PROFITS, POLITICS, AND THE PROMISE OF FREE SPEECH: DEFINING COMMERCIAL SPEECH AFTER *NIKE V. KASKY*

by
Matthew Yium[*]

As consumer demands become more sophisticated, companies like Nike, Wal-Mart and McDonald's seek to carve out a corporate identity that will separate them from their competitors. These corporations adopt marketing strategies that align their brand image with political ideology in the hopes of reaching a demographic similarly aligned with those beliefs. Yet when a corporation "takes a stand" on a political issue, courts have not agreed on whether such expression constitutes commercial or political speech. The distinction makes a difference: commercial speech, as a medium of expression motivated by profits, has been deemed less worthy of First Amendment protection than political speech. In this Note, the author traces the development of the commercial speech distinction from its origins up to the recent Nike v. Kasky *case, which illustrated the seemingly inevitable clash between commercial and political speech. The author then proposes a proof scheme that would facilitate the distinction. Finally, the author offers a justification for continued adherence to the distinction in the interest of consumer protection.*

[*] J.D. May 2005, Lewis & Clark Law School; M.P.W. 2000, University of Southern California; B.A. 1996, University of Colorado. The author wishes to thank Professor Stephen Kanter for his thoughtful feedback and guidance in writing this Note. Thanks also to C.J. Hu and my colleagues in the First Amendment Seminar.

I. INTRODUCTION

The First Amendment provides, in part, that "Congress shall make no law . . . abridging the freedom of speech."[1] This guarantee has extended to many kinds of speech.[2] Initially, the U.S. Supreme Court deemed commercial speech, as a category of speech motivated solely by an interest in profits, rather than ideas, wholly unprotected.[3] Since then, the Court has granted commercial speech "qualified but nonetheless substantial protection" from government regulation.[4] One of those qualifications is that false commercial speech lies wholly outside the protection of the First Amendment.[5] By comparison, the Court has granted nearly full protection to other types of false speech, such as libel of public figures.[6] This difference in treatment means that the protection of speech can depend entirely on whether a court classifies it as commercial or noncommercial.

Such a classification is not always easy. The Supreme Court has not offered a definitive test for defining commercial speech. It has held, however, that speech is *not* commercial simply because it is sold for profit.[7] A Hollywood movie, for example, is not subject to lesser protection by virtue of the fact that its dialogue functions to generate studio profits.[8] The Court deemed motion pictures, along with books, magazines and other literary publications to be significant mediums for the communication of ideas, rather than conduits for commercial messages.[9] The fact that such speech is sold for

[1] U.S. CONST. amend. I.

[2] Including most political, artistic, and scientific but excluding such types of speech as obscenity (Miller v. California, 413 U.S. 15, 36 (1973)), fighting words (Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)), and libel (Gertz v. Robert Welch, Inc., 418 U.S. 323, 332, 341 (1974)).

[3] Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

[4] Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 68 (1983).

[5] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

[6] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[7] *Virginia Pharmacy*, 425 U.S. at 761 ("Speech likewise is protected even though it is carried in a form that is 'sold' for profit") (citing Smith v. California, 361 U.S. 147, 150 (1959) (books); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (motion pictures); and Murdock v. Pennsylvania, 319 U.S. 105, 111 (religious literature)); *compare* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) (arguing that First Amendment protection should extend only to political speech).

[8] *Burstyn*, 343 U.S. at 501.

[9] *Id*. at 501–02.

profit does not make it "commercial." Yet today much commercial speech is regularly found in those very mediums the Court has deemed noncommercial. For example, commercial products are routinely placed in novels, movies, and television shows.[10] How do courts continue to justify a distinction between commercial and noncommercial speech?

One theory proposes that the First Amendment is intended to protect, and—some may argue—enable individual autonomy, including the act of self-expression.[11] Commercial speech does not operate as a means of self-expression. It is uttered primarily as a means to an end: essentially, as a way to make money.[12] The speech in films and books, on the other hand, is disseminated (at least in theory) primarily as a means of self-expression.[13] Whether it generates a profit is secondary to the self-expression; and to the extent that it *is* motivated primarily for a profit, perhaps it is better treated as commercial speech.

Even if courts can distinguish between artistic and commercial expression, it seems even more challenging to separate commercial from political speech. For example, how should a court characterize speech from a corporation when it speaks out on political issues? This Note attempts to address that question. In doing so, it begins by reviewing the origins of the commercial speech distinction, as well as the Court's justification for maintaining the distinction. The Note then examines a recent case involving the Nike corporation's press releases containing allegedly false statements regarding working conditions in its overseas factories. The issues arising in the Nike case illustrate the challenge of distinguishing between commercial and political speech.[14] The Note then proposes a proof scheme that would facilitate such a distinction. Finally, the Note offers a justification for continued adherence to the commercial speech distinction in the interest of consumer protection.

---

[10] One statistic shows that $3 billion was spent in 2003 just to get products placed in movies and television shows. Caroline E. Mayer, *FTC Rejects Ad Labeling on TV*, WASH. POST, February 11, 2005, at E04; *see also* Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205, 1231–35 (2004) (identifying new forms of non-traditional marketing strategies, in addition to product placement).

[11] David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 335 (1991). Two other commonly understood theories are: 1) that free speech in a marketplace of ideas leads to the discovery of truth, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); and 2) free speech furthers an informed democratic citizenry, Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 316 (1992).

[12] Commercial speech is considered "the *sine qua non* of commercial profits." *Virginia Pharmacy*, 425 U.S. at 771 n.24.

[13] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (motion pictures "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression").

[14] Kasky v. Nike, Inc., 45 P.3d 243, (Cal. 2002); Nike, Inc. v. Kasky, 539 U.S. 654, 657 (2003).

II. THE DEVELOPMENT OF THE COMMERCIAL SPEECH DISTINCTION

Prior to 1976, the Court held, without discussion, that commercial speech, by virtue of its being commercial, did not earn protection.[15] The Court made the conclusory statement: "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."[16] The plaintiff, Valentine, owned a Navy submarine that he exhibited for profit. He brought the submarine to New York, where a local ordinance prohibited distribution of printed advertising in the streets.[17] Valentine, having been told of this ordinance by the Police Commissioner, subsequently had double-sided leaflets printed: on one side was an advertisement for his submarine, on the other was a protest against the city's refusal to provide him "wharfage facilities at a city pier for the exhibition of his submarine."[18] The Court characterized the artificial attachment of political speech to the backside of commercial speech as merely a means of evading the law prohibiting distribution of commercial leaflets.[19] It concluded that "[i]f that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command."[20]

Valentine v. Chrestensen serves as an example of the ease with which a commercial speaker might protect his speech: that is, he might simply attach a line or two of political speech or a "moral platitude." One wonders whether the outcome of *Valentine* would have been different had Valentine, for example, already printed his handbills prior to the Police Commissioner's informing him of the prohibition on distribution of commercial handbills. Assuming that the outcome would have been different, it would seem that the Court inferred a disingenuous motive based on the sequence of events. Thus, because the political speech was merely a pretext to evade the law, the Court found the commercial characteristics of the speech to be primary.

