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Free the Fortune 500! The Debate over Corporate Speech and the First Amendment

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AFTERWORD

FREE THE FORTUNE 500!
THE DEBATE OVER CORPORATE SPEECH AND THE FIRST AMENDMENT

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INTRODUCTION

While the Supreme Court shirked the merits of the corporate free speech debate in *Nike v. Kasky*[1] with the cryptic dispatch that the petition for a writ of certiorari was "improvidently granted," the decision of those who organized this Symposium to proceed with scholarly commentary on the case was not improvidently made. One will find no shirkers here.

To the contrary, the assembled collection of articles is striking. From the compelling narrative of the case supplied to Ronald Collins and David Skover[2] to the thoughtful commentaries of James Weinstein,[3] Bruce Johnson and Jeffrey Fisher,[4] Robert O'Neil,[5] Erwin Chemerinsky and Catherine Fisk,[6] Deborah La Fe-

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1 123 S.Ct. 2554 (2003).

2 Ronald K.L. Collins & David M. Skover, *The Landmark Free-Speech Case That Wasn't: The* Nike v. Kasky *Story*, 54 CASE W. RES. L. REV 1965 (2004).

3 James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from* Nike v. Kasky, 54 CASE W. RES. L. REV 1091 (2004).

4 Bruce Johnson & Jeffrey Fisher, *Why Format, Not Content, is the Key to Identifying Commercial Speech*, 54 CASE W. RES. L. REV 1243 (2004).

5 Robert O'Neil, Nike v. Kasky–*What Might Have Been . . .*, 54 CASE W. RES. L. REV 1259 (2004).

6 Erwin Chemerinsky & Catherine Fish, *What is Commercial Speech? The Issue Not Decided in* Nike v. Kasky, 54 CASE W. RES. L. REV 1143 (2004).

tra,[7] Alan Morrison,[8] C. Edwin Baker,[9] and David Vladeck,[10] the energy and insights generated are impressive.

For all the variety and disagreement present, two motifs constantly reoccur. In assessing what to make of the corporate speech issue in *Nike*, the commentators are all ineluctably drawn to assessment of what to make more generally of commercial speech. And in assessing what to make of commercial speech, the commentators are ineluctably drawn to assessments of what to make more generally of freedom of speech. To tug at the thread is to tug at the sleeve; to tug at the sleeve is to tug at the coat.

I will not abuse the privilege of an Afterword to presume to have the last word. My purpose here will not be to draw judgments but to draw comparisons. And there are many to draw.

I. IS CORPORATE SPEECH DIFFERENT IN KIND FROM OTHER PROTECTED SPEECH?

A. The Scienter Issue

The fault line of the doctrinal dispute posed by *Nike v. Kasky* is fault itself. The First Amendment cannot be understood to give Nike a right to utter false statements of fact with *absolute* impunity. But is the converse true? Can the First Amendment be understood to give the government the right to impose penalties on Nike under a standard of absolute liability?

False statements are not protected under the reigning commercial speech standard established in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[11] The *Central Hud-*

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[7] Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV 1205 (2004).

[8] Alan Morrison, *How We Got the Commercial Speech Doctrine: An Originalist's Recollections*, 54 CASE W. RES. L. REV 1189 (2004).

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

[10] David Vladeck, *Lessons from a Story Untold:* Nike v. Kasky *Reconsidered*, 54 CASE W. RES. L. REV 1049 (2004).

[11] 447 U.S. 557 (1980). In *Central Hudson*, the Public Service Commission of New York ordered electric utilities to cease all advertising that "promotes the use of electricity." The Supreme Court held the restriction unconstitutional, and in the process of doing so announced what is now a famous four-part test:

> 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. at 563-64. The *Central Hudson* standard, with some refinements, continues to be the controlling First Amendment standard applicable to regulation of commercial speech. Under this test, commercial speech receives significant shelter from excessive government regulation, but

son test on the surface seems to simply disqualify false or misleading commercial speech from constitutional protection. The *Central Hudson* test is mute as to whether a speaker must be at fault for making the false statement before the speaker may be penalized. The *Central Hudson* test also does not speak to such issues as who has the burden of proving that an allegedly false or misleading statement is in fact false or misleading, or the extent to which false or misleading speech may include "soft" forms of "falsity," including subjective characterizations, expressions of opinion, or "puffery."[12]

