

# THE AD ON THE S TRAIN: AN ANALYSIS OF CORPORATE FREE SPEECH IN ADVERTISEMENT

*Sean Havern\**

## I. WHY A SIMPLE ADVERTISEMENT CREATES CONTROVERSY

Advertisements, commercials, and general solicitations surround us in our everyday lives. Whether walking the dog, scrolling through Facebook, or commuting on the train to work, people interact with advertisements. However, we do not often think about the limits placed on advertisements. While many are aware that television ads for cigarettes are banned or commercials for alcoholic beverages are regulated, most are not aware of the extent of regulations on advertisements or if there is any limit on the government's ability to regulate advertisements.

It is precisely that issue that this article considers. The ad in question was for *The Man in The High Castle*, a new Amazon Prime Show based on a popular novel of the same name.<sup>1</sup> This ad was removed from the S train on the New York Subway because it was considered to be offensive—and even “overwhelming” by some—for reasons that will be explained shortly.<sup>2</sup> This article will examine whether the New York Metropolitan Transportation Authority's removal of the ad without Amazon's consent was a violation of Amazon's First Amendment rights. However, what seems like a straightforward analysis on its face quickly becomes complicated due to the actors and subject matter involved. The circumstances surrounding the ad on the S train raises questions about the rights of corporate entities, the limits of First Amendment protection for advertisements, as well as the limits on the government's ability to regulate offensive material.

This article will argue that Amazon has a First Amendment claim against the City of New York for the removal and censorship of their advertisement. This article will have to answer several

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\* Editor-in-Chief Elect, Rutgers Journal of Law and Religion: Juris Doctor Candidate May 2017, Rutgers Law School.

<sup>1</sup> Laura Wagner, *New York Subway Pulls Nazi-Themes Ads For New Show, 'Man In The High Castle,'* NAT'L PUB. RADIO (Nov. 25, 2015, 5:35 PM), <http://www.npr.org/sections/thetwo-way/2015/11/25/457410075/new-york-subway-pulls-nazi-themed-ads-for-new-show-the-man-in-the-high-castle>.

<sup>2</sup> *Id.*

legal questions in order to articulate why Amazon has a claim and why they should prevail. Part III will analyze the principles of corporate personhood and free speech, explain and analyze the current state of commercial speech jurisprudence, and finally, the validity of government regulation of offensive speech will be analyzed. An analysis of these three areas of the law in Part IV will demonstrate that Amazon would likely be successful if they were to bring a claim against the City of New York, for a violation of their First Amendment rights. Further, the article will assert that the current jurisprudence surrounding the First Amendment and advertisements is correct and that a return to the previous standards would result in unclear laws that encourage governmental abuse and result in detrimental effects for society, the marketplace, and individuals.

## II. WHY THE AD WAS CONSIDERED OFFENSIVE, AND ULTIMATELY REMOVED

On November 25, 2015, National Public Radio (NPR), as well as several other news sources reported that New York's Metro Transportation Authority (MTA) removed advertisements for the new Amazon Prime show: *The Man in the High Castle*.<sup>3</sup> The MTA pulled the advertisements from the subway because they displayed Nazi iconography, which officials and Mayor Bill De Blasio found to be overwhelming and offensive.<sup>4</sup> Specifically, Mayor de Blasio commented, "[w]hile these ads technically may be within MTA guidelines, they're irresponsible and offensive to World War II and Holocaust survivors, their families, and countless other New Yorkers."<sup>5</sup>

The Nazi iconography, however, was not without context. Amazon's *The Man in the High Castle* is based on a popular novel of the same name depicting an alternate history to ours; one that diverged drastically during the Second World War.<sup>6</sup> In the show and in the book, the second World War ends with an Axis victory in both the Pacific and European theaters, resulting in the eventual invasion and conquest of the United States of America. The iconography in the advertisement wisely avoided more well-known, offensive symbols such as the swastika. Instead it depicted the "Nazi Eagle," placed on the American flag where the fifty

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

white stars would usually be.<sup>7</sup> Amazon responded in a limited way to the removal of the ad and simply released a statement saying it did not consent to the ad's removal.<sup>8</sup> The MTA's nonconsensual removal of the ad is the subject of this article and its analysis.

