Corporations and the Bill of Rights.

Supreme Court decisions treating corporations as though they were human persons have been the principal basis for corporate America's claim to the protections of the Bill of Rights. And of these initial ten amendments, the First has been the constitutional provision corporations have most frequently relied on in challenging regulation by the federal government and, by virtue of its incorporation in the Fourteenth Amendment, challenging regulation by the states.

First Amendment - - Free Speech

Corporate Political Speech

As we have seen *Citizens United* went a long way to equalizing the rights of corporations with those of individuals in the area of campaign finance. The *CU* Majority based its decision principally on *Bellotti.*

Powell vs Rehnquist: Two Conservatives Disagree

Justice Lewis Powell, who wrote for the Majority in *Bellotti,* had served for years as a director of Philip Morris, Inc. and, prior to being named to the Supreme Court, he wrote a widely circulated memorandum calling upon corporate America to take up arms against what he saw as the dangerous proliferation of anti-business activism. Powell's brand of Republican conservatism was staunchly pro-business and consistently against state and federal efforts to regulate corporations.

Justice Rehnquist, whose dissent in *Bellotti* and was one in a series of dissents where he vociferously disagreed with Powell, was also a conservative Republican, but one whose conception of federalism emphasized states' rights and, in particular, states' authority to regulate corporations.

Bellotti was Powell's seminal pro-corporation decision, finding that "corporations are persons within the meaning of the Fourteenth Amendment" who have the right to make monetary contributions to political campaigns concerning ballot initiatives. His conclusion concerning corporate personhood relied on *Santa Clara County v. Southern Pacific R. Co.,* 118 U. S. 394 (1886), which, as we have seen earlier, actually provides no basis for that finding.

Justice Rehnquist's dissent in Bellotti embodied his belief that the Constitution does not grant corporations the same rights as human beings.

> The free flow of information is in no way diminished by the Commonwealth's [Massachusetts'] decision to permit the operation of business corporations with limited rights of political expression. All natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain free as before to engage

> in political activity . . . The Fourteenth Amendment does not required the state to endow a business corporation with the power of political speech.

Corporate Commercial Speech

In 1942, the Supreme Court ruled in *Valentine v. Chrestensen* that "commercial speech" was not protected by the First Amendment. In 1976, in the seminal case of *Virginia Pharmacy Board v. Citizens Consumer Council,* that view was swept away and the First Amendment, in addition to protecting corporate America's ability to engage in political speech, increasingly provided the constitutional basis for corporations to limit government regulation.

Virginia Pharmacy Board was Ralph Nader's successful pro-consumer lawsuit to nullify a Virginia law prohibiting optometrists from advertising their prices. Since the state's optometrists were in favor of the law, Nader obviously could not claim that their right of free speech was being violated, so he devised a novel theory, namely, that the law violated the listeners', i.e., the consumers' right to free speech.

In his dissent Justice Rehnquist warned that "the logical consequences of this decision are far-reaching . . ." since they called into question a wide variety of laws regulating "existing commercial and industrial practices". Perhaps channeling Justice Holmes in his *Lochner* dissent*,* Rehnquist went on to assert:

> The Court speaks of the importance in a "predominantly free enterprise economy" of intelligent and well-informed decisions as to the allocation of resources. . . ." While there is again much to be said for the Court's observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teaching of Adam Smith in its legislative decisions regulating the pharmacy profession.

In 1980 in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* the Supreme Court elaborated on the limits placed by the First Amendment on government regulation of advertising and other commercial speech. Writing for the majority, Justice Powell struck down a New York regulation intended to enhance energy conservation by prohibiting utilities from promoting the use of electricity. Citing *Virginia Pharmacy* and *Bellotti*, Justice Powell reiterated that the First Amendment protects a corporation's commercial speech from unwarranted governmental regulation.

Again, Rehnquist registered his fundamental disagreement with Powell concerning the rights of corporations:

> I disagree with the Court's conclusion that the speech of a state-created monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the First Amendment.