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not protection as great as that provided to most other forms of non-commercial speech, such as political speech. This understanding of *Central Hudson* was reinforced in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), in which the Supreme Court elaborated on the meaning of the final prong of the *Central Hudson* test, requiring that the restrictions on commercial speech be no more expansive than necessary to advance substantial governmental interests. The Court in *Fox* imported traditional economic cost/benefit balancing into commercial speech jurisprudence, holding that under the reasonableness test the government must affirmatively establish that it has "carefully calculated" the burdens imposed by its regulation and that those burdens are justified in light of the weight of the government's objectives. *Id.* at 480. As the Court explained: "What our decisions require is a '"fit" between the legislature's ends and the means chosen to accomplish those ends.'" *Id.* (quoting Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341 (1986)). This "fit," the Court further explained, need not be "necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served . . . .'" *Id.* This notion of proportionality is now a vital element of commercial speech law.

[12] Exaggerations and hyperbolic self-promotion of the kind common in advertising, often called "puffery," is often dismissed as outside the ambit of "falsity" of the sort that constitutes false advertising. It is a well-established defense to false-advertising claims that the exaggeration, bluster, or boasting that is typical of much modern mass advertising simply does not constitute actionable false advertising, because consumers are inured to such hyperbole, and no reasonable consumer relies upon it. *See generally* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:38 (4th ed. 1997) ("'Puffing' is exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely."). As the estimable Prosser and Keeton hornbook explains, in its typical common-sense, "puffing" is "a seller's privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would believe him, or that no reasonable man would be influenced by such talk." W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 109, at 757 (5th ed.1984). This is the standard understanding of false advertising, and under the First Amendment, this is the law of the land. *See, e.g.*, U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 922 (3d Cir.1990) (defining "puffing" as "advertising that is not deceptive for no one would rely on its exaggerated claims"); Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir.1997) (defining "puffing" for Lanham Act purposes as "exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely and is not actionable under 43(a)"); Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 246 (9th Cir.1990) ("Puffing has been described by most courts as involving outrageous generalized statements, not making specific claims, that are so exaggerated as to preclude reliance by consumers."); United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1180 (8th Cir. 1998) ("Many claims will actually fall into a third category, generally known as 'puffery' or 'puffing.' Puffery is 'exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely and is not actionable under § 43(a).'"); Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 945 (3d Cir.1993) (same). The notion of "puffery" is largely parallel to the fact vs. opinion distinction and concepts of "rhetorical hyperbole" in defamation law. *See also infra* note 18.

In contrast the many unresolved issues surrounding false or misleading speech under the *Central Hudson* standard, the First Amendment principles applicable to defamation law relating to falsity, defamatory meaning, and fault are highly developed. Defamation law is a natural nominee for comparison, because defamation is the principle vehicle traditionally used by the law to remedy damage caused by false statements of fact that cause injury to reputation. Under the standards emanating from *New York Times Company v. Sullivan*[13] and *Gertz v. Robert Welch, Inc.*,[14] when the allegedly defamatory speech involves matters of public concern, the First Amendment requires a private-figure plaintiff to prove that the statement was made with at least ordinary negligence as a precondition to liability, and requires that a public figure or public official plaintiff prove that the statement was made with "actual malice," defined as knowledge of falsity or reckless disregard for truth or falsity.[15] The First Amendment places the burden of proving falsity on plaintiffs,[16] and provides at least some constitutional protection for statements that are not "factual."[17]

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[13] 376 U.S. 254 (1964).

[14] 418 U.S. 323 (1974).

[15] *See generally* RODNEY SMOLLA, LAW OF DEFAMATION, §§ 1:16-1:20, 2:1-2:19 (2004) (reviewing applicable standards and collecting cases).

[16] In defamation law, "ties" go to the speaker in cases in which the truth or falsity of a statement cannot be determined. Under the holding of *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), a statement on matters of public concern must be provable as false before there can be liability under state defamation law, and plaintiffs bear the burden of establishing falsity. This First Amendment principle was adopted by the Supreme Court in *Hepps* for the explicit purpose of tilting the balance in close cases toward freedom of speech, by ensuring that in cases in which the evidence on the question of truth or falsity is in rough equipoise, the legal system will err on the side of preserving free expression. *Id.* at 776 ("We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.").

