

ADVERTISING, THE FIRST AMENDMENT AND COMMERCIAL
SPEECH: THE BASIS FOR EVER-TIGHTENING GOVERNMENT
REGULATION OF PROMOTIONAL ACTIVITIES

Karl A. Boedecker, University of San Francisco

A series of United States Supreme Court decisions, handed down during the 1980's, have significantly changed the degree of constitutional protection accorded to advertising and related promotional activities under First Amendment free speech principles.

Marketers originally hailed the landmark cases of the 1970's which extended First Amendment protection to commercial speech (Bigelow v. Virginia 1975; Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc. 1976) because they overturned a decision which explicitly held that commercial advertising had no First Amendment protection (Valentine v. Christensen 1942.) The newly-articulated standard, however, left open several important questions regarding how much protection had been granted to commercial speech (Cohen 1978.)

Subsequent opinions have addressed some of these issues. A test for determining when commercial speech comes under the first Amendment has emerged (Central Hudson Gas & Electric v. Public Service Commission 1980.) The Supreme Court has used it during the past decade to expand significantly the power of government at all levels to regulate advertising and related promotional activities.

This no doubt comes as a surprise to those who would regard the 1980's as a decade of deregulation, but the case law has clearly laid the groundwork for tight government control over promotional efforts. This paper traces the development of First Amendment Law as it relates to commercial activities, describes the present standard by which the courts assess whether free speech protection applies to a particular promotional activity and considers the implications of recent cases for advertising and promotional activities.

In particular, it shows how the U.S. Supreme Court has used recent commercial speech cases to expand government authority to regulate promotional activities rather than protect those marketing efforts under conventional First Amendment free speech guarantees.

The court facilitated this process by holding that

commercial speech is entitled to some degree of First Amendment protection (Virginia State Board of Pharmacy, 1976), but less than non-commercial speech (Central Hudson, 1980.) Other opinions brought all aspects of the promotion mix into the commercial speech category (Posadas, 1986, advertising and sales promotion; Bolger, 1983, publicity/sales promotion; National Commission on Egg Nutrition, 1978, advertising/public relations; and, State University of New York, 1989, personal selling.) This has resulted in diminished First Amendment protection for promotional activities and thereby expanded government regulatory powers.

Furthermore, a series of cases (including those cited in the preceding paragraph) have upheld government authority to regulate, or forbid altogether, non-deceptive promotional activities for legal products and services.