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WHY THE ACLU WAS WRONG ABOUT
NIKE, INC. V. KASKY

Tamara R. Piety*

I. INTRODUCTION

Nike, Inc. v. Kasky\(^1\) was the great 2003 commercial speech “case that wasn’t.”\(^2\) When the Supreme Court agreed to hear the case, it generated a lot of press coverage\(^3\) with the expectation that a major revision of the commercial speech doctrine would be announced. And then the Court dismissed the writ of certiorari as improvidently granted.\(^4\) I was invited to offer my observations on this case because I contributed to the argument in an amicus brief on behalf of the Sierra Club for the respondent, Marc Kasky.\(^5\) The American Civil Liberties Union (“ACLU”), the organization of which our honoree, Nadine Strossen, is president, filed an amicus brief on behalf of the petitioner, Nike, Inc. Given my support for Kasky and the Sierra Club, it should come as no surprise that I believe Nike’s position was wrong. But I think the ACLU was wrong too. Because I believe that the triumph of Nike’s position would mean less freedom of speech rather than more, I think the ACLU should have been on Kasky’s side as well. This article explains why and also why the ACLU’s reasons for defending Nike may represent an example of what Richard Delgado has referred to as “First Amendment formalism.”\(^6\)

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3. See e.g. id. at pt. I (describing some of the press coverage).
4. Nike, 539 U.S. at 655.
6. See Richard Delgado, First Amendment Formalism is Giving Way to First Amendment Legal Realism, 29 Harv. Civ. Rights-Civ. Libs. L. Rev. 169 (1994). The appropriate response to First Amendment formalism may be a little realism. Professor Owen Fiss identified what Professor J.M. Balkin later called “ideological drift” in the Supreme Court’s First Amendment decisions of the seventies. Owen M. Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405 (1986); see J.M. Balkin, Some Realism about Pluralism: Legal Realist Approaches to the First Amendment, 1990 Duke L.J. 375, 383 (1990). Professor Fiss noted: “What startled me, however, was the pattern of decisions: Capitalism almost always won.” Fiss, supra, at 1407. This result he claimed “seemed to impoverish, rather than enrich public debate.” Id.
First Amendment formalism involves reflexively concluding that if it appears something falls into the covered speech category, any regulation or liability for such speech must be wrong rather than considering the possibility that the doctrine itself is insufficiently "nuanced, skeptical, and realistic"\(^7\) for resolving the problem presented. Such formalism relies on abstractions and absolute categories that compel results. Thus, invoking the First Amendment with regard to speech immediately triggers a species of this formalism that some would describe as "First Amendment absolutism"—the idea that once put in the category of "speech" no quarter should be given to anything that smacks of regulation lest it take us down a slippery slope to censorship.\(^8\) This was the position taken by the ACLU in Nike. Having characterized the speech in question as protected speech and characterized Nike as a speaker entitled to protection, the conclusion for the ACLU was clear—Nike’s "right" to freedom of speech must be protected.

Of course in some literal sense the case involved speech. However, it is not the case that all speech, as the word is ordinarily understood by the layperson, constitutes "speech" for purposes of the First Amendment. "[T]he freedom of speech does not encompass freedom to fix prices, breach contracts, make false warranties, place bets with bookies, threaten, extort, and so on."\(^9\) Much speech is not protected. Thus, a key issue in Nike was what sort of speech was involved—political or expressive speech (highest protection), commercial speech (limited protection), or some category of wholly unprotected speech.\(^10\) Kasky argued that Nike’s speech was commercial speech that was (ultimately) unprotected because it was false. And a "nuanced, skeptical, and realistic" analysis of the facts suggests that this reading was correct. It was certainly correct that at the stage of a motion to dismiss, Kasky’s allegations that Nike’s speech was false had to be taken as true.\(^11\)

But ultimately this case was not so much about freedom of speech as about what sort of "person" a corporation is and whether the government is able to exercise control over information in the market—the literal marketplace, not "the marketplace of ideas."\(^12\) What Nike’s executives wanted was the unfettered ability to issue whatever statements its representatives thought would advance the company’s interests, even if they knew these statements to be untrue. Absolving for-profit corporations from liability for false statements of fact does not seem calculated to lead to more freedom of speech, or any other kind of freedom for that matter. Certainly there will be less real information available to consumers and the public at large. I have written about many of the issues raised by this case more extensively elsewhere: Nike’s claim for a right to lie;\(^13\) why

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7. Delgado, supra n. 6, at 170.
9. Id. at 270–71 (emphasis in original, footnote omitted).
11. See e.g. Sistrunk v. City of Strongsville, 99 F.3d 194, 197 (6th Cir. 1996) (Pursuant to section 12(b)(6) of the Federal Rules of Civil Procedure, all allegations in a complaint need to be taken as true.).
some public relations speech (as in the Nike case) should be treated as commercial speech;\(^{14}\) and the undesirability of thinking of the corporation as a speaker with rights equivalent to those of a natural person.\(^{15}\) Those interested in a more detailed exposition and defense of the positions, which are merely sketched here, should consult these articles. Here I selected for discussion what I think are the most problematic of the arguments offered by the ACLU in support of Nike:

1. Nike’s status as a for-profit corporation had no bearing on the analysis of its speech.\(^{16}\)

2. The commercial speech doctrine does not, and ought not to, encompass speech that is issued outside of the product advertising context.\(^{17}\)

3. Allowing Kasky’s suit to proceed past a motion to dismiss would be unfair and result in an unbalanced debate, ultimately leading to less information.\(^{18}\)

The first two propositions can be supported by some case law.\(^{19}\) But as always, there is also authority to support the contrary argument. It is difficult to distill a clear picture of the commercial speech doctrine from the Court’s opinions. However, none of the three propositions are supported by an analysis of the factual context in which this case took place. Indeed, given this context, acceptance of these propositions seems ill-advised from the standpoint of furthering freedom—political, economic, or social. Each point is discussed below. First, in Part II, I describe the doctrinal and factual background of Nike. Then, in Part III, I return to these three specific propositions and offer arguments for why, ultimately, the ACLU’s position is not persuasive.\(^{20}\)

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16. See ACLU Br., supra n. 12, at *20.
17. See id. at *8.
18. See id. at *22.
19. For example, First National Bank of Boston v. Bellotti is often cited in support of the proposition that the status of the speaker as a corporation is not relevant to the question of the scope of First Amendment protection. 435 U.S. 765, 777 (1978) (“The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”). However, the expansiveness of this assertion was cast into question when, in a later decision, the Court did that very thing, that is, concluded that the speaker’s status as a corporation, or in that case, a professional organization largely funded by for-profit businesses, did alter the First Amendment calculus for purposes of analyzing the level of protection that would be afforded such speech. Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990). Justice Marshall noted: “[T]he unique state-conferr[ed] corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures.” Id. at 660. The Court is referring to campaign expenditures as a form of protected speech. As I discuss further below, other decisions can be read as describing an advertising/non-advertising distinction for purposes of discerning what constitutes commercial speech. See infra nn. 112–117 and accompanying text.
20. Those who are familiar with the Nike case and the commercial speech doctrine may want to skip ahead to Part III.
II. BACKGROUND

A. The Set-Up

Nike, Inc., as most people are undoubtedly aware, is the world’s largest manufacturer of athletic apparel. Watch football, basketball, track, golf, or almost any sport, and you will see “the Swoosh”—Nike’s logo—everywhere. Nike has hundreds of contracts with colleges and universities for the exclusive use of its apparel by the school’s teams. Over the years it has had endorsement contracts with many professional athletes such as Michael Jordan and Reggie White.