Mere commercial advertising at the time of *Valentine* was not worthy of the protection that political speech enjoyed. By 1975, the Court's attitude toward commercial speech had changed. For the first time, it suggested that commercial speech might be subject to some protection when it struck down a Virginia law prohibiting advertisements for abortions in nearby New York state, where abortions were legal.[21] Despite the commercial nature of the speech, it was protected, at least in part, because it involved dissemination of information about a constitutionally-protected right (abortion) and material of

[15] Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).
[16] *Id*.
[17] *Id*. at 52–53.
[18] *Id*. at 53.
[19] *Id*. at 55.
[20] *Id*.
[21] Bigelow v. Virginia, 421 U.S. 809 (1975).

"public interest."[22] The content of the speech was clearly distinguishable from the "purely commercial" quality of Valentine's speech. Here, the advertisement for abortion, though intended ultimately to sell a service, also raised public awareness as to the exercise of a constitutional right. Unlike Valentine's handbills, the commercial quality of the ads was indistinguishable from its political message. By informing consumers of the existence of the abortion service, the ads raised consumer awareness as to the existence of a right to utilize that service. It was clear, then, after *Bigelow v. Virginia* that commercial speech on a constitutional issue was worthy of some level of protection; it remained to be seen what might be the extent of that protection.

A year later, the Court finally gave its answer. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* involved a Virginia law that prohibited pharmacists from advertising prescription drug prices.[23] Because licensed pharmacists were the only source of prescription drugs for consumers, the law in effect completely banned dissemination of drug prices in the state.[24] Virginia argued that it had a state interest in maintaining professional standards for pharmacists, as it sought to prevent price wars over drugs.[25] The plaintiffs, the Virginia Citizens Consumer Council and a resident consumer argued that, as consumers, they had a right to receive the information.[26]

Justice Blackmun, writing for the majority, held that although the speech was commercial, it earned protection nevertheless. He first asserted that to the extent that there is a right to advertise, there is a reciprocal right to receive an ad.[27] He then reiterated the Court's traditional definition of commercial speech as "speech which does no more than propose a commercial transaction."[28] Putting aside the formal definition of commercial speech, Justice Blackmun reasoned that a speaker's commercial motivation in and of itself "hardly disqualifies him from protection under the First Amendment."[29] He analogized this situation to that in which labor unions and employers bargain over employment issues, which are motivated by economic self-interest and include speech that is considered protected.[30]

More importantly, Justice Blackmun delineated a broad scope of protection for commercial speech. He began by arguing that the value of commercial information could be equal to that of political speech.[31] The

[22] *Id*. at 822.

[23] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 749–50 (1976).

[24] *Id*. at 752.

[25] *Id*. at 751−52.

[26] *Id*. at 753−54.

[27] *Id*. at 757.

[28] *Id*. at 762 (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973)).

[29] *Virginia State Bd. of Pharmacy*, 425 U.S. at 762.

[30] *Id*. at 762–63.

[31] *Id*. at 763.

"consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[32] He continued by offering several examples of advertising content on issues of public importance that would be protected, including the ads in *Bigelow*.[33] Finally, he suggested that the commercial/noncommercial distinction might be constitutionally worthless.

> [T]here is another consideration that suggests that no line between publicly "interesting" or "important" commercial advertising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[34]

Read most broadly, Justice Blackmun suggests that an ad might always have constitutional value as an aid for the public's identification of sellers, their products, their prices, or any combination of the three in any given market, no matter how trivial the content of an ad might be. This view would certainly be consistent with protection for less trivial content, such as an ad for abortion services.

Justice Blackmun did define what he believed to be the decisive factor in limiting the scope of protection for commercial speech: its truthfulness. He distinguished between commercial speech that was concededly truthful (and which should be protected) from commercial speech that was either false or misleading (and which could be regulated).[35] He offered three justifications for regulation of potentially false or misleading commercial speech: (1) commercial speech is less likely to be chilled by regulation because the speaker's economic self-interest is durable; (2) the speaker/seller is in a better position to verify the truth of the speech more easily than the receiver/consumer; and (3) the government has a significant interest in ensuring that the stream of commercial information "flow[s] cleanly as well as freely."[36] These justifications will be assessed in further detail below.

After *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, it was clear that commercial speech earned a certain degree of First Amendment protection from government regulation. Several years later, the Court offered a workable standard of review to assess the constitutionality

---

[32] *Id*.
[33] *Id*. at 764.
[34] *Id*. at 765.
[35] *Virginia State Bd. of Pharmacy*, 425 U.S. at 771 n.24.
[36] *Id*.; *Id*. at 772.

of such regulation.[37] In *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, the Court struck down a New York state ban on advertisements promoting the use of electricity.[38] The state asserted an interest in public energy conservation in the face of a fuel shortage that resulted from severe weather.[39] The Central Hudson utility company brought a First Amendment challenge.[40]

The Court, in an opinion by Justice Powell, held that the promotional material was commercial because it was "expression related solely to the economic interests of the speaker and its audience."[41] After classifying the speech as commercial, Justice Powell determined whether the speech was protected anyway, which "turn[ed] on the nature both of the expression and of the governmental interests served by its regulation."[42] In examining the nature of the expression, Justice Powell first disposed of any question whether false commercial speech could be regulated. Because commercial speech's protection is derived from its "informational" function,[43] Powell argued, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."[44] Clearly then, false commercial speech may be regulated. When the speech is neither misleading nor unlawful, "the government's power is more circumscribed."[45] In consolidating the cases leading up to *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, Justice Powell then created a four-part test to define the extent of the government's powers:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[46]

Thus, once commercial speech is determined to be lawful and non-misleading, it is protected from regulation unless the government can establish a substantial interest, and the regulation directly advances that interest and is not more extensive than necessary to serve that interest. This test must be

---

[37] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 561 (1980).

[38] *Id*.