### III. THE EVOLUTION OF FIRST AMENDMENT JURISPRUDENCE CONCERNING CORPORATE AND COMMERCIAL SPEECH

A hypothetical claim by Amazon against the MTA implicates and requires discussion of several areas of the law. This section will first examine the law determining whether corporate entities enjoy the same rights and protections as individuals in the United States, including the protections granted by the Free Speech Clause of the First Amendment to the U.S. Constitution.<sup>9</sup> Second, this section will examine the jurisprudence surrounding Free Speech protections as they apply to what the Court has called "commercial speech," which includes advertisements. Finally, this section will examine the government's power to regulate speech that the public could find offensive.

#### A. *The Rights of Corporations as Artificial People*

Despite being a well-worn area of the law, there is still much debate surrounding the rights of corporate, or artificial entities, versus the rights of individuals. By no means is it a given that corporations do or should have the same rights as individuals, including the protections of the First Amendment, therefore it is necessary to begin with a discussion of the case precedent that supports the idea that corporations are "people."

In 1819, the Supreme Court decided *Trustees of Dartmouth College v. Woodward*, which was the first case in a long line of cases to articulate the legal principle that corporate entities share some of the rights as individuals.<sup>10</sup> This case for the first time established that a corporate entity could bring a Constitutional claim in order to vindicate its rights; in *Woodward*, it was the right to contract.<sup>11</sup> This principle was then extended to the application of the Fourteenth Amendment in *Pembina Consolidated Silver*

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<sup>7</sup> Wagner, *supra* note 1 (depicting the advertisement at issue).

<sup>8</sup> *Id.*

<sup>9</sup> U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.")

<sup>10</sup> 17 U.S. 518 (1819).

<sup>11</sup> *Id.* at 654.

*Mining & Milling Co. v. Pennsylvania*, where the court stated “[u]nder the designation of ‘person’ there is no doubt that a private corporation is included.”<sup>12</sup>

The Court has also addressed on several separate occasions whether, and to what extent, corporations enjoy First Amendment protections. The Court addressed this question in the context of campaign finance rules when it decided *Buckley v. Valeo*<sup>13</sup> in 1976, and then again, in 2010, in the much talked about and disputed case, *Citizens United v. Federal Election Commission*.<sup>14</sup> In *Citizens United*, the court addressed campaign finance rules that would have resulted in the censorship of a 2008 documentary criticizing Hillary Clinton, who at that time, was running for the Democratic nomination against Barack Obama for President of the United States.<sup>15</sup> The Citizens United documentary was alleged to have violated the Bipartisan Campaign Reform Act of 2002, which prohibited any “electioneering communication.”<sup>16</sup> “Electioneering communications” included any broadcast, cable, or satellite, which refers to a clearly identified candidate for federal office.<sup>17</sup> The challenged law in *Citizens United* was intended to regulate the speech of corporate entities in the political arena.

In both cases, the Court accepted that corporate entities are entitled to the protections of the First Amendment just as a natural born citizen would be. Specifically, in *Citizens United*, Justice Kennedy wrote, “the government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether,” thereby demonstrating that First Amendment protection is not unique to the individual, but also extends to corporate entities.<sup>18</sup>

Despite the clear and decisive way in which the Court has answered the question of corporate personhood, there remain opponents to the legal principle. While these opponents have gained little traction in the courts, they have written much on the absurdity and evolution of corporations as people.<sup>19</sup>

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<sup>12</sup> 125 U.S. 181, 189 (1888).

<sup>13</sup> 424 U.S. 1 (1976).

<sup>14</sup> 558 U.S. 310 (2010).

<sup>15</sup> *Id.* at 319.

<sup>16</sup> *Id.* at 320. *See also* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

<sup>17</sup> *Citizens United*, 558 U.S. at 320.

