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WHY FORMAT, NOT CONTENT, IS THE KEY TO IDENTIFYING COMMERCIAL SPEECH

Bruce E. H. Johnson and Jeffrey L. Fisher[†]

It is an odd lawsuit whose linchpin is that a company has deceived the public by making misleading statements through the media regarding its business operations, but that simultaneously acknowledges that "[t]he media have continued to expose [the company's] actual practices."[1] It is odder still when the lawsuit's complaint is grounded in consumer protection law, but the plaintiff freely admits that he was not harmed or deceived by the defendant company. Yet these were the paradoxical assertions that Marc Kasky leveled against Nike in late 1999, in a case that pressed the limits of consumer protection jurisprudence and eventually exposed the woefully underdeveloped foundations of the First Amendment's commercial speech doctrine.

Consumer protection laws in general—and false advertising laws in particular—allow the government to punish deceptive "commercial speech," regardless of whether the speaker was or should have been aware of the speech's misleading nature.[2] The

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1 First Amended Complaint at ¶ 19, Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002) (No. 994446); *see also id.* at Exs. F-L (collecting some such articles).

2 Although some of the submissions to this symposium, *see, e.g.*, Erwin Chemerinsky & Catherine Fisk, *What Is Commercial Speech? The Issue Not Decided in* Nike v. Kasky, 54 CASE W. RES. L. REV. 1143 (2004), assume that Kasky alleged that Nike "lied" or made the false and misleading statements at issue with actual malice—that is, knowing they were false or with reckless disregard for whether they were false—Kasky did not so characterize his complaint in the Supreme Court. *See Nike*, 123 S. Ct. at 2556-57 (Stevens, J., concurring) (noting that the complaint would have to be amended if Kasky were going to advance any such claim). Accordingly, the case was argued at the Supreme Court on the premise that Nike was at most negligent

Supreme Court has explained that the First Amendment permits commercial speech to be regulated more tightly than ordinary expression in order to "prevent[] commercial harms"[3] and to "protect[] consumers."[4] But these explications lie somewhere between utterly circular and terrifically obtuse. And they tell us little about whether the public statements that Kasky complained about—Nike's allegedly deceptive public statements regarding its overseas labor practices—were proper fodder for a consumer protection lawsuit.

If the purpose of the commercial speech doctrine is to allow the government to hold all for-profit companies and those companies' executives[5] to a higher standard of truthfulness in all of their public communications on subjects that might influence consumers, then Kasky might have had a legitimate grievance. If, however, the purpose of the doctrine is merely to allow the government to ensure that consumers are accurately informed about products and services in the marketplace, then the fact that the media already "expos[ed] Nike's actual practices" would seem to have made Kasky's dependence on the commercial speech doctrine inappropriate. In *Nike, Inc. v. Kasky*,[6] the Court refused to resolve this quandary, dismissing the case as improvidently granted and leaving in place (at least for now) the California Supreme Court's ruling that the commercial speech doctrine broadly applies to speech that a company makes essentially in any forum describing its products, services, or business operations, *regardless of whether any actual deception results*.[7]

This Article takes issue with California's new interpretation of the commercial speech doctrine and contends that the commercial speech doctrine does not allow the government to apply stricter standards to *any* speech that a company makes in order to bolster or sustain its bottom line. Such a governmental interest has virtually no stopping point in a world in which companies have

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in making the statements at issue.

[3] City of Cincinnati v. Discovery Network, 507 U.S. 410, 426 (1993).

[4] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978).

[5] While some of the submissions to this Symposium question whether companies truly have First Amendment rights on par with individual citizens' rights, *see, e.g.*, C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandry in* Nike, 54 CASE W. RES. L. REV. 1161, 1178-79, 1181; James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from* Nike v. Kasky, 54 CASE W. RES. L. REV. 1091, 1111-12, 1116 (2004), one need not dwell on that issue because Kasky named Phil Knight and other Nike executives individually as defendants, and the California Supreme Court allowed those claims to go forward.

[6] 123 S. Ct. 2554 (2003).