[39] *Id*. at 568.

[40] *Id*. at 559.

[41] *Id*. at 561 (citing *Virginia Pharmacy*, 425 U.S. at 762).

[42] *Id*. at 563.

[43] Justice Powell's characterization of commercial speech as primarily informational echoes Justice Blackmun. *Virginia Pharmacy*, 425 U.S. at 765.

[44] *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563.

[45] *Id*. at 564.

[46] *Id*. at 566.

preceded by a determination of whether the speech is in fact "commercial." When it is, the Court gives the regulation intermediate scrutiny under *Central Hudson*.

Three years after *Central Hudson*, the Court applied this analytical framework in a case involving a manufacturer of contraceptives who sought to send a mass mailing containing information that was part-informational, part-commercial.[47] The U.S. Postal Service warned the manufacturer, Youngs, that doing so would violate federal law, which stated that "[a]ny unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter."[48]

Justice Marshall, following *Central Hudson*, first determined whether the speech was commercial. He held that, despite the public service-type information about sexuality, prophylactics and venereal diseases, Youngs's material consisted primarily of commercial speech.[49] Youngs's mailing contained: "multi-page, multi-item flyers promoting a large variety of products available at a drug store, including prophylactics; flyers exclusively or substantially devoted to promoting prophylactics; [and] informational pamphlets discussing the desirability and availability of prophylactics in general or Youngs' products in particular."[50] Even a flyer entitled "Plain Talk about Venereal Disease," which does not refer to any of Youngs's products in the substantive content of the flyer, was considered commercial.[51] Justice Marshall reached this conclusion through an analysis of three factors: (1) whether the speech was in an advertising format, (2) whether the speaker had a commercial motivation, and (3) whether the speech referred to the speaker's products and services.[52] No single factor was dispositive, but the combination of all three provided enough evidence to conclude that Youngs's mailing was commercial.[53] As such, it was subject to "qualified but nonetheless substantial protection."[54]

Having found the speech to be commercial, Justice Marshall then examined the nature of the expression. In this case, the government did not claim the speech was unlawful or misleading. [55] Marshall concluded that the speech was particularly valuable because it involved reproductive rights. He stated, "advertising for contraceptives not only implicates 'substantial individual and societal interests' in the free flow of commercial information,

[47] Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 62 (1983).

[48] *Id*. at 61. The law at issue, 39 U.S.C. § 3001(e)(2) (2000), derived from 19th century morals legislation designed to "prevent the mails from being used to corrupt the public morals." *Id*. at 70 n.19.

[49] *Id*. at 66–68.

[50] *Id*. at 62.

[51] Youngs is identified only at the bottom of the last page. *Id*. at 62 n.4.

[52] *Id*. at 66–67.

[53] *Id.*

[54] *Id*. at 68.

[55] *Id*. at 69.

but also relates to activity which is protected from unwarranted state interference."[56] Like the abortion services ads in *Bigelow*, Youngs's mailing raised awareness of a constitutional right. Because the mailings involved "truthful information relevant to important social issues," Marshall found the First Amendment interest to be "paramount."[57]

Here, Marshall's application of the test appears to be closer to a balancing test, rather than a strict four-part analysis. Recall that the *Central Hudson* test stated: "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it *at least* must concern lawful activity and not be misleading."[58] At a minimum, commercial speech must be lawful and non-misleading in order to be considered a candidate for constitutional protection. Justice Marshall's approach went beyond examining the lawfulness or truthfulness of the speech; rather, he went so far as to determine whether the speech involved a constitutionally protected right.[59] Presumably, this suggests that the government's interest must be more substantial when it regulates speech involving birth control as compared to regulation of expression that does not involve a constitutionally protected right.[60]

In fact, Justice Marshall seems to argue that there may be a point where the government's interest may never be substantial enough. The government in *Bolger* had asserted an interest in regulating Youngs's material in order to help parents filter out information about birth control from their children. Marshall found the government's blanket prohibition, which blocked truthful information to adult recipients, to be too broad.[61] More importantly, he found that such a prohibition impeded discussion and decision making by parents on a constitutionally protected right.[62] When the government shuts down the "free flow of truthful information" on a decision that adults have a right to make, he argued, the regulation is constitutionally defective "*regardless of the strength of the government's interest.*"[63] If this is the case, any statute that impedes the flow of truthful information relevant to the exercise of a constitutionally protected right would appear to be invalid.

---

[56] *Id*. at 69 (citing Carey v. Population Serv. Int'l, 431 U.S. 678, 700 (1977) (right to reproduction is constitutionally protected)).

[57] *Id*.

[58] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566 (1980) (emphasis added).

[59] *Id*.

[60] *See also* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) (suggesting that courts scrutinize more strictly those laws that appear to be prohibited by any of the first ten amendments).

[61] *Bolger*, 463 U.S. at 72.

[62] *Id*. at 74–75.

[63] *Id*. at 75 (emphasis added).

III. DEFINING COMMERCIAL SPEECH IN A WORLD DEFINED BY CHANGE

The question proposed in *Virginia Pharmacy* was whether speech which does "no more than propose a commercial transaction" is so removed from any "exposition of ideas" that it lacks all First Amendment protection.[64] Justice Blackmun answered in the negative as to truthful commercial speech, suggesting that commercial speech in and of itself has value in the marketplace of ideas. He made an exception—and the Court continues to make an exception—for false commercial speech because "there is no constitutional value in false statements of fact."[65] On the other hand, the First Amendment protects false statements about public figures in the political arena.[66] This distinction is significant because it corresponds to the speech's ultimate level of protection: if the Court finds the speech commercial, it is given lesser First Amendment protection and the government may hold the speaker liable for false statements of fact.

Why the disparate treatment of commercial and political speech? In the arena of political debate, the Court has held that "factual errors are inevitable . . . and the imposition of liability for erroneous factual assertions can dampe[n] the vigor and limit the variety of public debate by inducing 'self-censorship.'"[67] Thus, in order to preserve the "breathing space" needed for freedom of expression to survive (at least in the political arena), the Court will not hold public political speakers liable for libel, absent actual malice.[68] This need for breathing space has been justified by the Court's belief that "speech concerning public affairs is more than self-expression; it is the essence of self-government."[69]

Commercial speech, on the other hand, is not spoken as much out of a need to convey an idea, but because of a desire for profit—at least in theory. Justice Blackmun thought that this distinction was "commonsense."[70] The speech in *Valentine*, for example, was easy to distinguish because Valentine's ulterior motive was obvious. As such, the Court rejected the claim that his speech was political simply because it lacked sincerity. But rarely today is a speaker's sincerity as obvious as it was in Valentine's day. The advertising industry has moved from so-called "reason-why" advertising to the modern

[64] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

[65] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

[66] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[67] *Virginia Pharmacy*, 425 U.S. at 777 (citations omitted).