In the mid- to late 1990s, Nike began to come under attack for its labor practices. Bob Herbert, a popular columnist for the New York Times, criticized Nike on this score. Others followed suit. Similar criticisms surfaced on college campuses. Leaders of grassroots, campus-boycott movements asked their institutions to boycott Nike because of its labor practices. These movements sought to use the institutional contracts to put pressure on Nike to change its labor practices.

Nike responded with a public relations campaign. This public relations campaign included, but was not limited to, letters to athletic directors, letters to university presidents, letters to the editor, and “advertorials.” The purpose of this public relations campaign was, I submit, not to weigh in on the debate on globalization (as Nike later claimed), a goal with rather dubious connections to shareholder welfare and its corporate purpose were it merely a contribution to a public debate. Rather, it represented an effort by Nike’s management to maintain the value of the company by influencing public perception. And thus Nike sought to respond to university presidents and athletic directors who contemplated not renewing their contracts on the basis of these allegations about Nike’s labor practices and convince them to continue doing business with Nike, thereby boosting sales and increasing or reviving investor confidence. The public relations campaign was simply good business. This was all well and good. No one would suggest that Nike could not defend itself against untrue allegations. Surely, Nike should be permitted to publicize the truth about its company, its practices, or any other matter related to its operation. And Nike was certainly better placed than any other entity or person to shed light on its own practices. There was only one problem: According to Kasky, much of what Nike said in this public relations campaign was

22. Id.; id. at ¶ 20.
23. See Collins & Skover, supra n. 2, at 975 (describing some of the public criticisms of Nike).
24. Id. at 970, 970 nn. 10–11.
25. Id. at 970–71, 970–71 nn. 12–18.
26. The appendix to Justice Breyer’s dissent in the Nike case is an example of one such letter to university presidents and athletic directors. See Nike, 539 U.S. 654 (Breyer, J., dissenting).
demonstrably untrue. And, according to Kasky, the Nike executives responsible for making the statements knew that these statements were untrue.

B. The Suit

Marc Kasky is a private citizen in California. He sued Nike claiming that many of the statements made in the context of Nike’s public relations campaign to refute the sweatshop allegations were not true and thus violated the state’s law governing unfair competition and false advertising. Kasky sued under a California law that provided that any citizen of California could sue on behalf of all of the citizens of the state of California for violations of unfair trade practices, false advertising, and, in this case, negligent misrepresentation and (most importantly) fraud and deceit.

In response to this lawsuit Nike filed a demurrer claiming that the First Amendment acted as an absolute shield to any liability for either negligent or intentional misstatements. Of course a demurrer is like a motion to dismiss for failure to state a cause of action. In essence Nike claimed there was no such cause of action. However, given that the second count of Kasky’s complaint alleged fraud and deceit, this was a fairly radical claim. Nike’s demurrer was a statement that the claim for fraud and deceit failed to state a cause of action because it, Nike, was absolutely protected by the First Amendment and thus could not be sued—even if its representatives had intentionally lied. It is worthwhile to pause to consider the significance of this claim. It is no small thing to claim that the government is “absolutely barred” from regulating or providing a remedy for fraud.

As every lawyer knows at the motion to dismiss stage, everything pleaded in the complaint must be taken as true. As a consequence, any court should have assumed for purposes of a motion to dismiss, that Kasky’s allegations about what Nike said and about what it knew were true. Nevertheless, the California trial court and appellate courts agreed with Nike—that its speech was protected speech barring the lawsuit—and dismissed the suit with prejudice. A dismissal with prejudice means a case cannot be re-filed under any construction of the facts or artful re-pleading. And, although Nike later came to disavow this position and argued to the Supreme Court that Kasky’s case

28. See Compl., supra n. 21, at ¶¶ 74–84.
29. Id.
30. Id. at ¶ 8.
31. Id. at ¶¶ 74–84.
32. Id. at ¶ 8 (citing the California Business and Professions Code). Interestingly, this aspect of the California law was amended in 2004 by Proposition 64, which eliminated the private attorney general provision. See Piety, supra n. 13, at 195 n. 256 (discussing Proposition 64). Not surprisingly many business interests lobbied heavily for Proposition 64.
33. See Compl., supra n. 21, at ¶¶ 74–84.
34. See Kasky, 45 P.3d at 248 (citing U.S. Const. amend. 1). For more a detailed discussion of the procedural posture of the case, see Piety, supra n. 13.
35. Compl., supra n. 21, at ¶¶ 78–80.
36. Before changing its strategy in the U.S. Supreme Court, Nike argued to the trial, appellate, and supreme court of California that Kasky’s suit was “absolutely bar[red].” See e.g. Ans. to Pet. for Rev., Kasky v. Nike, Inc., 2000 WL 34449849 at *8 (May 16, 2000).
37. See supra n. 11 and accompanying text.
38. Kasky, 45 P.3d at 248–49.
suffered from a pleading defect,\textsuperscript{39} it initially and forcefully proclaimed that there was no possibility of re-pleading or re-filing because Kasky's case was "absolutely barred" by the First Amendment.\textsuperscript{40}

A divided California Supreme Court disagreed with these lower courts and held that some of the speech was possibly commercial speech\textsuperscript{41} and, if it was commercial speech, it could be susceptible to regulation and/or recovery for false claims. Therefore, the Court remanded the case for trial.\textsuperscript{42} This decision did not mean that Kasky won. It simply meant that the case could go forward. And, it could go forward into that area that proved troublesome for the tobacco industry—the discovery stage.

Discovery was undoubtedly what Nike's management hoped to avoid. At least this seems the best explanation for why it did not invoke any of the more powerful arguments at its disposal for getting rid of the case, such as a SLAPP,\textsuperscript{43} defamation, or disparagement case.\textsuperscript{44} Had it brought any such action Nike would have been the plaintiff. As the plaintiff the burden would be on Nike to prove that Kasky's allegations were untrue or frivolous, a burden Nike would have a hard time proving if Kasky's allegations had a modicum of evidentiary support. Thus, instead of submitting to discovery, Nike petitioned for certiorari to the Supreme Court of the United States.\textsuperscript{45} The Court granted certiorari\textsuperscript{46} and oral argument was heard.\textsuperscript{47} And, as indicated above, many court watchers thought the commercial speech doctrine was about to be subjected to a substantial revision. These predictions were not realized.