<sup>18</sup> *Id.* at 319.

<sup>19</sup> *See generally* Lyman P.Q. Johnson, *Law and Legal Theory in The History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, (2012) (discussing the evolution of the theory of corporate personhood and its

### B. *The Freedom of Speech and Commercial Speech*

The Supreme Court has often discussed restrictions that government may justifiably place on commercial speech and advertisements. Advertising has faced many challenges and companies have had to remain cognizant of government power used to regulate their ads. This was the case during the height of government regulatory power regarding advertisement following the decision in *Valentine v. Chrestensen*.<sup>20</sup> In *Valentine*, the respondent, Chrestensen, owned and operated a submarine as an exhibit for profit. The petitioner, acting in his capacity as Police Commissioner, informed Chrestensen that he would not be able to distribute his pamphlets because it would be in violation of section 318 of the Sanitary Code.<sup>21</sup> Section 318 forbade the distribution of business and advertising materials in the street, but permitted the disbursement of “information or public protest” materials.<sup>22</sup> The handbill in question that Chrestensen wished to distribute was two-sided.<sup>23</sup> The front contained an advertisement for the submarine and commercial material, and on the back, it protested the City Dock Department’s refusal to permit Chrestensen to dock his submarine at the city pier.<sup>24</sup> The Police Commissioner informed Chrestensen that the handbill with the commercial material, despite the protest material on the other side, would still violate section 318.<sup>25</sup> Nevertheless, Chrestensen distributed the pamphlets.<sup>26</sup> In response, the City interfered with Chrestensen’s distribution of the pamphlets and fined him; he challenged the City’s actions under multiple theories, including the First Amendment’s guarantee of Free Speech.<sup>27</sup>

In an extremely brief opinion authored by Justice Owen Roberts, the Court reversed the lower court and found that the

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impact on our conceptualization of corporate responsibility). Nneka Logan, *The Ontological Scandal of Corporate Personhood and Speech: A Rhetorical Analysis of Key Supreme Court Decisions* (May 17, 2013) (unpublished Ph.D. dissertation, Georgia State University), *available at* [http://scholarworks.gsu.edu/communication\\_diss/43](http://scholarworks.gsu.edu/communication_diss/43).

<sup>20</sup> 316 U.S. 52 (1942).

<sup>21</sup> *Id.* at 53.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Valentine*, 316 U.S. at 53.

<sup>27</sup> *Id.*

regulation of the pamphlet did not violate Chrestensen's rights.<sup>28</sup> Justice Roberts pays lip service to the well-worn principle that individuals maintain their right to free speech when in public or walking in the streets.<sup>29</sup> Justice Roberts then states, "[w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial speech."<sup>30</sup> This all occurs without any reference to any past cases or legal authorities of any kind. The Court then dismissed the non-commercial portion of the pamphlet as a tool used by Chrestensen to avoid the consequences of section 318.<sup>31</sup> Again, the Court only discussed this issue briefly before its holding. However, the Court found in their opinion that municipal regulation of commercial speech does not offend the First Amendment.<sup>32</sup> This marked the height of the government's ability to regulate speech that is commercial in nature.

The Court, however, reexamined its *Valentine* decision, greatly narrowing the scope of *Valentine's* impact in *Bigelow v. Virginia*.<sup>33</sup> In *Bigelow*, the *Virginia Weekly* circulated an issue of the newspaper featuring on page two an advertisement for abortion services in New York.<sup>34</sup> Following the publication of this advertisement the managing editor of the *Virginia Weekly*, Jeffrey C. Bigelow, was charged with violating Va. Code Ann. § 18.1-63 (1960).<sup>35</sup> At the time, that statute read, "if any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Valentine*, 316 U.S. at 54.

<sup>33</sup> 421 U.S. 809 (1975).