[68] *N.Y. Times Co.*, 376 U.S. at 271–72.

[69] Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

[70] *Virginia Pharmacy*, 425 U.S. at 771 n.24.

advent of lifestyle advertising and infomercials.[71] Instead of merely proposing a commercial transaction, commercials sell an image, an emotion, or tell a story where a product is placed somewhere within the viewer's consciousness, but not so conspicuously that he knows he is being sold something.[72]

For this reason, some commentators insist that the commercial speech distinction be abolished altogether, leaving the same level of protection for commercial speech as noncommercial speech.[73] They argue that because the line between commercial and noncommercial speech has been blurred, the commercial distinction is (1) too difficult to define and therefore applied arbitrarily,[74] and (2) potentially overinclusive of legitimate speech such as artistic expression, and scientific and religious speech.[75]

In practice, then, the challenge for the Court has been to discern when a speaker is motivated by profits, and when he is motivated by a desire to express his political views. This challenge is particularly difficult when a traditionally commercial speaker, such as a corporation, expresses its views on an important public debate to a potentially commercial audience. This scenario is not uncommon today: Wal-Mart recently took out a number of full-page ads to rebut charges of anti-unionism and gender discrimination;[76] McDonald's has modified its targeted advertising and "super size" menu in response to claims that it targeted children and contributed to the country's obesity problem;[77] and Nike has refuted allegations of sweatshop labor in its overseas factories.[78] When the corporation in each of these cases speaks, is it doing so in order to protect its profits or to express its views on an important public debate? In other words, is such speech commercial or political?

---

[71] RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE 71–77 (Westview Press 1996) (describing a modern era of pervasive consumerism where the "marketplace of ideas" is ruled by those ideas that have commercial value).

[72] *Id*.

[73] Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 627–28 (1990). Kozinski and Banner propose granting the same intermediate level of scrutiny that the Court gives to symbolic speech, as it did in United States v. O'Brien, 391 U.S. 367, 377 (1968). *Id*. at 651.

[74] *Id*. at 648. *See also* La Fetra, *supra* note 10, at 1226 (arguing that the distinction is overly broad and therefore unpredictable, which causes a chilling effect on commercial speakers).

[75] Kozinski & Banner, *supra* note 73, at 639–48; La Fetra, *supra* note 10, at 1218.

[76] *Wal-Mart Launches PR Campaign to Bolster Company's Image*, Reclaim Democracy.org, (Jan. 13, 2005), *at* http://www.reclaimdemocracy.org/walmart/pr_campaign_full-page_ads.html (last visited Apr. 17, 2005).

[77] Bruce Horovitz, *Under Fire, Food Giants Switch to Healthier Fare*, USA TODAY, July 1, 2003, *available at* http://www.usatoday.com/money/industries/food/2003-07-01-junkfood_x.htm (last visited Apr. 17, 2005). Compare this potential legal battle with the well-publicized "McLibel" case (apparently the longest running trial in English court history) in which McDonald's sued two *pro se* defendants for libel after the latter distributed leaflets accusing McDonald's of, among other things, acts of animal cruelty. *See* David J. Wolfson, *McLibel*, 5 ANIMAL L. 21 (1999).

[78] *See infra* text accompanying notes 79-100.

IV. A CASE STUDY: *KASKY V. NIKE*

The *Nike, Inc.* case illustrates the challenge of applying the current commercial speech distinction when commercial and political motivations are nearly indistinguishable. In 1996 and 1997, Nike, a multi-national sports apparel corporation based in Oregon, was alleged by various media reports to be operating unlawful "sweatshops" in its overseas Southeast Asian factories.[79] In response to these allegations, Nike issued press releases, placed ads in major papers, and wrote letters to editors and university athletic directors defending itself, including making statements to the effect that they were complying with applicable international laws and that their workers were not abused.[80] At least some of these statements were made using Nike letterhead.[81] Marc Kasky, a California resident, sued Nike under California false advertising law (known as Unfair Competition Law or "UCL"), claiming that Nike had made false and/or misleading statements of fact.[82] Nike demurred to Kasky's complaint, arguing that it had a First Amendment right to defend itself on an important political issue of public concern, namely, globalization and "sweatshop" labor.[83] The Superior Court sustained Nike's demurrers, after which the Court of Appeals affirmed the judgment.[84] Kasky appealed to the California Supreme Court on the critical issue: whether Nike's speech was commercial or political.[85] If it was political, then Nike could claim protection under the First Amendment. But if it was commercial, Nike could be liable for any false statements, as long as those statements actually misled the public.

The California Supreme Court determined that the statements were commercial speech using what it called a "limited purpose" test which consisted of three factors: (1) the speaker must be someone who is generally engaged in commerce, (2) the audience must be actual or potential customers of the speaker's products, and (3) the content of the message must be commercial in nature.[86] Having formulated its standard broadly, it was essentially a foregone conclusion that Nike's statements were commercial. On the first factor, the press releases and letters were all signed off by Nike employees, and were therefore speakers who are generally engaged in commerce. Second, the statements were directed towards its potential audience, including universities who purchased their products and shoppers who read the newspapers. Finally, the messages themselves were commercial in nature, as they described Nike's own products and labor practices.[87] The Court reasoned that because Nike's

[79] Kasky v. Nike, Inc., 45 P.3d 243, 248 (Cal. 2002).
[80] *Id*.
[81] Nike, Inc. v. Kasky, 539 U.S. 654, 685 (2003) (Appendix to opinion of Breyer, J.).
[82] *Kasky*, 45 P.3d at 248.
[83] *Id*.
[84] *Id*. at 249.
[85] *Id*. at 248–49.
[86] *Id*. at 256.
[87] *Id*. at 258.

speech included facts about its own practices, Nike was in a better position to verify the truthfulness of the statements,[88] consistent with Justice Blackmun's first justification for regulation of commercial speech.[89] As to Blackmun's second justification, the California court held that Nike's speech was durable to the extent that it was motivated, as the lower court found, by profits and sales when making its statements.[90]

