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Corporations and Commercial Speech

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Corporations and Commercial Speech

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Ronald Collins: It's a delight to be back here in the Pacific Northwest where I once had the honor to teach. Thank you, Kellye Testy and Dana Gold, for including me in this splendid conference. And, of course, a bow to my colleague of many years, Professor David Skover.

Today's discussion will be about a rather famous case—actually, a non-case, Nike v. Kasky. 1 Is there anybody in the room who didn't file an amicus brief in Nike? There were so many people who filed on this or that side in the case. All three of our panelists today filed amicus briefs. I think Martin Redish filed one as well. And Erik Jaffe, I think you also filed an amicus brief in Nike.

Question: When you think about a case like Nike, where is the conservative/liberal divide? Laurence Tribe, he's liberal. So why is he representing Nike in the United States Supreme Court? And Erwin Chemerinsky, the great defender of the First Amendment, why did he oppose Nike's First Amendment rights? Where does the conservative/liberal divide fall here? I point this out not by any means to be righteous, but to show you how difficult it is, conceptually, if you think about it, to say, well, who's conservative and who's liberal and who's good and who's bad? So again, where does the divide fall?

Let me say a few words about the Nike case 2 so we see it in context, and then we'll turn to our panelists. Starting in 1996, CBS, a corporate entity, the New York Times, a corporate entity, and the Los Angeles Times, another corporate entity, wrote or published or aired a series of stories about the plight of workers in Nike's overseas factories. 3 The

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stories described the working conditions in Vietnam as horrendous. Workers, mostly women between the ages of fifteen and twenty-eight, spent six days a week in factories for $40 a month, quite often in conditions that would be considered deplorable or inhumane by our standards, so the stories went. Sometimes the women fainted from exhaustion, heat, or poor nutrition.

One New York Times columnist said that Nike executives were not troubled by those conditions, even after CBS aired the stories that sparked an investigation by human rights advocates. So, the story went, even after these stories came out, Nike—in its arrogance—maintained these deplorable working conditions in Vietnam.

Nike denied the allegations of abuse in its factories. The company said, however, that if there were such problems, it would launch an investigation. In one New York Times news story, Nike's spokesperson said, "Nike workers earn superior wages and manufacture products under superior conditions." All's well in Vietnam, so they said.

Marc Kasky, a California activist, was enraged by Nike's statements, and he decided to sue the company under California's unfair business practices law in the hopes that he could force Nike to admit to the mistreatment of workers. When he filed his case he alleged no injury to himself personally or to anyone else; he filed the action as a private attorney general in the California courts. And when the matter went all the way to the California Supreme Court, the Court decided by a four-to-three vote in Marc Kasky's favor that indeed he could commence this action against Nike. He could force Nike, if you will, to tell the truth.

A petition was filed in the United States Supreme Court. At that time Nike's general counsel had approached many people, including myself, and asked for assistance as they filed briefs in the Court. And an enormous number of briefs were filed.

There were oral arguments in the Court. Nobody, however, had really bothered to ask the question that any first year law student would have asked: was the California statute that gave rise to the case violated? But since this was a huge constitutional case, even seasoned lawyers overlooked the obvious. Thanks in good measure to Professor Vladeck, and I'm sure also to briefs filed by Professor Piety on behalf of the Sierra Club, the Court ultimately withdrew jurisdiction in the case and thus never reached any of the constitutional questions.

The case went back, and our hero Marc Kasky is this close, ladies and gentlemen, to bringing the great Nike to its knees, to having discovery, and to pointing out to the public what all the newspapers in fact had already written—that Nike was indeed exploiting its workers, or at least so the claim went.

But in the eleventh hour the Lord works in strange ways. A deal was struck, whereby Nike would admit to no fault, but would pay $1.5 million to the Fair Labor Association, a workers' rights group, and at least $500,000 a year in funding to a micro-loan program that subsidized entrepreneurial ventures for foreign employees.7

Did Marc Kasky and his lawyers receive any money? Who knows? It's a secret agreement, but it is strange that this man, who was so dedicated, in the eleventh hour decided, for whatever reason, not to proceed. The moral? We take our "heroes" as we find them.

Well, where that case ends is where our story—and our discussion—begins today. We have a wonderful group of people to discuss and examine this case. Let's start with my friend Professor David Vladeck, who teaches at Georgetown Law School. He's been with Public Citizen for twenty-five years, and in my estimation is one of the finest public interest advocates I've had the pleasure of meeting. Professor Vladeck, welcome.

To his immediate right is Professor Tamara Piety, who is on the faculty of the University of Tulsa Law School, and who filed an amicus brief on behalf of the Sierra Club. Anybody who is writing or reading in the area of commercial speech, if you don't know the name Tamara Piety, you soon will. She's written extensively on it and has a forthcoming book on it. Professor Piety, welcome.

And on the far end, last, of course but not least, is Mark Lopez, senior counsel for the American Civil Liberties Union (ACLU), who filed a significant amicus brief in the Nike case, and who has been very active in a number of matters on behalf of the ACLU involving campaign finance laws and very important areas involving the privatization of the public forum. Mr. Lopez, welcome.

Professor Piety, let's start with you.

Tamara Piety: You might well ask, why was the Sierra Club interested in this case? The Sierra Club got involved because it was concerned about "green washing" and the way in which false "green" claims may lower the incentives for real investment in potentially more costly, but more environmentally sound, manufacturing processes. If a

7. Collins & Skover, supra note 2, at 1020.
8. "Green" here refers to claims that something about the product—its manufacture or sale—is undertaken with concern for the environmental impact.
manufacturer can make false green claims with impunity, this may mean that false claims are indistinguishable from true claims and that those firms not investing in more environmentally sound practices can free-ride off those that do. Indeed, if there is no penalty for making false claims, there would actually be an incentive to make false claims because if you don’t have to actually put into practice the presumably more expensive green production methods, then you can get the benefit of that reputation without actually having to pay the price for it. This is something that the Sierra Club is very concerned about, and given the way Nike pleaded in its motion to dismiss, immunity for false claims was a real possibility.

Before I speak to the procedural posture of the Nike case, however, I want to start by mentioning a fairly provocative idea. And that is the proposition that for-profit corporations—and I’ll put aside the press for a moment—don’t have “opinions” as we normally understand that word and that they are inappropriate rights holders under the First Amendment. This proposition runs counter to much of the established doctrine in this area, but I argue that we need to revisit the assumptions in this area. Everything a for-profit entity “says,” whether in the form of advertising or in the form of a purported contribution to a matter of public concern, is marketing.10 There are a number of names for this marketing: “issue advertising,” “image advertising,” public relations, etc.—but all of this speech is marketing. I will say more about this later.

Another provocative nugget of food for thought: we’re often told that advertising doesn’t work, that it can’t convince people to buy something they don’t want. And I suspect no group thinks they are more immune to its effects than academics. But consider this: Could it really be the case that the billions spent per year on market research are similarly wasted? There is a good deal of evidence that it is not; even if it does not result in marketers being able to perfectly program consumers to respond like automatons to selling messages, market research has helped refine those approaches in ways that improve marketers’ ability to stimulate consumption. This is why marketers spend a lot of time trying to figure out what parts of their marketing works.

9. It may be a mistake to assume that environmentally sound practices are necessarily always more expensive. They may in some cases be less expensive. But discussions about implementation of such practices tend to take place in the context of a background assumption that fundamental changes in process will be costly to the extent that they require changes to existing infrastructure or additional infrastructure investments.

10. Obviously, sometimes a corporation’s “speech” is operational. That is, it speaks to carry out its business, and it clearly can speak in the form of response to subpoenas and the like. This statement refers to that sort of speech which, in its form and content, seems an analogue to expressive speech by a human being.
Nielsen, the ratings company, and others organizations try to measure how many people are watching specific shows so they know how many people are seeing the ads. That information in turn allows them to tell advertisers when they pay for these ads what they are actually getting. But that is not all. For many years advertisers have been doing market research to try to figure out what type of advertising works. And some of that research has suggested to them that explicit claims don’t work as well as emotional appeals. This has resulted in a shift away from what advertisers call “reason-why advertising”—“buy our toothpaste for pearlier whites”—and into press releases and public relations and other kinds of non-traditional advertising forms.

What is the significance of this move for the Nike case? As advertising has shifted away from explicit claims, marketers haven’t ceased making them. They’ve just moved them into the form of press releases, advertorials, issue advertising, and the like—speech forms that characterize public relations speech and not traditional advertising but which, like traditional advertising, are made in the hopes of financial gain for the company. The statements made in the Nike case were principally made in these forms.

