufacturers could comply with the statute and regulations merely by placing a blue dot or label on the product container. Only the retailers (not parties to this case) were required to speak by posting on the dairy or freezer case a sign notifying shoppers that products labeled

with a blue dot or shelf label might contain rBST. The dissent also questioned the milk producers' motives, stating :"Notwithstanding their self-righteous references to free expression, the true objective of the milk producers is concealment. They do not wish consumers to know that their milk products were produced by use of rBST because there are consumers who . . . prefer to avoid rBST."

The majority further held that Vermont had not shown "a substantial interest in compelling disclosure . . . . " Citing the Federal District Court's finding that Vermont defended its law based on "strong consumer interest and the public's right to know" rather than health and safety concerns, the majority held that Vermont's interest in gratifying "consumer curiosity" was not alone "a strong enough state interest to sustain the compulsion of even an accurate factual statement." The dissent observed that this consumer interest was based on widespread consumer concerns that harm to cows (e.g., udder infections, swelling and reproductive disorders) had already occurred and that the FDA's pre-approval study could not assure people about the long term effects of rBST.

Citing the inherent limitations of pre-approval studies, the dissent also showed that the majority's use of the FDA study was disingenuous. The FDA study found "no health risks to humans" to dismiss consumer health concerns. In the dissent's view, consumer "worries about possible adverse health effects from consumption of rBST, especially over a long term, is unquestionably a substantial [state] interest."

The dissent also noted that case law "has repeatedly emphasized that the primary function of the First Amendment in its application to commercial speech is to advance truthful disclosure—the very interest that the milk producers seek to undermine."

Is there a First Amendment Free Speech Right to misrepresent and lie in advertisements?

As you read the commercial speech case summaries, notice the case by case incremental expansion of who and what gets First Amendment free speech protection. Also consider whether the result blurs or even obliterates the distinction between commercial and non commercial (political) speech.

Here is a chronology of the key Supreme Court cases which have expanded corporate commercial speech protection until it now receives almost the full protection of political speech:

- **1976 *Virginia Bd of Pharmacy:*** This case expanded corporate commercial speech protection by inventing free speech protection for the listener as well as the speaker.
- **1980 *Central Hudson:*** The court created a four-part test to determine if a statute or regulation violates First Amendment free speech protections for corporate commercial speech.
- **2001 *Lorillard:*** This case, which struck down a state ban on advertising smokeless tobacco and cigars within 1,000 feet of schools and playgrounds, illustrates how the Central Hudson test can lead to the wrong result in almost any commercial speech case.
- **2003 *Nike*** The California Supreme Court reviewed U.S. Supreme Court commercial speech cases and determined that Nike's published public relations communications

were corporate commercial speech and could be regulated if the lower court determined that Nike's PR publication was misleading.

The decisions in the cases summarized below—*Virginia Bd of Pharmacy v. Virginia Consumer Council* and *Nike v. Kasky* — implicitly rest on two unspoken assumptions that Move to Amend vigorously contests. These are, first, that artificial entities like corporations should have the same constitutional rights as natural persons; and second, that the drafters of the Fourteenth Amendment contemplated that corporations should have First Amendment free speech protections.

Supreme Court cases inventing First Amendment free speech protections for corporations have opened up a pandora's box of confusing litigation over a host of questions. Such questions include whether the speech is commercial or not commercial and why it matters, whether lies promulgated by corporations are protected free speech and whether even harmful commercial advertisements are entitled to free speech protection.

The fiction that corporations' commercial speech is entitled to First Amendment free speech protection is based on two justifications :
(1) that limiting corporate speech, even in the public interest, is a form of censorship; and
(2) the notion that the general public is entitled to receive information promulgated by corporate entities.

The censorship rationale conflicts with the inherent police power of state and local governments to protect the health and welfare of their citizens and their communities. The right of the public to hear what corporations have to say rationale completely ignores the vast disparity between the ability of powerful and well resourced corporations to be heard through a giant megaphone and the inability of any individual of modest means to have his or her message heard at all. See the important findings of professors Martin Gilens and Benjamin I. Page, study "Testing Theories of American Politics: Elites, Interest Groups and Average Citizens." This study found that economic elites and business groups have substantial influence on government policy while average people and groups representing them have little or no influence.[1]

<u>Commercial "speech" (advertising) protected under First Amendment</u>
Virginia Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976)

A Virginia law provided that a pharmacist engaged in unprofessional conduct if s/he advertised prescription drug prices. The District Court declared that portion of the statute void. The U.S. Supreme Court affirmed, finding that the state law violated the pharmaceutical industry's and the recipients of the industry's First Amendment free speech protection.