[7] *See* Kasky v. Nike, Inc., 45 P.3d 243, 262 (Cal. 2002) (not deciding whether Nike's speech was in fact false or misleading).

fiduciary duties to generate profits, and it ultimately would subject all business speech to second-class status.[8] Rather, a close inspection of the larger landscape of the Supreme Court's First Amendment jurisprudence reveals that the true purpose of the commercial speech doctrine is to allow the government to address a much more narrow problem: the possibility that companies may impart false or misleading information that consumers may act upon without having time for reflection or counterspeech. Viewed thusly, the commercial speech doctrine pertains only to a much more modest class of business speech: that which occurs in direct proximity to consumers' purchasing decisions, e.g., speech that proposes a commercial transaction on a product label, advertisement, or similar format. The doctrine does not pertain to speech offered in a public debate regarding a company's corporate citizenship or otherwise at least one step removed from actual purchasing decisions.

Part I of this Article describes Kasky's complaint and—making explicit what was implicit in some of his own exhibits to that filing—places the complaint in the context of the larger public debate that surrounded Nike's statements. Part II explains why the First Amendment should have required the dismissal of Kasky's complaint—namely, because when speech is made, as Nike's was here, to the media in the context of a public debate about controversial business practices, it should fall outside the commercial speech doctrine. Based on this understanding, Part III sets forth a taxonomy of business speech and concludes that the dividing line between commercial and noncommercial speech is not, as many have argued, between statements regarding products and those involving corporate "images," but rather is between statements made in the course of economic transactions and those made in other formats during public debates.

I. KASKY'S COMPLAINT AND THE PUBLIC DEBATE OVER NIKE'S LABOR PRACTICES

The *Kasky* case grew out of a major public debate concerning the labor practices in Southeast Asian countries, where many large companies such as Nike produce their products. Beginning in 1995, several labor and environmental groups began publicly asserting that the working conditions in Nike's overseas factories were dangerous, that workers were mistreated and underpaid, and that child labor was being utilized. The assertions quickly gener-

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[8] For a warning from one of the Court's current Justices against putting too much emphasis on a speaker's economic motivation, see Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 81-83 (1983) (Stevens, J., concurring).

ated a firestorm of media scrutiny and editorial coverage, rendering Nike a lightning rod for complaints regarding the perceived ills of economic globalization. Groups began calling for legislative action in the United States and abroad and boycotts of Nike's products.[9] In response to this mounting controversy, Nike defended its business operations by issuing press releases, writing letters to the editor and op-eds in newspapers around the country, and sending a letter to university presidents.

Kasky complained about a handful of allegedly deceptive statements that Nike had made in nine of these various documents, primarily the press releases. The first statement was a response to protests that Nike, as summarized in a column in *The New York Times*, "benefit[s] both directly and indirectly from the systematic oppression of the Indonesian people" and that "Nike executives . . . are not bothered by the cries of the oppressed. It suits them. Each cry is a signal that their investment is paying off."[10] Nike countered in its press release that it treated its overseas workers well and that the average line-workers' wage in Asian facilities was "double the government-mandated minimum."[11]

Nike's release, however, did not generate any immediate press reports. When the media eventually ran stories repeating Nike's double-the-minimum-wage claim, they generally stated in the same articles that the claim was potentially misleading. *Business Week*, for instance, reported that "Nike Chief Executive Philip H. Knight defends the Indonesian operations, saying that sneaker assemblers in Indonesia earn an average of double the minimum wage. But that's because they have no choice but to do overtime."[12] The *San Francisco Chronicle*, the leading newspaper in Kasky's hometown, further noted in an article printing Nike's claim that developing countries "deliberately set [minimum wages] below the subsistence level" and that a human rights group was asserting that Nike pressured such countries into denying overtime and keeping worker pay artificially low.[13]

Second, Kasky complained about Nike's statement in the same press release that it provided "free meals" to its employees.[14] But when the *San Francisco Chronicle* investigated this claim, it

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[9] *See Nike*, 123 S. Ct. at 2566 (Breyer, J., dissenting).

[10] Bob Herbert, *Nike's Bad Neighborhood*, N.Y. TIMES, June 14, 1996, at A29.

[11] First Amended Complaint at ¶ 46, Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002) (No. 994446).