<sup>34</sup> *Id.* at 812. The advertisement in *Bigelow* specifically read:

UNWANTED PREGNANCY LET US HELP YOU. Abortions are now legal in New York. There are no residency requirements. FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS AT LOW COST Contact WOMEN'S PAVILION, 515 Madison Avenue, New York, N. Y. 10022 or call any time (212) 371-6670 or (212) 371-6650. AVAILABLE 7 DAYS A WEEK. STRICTLY CONFIDENTIAL. We will make arrangements for you and help you with information counseling.

*Id.*

<sup>35</sup> *Id.*

misdemeanor.”<sup>36</sup> Mr. Bigelow was tried and convicted for violation of § 18.1-63.<sup>37</sup> Bigelow then appealed his conviction on First Amendment grounds.<sup>38</sup>

Justice Harry Blackmun wrote the opinion of the Court, and in part III of the opinion, began his analysis on the merits of Mr. Bigelow’s First Amendment claim.<sup>39</sup> The Court quickly established that the challenged Virginia Supreme Court opinion relied on the principle that the guarantees of free speech and press ensured by the First Amendment do not apply to paid commercial advertisements.<sup>40</sup> In the next sentence of the opinion, Justice Blackmun discards this principle and states, “our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form.”<sup>41</sup> The opinion continues by stating that the existence of commercial aspects or the promotion of the advertisers’ personal commercial interests does not negate that individual’s First Amendment protection.<sup>42</sup> Further, unlike in *Valentine*, Justice Blackmun finds it appropriate to legitimize this view with citation to five separate cases supporting this interpretation.<sup>43</sup> One such case is *Murdock v. Pennsylvania*—an opinion issued only one year after *Valentine*—where the Court held that the State was not free of Constitutional restraint because the advertisement at issue involved sales or solicitation.<sup>44</sup>

The *Bigelow* Court also directly addresses *Valentine*, and while it does not overturn the decision, it narrows its scope considerably. Justice Blackmun writes “the holding is distinctly a limited one,” and states that it does not support a sweeping proposition that advertisement is unprotected per se when analyzing *Valentine*.<sup>45</sup> Finally, the opinion contrasts the advertisement at issue with

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<sup>36</sup> *Id.* at 812–13.

<sup>37</sup> *Id.*

<sup>38</sup> *Bigelow*, 421 U.S. at 814.

<sup>39</sup> *Id.* at 818 (discussing the possible issue of standing for Mr. Bigelow’s claim; however this analysis by the court does not have an impact on the issue being considered in this article).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*; see, *Pittsburgh Press Co. v. Human Rel. Comm’n*, 413 U.S. 376, 384 (1973); see also, *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (while primarily a case about defamation and libel, the piece in question was an ad in the *New York Times*, thus the Court needed to determine whether advertisements fall within the protection of the First Amendment).

<sup>42</sup> *Bigelow*, 421 U.S. at 818.

<sup>43</sup> *Id.*

<sup>44</sup> 319 U.S. 105, 110–11 (1943).

<sup>45</sup> *Bigelow*, 421 U.S. at 819–20.

several categories of unprotected speech including fighting words, obscenity, libel, or incitement to imminent lawlessness and finds that the advertisement does not fit into any of these categories.<sup>46</sup> Unfortunately, the Court does not elaborate more on why the advertisement does not fall into any of these categories.<sup>47</sup>

With the principle that the First Amendment may still apply to advertisement clearly in place, Justice Blackmun then turned to analyzing the advertisement at the center of the case.<sup>48</sup> The Court reasoned that the ad in the *Virginia Weekly* could be differentiated from the ads at issue in *Valentine* and *Pittsburgh Press Co.*—two cases where the Court found that the government action had not violated the First Amendment.<sup>49</sup> Unlike in *Valentine* and *Pittsburgh Press Co.*, where the disputed handbill and a contested help-wanted ad did little more than propose commercial activity, the advertisement in the *Virginia Weekly* contained information of clear public interest.<sup>50</sup> Finally, the Court’s opinion concluded that because the advertisement contained information important to the public, it is entitled to First Amendment protection, which was violated by the enforcement of § 18.1-63.<sup>51</sup> Curiously, the Court includes the language that “[a]dvertising . . . may be subject to reasonable regulation that serves a legitimate public interest” and that “the relationship of speech to [commercial] activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged.”<sup>52</sup> Unfortunately, Blackmun does little to elaborate on these words, an absence that does not go unnoticed by Justice William Rehnquist in his dissent.<sup>53</sup>