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[1]https://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_-testing_theories_of_american_politics.doc.pdf See also, professors Joshua Kalla and Ethan Porter, "Politicians Don't Actually Care What Voters Want." A two year survey revealed that "an overwhelming majority of legislators were uninterested in learning about their constituents views" and that "for most politicians, voters' views seemed almost irrelevant. https://osf.io/c2sp6/. For a brief description of this study, see "Politicians Don't Care What you Think", N.Y. Times, OP-ED, A-23, July 11, 2019.

The Virginia case is notable for its invention of the then-novel notion that the listening public, the recipient of the commercial speech, has a constitutional right to hear what corporations have to say. This invention allowed the Supreme Court majority to extend the First Amendment protection of the speaker to the listener which potentially means the public at large. The Court invalidated the state law, stating “What is at issue is whether a State may completely suppress the dissemination of truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients.” The Court concluded that the answer was no.

This extension of First Amendment free speech protection to listeners gave the courts a new basis for overturning laws and regulations the legislative bodies presumably believed to be in the public interest. While consumers need to know drug prices, the Court’s extension of the First Amendment’s reach to listeners opened the door to protecting commercial speech peddling products that are truly harmful to the public. An example of this is the *Lorillard* tobacco case discussed later. Justice Rehnquist’s dissenting opinion in the *Virginia Bd* case foresaw this problem, noting that the majority’s decision not only allows for dissemination of price information but also allows the promotion of prescription drugs, liquor, cigarettes and other products “the use of which it has previously been thought desirable to discourage.”

<u>Do corporations have a right to lie?</u>
Nike, Inc. v. Kasky, 539 U.S. 654 (2003)

California has laws designed to curb false advertising and unfair competition. Suing on the public’s behalf, Kasky alleged that Nike corporation made false statements of fact about its labor practices and factory working conditions in violation of these laws. This raised the issue of whether Nike’s statements warranted full First Amendment free speech protection.

When the U.S. Supreme Court reversed its initial decision to hear this case, it fell to the California Supreme Court to determine how the U.S. Supreme Court would go about deciding this issue. After reviewing a number of U.S. Supreme Court opinions, the California Supreme Court held that Nike's public relations statements defending its labor practices were commercial speech and reversed the California Court of Appeal’s ruling that it was non-commercial speech. The California Supreme Court also stated that further proceedings may be needed to determine if Nike's speech was false and misleading. If it was, then it would be subject to regulation under California’s false advertising law. *Nike, Inc. v. Kasky*, 27 Cal.4th 939 (2002) The California Court of Appeal never determined whether Nike’s statements were false and misleading because the case was settled out of court.

From its review of U.S. Supreme Court First Amendment case law (precedent), the California Supreme Court concluded that the starting point in determining the extent of corporate free speech protection was deciding whether the speech at issue was commercial or non-commercial. According to U.S. Supreme Court case law, speech is categorized as commercial if it is <u>based on a commercial transaction based on verifiable facts</u>. By contrast, if speech is a matter <u>of opinion or point of view that may invite public interest or debate</u>, it is non-commercial. Here’s the difference it makes: If the speech is commercial, it is potentially subject to some regulation or limitation. If, on the other hand, the speech is non-commercial it cannot be regulated or limited at all even if it is deceptive or an outright lie. Based on the facts in *Nike,* if the speech was non-commercial, it would get full First Amendment protection and could not be

regulated under California’s false advertising law. If, on the other hand, the speech was commercial, California could regulate it provided the speech was false or misleading.

Applying this analysis, the California Supreme Court suggested the following factors to consider in deciding whether speech is categorized as commercial or non-commercial. Those factors are (1) who the speaker is, (2) the speaker’s intended audience, and (3) the content of the message. After considering these factors, the California Supreme Court decided that Nike’s statements were factual statements about how Nike makes its products and categorized them as commercial. It then sent the case back to the California Court of Appeals to consider whether the statements were false or misleading. Because the case was settled, this question was never answered.

Critique:
The *Nike* case highlights that difficult and complicated questions are raised by the Supreme Court having invented CCRs for commercial speech. The Courts have used the phrase "non-commercial" speech instead of “political” speech to obfuscate the real issue which is that they have expanded "commercial" speech protection toward "political" speech protection which receives the greatest protection under the First Amendment. Thus, if the commercial speech contains an element of opinion, it would receive the full First Amendment free speech protection afforded purely political speech. This could allow corporations to mislead, misrepresent, or lie. The real issue is, should corporate commercial speech get any First Amendment protection? Corporations did not need First Amendment protection for nearly 200 years; they do not need it now.

<u>CCRs prevent state from regulating tobacco advertising near schools</u>
Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)

A Massachusetts law prohibited cigarette, cigar, and smokeless tobacco advertising within 1,000 feet of schools and playgrounds in the state. The Federal Cigarette Labeling and Advertising Act (FCLAA), prescribes mandatory health warnings for cigarette packaging and advertising, and preempts similar state regulations,. This federal law preempted the Massachusetts state law prohibiting tobacco advertising within 1,000 feet of schools and playgrounds. A tobacco corporation, Lorillard, challenged this advertising ban for cigars and smokeless tobacco.