So, in the Kasky complaint, what we have are counts for violations of these false advertising and unfair trade practices laws. Kasky alleged that Nike’s statements about its labor practices were false and thus violated the law. Count Two of his complaint alleged that these statements constituted fraud and deceit on the grounds that Nike’s misrepresentations were made “with knowledge [that they were false] and with reckless disregard of the law of California prohibiting false and misleading statements.” Later, a question was raised whether this phrase reflected an intention to plead intentional and knowing misstatement. However, there are a number of other allegations in the complaint, and I maintain, looking at the complaint as a whole (as a reviewing court is bound to do), the complaint makes clear that Kasky intended to allege that there was an intentional misrepresentation by Nike.

Let me give you one of my favorite examples. Nike issued a press release on October 27 in which it addressed concerns from some members of the public regarding women’s issues: “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

12. Id. ¶ 67.
women’s financial independence." This press release is quoted in Kasky’s complaint.

However, just about a month before that press release was issued, Dusty Kidd, a Nike employee, wrote the following in a letter to the CEO of the YWCA:

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.

Whatever the dispute may be about what constitutes a living wage, it seems fairly clear, to the extent a corporation ever has a “state of mind” or can have an “idea,” Nike knew at the time that Ms. Reich made the first quoted statement that it wasn’t paying a living wage, “whatever that might be,” because, as reflected in the second sentence of Dusty Kidd’s letter, Nike viewed a living wage as “driving us all out of business.” The juxtaposition of these two quotes in the complaint seems to makes clear that Kasky intended to allege that Nike intentionally lied.

Nike’s response to Kasky’s claims for fraud and deceit, and indeed to all of the allegations, was a demurrer—that is, “You [Kasky] failed to state a cause of action; fraud and deceit are barred by the First Amendment.” Now that seems to me to be a really radical claim—one seeking more protection under the First Amendment than anyone enjoys.

As we’ve heard already, and will undoubtedly hear more about in greater detail today, the commercial speech doctrine that was articulated in Virginia Pharmacy Board suggested that the reason the Court decided to extend limited protection to truthful commercial speech was because of the need for truthful information in the marketplace to assist consumers in making purchasing decisions. The decision indicated that the sort of governmental paternalism that would authorize the suppression of truthful information would need to meet a more exacting review than had previously sufficed. The Court focused on the listener’s right to hear and on the public interest in receiving truthful information, and almost not at all on some notion of the right of the speaker to speak.

13. Id. ¶ 59 (citing Press Release, Nike, Inc., Nike Addresses Concerns Regarding Women’s Issues and Highlights Leadership in Worker Initiatives (Oct. 27, 1997)).
14. Id. ¶ 60 (citing Letter from Dusty Kidd, Director of Labor Practices, Nike, Inc., to Prema Mattai-Davis, Ph.D., Chief Executive Officer, YWCA of America (Sept. 28, 1997)).
17. Virginia Pharmacy, 425 U.S. at 765.
The commercial speech doctrine that was developed and further articulated in *Central Hudson*\(^{18}\) provides that in order to receive constitutional protection, commercial speech must involve a legal activity and not be misleading. A doctrine intended to ensure that consumers get truthful information doesn't seem like a good basis for claiming a constitutional right to lie. And if it does not, this is because, I argue, the Court was not writing in terms of the speakers' interest and because it seemed to think that most of this speech would take a form in which, to the extent there was a claim, the claim would be made in advertising and could be tested. Today, fewer claims are made in advertising, an area that the doctrine clearly regulates, and many claims are made in the form of public relations speech, a form the status of which is uncertain and that Nike hoped to immunize by its demurrer. However, the claim for immunization required a focus on the speakers' rights.

Much of the language in the *Virginia Pharmacy* case focuses on whether or not listeners could get the information in question, not on whether the speaker had a right to say it. Thus, the case doesn't offer much support for the proposition that Nike had a right to make false statements as a participant in a political debate versus the public's right to know what Nike had to say. For example, here is a quote from *Virginia Pharmacy*: “Advertising, however tasteless and excessive it sometimes may seem, [is] nonetheless dissemination of information.”\(^{19}\) This characterizes advertising as “information.” But much advertising isn't remotely like information in the ordinary sense of the word.

I would submit that although the Court uses the words “advertising” and “commercial speech” interchangeably, this language revealed that even at the time this opinion was written the Court was dealing with an outmoded idea of “advertising.” Advertising, even then, was no longer limited to just exhortations like, “Buy our toothpaste, make your whites pearlier white!” Rather, it had expanded into communications that didn’t actually make any explicit claims. So, when you have an advertising campaign like “Newport, Alive with Pleasure!” you have to ask, “What does that mean?” It doesn’t say anything specifically, right? Does, “Alive with Pleasure!” make a specific claim that you could say is false because actually, if you smoke cigarettes you’ll be “gray and dead” instead of “Alive with Pleasure!”? No, the ad isn’t intended to make a factual claim. It’s just intended to evoke some sort of emotional response from

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\(^{19}\) Id. at 765.
you. And there is some evidence from market research that it is intended to do so with knowledge of how the audience to which it was directed will likely react emotionally.

In communications such as “Alive with Pleasure!” there is (apparently) no factual claim, so there is not much to test for its truth. This was not true, however, of Nike’s claims about its labor practices. Claims that Nike paid wages consistent with applicable minimum wage laws or that certain workers received a free lunch were factual and could be tested. Kasky alleged that these statements were knowingly false, and Nike responded that he failed to state a cause of action. The trial court and the appellate courts agreed, but the California Supreme Court disagreed and reversed. Because the case was still only in the pleading stage it was, as the California court noted, still “early” and Kasky should have been given an opportunity to develop the record in support of his allegations. Nike, of course, filed a petition for certiorari.

But a curious thing happened. Between the time of the California decision, when Nike had claimed that the First Amendment absolutely barred Kasky’s suit, and the petition for certiorari, Nike apparently belatedly realized that the Constitution doesn’t offer blanket immunity for fraud. So now for the first time appeared a claim that the Court should apply the New York Times v. Sullivan standard to the kinds of statements Nike made. I just want to say that I don’t think the Sullivan standard is appropriate because the Sullivan case was a defamation case, so the defendants in that case were making statements about somebody else. But in the context in which you are making positive statements about yourself, presumably you’re in the best position to know whether or not what you say about yourself is true, and it makes little sense to ask: “Did you say that with malice?” or “What did you mean when you said that?” The question may come up, I suppose, when we get to the more philosophically complex and perplexing category of self-defamation, but I presume that will come up later in this conference. The claim that Sullivan should apply was a belated recognition by Nike that it had had overreached itself in asserting First Amendment immunity for its commercial pronouncements. I do not think that Sullivan should apply to commercial speech because I don’t think commercial speech is the sort of speech that the First Amendment ought to protect. However, we don’t need to import Sullivan to protect truthful commercial speech. But this presents a dilemma of identifying what “commercial speech” is, and that is difficult.

So what is commercial speech? I’m not going to go through the tests purporting to define it because there are a lot of them, and Ronald Collins listed some. What I would add to Mr. Collins’s list is the California Supreme Court’s test, which focuses on the speaker and the intended audience, and in which the content of the message as commercial is key. This is a test that is deeply informed by the United States Supreme Court’s opinion in *Bolger v. Youngs Drug Products Corp.* But certainly, if the test for commercial speech is whether or not it constitutes “traditional advertising,” such a test would, I submit, potentially leave the doctrine to regulate a largely empty set to the extent that, as I discussed before, much of what falls into the category of “traditional advertising” today doesn’t make any claims that can be tested. On the other hand, if you recognize that much speech that passes for corporate self-expression is just marketing by another name and that claims are made in this area that have the potential to mislead the public, then it seems appropriate to, at a minimum, provide a remedy for false claims made through these channels, just as much as for those made through traditional advertising.

Public relations and marketing people often acknowledge that public relations speech is essentially marketing. But marketing doesn’t correspond very well to what we ordinarily identify as the sort of speech that requires First Amendment protection. Nike would like to have its marketing characterized as a “viewpoint” on globalization. However, for-profit corporations don’t have viewpoints. They have the goal of maximizing their returns and will often and demonstrably say whatever seems to advance that goal, true or not. I do not have the time here to go into why this feature makes for-profit corporations inappropriate rights holders under the First Amendment from a philosophical standpoint, or why there might be a legitimate difference in the concerns raised by the speech of for-profit institutional, fictional persons and that of not-for-profit organizations or human beings. But, suffice it to say that the late Milton Friedman’s view was that a company has no business spending money from its treasury for any kind of speech issue or social welfare goal unless it is advancing the goal of profit maximization in some way. And I think that probably fairly restates the current law of corporations, although with a wide latitude under the business judgment rule for management to decide what sorts of speech and ancillary expenditures might advance that goal.