[17] Separating "fact" from "opinion," and determining the extent to which the First Amendment ought to be understood as speaking to this issue, has been a vexing issue. The question has had a roller-coaster history, for example, in First Amendment cases dealing with defamation standards. The starting point for analysis is the holding of the United States Supreme Court in its landmark decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Prior to *Milkovich* there was a spreading consensus among lower courts that the First Amendment contained a free-standing constitutional protection for statements of opinion in defamation actions. This constitutional protection of opinion was seen as superseding and augmenting the protections embodied in the "fair comment" privilege recognized at common law. The basis of this belief was traced most famously to language in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in which the Supreme Court stated with seemingly emphatic certitude that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 339-40. Building on this pronouncement in *Gertz*, as well as other statements from the Supreme Court protecting "rhetorical hyperbole," Greenbelt Coop. Publ'g Assoc. v. Bresler, 398 U.S. 6, 14 (1970), "lusty and imaginative expression of contempt," Old Dominion Branch No. 496, Nat'l Assoc. of Letter Carriers v. Austin, 418 U.S. 264, 286 (1974). or vicious parody, Hustler Magazine v. Falwell, 485 U.S. 46 (1988), lower courts not only treated opinion as independently protected by the First Amendment, but constructed various

Corporate speech of the sort in contest in *Nike*, in which a major corporation defends its labor practices in a foreign country, is not traditional product advertising, yet it certainly *is* speech on matters of "public concern."[18] If we pigeonhole this type of corporate speech as a form of commercial speech, even though it is not traditional product advertising, and if we simply assume that libel law has nothing to do with the equation, either directly or by analogy, then received First Amendment doctrine would not appear to require any demonstration of fault on the corporate speaker prior to the imposition of some legal disability. At the very least, it would be fair to say that the *Central Hudson* standard has yet to evolve to a point that clearly decides these issues.[19]

In contrast, we might instead take the view that corporate speech such as that at issue in *Nike* is not "commercial speech" at all. We might reach this judgment using the technique suggested by Bruce Johnson and Jeffrey Fisher, who argue that corporate expression conducted through the traditional channels of mass media news and entertainment, as opposed to paid advertising, ought not be treated as commercial speech.[20] Or we might find persuasive the clever historical point made by Robert O'Neil, who points out

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multi-part doctrinal tests to define "opinion" generously. These judicial decisions tended to emphasize such factors as (1) the author's choice of words; (2) whether the challenged statement is capable of being objectively characterized as true or false; (3) the context of the challenged statement within the writing or speech as a whole; and (4) the broader social context into which the statement fits. *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 983 (D.C.Cir.1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). The Supreme Court's decision in *Milkovich*, however, complicated this picture. In *Milkovich*, the Court held that there is no free-standing First Amendment privilege protecting "opinion" in defamation suits. *Milkovich*, 497 U.S. at 19-20. Yet at the same time, the Supreme Court in *Milkovich* held that in defamation suits against media defendants involving stories on issues on "matters of public concern," the First Amendment requires that the defamatory statement, whether express or implied, be provable as false before there can be liability. *Id.* at 20.

[18] O'Neil, *supra* note 6, at 1260.

[19] *See* Chemerinsky & Fish, *supra* note 7, at 1150-53.

[20] Johnson & Fisher, *supra* note 5, at 1252-54. There is much to commend this view, for channels of communication do seem to be part of our cultural lexicon and our approach to how we understand and process expression in the mass media. Advertising is carried through advertising channels, the argument goes, while news and comment are carried through the channels and forums of news and entertainment media. Walk through Times Square in New York. Brilliant neon signs light the square with advertisements. These are punctuated by news scrawls that continuously report the day's breaking news. Open a newspaper. There are stories carrying information and ads carrying commercial messages. Turn on the television. News and entertainment programming carry news and commentary. The commercials that punctuate the news and entertainment broadcasts are clearly marked and plainly distinct. Our cultural and economic conventions thus separate advertising channels and forums from news and commentary forums and channels. As consumers we know when we are being sold a product or service through a commercial pitch, and when we are being sold an idea or fact through an argumentative pitch. When Nike communicates in a commercial it communicates through a channel or forum that everyone understands to be advertising. But when Nike communicates through the channels of news or information, most people do not understand it to be advertising.

that prior to the evolution of modern commercial speech doctrines, corporate speech on issues relating to politics or social issues would routinely have been understood as receiving the same high levels of First Amendment protection as the same speech would have received if uttered by other non-corporate speakers.[21] And even if the speech at issue in *Nike* is *in part* commercial speech, we might be willing to treat it as a "hybrid," as Justice Breyer suggested in oral argument in the case,[22] a form of speech in which traditional commercial speech is blended with speech on matters of public concern. This might lead us to decide that general First Amendment principles ought to be imported into the governing commercial speech standards, in whole or in part, such as the First Amendment fault principles governing libel law. If such a move were made we would engraft on false advertising or unfair trade practice laws a fault standard (such as negligence or scienter) as a precondition to liability.[23]

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[21] O'Neil, *supra* note 6, at 1260.