Nike appealed to the U.S. Supreme Court, which initially granted certiorari. The Court heard oral arguments in 2003.[91] In a per curiam opinion, the Court, by a vote of 6-3, surprised many by deciding not to decide the case at all. According to Justice Stevens in his concurrence, there were at least three reasons for the Court's decision.[92] First, when the case went up to the U.S. Supreme Court, the California Supreme Court had yet to issue a final judgment on any of the issues.[93] Moreover, a ruling by the U.S. Supreme Court would not necessarily preclude litigation in the California court in later proceedings, nor would it serve the goal of judicial efficiency.[94] Second, neither party had standing in federal court.[95] Because Kasky did not assert a federal claim, and because he brought a private citizen suit in state court, he did not allege an injury to himself that was "distinct and palpable."[96] Nike also lacked standing because, although the California Supreme Court had rejected Nike's demurrer, such a ruling did not constitute a final judgment altering Nike's legal rights.[97] Finally, because of the difficulty of the First Amendment questions and because the record in the lower court had yet to be developed, the case was not yet justiciable.[98] The dismissal by the U.S. Supreme Court thus left the California ruling standing.[99, 100]

---

[88] *Id*.

[89] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

[90] *Kasky*, 45 P.3d at 258. For an example, see *infra* text accompanying note 126.

[91] Ronald K.L. Collins & David M. Skover, *The Landmark Free-Speech Case That Wasn't: The* Nike v. Kasky *Story*, 54 CASE W. RES. L. REV. 965 (2004).

[92] Nike, Inc. v. Kasky, 539 U.S. 654, 657–58 (2003).

[93] *Id*. at 658.

[94] *Id*. at 659–60.

[95] *Id*. at 661.

[96] *Id*.

[97] *Id*. at 662.

[98] *Id.* at 663.

[99] Justice Breyer's dissenting opinion, joined by Justice O'Connor, criticizes the *Kasky* decision, not only arguing that the U.S. Supreme Court had jurisdiction to decide the case, but further arguing that they would have reversed *Kasky* on its merits. *Id*. at 676–81. *See also* La Fetra, *supra* note 10, at 1212; and Elliott L. Dozier, Kasky v. Nike: *The Effect of the Commercial Speech Classification on Corporate Statements*, 33 STETSON L. REV. 1035 (2004).

[100] The case was settled out of court, including a payment of $1.5 million by Nike to a non-profit workers' rights organization, Fair Labor Association. Collins & Skover, *supra* note 91, at 1019.

V. ANALYSIS OF THE *KASKY* LIMITED PURPOSE TEST

The majority's limited purpose test in *Kasky* was designed specifically for review of the constitutionality of false advertising laws (hence the term "limited purpose").[101] The primary concern with unregulated advertising is that the desire for profits will induce sellers to manipulate the public through false statements about its products or services. Not only is false advertising regulation designed to protect the consumer, it also deters the seller from acting in a way our society deems unfair or immoral. In this regard, an effective test for determining whether speech is commercial should focus not merely on what is said, but also on who said it and to whom it was spoken. The limited purpose test does just that.

The first two prongs of the *Kasky* test require a speaker who is generally engaged in commerce and an actual or potential audience for that speaker's products or services.[102] In other words, it requires a speaker who can be presumed to be motivated by a desire to profit from his speech, by virtue of his status as a commercial actor. The corporate identity of a speaker can and should create an initial presumption of commercial rather than political motivation. Corporations, after all, are formed for the purpose of making profits.

One of the primary legal critiques of the *Kasky* test's reliance on speaker identity is that the U.S. Supreme Court has stated at one time that the identity of a speaker should not be determinative of the constitutionality of his speech.[103] In *First National Bank of Boston v. Bellotti*, the Court struck down a Massachusetts law forbidding corporations from making contributions to influence the vote on referendum proposals submitted to the voters, unless the referendum was one which materially affected the corporation. The Court found that the law directly targeted the "type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."[104] This holding arguably would preclude the use of corporate identity to determine the constitutional value of speech.

Bellotti is distinguishable from *Kasky*. The law in *Bellotti* banned all corporate speech on any political issue that did not "materially affect" the corporation. False commercial speech, which the California UCL specifically targets, is not the type of speech that is "indispensable" to decisionmaking in a democracy.[105] Apparently the Massachusetts legislature had presumed that corporate interests would yield "undue influence" on the outcome of an

---

[101] Kasky v. Nike, Inc., 45 P.3d 243, 256 (Cal. 2002).

[102] The limited purpose test follows Justice Marshall's test in *Bolger* with the exception of the advertising format requirement. *Id*. at 257–58.

[103] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); *Kasky*, 45 P.3d at 270–71 (Brown, J., dissenting); La Fetra, *supra* note 10, at 1219–28.

[104] *Bellotti*, 435 U.S. at 777 (footnote omitted).

[105] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (stating that "there is no constitutional value in false statements of fact").

election and thereby "destroy the confidence of the people in the democratic process."[106] Under the scheme it devised, however, the identity of the speaker was the *only* factor used to determine the speech's protection. The result was that the government affirmatively silenced a distinct segment of political speakers based solely on those speakers' identities.[107]

By contrast, the California UCL silences only those who speak falsely or misleadingly. It does not outright prohibit political speech—it is intended to be applied to business acts, practices, and advertising.[108] It does not favor one type of commercial speaker over another: it prohibits false advertising regardless of the speaker's identity and interest. The limited purpose test also does not rely solely on the identity of the speaker, but considers the audience and content of the message as well. *Bellotti* in no way precludes identity from being one of a combination of factors in the consideration of whether speech is commercial.

VI. BLURRING THE LINES: INEXTRICABLY INTERTWINED SPEECH

While the limited purpose test closely follows a *Bolger* analysis of commercial speech, one noticeable difference is its removal of advertising format as a factor. By doing this, the *Kasky* court tacitly acknowledged the realities of the commercial world. Today, profit-motivated messages appear in all forms. Given the nature of modern communication, one would think that there must exist some kind of speech that is at once commercial and noncommercial. As the Court has acknowledged in the area of fighting words, "much linguistic expression serves a dual communicative function."[109] Some have suggested that the commercial elements of Nike's speech, for example, were "inextricably intertwined" with the noncommercial elements.[110] If that is the case, U.S. Supreme Court precedent would suggest that Nike's speech should be fully protected.[111]

In its most recent ruling on inextricably intertwined speech, the Court offered a relatively narrow definition.[112] The case in *Board of Trustees of the State University of New York v. Fox* arose when American Future Systems

---

[106] *Bellotti*, 437 U.S. at 789.