The Court dismissed the case announcing that certiorari had been "improvidently granted."\textsuperscript{48} Nevertheless, the decision offered some indications in the concurring and dissenting opinions as to where the Court might be inclined to go in future cases. What these opinions had in common was they largely reflected acceptance of Nike's arguments on the substance of the dispute—even if the Court was not prepared to announce a new doctrine or a major revision of the existing one.\textsuperscript{49} Nike had convinced the Court, or at least those members who voiced their views, that what it was engaging in was principally speech on matters of public concern rather than marketing. Put another way, both the dissent and the concurrence seemed prepared to say that much of what Nike had disseminated in its public relations campaign was not commercial speech.

\begin{footnotes}
\item[39] See Piety, supra n. 13, at 168–78 (discussing this aspect of the case); supra n. 36 and accompanying text.
\item[40] Kasky, 45 P.3d at 248 (quoting Nike's demurrer) (internal quotation marks omitted).
\item[41] Id. at 262–63.
\item[42] Id.
\item[43] "SLAPP" stands for Strategic Lawsuits Against Public Participation. Collins & Skover, supra n. 2, at 974, 974 n. 34 (providing more descriptions and examples).
\item[44] See e.g. Bose Corp. v. Consumers Union, 466 U.S. 485 (1984).
\item[45] See Nike, 539 U.S. at 657.
\item[46] Id.
\item[48] Nike, 539 U.S. at 655.
\item[49] Id. at 660 (Stevens, J., concurring) (suggesting the speech was mixed); id. at 665, 668 (Breyer, J., dissenting) (agreeing that Kasky's suit threatened to imbalance the debate). Justice Kennedy dissented from the dismissal without opinion. Id. at 665.
\end{footnotes}
C. **Doctrine: Commercial Speech**

At this point it is necessary to raise the question: What is commercial speech? No one really knows. The definitions are murky, and lines between types of related marketing speech and regulated speech are unstable.\(^{50}\) Indeed, that was one of the problems in the *Nike* case—the uncertainty of defining “commercial speech.” If Nike’s speech was “commercial” it was protected, but nevertheless subject to regulation for its truth pursuant to the commercial speech doctrine. If it was not “commercial,” it could be either completely unprotected falsehood, or protected political speech that, while not completely incapable of being regulated, is subject to strict scrutiny of governmental attempts to regulate it.\(^{51}\)

It is hard to say what commercial speech is, but, whatever it is, the doctrine in its current form has only existed since 1976 and the decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,\(^ {52}\) which set up commercial speech as a category of speech regulation subject to intermediate scrutiny. Prior to 1976, commercial speech was not protected at all.\(^ {53}\) And whether the limitations on commercial speech began then or the case simply expressed existing doctrine, we know that in 1942 at least commercial advertising was not considered protected speech. That was the year the Supreme Court confronted, in *Valentine v. Chrestensen*,\(^ {54}\) a mixed speech case involving a handbill that on one side offered the public the opportunity to tour petitioner’s submarine for an admission fee and, on the other side, registered a protest against the city’s dockage fees.\(^ {55}\) The Court found it had no difficulty deciding, despite the political protest element in the handbill, that the commercial purpose predominated and thus there was no First Amendment difficulty presented by governmental regulation:

This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. *We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.*\(^ {56}\)

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51. There is some dispute whether all speech not falling into an exception of unprotected speech is by default subject to strict scrutiny, or if instead it is only in the domain of public discourse that the First Amendment strict scrutiny test applies. James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 Case W. Res. L. Rev. 1091, 1095-96, 1095-96 nn. 20-21 (2004) (citing Rodney Smolla for the first proposition and Robert Post for the second).

52. 425 U.S. 748 (1976).

53. There is some disagreement about this. See e.g. Robert M. O’Neil, *Nike v. Kasky—What Might Have Been . . .*, 54 Case W. Res. L. Rev. 1259 (2004) (representing what appears to be a minority view that speech like Nike’s would actually have been protected prior to 1942).

54. 316 U.S. 52 (1942).

55. *Id.* at 52–53. Chrestensen had already once been told that his handbills violated littering ordinances in New York City, but he was advised that political protests were subject to an exception to that ordinance. *Id.* at 53. So he had his handbills reprinted to include a protest about the dockage fees. *Id.*

56. *Id.* at 54 (emphasis added).
However, by 1976, the mood and understanding of the Court had changed fairly dramatically. Before that year, there had been a series of decisions which seemed to suggest that perhaps there was some kind of protection for commercial speech, whatever “commercial speech” might be.\textsuperscript{57} Finally the Court did indeed announce such protection in \textit{Virginia Pharmacy}.\textsuperscript{58} The case involved publication of the price of prescription drugs.\textsuperscript{59} The question presented was whether it was appropriate for the state to suppress price information on the theory that publication of price information by pharmacists would lead to undesirable price competition, which would in turn decrease the quality of the services provided.\textsuperscript{60} The Court found this argument rested on speculation.\textsuperscript{61} Truthful information, the Court noted, was necessary to the proper functioning of the market and people cared as much, if not more, about the price of drugs than they did about the most pressing political issues of the day.\textsuperscript{62} Because proper market function required information, and proper market function and the health of the economy was of great public importance, the Court concluded the government should not paternalistically interject itself into that market function by “protecting” people from the truth.\textsuperscript{63} The Court held the listener has not just an interest but a right to hear price information. So, if the information was truthful, it would be protected.\textsuperscript{64} Nevertheless, the Court held the government retained the ability to regulate such commercial speech for its truth on the same grounds, the proper functioning of the market, because it was only truthful information that contributed to that proper functioning.\textsuperscript{65}

Notice that the first requirement of commercial speech protection is that the speech to be protected be truthful. If it is not truthful, it would not seem to be covered by the doctrine. But this again raises the question: What is commercial speech? Presumably there is such a thing as untruthful commercial speech, which is completely regulable. But this implies that there is a category of speech that is distinctly commercial. Being true is not what makes something commercial, but under the doctrine it is what makes speech in this category subject to protection. Truth or falsity is of no help in defining what is “commercial.” But the definition is crucial since truth is often said to be precisely what the government may not regulate with respect to other areas of protected speech. In other words, when will it be appropriate to ask whether the speech is truthful as a precursor to evaluating regulation and when will it not, given that in the political area “truth” is precisely the area that the government must avoid evaluating?\textsuperscript{66}