But there is no seriously disputing that a substantial portion of for-profit speech delivered through public relations vehicles is marketing. One thing about public relations speech is that you often get somebody else to deliver your marketing message for you for free. This isn’t true of every marketing vehicle. Some, like traditional advertising, you have to pay for. And even some public relations speech—that is, speech intended to improve public image—is offered in an advertising format like image advertising. An example of image advertising is taking out an ad saying, “Nike supports a living wage,” or “Nike supports the Environmental Protection Act.” Why is Nike doing that? It’s doing that because it wants to get the benefit from the public perception of itself as a “personality,” a responsible, good citizen personality, in addition to its other advertising, which may be intended to create a “hip” or “cool” personality. And I think, by the way, that one of the psychological effects of this advertising is to reinforce the legal notion of corporate personhood by grounding it in these created personalities. So when a company makes statements about itself as having a personality of a certain type, it tends to normalize and reinforce the notion of corporate personhood.

Other favorite PR vehicles are press releases, video news releases, and the like. They are issued in the hopes that their contents will be picked up by the media as “news” and thus that any claims therein will gain credibility by coming from an apparently neutral third party—the press. This technique has been fairly successful. Sometimes a press release is picked up in its entirety without attribution to its source. This practice actually implicates journalism ethics, another topic altogether from that of the legal ramifications.

Public relations marketing can also take the form of the acceptance by company representatives of public speaking engagements. I was on a panel at the University of Miami School of Communications to which Nike sent a representative. What is Nike’s incentive to participate in academic debate? Undoubtedly it is part of its marketing strategy.

Marketing can include promotional events, product placement in movies and television, the list goes on and on. It includes what is known as “stealth marketing,” which, in case you haven’t heard of it, is an industry term of art to refer to word-of-mouth marketing efforts where the target audience interacts with someone one-on-one in the product endorsement. That interaction often does not involve the endorser identifying him or herself as paid by the product manufacturer. This occurs, for example, when a marketer sends actors out to bars to pose as patrons and to order and talk about a particular vodka in the hopes of generating word of mouth on that vodka. Although the professional organizations for word-of-mouth marketing insist that they support transparency and
disclosure, since such disclosure isn’t always made, one is left with the suspicion that, like the press release carried by a newspaper as “news,” this technique, to the extent that it works, depends on the target audience believing that the person he or she is interacting with is not being paid for the endorsement, but rather is simply sharing their enthusiasm for the product with a stranger.

In addition, putting statements in forms that mimic opinion rather than traditional advertising speech makes the speech appear more like opinion and less like marketing. Nike claimed that putting its statements in a form like a letter to the editor ought to take it out of the category of regulated marketing speech and into the category of protected opinion speech. However, at least one such letter quoted in the complaint seemed to support the characterization under the commercial speech doctrine as a proposal for a commercial transaction. It was a letter to the editor, a quintessential example of opinion, or so Nike claimed. But the letter itself—offered and published during the holiday season—noted, “we encourage shoppers to remember” that Nike was the industry leader in improving labor practices overseas, and it went on to support Nike’s labor practices.

Why should we shield communications like this from liability if they contain false factual claims? Making companies liable for a false statement is not the same as censorship. It just means that if you’re going to make these statements in order to sell more sneakers, or coffee, or whatever it is, and if the statements aren’t true, then you ought to be held liable for those misstatements, and there is nothing unfair about this. Why should for-profit entities enjoy First Amendment protection for intentional misstatements made with an eye to increasing profits under the guise of protecting their “expressive rights”?

Well this was a very quick overview of some of the arguments I’ve raised in other contexts addressing ideas about what the First Amendment is meant to protect, which proceed from Thomas Emerson’s articulation for the four values the First Amendment is meant to protect26—values which I submit do not support the extension of broad First Amendment protection to for-profit corporations’ speech generally, and certainly not to false speech. These four values are: (1) the protection of the human interest in self-expression, autonomy, and self-realization; (2) protection for the discovery of truth; (3) protection of democracy as a political process; and (4) the provision of a social “safety value” to allow

24. Kasky, 45 P.3d at 258. See supra note 11.
25. Id. (emphasis added).
the expression of minority, dissident, and disruptive voices on the theory that allowing expression is itself a way to defuse any threat posed by such unrest.

As to the first concern, corporations are not human beings, so the interest in protecting human expression, that whole justification falls out, just drops away. Moreover, for a number of reasons, which Professor Greenwood discusses, the for-profit corporation isn't a very good proxy or conduit for human expression, whether of its employees or its shareholders. Because managers are fiduciaries, their speech on behalf of the corporation is not their own. And because of the very limited role that shareholders play in corporate governance, as well as their often primary interest in a financial return rather than having the corporation act as their spokesperson, it doesn't speak for the shareholders either.

As to the truth component, there is fairly substantial evidence that corporations will only disclose information that may be negative to profitability when they are required to by law (and sometimes not even then) and will similarly make statements intended to maximize the corporation's welfare to whatever the limits are of the laws governing false advertising, fraud, unfair competition, and the like. Indeed, they may have a duty to do so. Given the fiduciaries' mandate to maximize the financial well-being for the shareholders (as realized through the corporation, a problem which itself deserves an entire symposium), the corporation has a duty to say and do that which will maximize its value as long as it is legal to do so. And it may seem to managers that it has a duty to do so even when the behavior in question is illegal if the sanctions for doing so are less than the risk associated with not doing so. I've had corporate counsel say things to me to the effect that, "We need to be able to say to clients that misstatements are illegal, because if we can't tell them it's illegal, then there's no grounds for us to counsel them not to do it." Given the possibility offered by the corporate form's perpetual life and limited liability for investors and managers; the ability of large players in some markets to dominate the market through the creation of widely recognized trademarks, logos, etc.; the ever-shrinking number of media dependent on the advertising dollars of these large corporations; and finally, the absence of a readily identifiable entity with both the means and the incentives to offer counter-speech, it doesn't seem that for-profit corporate speech requires broad protection in order to protect the discovery of the truth. To the contrary, these factors suggest that such protection might actually diminish the amount of truthful information rather than generate it. Remember, declining to offer the for-profit commercial speaker a constitutional shield for fraud is not the same as saying that it can't speak at all.
As to democratic process, corporations—whether for-profit or not-for-profit—aren't voters, and it would seem of less importance to protect their speech in order to protect the democratic process than it would to protect that of citizen voters. Indeed, some might say that through lobbying, for-profit corporations actually have an enormous influence on the political process, far more than the average citizen, and are in little need of a constitutional shield for fraud.

Finally, because many of these entities are some of the largest and most powerful institutions in the world, far more powerful than many countries, it is somewhat ludicrous to suppose that we need to provide them with a way to “blow off steam” in order to ensure social stability.

This brings me to my last point. In discussing the issue of commercial speech, one of the things I think that we encounter is the promotion of an abstract principle divorced from the actual practices in the world. For example, the claim raised by many that the principle of equality forbids us from artificially restraining one “side” in the debate on globalization ignores the reality that most of what is heard on this and other topics in the culture is already one-sided. But it is the commercial side that we hear, represented by companies like Nike because they are the ones with the resources to speak, as well as the economic incentive to speak. So, for example, Justice Chin of the California Supreme Court in his dissent complained that the majority’s holding lacked balance because it subjected one side of the debate to different rules, unfairly hamstringing Nike’s statements.27 But where is the concern for “the balance” in resources or incentives? Does it matter that Nike has more money than almost any other speaker? Justice Chin’s concern puts me in mind of the famous quote from Anatole France about the law in its majesty equally forbidding the rich and the poor from sleeping under bridges! Nike has billions of dollars to promote its point of view, and there isn’t really a very good readily identifiable source of counter-speech with a similarly concrete economic incentive to expose falsehoods. And the press, for reasons related to incentive structures set up by concern about pleasing advertisers, as well as ambiguities about the market for “the truth,” is not really a very good proxy for that concrete counter-speech.

Why should we care about whether we can regulate commercial speech or whether we should view with some trepidation the prospect of unrestrained commercial speech as was proposed by Nike and some of its amici? For one: tobacco. The tobacco industry, as indicated in many of the documents unearthed in the last several years of litigation, engaged in deliberate obfuscation of the health risks of smoking, knowingly

27. *Kasky*, 45 P.3d at 263 (Chin, J., dissenting).
marketed to children, and falsely denied the addictive properties of nicotine and the negative health consequences of secondhand smoke. Evidence of these claims can be found in the opinion from the District Court in D.C. in the conspiracy case brought against some tobacco companies. The opinion is approximately 1700 pages long and filled with facts relevant to this discussion. Second, pharmaceuticals and public health: there's been a lot of concern about the direct-to-consumer marketing of pharmaceuticals and how that takes place, so we could add a number of drugs to the list with nicotine. And it is not just the marketing of harmful products. Other candidates for reasons to be concerned about expansive protection for commercial speech might be global warming, obesity, alcohol marketing, vehicle safety, securities regulation, and just plain old ordinary consumer protection law, which might be put at risk were the commercial speech doctrine done away with in favor of greater protection for commercial speech.