[22] Tr. of Oral Argument at 58-59, Nike, Inc. v. Kasky, 123 S. Ct. 2554 (2003) (No. 02-575), 2003 WL 21015068 ("I think it's both. You know, it's both. They're both trying to sell their product and they're trying to make a statement that's relevant to a public debate.") (question of Justice Breyer).

[23] The intermingling of traditional product or service advertising with corporate speech on broader social issues of public concern has posed difficult problems for courts before. Indeed, distinguishing between commercial and non-commercial speech is itself not easy, as the Supreme Court has recognized, for often ostensibly commercial messages carry a political undercurrent, and vice-versa. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 n. 24 (1976). The point was well-illustrated in a colorful case arising in New York out of the highly publicized dispute between Mayor Giuliani and *New York Magazine*. N.Y. Magazine, a Div. of Primedia Magazines, Inc. v. Metro. Transp. Auth., 136 F.3d 123 (2d Cir. 1998). The New York Metropolitan Transit Authority removed from the sides of buses an *New York Magazine* ad that contained the magazine's logo and read: "Possibly the only good thing in New York Rudy hasn't taken credit for." *Id.* at 125. The United States Court of Appeals for the Second Circuit noted:

> [T]his case aptly demonstrates that where there are both commercial and political elements present in speech, even the determination whether speech is commercial or not may be fraught with ambiguity and should not be vested in an agency such as MTA. While the Advertisement served to promote the sales of a magazine, it just as clearly criticized the most prominent member of the City's government on an issue relevant to his performance of office, subtly calling into question whether the Mayor is actually responsible for the successes of the City for which he claims credit.

Id. at 131. This decision was consistent with other judicial pronouncements involving situations in which commercial and non-commercial speech elements are intertwined or indistinguishable, in which courts tend to apply the higher levels of protection afforded non-commercial speech. *See* Children of the Rosary v. City of Phoenix, 154 F.3d 972, 982 (9th Cir. 1998) (advertisement for pro-life bumper sticker was not commercial speech because it did not express economic interests; it sought to combine religious, political, and ideological concerns to purposefully blur the distinction between commercial and non commercial speech), *cert. denied*, 526 U.S. 1131 (1999); Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth., 148 F.3d 242, 247 (3d Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999) (advertisements of pro-life group linking abortion and breast cancer were not commercial speech even though the advertisement gave a number to contact medical malpractice attorneys unaffiliated with the group); Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n, 149 F.3d 679, 685 (impersonal investment advice

The choice here is not necessarily all or nothing. The First Amendment could evolve, for example, to require fault before any serious penalty may be imposed, but might permit a less punitive remedy, such as a cease and desist order, merely on an adjudication of falsity. Even under some such compromise solution, however, we would need to resolve such questions as how to allocate the burden of proof and how to apply the "puffery" concept or "fact v. opinion" distinction.[24] These are nuances, however, details that could be worked through without too much travail and that are beyond the ambition of this essay. Far more important is the core threshold question: Does the First Amendment require *any* libel-style First Amendment doctrinal protections over and above a naked finding of falsity?

Many thoughtful contributions contained in this Symposium address this issue, from a wide variety of angles. I wish to focus on three broad aspects of the debate: (1) arguments relating to conceptions of human dignity; (2) arguments relating to claims that commercial speech is uniquely "hardy" and "verifiable"; and (3) arguments grounded in hierarchical conceptions of freedom of speech, in which commercial speech is treated either as less important than, or as inherently less trustworthy than, other forms of protected speech.

B. Human Dignity Arguments

1. The Human Side of a Human Right

Conceptions of human dignity enter the corporate speech debate from many directions. First Amendment theorists who believe that the principal purpose of the First Amendment is to advance human autonomy and dignity, may attempt to disqualify corporate speech from protection on the simple and sufficient reason that corporations have no human dignity to protect, because they are inhuman.[25] Several contributors conceptualize the First Amendment in terms that emphasize the value of the Amendment as an individual *human* right, with emphasis on the term *human*. To the extent that the value of freedom of speech is articulated principally in a vocabulary of realization of human dignity, there will be little appropriate role for recognizing corporations as worthy of First Amendment protection, as corporations are artificial

published by financial publisher is not commercial speech because the investment advice does not propose a commercial transaction).