The Court thankfully refined the unclear standard set by Justice Blackmun in *Bigelow* when it addressed a similar regulation of commercial speech in *Central Hudson Gas & Electric*

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 821.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 822. Specifically, the advertisement coincided with the public’s interest in knowing where and how they could exercise their constitutional right to abortion and how such a procedure could be procured in a safe way. *Bigelow*, 421 U.S. at 822.

<sup>51</sup> *Id.* at 826.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 829–30 (Rehnquist, J., dissenting) (arguing the language of the majority opinion is ambiguous and seems to be aimed at protecting this particular advertisement without attempting to set a rule for advertisements in general, and that—despite the brief discussion of the balancing of interests—the interest of the State is given little to no weight).

*Corporation v. Public Services Commission*.<sup>54</sup> In *Central Hudson Gas & Electric*, the Court addressed a ban on promotional advertisement by electric and gas companies during a fuel shortage.<sup>55</sup> Justice Lewis F. Powell, Jr. wrote the opinion of the Court and authored the *Central Hudson Gas & Electric* test.<sup>56</sup> The test states that if the communication in question is neither misleading nor related to unlawful activity, the government's power is more circumscribed.<sup>57</sup> The State must show a substantial interest served by the regulation of the commercial speech and the regulation must be in proportion to that interest.<sup>58</sup> Justice Powell provided two criteria to aid in applying this test.<sup>59</sup> First, the restriction must directly advance the State's interest, and second, the regulation cannot provide ineffective or remote support to the interest.<sup>60</sup> This language is extremely similar to intermediate scrutiny test often applied by the court where the State must have an important governmental goal and the means must be substantially related to that goal.<sup>61</sup>

Justice Powell begins his analysis by explaining that commercial speech does more than just serve the commercial interest of the speaker, but it also disseminates information about products and services to the public.<sup>62</sup> He continues by unambiguously stating, "[t]he First Amendment, as applied to the states through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation."<sup>63</sup> Justice Powell heavily emphasizes the value to the public of information, even when that information is partial or promotional, as long as it is not fraudulent or misleading.<sup>64</sup> Further, he stresses that the government must narrowly tailor its means to substantially

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<sup>54</sup> 447 U.S. 557 (1980).

<sup>55</sup> *Id.* at 558–59.

<sup>56</sup> *Id.* at 564.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

<sup>61</sup> *Id.* at 564; *see generally* *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994) (holding the must-carry provisions of the Cable Television Protection and Competition Act of 1992 were subject to the intermediate level of scrutiny applicable to content neutral restrictions that impose an incidental burden on speech); *In re Primus*, 436 U.S. 412, 438 (1978).

<sup>62</sup> *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 562.

<sup>63</sup> *Id.* at 561 (citing *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 761–62 (1976)).

<sup>64</sup> *Id.* at 562; *see also* *Bates v. State Bar of Ariz.*, 443 U.S. 350 (1977); *Linmark Assocs, Inc. v. Willingboro*, 431 U.S. 85 (1977).

advance the important interest.<sup>65</sup> The narrowly tailored requirement is most important where the government decides to act through complete suppression of information when a narrower means is available.<sup>66</sup>

The Supreme Court then wrestled with the standard set in *Central Hudson Gas & Electric* for twenty years by addressing the issue of commercial speech in narrow and convoluted ways.<sup>67</sup> However, the Court finally settled back on the *Central Hudson Gas & Electric* test in *Lorillard Tobacco Co. v. Reilly*,<sup>68</sup> where the Court invalidated the pre-emption of outdoor cigarette advertisements because the means used by the government were impermissibly broad.<sup>69</sup> The law at issue in *Reilly* came from Massachusetts and set out many restrictions regarding the advertisement of tobacco products including the placement of tobacco materials in stores and the use of outdoor advertisement.<sup>70</sup>