\textsuperscript{58} 425 U.S. 748.
\textsuperscript{59} \textit{Id.} at 749–50.
\textsuperscript{60} \textit{Id.} at 769–70.
\textsuperscript{61} \textit{Id.} at 770–73.
\textsuperscript{62} \textit{Id.} at 765.
\textsuperscript{63} \textit{Va. St. Bd. of Pharmacy}, 425 U.S. at 770–73.
\textsuperscript{64} Note that the conclusion that proper functioning of the market requires protection for the publication of truthful information does not in any way compel the conclusion that the First Amendment need be the source of that protection.
\textsuperscript{66} For a discussion of the circularity of this inquiry, see Weinstein, \textit{supra} n. 51. For a full discussion of the cases and the definitional ambiguity in commercial speech doctrine, see Nat Stern, \textit{In Defense of the Imprecise Definition of Commercial Speech}, 58 Md. L. Rev. 55 (1999).
The Court in *Virginia Pharmacy* suggested a couple of definitions for commercial speech, both fairly un-illuminating, if not to say tautological. One of these definitions—"speech that does no more than propose a commercial transaction"—was used repeatedly by Nike and its *amicis*, including the ACLU, in the *Nike* case. Another definition suggested by the *Virginia Pharmacy* decision and offered in many of the supporting briefs for Nike suggests that commercial speech is the equivalent of "traditional advertising." Putting aside for the moment that the word "advertising" is itself imprecise, it is even less clear what would constitute "traditional" advertising or why there should be any distinction made between traditional and nontraditional advertising in terms of the doctrine. However, to the extent that the Court itself seemed to use the terms "commercial speech" and "advertising" interchangeably in *Virginia Pharmacy*, it suggested that the Court at least thought commercial speech was advertising. So, the argument went: If Nike's speech was advertising, it was commercial speech; if it was not advertising, it was not commercial speech.

However, neither of these definitions—"commercial speech equals advertising" or "speech that does no more than propose a commercial transaction"—meshes very well with the purposes announced by the Court for protecting commercial speech, that is, to afford protection to truthful commercial information in order to enhance the operation of the market, since such information relevant to market function is not limited to traditional advertising. On the other hand it is also the case that there is often very little in the way of "information" in advertising and other marketing communications. Much market information takes place in other forms: press releases, websites, interviews, and other marketing strategies. So traditional advertising is too narrow. Even in 1976 when the doctrine was announced, the Court was working with a fairly outmoded

69. ACLU Br., supra n. 12, at **5, 9, 21.
70. See e.g. Br. Amici Curiae on behalf of the Arthur W. Page Socy., the Council of Pub. Rel. Firms, the Inst. for Pub. Rel., the Pub. Affairs Council & the Pub. Rel. Socy. of Am. in Support of Petr., *Nike, Inc. v. Kasky*, 2003 WL 835090 (Feb. 28, 2003). This brief is largely devoted to defending this proposition in order to distinguish what its members do, i.e., public relations, from what it characterizes as more appropriately regulated traditional advertising.
71. *Va. St. Bd. of Pharmacy*, 425 U.S. at 758–73 (using terms "commercial speech," "commercial advertising," and "advertising" interchangeably as if they were all describing the same thing).
72. I offer a suggestion of what I think is motivating this in *Free Advertising: The Case for Public Relations as Commercial Speech*. Piety, supra n. 14. In summary, "traditional advertising" is often devoid of any explicit assertions that can be tested for their truth. Assertions of facts are more commonly made in the public relations speech that is more self-consciously oriented to the reader's rationality. Traditional advertising, particularly by the largest companies, typically has more emotional content. For a discussion of some of the problems with the emotional appeals made in advertising, see 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 (2001).
73. See infra n. 113.
74. For a discussion of the content follows form argument, see Bruce E. H. Johnson & Jeffrey L. Fisher, *Why Format, not Content, is the Key to Identifying Commercial Speech*, 54 Case W. Res. L. Rev. 1243 (2004).
75. Weinstein suggests that "[t]he proper approach . . . is first to ask what free speech values are implicated by the regulation of the speech in question, and then, based on such an analysis, to categorize the speech in question," rather than attempting to categorizing it without examining this context. Weinstein, supra n. 51, at 1141.
definition of "advertising." Today, most advertising does not propose any transaction or offer much information. Moreover, in decisions after Virginia Pharmacy, the Court has clearly found that the injection of some issue of public concern into promotional material will not convert commercial speech into noncommercial speech.\(^7\)

A different line of cases, one involving speech by corporations on political issues, a strand distinct doctrinally from the commercial speech cases, also contributed to the support for Nike's position. This strand begins with the Supreme Court's decision in First National Bank of Boston v. Bellotti,\(^7\) where the Court concluded that a corporation's expenditures in a political campaign, namely advertising related to political issues, was protected speech under the First Amendment.\(^8\) This case was decided only two years after Virginia Pharmacy and reflects a move, almost immediately, from a decision that some protection for commercial speech was appropriate to protect listeners, to the position that the commercial speaker was entitled to protection as a speaker—a somewhat different proposition.\(^9\) That the reasoning in Bellotti was later revisited in 1990 and substantially qualified, perhaps even arguably overruled in Austin v. Michigan State Chamber of Commerce,\(^8\) appears to be a fact of collective amnesia on the part of many of Nike's supporters.\(^8\) In sum, going into the case there was no clear definition of what made speech "commercial" and whether Nike's status as a commercial entity would be in any way determinative of the issue.

III. WHY THE ACLU WAS WRONG

These two strands of authority, Virginia Pharmacy and Bellotti, came together in the Nike case because Nike's speech was not traditional advertising. The case arose in the context of public relations and general marketing efforts rather than in traditional advertising. Nike also characterized the statements in question as speech relating to the debate on globalization,\(^8\) thus making it look more like Bellotti-type political speech than like Valentine-type commercial speech, that is, more like political speech than like promotional activity. Nike took corporate personhood and successfully transformed it, for rhetorical purposes, into simply personhood. Accordingly, many observers seemed

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76. E.g. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67–68 (1983) ("The mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues such as venereal disease and family planning." (footnote omitted)).
78. Id. at 766.
79. Nevertheless, the Virginia Pharmacy Court did view protection for the speaker as a predicate to finding protection for the listener. 425 U.S. at 762–63. However, the argument with respect to the interests of the speaker was made by analogizing the commercial speaker to that of a labor union. Id. Concluding that the focus on economic matters did not remove the speech from protection and was something of a sleight-of-hand in that, as noted in footnote seventeen, labor disputes represented a "special context." Id.; id. at 763 n. 17. The Court spent little time distinguishing the interests of a commercial speaker from that of union members, because the issue as the Court construed it was the standing of the consumer/listeners to invoke the First Amendment. Id. at 763–64.
82. Nike Br., supra n. 68, at **1–2.
to find nothing strange about the suggestion that Nike had a “voice” that needed to be heard in a debate on a matter of public concern. Framed this way, and by invoking civil rights cases, Nike aligned itself with civil rights marchers and historically disadvantaged minorities and suggested that balance required that its voice be protected in order to be heard. The ACLU followed where Nike led. All of these arguments were, I suggest, misplaced, because the facts demonstrated that the speech was marketing, both in its explicit goals and because the nature of a corporation means all speech by a corporation must be viewed through that lens, and that protection for such marketing speech is demonstrably not necessary in order for Nike’s voice to be heard because it has both ample means and opportunities to speak and powerful motives to do so that are unlikely to be chilled by the requirement that its speech be truthful.

