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If the Shoe Fits: *Kasky v. Nike* and Whether Corporate Statements About Business Operations Should Be Deemed Commercial Speech

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If the Shoe Fits

KASKY V. NIKE AND WHETHER CORPORATE STATEMENTS ABOUT BUSINESS OPERATIONS SHOULD BE DEEMED COMMERCIAL SPEECH*

I. INTRODUCTION

Given the United States Supreme Court's ever-tightening scrutiny of any regulation of accurate commercial speech, it might seem that the distinction between commercial and noncommercial speech is without a difference.[1] But there remains a considerable difference when the audience is being deceived. In contrast to deceptive noncommercial speech, there are neither constitutional nor public policy reasons to protect deceptive[2] commercial speech.[3]

Despite this distinction, the Court has never succeeded in articulating a workable definition of commercial speech. As a result, lower courts have frequently struggled to determine when corporate speech receives less than full protection under the First Amendment. The California Supreme Court in *Kasky v. Nike*[4] (*Kasky*) sought to resolve some of this uncertainty by fashioning a "limited purpose" test. The issue in *Kasky* was whether Nike's statements about its labor practices in overseas factories, communicated in letters to university athletic directors,[5] were commercial speech and therefore susceptible to false advertising laws.[6] The court held that commercial speech includes a corporation's communications to customers or potential customers about its business operations, including the working conditions, wages, identities and qualifications of those making the products, though only for the limited purpose

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[1] *See* Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 88 (1999) ("[T]he notion that classifying speech as commercial regulates it to a First Amendment backwater has become increasingly antiquated."); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 126 ("[I]t is unclear why 'commercial speech' should continue to be treated as a separate category of speech . . . .").

[2] Author's use of the modifier "deceptive" throughout this Note is in the sense of commercial deception; that is, false or materially misleading.

[3] *See infra* Part II.B. *See generally* Charles Gardner Geyh, *The Regulation of Speech Incident to the Sale or Promotion of Goods and Services: A Multifactor Approach*, 52 U. PITT. L. REV. 1, 6 (1990) ("[T]he concerns that warrant a privilege of sorts to disseminate falsehoods outside the commercial sphere do not apply with equal force to speech within the commercial sphere.").

[4] 45 P.3d 243 (2002), *cert. granted*, 537 U.S. 1099 (2003), *cert. dismissed as improvidently granted*, 539 U.S. 654.

[5] The letters were not the only communications alleged in Kasky's complaint to be misleading commercial speech. For the complete list of communications named, and an explanation of why this Note focuses only on the letters to universities, see *infra* note 60.

[6] *Kasky*, 45 P.3d at 247.

of ensuring that these communications are not false or deceptive.[7]

This Note argues that the *Kasky* court was correct to recognize that today's commercial speech encompasses communications beyond traditional advertisements about products or services. Corporations are aware that a sizeable number of consumers rely on their statements about their business operations when making investment and purchasing decisions.[8] In order to ensure the accuracy of these statements, and thereby protect the integrity of the market, this speech is properly considered commercial speech.

Speech about business operations also possesses the "common sense" safeguards that distinguish commercial speech from noncommercial speech. Like speech about products or services, factual statements about business operations are likely to be within the commercial speaker's knowledge.[9] And as we will see, there is a substantial economic incentive for corporations to continue to speak about their business operations, even after the ruling in *Kasky*.[10]

While the case was pending before the United States Supreme Court, a politically diverse range of organizations emerged on Nike's side, including the ACLU, the AFL-CIO, and the Business Roundtable.[11] More interesting, however, was the substantial disagreement within at least one of these groups about the merits of the *Kasky* test. When the United States Supreme Court agreed to review the decision, the Northern California ACLU submitted an amicus brief supporting Nike,[12] while the Southern California ACLU's Catherine Fisk co-authored an amicus brief for Kasky with Erwin Chemerinsky.[13]

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[7] *See id.* at 247, 257. The United States Supreme Court initially granted certiorari to review this decision and in fact heard oral arguments, but it declined to rule on the case on the last day of term and the parties ultimately settled before trial. *See supra* notes 67–70 and accompanying text.

[8] *See infra* Part IV.A.

[9] *See infra* Part IV.B.1.

[10] *See infra* Part IV.B.2.

[11] *See, e.g.*, Linda Greenhouse, *Free Speech for Companies on Justices' Agenda*, N.Y. TIMES, Apr. 20, 2003, at A17.

[12] *See* Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Northern California in Support of Petitioner, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

[13] *See* Brief of Amici Curiae Members of the United States Congress, Representatives Dennis Kucinich, Bernard Sanders, Corrine Brown, and Bob Filner, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575). Moreover, the ACLU of Southern California adopted the following policy statement, entitled "Government Regulation of Commercial Speech":

These peculiar alignments and factions starkly illustrate the difficult issues inherent in the commercial speech doctrine.

Kasky's critics generally concede that statements about business operations properly may be considered commercial speech, but argue that Nike should be protected from liability for deception because the corporation was engaged in debate on a matter of public concern.[14] It is true that corporations with overseas factories offer crucial perspectives on the public policy debate about the merits of globalization. Arguably, therefore, corporate speech in this context should be accorded the same breathing room for error afforded to those critical of globalization.[15] No such protection is warranted, however, when a corporation is merely refuting public criticism about its own goods, services, or business operations in order to maintain sales, as Nike had done here. A corporation's deceptive statements of fact to consumers about its own business operations cannot be legitimately seen as facilitating informed public or private decisionmaking, and hence such statements do not warrant protection under the First Amendment.[16]

In order to provide some context for the *Kasky* definition, this Note first appraises the Supreme Court's more salient attempts to define commercial speech and its justifications for according commercial speech some protection from regulation. It then reviews the procedural history of the

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> Government may regulate commercial speech where the information disseminated is false or misleading, and the speaker either knows the speech is false or misleading, or has acted with reckless disregard for the falsity or misleading nature of the speech. Governmental regulation of false or misleading commercial speech does not chill constitutionally protected speech.

ACLU of Southern California Policy on Commercial Speech, Adopted Nov. 20, 2002, *available at* http://reclaimdemocracy.org/nike/commercial_speech_socalaclu.html (last visited Sept. 1, 2004). Professor Fisk has indicated that the amicus brief filed in Nike v. Kasky "does track the ACLU-SC policy." E-mail from Catherine Fisk, American Civil Liberties Union of Southern California, to Susan Herman, Professor of Law, Brooklyn Law School (Sept. 2, 2003, 3:36 pm EST) (on file with author).

[14] Speech on a matter of public concern is generally considered close to core of the First Amendment. *See generally* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990). I discuss this criticism further in Part V.A.

[15] Provided of course, that the corporation does not attempt to disguise product marketing as participation in public debate. *See infra* text accompanying notes 34–38 and 152–55.

[16] *See infra* Part II.B. *See generally* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 13–25 (2000) (explaining how under the Court's Meiklejohnian commercial speech jurisprudence, constitutional value only attaches to communicative acts about commercial subjects that contribute to wise democratic decisionmaking).

dispute, and shows how Nike's statements about its business operations functioned as commercial speech.

The Note also explains why the *Kasky* test will not inappropriately chill speech and addresses the arguments suggested against the California Supreme Court's ruling in *Kasky*. It first observes that Nike's speech should not be considered fully protected speech on a matter of public concern by distinguishing debates about public policy from debates about a corporation's own products, services, or business operations. Second, the Note evaluates the efficacy of counter-speech as a less-restrictive alternative to regulation and concludes it is inadequate in the area of commercial speech. Finally, it rejects the suggestion that there is a slippery slope from *Kasky* to regulation of political speech or even image marketing.

This Note concedes that the California Supreme Court's commercial speech test fits uncomfortably within traditional legal and political paradigms. It nevertheless concludes that because deceptive commercial speech does not further any constitutional, free market, or autonomy values, courts should follow *Kasky*'s lead and adopt a commercial speech definition that accurately reflects modern forms of commercial speech and a diverse range of consumer preferences, for the limited purpose of regulating commercial deception.

II. THE UNITED STATES SUPREME COURT'S COMMERCIAL SPEECH JURISPRUDENCE

A. *Salient Attempts to Define Commercial Speech*

The United States Supreme Court's first opportunity to consider the collision of the First Amendment and commercial speech came in 1942. The Court unanimously determined in *Valentine v. Chrestensen* that the First Amendment does not protect "purely commercial advertising."[17] *Valentine* was overruled in 1976, when Justice Douglas' mantra that the free flow of commercial information is essential to private economic decisionmaking[18] was finally adopted by a majority of the Court

[17] 316 U.S. 52, 54 (1942).

[18] *See, e.g.*, Dun & Bradstreet, Inc. v. Grove Trustee, 404 U.S. 898, 905 (1971) (Douglas, J., dissent from denial of certiorari). Douglas had been a long-time advocate of First Amendment protection for commercial speech. *See* Soontae An, *From a Business Pursuit to a Means of Expression: The Supreme Court's Disputes over Commercial Speech from 1942 to 1976*, 8 COMM. L. & POL'Y 201, 212–19 (2003).

in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*[19] (*Virginia Pharmacy*).

While *Virginia Pharmacy* suggested commercial speech to be "speech which does no more than propose a commercial transaction,"[20] later decisions indicate the Court's awareness that commercial speech can encompass much more. Indeed, just a few years later the Court hit the other end of the spectrum with its most inclusive formulation of commercial speech to date. In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*[21] (*Central Hudson*), the Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience."[22] This would certainly have encompassed Nike's communications (and more), but the Court has never actually applied this test.

That is fortunate, because *Central Hudson*'s formulation of commercial speech is clearly overbroad.[23] While a corporation's legal obligations to shareholders ensure that virtually all of its communications are economically motivated, it is nevertheless capable of speaking in noncommercial contexts. Conversely, forms of speech that have long been protected under the Constitution may be solely related to economic interests, including much of political speech.[24]

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[19] 425 U.S. 748, 770 (1976) (holding that Virginia's prohibition of truthful advertising of drug prices was unconstitutional). For an account of the period between *Valentine* and *Virginia Pharmacy*, see An, *supra* note 18.

[20] 425 U.S. at 762.

[21] 447 U.S. 557 (1980).

[22] *Id.* at 561.

[23] Of course, *Central Hudson* is primarily maligned not for this overly broad definition of commercial speech, but rather for the test it set out for permissible regulation of truthful or non-misleading commercial speech. The test states:

> If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the state's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Id. at 564.

[24] As the Court later noted, "[i]t is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking." Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 795 (1988). *But see* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 201–04 (1989); C. Edwin

Only a few years later, the Court in *Bolger v. Youngs Drug Products Corp.*[25] (*Bolger*) was faced with pamphlets containing both contraceptive advertisements and information about venereal disease and family planning. Though the pamphlets did not explicitly propose a commercial transaction, the Court recognized them as commercial speech. Despite this finding, the Court was concerned that accurate and socially helpful information might be prohibited. The resulting series of plot twists in the decision made *Bolger* something akin to a Who-Done-It (or perhaps more accurately a What-Did-It-Do).

First, the Court indicated that informational pamphlets containing contraceptive advertisements "cannot be characterized merely as proposals to engage in commercial transactions."[26] Then the Court identified three qualities of speech that in various combinations may or may not be indicative of commercial speech.[27] Finally, the Court concluded that the pamphlets were commercial speech despite the fact that they discussed important public issues such as venereal disease and family planning,[28] but held that because the pamphlets "convey truthful information relevant to important social issues such as family planning and the prevention of venereal disease," they are protected by a "paramount" First Amendment interest.[29] The state's interest in suppressing potentially offensive advertisements was not sufficient to justify regulation of advertising that "relates to activity which is protected from unwarranted state interference."[30]

The Court observed that because Youngs' pamphlets were in advertisement format, referred to the speaker's products and were economically motivated, there was "strong support" that they were commercial.[31] This essentially combined the definitions set forth in *Central Hudson* and *Virginia Pharmacy* into an implied "totality of the circumstances" test. As might have been expected, however,

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Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's 'The Value of Free Speech'*, 130 U. PA. L. REV. 646 (1982).