[107] *Id*. at 784 ("The 'materially affecting' requirement . . . amounts to an impermissible legislative prohibition of speech based on the *identity of the interests* that spokesmen may represent in public debate over controversial issues and *a requirement that the speaker have a sufficiently great interest in the subject to justify communication*") (emphasis added).

[108] *Kasky*, 45 P.3d at 249.

[109] La Fetra, *supra* note 10, at 1217 (citing Cohen v. California, 403 U.S. 15, 26 (1971)).

[110] *Kasky*, 45 P.3d at 275 (Brown, J., dissenting); *Id.* at 267 (Chin, J., dissenting); Dozier, *supra* note 99, at 1059.

[111] Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988); Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989).

[112] *Bd. of Trs. of the State Univ. of N.Y.*, 492 U.S. at 474.

(AFS) held a "Tupperware party"[113] in a college dormitory on State University of New York's campus. SUNY regulations prohibited "private commercial enterprises" from operating on campus, including in dormitories.[114] After an AFS representative was arrested during one of these parties, Fox and fellow students sued for declaratory judgment, claiming a violation of their First Amendment rights.[115] Fox argued that any commercial speech regarding the sales of housewares was inextricably intertwined with noncommercial speech regarding "how to be financially responsible and how to run an efficient home."[116] Justice Scalia, writing for the majority, found that speech is "inextricably intertwined" only when the commercial characteristics are *required* by force of law or when it is impracticable to speak one without the other.[117] By contrast, in this case:

> [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. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.[118]

Like the Court in *Valentine* and Justice Marshall in *Bolger*, Justice Scalia reiterates that a speaker's motivation will be determinative of whether his speech will be considered commercial. The assumption is that if a speaker is required by law to include a commercial message in his otherwise noncommercial speech, his speech is not motivated primarily by profits.

Despite Justice Scalia's narrow interpretation of the doctrine, Justice Brown, dissenting in *Kasky*, drew on labor union precedent to suggest that "inextricably intertwined" speech can involve speech motivated by economic profits.[119] In *Thomas v. Collins*, the U.S. Supreme Court held that a union organizer's speech was protected, although motivated by economic self-interest, because it was "inextricably intertwined" with noncommercial elements (the contribution to an important public debate on unionism).[120] The court reasoned that "[t]he feat would be incredible for a national leader . . . lauding unions and their principles . . . not also and thereby to suggest attachment to the union by becoming a member."[121] The majority's underlying

[113] Justice Scalia, writing for the majority, described Tupperware parties as consisting of "demonstrating and offering products for sale to groups of 10 or more prospective buyers at gatherings assembled and hosted by one of those prospective buyers (for which the host or hostess stands to receive some bonus or reward)." *Id*. at 472.

[114] *Id*. at 471–72.

[115] *Id*. at 472.

[116] *Id*. at 474.

[117] *Id*. (citing Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796 (1988)).

[118] *Id.* at 474.

[119] Kasky v. Nike, Inc., 45 P.3d 243, 275 (Cal. 2002) (Brown, J., dissenting).

[120] Thomas v. Collins, 323 U.S. 516 (1945).

[121] *Id*. at 535.

fear was that if the government were allowed to regulate intertwined speech, it would have a chilling effect on an important debate such that "[n]o speaker . . . safely could assume that anything he might say upon the general subject would not be understood by some as an invitation."[122]

Justice Brown found Nike's situation analogous to the union organizer.[123] Nike, practically speaking, could not comment on the issues of labor exploitation and economic globalization without referencing its own labor practices because "Nike's overseas labor practices *are* the public issue."[124] Just as any union organizer's speech would inevitably be seen as an invitation to join the union, even an indirect product reference by a large corporation like Nike could be seen as "promoting" its product.[125] Thus, the dissent argued that Nike's speech was inextricably intertwined and should therefore be protected.

The problem with the dissent's argument is that Nike affirmatively linked its own practices to the issue. In one letter to the editor, Nike wrote, "[d]uring the shopping season, we encourage shoppers to remember that Nike is the industry's leader in improving factory conditions."[126] This statement was clearly intended to influence consumer decisionmaking, yet has little to do with the political issue. Another particularly revealing fact as to Nike's primary profit motivation is that at least one of their letters to a university athletic department was written on Nike letterhead and signed by its Director of Marketing.[127] Nike could have had its Vice President for Corporate Responsibility sign off on its statements—or could have had its message relayed through compliance reports published by a third party watchdog, such as the Fair Labor Association. Speech from the Fair Labor Association would not qualify as commercial under the limited purpose test, as it is not an organization generally engaged in commerce. Even though the Vice President for Corporate Responsibility would likely meet the limited purpose test,[128] the test itself may have looked different under different facts; in other words, had Nike come into court with better evidence of its political motivation, the outcome may have been different. Instead, it chose to express its "political" message on stationery that featured its unmistakably commercial logo at the top. This attachment of a commercial logo to so-called political speech likely

[122] *Id*.

[123] *Kasky*, 45 P.3d at 275 (Brown, J., dissenting).

[124] *Id*. at 276 (emphasis in original).

[125] *Id*. Justice Marshall also argued that "a company with sufficient control of the market for a product may be able to promote the product without reference to its own brand names." Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67 n.13 (1983).

[126] Brief for Appellant at 6–7, Kasky v. Nike, 45 P.3d 243 (Cal. 2002) (No. S081859).

[127] Nike Inc. v. Kasky, 539 U.S. 654, 685 (2003) (App. to opinion of Breyer, J.), *Cf*. *Nike*, 539 U.S. at 676–77 (Breyer, J., dissenting) (arguing that the content of the letter provided facts that would be useful for participants in the public debate on global labor practices).

[128] The majority specifically identified "Nike and its officers and directors" as being "engaged in commerce" for the purposes of the test. *Kasky*, 45 P.3d at 258.

damaged Nike's credibility (not unlike Valentine) in arguing that its statements were primarily motivated by its desire to participate in a political debate.