A. Conflating Persons with Corporate Persons

Nike, and many of its amici, including the ACLU, used the metaphor of corporate personhood to cast Nike in the role of embattled speaker. But it is this move, as in Bellotti, to treat the corporation as a person, that distorts the inquiry and causes commentators and amici to treat this as a freedom of speech case. Were the Nike case to be recast as a request for constitutional protection for marketing activities and protection from liability for false statements made in the course of promotional activities, it would have substantially less appeal. But, if Nike’s arguments were to be adopted, unregulated marketing might well be the consequence.

While a corporation is a person for purposes of many legal issues and has been for a long time, it has never been the case that a corporation’s rights are the same as a natural person for all constitutional purposes. It does not follow from the proposition that a corporation is a “person” for some legal purposes that it will enjoy all the rights of a natural person, anymore than the fact that a corporation is a “citizen” for purposes of federal diversity jurisdiction means it is entitled to vote in elections. So, simply saying that the corporation has some speech rights, as the Court did in Bellotti, does not mean that those rights are coextensive with those of natural persons or, perhaps more fundamentally, that the protection given to speech by corporations for marketing is extended on the basis of the same concerns as the protection given to speech by human beings. Although there is no single theory that undergirds the rationale for First Amendment protection, most observers agree that a substantial basis for the protection for freedom of expression is the protection of human dignity. Arguably these concerns do not apply to corporations.

84. Id. at 1751–52 (discussing federal diversity jurisdiction). A vote might be a much less pernicious input into politics than the current influence corporations can wield through lobbyists. Compared to that, what is a mere vote?
85. See Bellotti, 435 U.S. at 781–83.
87. The argument has been made that individual self-expression also depends upon the availability of expression from corporations to provide material and information with which to express oneself. See Martin H. Redish, Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker, 130 U. Pa. L.
Moreover, as a matter of corporate governance theory, it is not clear how a corporation could ever be said to have an opinion that did not advance the shareholders’ interests in some way. Despite the calls for increased corporate social responsibility and the inclusion in many state corporate governance statutes of a provision that allows a board of directors to consider, without fear of liability to shareholders, constituencies other than shareholders, such as employees, neighborhoods, consumers, and the like, the status of the operation of such provisions is still unclear. The only constituency that a board must consider is its shareholders, and that consideration is generally limited to shareholders’ economic well-being, i.e., maximizing share value. The late Milton Friedman has argued that boards violate their duties to shareholders when they expend resources in any fashion that fails to address this interest and, therefore, presumably have no business getting involved in, or making contributions to, any public debate except insofar as it advances that interest.

Apart from the theoretical grounds for distinguishing a corporate speaker from a human speaker, there are doctrinal grounds as well. In its brief, the ACLU relied heavily on Bellotti for the proposition that Nike’s status as a corporation had no bearing on the issue of whether its speech in this context should be protected. The problem is, as noted above, the Supreme Court has retreated somewhat from the stance of undifferentiated treatment between corporations and natural persons since the Bellotti decision. Even in the area of the most protected speech, political speech, the Court has held:

State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments. These state-created advantages not only allow corporations to play a dominant role in the Nation’s economy, but also permit them to use “resources amassed in the economic marketplace” to obtain “an unfair advantage in the political marketplace.”

88. See e.g. Ohio Rev. Code Ann. § 1701.59(E)(1)-(4) (Anderson 2004) (providing that a director of a corporation may take into account the interests of employees, suppliers, creditors, and customers; the economy of state and of nation; and community and societal considerations when deciding what is in the best interest of the corporation).
89. See e.g. Cynthia A. Williams, Corporate Social Responsibility in an Era of Economic Globalization, 35 U. Cal. Davis L. Rev. 705 (2002).
90. See e.g. The Good Company, The Economist (Jan. 22, 2005).
91. Milton Friedman suggests that there is only "one instance when corporate social responsibility can be tolerated, ... when it is insincere." Joel Bakan, The Corporation: The Pathological Pursuit of Profit and Power 34 (Free Press 2004).
92. See ACLU Br., supra n. 12, at *iii (providing the Table of Contents listing references for Bellotti as "passim"); id at *18 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." (citing Bellotti, 435 U.S. at 777) (internal quotation marks omitted)); id. at *20 ("The essential question ... is whether Nike's corporate status or economic interest ... deprives the proposed speech of what otherwise would be its clear entitlement to protection." (citing Bellotti, 435 U.S. at 778)).
This observation, made with respect to political speech, must surely have even greater application to that speech subject to less protection, i.e., commercial speech, given that what makes it less protected is that false commercial speech is not protected, while some false political speech may be. Although, as the ACLU's brief observes, there is, even for commercial speech, a “significant measure of First Amendment protection” that is only extended to truthful speech. There is no “significant measure” of First Amendment protection for commercial speech that is untruthful, false, and misleading. And Kasky claimed Nike’s statements were just that—untruthful, false, and misleading.

B. The Limitation of Commercial Speech to Product Advertising

The ACLU also argued that Nike’s statements were “part of a nationwide debate in which consumers were being asked to make a political choice about whether or not to boycott Nike products, and to think more broadly about the role and responsibilities of multinational corporations in a global economy.” This sort of speech, it argued, was distinguishable from “the commercial aspects of the speech proposing a transaction.” The government’s interest, it argued, was in regulating “product advertising” and does not extend to “speech concerning public affairs unrelated to products sales.” Presumably referring to those statements referenced in the lawsuit, the brief suggested “[n]one of these statements directly proposed a commercial transaction or promoted Nike’s products.” I respectfully disagree.

The best test of this claim is to review the statements Kasky included in his complaint. For example, in a letter to the editor of the San Francisco Examiner, Nike Director of Communications, Lee Weinstein, wrote:

Consumers are savvy and want to know they support companies with good products and practices . . . . During the shopping season, we encourage shoppers to remember that Nike is the industry’s leader in improving factory conditions. Consider that Nike established the sporting goods industry’s first code of conduct to ensure our workers know and can exercise their rights.

This letter certainly seems to represent speech proposing a commercial transaction. It refers to the “shopping season” and it “encourage[s] shoppers to remember . . . .” It would be hard to find a more straightforward invitation to trade than this letter. The letter reminded consumers that Nike is an industry leader in protecting workers’ rights because its executives apparently believed this factor influences consumers’ purchasing decisions. Nike told consumers they could purchase Nike products with confidence that they were not contributing to intolerable working conditions somewhere in the world because its executives apparently believed this information was relevant to consumers’


95. ACLU Br., supra n. 12, at *9.
96. Compl., supra n. 21, at ¶¶74–84.
97. ACLU Br., supra n. 12, at *7.
98. Id. at *4.
99. Id.
100. Id. at *8 (emphasis added).
101. Id. at *2 (emphasis added).
102. Compl., supra n. 21, at ¶27 (emphasis and ellipses in original).
purchasing decisions. It is difficult to read these statements another way. So why should this statement to consumers be protected from liability if it is not true? What great principle is at stake that demands shielding Nike if this statement is not true?