Ronald Collins: Professor Piety, thank you very much for those remarks. For those of you who are in doubt, the reference to the Emersonian principle is Thomas Irwin Emerson, the late professor of Yale Law School, and not to Ralph Waldo Emerson.

The next presenter is Mark Lopez of the American Civil Liberties Union.

Mark Lopez: Thank you. Thank you, David Skover and Dana Gold. This is a very timely and important discussion we’re having today. Thank you to Ronald Collins and my copanelists. They’re all experts in this business, and their points of view are very helpful to the discussion. I want to particularly acknowledge Ronald Collins and his collaborator Professor Skover, who produced a very readable and helpful law review article on the topic in the ‘04 Case Western Law Review. I read it on the plane, and it really brought back Nike for me. I recommend it.

It’s in my nature to respond to argument, so I’ll start like that. There are consequences to what corporations say. There are consequences in the court of public opinion. If they say they’re green, and they’re not green, you can bet the Sierra Club is going to be all over them. You can bet that the Fourth Estate is going to run with it, and you can bet that the competitors of that corporate speaker are going to make hay of that misrepresentation as well.

Now, please appreciate that there are already laws that prohibit corporations from engaging in fraud and deceit. They mostly target those communications that propose a commercial transaction. And they’re

29. See Collins & Skover, supra note 2.
there, and they should be there, and we have Professor Vladeck to thank for them, to protect the consumer from misrepresentations that might influence your product decision, your purchasing decisions. As the law stands, it is largely confined to representations about price, availability, and suitability.

Let me raise another issue in response to some comments I heard earlier in the first panel. Let’s not tar all corporations, or let’s not paint all corporations with the same tar. The ACLU is a corporation, so is the Sierra Club, and I would submit to the young lady in the back who talked about the inequities of wealth to the process of debate, I would suggest that you join the Sierra Club and organizations like the ACLU and other advocacy organizations, because your $5, your $15, can go a long way when you aggregate those resources. They can go a long way in providing a counter-response to the aggregations of wealth that corporations have.

So let me just tell you why the ACLU would be very concerned about any attempt to regulate corporate speech. Like I said, we are a corporation. One of the most important things we do is to criticize government. And when we do that, we often do it by criticizing elected officials.

In 2002, I believe it was, the government decided to make it a crime to engage in any broadcast advertising, whether it be radio or television, that identified a federal candidate within thirty days of a primary election, or within sixty days of general issue election. The law was written broadly enough to catch an organization like the ACLU. Well, that’s our bread and butter. That’s what we do. And, to our dismay, the Court upheld that restriction, basically saying that, as corporations, we have the ability to aggregate great amounts of resources and unfairly influence the political process.

The development of the law in this area didn’t stop there. There are other restrictions that are starting to target the ACLU and advocacy groups like us. Whatever side of the political spectrum you’re on, governments are taking direct aim at the speech of advocacy groups organized as corporations. And the question you have to consider is: does the ACLU’s status as a corporation justify applying a lesser First Amendment standard to the ACLU than would apply to a non-corporate entity? That’s something we obviously are very concerned with.

I hope that goes somewhat in the direction of answering your question because that’s part of the answer to the question of why the ACLU

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came down on Nike's side of this case, a question I get from everyone. I'm four years removed from this case. I've moved on to other cases, but I do recall at the time that there was an NPR show and some other press on the subject, and the question was always, "Why is the ACLU on this side of the issue?"

The answer to the question is surprisingly straightforward. You have to understand what the premises of the First Amendment are, just like you have to understand what's really behind corporations. The First Amendment presupposes that freedom of speech, the freedom to speak one's mind, is not only an aspect of individual liberty and thus constitutionally protected, but it is also essential to the common quest for truth and the vitality of society as a whole. What this means is that speech concerning public affairs is more than self-expression. It is the essence of self-government. This means that the individual liberty interest serves a greater purpose. It advances society's interest in a free and unfettered debate about public issues. The judgment has been made. There is consensus on this issue that in a democratic society, the public interest can be fulfilled only if debate on matters of public concern is unfettered from government restrictions.

In a perfect world, there would be no misrepresentation when people speak, but erroneous speech is inevitable and must be protected if the purposes of the First Amendment are to be fulfilled. As the case law stands, and as it has been settled for at least fifty years, under the First Amendment there is no such thing as a false idea. We rely for correction of those ideas on more speech. Except for cases involving product advertising or where representational interests are at stake—fraud, slander—courts are not in the business of sorting out the truth. It's left to the court of public opinion.

Nike's statement in this case was a direct response to criticisms of its corporate practices. Those practices were the subject of a debate, not a commercial transaction. The regulation of product advertising is, as I said, limited to speech that promotes a commercial transaction. The speech by Nike in this case has a commercial aspect, but it's subordinate to the political aspect, and that's what distinguishes it from the product advertising cases. The fact that Nike has an economic interest in what it says is frankly neither here nor there. Labor unions, for instance, have an economic interest when they advocate, and that has never been a consideration of the Court. The Court's cases proceed on the assumption that you can speak without restraint, except in the situations where you are engaged in product advertising.

The Court's cases and First Amendment jurisprudence proceed from the assumption that there are a very limited set of circumstances in
which speech can be prohibited. In the context of corporate speakers or commercial advertising, those restrictions have been limited to situations involving product advertising. As we heard from our first panel, they have not been broadly extended to prohibit speech that affects other matters of public concern. That's what was at stake in Nike.

In Nike, although there was no decision, there were a number of concurring opinions from the decision not to decide the case. The justices who tend to be on the liberal side of the Court were all of the view, as I read those concurring opinions, that the speech at stake was the type of political speech that is fully protected under the First Amendment.

I understand that sometimes the line gets blurred in the context of advertising and corporate speech that is in the form of public relations, but the Court has tools for figuring that out, and it's a subjective test. They've done it before. They did it in the Bolger case, and they're perfectly capable of doing it on a case-by-case basis.

I submit that the Nike case wasn't a close call. And if I had to guess, it would have come down nine-to-nothing against Kasky. That's all I have to say. There's a lot more to be said about political advertising restrictions, the commercial speech doctrine, and corporate speech in general. I think we're going to hear it all today. Thank you.

Ronald Collins: Mr. Lopez, thank you. Our next speaker is Professor David Vladeck from Georgetown University School of Law.

David Vladeck: Thanks very much for inviting me to participate in today's panel.

Even though we are discussing a case that was not decided on the merits, Nike is an important case because it crystallizes two of the essential critiques about the commercial speech doctrine, critiques that have run through this doctrine from before its advent in 1976 to today. The fundamental debate triggered over what constitutes "commercial speech" and how strictly commercial speech should be regulated is still being played out — not just in the academy, but also in the courts on a day-to-day basis. So this is a timely and important topic.

The key issue in Nike, and the core issue in the commercial speech doctrine, is: what is commercial speech? And next, once you've identi-

32. See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980) (“[O]ur decisions have recognized the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.”) (internal quotations and citations omitted).
34. Id. at 656 (Stevens, J., concurring, joined by Ginsburg, J., and joined by Souter, J., as to Part III).
fied the domain of commercial speech, what standards should the courts employ in evaluating government restraints on commercial speech?

Now, obviously, the first question ought to be the definitional question of, "What is it?" But that turns out to be the more complicated question, which I'd like to return to in a moment. Let me first talk a bit about the standards the courts have imposed in evaluating restraints on commercial speech.

When the Court first decided *Virginia Pharmacy Board* in 1976, the Court clearly was wrestling with what it thought were two imperatives. One was the need to open up the channels of communication of commercial information to listeners, consumers. The Court said—and I don't think there's any doubt about it—that for the ordinary citizen the price of pharmaceuticals may be just as important or even more important than whatever foreign war is raging at the time. That was true of our clients in *Virginia Pharmacy Board*. The plaintiffs in that case, you will recall, were elderly people who had to drive all over northern Virginia to find low cost prescription drugs, and they challenged the state law that prohibited pharmacies from advertising the price of prescription medications. The *Virginia Pharmacy Board* Court wanted to get rid of archaic rules and laws, like the one before the Court, many of which were highly paternalistic and interfered with the flow of communication of information that consumers need to better their daily lives. So one imperative that drove the Court was the need to clear away anti-competitive state laws that interfered with the flow of truthful commercial information that would help consumers make informed purchasing decisions.