[24] *See supra* notes 13, 16-18.

[25] Baker, *supra* note 10, at 1163-64.

legal constructs, not individual human beings with flesh, blood, mind, or soul.[26]

2. David and Goliath

A close cousin of the corporation-is-not-a-human argument is the "little guy" argument.[27] Freedom of speech may be conceptualized as grounded in notions of David and Goliath, a constitutional guarantee aimed at protecting minority viewpoints against the tyrannies of majorities, at facilitating dissent, and at empowering the dispossessed to make their case against those in possession.

3. Libel and Individual Reputation

From a quite different direction, libel law has historically been understood as grounded principally in the societal interest in protecting human dignity by protecting reputation, and libel doctrines contain a number of defenses that especially protect individuals for statements made in self-defense or counteract in response to reputational attacks.[28] Again, corporations arguably have little moral or policy claim to analogous legal protections, as they have no human dignity to defend.

4. Libel and Corporations

Even so, there are no self-evident reasons why the basic First Amendment principles governing modern defamation law could not apply quite seamlessly to corporate speech. One may argue that there are more connections between commercial speech doctrines and First Amendment libel principles than there are disconnections. The speech at issue in *New York Times Company v. Sullivan* itself was an advertisement on behalf of the Committee to Defend Martin Luther King.[29]

It is true, of course, that defamation law is traditionally concerned primarily with the protection of individual reputations. In its modern defamation law decisions the Supreme Court has thus spoken of the need to strike the appropriate balance between our nation's robust commitment to freedom of speech and the vital interests served by defamation law, which the Court has described as reflecting "no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any

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[26] *Id.*

[27] *See* Vladeck, *supra* note 11, at 1077-78.

[28] *See* SMOLLA, *supra* note 16, at §1:25 (discussing role of protection of human dignity in defamation law).

[29] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 257(1964).

decent system of ordered liberty."[30] The dividing line established in *Gertz* between public and private figures is an essential bulwark in the preservation of this "essential dignity." At the heart of this critical doctrinal dichotomy rests a corresponding set of mediating moral and policy judgments, often described in the shorthand of "assumption of risk" and "access to the channels of communication." The first judgment is grounded in notions of fairness and assumption of risk: It is a fair "bargain" to impose on public figures additional exposure to risk of injury to reputation as part of the price of voluntary entry into the public arena. A second judgment is grounded in our profound national commitment to free public discourse and robust debate: When persons enter an arena to participate in public discourse and influence the outcome of a public controversy, it is important that we provide "breathing space" to all points of view in that debate, and in the service of that breathing space we rely heavily on the marketplace of ideas, and on the access of those individuals to channels of mass communication, to provide correctives and reputational self-defense.[31]

Yet it is also true that defamation law has always, historically, held its doors open to corporate plaintiffs. The one doctrinal accommodation concerns the calculation of damages—as corporations cannot have hurt feelings or suffer emotional distress, corporate plaintiffs may not recover such subjective anguish-related damages. With that one exception aside, however, courts for centuries have allowed corporations to sue for defamation, and since the decision in *Gertz* there have been hundreds of cases applying the public figure/private figure dichotomy to corporations and corporate leaders.[32]

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[30] Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

[31] *Id.* at 344.

[32] In these cases there are often battles over whether the corporation should be deemed a public figure or a private figure. At one extreme are the relatively easy cases in which a corporation has actively thrust itself into a pre-existing public controversy. In such cases the corporate plaintiff is easily and properly classifiable a public. Courts tend to struggle however, with the much more common paradigm: the corporation that has been active as an advertiser of its own products and services, but which has not in any other manner affirmatively thrust itself into a pre-existing public controversy. A corporation does not become a public figure simply by conducting its business in a routine way. There must be a pre-existing controversy, courts normally hold, and the corporation must "thrust itself" into it. *See* Golden Bear Distrib. Sys. v. Chase Revel, Inc., 708 F.2d 944, 952 (5th Cir. 1983). When a corporation has merely advertised and conducted its business in a normal way, courts are often reluctant to saddle it with public figure status even if it is nationally known and relatively large. In *Snead v. Redland Aggregates, Ltd.*, 998 F.2d 1325 (5th Cir. 1993), *cert. dismissed*, 511 U.S. 1050 (1994), a case in which a claim was brought by the president and chairman of a railroad company against two corporations, and the corporations brought counterclaims for libel, the court analyzed the question of whether, in this business context, the plaintiffs were public or private figures and determined that they should properly be classified as private. The court's opinion began by observ-

5. *Human Dignity, Speaker-Based Discrimination, and Speech of "Public Concern"*

On one level or another much of the commentary on corporate speech divides on the threshold question of whether attention should focus principally on the identity of the speaker or the content of the speech. Edwin Baker so frames the issue,[33] concluding that "reflection and example show commercial is *crucially* about the identity of the speaker."[34] A focus on the speaker favors the state (which is seeking to regulate corporate speech), while a focus on the speech tends to favor the corporation (which by definition seeks to free corporate speech).