This question seems equally appropriate to ask of all the statements Kasky alleged were untrue and that Nike and the ACLU characterized as contributions to the debate about globalization. Kasky alleged Nike made false and misleading statements in the following areas:

1. "[T]hat workers who make Nike products are protected from and not subjected to corporal punishment and/or sexual abuse;"
2. "Nike products are made in accordance with applicable governmental laws and regulations governing wages and hours;"
3. "Nike products are made in accordance with applicable laws and regulations governing health and safety conditions;"
4. "Nike pays average line-workers double-the-minimum wage in Southeast Asia;"
5. "Nike workers who produce Nike products receive free meals and health care;"
6. GoodWorks International, a group formed by Nike for the purpose of inspecting Nike’s operations overseas, and headed by former United Nations representative Andrew Young, did a review of its operations and concluded that Nike is "doing a good job and ‘operating morally’;" and finally,
7. "Nike guarantees a ‘living wage’ for all workers who make Nike products."

How does it contribute to the debate on globalization for Nike to report that its workers receive free meals, if they do not? Can we say this is information? Or is it misinformation? Although the claims about “operating morally” and a “living wage” are ambiguous and appear to be more opinion than fact, the remaining assertions are simply factual claims subject to verification and of the type that might be routinely supplied to the government or to investors and which these audiences can expect would be truthful on pain of legal sanction or liability if they are not. Why should the same duty not run to consumers? And if Nike’s right to mislead consumers stems from the First Amendment, why does the First Amendment not represent a barrier to having to truthfully report this type of information elsewhere—for example, to prospective shareholders?

These statements may or may not contribute to the discussion about globalization. Nevertheless, they are not the sorts of claims that we generally consider inappropriate for the government to regulate, or for courts to act as "arbitrators [sic] of truthfulness." To the contrary, these are the kind of factual claims the courts regulate all the time. Indeed, we might say that this is precisely the function of a court system—to act as an arbiter of truth with respect to such factual statements. If Nike reports in its regulatory filings that it pays minimum wage or that it offers health care, we would expect these

103. Id. at ¶ 1(a).
104. Id. at ¶ 1(b).
105. Id. at ¶ 1(c).
106. Id. at ¶ 1(d).
107. Compl., supra n. 21, at ¶ 1(e).
108. Id. at ¶ 1(f).
109. Id. at ¶ 1(g).
110. ACLU Br., supra n. 12, at *3.
claims to be truthful. Why should we not demand the same in letters to the editor written in order to influence sales?

In its brief, the ACLU referred to the government’s interest in regulating product advertising111 as if commercial speech were equal to product advertising.112 However, commercial speech cannot be viewed as so limited, even though advertising was clearly what was foremost in the Court’s reasoning,113 because not long after the establishment of the commercial speech doctrine in Virginia Pharmacy, the Supreme Court made clear in Bolger v. Youngs Drug Products Corp.114 that including some purely editorial material in promotional speech did not transform it from commercial speech into political speech.115 In Bolger the merchandise was condoms, and the promotional material included information on the use of condoms for the prevention of venereal disease as well as for contraception.116 Just as in Valentine, where the inclusion of some “protest” content did not transform an advertising flyer into a political protest, the Court in Bolger found that the inclusion of this purely informational content that was not clearly sales oriented did not obviate the overall commercial character of the material.117 The key was its commercial character. Similarly, here the overall character of Nike’s communications was also commercial in character.

Moreover, as the ACLU itself argued, the rationale for protecting truthful commercial speech is to protect sources of consumer information, not to protect the rights of the commercial speaker.118 But the governmental interest is in protecting truthful information. Indeed, if a communication is not truthful, can it even be said to be information? As the Supreme Court itself has noted, “there is no constitutional value in false statements of fact.”119 And so it is unclear why holding Nike to account for the distribution of untruthful or bad information is not entirely consistent with this rationale or is in any way subverting the case law cited, which champions the right of consumers to receive truthful information. The ACLU noted: “Commercial speech is protected to safeguard the consumer’s interest in ‘the free flow of information and ideas.’ Quite apart from the dubious breadth of ‘ideas,’ which would seem to apply to all First Amendment protected speech, not just commercial speech, the key idea is, as the ACLU notes, that ‘it is the interest of the listener that is paramount, rather than that of the speaker.’”120 But the listener’s interest is in receiving accurate information. This was all

111. See id. at *4.
112. See id. at *3 (again exempting “product advertising” from First Amendment coverage, along with speech, where reputational interests are at stake, as if commercial speech were the equivalent of product advertising); id. at *8 (referring to “product sales” and the appropriate regulation of the same).
113. In Virginia Pharmacy the Court refers to commercial speech and advertising as if the two were the same thing. Compare Va. St. Bd. of Pharmacy, 425 U.S. at 759 (“the notion of unprotected ‘commercial speech’ all but passed from the scene”) with id. at 765 (“Advertising, however tasteless and excessive . . . .”).
115. Id.
116. Id. at 62.
117. Id. at 67–68.
118. ACLU Br., supra n. 12 at **8–10.
120. ACLU Br., supra n. 12, at *7 (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 n. 21 (1993)).
121. Id. (emphasis added).
Kasky sought to require by his lawsuit—to ensure Nike provided consumers with accurate information about its manufacturing processes so that their decisions could be “intelligent and well informed.” And it has never been the case that the Court has concluded that the consumers’ need for accurate information was limited to the desire to buy “safe products at competitive prices” as the ACLU suggested. The need for accurate information arguably includes all aspects of the product that might be relevant to its purchase.

Advertisers themselves try to set their products apart and recommend them as the “best” on the basis of attributes such as the manufacturing process, whether on the grounds of labor, environmental, or animal testing practices (to name only three), so the consumers’ desire for information about these attributes is no less an aspect of the product than its country of origin, whether it was made by the blind or by Native Americans—all process concerns that are protected by regulation. For purposes of consumer choices, what constitutes the best product is almost always a subjective matter that may include factors such as labor practices. That choice, as early case law indicates, is best left with the consumer. But the consumer can only make an informed choice if the information he or she receives is truthful. It is not paternalistic to provide remedies for false statements any more than it is paternalistic to provide remedies for battery or breach of contract.

C. Fairness, Balance, and the Preservation of Information

Finally, the ACLU, again echoing Nike, argued that all of Nike’s speech was issued in self-defense—thereby, presumably eliciting concerns about the fundamental fairness of allowing self-defense. However, concerns about permitting self-defense do not suggest that it may be conducted in any manner—by fair means or foul. The issuance of false statements would seem to be foul means. Again, the trope of the speaker with speech rights (rather than the public with the right to accurate information) was invoked, this time to cast Nike as an embattled rights holder entitled to speak its piece, as if its interests in this defense were dignitary rather than commercial.