Even despite the *Kasky* court's determination that its speech was commercial, Nike could have and can still speak on the issue of global labor without fear of liability, as long as it does not make representations about its own products and practices. It can also speak about its own practices, as long as it does so truthfully. As the majority in *Kasky* stated from the outset of its opinion:

> [The court's holding] in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully.[129]

In assessing whether this caused a chilling effect on Nike, one should compare Nike's statements prior to the lawsuit to those after settlement. Initially, according to Kasky's brief, Nike had made statements as to its factories' specific compliance with laws governing wages, working hours, occupational health-and-safety standards and environmental conditions.[130] Nike's current statements, published on their website, do not promise that its factories comply with fair labor standards.[131] Instead, they express Nike's general condemnation of labor exploitation, particularly of children.[132] By acknowledging the difficulties of working with contract factories in third world countries, Nike presents consumers with an honest portrayal of its commitment to its goals.[133] Thus, Nike's speech was chilled as to statements about its actual compliance with fair labor standards.[134]

Nevertheless, if Nike wanted to speak directly on its own products and practices, it had options. For example, it could have made a statement that it spends a certain amount of money with the hopes of ensuring factory

---

[129] *Id*. at 247.

[130] Brief for Appellant at 6, *Kasky*, (No. S081859).

[131] *Workers & Factories: Code of Conduct*, Nike, *at* http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=code (last visited Apr. 17, 2005) (Nike's website states: "The existence of the Code, by itself, cannot ensure compliance.").

[132] *Id*.

[133] "Our goal is to do business with contract factories that consistently demonstrate compliance with standards we set and that operate in an ethical and lawful manner. The path to that goal is paved with significant, complex and ongoing challenges." It concludes by saying, "It's not a perfect record and it never will be, but we're committed to the process." *Workers & Factories: Our Business Model and Its Challenges*, Nike, *at* http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=businessmodel (last visited Apr. 17, 2005).

[134] Nike has also stated that as a result of the *Kasky* decision, it chose not to release its Corporate Responsibility Report, as well as restrict its communication on social issues that could potentially reach California consumers. Nike, Inc. v. Kasky, 539 U.S. 654, 682–83 (2003) (Breyer, J., dissenting).

compliance with fair labor standards. It then could pair that statement with contact information for specific factories (or direct consumers to its website for such information), so that consumers can do their own investigation as to factory compliance. In fact, Nike currently lists contact information for the factories that produce various university apparel.[135] This option has many advantages: it defends Nike from the allegations by showing it is working in good faith, it creates an incentive for the factory representatives to be accountable and it would probably limit restitutionary damages to only those products manufactured in factories making statements that turn out to be false.[136]

VII. REGULATING COMMERCIAL SPEAKERS: CORPORATE ADVANTAGES

The *Kasky* dissent analogized Nike's situation to the speech of a union organizer in *Thomas*.[137] But its analogy is misplaced. Unlike *Thomas*, where the government was protecting a union organizer from the power of his employer, in *Kasky*, the power dynamic is reversed. Part of the reason Congress passed the Fair Labor Standards Act was to level the respective bargaining power of employees and employers.[138] Nike is a large, influential corporation, with significant power to deceive consumers and to do so on a larger scale than most companies. Nike is also in a better position than the consumer to determine whether its statements are true and it has the resources to communicate through channels of mass media.

Corporations, by virtue of their corporate status, have certain other advantages over individual commercial speakers. From an economic standpoint, for example, the chilling effect is not as serious a consideration for corporations than it might be for an individual. The potential liability of a false statement might be a cost that a corporation like Nike can bear without affecting its speech at all. The harm of chilling a commercial speaker is simply not as great when the speaker is a corporation whose bottom line is profits: a corporation is more likely to take the measured risk of speaking before checking its facts when it has built the cost of liability into its outlay. Unlike a corporation, the individual commercial speaker does not necessarily have the same profit-driven motivation to assume the risk of liability. To be fair, in the

---

[135] *Workers & Factories: Collegiate Licensing*, Nike, *at* http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=collegiate (last visited Apr. 17, 2005). In fact, Nike further reduces potential for liability by stating that the information about the University of Oregon apparel "is accurate on the date posted, 29 October, 2004, to the best of NIKE Inc.'s knowledge." *Workers & Factories: Collegiate Licensing - University of Oregon*, Nike, *at* http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=collegiate&subcat=oregon (last visited Apr. 17, 2005).

[136] The UCL provides restitutionary damages directly resulting from deceptive statements. Kasky v. Nike, Inc., 45 P.3d 243, 249 (Cal. 2002).

[137] *Id.* at 275 (Brown, J., dissenting).

[138] 29 U.S.C. § 202 (2000).

Kasky case, the stakes were high: the UCL provides restitutionary damages for unfair practices, meaning that Nike would have to refund significant profits.[139] Moreover, Nike could have been liable under the UCL not only for false statements, but also for those in which "members of the public are likely to be deceived."[140] But liability alone is not reason enough to prohibit some regulation of corporate speech.

Corporations have other advantages. They often have the power and resources to change the laws themselves. In fact, in an effort to prevent future UCL claims against it, Nike and a number of big businesses funded an initiative to prevent individuals like Marc Kasky from bringing suit under California's UCL.[141] Prior to the election, the UCL granted private citizens a right of action on behalf of the general public, even if the individual was not yet harmed by the allegedly false information. [142] In November 2004, the initiative passed; the law has now been amended so that only those individuals who have already been harmed by false advertising may bring suit.[143]

Finally, some commentators, such as Professor C. Edwin Baker, have insisted that a corporation, lacking in individual flesh and blood experience, should never be entitled to the same kind of protection that an individual deserves.[144] Because the relationship between corporations and individuals is structurally determined, the corporation's underlying profit interest will always inform its speech and thereby distort its discourse.[145] The government thus has a greater interest in regulating corporations than it does in regulating an individual, in order to ensure the integrity of that discourse.[146] One means of achieving a level discourse is to subject the corporation's speech to a higher degree of regulation than individual speech.[147]

VIII. MOTIVATION RULES: A PROOF SCHEME DESIGNED TO IDENTIFY COMMERCIAL SPEECH

A central theme running through the Supreme Court's tests for commercial speech is that to be commercial, speech should be motivated by commercial

[139] *Kasky*, 45 P.3d at 249.

[140] *Id*. at 250.

[141] *Corporations Attempt to Gut the Nation's Toughest Consumer Protection Law: California's Unfair Business Practices Act*, ReclaimDemocracy.org (Feb. 18, 2004), *at* http://reclaimdemocracy.org/corporate_accountability/california_unfair_business_practices_attack.html (last visited Apr. 17, 2005).

[142] *Kasky*, 45 P.3d at 249.

[143] Cal. Sec. of State: Cal. Gen. Election: State Ballot Measures-Statewide Returns, *at* http://vote2004.ss.ca.gov/Returns/prop/00.htm (last visited Apr. 17, 2005).

[144] C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in* Nike, 54 CASE W. RES. L. REV. 1161, 1178–83 (2004).