In 1980, in *Consolidated Edison Co. v. New York Public Service Commission*, Con Edison had sent an insert advocating the use of nuclear power in its monthly bill to customers. In response, an environmental organization asked the NYPSC to make the utility include a rebuttal with the next month's bill. Instead, the NYPSC issued a rule prohibiting public utility companies from including inserts on controversial public policy issues. Justice Powell, again writing for the Majority and again relying on *Bellotti*, found that a corporations had a First Amendment right to subject its customers at their expense to the corporation's political positions. Powell dismissed the interests of customers who disagreed with the utility by observing that they could avoid being forcibly exposed to Con Ed's political views by simply throwing the bill insert into a wastebasket.

Differing again with Powell, Rehnquist joined Justice Blackmun's dissent arguing that New York had the right to regulate the speech of a utility that enjoyed a state-created monopoly.

In 1980, in *John Donnelly & Sons, Inc. v. Campbell* (1st Circuit), a Maine law prohibiting most highway advertising billboards was invalidated on corporate free speech grounds.

In 1993, in *City of Cincinnati v. Discovery Network*, a city ordinance intended to promote safety by reducing the number of newsstands on city sidewalks and aesthetics by prohibiting the stocking of advertising handbills on newsstands was invalidated by the Supreme Court on corporate free speech grounds.

In 1993, in New York State Association of Realtors, Inc. v. Shaffer (E.D.N.Y.), "non-solicitation orders" issued by the New York Secretary of State prohibiting licensed real estate brokers from directly soliciting prospective clients in order to prevent "blockbusting" (individuals stirring up the fear of property owners in racially transitional areas), was invalidated on corporate free speech grounds.

In 1995, in *Rubin v. Coors Brewing Co*, federal regulations restricting the promotion of the alcohol level of beer were invalidated by the Supreme Court on corporate free speech grounds.

In 1996, in *44 LiquorMart v. Rhode Island,* Rhode Island laws banning the advertisement of retail liquor prices, except at the place of sale, were invalidated by the Supreme Court on corporate free speech grounds.

In 1998, in *Bad Frog Brewery v. New York State Liquor Authority* (2nd Circuit), New York's refusal to allow a brewery to sell beer bearing labels depicting a frog "giving the finger", reversed on corporate free speech grounds.

In 1999, in *Greater New Orleans Broadcasting Association v. United States*, a federal law prohibiting broadcasting advertisements for gambling casinos was invalidated by the Supreme Court on corporate free speech grounds.

In 2001, in *Lorillard v. Reilly*, a Massachusetts law restricting tobacco advertising aimed at young people was invalidated by the Supreme Court on corporate free speech grounds.

In 2002, in *Thompson v. Western States Medical Center,* a federal law restricting the advertising of drugs "compounded" by pharmacists was invalidated by the Supreme Court on corporate free speech grounds.

In 2008, in *Passions Video, Inc. v. Nixon* (8th Circuit), a Missouri law restricting the advertising of "sexually-oriented" businesses was invalidated on corporate free speech grounds.

In 2006, in *This, That & the Other Gift and Tobacco, Inc. v. Cobb County Georgia* (11th Circuit), a state law banning advertisements for sexual devices was invalidated on corporate free speech grounds.

In 2008, in *Bellsouth Telecomm v. Farris* (6th Circuit 2008), a Kentucky law that raised the tax on telecommunications services, but prohibited telecommunications companies from indicating that the added charge on their bills was a tax, was invalidated on corporate free speech grounds.

<u>The "Compelled Speech" Doctrine and Its Corporate Capture</u>

In *West Virginia State Board of Education v. Barnette* (1943), which upheld the right of schoolchildren who were Jehovah's Witnesses to refuse to recite the Pledge Allegiance or salute the flag, Justice Robert Jackson wrote:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can proscribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

This decision, vindicating the rights of members of an unpopular religious minority, established the principle that individuals are protected by the First Amendment from being compelled to utter speech with which they do not agree.

After *Virginia Pharmacy Board* and *Bellotti,* the rapidly evolving concept of corporate personhood saw an individual's right not to say what he or she does not want to say morph into a corporation's right to resist government regulation.

In 1986, for example, *Pacific Gas & Electric Corp. v. Public Utilities Commission of California* (1986) involved a utility (PG&E) that sent its customers a newsletter containing political editorials along with their monthly billing statements. A consumers' rights organization, objecting that the utility's customers should not be forced pay for PG&E's own political speech, petitioned the California Public Utilities Commission (Commission) to forbid PG&E from using billing envelopes to disseminate its political views. Rather than prohibiting the corporation from using its customers' money to editorialize, the Commission instead decided that any empty space in the monthly newsletters should be made available for messages from the consumers' rights

organization or other speakers. In another Powell opinion, the Supreme Court held that the Commission's ruling amounted to compelled speech and decided in favor of PG&E.