122. Id. at *9 (quoting Va. St. Bd. of Pharmacy, 425 U.S. at 765) (internal quotation marks omitted).
123. Id. at *5.
126. E.g. Va. St. Bd. of Pharmacy, 425 U.S. at 770 (describing protecting consumers from truthful information as “highly paternalistic” and suggesting that “people will perceive their own best interests if only they are well enough informed”).
127. In its brief, the ACLU argued: “It was only in response to these allegations [i.e., criticisms of Nike’s labor practices] that Nike began publicly answering its critics, defending its overseas practices, and denying claims that it was operating sweatshops under supposedly slave-labor conditions.” ACLU Br., supra n. 12, at *2.
In addition, the ACLU argued, were Kasky's suit allowed to proceed, it would represent viewpoint discrimination,\footnote{Id. at *6.} which would unfairly imbalance the public debate and ultimately chill corporate speech, causing a net public loss of "valuable information."\footnote{Id. at **22-23. Given that Kasky alleged, and at the motion to dismiss stage one must presume it is true, that Nike's statements were false, it is hard to imagine how the statements constitute "information" that would assist consumers in pursuing their goals or effectuating their choices as the ACLU argued it would. "Here, the information at issue is valuable to consumers primarily because it enables them to use their economic buying power to pursue a larger political and societal goal." Id. at *5. If Kasky's allegations were correct, it seems more likely to nullify than advance those efforts.} All of these arguments can be summarized as some form of fairness argument. Examined from the perspective of commercial self-interest and consumer protection, the facts do not support these fairness arguments.

In the first place, it seems to stretch credulity to argue imbalance in the context of a multi-billion dollar corporation, which spends enormous sums on communications with the public where no other speaker spends anything approaching the same amount of money in counter speech.\footnote{According to Kasky, Nike spent almost one billion dollars on advertising and marketing in 1997. Compl., supra n. 21, at ¶ 13. It is not clear whether "marketing" would include public relations communications. If it did not, the figure for total expenditures might be even larger.} Moreover, because of these expenditures, Nike has far more access to speech outlets and media than any of its adversaries, except perhaps columnists like Bob Herbert. In the second, the suggestion that being required to proceed through the discovery stage of Kasky's lawsuit would "chill" Nike's willingness to speak seems unlikely, even if we were to presume that, contrary to Kasky's claim, this speech was truthful and would thus represent lost information.\footnote{Although Nike claimed it had withheld various reports from the public as a result of the California Supreme Court's decision, the sincerity of this position, given the pending litigation, was suspect. See Carolyn Wu, Bush Administration, ACLU, Organized Labor, Media and European Entities Join Together To Protect First Amendment in Supreme Court Case Involving NIKE, Inc. (Nike Press Release) (March 3, 2003) ("The company said it would not publicly release its annual corporate responsibility report .... It also said that it has declined to participate in the Dow Jones Sustainability Index [and further] declined to participate in several media interviews as well as invitations to speak at various business and academic forums due to the decision.") (available at http://www.nike.com/nikebiz/news/pressrelease.jhtml?year=2003&month=03&letter=a). And although the California decision is apparently still good law, at least it was when Nike's 2004 Corporate Responsibility Report was issued, Nike has continued to issue press releases in this area and even do its own "reporting" on abuses found in its factories. See David Teather, Nike Lists Abuses at Asian Factories, http://www.guardian.co.uk/ethicalbusiness/story/0,14713,1459135,00.html (Apr. 14, 2005); see generally Nike, Inc., FY04 Corporate Responsibility Report (2004). Perhaps with the passage of Proposition 64 and the elimination of the private attorney general provision, Nike's representatives feel confident that company has nothing to fear from the government on this score.} Nike had, and continues to have, the most powerful incentive to disseminate its message of any of the speakers involved—a financial one. Indeed, it was precisely for this reason the Supreme Court thought the regulation of commercial speech was less likely to be troublesome, because it concluded the motivations for such speech were so robust, speech was likely to remain consistent with the limitations or costs associated with it.\footnote{The Court noted in Virginia Pharmacy: "[C]ommercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely." 425 U.S. at 771–72 n. 24. However, note also that this quote illustrates the Court's tendency to use the terms "advertising" and "commercial speech" as if they were synonymous.}
(although its interests may obviously be, as Milton Friedman noted, to say something that is not true if it thinks that is what the market wants to hear). Nevertheless, Nike managed to analogize its position to that of the defendants in New York Times Co. v. Sullivan and claim that the verification of the truth of its claims would be unduly burdensome, thus chilling valuable speech—a theme echoed by the ACLU. How this analogy was raised requires a little additional background.

In response to Kasky’s initial pleading, and continuing through the appeals in the California courts, Nike claimed that Kasky’s suit was absolutely barred by the First Amendment. However, this position was modified somewhat in its brief before the Supreme Court. There, Nike argued for the first time (as an alternative basis to a complete bar) that Kasky’s suit was defective because it failed to meet the standard set by Sullivan, that is, that Kasky had failed to plead the actual malice standard set in Sullivan. Suffice it to say, this claim was inaccurate as a matter of pleading. But what is more significant for purposes of this discussion is that the analogy was inapposite as well.

In the first place, Sullivan was a libel case; Nike was not. So it is not surprising that Kasky would not have pleaded elements of a different cause of action. Kasky could not have alleged that Nike had malice against itself, so no one should be surprised that Kasky did not plead malice. He did, however, plead fraud and deceit, which are intentional torts.

But the facts were also significantly different in ways that go to the heart of the fairness inquiry. The defendants in Sullivan were persons who were soliciting contributions for the legal defense of Dr. Martin Luther King, Jr., via an advertisement in the New York Times. The advertisement contained statements recounting some of the struggles civil rights marchers and workers had with law enforcement and other government officials in the South. A police commissioner from one of the cities mentioned sued the group and the newspaper for libel, claiming that, even though he was not mentioned by name, he was sufficiently identifiable such that any inaccuracies in the advertisement constituted a libel against him. In reviewing his claim the Supreme Court concluded that speech concerning a public figure, on a matter of public concern,
could only be actionable on an allegation that the libel was made with actual malice. Mere negligence would not suffice.

The opinion contains much discussion about the impossibility of ensuring complete accuracy in political debate. Nike made use of this discussion in its brief to claim that, as for the defendants in Sullivan, to require absolute accuracy in Nike’s statements would be to impose an oppressive burden on it and that “‘erroneous statement is inevitable in free debate,’ and therefore ‘must be protected if the freedoms of expression are to have the breathing space that they need to survive.’” Justice Brennan writing for the majority in Sullivan observed it may even be the case that there is some informational value in falsehoods in the area of political speech.