Large parts of modern First Amendment law are tied explicitly to the notion that the First Amendment is concerned principally, if not entirely, on the protection of speech on "matters of public concern." Defamation law—a body of legal doctrine that is especially germane because it is the body of law most classically dedicated to separation of truth of falsity—is a body of law in which heightened First Amendment standards kick in *only* when the speech first qualifies as speech on matters of public concern.[35]

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ing that the Supreme Court's decision in *Gertz* was grounded in two policy justifications for differentiating between public and private figures. "First, public figures 'enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.'" *Id.* at 1329 (quoting *Gertz*, 418 U.S. at 344). Second, the Fifth Circuit observed, "public figures 'invite attention and comment,'" assuming the risk of greater scrutiny of their affairs, as part of the cost of entering the public arena. *Id.* at 1329 (quoting *Gertz*, 418 U.S. at 344-45). Applying these policy justifications to the context of businesses and professionals requires a case-by-case assessment of the extent to which they are implicated by the particular factual circumstances giving rise to the allegedly defamatory speech. *Id.* at 1329 ("[T]he inquiry must be made on a case-by-case basis, examining all the relevant facts and circumstances."). Those in business and businesses themselves do not necessarily have greater access to the channels of effective communication than do other individuals. "Some corporations, such as media corporations or large conglomerates, obviously have such access, but the bulk of corporations do not." *Id.* The same is true of the "assumption of risk" rationale. "Although some corporations voluntarily thrust themselves into the public eye, the majority of corporations do not." *Id.* The Court in *Snead* articulated several factors that deserve consideration in making the public figure / private figure assessment. "First, the notoriety of the corporation to the average individual in the relevant geographical area is relevant. Notoriety will be affected by many factors, such as the size and nationality of the corporation." *Id.* Second, the Court instructed, the "nature of the corporation's business must be considered." *Id.* And third, the Court stated that "courts should consider the frequency and intensity of media scrutiny that a corporation normally receives. For example, even a small corporation that does not deal with consumers might attain notoriety if it engages in frequent corporate takeovers that become widely publicized." *Id.* Applying these factors, the Court in *Snead* held that the business plaintiffs before it were not public figures. *Id.* at 1329-30.

[33] Baker, *supra* note 10, at 1163-64.

[34] *Id.*

[35] *See* Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (raising the possibility that common-law strict liability standards for defamation may be constitutionally

Other bodies of First Amendment doctrine similarly treat the "matters of public concern" construct as a threshold gatekeeper. In cases in which public employees claim that they have been inappropriately dismissed or disciplined in retaliation for the exercise of free speech rights, for example, courts must initially ask whether the employee's speech was on a "matter of public concern."[36] If this question is answered affirmatively, the employee has a foot in the door; the court will then proceed to apply a balancing test, in which the interest of the employee to speak is balanced against the interest of the government as employer in promoting the efficiency of the public services it performs.[37]

In the context of corporate speech, the "matters of public concern" standard will tend to work to the benefit of corporations. While one may impugn the *motive* of corporate commentary on matters of public concern, it is much harder to morph the content of such commentary itself. Imagine, for example, that a tobacco company launches a dignified public service advertising campaign commemorating the Bill of Rights. The ads, devoid of any overt commercial content whatsoever, tout the value of freedom of speech, freedom of religion, or due process of law. At the ends of the ad spots the corporate sponsors name is briefly flashed on the television screen. It would be difficult to argue that the content of a commercial advancing the cause of freedom of speech is anything other than content on a matter of public concern. Yet there are many who would view such advertising with heavy cynicism, on the assumption that the corporate motivation has nothing to do with any authentic altruistic reverence for civil liberties, but rather is entirely the stuff of a crasser materialistic push for a libertarianism that is suspicious of all governmental regulation, including regulation of smoking.