[12] Elisabeth Malkin, *Pangs of Conscience: Sweatshops Haunt U.S. Consumers*, BUSINESS WEEK, July 29, 1996, at 46.

[13] Stephanie Salter, *Decent Wages for Nike Workers? Just Do It*, S.F. CHRON., June 27, 1996, at A19.

[14] First Amended Complaint at ¶ 52, *Kasky* (No. 994446).

reported that despite such promises, a factory in Indonesia "started deducting 25 cents-a-day from workers' daily wages as a charge for the cost of lunch."[15] When a representative business periodical repeated Nike's assertion, it also noted that other groups, "on the other hand, are concerned about persistent reports of exploitative conditions."[16]

Coverage of Nike's two other allegedly misleading assertions in press releases followed a similar pattern of point and counterpoint. Nike's representation that its "expatriates ensure safe working conditions and prevent illegal working conditions"[17] was quickly challenged in a nationally televised segment on CBS's news magazine *48 Hours*. The story recounted "a fair number of incidents of physical abuse of workers" in violation of local regulations at Nike's Asian factories and suggested that Nike exercised very little control over supervisors of those factories.[18] A *Time* magazine article added that Nike had a "credibility problem" on this issue because even if factory owners truly abide by "the Indonesian government's labor standards[, that] is saying very little" because those standards condone dubious practices such as child labor.[19]

Nike's final contested press release, in which it asserted it guaranteed "a living wage for all workers,"[20] was issued about one year later, in response to renewed allegations against the company. In the fall of 1997, leading newspapers reported that a coalition of women's groups was charging that Nike's Asian female employees "often suffer from inadequate wages, corporal punishment, forced overtime and/or sexual harassment."[21] (By this time, several Internet sites also were collecting and posting negative press coverage of Nike in order to combat, as one such website entitled "Boycott Nike" put it, Nike's "progressive image."[22]) After Nike issued its responsive press release, a typical media story repeating Nike's

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[15] Julia Angwin, *The Tired Souls Behind Nike Soles: Indonesian Worker Tells of Suffering*, S.F. CHRON., July 26, 1996, at B3.

[16] Andy Zipser, *Nike: Shareholders Will Be Sweating It Out, Too*, BARRON'S, Sept. 16, 1996, at 11.

[17] First Amended Complaint at ¶ 28, *Kasky* (No. 994446).

[18] *48 Hours: Just Doing It* (CBS television broadcast, Oct. 17, 1996), *at* http://www.saigon.com/~nike/48hrfmt.htm.

[19] Nancy Gibbs, *Cause Celeb: Two High-Profile Endorsers Are Props in a Worldwide Debate over Sweatshops and the Use of Child Labor*, TIME, June 17, 1996, at 30.

[20] First Amended Complaint at ¶ 62, *Kasky* (No. 994446).

[21] Steven Greenhouse, *Nike Supports Women in Its Ads, but Not Its Factories, Groups Say*, N.Y. TIMES, Oct. 26, 1997, at 30; *see also* Dottie Enrico, *Women's Groups Pressure Nike on Labor Practices*, USA TODAY, Oct. 27, 1997, at B2 (citing a Dartmouth study that found that the average annual wage for Vietnamese Nike workers was, in some cases, nearly $200 lower than the average Vietnamese worker's wages).

[22] *Boycott Nike*, http://www.saigon.com/~nike/nike.html (last visited Apr. 14, 2004).

"living wage" claim also included an assertion from an interest group that "Nike's workers in Vietnam could 'barely afford three meals a day let alone transportation, rent, clothing, health care, and much more.'"[23] An ESPN television documentary that later aired on the issue also directly challenged Nike's claim.[24]

Nike's letters to the editor and editorial advertisements that Kasky complained about also met with vigorous concurrent counterspeech. Nike's letter to the editor of *The New York Times,* in which it claimed that it provided employees "free meals, housing and health care,"[25] appeared amidst several scathing editorials in that newspaper—as well as in one of Kasky's local papers—concerning Nike's overseas business practices.[26] Nike's editorial advertisement asserting that it was "doing a good job" and "operating morally"[27] appeared during this same time period and on the same day (June 24, 1997) as one of Mr. Herbert's columns. It was followed later by another editorial in the *San Francisco Chronicle* claiming that "Nike's hypocrisy knows no bounds."[28]

In light of all of this contemporaneous and easily accessible press coverage, it is difficult to understand how consumers could have been misled by any alleged inaccuracies in Nike's speech. Even Kasky himself scrupulously refused to allege that he had been deceived in any way by Nike's assertions. At the very least, any person who wished to factor Nike's labor practices into his or her purchasing decisions would have been alerted that serious allegations had been leveled against Nike and that Nike's credibility was being questioned.