On the other hand, the Court was worried about lifting the floodgates to a market that would be rife with falsehoods and half-truths. The Court wanted to ensure that commercial information flowed "cleanly" as well as freely. So, if one looks at the story behind *Virginia Pharmacy Board* and studies the Court's opinion in that case, the picture that emerges is an effort to accommodate what the Court saw were two competing goals: ensuring the flow of truthful information to consumers relating to purchasing decisions without exposing consumers to an unreasonable risk of fraud and deception.

By recognizing that commercial speech is deserving of constitutional protection, *Virginia Pharmacy Board* marks a critical step forward in the Court's First Amendment jurisprudence. But the Court's opinion did not attempt to formulate a standard to guide the Court in evaluating restraints on commercial speech, and the Court's efforts to do so in the

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intervening thirty years have been less than satisfying. The first efforts to articulate a test in Central Hudson\(^37\) resulted in a controversial, five-to-four ruling. Justice Blackman, who wrote the Virginia Pharmacy Board opinion, was unhappy with Justice Powell's formulation in Central Hudson\(^38\) because, in Justice Blackmun's view, the Central Hudson standard cut back on the Court's ruling in Virginia Pharmacy Board. And the Court's efforts to fine-tune the standard since Central Hudson have been just as controversial.\(^39\)

In my view, the standard articulated by the Court in Central Hudson was intended to be a genuinely "intermediate" standard of scrutiny, with courts giving legislative judgments considerable deference. The theory, of course, was that the doctrine was developed to enable to listeners, or consumers, to get information they needed to make informed choices.\(^40\) And listeners, of course, are interested only in truthful information. The theory did not seek to advance the expressive interests of the speakers; indeed, the early cases are strikingly devoid of any mention of the speaker's interests.\(^41\) Applying the test as first formulated, the Court upheld a number of state laws that restrained commercial speech, because the Court thought that they served sufficiently strong governmental interests and did so in a way that did not intrude needlessly on protected speech.\(^42\) In recent cases, however, the Court has transformed the standard without doing so explicitly. No longer do courts give deference to legislative judgments or uphold restraints that are reasonable and proportionate to the interest they serve. Rather, the standard applied today is a

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37. Central Hudson, 447 U.S. at 566. According to the majority,
In commercial speech cases, then, a four-part analysis has developed. 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.

Id.

38. See id. at 576 (Blackmun, J., dissenting).


40. Id. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising.").

41. Vladeck, supra note 39, at 1070 n.91 (and authorities cited therein).

42. See, e.g., Florida Bar v. Went for It, Inc., 515 U.S. 618 (1995) (upholding restraint on lawyer communications to potential clients); United States v. Edge Broad. Co., 509 U.S. 418 (1993) (upholding restraint on advertising lottery information); Bd. of Trs. v. Fox, 492 U.S. 469 (1989) (remanding case but holding that restraints on commercial speech need not satisfy a "least restrictive means" test but instead should meet a reasonable "fit" test, which shows that the restraint is "in proportion to the interest served").
rigorous one—akin to strict scrutiny—and results in the virtual automatic invalidation of laws restraining commercial speech.43

One question raised in Nike v. Kasky, and brought up by Mark Lopez, is whether there is a general notion in First Amendment law that there is no such thing as a false idea. Nike’s defense was, in part, that even if its statements about its labor practices were wrong, they were “ideas” entitled to full-bore constitutional protection. Mr. Lopez is right, of course, that in the realm of political speech, the Court has said often that there is no such thing as a false idea. But that is demonstrably not true in the commercial context. The Court has always said that falsehoods have no place in commercial speech because they distort the market; they undermine the values Virginia Pharmacy Board was supposed to enhance. And, indeed, the First Amendment has never been a defense to a claim of fraud or deception.

In my view, however, the more troubling and problematic part of the debate goes to the extent that the government still has leeway under the commercial speech doctrine to regulate truthful speech. Adam Winkler earlier pointed out that if the courts undermine the ability of the government to regulate truthful speech, it would threaten the government’s ability to impose structural regulations of speech, as Congress and the Securities and Exchange Commission have done with the regulation of the sale of securities. My point, of course, is that it is not only the securities laws that are threatened. There are a host of government programs that depend on the government regulating truthful speech, either because of concerns that the speech, although literally true, may be deceptive or misleading, or because of non-speech concerns. A pharmaceutical company may not sell a drug unless the drug’s labeling has been approved by the FDA; a food manufacturer may not sell a can of soup unless the soup’s labeling conforms with federal law. Do these requirements violate the First Amendment? Does it matter that, in the case of pharmaceuticals, the government is worried about possible deception, while in the case of food items, like soup, the government is using labeling to promote a better understanding of nutrition? So one question is what, if anything, is left of the government’s power to regulate truthful speech?

With respect to potentially misleading speech, the government’s power, in my view, has been greatly circumscribed by the modern commercial speech cases. One case illustrates my concern. The D.C. Circuit,

in *Pearson v. Shalala*, invalidating the Food and Drug Administration’s regulations forbidding the sellers of dietary supplements from making health claims that were not supported by a significant body of scientific work. Although the court recognized that the statutory scheme governing dietary supplements was designed to protect against consumers being misled about the efficacy of the products, the court thought that this goal could be served equally well through FDA-required disclaimers. As a result of this ruling, the FDA has now revised its regulations governing health claims on foods and dietary supplements to permit virtually any claim—even those without substantial scientific support—so long as a disclaimer appears somewhere on the label.

*Nike* therefore exposed, but left unanswered, a wide-range of questions about the level of scrutiny courts ought to apply in reviewing government restraints on speech—questions to which the Court, at some point, will have to return. But as I noted at the outset, *Nike v. Kasky* raised an even more fundamental question—namely, what is commercial speech? Nike’s principal defense, and I think Mark Lopez has done a very good job laying it out, was that the kind of statements it made in defense of its labor practices should be defined as core political speech, not commercial speech, and thus were entitled to full First Amendment protection.

After all, Nike contended, our critic threw down the gauntlet, and we simply picked it up. We did battle with our critics by taking out ads and engaging in other communications that set forth our position. Nike’s defense of its trade practices, its argument went, did not take place mainly in newspaper ads or department store fliers, but in letters to the editor of the *New York Times*, in letters addressed to university athletic directors, and in communications to other opinion-makers. Opinion-makers, Nike pointed out, are not necessarily the same as consumers, and audience and context should matter in deciding whether speech is “commercial.”

And Nike, of course, had some of the best First Amendment lawyers in the country making that argument for it: Harvard Law Professor Larry Tribe, Duke Law Professor and former Acting Solicitor General Walter Dellinger, and veteran Supreme Court advocate Tom Goldstein. Of the thirty-three amicus briefs that were filed, the vast majority were

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45. Id. at 659–60.
filed on behalf of corporate speakers who wanted to expand the reach of pure speech to cover statements by corporations made in response to criticisms like those that were leveled against Nike.

This was, I think, the most interesting part of the debate of Nike. The first argument Nike made in support of its theory is that the courts need to level the playing field. After all, isn’t it an odd First Amendment jurisprudence that allows Nike’s critics to have broad protection under the *New York Times* v. *Sullivan* standard, while Nike is not permitted to take advantage of the same protections? Why should participants in the same debate be judged by different standards? That is plainly the law today. There is no question that Nike, as a twenty billion dollar company, qualifies as a “public figure” under the *Sullivan* test. On the other hand, Marc Kasky, an obscure activist that no one had heard of before the litigation, is plainly entitled to full-bore constitutional protection because he plainly was not a public figure. And so the first question was why shouldn’t the playing field be level? Why shouldn’t Nike’s speech be treated as pure speech under the First Amendment just as Marc Kasky’s speech would be deemed pure speech, thus giving Nike and Marc Kasky equal treatment under the law?

Here I want to register my disagreement with Mark Lopez. Mr. Lopez says that, had the Court reached the question in *Nike*, nine justices would have voted to extend protection to this kind of speech, and zero would have gone in the other direction. I actually think that there are only two justices who expressed that view, Justice Breyer and Justice O’Connor. I doubt the Court would have taken such a dramatic step, let alone unanimously, and let me tell you why.

First, Nike’s argument, no matter how it’s dressed up, was an argument that it was constitutionally permissible for corporations to lie about facts salient to consumers in communications that were plainly designed to reach a consumer audience. Nike’s statements about its labor practices were not made in the rarified air of a debating club. They were made to staunch consumer defections away from Nike products when revelation of its exploitive labor practices first hit the press. Nike had to layoff workers. Nike posted its first loss in its corporate history. Nike’s reputation was tarnished in the eyes of the public. So the argument that Nike’s statements were made principally for political rather than economic gain is highly contestable and I think probably could not have withstood review. But the Court was, in my view, unlikely to conclude as a matter of law that these statements were “political speech,” especially

since the case had not gotten past the motion to dismiss stage before the California courts. At best for Nike, the Court would have remanded the action to permit the parties to flesh out the record on the nature of Nike's communications and their intended audience, perhaps giving clearer instruction as to where the line between political and commercial speech should be drawn.