[25] 463 U.S. 60 (1983).

[26] *Id.* at 65.

[27] *Id.* at 66–67. *See infra* text accompanying note 31.

[28] *Id.* at 67–68.

[29] *Id.* at 69.

[30] *Bolger*, 463 U.S. at 69, 71–72 (citing Carey v. Pop'n Serv. Int'l., 431 U.S. 678, 701 (1977)).

[31] *Id.* at 66–67.

lower courts were unsure how to interpret *Bolger*.[32] As Professor Stern pointed out: "To harsher critics, the immediate 'misclassification' of Young's pamphlets epitomizes the broader 'imprecision and confusion' sewn by the Court's enumeration of relevant but nonbinding factors."[33]

In subsequent cases, the Court's attempts to categorize speech became even more complicated by its increasing recognition that much speech has both commercial and noncommercial elements. When a communication contains noncommercial speech "inextricably intertwined" with commercial speech, it is labeled "hybrid" speech and is accorded full First Amendment protection.[34] The seeds for the category of hybrid speech were sown in *Central Hudson* and *Bolger*,[35] but the Court did not fully explain what "inextricably intertwined" meant until *Board of Trustees of the State University of New York v. Fox*[36] (*Fox*). Confronted with speech on a university campus that included both a Tupperware sale and home economics information, the Court concluded that "[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares."[37] In other words, if it is *possible* to parse the noncommercial from the commercial speech in a particular mode of communication, the speech is not inextricably intertwined and therefore the speaker receives the

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[32] *See, e.g.*, *In re* Dow Corning Corp., 227 B.R. 111, 117 (Bankr. E.D. Mich. 1999) (expressing uncertainty whether *Bolger* expanded the definition of commercial speech); Semco, Inc. v. Amcast, Inc., 52 F.3d 108, 112–13 (6th Cir. 1995) (concluding that under *Bolger* commercial speech would include a trade journal article written by president of Amcast corporation generally referring to Amcast products).

[33] Stern, *supra* note 1, at 86.

[34] *See, e.g.*, Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 796 (1988) ("[W]here, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical."). I discuss this further *infra* text accompanying notes 152–55.

[35] In *Central Hudson*, the Court drew a distinction between "direct comments on public issues," which receive "the full panoply of First Amendment protections," and statements about public issues "made only in the context of commercial transactions." Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 563, n.5 (1980). In *Bolger*, the Court indicated informational pamphlets containing contraceptive advertisements "cannot be characterized merely as proposals to engage in commercial transactions," but also noted that "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." 463 U.S. at 66, 68. The negative implication of the language in these decisions is that there might be some context in which statements about public issues are not merely commercial.

[36] 492 U.S. 469 (1989).

[37] *Id.* at 474; *cf. Riley*, 487 U.S. at 796.

lesser First Amendment protection afforded commercial speech.[38]

In recognizing a hybrid speech category, the United States Supreme Court demonstrated a more sophisticated awareness that speech can be multifaceted, but subsequent cases did little to clarify the definition of commercial speech. Indeed, while *Fox* echoed *Virginia Pharmacy* by suggesting that speech proposing a commercial transaction is "*the* test for identifying commercial speech,"[39] the Court's conclusion in *Rubin v. Coors Brewing Co.*[40] affirmed its earlier indications that commercial expression need not convey a specific proposal to buy or sell.[41] Occasionally the Court has even employed contrasting notions of commercial speech in a single decision.[42]

Given the diversity of corporate speech that has made its way to the United States Supreme Court and its concomitant struggle to define such speech, the Court has felt it necessary to concede "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category."[43]

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[38] *Riley*, 487 U.S. at 796. Even when courts properly understand the United States Supreme Court's instructions for dealing with hybrid speech, however, much speech is difficult to categorize, with the result that differing protections have been applied in analogous—and in one case identical—situations. *Compare* Keimer v. Buena Vista Books Inc., 89 Cal. Rptr. 2d 781 (1999) (finding misleading or false quotations from content of book on book's cover are commercial speech because functioning as an advertisement), *with* Lacoff v. Buena Vista Publishing, Inc., 183 Misc. 2d 600, 604, 705 N.Y.S.2d 183 (2000) (classifying the exact same misleading quotations on the cover of the same book as noncommercial speech protected by the First Amendment).

[39] *Fox*, 492 U.S. at 473–74 (emphasis added).

[40] 514 U.S. 476, 481–82 (1995) (holding that alcohol content information on beer labels is commercial speech).

[41] *See* Friedman v. Rogers, 440 U.S. 1, 11 (1979) (explaining that trade names are a form of commercial speech); *accord* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (trademark is commercial speech even when used in connection with an event that is fully protected by First Amendment); Bad Frog Brewery, Inc. v. New York State Liquor Auth., 134 F.3d 87 (2d Cir. 1998) (beer labels depicting frog making obscene gesture are commercial speech); *but see* Transp. Alternatives, Inc. v. City of New York, 340 F.3d 72 (2d Cir. 2003) (use of corporate logo at political bike event not commercial speech).

[42] *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (defining commercial speech as "[e]xpression concerning *purely* commercial transactions," but finding a lawyer's in-person solicitation, which included explaining Ohio's guest statute and other legal information, to be commercial speech) (emphasis added).

[43] City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993).

B. *Autonomy, the Free Market, and the Facilitation of Wise Public Decisions – Why the Court Protects Commercial Speech*

The enduring moral force behind the Court's decision in *Virginia Pharmacy* to accord commercial speech some limited protection from state regulation was its recognition that government will rarely be justified in suppressing accurate speech of any kind.[44] Writing for the Court, Justice Blackmun rejected Virginia's "highly paternalistic" argument that the ban on advertising by pharmacies was justified because it protected consumers, and suggested instead "that people will perceive their own best interests if only they are well enough informed."[45]

This autonomy principle animates Blackmun's two justifications for striking down state regulation of accurate commercial speech. First, he reasoned that when consumers utilize comparative pricing data in making their purchasing decisions, they effect "the proper allocation of resources in a free enterprise system."[46] Second, Blackmun alluded to the link between accessibility of commercial information and public decisionmaking, in that commercial speech helps citizens to make informed decisions about the extent to which America's predominantly free market economy should be regulated or altered.[47]

As a justification for protecting accurate commercial speech, the efficient allocation of resources in a free market system is logically sound and certainly resonates with much of modern legal zeitgeist. Nevertheless, it is not a *constitutional* value by which the extent of First Amendment protection can be measured.[48] As Robert Post put it, "The First Amendment

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[44] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976).

[45] *Id.* at 769–70.

[46] *Id.* at 765. This, of course, is the argument that Justice Douglas had been urging in the previous decades. *See* An, *supra* note 18.

[47] *Virginia Pharmacy*, 425 U.S. at 765; *see also* Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977) ("Advertising, though entirely commercial, may often carry information of import to significant issues of the day.").

[48] *See* Post, *supra* note 16, at 11. *See also* Geyh, *supra* note 3, at 11 ("it cannot seriously be suggested that the promotion of economic efficiency and free enterprise are values underlying the first amendment."); Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1226–27 (1983) ("It was strange indeed for the Court to suggest that the first amendment has been Chicago-school economics travelling [*sic*] incognito for all these years.").

cannot be understood as a repository of microeconomic theory, as the champion of a particular (and contested) view of proper market functioning."[49] Keeping the market efficient remains, however, a powerful *policy* reason for limiting state regulation of accurate commercial speech.

However, inasmuch as commercial speech also contributes to informed public decisionmaking, it unquestionably justifies constitutional protection. When consumers receive accurate information about the prices of a commodity, they are better able to make autonomous and democratic decisions, including decisions about whether the commodity should be subject to government subsidies. Thus, commercial speech can be seen as furthering the Meiklejohnian conception of the First Amendment: protecting speech to facilitate wise decisions.[50]

Both of the Court's rationales for protecting the "free flow of commercial information" are predicated on the interest the public has in receiving the information.[51] While it has been argued that commercial speech also promotes a speaker's constitutional rights,[52] there is near unanimous consensus among commentators that commercial speech is only protected

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[49] Post, *supra* note 16, at 10.

[50] *See id.* at 13–15.

[51] *Virginia Pharmacy*, 425 U.S. at 764.

[52] For example, Martin Redish points out that because deciding to form a corporation in the first place is an "exercise of free will," we should "view the corporation's speech as a means of facilitating the self-development of those who formed and operate the corporation." Martin Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 571 (1997). I disagree. As Professor Geyh has pointed out, "it is illogical and ill-advised to conclude that artificial entities are capable of self-fulfillment or self-expression deserving of First Amendment protection. This is not to say that corporate speech is undeserving of First Amendment protection. Rather, it is simply to say that self-expression, self-realization or self-fulfillment are attributes of speech that only natural persons are capable of enjoying, and that the constitutional value of corporate speech cannot be derived from its value to the speaker." Geyh, *supra* note 3, at 30–31. *See also* Post, *supra* note 16, at 12 ("[W]e most naturally understand persons who are advertising products for sale as seeking to advance their commercial interests . . . ."); BAKER, HUMAN LIBERTY, *supra* note 24, at 196 ("[Commercial speech] lacks the crucial connections with individual liberty and self-realization that are central to justifications for the constitutional protection of speech . . . ."); Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 240 (1982) (corporations "are accorded 'personality' in order to create a mechanism for saving transaction costs in business dealings, not to create autonomous beings"); Geyh, *supra* note 3, at 31 (summarizing Shiffrin's argument that "[R]egardless of whether speech incident to the sale of goods . . . is capable of furthering the speaker's self-expression, it is not ordinarily so utilized. Rather, it is primarily a vehicle for proposing and implementing commercial transactions.").

for the value it has to the listener.[53] In contrast is noncommercial speech, for example political speech, which serves both the speaker's constitutional interest in participating and the listener's interest in receiving. An important implication follows from this distinction: Because the constitutional and economic policy values of commercial speech extend no further than the speech's use to the listener, non-deceptiveness is a prerequisite to its utility, and therefore to its protection.[54]

III. BACKGROUND AND PROCEDURAL HISTORY OF THE DISPUTE BETWEEN NIKE AND KASKY

In the mid-1990s, awareness about the negative aspects of globalization swelled.[55] While by no means the only company to face allegations that some of its products are produced in overseas factories with sweatshop-like conditions, Nike has probably shouldered the most criticism.[56] Prominent examples

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[53] *See, e.g.*, Helen Norton, *You Can't Ask (or Say) That: The First Amendment and Civil Rights Restrictions on Decisionmaker Speech*, 11 WM. & MARY BILL RTS. J. 727, 743 (2003) ("[T]he constitutional salience of commercial speech turns on its ability to facilitate its recipients' informed decisionmaking."); Geyh, *supra* note 3, at 5–6 (identifying one factor that may justify regulation of commercial speech as the fact that "the audience, rather than the speaker, is the one whose first amendment interests are at issue").