Nor is there anything unusual about this type of media coverage. In fact, it is exactly what one would expect regarding an issue of intense public concern, and it places the First Amendment issue in *Kasky* and in similar future controversies in stark relief: When the media provide consumers with informative counterspeech regarding a company's business practices, and consumers have ample time to reflect on that information, should the government nev-

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[23] *Nike's Treatment of Women Overseas Assailed, Spokesman Defends Pay,* DALLAS MORNING NEWS, Nov. 2, 1997, at A44.

[24] *See* First Amended Complaint at ¶ 64, *Kasky* (No. 994446) (describing *Outside the Lines: Made in Vietnam: The American Sneaker Controversy* (ESPN television broadcast, Apr. 2 & 11, 1998)).

[25] First Amended Complaint, *supra* note 2, at ¶ 52, *Kasky* (No. 994446).

[26] *See* Bob Herbert, *From Sweatshops to Aerobics,* N.Y. TIMES, June 24, 1996, at A15; Bob Herbert, *Nike's Bad Neighborhood,* N.Y. TIMES, June 14, 1996, at A29; Bob Herbert, *Nike's Pyramid Scheme,* N.Y. TIMES, June 10, 1996, at A17; Bob Herbert, *Trampled Dreams,* July 12, 1996, at A27; Stephanie Salter, *Decent Wages for Nike Workers? Just Do It,* S.F. EXAMINER, June 27, 1996, at A19.

[27] First Amended Complaint, *supra* note 2, at ¶ 58, *Kasky* (No. 994446).

[28] Tim Keown, *Hypocrisy Is Nike's Sole Purpose,* S.F. CHRON., Nov. 14, 1997, at E1.

ertheless be allowed to punish companies for making potentially misleading assertions to the press in the course of this coverage? In other words, is there any "commercial harm" that flows from a company's incorrect public statement about its business operations, even if any potentially misleading aspects of that statement are counteracted before consumers make their ultimate purchasing decisions?

II. PINNING DOWN THE PURPOSE OF THE COMMERCIAL SPEECH DOCTRINE

It is hornbook law that "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,'"[29] and that such speech may not be punished unless it is made, at a minimum, with actual malice.[30] In the famous words of Justice Brandeis, the usual remedy to be applied to false speech on a matter of public concern "is more speech, not enforced silence."[31] Yet the California Supreme Court's decision in *Nike* labels speech as "commercial" even if it pertains to an ongoing public debate regarding a company's public image.[32] To determine whether the First Amendment allows consumer protection law to make such a significant inroad into the public-concern rule, it is necessary to identify the underpinnings of the commercial speech doctrine.

The text of the First Amendment does not distinguish between commercial and noncommercial speech. This, of course, does not necessarily mean that commercial speech cannot be more aggressively scrutinized.[33] To the contrary, the Supreme Court generally has held that the Constitution often allows courts or the government to apply enhanced scrutiny to particular practices when the usual default suppositions surrounding those practices are not present. For example, as John Hart Ely famously explained in *De-*

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[29] Connick v. Myers, 461 U.S. 138, 145 (1983) (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)).

[30] *See, e.g.*, *id.* at 145; N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

[31] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[32] Kasky v. Nike, Inc., 45 P.3d 243, 254 (Cal. 2002).