[145] *Id*. at 1174.

[146] *Id*.

[147] *Id*.

promptings.[148] It is often difficult to distinguish between commercial and noncommercial motives. Because of the difference in the level of protection given to commercial and noncommercial speech, an effective commercial speech distinction must be able to distinguish between the two kinds of motivation. In order to do this, the Court might consider adopting a proof scheme similar to that used in federal employment discrimination cases.

When a plaintiff brings a federal employment discrimination action against his employer, he must first make a prima facie case by presenting evidence of some discriminatory motive.[149] The defendant-employer then has an opportunity to present a nondiscriminatory reason for its action.[150] Finally, the plaintiff is given a chance to show that the employer's nondiscriminatory reason is merely a pretext for the discrimination.[151]

Similarly, when making a determination of the commercial nature of speech, a court dealing with the question of a speaker's motivation might presume that a corporation's speech is commercial once a plaintiff proves a prima facie case. This presumption would be satisfied, if for example, the limited purpose test were met. A plaintiff in such a case would have to allege a corporation's status as a corporation, its commercial audience, and its speech pertaining to its own product or practice. The corporation then has an opportunity to present a noncommercial reason that prompted its speech. The plaintiff must then have a chance to prove that the noncommercial reason offered by the corporation is merely a pretext to avoid liability.

This proof scheme gives both sides fair opportunity to make their case, while helping the courts sort out the often difficult task of determining the motivation behind the speech. It also addresses many of the problems with the current commercial speech distinction. First, it affirms *Kasky* by assuming that corporate speech is more likely commercial because it is spoken by someone generally engaged in commerce. This avoids upsetting *Bellotti* because although there is a presumption against the corporation, identity alone is not dispositive as to its degree of protection. The proof scheme also addresses the pretext problem (immunization of commercial speech by artificial attachment to an important debate), which was first seen in *Valentine*[152] and again noted as a central concern by Justice Marshall in *Bolger*.[153] In Nike's case, it could show

[148] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (requiring a commercial proposal); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66-67 (1983) (requiring a commercial motivation); and Cent. Hudson Gas and Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 561 (1980) (requiring an economic interest).

[149] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[150] *Id*.

[151] *Id*. at 804.

[152] Valentine v. Chrestensen, 316 U.S. 52, 55 (1942).

[153] *Bolger*, 463 U.S. at 68.

that its speech was not a pretext, but was "necessitated" and "prompted" by the larger public debate.[154]

If one assumes that speech can be motivated by both commercial and noncommercial promptings, then a "mixed motive" analysis, also drawn from employment discrimination cases, might serve as another viable model.[155] In fact, it may well be that because corporations are formed for the purpose of making profits, all corporate speech will be presumed to be commercial. In a mixed motive proof scheme, the presumption of commercial motivation is tempered by the opportunity for a corporation to present a noncommercial motivation. Thus, after plaintiff's prima facie case, a defendant admits commercial motivation but presents a noncommercial motivation, claiming that it would have spoken on the issue regardless of its effect on profits.[156] A successful defense would either limit the defendant corporation's liability (as in employment discrimination cases) or relieve it of liability entirely.

This scheme would alleviate much of the concern of the chilling effect on corporations which, under the UCL, could be liable for significant restitutionary damages. Also, by adopting a mixed-motive proof scheme, smaller companies that are motivated at least in part to speak on a political issue might not be liable for the extent of damages for which they otherwise would have been liable. More importantly, this model allows corporations to speak on important public issues without fear of strict liability.

IX. COMMERCIAL SPEECH JUSTIFIED: THE IMPORTANCE OF CONSUMER PROTECTION

The blurring of commercial and noncommercial speech should not lead to the abandonment of the commercial speech distinction. On the contrary, this blurring suggests that advertisers have an even greater opportunity to deceive consumers, without the consumer even knowing it. False and deceptive advertising harms consumers. Even Kozinski and Banner agree that the government has a substantial interest in preventing consumer fraud.[157] The government can and should have an interest in preventing economic harm to consumers. False advertising induces consumers to act on misinformation, thereby creating such harm. Yet it is not just the single economic transaction that makes a difference. Rather, "[i]t is a matter of public interest that those decisions, *in the aggregate*, be intelligent and well informed."[158] Because the sheer volume of advertising to which consumers are subjected continues to

[154] Kasky v. Nike, Inc., 45 P.3d 243, 266 (Cal. 2002) (Chin, J., dissenting).

[155] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[156] *Id*. at 242–43.

[157] Kozinski & Banner, *supra* note 73, at 651.

[158] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (emphasis added).

climb,[159] the aggregate economic harm should continue to be a matter of public interest. The commercial speech distinction provides a means for courts to prevent that harm.

There is also a moral dimension to the government's interest in regulating false advertising: the speaker profits from his deceptive practices. Our society's disdain for such conduct explains why the UCL, for example, requires a defendant liable for false advertising to give back profits he gained from the deception. Advertising undermines our autonomy in more profound ways than merely causing us to act irrationally based on misinformation.[160] As Collins and Skover pointed out: the day of reason-why advertising is long gone.[161] Instead, advertisers seek to manipulate consumers on a deeper psychological level, to create a relationship between the consumer and its products.[162] This type of advertising, some have argued, has led to unprecedented social harm.[163]

X. CONCLUSION

The commercial speech distinction has developed into a complex, sometimes confusing principle upon which the Supreme Court has justified seemingly conflicting outcomes. This conflict is not necessarily a reflection of a poor definition; rather, it reveals the complexity of human motivation behind the speech that the Court is seeking to define. The First Amendment should protect most commercial speech; but insofar as the primary motivation for such speech is profit, there exists the danger of consumer deception. The commercial speech distinction continues to serve an important role in this regard: in

[159] "Each day of our lives, 12 billion display ads, 2½ million radio commercials, and over 300,000 television commercials are dumped into the collective consciousness." COLLINS & SKOVER, *supra* note 71, at 78.

[160] Tamara R. Piety, "*Merchants of Discontent": An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE U. L. REV. 377, 401–07 (2001).

[161] COLLINS & SKOVER, *supra* note 71, at 71–77.

[162] Piety, *supra* note 160, at 409.

[163] *Id*. at 434–50 (outlining social harms such as the addiction of consumers to harmful products, the exploitation of children, and the inequality of women).

distinguishing self-serving speech from speech that is valuable in and of itself, the distinction provides the government with a means of protecting the public from economic harm, while preventing commercial actors from profiting from their deception.