[54] While there is essentially no such thing as a false idea in *public discourse* (*see* Gertz v. Robert Welch, 418 U.S. 323, 339–40 (1974)), the First Amendment has not been found to protect false *commercial statements*. *See* Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.") (citation omitted); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 762 (1985) (explaining that the First Amendment's protection for false statements did not apply to the commercial speech at issue); Norton, *supra* note 53, at 754 (noting that the *Virginia Pharmacy* Court's distaste for the "highly paternalistic approach" that seemed transparent in the suppression of truthful information is most consistent with "a view of commercial speech as constitutionally valuable when – but only when – it accurately informs individuals' decisionmaking among lawful alternatives."); Geyh, *supra* note 3, at 6 ("the concerns that warrant a privilege of sorts to disseminate falsehoods outside the commercial sphere do not apply with equal force to speech within the commercial sphere"). For the more difficult question of whether knowing falsehoods in areas such as political speech can be constitutionally prohibited, see *infra* note 185 and accompanying text.

[55] The frequency of exposés in 1995 and 1996 on exploitative labor practices by big name labels prompted Andrew Ross, director of American Studies at New York University, to term that period "The Year of the Sweatshop." *See* NAOMI KLEIN, NO LOGO 327 (2002).

[56] There have been more than 1,500 news articles and columns written about scandals involving Nike's labor practices. *See* KLEIN, *supra* note 55, at 366. Whether or not this profuse coverage is justified, "Nike – as the market leader – has become a

of media criticism of globalization in general and of Nike in particular included a CBS "48 Hours" special on working conditions in Nike factories in Southeast Asia,[57] a *New York Times* report on abusive treatment of workers following a strike at a Javanese factory,[58] and Bob Herbert's Op-Ed in the *New York Times*, "Nike's Bad Neighborhood,"[59] all of which were published in 1996.

On June 18, 1996, the Director of Sports Marketing at Nike, Inc. sent letters to university presidents and athletic directors, making several specific factual claims about the labor practices in Nike's factories "around the globe."[60] The letter identified itself as a response to "false and irresponsible" accusations that Nike uses child labor in the production of its goods. It claimed that "wherever Nike operates around the globe," it "strictly prohibits child labor, and certifies compliance with applicable government regulations regarding minimum wage and overtime, as well as occupational health and safety, environmental regulations, worker insurance and equal

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lightening rod for . . . broader resentment. It has been latched on to as the essential story of the extremes of the current global economy: the disparity between those who profit from Nike's success and those who are exploited by it are so gaping that a child could see what is wrong with this picture." *Id.* at 377.

[57] *See* Editorial, *Swoosh Goes the First Amendment*, WALL ST. J., May 14, 2002, at A18 (urging that Nike's statements should be protected because they were in response to the CBS "48 Hours" special and other public criticism).

[58] *See* KLEIN, *supra* note 55, at 328.

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

[60] *See* Nike v. Kasky, 539 U.S. 654, 685–86 (2003) (letter from Nike to universities attached as appendix to opinion of Breyer, J., dissenting from dismissing writ of certiorari as improvidently granted) [hereinafter "Letter to Universities"]. For the sake of concision and the reader's convenience, my analysis will primarily consider this letter sent to the universities. That was the principle communication analyzed by the California Supreme Court, which needed only find sufficient evidence that Kasky's complaint alleged some commercial speech by Nike, as the case was before it on a motion for summary judgment by Nike. It should be noted, however, that Kasky alleged there were nine communications from Nike that should be subject to commercial speech analysis:

> [A] two-page letter with Nike's logo from Nike's Director of Sports Marketing to university presidents and directors of athletics; a 33-page illustrated pamphlet, entitled 'Nike Production Primer'; a posting with Nike's logo on Nike's website; a posting of a press release with Nike's logo on Nike's website; a three-page document on Nike's letterhead with Nike's logo; a press release with Nike's logo; a five-page letter with Nike's logo from Nike's Director of Labor Practices to the Chief Executive Officer, YWCA of America; a two-page letter with Nike's logo from Nike's PR Manager, Europe, to International Restructuring Education Network Europe; a letter to the editor of The New York Times from Nike's Chairman and Chief Executive Officer.

Respondent's Brief at 5, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575) (internal citations omitted).

opportunity provisions."[61] The letter expressed hope that the recipient would "find this information useful in discussions with faculty and students who may be equally disturbed by these charges."[62]

Armed in part with a leaked Ernst & Young audit describing one of Nike's factories,[63] California activist Marc Kasky filed suit against Nike in San Francisco Superior Court on April 20, 1998, alleging that the statements in Nike's letters to the athletic directors and other communications were "false representations of fact about the conditions under which [Nike's products] are made."[64] He further alleged that Nike made these representations "with intent to induce members of the public to buy its products and in order to maintain and/or increase its sales and profits."[65]

Nike demurred and in early 1999 the court held a hearing to determine whether Nike's allegedly false and misleading statements were commercial speech. After considering the issue, the court sustained the demurrers without leave to amend. The Court of Appeals affirmed the lower court's judgment, concluding that Nike's statements were noncommercial speech.[66] After the California Supreme Court reversed the demurrers, the United States Supreme Court granted Nike's petition for certiorari.[67]

At oral argument in front of the Supreme Court, Kasky's attorney Paul Hoeber began by emphasizing "Mr. Kasky never bought any Nikes. He never bought any. I suppose now he never will."[68] The unique benefit of Kasky's lack of patronage was that while his lack of injury foreclosed standing in federal court because of Article III's case or controversy

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[61] *See* Letter to Universities, *supra* note 60.

[62] *Id.*

[63] The audit had been prepared at Nike's request. *See* Keith Hammond, *Leaked Audit: Nike Factory Violated Worker Laws*, MOTHER JONES, Nov. 7, 1997, *available at* http://www.motherjones.com/news/feature/1997/11/nike.html (last visited Aug. 26, 2004). The leak was Dara O'Rourke of the University of California at Berkeley. Nike was naturally enraged with O'Rourke, but perhaps this transgression against the company later instilled O'Rourke's more favorable independent review of the same Vietnamese factory with more credibility than it otherwise might have had. *See* KLEIN, *supra* note 55, at 376.

[64] Respondent's Brief at 1, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

[65] *Id.* at 6 (internal quotation marks omitted).

[66] *See* Nike v. Kasky, 539 U.S. 654, 656 (2003) (outlining the procedural history of the litigation).

[67] Nike v. Kasky, 537 U.S. 1099 (2003).

[68] Respondent's Oral Argument at 30, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

requirement, he could still bring an action against Nike in California under that state's Unfair Competition and False Advertising Laws.[69] Considering how easy it would have been to go out and buy a pair of Nike shoes, it appears that Mr. Kasky (and his legal team) preferred to have no Article III shoe to stand in, perhaps fearing a federal court would be more sympathetic to Nike's First Amendment defense.

In any event, lack of jurisdiction was but one of three reasons Justice Stevens cited as "independently sufficient reasons" for dismissing the certiorari as improvidently granted.[70] The already flagging anticipation that there would be federal precedent one way or the other on the issue was completely abandoned when the case was settled on September 12, 2003.[71]

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[69] The relevant aspect of California's Unfair Competition and False Advertising Laws is its so-called "private attorney general" provision, which allows an unfair competition action to be brought "by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public." CAL. BUS. & PROF. CODE § 17204 (1993). The normative and legal merits of a private attorney general statute are beyond the scope of this Note. Given the fervor of the international anti-Nike movement it is probably fair to conjecture that there is sufficient incentive for an activist to bring a suit against the corporation even without the potential for personal gain. This may be a legitimate point of criticism of California statutory law, but not of the California Supreme Court's conception of commercial speech. Moreover, California has an anti-SLAPP (strategic lawsuits against public participation) statute, which its courts have used effectively to deter harassing litigation that has no merit. *See, e.g.*, Bernado v. Planned Parenthood Fed'n of Am., 9 Cal. Rptr. 3d 197 (Cal. Ct. App. 2004) (affirming dismissal of SLAPP lawsuit brought by private attorney general alleging that Planned Parenthood's statements about the safety of abortions on its website were misleading under *Kasky* and upholding award of $77,835 in attorney's fees to Planned Parenthood).

[70] Nike v. Kasky, 539 U.S. 654 (Stevens, J., concurring in dismissal of certiorari as improvidently granted). The other reasons suggested by Stevens were that "the judgment entered by the California Supreme Court was not final within the meaning of 28 U.S.C. § 1257" and that "the reasons for avoiding the premature adjudication of novel constitutional questions apply with special force to this case." *Id.* at 658. Still, the dismissal came as some surprise given that the Court had heard oral arguments (with extended time) and considered three-dozen amicus briefs.

[71] The only disclosed term of the settlement was an agreement to donate $1.5 million to the Fair Labor Association, a D.C.-based group that monitors corporate labor practices globally and tries to educate workers. *See* Adam Liptak, *Nike Move Ends Case Over Firms' Free Speech*, N.Y. TIMES, Sept. 13, 2003, at A8. To put this figure in context, note that it is about half of one day's advertising budget for the corporation. Press Release, ReclaimDemocracy.org, *Kasky v. Nike Inc. Settled Participants Pleased, Many Activists Inflamed* (Sept. 12, 2003), *at* http://www.reclaimdemocracy.org/nike/nike_settles_lawsuit.html (last visited Aug. 26, 2004).

IV. THE CALIFORNIA SUPREME COURT'S TEST FOR COMMERCIAL SPEECH

As we saw in Part II, the United States Supreme Court has "recited various descriptions, indicia, and disclaimers without settling upon a precise and comprehensive definition" of commercial speech.[72] While an argument can be made that the Court's "I know it when I see it" approach in this area provides it with the flexibility necessary for dealing with unanticipated forms of speech,[73] the result has been that lower courts frequently struggle to determine what level of protection Supreme Court precedent affords the difficult-to-categorize speech at issue.[74]

In *Kasky*, the California Supreme Court attempted to synthesize the principles underlying the United States Supreme Court's commercial speech decisions into a workable test for evaluating whether modern corporate marketing communications should be subjected to commercial deception laws. The test asks whether the speech in question is "directed by a commercial speaker to a commercial audience," makes "representations of fact about the speaker's own business operations," and does so "for the purpose of promoting sales of its products."[75] If the answer to each of these questions is yes, then the speech is commercial, but only for the limited purpose of subjecting it to false advertising laws.[76]

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[72] Stern, *supra* note 1, at 56. *See also* Allan Tananbaum, Note, *"New and Improved": Procedural Safeguards for Distinguishing Commercial from Noncommercial Speech*, 88 COLUM. L. REV. 1821, 1836 (1988) ("the Court has resorted to a series of negatives: that speech takes the form of an advertisement does not render it commercial; selfish, even pecuniary motives of the speaker do not by themselves transform expression into commercial expression; and the inclusion of pronouncements of issues of public concern in an advertisement is of little help in the determination of whether the speech is commercial."); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1184–85 (1982) ("[T]he Supreme Court, for all it *has* said about commercial speech, has conspicuously avoided saying just what it is.").

[73] *See, e.g.*, Stern, *supra* note 1, at 87–88 ("Viewed as a whole, the Court's pronouncements on the nature of commercial speech possess as much clarity and coherence as can reasonably be expected in modern First Amendment jurisprudence. . . . In fact, the Court's avoidance of mechanical tests and rigid categorization has promoted recognition of reasoned distinctions among expression in various commercial settings.").

[74] *See, e.g.*, David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 383 (1990) (noting that inadequacies in the Court's descriptions of commercial speech have forced the lower courts to guess at the proper way to categorize speech in a given case).

[75] *Kasky v. Nike*, 45 P.3d 243, 247 (2002).

[76] *Id.* at 256.