Disagreeing again with Powell, Rehnquist set forth his diametrically opposing views on corporate personhood, distinguishing publishers from other types of corporations and arguing that corporations should not all be treated the same.

> 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 is not an individual or a newspaper publisher; it is a regulated utility. The insistence of treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently entities that are the same.

In 1996, in *International Dairy Foods Association v. Amestoy* (2nd Circuit), a Vermont GMO law that required dairy products produced with bovine growth hormone be labeled to indicate that fact, was invalidated on the grounds that it compelled corporate speech.

In 2007, in *All State Insurance Co. v. Abbot* (5th Circuit) a Texas law requiring an insurer which promoted the use of auto body shops that it owned, to also promote non-owned auto body shops, was invalidated on the grounds that it compelled corporate speech.

In 2018, in *Janus v. American Federation of State, County, and Municipal Employees*, discussed earlier, an Illinois law that required non-union members to pay fees to the union to cover the union's expenditures for collective bargaining and related activities was invalidated on the ground that it compelled speech.

First Amendment - - Religious Free Exercise and Free Speech

Hobby Lobby was a lawsuit brought under the Religious Freedom Restoration Act that did not include a free speech claim. But subsequent cases have combined both types of claims.

Corporate Coupling of Religious Free Exercise and Free Speech Rights

In *Employment Division v. Smith*, Justice Scalia found that religious exemption claims that were based on both the Free Exercise Clause and the Free Speech clause of the First Amendment deserved treatment that was fundamentally different from those based on the Free Exercise Clause alone.

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech . . .

And finding that "The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity, the Court ruled against the religious claimants.

The plaintiffs in two post-*HL* cases coupled a free exercise claim with a free speech claim in successfully asserting a religious exemption from generally applicable law.

In *Brush & Nib Studio, LC v. City of Phoenix* (2019) the Arizona Supreme Court cited both *HL* and *MC* in upholding the religion-based refusal by a for-profit corporation to create invitations for the wedding of a same-sex couple. The Court based its decision on the right of the corporate owners to the free exercise of their religion under both Arizona's Constitution and the state's Free Exercise of Religion Act (a state version of RFRA) and the owners' free speech right to refuse to engage in speech which violated their religious beliefs.

Also in 2019, in *Telescope Media Group v. Lucero*, the U.S. Court of Appeals for the Eighth Circuit ruled that a Minnesota for-profit corporation in the business of wedding videography was protected by the First Amendment from being compelled by a Minnesota public-accommodation law to provide videography services for same-sex weddings, when doing so would violate the corporate owners' religious beliefs. The Court cited *MC*, but not *HL* and based its decision primarily on the owners' First Amendment right to refuse to engage in speech which violated their religious beliefs.

In both cases, the Court apparently assumed without discussion that a corporation could assert the First Amendment rights of free exercise of religion and free speech based on the rights of its shareholders. Accordingly, the courts did not expressly address "corporate personhood" - - the critical issue in *HL.*

Finally, the Masterpiece Cakeshop, discussed in Session Two, is now involved in another anti-discrimination case, this one stemming from the bakery's refusal to create a cake with a pink interior and blue exterior to celebrate the gender transition of a Colorado resident. The bakery based its decision on the baker's Christian belief that "God made them Man and Woman" and, therefore, helping to celebrate a person's changing his or her birth gender would be sinful. Assuming the procedural deficiencies of the first Masterpiece Cakeshop case are avoided, this second case may give the Supreme Court an opportunity to rule on the bakery's Free Exercise claim and provide a clearer picture of *HL*'s influence. Unless the legal landscape changes radically, however, the bakery's coupling of a free exercise claim coupled with a free speech claim is likely to be a winning combination.

Second Amendment

Whether corporations have a right to keep and bear arms has not yet been decided by the Supreme Court. However, some lower federal courts have addressed the issue.