### C. *The Government's Power to Regulate Offensive Speech*

As discussed earlier in this article, there are forms of expression that do not receive First Amendment protection. These areas include inciting lawless action,<sup>71</sup> fighting words,<sup>72</sup> obscenity,<sup>73</sup> or libel,<sup>74</sup> among others. However, words that the public could consider offensive are not unprotected per se. This issue is at the heart of several Supreme Court cases including *Cohen v. California*<sup>75</sup> and *R.A.V. v. St. Paul*.<sup>76</sup>

In *Cohen*, the appellant, Paul Cohen, entered into a courthouse wearing a jacket with the words "fuck the draft" emblazoned on it.<sup>77</sup> Mr. Cohen was convicted and sentenced to thirty days imprisonment for violating California Penal Code §

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<sup>65</sup> *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 565.

<sup>66</sup> *Id.*

<sup>67</sup> *Compare* *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (upholding a ban on casino advertisement material in Puerto Rico); *with* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (striking down a law banning the mailing of advertisements for condoms).

<sup>68</sup> 533 U.S. 525 (2001).

<sup>69</sup> *Id.* at 551–52.

<sup>70</sup> *Id.* at 535–36.

<sup>71</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>72</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>73</sup> *Roth v. United States*, 354 U.S. 476 (1957).

<sup>74</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>75</sup> 403 U.S. 15 (1971).

<sup>76</sup> 505 U.S. 377 (1992).

<sup>77</sup> *Cohen*, 403 U.S. at 16.

415, which prohibits “disturbing the peace . . . by . . . offensive conduct.”<sup>78</sup> In this case, Justice Harlan identified that the punishment against Cohen was not for the political message underlying the statement on the jacket, but rather, the words used to communicate that message, particularly the use of the word “fuck.”<sup>79</sup>

Justice Harlan differentiated this case from an obscenity case, such as *Roth v. United States*, because despite the nature of the words used they do not “conjure up such psychic stimulation in anyone likely to be confronted with Cohen’s crudely defaced jacket.”<sup>80</sup> It is important to note that obscenity cases like *Roth* are not the same as cases involving offensive language like *Cohen*. Justice Harlan also noted that the fact that unwilling listeners may be exposed to the offensive speech is not alone enough to abridge Mr. Cohen’s speech rights.<sup>81</sup> The Court finally addresses the issue of whether the government may regulate offensive speech and finds that the government has the burden of showing a compelling state interest and narrowly tailored means.<sup>82</sup> In *Cohen*, the State was unable to meet either of these requirements and, therefore, failed to meet their burden.<sup>83</sup>

The Court tackled this question again in *R.A.V. v. St. Paul* in relation to speech that is typically known as “hate speech.”<sup>84</sup> “Hate speech” is typically understood as speech that targets a particular group and utilizes known epithets or phrases to disparage that group.<sup>85</sup> In *R.A.V.*, the Court was confronted with an ordinance that made punishable the display of certain symbols; such as burning crosses or Nazi swastikas on public or private property.<sup>86</sup> The ordinance was challenged after a group of boys

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<sup>78</sup> *Id.* (internal quotation marks omitted).

<sup>79</sup> *Id.* at 19.

<sup>80</sup> *Id.* at 20.

<sup>81</sup> *Id.* at 22.

<sup>82</sup> *Id.* at 24–26.

<sup>83</sup> *Cohen*, 403 U.S. at 26.

<sup>84</sup> 505 U.S. 377 (1992).

<sup>85</sup> *Id.* at 393.

<sup>86</sup> *Id.* at 393. In that case, St. Paul, Minn., Legis. Code § 292.02 (1990) specifically stated:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

were arrested for burning a cross on the property of a local African-American family.<sup>87</sup> The Court struck down the ordinance, claiming that it was content based and violated the free speech rights of the boys prosecuted under it. In a torn manner, the late Justice Antonin Scalia wrote, “[l]et there be no mistake about our belief that burning a cross in someone’s front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.”<sup>88</sup>

Although *R.A.V.* involves speech with a possible political message and a content-based law, it likewise demonstrated the limit on governmental authority in regulating offensive language, even language that disturbs and offends the great majority of society.