A. *Consumer Preferences and Corporate Marketing Indicate that Statements of Fact about Business Operations Can Be Commercial Speech*

In holding that commercial speech can include representations of fact not only about a speaker's products and services, but also about the speaker's business operations, the California Supreme Court arguably expanded the subject matter of commercial speech. Business operations, as the court explained, include "statements about the manner in which the products are manufactured, distributed, or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manufacture, distribute, sell, service, or endorse the product."[77]

Since at least the 1990s there has been a significant market of consumers whose decisions to purchase or invest are influenced by concerns about the seller's business operations.[78] This market appears to be continuing to grow and, by 2003, total assets under professional management screened for one or more social issues had risen to $2.16 trillion.[79] This figure reflects a seven percent increase in issue-screened portfolios since 2001, while during that same time the broader universe of managed portfolios fell by four percent.[80] The integration of criteria like commitment to diversity, working conditions, or impact on the environment of production into investment decisionmaking is not simply due to a rise in activism; rather, many "social investors believe that careful attention to social factors can help identify companies with higher quality

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[77] *Id.* at 257.

[78] *See* John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 472 (1999-2000) (noting the large portion of consumers influenced by social issues); John M. Church, *A Market Solution to Green Marketing: Some Lessons From the Economics of Information*, 79 MINN. L. REV. 245, 251–54 (1994) (summarizing the results of polls and data on consumers, and concluding that one in two consumers have made a purchasing choice based on a product's effect on the environment).

[79] SOCIAL INVESTMENT FORUM, *2003 Report on Socially Responsible Investing Trends in the United States*, at i, Dec. 2003, *available at* http://www.socialinvest.org (last visited Aug. 26, 2004). $2.16 trillion is a materially significant percentage of the current total of all investment assets under professional management in the United States ($19.2 trillion). *Id.* at 1. Of course, the trend of rising investor preferences for corporations with responsible wages and working conditions is not limited to America. *See, e.g.*, SOCIALFUNDS.COM, *Canadian Firm Launches Social Index*, Feb. 16, 2000, *at* http://www.socialfunds.com/news/article.cgi/article160.html (last visited Sept. 17, 2004).

[80] *2003 Report on Socially Responsible Investing Trends*, *supra* note 79, at i.

management, that can produce higher returns to investors."[81] Prudent bankers may be reluctant to invest in overseas companies that tolerate abusive treatment of their labor forces for fear of attendant instability, both within the company and between the company and the local government.[82] Consumers may believe that workers who are well-rested, safe, and adequately compensated will produce higher quality goods.

Given the importance of social issues to investors and consumers, it comes as no surprise that even as early as 1993 companies spent about $1 billion on cause-related marketing (a 150% increase from 1990).[83] It is not uncommon for corporations to include ethics policies "in marketing materials intended to impress 'socially conscious' customers and investors."[84] Clearly Nike has long recognized the impact of this market. In fact, in 1998 Nike's CEO Phil Knight attributed Nike's disappointing financial results in 1997 and 1998 to concerns about alleged sweatshop labor.[85] In a 1998 letter sent to a California newspaper editor, Nike explicitly drew the connection between its labor practices and consumer purchasing habits, writing that "[c]onsumers are savvy and want to know they support companies with good products and practices" and that "[d]uring the shopping season, we encourage shoppers to remember that Nike is the industry's leader in improving factory conditions."[86]

The consumer market most central to the dispute between Nike and Kasky is the schools and universities where Nike has or would like to have sponsorship and bulk-purchasing contracts, which are of no small economic

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[81] Brief of Amici Curiae Domini Social Investments, L.L.C. et al, at 10 n.3, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

[82] *See* Anderson, *supra* note 78, at 472; *see also* Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 NW. J. INT'L L. & BUS. 66, 97 (1993-1994) (discussing the correlation between human rights violations and investment risk).

[83] *See* Tom J. Brown & Peter A. Dacin, *The Company and the Product: Corporate Associations and Consumer Product Responses*, 61 J. MARKETING 68 (Winter 1997); *see also* Orentlicher & Gelatt, *supra* note 82, at 97 ("[A]t a time when consumers are increasingly assertive in demanding that the products they purchase be produced in a manner deemed 'socially responsible,' it is scarcely possible to draw a bright line between corporations' goal of maximizing profits and social expectations that they behave responsibly.").

[84] Andrew B. Cripe, *Employee and Director Accountability to Shareholders: Doing Business for Business Owners*, 1 DEPAUL BUS. & COMM. L.J. 153, 156 (2003).

[85] *See* Phillip H. Knight, Cover Letter to Annual Report to the Shareholders (1998), *available at* http://www.sec.gov; *see also* Brief of Amici Curiae Brief of Domini Social Investments LLC, KLD Research & Analytics, Inc., and Harrington Investments, Inc. at 6, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

[86] *See Kasky v. Nike*, 45 P.3d 243, 258 (2002).

consequence.[87] Campuses like the University of North Carolina, Duke University, Stanford, Penn State, and Arizona State are among many where concern about labor practices have threatened contract formation or renewal with Nike.[88] At the University of California at Irvine, for example, such concern eventually led the athletic department to switch to Converse.[89] Nike's letters to athletic directors about its own business operations are appropriately seen, therefore, as speech intended to preserve its contracts with universities – or more generally, its economic interests.[90]

Because concerns about the conditions under which products are made are shaping consumer purchasing or investing choices and corporate marketing choices, such information should be granted the same limited protection as other commercial speech, and corporations should not be prevented from using such information to make sales. Conversely, however, corporations should not be permitted to thwart the efficient allocation of resources by communicating deceptive information about their business operations. Indeed, as Catherine Fisk and Erwin Chemerinsky pointed out in an amicus brief during the *Kasky* litigation, if such statements were *not* considered commercial speech, many undesirable commercial deceptions would be possible.[91] At the very least, businesses could get away with deceptive claims that they should know are false or misleading.[92] For example, a corporation could advertise that its food is kosher without any duty to at least reasonably ensure the accuracy of this statement. Like the Nike claims at issue in *Kasky*, this would be a statement of fact about the conditions under which the seller's products are made. Of course, no one would suggest that consumers who observe kosher dietary laws do not care

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[87] KLEIN, *supra* note 55, at 406.

[88] *Id.*

[89] *Id.*

[90] Of course, critics of *Kasky* have argued that this background is precisely why Nike's speech should be protected from liability for deception. *See infra* Part V.A.

[91] *See* Brief of Amici Curiae Members of the United States Congress, Representatives Dennis Kucinich, Bernard Sanders, Corrine Brown, and Bob Filner at 10–14, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575). Some of my examples of the undesirable communications that could result if business operations are not considered commercial speech are based on arguments posed in this brief. However, Professor Fisk and Professor Chemerinsky do not seem to distinguish between negligent and knowing deceptions, a distinction that I feel is important. *See id.*

[92] Knowing falsehoods would be presumably still be actionable, for example under fraud laws. *See infra* notes 158 and 185 and accompanying text.

more about the conditions under which the food products they purchase are made (e.g., not involving work on Saturdays) than about price or the taste.

Other examples abound: corporations would be free of responsibility for negligent claims that their products were produced without pesticides or in other environmentally sustainable methods,[93] that their tuna was caught in a dolphin-safe manner, or that their cosmetics were produced without animal testing. In fact, if factual statements about business operations are not commercial speech, a seller could be free to claim its goods were made in the United States, even if the claim was materially misleading (i.e., only final assembly in the U.S.). This would run contrary to the policy underlying federal statutes regulating "made in USA" labeling on various goods. Such statutes were enacted in recognition of the fact that a factual statement to consumers about business operations can be extremely important to the proper allocation of resources, and should therefore be reasonably regulated to the extent that it is deceptive.[94]

In the end, a consumer's particular motivation for buying or investing is irrelevant to the prejudice incurred when the consumer does not get what she pays for, as the United

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[93] There has been some commercial speech litigation involving false environmental advertising. Some courts have in fact ruled that such statements are commercial speech under United States Supreme Court doctrine. *See, e.g.*, Ass'n of Nat'l Advertisers, Inc. v. Lungren, 44 F.3d 726, 728 (9th Cir. 1994) (Commercial speech analysis applies to California statute prohibiting advertisements or product labels that claim a certain environmental attribute – for example "ozone-friendly" – unless the product meets the statutory definition of that quality because "the statute regulates representations concerning specific consumer goods which takes the form of advertisements or product labels [and] specifically requires that the representation be made about specific consumer goods which a firm manufactures or distributes" and because "there is little doubt that by touting the environmental benefits of consumer products," the sellers "hope to capture a portion of the "green market."). Indeed, "[n]early one in every two consumers has altered his or her purchasing decisions to help protect the environment." Church, *supra* note 78, at 251. *See generally* David Hoch & Robert Franz, *Eco-Porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 ALB. L. REV. 441 (1994).

[94] *See, e.g.*, 16 C.F.R. § 250.7(a)(1) (1998) (regulating prerequisite conditions for "Made in USA" labeling on furniture); 16 C.F.R. § 300.25(a) (1998) (regulating prerequisite conditions for "Made in USA" labeling on wool products); 16 C.F.R. § 303.33(a)(2) (1998) (regulating prerequisite conditions for "Made in USA" labeling on textile fiber items). Moreover, there are many such statutes regulating what attributes can be claimed about the conditions under which a product was made, including many that touch on areas of public concern. *See, e.g.*, ARIZ. REV. STAT. § 44-1231.01 (2004) (regulating prerequisite conditions for representations that product was made by Native Americans); MINN. STAT. § 325F.47 (2003) (regulating prerequisite conditions for representations that product was made by a blind person).

States Supreme Court has made clear at least since 1934.[95] Proof that the product asked for (say, a shoe made by American workers, to take a modern example) is of the same quality as the product received (say, a shoe made in Indonesia) is similarly irrelevant to whether the consumer is prejudiced.[96] The market should accurately reflect consumer preferences, whatever they are. This protects both consumers in their private economic decisionmaking and competitors who are honest about where their products are made, who makes them, and under what conditions.

B. Why the Kasky *Test is Acceptable*

1. Verifiability

The California Supreme Court pointed out that when Nike described its own labor policies and the working conditions in factories where its products are made, the company "addressed matters within its own knowledge."[97] The court emphasized that because "Nike was making factual representations about its own business operations,"[98] the company "was in a position to readily verify the truth of any factual assertions it made on these topics."[99] Commercial speech is thought to be more verifiable, and therefore less deserving of breathing room for inadvertent deception, because the speaker is uniquely positioned to know about her own products or services.[100] While the United States Supreme Court's reliance on this counterbalancing characteristic has been questioned,[101]

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[95] *See* FTC v. Algoma Lumber Co., 291 U.S. 67, 78 (1934) ("The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. . . . In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps ignorance.").

[96] *Cf. id.* at 77–78 (rejecting the argument that if the quality of white pine and yellow pine is the same, a buyer who asks for one and gets the other is not prejudiced).

[97] *Kasky v. Nike*, 45 P.3d 243, 258 (2002).

[98] *Id.*

[99] *Id.*

[100] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771, n.24 (1976); Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 564, n.6 (1980).

[101] *See, e.g.*, Redish, *supra* note 52 at 568 ("Surely, the assertions contained in Consumer Reports Magazine are no more or less objectively verifiable than are the claims of commercial advertisers."); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 635–38 (1990) (noting that "the way advertising is actually practiced today," commercial speech is no longer so verifiable); Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old*

the Court continues to invoke it as a common sense distinction from pure speech, and, in general, the proposition seems well founded.[102] Corporate speakers are likely to know, or easily be able to verify, the materials used in their products. Likewise, a commercial speaker is likely to know, or easily be able to verify, the wages paid to its workers, the amount of overtime put in by its workers, the ages of its workers, and where its factories are located. Thus, in addition to functioning like other commercial speech in the market, a commercial speaker's statements of fact about her own business operations are certainly as verifiable as other commercial speech.