[33] Justice Thomas, as well as numerous commentators, generally has argued that commercial speech ought to be treated the same as all other speech, at least when the speech at issue is true and not misleading. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518-28 (1996) (Thomas, J., concurring); Alex Kozinksi & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990). Whatever the merits of that view, the Supreme Court does not appear interested in adopting this position in the near future. And even if it did, it is far from clear that the Court also would treat misleading or false commercial speech the same as other speech of public concern. Accordingly, we take it as a given, at least for now, that there is some class of speech that may be properly characterized as "commercial" and afforded reduced constitutional protection.

mocracy and Distrust, the Court has varied the stringency of its applications of the Equal Protection Clause according to how likely it is that the political dynamics leading to the classification at issue operated in a properly pluralistic manner.[35] When there is reason to suspect that the democratic process broke down, as in the case of racial classifications, the Constitution permits increased scrutiny.

The same reasoning applies to the First Amendment. To the extent that there is sound justification for affording commercial speech less constitutional protection than other speech about which the public is keenly interested, that justification should be rooted in a communicative breakdown that occurs in the commercial marketplace.

Perhaps the primary difference between communication in the marketplace and other public interchanges of ideas that receive full protection under the First Amendment is that assertions about products and services that are made in the commercial marketplace rarely afford consumers significant time or ability to scrutinize their truthfulness. For example, when a company asserts that its product contains a certain ingredient, that claim may not provide any realistic opportunity for factual or ideological debate.[36] Indeed, the Supreme Court has noted that in the context of professional services the public often "lacks sophistication" or access to the information necessary to evaluate a solicitor's claim, even if it tried to do so.[37] Given these realities, there is a very real danger that, in Justice Stevens' words, consumers "may respond to [false advertisements] before there is time for more speech and considered reflection to minimize the risks of being misled."[38]

A corollary of the Court's inability-to-reflect canon is that false or misleading speech in the "commercial" context may be regulated because it "lacks the value that sometimes inheres in false or misleading political speech."[39] The usual rule is that "[e]ven a false statement may be deemed to make a valuable con-

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[35] JOHN HART ELY, DEMOCRACY AND DISTRUST 88-104 (1980).

[36] *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 496 (1995) (Stevens, J., concurring). This concern that speech may spur people to harmful action before intervening information or time for reflection is able to blunt the effect of the speech tracks another area of First Amendment jurisprudence: the imminent lawless action doctrine. A person may not be punished for advocating illegal activity if the addressees are likely to contemplate that advocacy or to receive intervening speech before acting. *See, e.g.*, Hess v. Indiana, 414 U.S. 105 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969).

[37] *In re* R.M.J., 455 U.S. 191, 200 (1982) (quoting Bates v. State Bar, 433 U.S. 350, 383 (1977)).

[38] *Rubin*, 514 U.S. at 496 (Stevens, J., concurring).

[39] *Id.*

tribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"[40] But in the sphere of product advertising, the predominant goal is sales, not knowledge, and the time frame is short, not long. Thus, the Court has held that the regulation of misleading commercial speech prevents "uninformed acquiescence,"[41] because, as Kathleen Sullivan has put it, "the consumer is not expected to have the competence or access to information needed to question the advertiser's claim."[42] Even within the realm of commercial speech, the Supreme Court has held that statements that are "more conducive to reflection and the exercise of choice on the part of the consumer" receive incrementally more First Amendment protection.[43]

In light of the First Amendment's emphasis upon relying whenever possible on informed consumer choice, California's extension of the commercial speech doctrine beyond consumers' ephemeral purchasing decisions makes little sense. Whatever force the Court's inability-to-reflect rationale has when applied to consumers' evaluation of direct proposals to engage in commercial transactions evaporates in the context of public debates over good corporate citizenship. In fact, by holding that consumers require "protection" from potentially misleading information pertaining to a company's social image during an ongoing public debate, the California Supreme Court seemingly has reverted to the "paternalistic approach" to commercial speech regulation that the Court explicitly rejected in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[44] It is paternalistic to assume that consumers lack the ability to sift through competing assertions and decide for themselves whether a company's attempts to enhance its image reflects reality, or whether the company's statements should influence their purchasing decision at all.[45] People perform essentially the same exercise every day in assessing conflicting personal and political speech; juries do it everyday in courtrooms across the country.

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[40] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964) (quoting JOHN STUART MILL, ON LIBERTY 15 (Ronald B. McCallum ed., Oxford Press 1947) (1859)).