Even more fundamentally, I have problems with Nike's claim that, under current law, the playing field is not level and that corporations need to be shielded from liability in order to be full participants in whatever debate they choose. The simple fact is that corporate speech now drowns out all other speech. The tobacco industry spends over $15 billion in advertising every year. The pharmaceutical companies spend nearly $16 billion in advertising annually. What non-corporate entity can match these expenditures?

Contrary to what Mark Lopez suggests, there is rarely a corporate adversary willing to take on tobacco or drug companies when they promote a particular product. No company ran ads questioning the safety of Bextra, Celebrex, or any of the other highly-promoted COX-2 inhibitors. Nor was there any counter-advertising to the tobacco industry's promotional blitzes until the early 1970s. Even then, as today, the budgets for public health organizations engaged in anti-tobacco advertising were dwarfed by the advertising budgets of big tobacco. There is no counter-advertising for drug products, even those making dubious health claims, and virtually no counter-advertising for beer and other alcoholic beverages that are heavily promoted to young people.

So Nike's first claim that the playing field needs to be leveled to permit it and other corporations to speak freely is a hard one for me to swallow. The problem, in my view, is not that we lack corporate advertising. Nor do I think it would be right to import the concepts of New York Times v. Sullivan into commercial speech cases. The public figure doctrine announced in New York Times v. Sullivan was developed by the courts to respond to a serious deficit in First Amendment law. An individual, a small group of individuals, a small corporation, or, at times, even the New York Times, could not risk criticizing a large corporation or a public figure without assuming the risk of sustaining a financial judgment that would either put the company under the water or be ruinous for the individual or individuals involved. But the First Amendment was not intended to be the exclusive preserve of the rich or powerful. So the


Court in *New York Times v. Sullivan* tried to level the playing field by recognizing that where public figures are the targets of criticism, they have the wherewithal to defend themselves, and thus a heightened standard of proof should be required to protect their critics from liability where the criticism, although wrong, was not made with constitutional malice.  

To be sure, the *Sullivan* standard is a leveling device: it permits resource-poor individuals and organizations to participate in the marketplace of ideas on an equal footing with their resource-rich, public figure counterparts. But Fortune 500 companies like Nike are hardly resource-poor organizations easily deterred from speaking out in their own interest.

Part of it, of course, is the point that Professor Piety made before. In a libel case, the plaintiff always has equal or superior knowledge of the facts. For that reason, it is not unfair to place a heightened burden on the public figure plaintiff to prove falsity and to show that the defendant knew, or should have known, that the statement was indeed false. That presumption, of course, would be absolutely backwards in a commercial speech case. Nike repeatedly argued, correctly, that it, not Marc Kasky, uniquely had possession of the relevant facts. But that dynamic cut against Nike's argument. One key point in *Sullivan* was that misstatements of fact are "inevitable in a free debate" over political and social matters. But misstatements of fact are hardly inevitable when a corporation is making statements about matters uniquely within its knowledge and does so to influence consumer behavior.

Mark Lopez's claim that the ACLU participated in *Nike v. Kasky* out of its own self-interest is alarming to me. I worked for Public Citizen, a public interest group, for nearly thirty years. Public Citizen often criticized corporate wrongdoing, and did so with unrestrained zeal, knowing full well that it could be sued for trade libel or product disparagement. In fact, Public Citizen was sued on a number of occasions. That did not chill our speech, even though at times we faced potential liability that far outstripped our assets. Consider another example: Consumers Union, publisher of *Consumer Reports*, is one of the flagship public interest organizations. It has been on the wrong side of much product disparagement litigation, including the *Bose* case before the United States Supreme Court, and the *Suzuki* case that went up to the Ninth Circuit.

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Those cases have not caused Consumers Union to scale back its advocacy activities for one whit.

I am not suggesting for a moment that we ought to give for-profit corporations greater protection than they already have in order to insulate them from liability, nor do I think non-profits deserve additional protection either. Corporations ought to be held accountable for what they say, particularly when they are trying to persuade customers to purchase their wares. Before yielding the podium, I want to discuss briefly the current issues before the courts on commercial speech. *Nike* certainly did not mark the last word in the evolution of the commercial speech doctrine. And here I want to return to a point I made earlier—namely, that in my view, the commercial speech doctrine, as an engine of consumer protection, has suffered serious erosion in the past decade. As a result of this erosion, there have been impacts both on the regulatory side and on the litigation side. On the regulatory side, the FDA has already significantly changed its rules governing health claims on dietary supplements and food products. If you purchase a food product or dietary supplement today, you will see a health claim on it, maybe or maybe not accompanied with a disclaimer saying the FDA does not know whether the claim is true or not. This health claim will be authorized by the FDA, even though the underlying statute *forbids* health claims in the absence of "significant scientific agreement." Why? Because the FDA believes that the First Amendment no longer permits the agency to enforce the law the way it is written.

There have also been a number of "attractive alcohol" advertising cases brought by parents of children who complain that alcohol ads—particularly beer ads—are aimed at minors. Many of the problematic ads appear in periodicals that are disproportionately read by minors. The industry defense in those cases is, of course, "the First Amendment permits us to do that." Whether that defense will hold up under scrutiny remains to be seen, but initially courts have accepted it. These issues are still very much on the forefront today. *Nike*, a case undecided, helps crystallize these issues, but they are by no means resolved. Thank you.

**Ronald Collins:** Thank you, Professor Vladeck.

We have some questions that the various panelists have proposed. Feel free, if you want, to ask those questions. It's not my intention to go

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through the litany of them all, but if any of them strikes your fancy, and
you’d like to ask them in their stated form or in a variation that you pre-
fer, I welcome it. Let me start off with one of those questions for our
panel.

Does it seem like Nike was involved in exploitative practices
abroad? Well, certainly, but I’ll speak for myself. By my measure, yes.
Does it seem that these work practices they had were unconscionable?
By my measure, yes. Should Nike be held to account? Of course.

The question to the panel: at the end of the day, did Nike really get
away with anything? Did Nike actually mislead anybody? There were
literally thousands of articles, and I would say ninety-eight percent,
maybe even a hundred percent—except for maybe the Nike ad-trade
show—slammed Nike again and again. There were all sorts of TV spe-
cials that slammed the company. I mean, who in the U.S. who reads
newspapers and listens to radios, watches television, could have believed
for a moment, a fleeting moment, that anything that Nike had said bore
any semblance of truth?

Doesn’t this prove that at the end of the day this debate was best
left in the court of public opinion and not in the Superior Court of
California?

Tamara Piety: Well, I would say that it seems that Nike appears to
have recovered a lot of market share, and that’s what they’re interested
in, not so much the public opinion, except insofar as consumers and
investors read it.

The thing I find really interesting about this area is that amongst
many public relations professionals they think that the perception is the
problem. So if you can cure the perception, then you’ve cured the prob-
lem. In fact, maybe it is better because curing the perception might be
cheaper. The problem is not the labor practices. It’s the perception
about
the labor practices.

What has been suggested is that Nike didn’t release the corporate
social responsibility report because it was involved in this litigation. But
that report has been released now even though the Kasky decision, the
one that was supposed to be so chilling to the company’s willingness to
issue this report, is still good law in California.

But an interesting thing happened between the time the case was
argued in the Supreme Court and when they released the report, which
may shed some light on Nike’s willingness to release the report. Califor-
nia passed Proposition 64, which repealed the private attorney general
 provision of the controlling statutes in the Nike case, so that someone
like Kasky could no longer sue on behalf of the citizens of California. Now the state attorney general can still do so. But apparently Nike's not worried about the attorney general. I think that says a lot about the degree of corporate influence in government, which will probably be addressed in the next panel and throughout the day.

But one of the problems here is the problem that Professor Vladeck bought up, the issue of what can the government do to restrain false speech?

Mark Lopez: I think you suggested the answer. The First Amendment works in this case just the way it was supposed to. I will quickly say that I am troubled by the advertising example that Professor Vladeck put out about how the advertising folks in the tobacco industry drown out critics and unfairly control the debate. There was an opposing point of view that eventually won the debate over the safety of tobacco products.

At the end of the day in the tobacco context there was detrimental reliance. The industry misrepresented the suitability of the product, and there was a remedy for the people that were injured. That's very different than Nike where we don't have those factors present.