A statement made by a journalist writing for the *Wall Street Journal* or a citizen on her own web page *defending* Nike's em-

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permissible when the attempt to impose liability does not involve any issue of "public concern"). There is authority for the proposition that the First Amendment might permit strict liability standards to apply in defamation actions not involving public figure plaintiffs or issues of public concern. *See* Sleem v. Yale Univ., 843 F.Supp. 57, 62 (M.D. N.C. 1993); Pearce v. E.F. Hutton Group, Inc., 664 F.Supp. 1490, 1505 n. 21 (D.D.C. 1987); Ross v. Bricker, 770 F.Supp. 1038, 1043 (D.V.I. 1991); SMOLLA, *supra* note 16, at § 3:17 (2004); *see also* Mutafis v. Erie Insurance Exchange, 775 F.2d 593, 594-95 (4th Cir. 1985) (holding that under *Dun & Bradstreet* no First Amendment principles attached to speech arising from an inter-office memorandum not on issues of public concern); *Snead*, 998 F.2d at 1333 (holding that *Dun & Bradstreet* exempts states from First Amendment strictures in defamation actions when speech not on matters of public concern).

[36] *See* Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Coninck v. Myers, 461 U.S. 138 (1983); Waters v. Churchill, 511 U.S. 661 (1994).

[37] *Coninck*, 461 U.S. 138; *Waters*, 511 U.S. 661.

ployment practices in the third world would enjoy the full-blown protection of modern First Amendment law. The notion that the government could impose a strict liability penalty on the *Wall Street Journal* or the citizen-commentator for falsehoods on the theory that the *Journal* or the citizen had committed an offense against the polity by injecting bad information into the marketplace would manifestly run afoul of modern First Amendment principles.[38] By the same token, the idea that the government could impose a strict liability penalty on a journalist or citizen for false statements *critical* of Nike for its third-world employment practices would similarly offend the Constitution. Thus the question is cleanly posed. If we posit for the sake of pristine example that the *speech* in contest is identical, may a different First Amendment standard be applied merely because the *identity of the speaker* changes?

One of the principal attacks on the liability rules imposed by California law is grounded in the claim that the First Amendment ought not countenance asymmetry in the legal standards applicable the statements made by those who attack Nike and the statements made by Nike in its own defense. Activists who criticize a major international corporation such as Nike are subject to liability for defamation only on proof that the corporation was defamed by a false statement of fact which was published with "actual malice"—knowledge of falsity or reckless disregard for truth or falsity. If Nike in defending itself is subject to liability on some lesser showing of fault—strict liability or negligence—there is a tilt to the playing field that arguably skews the free flow of information in the marketplace in a manner that offends core First Amendment values. As the Supreme Court once put the matter (outside the context of commercial speech), it might be argued that the government "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."[39]

Asymmetry, however, is no bother when it is perceived as a corrective. When David is fighting Goliath, some may not be especially offended when, while the ref happens to be looking the other way, David slips a low blow. Nike is an international corporate giant with enormous market influence, a high-powered public relations machine, and an behemoth budget for advertising buys. It is not exactly as if Nike lacks the capacity to get its message across. And in the eyes of many, that message is constantly ma-

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[38] *See supra* notes 13-14 and accompanying text.

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

nipulative, pulling out all the stops of sophisticated public relations and image advertising to seduce consumers and assuage materialist guilt. A little asymmetry in the legal liability standards does not exactly pull at the heartstrings. An activist dares pull on our moral conscience by lobbing a few caustic attacks on Nike. So what if he gets a bit of a legal break when the slings and arrows of litigious fortune commence to fly?

If the argument is that corporate speech is somehow different *in kind* from other speech protected by the First Amendment, the question is *how* is it different in kind? Reliance on the mere fact that a corporation as a "person" is a legal fiction is not persuasive, for there are many non-profit corporations and other forms of collective organization engaged in expressive activity that has always been understood to enjoy full First Amendment protection. The fact is that much of the speech that rests at the core of our First Amendment tradition is not speech by *individuals*, but speech by organizations, including corporate organizations, that may be non-profits but still operate in a collective manner. Political parties, public interest groups, art organizations such as theaters, museums, or symphonies, religious entities, labor unions, and private universities are among the myriad examples of entities that are "incorporated," that often have boards of trustees, chief executives, and staffs organized in hierarchical systems similar to a profit-making corporation, and that engage in a wide variety of expressive activity. When these entities engage in expression, the collective entity itself speaks through its employees or agents (such as a public relations firm or advertising agency), not any one human being.