2. Hardiness

The Supreme Court has also not seemed to worry much about any chilling effect on commercial speech.[103] The reason is that there is a strong economic incentive to speak about one's products or services in order to compete in the market.[104] This is also true of commercial speech about business operations, although admittedly to a lesser extent because business operations are normally not for sale. It is realistic to assume that a corporation will assess the costs of promoting its business operations differently post-*Kasky* and that as a result some speech about a corporation's business operations will not reach the public. It is also safe to assume, however, that corporations will continue to market business operation information and to address materially inaccurate information about their business operations,[105] given the portion of

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Message, 72 MINN. L. REV. 289, 297 (1987) (pointing out that it can be as difficult to verify whether commercial speech is misleading as it is for more fully protected speech, like political speech).

[102] *See* Geyh, *supra* note 3, at 23 ("We are dealing in 'common-sense' general impressions here, not mathematical axioms, and the fact that less than all speech in the commercial arena may be subject to objective verification does not refute the accuracy of the generalization, or eviscerate the utility of the distinction to the extent it applies.").

[103] Post *supra* note 16, at 35.

[104] *But see id.* at 33 (noting that the "empirical assumption that commercial speech is more sturdy than public discourse is suspect"); Kozinski & Banner, *supra* note 101, at 635–38 (arguing that there is little support for the empirical assumption that that "economic motives render speech more durable than other motives" and even if these are characteristics of commercial speech, it is unclear why less protection for commercial speech is therefore justified).

[105] Deborah E. Glass & Thomas H. Clarke Jr., *Beware of Clever Metaphors: Kasky v. Nike Could Be Harmful to Your Company's Health*, 22 NO. 4 ACC Docket 80, 90 (2004) (Recommending that "if statements of product quality are made, such as the reliability of software, quality assurance and quality control procedures should be

consumers whose investing and purchasing decisions are influenced by such information.[106]

We do not have to look very far for some strong evidence of the sturdiness of speech about business operations. In spite of repeated threats to discontinue providing any information about its factory conditions should it lose its litigation with California activist Marc Kasky,[107] Nike now provides more extensive information related to the working conditions in its factories on its website than it did before the suit settled.[108] Its Code of Conduct – which formed the basis of the letters to university directors of which Marc Kasky complained[109] – asserts that "[w]herever Nike operates around the globe we are guided by this Code of Conduct and we bind our contractors to these principles."[110] Among many statements of fact about the specifics of the conditions in its factories, Nike asserts that it binds its partners to "not use forced labor in any form," to "not employ any person below the age of 18 to produce footwear," and to "provide[] each employee at least the minimum wage." Moreover, in a twelve-page file explaining its labor practices and policies, Nike claims that:

> [Any] Nike contractor found employing any worker under our age standards must (a) remove the child from the workplace, (b) continue to pay that worker's basic weekly wage, (c) place that worker in an accredited local school and pay fees to keep them there, and (d) agree to re-hire that worker when reaching the Nike minimum age. Factories that refuse to follow these steps will lose our business.[111]

The potential influence of these statements is somewhat enervated by Nike's concession that its standards are difficult

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undertaken to assure that the requisite quality does indeed exist and that the error rate is statistically insignificant.").

[106] *See* Orentlicher & Gelatt, *supra* note 82, at 97 ("[A]t a time when consumers are increasingly assertive in demanding that the products they purchase be produced in a manner deemed 'socially responsible,' it is scarcely possible to draw a bright line between corporations' goal of maximizing profits and social expectations that they behave responsibly."). *See generally* Part IV.A.

[107] *See, e.g.*, Petitioners' Brief at 39, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

[108] *See* NIKE, INC., WORKERS AND FACTORIES, *at* http://www.nike.com/nikebiz/nikebiz.jhtml?page=25 (last updated Jan. 2004).

[109] *See supra* note 60 and accompanying text.

[110] *See* NIKE, INC., NIKE CODE OF CONDUCT, *available at* http://www.nike.com/nikebiz/gc/mp/pdf/English.pdf (last updated Jan. 2004).

[111] NIKE, INC., CORPORATE RESPONSIBILITY REPORT: LABOR PRACTICES, at 30 (2001), *available at* http://www.nike.com/nikebiz/gc/r/pdf/laborpractices.pdf (last updated Jan. 2004).

to enforce.[112] Finally, the site provides information about Nike's internal compliance standards and about independent audits of its factories.[113] In sum, Nike appears not to have "shut down its public relations office."[114] Although after *Kasky* the corporation is being "much more careful when it makes claims to influence consumers about how it treats its overseas workers,"[115] it has concluded that it is worthwhile to keep speaking on the matter. The portion of the market that cares about business practices is too important to ignore; it would make little business sense to refrain from providing as much specific, positive, non-deceptive information as possible. Thus, while it is hard to predict how much chill will result (beyond chilling deceptive corporate marketing[116]), it seems that *Kasky* has yet to have a significant impact on the willingness of corporations to continue their public relations.[117]

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[112] *See, e.g.*, NIKE, INC., NIKE CODE OF CONDUCT *at* http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=code#code ("While our policy is clear, we have learned that child labor presents many challenges, including falsified age records.") (last updated Jan. 2004).

[113] NIKE, INC., Nikebiz: Responsibility: Workers and Factories: Compliance, Monitoring, & Assessment, *at* http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=compliance (last updated Jan. 2004).

[114] *See* Toni Muzi Falconi, *Nike vs. Kasky: Update Note*, Global Alliance for Public Relations and Communication Management Website, *at* http://www.globalpr.org/news/stories/nike-kasky2.asp (last visited Aug. 26, 2004) (concluding after an August 12, 2003 teleconference with Nike's VP of corporate affairs and a Nike attorney that "I do not believe that public relations professionals within organizations, or within agencies, or consultants now always require their lawyers to check every single statement, press release, public appearance, publication and web page.").

[115] *See* Tony Mauro, *Justices get Nike out of their hair – for now*, FIRST AMENDMENT CENTER ONLINE, June 27, 2003 (quoting Public Citizen Litigation Group attorney Alan Morrison's prediction as to how settlement of the suit will affect Nike), *at* www.firstamendmentcenter.org (last visited Aug. 24, 2004).

[116] *See* David Graulich, *Press Release: Write in Haste . . . Repent*, NAT'L L.J., Oct. 14, 2002, at D12. (admitting that PR consultants and the firms that employ them were watching the dispute between Nike and Kasky "to see if it sets limits on how far one can lawfully go in a press release").

[117] A cursory survey of other major corporate websites indicates that they too continue to make statements of fact about their business operations. *See e.g.*, WAL-MART, SWEATSHOP ALLEGATIONS, News Center / Statements / Sweatshop Allegations ("We require suppliers to ensure that every factory conforms to local workplace laws and that there is no illegal child or forced labor.") *at* http://www.walmartstores.com (last visited Oct. 20, 2004); LEVI-STRAUSS & CO., SOCIAL RESPONSIBILITY / GLOBAL SOURCING & OPERATING GUIDELINES (identifying numerous specific workplace conditions that must be satisfied as prerequisites for initiating and renewing investment and business contracts) *at* http://www.levistrauss.com/responsibility/conduct/guidelines.htm (last visited Oct. 20, 2004); REEBOK WEBSITE, GUIDE TO THE IMPLEMENTATION OF REEBOK HUMAN RIGHTS PRODUCTION STANDARDS 10 ("Reebok will not select business partners who pay less than the minimum wage required by applicable law or who pay less than the prevailing local industry wage.") *at*

3. The Limited Purpose of the *Kasky* Test

While many courts and commentators have attempted to do what the Supreme Court could not – propose a comprehensive definition for commercial speech[118] – the California Supreme Court may be the first to articulate a test for classifying speech that is strictly limited to the context of commercial deception actions. This has significant advantages.

First, *Kasky* avoids what the United States Supreme Court still occasionally permits: regulation of non-deceptive speech.[119] Thus, as broad a net as the *Kasky* definition may cast, it will never lead a court to even consider whether to uphold the suppression of contraceptive advertisements in pamphlets containing accurate information about venereal disease,[120] the disciplining of attorneys who non-deceptively solicit clients,[121] the prohibition of accurate advertisements for gambling,[122] or

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http://www.reebok.com/static/global/initiatives/rights/pdf/ReebokHR_Guide.pdf (last visited Oct. 20, 2004).

[118] *See, e.g.*, Post, *supra* note 16, at 25 (Commercial speech is "the set of communicative acts about commercial subjects that within a public communicative sphere convey info of relevance to democratic decision making but that do not themselves form part of public discourse."); Geyh, *supra* note 3, at 5–6 (advocating a multifactor case-by-case analysis for speech, in which the level of judicial scrutiny afforded depends upon the presence or absence of factors including the opportunity for timely expression of alternative viewpoints, the extent to which truth or falsity can be objectively verified, the presence of a commercial incentive to exaggerate product or service attributes, the likelihood of audience manipulation, the hardiness of the speech and the constitutional implications of compelling additional speech); Todd F. Simon, *Defining Commercial Speech: A Focus on Process Rather than Content,* 20 NEW ENG. L. REV. 215, 244 (1984-1985) (Commercial speech is "calculated expression in the form of advertising or promotional material which is designed by the speaker to affect consumer purchases on the basis of information or impressions contained therein resulting in action which is harmful to individual consumers or to society as a whole."); Nadir N. Tawil, Comment, *Commercial Speech: A Proposed Definition*, 27 HOW. L.J. 1015, 1027 (1984) ("Commercial speech is an expression designed primarily to promote a commercial product, service, or a business interest."); Richard M. Alderman, *Commercial Entities' NonCommercial Speech: A Contradiction in Terms*, 1982 UTAH L. REV. 731, 744–45 (commercial speech is any speech by a commercial entity).

[119] *See, e.g.*, Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) (upholding state bar rules prohibiting lawyers from sending targeted direct-mail solicitations to victims or their relatives for 30 days following an accident, or from accepting referrals obtained in violation of that prohibition).

[120] *Cf.* Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) (considering whether to uphold state regulation on truthful commercial information).

[121] *Cf.* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upholding state regulation of truthful in-person solicitation by an attorney).

[122] *Cf.* Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (sustaining restriction of accurate advertisements for casinos).

limits on the placement of tobacco or alcohol advertisements.[123] In short, the *Central Hudson* framework for regulating truthful commercial speech will never be triggered by the *Kasky* analysis.[124]

Second, unlike the United States Supreme Court's attempts at definition, which aim to categorize speech as commercial (or not) irrespective of the regulation to be imposed on the speech at issue, the *Kasky* limited purpose test hones in on the autonomy theme underlying the judicially recognized rationales for protecting commercial speech. The *Kasky* test is in fact predicated on the idea that consumers should get as much accurate commercial information as possible.[125] Both the constitutional value of facilitating public decisionmaking and the economic efficiency value of properly allocating resources in our free market system depend upon the free flow of *accurate* information.[126] If Professor Post is correct that any definition of commercial speech will necessarily be predicated on the values that commercial speech is intended to serve,[127] then *Kasky* is at least a good step in the right direction.[128]

Because it is clear that "ambiguities may exist at the margins of the category of commercial speech,"[129] there is also a safeguard inherent in limiting the applicability of a commercial speech definition to false advertising. Perhaps the most serious pitfall in the commercial speech doctrine is the potential that truthful, "pure" speech will be suppressed due to misclassification.[130] But in the event that some corporate

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[123] *Cf.* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996) (only a plurality condemning state prohibition on price advertising for alcoholic beverages as a "wholesale suppression of truthful, nonmisleading information.").

[124] *See supra* note 23.

[125] *See supra* Part IV.A. *See also* Norton, *supra* note 53, at 744 ("[C]ommercial speech that undermines informed decisionmaking – because it is false, misleading, or concerns illegal conduct – receives no First Amendment protection.").

[126] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976). *See supra* Part II.B.

[127] *See* Post, *supra* note 16, at 7 ("We might seek to define the category by reference to the constitutional values it is designed to serve.").