#### IV. WHY AMAZON WOULD WIN IF THEY BROUGHT SUIT, AND WHY THEY SHOULD WIN

This article must answer three questions in order to analyze whether the MTA violated Amazon’s First Amendment rights in taking down the ads for *The Man in The High Castle* without consent. First, is Amazon, as a corporate entity, entitled to First Amendment protection at all? Second, is the advertisement entitled to First Amendment protection at all, and, if so, to what extent? Third, was New York City Mayor Bill de Blasio’s statement that the ad was offensive, sufficient justification for the removal of the ad?

The answers to the first and third questions are relatively straight forward and can be determined with simple analysis of precedent. However, the second question demands greater analysis. For this reason, this article will argue that the standard currently used in cases of advertisements is most consistent with the First Amendment. Further, this article will argue that other possible standards are too expansive or too unclear, and thus, susceptible to governmental abuse and corruption.

As stated, first it must be determined whether Amazon can even sue for violation of its First Amendment rights. Despite vigorous opposition by academics, politicians, and interest groups, the law surrounding corporate personhood and the applicability of constitutional protections is well settled. As the Court articulated

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<sup>87</sup> *R.A.V.*, 505 U.S. at 380.

<sup>88</sup> *Id.* at 396.

in *Woodward*<sup>89</sup> and confirmed in cases such as *Buckley*<sup>90</sup> and *Citizens United*,<sup>91</sup> corporations are entitled to constitutional protections—including the protections offered by the First Amendment. As a corporate entity, Amazon also has the benefit of the protections of the First Amendment. This means that Amazon has the capability of suing the City of New York for First Amendment violations in relation to the removal of the advertisement. Additionally, any defense the City could bring based on the corporate status of Amazon would likely be unsuccessful. This of course, does not mean that Amazon will be able to prevail on the First Amendment claim; only that they are able to bring the claim.

Next, analysis of the government action itself will determine whether the removal of the advertisement was a violation of Amazon's First Amendment rights. This analysis will utilize the *Central Hudson Gas & Electric* test outlined by Justice Powell.<sup>92</sup> The City of New York certainly had more narrowly tailored means to respond to the offense caused by the Nazi iconography. For example, the City could have requested that Amazon alter the advertisement and remove the "Nazi eagles" or maybe even painted over the eagles themselves. Both of these actions are narrower means than the removal of the whole ad resulting in full suppression. Of course, the fact that they may have acted in a more narrow way does not save them, nor does it compensate for the lacking governmental goal for which the action serves. This test requires that the government show a substantial interest in regulating the speech and that the interest be pursued in a narrowly tailored way.<sup>93</sup> The action taken by the MTA meets neither of these requirements.

The MTA was also not pursuing a substantial governmental interest in removing the advertisement. Granted, all the reliable information comes from the quotes of Mayor de Blasio,<sup>94</sup> which stated that the removal of the ads occurred because they were offensive.<sup>95</sup> As the Court explained in both *Cohen*<sup>96</sup> and again in *R.A.V.*,<sup>97</sup> it is not a substantial governmental goal to

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<sup>89</sup> 17 U.S. 518 (1819).

<sup>90</sup> 424 U.S. 1 (1976).

<sup>91</sup> 558 U.S. 310 (2010).

<sup>92</sup> 447 U.S. 557 (1980).

<sup>93</sup> *Id.* at 565.

<sup>94</sup> Wagner, *supra* note 1.

<sup>95</sup> *Id.*

<sup>96</sup> 403 U.S. 15 (1971).