[41] Edenfield v. Fane, 507 U.S. 761, 774-75 (1993).

[42] Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123, 156 (1996).

[43] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 642 (1985) (print advertisements deserve more protection than personal solicitations); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457-58 (1978) (same).

[44] 96 S. Ct. 1817 (1976); *accord* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 496-98 (1996) (plurality opinion); *Id.* at 520-23 (Thomas, J. concurring).

[45] We are grateful to our DWT colleague, Eric Stahl, for contributing this point.

It also is instructive to consider this issue from the business community's perspective. While consumers have limited time to assess product labels and print advertisements, companies have virtually unlimited time to craft such traditional advertising pitches. This is a dramatically different situation from responding to media inquiries during a fast-developing public debate. If there is a situation in which it is fair to hold a speaker accountable for inadvertent or negligent misstatements, it is the former, not the latter.

But even assuming that there is room after *Virginia Pharmacy* to take the position that California currently does, the State's new consumer protection scheme still improperly overruns the media's role in our First Amendment hierarchy. The Supreme Court has long recognized that the press is "a mighty catalyst in . . . informing the citizenry of public events and occurrences."[46] This is because the media does more than simply provide an empty vessel for third parties to disseminate their speech.[47] Rather, a core function of the press is to consider the sources of statements that it receives, as well as to investigate those statements' veracity and to set them beside the counterspeech of other interested parties. Thus, when a news organization receives a company's press release regarding its business operations, that organization can bring independent judgment to bear on the accuracy of the release. If a company's assertions are not credible, the media can, and sometimes does, decline to run any story on the subject. When media entities publish controversial claims by businesses (either because the claims are open to debate or because a publisher feels that the subject of a report is entitled to present its side of the story), they generally contrast those claims with independent analysis or opponents' counterclaims.[48] Unlike the typical advertising scenario, in short, potentially misleading corporate press releases in the course of a public debate are automatically tempered by their clash with competing speech.

Even when the media reprints a company's speech in an op-ed or an editorial advertisement, that speech is very likely to be responsive to, or challenged by, other articles in the same publication. In contrast to advertisements that directly propose commercial transactions, companies usually do not take the trouble to purchase space in media publications to discuss their business opera-

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[46] Estes v. Texas, 381 U.S. 532, 539 (1965).

[47] *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 729 (1972) (Stewart, J., dissenting).

[48] *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) (stating that the press provides means of "counteract[ing] false statements" regarding public figures).

tions unless those operations already have become the subject of considerable public scrutiny.[49] Consequently, as with press releases, the media typically arms the public with the resources for full reflection on business practices discussed in op-eds and editorial advertisements.

From a constitutional law standpoint, the media's provision of these resources to would-be consumers makes all the difference. For the press not only is effective in ventilating corporate speech and in unmasking misleading claims regarding issues of public concern, but it also is a constitutionally preferred means of doing so. As the Supreme Court repeatedly has emphasized, "self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.'"[50] Accordingly, "[t]he very purpose of the First Amendment is to foreclose [the government] from assuming guardianship of the public mind" through unnecessarily regulating the content of public debate.[51] Whenever the press presents the public with adequate information to assess the accuracy of a speaker's claim, the Court has insisted that "*the people* in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments."[52]

The California Supreme Court's *Kasky* decision pretermits this entire process of ventilation and individual assessment. It holds that the moment a company sends a press release or letter to the media that offers a potentially misleading portrayal of the company's business operations, the company may be sued and held strictly liable.[53] It does not matter whether the media ever prints the company's statements or, if they do, whether they place those statements in context or beside assertions refuting them.

This holding impermissibly substitutes state regulation of the content of public debate for the alternative suggested by the First

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[49] *Compare* James Gleick, *Tangled Up in Spam*, N.Y. TIMES, Feb. 9, 2003, (Magazine) at 42 (complaining bitterly about floods of SPAM), *with* Microsoft Corp., *Spiking the Spammers*, N.Y. TIMES, Feb. 13, 2003, at A41 (editorial advertisement explaining industry anti-SPAM efforts and urging consumer and government action). *See also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (explaining that editorial advertisements are "an important outlet for the promulgation of information and ideas" by non-publishers). Certainly that was the case with Nike.