[128] *But see* Linda Greenhouse, *Free Speech for Companies on Justices' Agenda*, N.Y. TIMES, Apr. 20, 2003, at A17 (quoting Professor Post as commenting on Nike v. Kasky: "The structure of public discourse is at stake.").

[129] *Kasky*, 45 P.3d at 254–55 (quoting Edenfield v. Fane, 507 U.S. 761, 765 (1993); citing City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993); Zauderer v. Office of Disciplinary Council, 471 U.S. 626, 637 (1985); Rubin, Sec. of the Treasury v. Coors Brewing Co., 514 U.S. 476, 493 (1995) (Stevens, J., concurring)).

[130] *See* McGowan, *supra* note 74, at 404 ("[T]here is always a possibility that the doctrine will be applied to deny first amendment protection to speech that is not commercial at all."). A related pitfall that arises in hybrid speech cases is the

communication is mis-categorized as commercial speech under *Kasky*, permissible regulation is still limited to the communication's capacity to deceive consumers. The entity bringing the suit would have the burden of proving that the statements were likely to deceive before the commercial speaker would face any liability.[131] Moreover, because the relief sought generally is equitable in nature, a judge and not a jury would be deciding whether the commercial speech is likely to deceive the public.

4. Other Limits

While some of the communications named in Kasky's complaint could be argued to fit plausibly within more classic notions of commercial speech,[132] the California Supreme Court's definition of commercial speech is clearly applicable to forms of communication beyond what the United States Supreme Court has considered in commercial speech cases thus far. This in itself is not shocking. After all, as the *Kasky* court recognized, the format of particular communications before the United States Supreme Court has not always been determinative of whether they are commercial speech. For example, commercial speech has been held to include the alcohol content on the label of a beer bottle,[133] letterhead and business cards identifying an attorney as a Certified Public Accountant or Certified Family Planner,[134] and trade names.[135] The United States Supreme Court also made it clear in *Bolger* that the presence of particular speech characteristics like advertisement format, economic motivation, and product reference may nevertheless in some cases be insufficient to indicate that the speech is commercial, and in other cases may not be necessary, either

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possibility that "entirely truthful commercial speech [will] deprive otherwise fully protected speech of first amendment protection." *Id.* at 395.

[131] *See* Stern, *supra* note 1, at 122; Ivan L. Preston, *The Definition of Deceptiveness in Advertising and Other Commercial Speech*, 39 CATH. U. L. REV. 1035, 1056–57 (1990).

[132] For example, some of Nike's communications were paid advertisements. For a complete list of the communications Kasky named in the complaint, see *supra* note 60.

[133] *Rubin*, 514 U.S. at 481.

[134] Ibanez v. Florida Dep't of Bus. & Prof'l Reg'n., Bd. of Accountancy, 512 U.S. 136, 142 (1994).

[135] Friedman v. Rogers, 440 U.S. 1, 12–16 (1979) (elaborating on the capacity of a trade name to project a misleading impression of the nature of the practice it signifies).

individually or in combination, for a determination that the speech is commercial.[136]

The California Supreme Court, however, seemingly went a step further than *Bolger* by eschewing format as a relevant variable entirely. Instead, the *Kasky* test simply requires that the seller's communication be intended to make a sale and to reach a potential customer.[137]

Given the impossibility of naming the myriad types of communications that comprise modern commercial speech,[138] doing away with the format prong makes some sense. On the other hand, the potential risk posed by dropping any format requirement from a test for commercial speech is the fear of overextending the *Kasky* test to corporate speech in noncommercial settings. For instance, we do not want corporations to be chilled from responding to the press or to law enforcement officials in emergency situations.[139] In these kinds of situations it is easy to imagine a corporate agent having to make its best guess or otherwise make off-the-cuff statements regarding the facts of its products, services, or business operations. While, as we have seen, a corporate speaker is likely to know, or be able to verify, the truth about such facts, in the context of an emergency press conference the corporate speaker is functioning as a public citizen and there should be no legal disincentive for the corporation to disclose information rapidly. Fortunately, there are significant limiting factors in *Kasky* that should adequately prevent this undesirable result.

First, given that the sort of communications at issue before the California Supreme Court were not off-the-cuff but

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[136] Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66–67 n.13 and n.14 (1983).

[137] *Kasky*, 45 P.3d at 256–58.

[138] *See* LOUISE M. PARENT ET AL., *Advertising Review, Clearance and Challenges*, *in* SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL §56:18 (Robert L. Haig ed., 2003) ("Marketers and the in-house lawyers who counsel them know that there are many, many more ways of communicating with consumers and influencing their purchasing decisions" than advertising in the traditional sense, including but not limited to: "internet web sites," "direct mail," "press releases," "package labeling," "product names and trademarks," "slogans and taglines," and "distribution of article reprints.").

[139] Jeffrey L. Fisher, *Nike v. Kasky: Will the Shield of the Commercial Speech Doctrine Become a Sword?*, 20-WTR COMM. LAW. 1, 30 (2003) ("When contacted by reporters, corporate spokespersons would be liable for any factual inaccuracies that they inadvertently include in their statements. Even when it would be possible for businesses to take the time to verify factual uncertainties and to craft their own press releases, they would still be liable for any part of their releases that a jury later determines has the capacity to mislead the public.").

were instead part of a "modern, sophisticated public relations campaign,"[140] the *Kasky* test implies that some degree of forethought on the part of the speaker is required before the speaker should be held accountable for commercial misrepresentations. This is not too difficult a distinction to make. For example, in the context of a terrorist threat, a corporation may be called upon to disclose the locations of its factories, or the identities or qualifications of its workers in a particular factory. In this scenario, the corporation is functioning more as a public citizen without the opportunity to meticulously verify its facts. On the other hand, in non-emergency situations where the corporation's lawyers or PR consultants construct the text for its commercial website, or agents of the corporation compose letters to universities where the corporation has apparel contracts, the speech is commercial.

The second limiting factor is the *Kasky* test's tandem requirements of economic motivation and commercial audience, which would exempt corporate speech in noncommercial settings, for example at the emergency press conference just described. It is also worth noting that there is a general correlation between the materiality of a commercial speech falsehood and the likelihood that the speaker knows the statement is deceptive. With some exceptions, the more material a deception is, the more likely that the commercial speaker is actually aware of the deception.[141] Moreover, the less materially misleading a seller's statement of fact about her products, services, or business operations, the less likely anyone would try to bring a false advertising lawsuit.[142] Practically speaking, therefore, the absence of a format prong

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[140] *Kasky*, 45 P.3d at 257.

[141] Claims come to the FTC or Lanham Act judges with a presumption of materiality, but if it appears the claim is immaterial, if the advertiser presents evidence to that effect, or if harm to the public cannot be proven, then the case will be dismissed. *See generally* Preston, *supra* note 131, at 1056–57.

[142] For example, if a corporate agent responds at a press conference that 75% of her corporation's products are made in the USA, and in actuality only 70% are, the difference is unlikely to be material enough to produce a suit. Moreover, damages are not available to those bringing actions under private attorney general statutes such as the California statute authorizing Kasky's suit. To the extent that the California statute allows an unharmed activist to bring a suit against a commercial speaker who has allegedly falsely advertised, the problem may lie not with the *Kasky* commercial test but with the California statute. Significantly mitigating any such problem, however, is California's anti-SLAPP (strategic lawsuit against public participation), which is an effective means of deterring litigation that is harassing and without merit. *See supra* note 69.

should not significantly chill corporate speakers because the sort of false or misleading claims one would have to account for in a court of law are also *more likely* to have been made by a speaker who had actual knowledge or reckless disregard of the deception.

V. RESPONDING TO *KASKY*'S CRITICS

A. *The Importance of Clarifying the Matter Debated*

Some critics of the commercial speech doctrine, including Professor Ronald Collins, have argued that the kind of statements at issue in the Nike case "should be treated on par with political and/or artistic statements."[143] Presumably, this is because the statements were made in response to public criticism, rendering the commercial elements inextricably intertwined with noncommercial elements. When it is not possible for the speaker to utter the noncommercial component without the commercial component, the speech is considered "hybrid" speech and is entitled to full First Amendment protection.[144] It is unfair to Nike and to the public, the argument goes, if the corporation is not permitted to tell its side of the story without being hobbled by the shackles of commercial speech, even if its communications are properly characterized as such.[145] To evaluate this claim it is crucial to recognize that there are actually two areas of public concern relevant to Nike: the broad public debate about globalization, and the narrower public charge that some of Nike's products are being manufactured in factories with substandard treatment of workers. Once it is accepted that a seller's statements about business operations are within the subject

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[143] Ronald K.L. Collins, *Let Nike Talk*, LEGAL TIMES, Jan. 6, 2003, at 37.

[144] *See, e.g.*, Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 796 (1988) ("Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase."). For background on hybrid speech, see *supra* notes 34–38 and accompanying text.

[145] For example, Eugene Volokh, a UCLA law professor who edits the libertarian Web blog "The Volokh Conspiracy," argues that "[i]t seems wrong to let Nike's critics play under one set of rules (because they're not commercial advertisers), but force Nike to play under another." Eugene Volokh, *Nike and the Free-Speech Knot*, WALL ST. J., June 30, 2003, at A16. *See also* Richard O. Faulk, Commentary, *A Chill Wind Blows: California's Supreme Court Muzzles Corporate Speech*, 16 No. 21 ANDREWS DEL. CORP. LITIG. REP. 11 (2002) (observing that as a result of *Kasky*, "critics of corporate products or practices may speak more freely than their targets may speak in defending themselves").

matter of commercial speech,[146] the conclusion that factual refutations to specific public concerns about those business operations should not be fully protected speech is inevitable.

In the public debate about whether globalization is more beneficial or more detrimental to the overall good, there is no question that Nike can and should participate with the full protection of the First Amendment. Indeed, corporations like Nike offer a crucial perspective on issues such as the domestic and foreign economic effects of using foreign labor, whether domestic companies should be responsible at all for working conditions in overseas factories, and what standards are acceptable in those factories. For instance, the business community has "emerged as a central voice in the domestic debate about U.S. human rights policy toward China."[147] The *Kasky* court explicitly recognized the right of corporations to participate in such policy debates.[148] Thus, the claim that the California Supreme Court's opinion prevents Nike from telling its side of the story in the debate about globalization is merely a straw man argument.

For example, as an implied analogy to *Kasky*, Professor Collins has us imagine that a bicycle-manufacturing company makes statements in commercials "about the general desirability of foreign-based manufacturing sites or about environmentally desirable ways to manufacture steel and rubber."[149] Certainly most would agree with Collins that such statements should not be "within the purview of government regulation,"[150] *including* the California Supreme Court.[151] Of course, even assuming Nike had made statements of this variety, the United States Supreme Court has indicated that full First Amendment protection is only warranted when a "law

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[146] And, in fact, most of *Kasky*'s critics do accept this premise. *See, e.g.*, Volokh, *supra* note 145 (conceding that "[a] billboard saying, 'Buy Nike shoes: Made with high-paid labor,' . . . would be commercial speech.").

[147] Orentlicher & Gelatt, *supra* note 82, at 95–96.

[148] *Kasky*, 45 P.3d at 261 ("[T]o the extent Nike's speech represents expression of opinion or points of view on general policy questions such as the value of economic "globalization," it is noncommercial speech subject to full First Amendment protection.").

[149] *See* Collins, *supra* note 143.