The *Lorillard* case pitted the children's health and the state's police power to protect the health, safety and welfare of its citizens against the tobacco industry’s motive to maximize profits by addicting children at an early age to make them lifelong customers. The children and the state lost! Worried parents also lost.

In its analysis, the Court relied on a four pronged test enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980) to determine

whether the Massachusetts law could survive Lorillard's constitutional challenge.[2] According to this test:

- The speech must concern lawful activity and not be misleading
- The government must have a substantial interest
- The law or regulation must materially advance the government's substantial interest
- The regulation must be narrowly tailored. According to the *Hudson* court, the regulation must be "not more extensive than is necessary to serve that [substantial] interest.

After reviewing case law and the scientific literature the Court found that the government had a substantial interest in protecting children. The state demonstrated its interest in protecting children from tobacco advertising. Studies show a link between tobacco advertising and a demand for buying tobacco products. "[T]he Surgeon General's report and the Institute of Medicine's report found that 'there is sufficient evidence to conclude that advertising and labeling play a significant and important contributory role in a young person's decision to use cigarettes or smokeless tobacco products.'" "Another study revealed that 72% of 6 year olds and 52% of children ages 3 to 6 recognized 'Joe Camel,' the cartoon anthropomorphic symbol of R. J. Reynolds' Camel brand cigarettes." "After the introduction of Joe Camel, Camel cigarettes' share of the youth market rose from 4% to 13%."

After its review, the Court found that tobacco advertising advanced a substantial governmental interest in protecting children. Despite this the Court invalidated the tobacco regulations because it found that the state law did not meet the fourth requirement of the *Hudson* test requiring that the regulation be narrowly tailored.The Court said "a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." The Court decided that the "cost" of speech regulation in this case was too burdensome on this commercial speech.

Critique:
By requiring that laws or regulations must be narrowly tailored, the Court made it easy to always find a ground for striking them down. The *Lorillard* decision creates a giant loophole allowing harmful advertising to escape regulation that would protect the public health.This result blurs or even obliterates the distinction between commercial and non commercial speech, making First Amendment protection for commercial speech almost indistinguishable from protection for non commercial (political) speech.

By applying a First Amendment free speech analysis to advertising of lethal products, the *Lorillard* Court avoided weighing the relative importance of the competing interests. In his book "Lethal but Legal," sociologist Nicholas Freudenberg identifies six industries that legally sell us

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[2]In *Central Hudson* the Public Service Commission of New York ordered electric utilities in that state to cease their advertising that "promoted the use of electricity" during the energy crisis of 1973-1974. After the crisis eased in 1977 the Commission revisited and continued the ban on "advertising intended to stimulate the purchase of utility services" (i.e., that would increase consumption of electricity). Central Hudson Gas & Electric challenged this latter ban. The New York state trial and appellate courts affirmed, including the New York Court of Appeals, the highest in the state. *Id.* at pp, 558-561. The Supreme Court reversed and struck down the ban on advertising to create demand. *Id.* at pp, 558-561.

lethal products. Three of these are alcohol, guns and tobacco. We now know that tobacco use, especially by children, can cause long term health problems and even death. Yet this life or death issue is nullified by elevating the requirement that the regulation be narrowly tailored above children's right to health and long life. It's hard to believe that the drafters of the First Amendment free speech clause intended it to elevate a corporation's commercial interest in more broadly peddling its wares above protecting life itself. Cases like *Lorillard* illustrate the original sin of extending First Amendment protection to commercial speech.

Conclusion

The whole line of U.S. Supreme Court commercial speech jurisprudence illustrates the fact that the question you ask determines the answer you get. This line of case law on commercial speech protection starts the analysis with the question whether the speech is commercial or non commercial, which in turn asks the question whether the speech is factual and objectively verifiable or a matter of opinion, which, in turn, asks the question whether, if commercial, the speech is or is not false and misleading. And so we go down the rabbit hole.

As the *Lorillard* case illustrates, the various tests the courts have made up are not helpful and do not allow the courts to weigh the relative importance of the competing interests at stake. The case law has also evolved to the point that commercial speech protection is nearly indistinguishable from the full First Amendment protection for political speech. It's hard to believe that the drafters of the First Amendment free speech clause intended it to elevate a corporation's interest in peddling its wares above the health, welfare and safety of the people the government is supposed to serve. Corporations did not need or receive free speech protection for nearly 200 years; they do not need it now.

In expanding First Amendment free speech protection for corporate commercial speech, the federal courts have relied heavily on the notion that the public has a First Amendment right to hear what corporations have to say. It turns out that what the public gets to hear is only what the corporations want us to hear which is whatever increases their profits.

Going forward, the real question should be whether corporate commercial speech should get any free speech protection. Judicial decisions based on false premises will persist until we abolish all so-called corporate constitutional rights by constitutional amendment.

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