Lower Court Decisions in the Affirmative

The U.S. Court of Appeals for the 7th Circuit ruled in one case that a corporation has a Second Amendment right to sell firearms and in a second case that a ban on firing

ranges in the city of Chicago violated the Second Amendment rights of a corporation that operated firing ranges. In addition, one U.S. District Court in the Seventh Circuit ruled that a ban on gun stores in Chicago violated the Second Amendment and another district court ruled that that a gun shop could assert the Second Amendment rights of its customers in contesting an adverse zoning decision.

The Court of Appeals for the Third Circuit, although deciding against an individual seller of firearms, found that the Second Amendment applied to the case. Similarly, the Tenth Circuit, ruling against a retail seller of firearms, also held that the Second Amendment applies to sellers.

Lower Court Decisions in the Negative

The Court of Appeals for the 9th Circuit, in a case where a gun shop owner challenged a zoning ordinance that prohibited gun shop being located in close proximity to schools, ruled that the Second Amendment does not confer a freestanding right on commercial proprietors to sell firearms. The U.S. Supreme Court declined to review the 9th Circuit decision.

In addition, the U.S. Court of Appeals for the 4th Circuit has also ruled that the Second Amendment does not grant corporations a federally protected right to sell firearms.

Third Amendment

Whether corporations are protected from having soldiers quartered in their “houses” has not yet been decided by the Supreme Court.

In the sole reported decision concerning this Amendment, the Second Circuit Court of Appeals found that New York’s eviction of striking prison guards from prison-provided housing and the quartering of National Guardsmen in their place violated the Amendment. The case did not involve a corporation.

Fourth Amendment

Although the Fourth Amendment protects “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”, the Supreme Court has held that it applies to corporations, which effectively makes them not only “persons”, but also “people”.

Fifth Amendment

The Fifth Amendment guarantees five distinct rights of which corporations possess three: 1) due process; 2) protection against double jeopardy; and 3) protection against having their property taken for public use without just compensation.

Corporations do not yet have the right to: 1) grand jury indictment; 2) protection against self-incrimination.

Sixth Amendment

The Sixth Amendment guarantees those accused of a federal crime eight distinct rights and an accused corporation has the full right to seven of these:

1) Notice of Charges - - the right to be informed of the nature and cause of the accusation against the corporation;

2) Public Trial - - the right to a trial that is open to the public;

3) Speedy Trial - - the right to a trial with minimum delay;

4) Jury Trial - - the right to a trial by jury;

5) Venue - - the right to a trial in the state and judicial district in which the crime occurred;

6) Confrontation - - the right to be confronted with the witnesses against the corporation;

7) Calling Witnesses - - the right to subpoena witnesses favorable to the corporation; favor.

As to the 8th right, Assistance of Counsel, a corporation is entitled to have counsel in its defense, but unlike a human being, a corporation is not entitled to the appointment of defense counsel at public expense.

Seventh Amendment

In most civil cases in federal court, corporations, like individuals, have the right to a jury trial. However, since the Supreme Court has not extended the Seventh Amendment to the states, the right of an individual or a corporation to a jury trial in a state court depends on the particular state's constitution and laws.

Eighth Amendment

The Eighth Amendment provides protection against: 1) Cruel and Unusual Punishment; 2) Excessive Bail; and 3) Excessive Fines

Since a corporation cannot be executed, corporally punished, or jailed, the first two provisions do not apply.

Excessive Fines

It was only in 2019 that the Supreme Court applied the protection against excessive fines to the states and it has not yet decided whether this prohibition applies to corporations. On the other hand, lower courts have ruled that corporations do not enjoy this protection and the Justice Department's Federal Criminal Fine Guidelines begin with the premise that a totally corrupt corporation should be fined out of existence, so right now corporations are not protected. So, as of now, corporations are not protected.

Ninth Amendment

This brief and ambiguously open-ended amendment - - “the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people” - - has rarely been invoked by the Supreme Court to decide a case. As far as I’ve been able to determine, it has not been the basis of a decision involving corporate personhood.

Tenth Amendment

Like the Ninth Amendment, the Tenth is brief and its meaning is not entirely clear- - “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” Although courts have invoked the Tenth Amendment more frequently than the Ninth, these decisions have generally sought to distinguish the rights of the federal government from the rights of the states, rather than determining which rights are exclusively reserved to the people. As far as I’ve been able to determine, this Amendment has not been the basis of a decision involving corporate personhood.