But all of these statements must be viewed through the lens of the factual circumstances of the case, i.e., a libel case where the defendants’ speech concerned other people. The defendants in Sullivan were talking about the police and the police commissioners. They were not talking about themselves. It is not unreasonable to assume that political debate might be unduly chilled if every participant must be sure of the accuracy of every statement made about persons and situations about which they may not have complete information. This is particularly true where the powerful might seek to suppress the speech of the relatively less powerful by holding them to a rigorous standard of absolute accuracy, as indeed the plaintiff Sullivan appeared to be attempting to do.

In contrast, Nike was talking about itself. With respect to the corporation’s activities: Who is in a better position to know what Nike is doing than Nike itself? It is not at all clear that there is anything inevitable about intentional false promotional statements made on behalf of corporate interests. Nor do such statements add anything valuable to public debate or to market function. There is nothing fundamentally unfair about requiring the person who is talking about himself say something that is true. How much less unfair is it in this context where it is a commercial organization issuing speech for the purpose of favorably influencing purchasing decisions? The organization has no human feelings to express, nothing to “get off its chest,” no expressive interests. Rather, it is trying to increase sales. As the Court noted in Virginia Pharmacy:

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.

It is difficult to understand what could possibly be the justification for giving manufacturers and sellers a shield from liability for false information issued in order to

144. Id. at 283–88.
146. Nike Br., supra n. 68, at *44 (quoting Sullivan, 376 U.S. at 271–72) (internal quotation marks and ellipses omitted).
147. Sullivan, 376 U.S. at 279 n. 19 (“Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’” (citations omitted)).
148. Id. at 257–58.
generate sales, or what fairness principle requires such a shield. Consider the following statements regarding a living wage.

According to Kasky’s complaint, on October 27, 1997, Kathryn Reith, Nike’s Manager of Women’s Sports Issues, issued a press release offering that “Nike is fulfilling our responsibility as a global corporate citizen each and every day by guaranteeing a living wage for all workers . . . and creating opportunities for women’s financial independence.” However, Kasky also alleged that just a month before this statement was issued, Dusty Kidd, Director of Nike’s Labor Practices department wrote a letter to Dr. Prema Matai-Davis, Chief Executive Officer of YWCA of America, saying:

I am fully cognizant of the call on the part of some for a “living wage.” That is generally defined as sufficient income to support the needs of a family of four. We simply cannot ask our contractors to raise wages to that level—whatever that may be—while driving us all out of business, and destroying jobs, in the process. In light of the letter to Dr. Matai-Davis we can say that whatever a living wage is, Nike’s representatives know Nike does not pay it. So when its representatives said Nike paid a “living wage” they did not believe it to be true. It is hard to conceive why fairness, an interest in preserving the flow of information to consumers, or an interest in balance requires this sort of constitutional shield. Indeed, to the extent that such protection would seem a license to commit fraud, it would be a constitutional sword, not just a shield. Nike wrapping itself in the mantel of the embattled speaker and appropriating the status of the oppressed minority voice has some comic aspects as Professor Rodney Smolla captured in the title to his article on the case entitled, “Free the Fortune 500!” It would be funnier if the consequences were not so serious.

IV. CONCLUSION

In Bellotti, the Supreme Court observed:

According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee’s arguments were supported by record or legislative

150. Compl., supra n. 21, at ¶ 62 (internal quotation marks omitted, emphasis and ellipses in original).
151. Id. at 25, ¶ 63 (internal quotation marks omitted, emphasis added).
152. Corporations often proceeded fairly aggressively to suppress speech of those whose speech they claim infringes on copyright or trademark, or which they argue constitutes unfair competition or disparagement of their products or company. One notorious example is the libel case McDonald’s Corporation pursued against two impecunious London Greenpeace members who distributed a flyer criticizing, among other things, the nutritional value of McDonald’s foods, and its labor and environmental practices. See McSpotlight.org, The McLibel Trial, http://www.mcs spotlight.org/case/index.html (accessed Jan. 22, 2006); McSpotlight.org, The McLibel Trial Story, http://www.mcs spotlight.org/case/trial/story.html (accessed Jan. 22, 2006). For additional examples of corporate interference in speech generally through pressure exerted on governmental bodies, see William A. Wines & Terence J. Lau, Can You Hear Me Now?—Corporate Censorship and Its Troubling Implications for the First Amendment, 55 DePaul L. Rev. 119 (2005). Wines and Lau’s claim seems to rest primarily on the dangers of imbalance arising from the influence of the most powerful corporations that would suppress the speech interests of others, including perhaps other, smaller corporations.
153. Rodney A. Smolla, Free the Fortune 500! The Debate over Corporate Speech and the First Amendment, 54 Case W. Res. L. Rev. 1277 (2004). Note that all of Smolla’s arguments regarding paternalism rely on case law denying the government’s ability to regulate truthful information, precedent that is arguably of dubious relevance for the proposition that it is in any way paternalistic to regulate sanctions for untruthful speech.
findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.154

That day may be here. We are standing at a juncture in which the influence of corporate voice is threatening to democracy and to the government’s ability to address grave issues of public concern.155 The advertising of tobacco, pharmaceutical drugs, and other substances affect public health. The infiltration of public relations into the news, and presented as news instead of promotion, often in support of corporate interests, decreases the reliability of the media and thus the public’s source of information. The lobbying efforts of corporations have arguably resulted in a reduction of confidence in the government.

The Court in Virginia Pharmacy extended First Amendment protection to commercial speech on the grounds that the government had no legitimate interest in that context to protect consumers from truthful information. It would be a perversion of that holding to hold that the disseminators of commercial speech are entitled to constitutional protection for the dissemination of false information simply because the speech was not explicitly tied to some product or because it was not uttered in a conventional advertisement. The Virginia Pharmacy case did not address the rights of the corporation or of the individual pharmacists to speak so much as it addressed the right of the consumers to hear. If that is the basis for protection of commercial expression then, it seems clear, as the Court stated in Virginia Pharmacy, the government should be able to make sure “that the stream of commercial information flow[s] cleanly as well as freely.”156

155. With respect to many of these concerns, such as the environment, while the government can regulate and try to make corporations internalize some of the costs like environmental pollution, consumer choice can have this effect as well. Governmental regulation is in some sense a blunt instrument. In order for an environmental change to really take hold it takes wide-spread voluntary cooperation. Thus, government wants to encourage such widespread, voluntary cooperation to achieve these public goals. The inability of consumers to verify environmental, labor, animal testing, and other process concerns means that consumer interests in using their purchasing power to meaningfully address such issues will be thwarted at the outset. If consumers cannot reliably tell the difference between a product that is “green” and one that is not, then the company that takes the trouble to incur any additional process costs is going to be at a competitive disadvantage compared to those who do not, where both companies are equally free to claim that their products are green. Put another way, if there is no cost associated with this misrepresentation, then the companies who are not assuming that additional marginal cost of the process can free-ride off those who are. It is unclear whether, in a world of reliable information, most consumers would prefer green products in sufficient numbers to effect real change. But it is a certainty that in a world with no penalty for false information, consumers will be relatively impotent in their ability to effect meaningful change.