<sup>97</sup> 505 U.S. 377 (1992).

regulate offensive speech. It is certainly imaginable that the City of New York could conjure up a more substantial interest if there was a suit brought but based on the current information it appears that the goal was simply to save some citizens from being offended. As the Court in *Cohen* makes clear, the want to save some people from temporary offense is not enough to override the speech rights of the speaker.<sup>98</sup>

However, even if a court were to accept this goal or any other, as substantial as the action was, it would still violate the First Amendment because the MTA's means are impermissibly broad. Again relying on Mayor de Blasio's own comments, the aspects of the advertisement that offended people was the Nazi iconography.<sup>99</sup> The iconography in particular was the "Nazi eagle" which appeared on the American flag where the stars would usually sit.<sup>100</sup> In response to this imagery, the MTA removed the whole advertisement. This is not a narrowly tailored action. In fact, Justice Powell explicitly addresses this sort of suppression when he states in *Central Hudson Gas & Electric Corp.* that government action resulting in full suppression is impermissible when a narrower means of serving the governmental interest is present.<sup>101</sup>

## V. CONCLUSION

The suppression of the ad on the S train alone is of little consequence. The harm financially to Amazon and its show *The Man in The High Castle* itself was likely negligible, perhaps even nonexistent as this action created media attention for the show. However, it is cases like these that should make us stop and analyze the value of our Constitutional rights and make us evaluate how far they should reach. If Amazon were to sue the City of New York, they would likely prevail. Indeed, if Amazon were to take such action, then they *should* prevail.

Although commercial speech may not be held in as high regard as political speech, it is still critically important to our society and general way of life. As Justice Powell observed, commercial speech does not just serve the speaker and their commercial needs, but it also disseminates information to the

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<sup>98</sup> *Cohen*, 403 U.S. at 22.

<sup>99</sup> Wagner, *supra* note 2.

<sup>100</sup> *Id.*

<sup>101</sup> 447 U.S. 557, 562. (1980).

consumer.<sup>102</sup> Such information is increasingly important to the public in the new global market and an ever-expanding marketplace. Further, a lesser standard like those applied by the Court in *Chrestenson* or *Valentine* leaves much discretion in the hands of government officials, who could be motivated to use this power to protect businesses and concerns they favor over the competition, and could use this regulatory power to suppress competition through the suppression of advertisement. Such a turn of events would not only be detrimental to the marketplace and our society, but also to individuals looking for information, no matter how trivial or mundane that information may be.

As such, it is highly likely that if Amazon were to sue the City of New York for violation of its First Amendment rights Amazon would prevail—as they should. While the protection of commercial speech may seem trivial, or an interest of powerful corporations and advertisement firms, it is in reality a matter of great importance to the average citizen and the marketplace in general. As Justice Powell stated, commercial speech is not without value, in fact it provides everyday people with information that they then use to make important, albeit often mundane decisions.<sup>103</sup>

The decision of which car to buy, what store to shop at, and which plumber to call are all vital pieces of information necessary in everyday life even if we often forget this information's importance until the need arises. A government that can freely regulate such advertisement or even regulate the advertisement under a more deferential test, like the one employed by Justice Blackmun in *Bigelow*, could quickly become the arbiter of what advertisement is allowed and which concerns and businesses are able to advertise at all. This would not only open up doors for corruption and malicious intent on behalf of officials and business people alike, it could greatly hamper the amount of information available to the average person.

With such high stakes, it is important to constantly push the boundaries of our civil rights and always be vigilant against small, even seemingly insignificant violations by the government. The ad on the S train is not one of the most important pieces of speech of our time, but protecting it under an expansive view of free speech, is surely an important goal. It is important that we always remember the purpose of the Bill of Rights is not to tell

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<sup>102</sup> *Id.* at 572.

<sup>103</sup> *Id.* at 562.

individuals what they may do, but to tell the government what they may not do. It is not a document that presumes taste or sensibility, nor is it one that allows the government to do this on society's behalf. This principle cannot be limited to only the most valuable or high-minded speech in society. Such a limitation would be tantamount to a gate with no fence. It may prevent the government from walking on that small area but they are still free to roam wherever else they please; directly at odds with the purpose of the First Amendment and the Bill of Rights.