[150] *Id.*

[151] *Kasky*, 45 P.3d at 260 ("To the extent Nike's press releases and letters discuss policy questions such as the degree to which domestic companies should be responsible for working conditions in factories located in other countries, or what standards domestic companies ought to observe in such factories, or the merits and effects of economic 'globalization' generally, Nike's statements are [fully protected] noncommercial speech.").

of man or of nature makes it impossible" to utter the protected statements in a noncommercial context.[152] For this reason, reliance on *Riley* by one of the *Kasky* dissenters[153] in support of the argument that Nike's speech was hybrid speech seems misplaced. The Court in *Fox* went to the trouble of clarifying that in *Riley* "the commercial speech (if it was that) was 'inextricably intertwined' because the state law *required* it to be included."[154] As the California Supreme Court observed: "No law required Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization, nor was it impossible for Nike to address those subjects separately."[155]

In any event, closer examination reveals that Nike's statements were not about globalization in general, but instead were about the specific labor practices in Nike's overseas factories.[156] If statements about the conditions under which products are made are properly within the subject matter of commercial speech, the fact that Nike was flatly contradicting allegations about these conditions in its communications to consumers should not transform the statements into speech that is fully protected without regard to its falsity.[157] Were the United States Supreme Court to allow as much, a seller would have incentive to keep itself uninformed about the safety of its products, the effectiveness of its services, or the standards of its business operations. At least as long as the seller was not intentionally lying, it could refute any damaging allegations, claim to be engaging in debate on a matter of public concern, and expect the protection of the First Amendment.[158] Beyond

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[152] Bd. of Trs. of the State Univ. of New York v. Fox, 492 U.S. 469, 474 (1989).

[153] *Kasky*, 45 P.3d at 266 (Chin, J., dissenting).

[154] *Fox*, 492 U.S. at 474. Moreover, at issue in *Riley* was the regulation of charitable solicitations. Unlike the speech at issue in *Kasky*, charitable solicitations do not involve factual representations about service or a product, for example statements about the conditions under which products are made.

[155] *See Kasky*, 45 P.3d at 260–61.

[156] *See* Letter to Universities, *supra* note 60 and accompanying text.

[157] *Cf.* Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 68 (1983) (explaining that "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues"); *but see* Fisher, *supra* note 139, at 31 (2003) ("[W]hen the performance qualities of a product or service become an issue of public concern, its purveyor ought to be able to respond to media inquiries and issue press releases with the full protection of the First Amendment.").

[158] In fact, in some jurisdictions, if commercial speech were to be treated on a par with political speech, even the intentional lie might be privileged by the First Amendment. *See, e.g.*, State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm.,

the distortion this would inflict on the free market, the impact on the public welfare would be immeasurable.

For example, when faced with allegations that its pain-reliever containers have been tampered with, a seller or manufacturer could claim that the containers are tamper-proof with constitutional protection, hoping to maintain its sales even where it should have known its refutation to be untrue. Or, if university students were to protest Nike contracts because the athletic shoes were made of leather, Nike's letter to the athletic directors negligently could assert with First Amendment immunity that the material was synthetic. Commercial speech should not be transformed into fully protected public debate just because the speaker refutes a public allegation about its specific product, service, or business operation.[159] Moreover, because the facts of a corporation's own business operations, products or services are easily verifiable before the corporation speaks, it needs little breathing room for error when it imparts this kind of information.[160]

In a hypothetical horrible Professor Eugene Volokh parades as a possible consequence of *Kasky*, "[P]ro-life activists accuse an abortion clinic of using some supposedly heinous or dangerous abortion procedure."[161] The doctors who co-own the abortion clinic then respond, in op-eds, in interviews with

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957 P.2d 691, 697–99 (Wash. 1998) (finding no compelling interest to sustain a Washington state law prohibiting political advertisements containing false statements of material fact made with actual malice).

[159] *Cf.* Nat'l Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 163 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978) ("[T]he right of government to restrain false advertising can hardly depend upon the view of an agency or court as to the relative importance of the issue to which the false advertising relates."). At issue in this case were statements by a trade association denying there was scientific evidence that eating eggs increased the risk of heart and circulatory disease. The court held that these statements were commercial speech that could be regulated to the extent the statements were false or misleading, even though the trade association made the statements "to counteract what the FTC described as 'anti-cholesterol attacks on eggs which had resulted in a steadily declining per capita egg consumption.'" While the reasoning of the Seventh Circuit was sound, its holding takes a crucial step beyond *Kasky*, seemingly evaluating the speech at issue based on its *potential* to mislead customers, which is probably over paternalistic. *See* Post, *supra* note 16, at 39 (The state should not be invited "to mutilate the thinking process of the community.").

[160] *See supra* Part IV.B.1. In general, statements of fact about business operations are perhaps even more verifiable than statements of fact about products, as many companies have far more products than factories. Nike may be an exception, with 900 factories in 50 countries and more than 660,000 workers. *See* NIKE INC., OUR BUSINESS MODEL & ITS CHALLENGES, *at* http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=businessmodel (last updated Jan. 2004).

[161] Eugene Volokh, *Business Speech in Public Debates*, THE VOLOKH CONSPIRACY, Jan. 10, 2003, *available at* http://volokh.com/2003_01_05_volokh_archive.html (last visited Sept. 20, 2004).

newspapers, and in public debates, "[N]o, what we do is ethical and humane."[162] A jury finds that these statements were misleading and the judge issues an injunction against further such statements.[163]

Professor Volokh is among the many critics of the *Kasky* decision who fail to differentiate between debate about business policy and debate about the particular facts of a business' operations. Significantly, in Professor Volokh's example, the pro-life activists are accusing the clinic of using specific procedures (the dangerous and heinous kind). In other words, they are concerned with the facts of the clinic's business operations. To the extent that the doctors do not engage their critics in *that* debate, and instead comment on the ethics or humaneness of abortions in general, or even whether a particular type of abortion procedure is actually dangerous, they would be outside the scope of commercial speech as defined in *Kasky*. However, to the extent that the doctors deny that they are using the procedures that they are being accused of, they are indeed engaging in commercial speech and should not be permitted to mislead the public.

Bernardo v. Planned Parenthood Federation of America[164] (*Bernardo*), a recent California Appeals Court decision applying *Kasky*, may allay Professor Volokh's fears. In *Bernardo*, plaintiffs alleged that the Planned Parenthood website contained misleading statements regarding the safety of abortions and the debated link between breast cancer and abortions, and sought injunctive relief under the same California false advertising laws employed in *Kasky*.[165] For example, Planned Parenthood claimed that the theory linking abortion and breast cancer "has not been borne out by research."[166]

The court found that even if Planned Parenthood was a commercial speaker, its statements were not within the range of the *Kasky* test because they were clearly framed as statements of opinion.[167] As the court noted, the plaintiff could

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[162] *Id.* Professor Volokh's example is transparently aimed at the political leanings he must suspect are shared by those who support the *Kasky* test.

[163] *Id.*

[164] 9 Cal. Rptr. 3d 197 (2004).

[165] *Id.* at 203.

[166] *Id.* at 205. Notably, Planned Parenthoods website also included "studies that support Bernardo's position that such a link exists." *Id.*

[167] *Id.* at 219–20.

not claim that the alleged link between cancer and abortion was "within Planned Parenthood's 'own knowledge.'"[168] The link was, rather, a matter of genuine scientific debate. There is an unmistakable distinction between statements made in the context of policy debates and statements about the factual operations that will be within the corporation's own knowledge. Thus, corporate speakers can and should participate in policy debates to the same extent as their critics.

The situation is different where the corporation addresses concerns about the facts of its business operations. There, the corporation is speaking on matters within its own knowledge and should not be permitted to deceive consumers or potential consumers. This asymmetrical treatment of allegations about a corporation's products, services, or business operations, which may be inaccurate so long as they do not defame the corporation or its products,[169] and the commercial speaker who refutes the allegations,[170] is acceptable not because commercial speech is less valuable, but because the linchpin for its constitutional value – facilitation of autonomy and wise public decisionmaking – is accurate information.

It also has been suggested that by refusing to afford full First Amendment protection to corporate statements that are in response to allegations regarding business operations, "[r]eporters may . . . shelve such stories for fear of publishing something that is too one-sided."[171] It is hard to assess the validity of such predictions, made without any empirical

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[168] *Id.* at 219.

[169] *See* Restatement (Second) of Torts § 561 (1977) (a corporation for profit may sue if "the matter tends to prejudice it in the conduct of its business or to deter others from dealing with it"); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. at 761-62 (holding that corporations may sue for defamation to protect their business reputations). Corporations that are characterized as public figures would have to show that the speaker uttered a false statement with reckless disregard for the truth. *See Kasky*, 45 P.3d at 261 (finding that Nike could recover damages upon proof that statements by a noncommercial speaker were false and made with actual malice). It is less clear what scienter is to be imposed on commercial speakers (in contrast to noncommercial critics) who make statements about *a competitor's* products or services. *Compare* Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 555–58 (5th Cir. 2001) (concluding strict liability applies whether the commercial speech is about the speaker's own goods or those of another) *with* WWFE v. Bozell, III, 142 F. Supp. 2d 514 (S.D.N.Y. 2001) (noting that the Fifth Circuit does not require actual malice but observing the question is still open in the Second Circuit and that in any case actual malice was sufficiently proven in the case before it to preclude summary judgment).

[170] Faulk, *supra* note 145 ("A strict standard of 'absolute truthfulness' means a besieged speaker with little time to investigate allegations responds at its own risk," while those making the allegations have more time to verify their statements.).

[171] Fisher, *supra* note 139, at 30.

evidence, but simple observations of media behavior undercut this concern. A predictable rule of thumb is that the media's decision to publish is predicated more on the newsworthiness of a story than on the reporter's ability or interest in covering all sides of a controversy.[172] For example, in the 1990s many hundreds of reporters apparently had no problem publishing allegations and evidence of sweatshop conditions in overseas corporate factories, with or without the corporations' statements of fact about these conditions.[173]

B. The Ineffectiveness of Counter-speech

It has been argued that media scrutiny and corporate competition, or alternatively, government counter-speech will adequately safeguard against commercial deception, particularly when there is already public concern about a corporation's products or business operations.[174] The prospect that consumers will benefit from the "'clearer perception and livelier impression of truth, produced by its collision with error,'"[175] as was urged by a conglomeration of media corporations opposed to *Kasky*,[176] is undeniably appealing. And counter-speech is certainly less restrictive. Nevertheless, the view that counter-information will serve to negate the distorting effects of speech "is of questionable accuracy in the arena of commercial speech."[177]

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[172] *See, e.g.*, FREDERICK LEWIS ALLEN, THE BIG CHANGE: AMERICA TRANSFORMS ITSELF, 1900-1950 234 (1952).

[173] *See supra* notes 55-56 and accompanying text.

[174] *See, e.g.*, Helen McGee Konrad, *Eliminating Distinctions Between Commercial and Political Speech: Replacing Regulation with Government Counterspeech*, 47 WASH. & LEE L. REV. 1129 (1990) (arguing for government counterspeech over regulation); Scott Joachim, Note, *Seeing Beyond the Smoke and Mirrors: A Proposal for the Abandonment of the Commercial Speech Doctrine and an Analysis of Recent Tobacco Advertising Regulations*, 19 HASTINGS COMM. & ENT. L.J. 517, 548 (1997) (arguing corporate counter-speech is likely when one company has a better product than its competitor); Brief Amici Curiae of Forty Leading Newspapers, Magazines, Broadcasters, Wire-Services, and Media-Related Professional and Trade Associations in Support of Petitioners, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

[175] New York Times v. Sullivan, 376 U.S. 254, 279 n.19 (1964) (quoting JOHN STUART MILL, ON LIBERTY 15 (Blackwell ed. 1947); *see also* Thornhill v. Alabama, 310 U.S. 88, 95 (1940) ("[F]alsehoods may be exposed through the processes of education and discussion . . . .").