[50] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 n.12 (1978) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

[51] Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 791 (1988) (quoting Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J. concurring)).

[52] *Bellotti*, 435 U.S. at 791 (emphasis added). For a particularly robust description of the deference due to the press in this regard, see generally Potter Stewart, *"Or of the Press"*, 26 HASTINGS L.J. 631 (1975).

[53] Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002).

Amendment: media scrutiny and counterspeech. If, in the *Kasky* case, consumers believed Nike's statements, it was not because they lacked the ability to reflect on the ongoing controversy or because they lacked access to "more speech" challenging Nike's assertions.[54] Nor was it because any party's false statements did not "make a valuable contribution to public debate" by triggering additional investigation and corrective speech.[55] In the classic mode of public discourse on a controversial issue, the media ventilated competing claims and provided the people with information that allowed them to draw their own conclusions.

What is more, the California false advertising law, as construed in *Kasky,* handicaps the business side of all public debates regarding business issues by "licens[ing] one side of a debate to fight freestyle, while requiring the other side to follow Marquis of Queensberry rules."[56] Especially in these circumstances, the Supreme Court has held, "the First Amendment is plainly offended."[57]

III. A WORKABLE TAXONOMY OF COMMERCIAL SPEECH

While the inability-to-reflect rationale for punishing inadvertently false or misleading commercial speech may make sense in the realm of product labels and advertisements, it lacks any force whatsoever when the corporate speech at issue involves the company's business operations and is directed toward the media in the context of an extended public debate on a matter of public concern. Indeed, the very press coverage of Nike that forms the backdrop of the *Kasky* case demonstrates that the media serves as an effective watchdog over corporate press releases and more than adequately counterbalances companies' assertions regarding controversial business practices.

But to develop a workable definition of "commercial speech," we must recognize that *Kasky* is, in fact, essentially an easy case. It involves neither speech in a traditional advertising forum nor assertions about a particular product or service. When, as is increasingly the case in our modern market economy, only one of these attributes is absent, the question still arises whether the government should be permitted to subject a company's statements to

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[54] *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 496 (1995) (Stevens, J., concurring); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457-58 (1978).

[55] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964).

[56] R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992).

[57] *Bellotti*, 435 U.S. at 785-86.

reduced First Amendment protection. A useful definition of commercial speech must deal with each of these permutations.

It may be helpful to lay out a taxonomy to aid in this analysis. The following matrix sets out four kinds of corporate speech according to whether it is made in a traditional advertising forum; whether it describes particular products or services that are for sale, such as their physical attributes or the terms and conditions on which they are available; whether it contains both of these attributes; or whether it contains neither of them:

	Speech involving products and services	Speech involving business operations or "image"
Traditional Advertising Format	1	2
Not Traditional Advertising Format	3	4

Boxes 1 and 4 are the easy cases. Box 1 covers typical commercial speech, such as product label or a newspaper advertisement saying that Nike basketball shoes are on sale this weekend for 20% off. Box 4 covers most, if not all, of the speech at issue in *Kasky*,[58] which, according to our analysis above, cannot properly be characterized as commercial.

Boxes 2 and 3 are the hard cases. An example of speech covered by Box 2, taken from Justice Breyer's dissenting opinion from the dismissal in *Kasky*, is a hypothetical tuna label saying that the company employs "dolphin-safe" catching practices.[60] Other examples in modern society abound: oil companies advertise their environmentally conscious methods of managing resources; coffee companies sell "fair trade" coffee beans, which state on the bag that the foreign workers were compensated in certain ways; and express mail companies advertise on television and on labels that they donate money to certain charities. In each of these in-

[58] We hedge slightly here because of one unusual document in the case: a letter to university presidents designed to assure them that Nike's overseas labor practices were lawful and moral. Although Justice Breyer clearly viewed this as belonging in box 4, *see Nike*, 123 S. Ct. at 2565-66 (Breyer., J. concurring), Justice Stevens—perhaps because the case was only at a demurrer, or motion-to-dismiss, stage—opined that the letters could be viewed as "direct communications with customers . . . that were intended to generate sales." *Id.* at 2558 (Stevens, J., concurring). That could place the letters in box 2.