David Vladeck: Let me say two things. First, I think Nike won the debate because if one looks at its sales, its counter-advertising campaign was incredibly effective. As soon as Nike started to respond to the charges, Nike did pretty well, and the idea that Nike has engaged in self-censorship as a result of this litigation is very hard to accept.

The other point I would make is that in some ways Nike is interesting because it's such a rich example of a real give-and-take between two opposing parties that were able to make their voices heard. But that example is atypical. Often, there is no counter-campaign. Indeed, more often than not the public is not made aware of these kinds of concerns for years or decades; consider, for example, the big public health debacles like tobacco, where the tobacco industry monopolized the debate for decades.

To be sure, the Surgeon General report came out in 1964, but even as late as 1984 the vast majority of Americans did not believe there was a direct link between smoking and health risks because the drumbeat of doubt sewn by the tobacco industry overwhelmed whatever modest public health campaign and counter-advertising campaigns were launched.

56. In 2004, Initiative Measure (Prop. 64) § 3 substituted "who has suffered injury in fact and has lost money or property as a result of such unfair competition" for "acting for the interests of itself, its members or the general public" in CAL. BUS. & PROF. CODE § 17204 (West 2006).

against it. So I think the First Amendment did win in the sense that *Nike* was a great case and got people to start thinking about what the role of corporations in society are and what the First Amendment should say about it.

**Ronald Collins:** Before we go, I just have a quick comment. If Nike was doing so well with its public relations campaign, why did it settle with Marc Kasky? I think of Marc Kasky as a public figure, so let me exercise my free speech rights under *New York Times v. Sullivan* and its progeny. To me, the real problem was Marc Kasky. I submit to you that Marc Kasky sold out at the eleventh hour. We wouldn’t otherwise be having this discussion. All the terrible things that Nike allegedly had done, Marc Kasky could have made public. But he chose to enter into a secret settlement agreement with Nike. Did he sell out? We don’t know. We can’t even find out. But when it’s all said and done, the great public interest advocate who was responsible for all of this simply walked away into the San Francisco sunset.

We don’t know what happened at all in this case, and so at the end of the day I don’t think Nike’s public relations campaign worked. If it did, the company wouldn’t have gone out of its way to settle with Marc Kasky the way it did.

**Audience Participant Martin Redish:** Professor Vladeck, in your talk you painted the *Nike* case in a David-versus-Goliath light, Marc Kasky against Nike. Marc Kasky’s just a schmoe who sued. This was Bob Herbert of the *New York Times*, a profit-making corporation. This was CBS going up against Nike. And in the tobacco litigation, the American Cancer Society has been very clear what one side of the debate is, not to mention the government and its required warnings.

Is it fair in a case like *Nike*? Does it further First Amendment values for Bob Herbert and the *New York Times* and CBS when they attack Nike to have a greater degree of First Amendment protection than when Nike responds for Nike?

**David Vladeck:** Well, let me make two points. The first is that Bob Herbert and the *New York Times* actually came out on Nike’s side in the litigation, and the only pro-Nike article he ever wrote was defending Nike’s First Amendment rights.58

**Martin Redish:** Yeah, but that’s beside the point.

**David Vladeck:** No, I think it actually supports your point in some respects, and in that sense *Nike* was itself somewhat of an unusual case, though I would still point out that the notion that the *New York Times* and CBS necessarily geared their news stories to counteract the pervasive-
ness of the Nike ads may not be correct. I don’t know. I wouldn’t depend on that.

But if you look at tobacco, which is in my sense a better example because of the scope and its duration, the American Cancer Society made almost no dent for the first twenty years in the tobacco wars, almost no dent at all, nor did the federal government. And if you look at people’s views about smoking and health up until the mid-1980s, it was clear that one side monopolized the debate. That is what troubles me.

The point I was really trying to make is that I don’t understand the inhibition, or self-censorship argument Nike pressed. I really don’t. As long as you’re not lying, you ought to be willing to throw out your ideas, and, if need be, defend them. What is wrong with that?

The only reason why there was an imbalance in this case is because, as you put it so eloquently, Kasky was a schmoe. If the battle had been between CBS and Nike, that would have been an even battle, the same way the playing field was level in every respect when Philip Morris sued NBC over the Dateline program, which alleged that Philip Morris had in fact manipulated the nicotine content in its cigarettes. That’s your case, where there are two well-heeled public figures fighting it out on a First Amendment issue, and there the playing field is plainly level.

But Nike, of course, never brought a products disparagement action against anybody the way Suzuki has done, the way lots of other corporations do when they think they are being unfairly maligned. Nike could well have sued the New York Times and accused Bob Herbert of engaging in deliberate falsehoods. And then we could have had your case, and I would have loved to have seen it. Nike, of course, did no such thing. One can reasonably ask why.

Audience Participant Erik Jaffe: Two quick questions. Professors Vladeck and Piety, you criticized the notion that New York Times v. Sullivan might apply based on the self-regarding statement as opposed to other-regarding statements, though I gather it’s fairly well-accepted that New York Times v. Sullivan would even apply to a politician speaking about himself or herself. So, “I graduated summa from Harvard,” it’s a lie. If we wouldn’t let people sue that politician for false statements in a political race, except perhaps under the Sullivan standard of knowing falsehoods, then, regardless of whether Nike might have survived the Sullivan standard—and, based on your presentation, perhaps they still would have been liable under that standard—why wouldn’t you apply it if the issue was not giving the little guy a chance, but just creating breathing space for fairly debatable factual issues? And perhaps this was not that case, and it was lost, but we’re talking about the standard, not the results.
Then, the second question is: why not just apply *O'Brien* to commercial speech? Commercial speech is sort of mixed speech that has both a transactional and an expressive component to it. Why not let the state regulate the transactional component so long as it doesn’t unduly burden the expressive component and doesn’t do so in a viewpoint-discriminatory manner?

This would seem to solve all transactional problems in the consumer fraud. It would come with a bunch of remedies that would be more traditionally commercial, like rescission, like damages to people who actually have standing, unlike Kasky, and that would get rid of this whole *Central Hudson* nonsense.

**David Vladeck:** Let me start with your *O'Brien* point. Were it only so easy to hermetically seal off the commercial- and speech-related activities of corporations, your *O'Brien* test might make some sense. There are two acts here. One is equivalent to burning one’s draft card. The other one is equivalent to taking market activity. You’re saying *O'Brien* allows the government to regulate the conduct, not the speech, right? As I understand it, that’s your point.

**Erik Jaffe:** Right; to the extent that the statements were product representations that went into the decision-making purchase, sure.

**David Vladeck:** The problem with that idea is that that’s not the way Nike marketed itself. Nike wanted consumers to buy its sneakers not because they were made better, not because there was any product differentiation, not because they would last longer or anything like that. Nike wanted you to buy its sneakers because they were good people.

**Erik Jaffe:** That’s okay. It’s product characterization.

**David Vladeck:** Okay. Well, then Nike loses the case, and that’s exactly what Nike—

**Erik Jaffe:** No, the remedy is rescission assuming any reliance. Nike doesn’t lose this case. It may lose a different case by somebody who bought the shoe because they felt they were great people, but they don’t lose this case.

**Tamara Piety:** Well, I think part of the response to that, though, is that the structure of false advertising law presumes that in the context of false advertising about a “genuine leather” bag being “made in the U.S.”

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59. United States v. O'Brien, 391 U.S. 367, 376 (1968). The Court held that when a course of conduct combines elements of speech and nonspeech,

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.*
the damages for a consumer if these claims aren’t true are not going to be large enough to really make it meaningful for any individual to sue.

This is the quintessential sort of governmental function to protect the operation of the market in that context. If you look at it in that context, no one will ever have the incentive to sue. That’s part of the problem.

**David Vladeck:** The case was really brought on as fraud on the market case, just like a securities case, just like any fraud on the market case. And if you can’t bring that kind of case against Nike, how can you bring in it the securities context?

**Audience Participant Kent Greenfield:** I wanted to ask you about this securities law case. If Nike is right, doesn’t that make many of the securities laws problematic under First Amendment grounds—especially because securities laws don’t require an affirmative lie, but only a material misrepresentation that is sufficiently misleading as to create a misimpression in the mind of the hearer?

**Ronald Collins:** Well, David Vladeck raised that very point as Professor Skover and I were writing our article, and I think it’s a strong point. If Nike—whose rights we thought deserved First Amendment protection—can make those statements to the public, then by that logic why couldn’t it make them to those who invested in the corporation? I’m hard pressed to answer that question. Maybe my esteemed colleague Professor Skover has an answer to the question of why there should be a different standard, although under current law as it exists, clearly there would be. Clearly, if Nike had prevailed on First Amendment grounds in the case as postured, it could make one statement to the public that it might not be able to make to its shareholders.