[176] Brief Amici Curiae of Forty Leading Newspapers, Magazines, Broadcasters, Wire-Services, and Media-Related Professional and Trade Associations in Support of Petitioners at 18, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

[177] Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and the Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 56–57 (2003) (surveying how behavioral analysis might inform First Amendment jurisprudence).

First of all, in commerce it is not always clear when counter-speech is needed. Manufacturers may coordinate efforts to mislead consumers.[178] There are often disincentives for sellers to counter the speech of their competitors. For example, corporations frequently choose not to advertise that their products are safer than the competitor's, for even if doing so would improve a particular brand as against that competitor, public concern about safety may reduce demand for the product as a whole.[179] Moreover, in some instances, consumers, the media, and corporate watch-dog groups would have no way to know whether a corporation believes itself to be speaking on a matter of public concern (therefore privileged to make deceptive statements about its business operations, products, or services), and as a result would not know whether the corporation's statements warranted scrutiny.[180]

Secondly, even when it is clear to some entity that counter-speech is needed to correct a commercial deception, it is not always possible to produce effective counter-speech. Without the interest of the media, concerned consumers are hopelessly outmatched in a shouting match over the truth of a giant corporation's business operations. For example, Nike's daily budget for advertising is around 3 million dollars.[181] The media by necessity and choice will not investigate or expose every instance of false or misleading commercial speech, but only those few that make good stories.[182]

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[178] *Id.* at 57. *See, e.g.*, Does I v. Gap, Inc., 2002 WL 1000073, at *2 (D. N. Mar. I. May 10, 2002) (certifying plaintiffs as a class against numerous garment corporations because the "injuries, although different, all stem from the same alleged conspiracy amongst the defendants to dominate and control the garment workforce of the Commonwealth"). For more on this case, including the substantial settlements that resulted, see Press Release, Sweatshop Watch, First-Ever Lawsuits Filed Charging Sweatshop Conspiracy Between Major U.S. Clothing Designers, Retailers, Foreign Textile Producers (Jan. 13, 1999) *available at* http://www.sweatshopwatch.org/swatch/marianas/lawsuit.html.

[179] Horwitz, *supra* note 177, at 56–57.

[180] For example, the product label "Made by Native Americans," may or may not touch on a matter of public concern, depending on many contextual factors like the region where the product is sold.

[181] *See* Press Release, ReclaimDemocracy.org, *Kasky v. Nike Inc. Settled – Participants Pleased, Many Activists Inflamed* (Sept. 12, 2003), *at* http://www.reclaimdemocracy.org/nike/nike_settles_lawsuit.html (last visited Aug. 26, 2004).

[182] *See, e.g.*, ALLEN, *supra* note 172, at 234.

C. *Will the* Kasky *Test Chill Political Speech?*

Commenting on *Kasky*, Paul McMasters observed "that if free-speech rights can be taken away from one type of organization – a for-profit corporation – then, presumably, they could be taken away from other types of organizations as well, such as political parties, religious groups, or, conceivably public-interest non-profits."[183] Granting this First Amendment ombudsman some license for hyperbole – after all, the case had not yet been settled and so perhaps scare tactics would find purchase – this grave prediction flies in the face of First Amendment history and theory. Perhaps most directly, if somewhat simplistically, one might reply that no free speech rights were taken away from Nike: The commercial speech doctrine simply limits a corporation's leeway to deceive consumers. The corporation still has rights under the First Amendment to issue political speech, to lobby, or to produce artistic expression. Moreover, its individual members have the speech rights of every citizen. But the First Amendment has never given a corporation the right to utter deceptive commercial speech.

More generally, McMasters is overlooking the fact that the constitutional purposes served by commercial speech differ significantly from those served by political, religious, and non-profit speech. While political, religious, or artistic speech are protected by both the speaker's and the listener's First Amendment interests, commercial speech is constitutionally valuable only for the listener.[184] As such, the right to utter even deceptive political or religious speech could not be taken away, except perhaps where the speaker has knowingly lied or has spoken with reckless disregard for the truth.[185]

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[183] Dan Kennedy, *Silent Swoosh*, THE PHOENIX.COM, May 2-8, 2003, *at* http://www.bostonphoenix.com/boston/news_features/don't_quote_me/multi-page/documents/02860571.html (last visited Sept. 2, 2003); *see also* McGowan, *supra* note 74, at 404 ("The existing commercial speech cases . . . will support almost any application of the doctrine: all the Court needs to do is find a link between the speech and profit. This practice perpetuates itself, and grows even broader through application, because each peculiar application of the doctrine becomes precedent for future, even more peculiar applications.").

[184] *See supra* Part II.B.

[185] Jurisdictions are divided on whether a state can constitutionally prohibit *knowing* falsehoods in areas of protected speech such as political speech, and the United States Supreme Court has not addressed this question. *Compare* State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691 (Wash. 1998) (holding a state law prohibiting political advertisements containing false statements of material fact made with actual malice to be unconstitutional) *with* State v. Davis, 499 N.E.2d

The person engaging in political or religious speech is achieving a purpose that is guaranteed by the First Amendment and is irrespective of whether anyone is even there to hear the speech. While in rare instances there may be a compelling enough interest to prohibit knowing falsehoods in such speech (e.g., defamation of political rivals), the constitutional value it has for the *speaker* ensures that she will never be liable for any negligent misleading statements. The determinative factor in the amount of constitutional protection for speech is "the achievement of constitutional purposes."[186]

D. *How Does the* Kasky *Test Affect Image Marketing?*

The trend in marketing is leaning away from informational advertising and towards marketing an image that will emotionally affect the consumer.[187] Frequently, advertisements "do[] not refer to any individual product or service at all, but rather seek[] to project a favorable impression of the sponsoring corporation."[188] This kind of image marketing has led some to fear that "[i]f certain forms of commercial expression such as that in Nike are not accorded ample constitutional protection, the sphere of our political and artistic expression will inevitably decrease."[189] This does not seem too likely. As we have seen, the purview of *Kasky* is explicitly limited to "factual representations" about the speaker's own business operations, products, or services.[190] Bicycle commercials that present "poets reading their award-winning poems, rock and rap musicians singing their popular songs, and 9/11 heroes urging viewers to support American charities"[191] do not contain statements of fact about business operations, products, or services. Nor do ads that "depict deliciously tempting cakes and cookies with a simple statement: 'Got Milk?'"[192] Moreover, it is fairly difficult to

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1255 (Ohio Ct. App. 1985) (holding a state law prohibiting false statements about political candidates made with actual malice to be constitutional).

[186] Post, *supra* note 16, at 18; *see also* Stern, *supra* note 1, at 148.

[187] Horwitz, *supra* note 177, at 56.

[188] Stern, *supra* note 1, at 120.

[189] Collins, *supra* note 143, at 36.

[190] *See Kasky*, 45 P.3d at 247.

[191] *Cf.* Collins, *supra* note 143, at 37 (suggesting these hypothetical commercials as examples of what would be at risk if the United States Supreme Court upholds *Kasky*).

[192] *Cf.* Joachim, *supra* note 174, at 542–44 (suggesting this and other non-quid-pro-quo advertisements are at risk from the commercial speech doctrine).

suppose exactly what the claim of deception would be in image advertisements such as the ones just quoted.[193] Even where possible claims of deception are more conceivable, for example that a tobacco corporation is misleading consumers when its commercials portray sexy models smoking (i.e., "smoke and you'll be sexy"), the corporation is clear of the *Kasky* test because this is not a factual representation about its own goods, services, or business operations. Whether smoking cigarettes actually will make the individual consumer sexier is by no means within the tobacco corporation's knowledge.[194]

VI. CONCLUSION

> Liberals don't much like commercial speech because it's commercial; conservatives mistrust it because it's speech.[195]

Deciding how much protection to accord commercial speech will always be thorny. As the above quotation memorably captures, commercial speech does not neatly fall within our legal and political paradigms. Indeed, the free market justification for according protection to commercial speech is subverted both by not enough protection and by too much protection: If facilitation of consumer choice is the goal, there must be a balance between under-protection, which would allow the government to regulate and suppress accurate information, and over-protection, which would allow deception by sellers. Those who are ideologically bent may feel conflicted between corporate accountability and robust protection of speech and debate, or between protecting states' rights and promoting efficiency in the market.[196]

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[193] *See also* Stern, *supra* note 1, at 121 ("It is difficult to imagine a company's being deterred from airing an advertisement conveying its warm and caring nature by the prospect that an employee's alleged failure to live up to this portrayal will provoke a successful action, public or private, for misrepresentation.").

[194] *Cf.* Bernado v. Planned Parenthood Fed'n of Am., 9 Cal. Rptr. 3d 197, 219-20 (Cal. Ct. App. 2004) (finding that a commercial speaker's statements of opinion on matters not within its knowledge are not within the *Kasky* definition of commercial speech).

[195] Kozinski & Banner, *supra* note 101, at 652.

[196] Chief Justice Rehnquist has had conspicuous difficulty staying consistent on the degree of protection to be accorded commercial speech. As Earl Maltz puts it, "the philosophy of deference reflected in Rehnquist's early commercial speech opinions was plainly an important theme not only of his personal approach to constitutional adjudication, but also of conservative constitutional jurisprudence generally from the 1960s through at least the end of the Burger era." Earl M. Maltz, *The Strange Career of Commercial Speech*, 6 CHAP. L. REV. 161, 170 (2003). For example, in the 1970s then Justice Rehnquist was writing dissents like this one:

Part of the problem arises from subtle distinctions between corporate business practices. For example, what degree of outsourcing and subcontracting makes commercial speech about business operations so unverifiable that the corporation should not be liable? Similarly, the proliferation of hybrid speech counsels against a heavy-handed approach to regulation. Nevertheless, the vast majority of commentators and perhaps all but one member of the current Court would at least feel comfortable upholding regulations of deceptive commercial speech.[197] Deceptive commercial speech is a negative factor in the facilitation of public decisionmaking, private autonomy, and an efficient free market. For this reason, it remains important to accurately identify all commercial speech and regulate against duplicity.

While it may be true that "[f]ew things are harder than to observe clearly the life and institutions of one's own day,"[198] this is in fact the lot of legal scholars and courts. The California Supreme Court appropriately recognized that contemporary

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> The Court speaks of the importance in a "predominantly free enterprise economy" of intelligent and well-informed decisions as to 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 [government] to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 783–84 (1976) (Rehnquist, J., dissenting); *see also* Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 591 (1980) (Rehnquist, J., dissenting); Bates v. State Bar of Arizona, 433 U.S. 350, 404 (1977) (Rehnquist, J., dissenting). Beginning in the mid-90s, however, Rehnquist's position shifted significantly. In 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996), and Rubin, Sec. of the Treasury v. Coors Brewing Co., 514 U.S. 476 (1995), Chief Justice Rehnquist joined a unanimous Court in finding restrictions on commercial speech to violate the First Amendment. Finally, in Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001), the Chief Justice cast a critical vote in support of the majority to strike down a prohibition on cigarette advertising outdoors within 1000 feet of a school or playground. *See Lorillard Tobacco*, 533 U.S. at 529–31.

[197] *See supra* note 54. The holdout on the Court for completely abandoning the separate category of commercial speech is Justice Thomas. *See Lorillard Tobacco Co.*, 533 U.S. at 578–79 (Thomas. J., concurring) ("[T]here is no reason to apply anything other than our usual rule for evaluating solicitation and incitement simply because the speech in question happens to be commercial."); *44 Liquormart*, 517 U.S. at 522 (Thomas. J., concurring) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of a lower value than 'noncommercial' speech.").

[198] ALLEN, *supra* note 172, at 234.

marketing methods and consumer preferences demand a new test to adequately categorize allegedly deceptive commercial statements.

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