[60] *Id.* at 2566 (Breyer, J., dissenting).

stances, the speech appears in a traditional advertising format, but it concerns the company's business operations rather than the product's physical attributes.

Box 3 covers the converse situation: speech that does not appear in a traditional advertising format but that pertains to particular products or services. For example, a company's president might state on a television interview that his or her company's computers process information faster than any competitor's. Or a fast food company may issue a press release in response to a lawsuit filed that day stating that its products comprise part of a healthy diet.

A proper understanding of the potential commercial harms that animate the commercial speech doctrine dictates that the First Amendment permits the government to regulate Box 2 as commercial speech but not Box 3. The business speech in Box 2 is offered in a context of a direct offer to engage in commerce and in which consumers are actively making purchasing decisions. Here, consumers may not have the time to gather potentially competing information. Nor are they likely to have resources to scrutinize the companies' claims, since the speech is not being conveyed in the context of a media story or similar format.

The speech in Box 3, however, is conveyed in the midst of press coverage of an issue of public concern. Expanding the commercial speech doctrine to deprive such speech of the usual First Amendment protections is unnecessary because the media coverage is likely to place any misleading statements into context or to challenge any incorrect factual assertions. Even though the company may inadvertently be imparting false information to (or through) the media, consumers are likely to learn the truth (or competing versions of the "truth") before acting on that information. As Justice Breyer explained in his *Kasky* dissent, to the extent that the justification for stripping commercial communications of "actual malice" protection conflicts with the justifications for giving speech on matters of public concern the maximum possible breathing space, "the last mentioned public-speech principle" should trump the "first mentioned commercial-speech principle."[61]

This focus on the context of the communications diverges from much of the critique of *Kasky*, which concentrates instead on the subject of Nike's speech—viz., the fact that it involved business operations instead of any tangible attributes of any of its

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[61] *Id.* at 2565 (Breyer, J., dissenting); *see also id.* at 2559 (Stevens, J., concurring) (emphasizing the need for participants in an "ongoing discussion and debate about important public issues" to be "free to participate . . . without fear of unfair reprisal").

products. But this is as it should be. The Supreme Court does not decide whether speech involves an issue of public concern depending on how important or topical the subject of the speech happens to be. Rather, the First Amendment leaves it up to the public and the media to decide what issues are worthy of public debate, and then it protects parties' ability to speak on that issue. By the same token, the commercial speech doctrine should leave it up to businesses and consumers to decide what issues are important enough to appear on product labels and other direct advertisements. Those issues may involve what the product is made of or how the people who made the product were treated. Either way, once the marketplace dictates those advertising decisions, the government may step in and regulate at the point of solicitation and sale.[62] But when the speech at issue is offered to the media or otherwise is submitted during a public debate about a commercial matter, the First Amendment assumes that the media and other channels of communication already guard against consumers being misled, and the First Amendment requires the government to stand down, absent at least a showing of actual malice.

In short, to borrow the Supreme Court's language, traditional advertising or solicitation, regardless of whether it deals with specific products or more general business operations, is a "*business transaction* in which speech is an essential but subordinate component."[63] But a company's speech in a press release or an editorial advertisement is a *public statement* in which business is an essential but subordinate component. Because a company's public statements are intended in significant part to participate in the marketplace of ideas, as well as that of goods and services, the Supreme Court should refuse to allow the government to regulate such speech with a strict-liability consumer-protection regime such as California's. Such a regime improperly allows the government to substitute censorship of public debates for the First Amendment's preferred process of media investigation, counterspeech, and consumer reflection.

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62 This means that the government could pass a law allowing it to punish false or misleading speech and allowing private consumers to do the same so long as they relied on the speech and were harmed by it. Private parties who were not gulled at the point of sale should not have "standing" in the abstract to complain about allegedly false or misleading commercial speech. The Supreme Court, in fact, already has adopted such a point-of-sale doctrine with regard to derivative actions under SEC rule 10b-5, which arguably regulates commercial speech as well. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). This decision rested on statutory grounds, but much of the reasoning makes sense with regard to claims that impact the First Amendment more generally.

63 Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978) (emphasis added).