**Professor Skover, do you care to add anything?**

**David Skover:** Allow me to preface my comments by saying it may have seemed to the avid readers of our work . . .

**Ronald Collins:** All two of them.

**David Skover:** Yes, indeed. It may have seemed that we have taken very inconsistent positions in our Nike piece versus what we had said about the infiltration of commerce into communication in *The Death of Discourse*.60 There, we were very critical of the corporatization of speech in terms of polluting discourse. But in the long run, I think the heart of the distinction here—the reason why Ron Collins and I took what looked like a more Nike-protective position in our article—was that we were concerned about the ramifications of a ruling against Nike for other kinds of cases.

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I have a question to Tamara Piety and to David Vladeck in this regard. Professor Piety correctly portrayed the movement in advertising from reason-why to image advertising, which means that fewer and fewer empirically provable claims are subject to scrutiny. So, in a world in which image advertising is burgeoning, where empirically provable claims are fewer and fewer, then why would we likely posit any real consumer harms that the First Amendment should concern itself about?

For example, if we had a case of total puffery—for example: “Nike has the blessings of the Gods”—would we deny First Amendment protection? We wouldn’t think to deny First Amendment protection. Even under contract law, we would say this is mere puffery, right? And we don’t really believe in that instance that there’s a harm the state should concern itself with to regulate the marketplace. But in a world of mixed messages where puffery and possible factual falsities are not easily demarcated, then what are we to do? That’s the really hard question.

What Ron Collins and I were concerned about—and my question to you is—do we really want to leave to black-robed judges the function of acting as truth commissioners, determining what misrepresentations there are in these mixed political-commercial messages?

Tamara Piety: Well, this is so rich with possible topics, but let me just start by saying that I think one of the things we didn’t address today, but which I addressed in a separate article, is the degree to which the law in some ways is continuing to operate on a different paradigm than that of market and communication, and it’s not very well-situated or positioned to make those distinctions.

For example, FTC regulations with respect to false advertising also include, like the securities laws, that misrepresentation exists if the statement is actually true but liable to deceive. And we have a world in which consumers make decisions on things like the “moral” components of the product that Nike said were outside of the scope of that. And we’ve got this advertising, “Newport, Alive with Pleasure,” and the counter-speech is the tombstone warning, which is not very effective.

Nevertheless, the legal system that we have is constantly, one might say pretty much exclusively, engaged in separating out facts and situations. And the question is: should it be on the basis of something real, or should it be on the basis of an image that we have of what’s going on that is fairly divorced from reality of the practice?

My position in the Nike piece was relatively conservative in the sense that I was saying let’s not throw away the commercial speech

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doctrine—preserve it. But this definitional scope needs to include real marketing practices, not just traditional advertising, whatever that may be.

David Vladeck: Let me add two thoughts. The first is that there have been very few of the kind of cases that we’re worried about. Apart from Nike, the only other image ad case was the Joe Camel case where there was a cartoon image that was used in a way that people thought was inappropriate, because they were trying to sell to an audience that was legally forbidden from purchasing the product.62

The other point I wanted to make is that it is true that that is where the advertising has gone. That’s not where the government regulation is going. If you look at where the friction is in commercial speech, it is still generally applicable, not product-specific, government regulation: whether the FDA can forbid a seller from making a specific claim, such as “this product will reduce your risk of heart disease,” not whether Kellogg’s is a good company or not. And so it may be true that the advertising techniques are leaving the commercial speech doctrine in its dust, and that may be a good thing.

But with respect to specific claims, the kind that Erik Jaffe was talking about earlier, the commercial speech doctrine is still spawning a substantial amount of litigation over those issues. The FTC, for example, may be considering down the road whether to restrain alcohol advertising in periodicals principally directed at minors. This old-style regulation is not of the kind that you’re necessarily talking about, but it still lies at the heart of the commercial speech doctrine.

Audience Participant: In the whole issue of someone being hurt, it would seem that corporations were required to tell the truth so that people could not be hurt. But in the context of this kind of behavior by Nike where corporations are just minimizing costs by going offshore, no one’s being hurt. Everybody’s getting cheaper tennis shoes. So in that sense, what role do damages have to do in the calculus here, if at all? Apparently, none.

Tamara Piety: Well, as I’ve indicated before, there seems to be a presumption that false statements that are likely to affect consumer behavior are harmful in and of themselves. I could say, from the perspective of the Sierra Club, that the reason the Sierra Club was concerned about it is that there is some sense that something like global warming or environmental degradation is too big a problem to be solved just by governmental response. One of the ways to help solve the problem, aside from governmental response, is via consumer responses—getting

consumers to vote with their dollars, so that they punish bad practices and reward good practices.

They can't do that if they don't know a false claim from a good claim. And if it's just as good to say you did something good, but not incur the expense of actually doing it, then you can free-ride off of that interest in good environmental practices and drive the companies who actually invest in those better practices out of business because you've not assumed that cost.

Audience Participant Adam Candeub: Whenever we hear the argument, "why should corporations have First Amendment rights?" we all know what they're going to say. We know what their position will be. And we also know that true statements from corporations have enormous value to the economy. False ones generally decrease utility.

So, if we don't really value corporate contributions to political discourse because we all know what it's going to be about, and if we really do value true statements from corporations because the market can't work without correct information, then should we be so afraid of judges chilling corporate speech by requiring corporations to be truthful in all their publications?

Tamara Piety: Well, I would say no.

David Vladeck: There's one thread that ties all of these cases together—including the most recent cases—and that is the Court's hostility to the idea of falsity in the commercial market. In contrast to Mark Lopez, I think that that might have been Nike's undoing in the litigation because no matter how Nike tried to sell the idea, the company was asking for license to say untruths in the commercial market, and that was just a very unpalatable argument.

Mark Lopez: Our position is that Nike is allowed to stake out a position under the First Amendment on political and social issues that may have some commercial aspect. But when consumers make decisions based on those representations, they're making a political decision. They're not making a point of purchase decision that you would commonly associate with product advertising. They're making a political decision, and it's almost like "consumer beware."

Nike is representing that this is the better way to do business. This is how we do business, and they're not being entirely candid, we can all probably agree, about how they are doing business, but they're probably not being as bad as the allegations were. They had to be accepted for purposes of the complaint as an outright lie, but that's not how it would have played out in court. It would have been a gray line. It would have been a very gray area about what Nike's practices actually were—what was actually going on.
So, when Nike speaks, especially in the context of a debate where there’s a lot of other speakers, consumers are not making a purchasing decision in the sense that you and I make purchasing decisions about suitability or price. They’re making a political decision.

Now, I agree with the fellow about the securities industry. To me that’s a trickier question. I really don’t have an answer for it, because if I’m a shareholder or thinking about buying securities in a particular company, I’d want to make sure that every representation is a correct representation, so I guess there will be a separate body of law that’s going to deal with that.

Kent Greenfield: But what if as a shareholder you care about whether they’re doing business in an unjust way in Vietnam?

Tamara Piety: Well, let me just suggest the problem no one raised, as a counterargument to my own position, and that is the difficult problem of someone like Martha Stewart of Martha Stewart Living Omnimedia when she said, “I’m not guilty of securities fraud.”

Now, she’s an individual defendant. Can she defend herself? She obviously ought to be able to defend herself, but in making this statement is she motivated to defend herself or to help the company or both? Was that directed at improving the stock position?

Audience Participant: First of all, just a quick comment. I think the idea that we don’t consider as consumers the practices as a generality and that we just go pick the cheapest thing off the shelf is very insulting to some of us who are discerning.

But the other question I have is regarding this idea of puffery. Let them go at it. I’m concerned about vulnerable groups, particularly the advertising to “tweens” and younger children and young adults, who in other areas of the law we recognize as not having the maturity and ability to factor through reason and so forth. Are we going to regulate that area and protect—I guess I’m the voice of “what about the children” now—a child so that they can make up their own mind? They can’t in this day and age.

David Vladeck: Under the ACLU’s position, the alcohol industry would have a right to advertise, maybe even in the Weekly Reader. And one of the great debates with respect to alcohol and tobacco is what do you do with advertisements that are plainly geared for kids? The alcohol industry has a “voluntary standard” in which they agree not to advertise in certain periodicals that are aimed particularly at kids, like the Weekly Reader, but it’s a voluntary standard that is not faithfully followed.

There have been many violations of the Master Settlement Agreement that voluntarily restricts the tobacco industry’s ability to advertise
to kids. The Supreme Court, unfortunately, in *Lorillard*,\(^\text{63}\) struck down by five-to-four Massachusetts's effort to largely ban outdoor advertising of tobacco, which I think really reflects a shift by the Court on commercial speech. I think that twenty years ago Massachusetts would have won that case.

Ronald Collins: Ladies and gentlemen, thank you for your attention.

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