If the argument is that corporate speech cannot plausibly rest in the *collective* nature, rather than individual human nature, of the speaker, then perhaps it is the profit motive that matters. Yet this is similarly unconvincing. For again, the notion that speech is not stripped of its protection under the First Amendment merely because it is carried on for pecuniary gain is well-entrenched in First Amendment doctrine and well-defensible in First Amendment theory.[40] The difficulties multiply when one considers the fact that *advertising is often conducted by individuals*. A business may be a sole proprietorship (as in the case of a lawyer who is a sole practitioner), or a business, although incorporated and large, may be so wrapped up in the individual persona of one high-visibility person (Martha Stewart, for example) that the individual's *personal* expression is inextricably intertwined with the expression of the cor-

[40] *See, e.g.*, First Nat'l Bank of Boston v. Belotti, 435 U.S. 765 (1978).

porate business. Alan Morrison's essay here is illuminating, reminding us of the seminal connections between the evolution of commercial speech protection and lawyer advertising.[41]

C. *Hardiness and Verifiability Arguments*

The diminished protection granted to commercial speech is historically justified by the unique "hardiness" and "verifiability" of statements made in commercial advertising.[42] A still unresolved tension in commercial speech doctrine turns on the extent to which commercial speech may be treated differently from other protected speech on the theory that it *needs* less help to survive. The classic argument is that it is both uniquely *hardy* and uniquely *verifiable*, and thus may be left more to fend for itself.[43] There is an arguable element of question-begging to this point, however, for advertisers might just as plausibly assert that commercial speech is only as hardy as the law empowers it to be, and that if certain advertising practices are prohibited by law and the sanctions sufficiently enforceable, no degree of perceived hardiness will enable the speech to persevere.

In this vein, it is worth considering whether the "chilling effect" argument, so powerful in many First Amendment contexts, and especially prominent in defamation cases,[44] applies any more

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[41] *See* Morrison, *supra* note 9, at 1196-97. Do lawyers who advertise have the same First Amendment rights as those who advertise other goods and services? In doctrinal terms, this conflict might be distilled in the question: "Is lawyer advertising a separate and self-contained subset of commercial speech law, providing lawyers with *less* protection than other advertisers?" The sheer fact that the Supreme Court has decided so many lawyer advertising cases has had some tendency to lead us to think of lawyer advertising jurisprudence as a discrete body of law. As Alex Kozinski and Stuart Banner explained:

> Lawyer advertising, initially an area covered by mainstream commercial speech jurisprudence, became the subject of so many cases that it developed into its own distinct area of common law. The first few cases, such as *Bates* in 1977 and *Primus* and *Ohralik* the following year, drew on the more general commercial speech doctrine to formulate rules regarding client solicitation. But, by the time we got to *R.M.J.* in 1982, *Zauderer* in 1985, and *Shapero* in 1988, that practice stopped. In its place the Court relied on the precedent of the previous decade. At present, the law of attorney advertising has grown to such an extent that it has been able to seal itself off from its roots in first amendment theory; in a field of common law that is only thirteen years old, judges often decide these cases with reference only to prior case law.

Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 630 (1990). While constitutional protection for commercial speech has steadily expanded over the course of the last decade, there appears to be a residual bias against lawyer advertising that continues to exert some influence on regulatory policy. Lawyer advertising at times appears to be regarded as a "second class" commercial speech citizen, not entitled to full participation in the free speech privileges and immunities other advertisers enjoy.

[42] *See Central Hudson*, 447 U.S. at 564; *see also* Baker, *supra* note 10, at 1167.

[43] *See* Baker, *supra* note 10, at 1167. For a critique of this position, see Kozinski & Banner, *supra* note 42, at 634-38.

[44] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

or less cogently to advertising than to other forms of speech. Let us first flip the traditional argument. There are many sound reasons justifying *New York Times Co. v. Sullivan* and its progeny, but one of the central animating assumptions underlying *New York Times* is that the scienter requirement (actual malice) created by the case is necessary to avoid the chilling effect of strict liability or negligence as the operative fault rule.[45] This is an article of faith in modern First Amendment doctrine. Like many articles of faith, however, it has always been more a matter of normative judgement than scientific demonstration. Would our robust and argumentative culture of news, information, and entertainment be less vigorous in the absence of the actual malice standard?

Try this thought experiment. Imagine that the Supreme Court in, say *Gertz v. Robert Welch, Inc.*,[46] had held that, upon reconsideration of the question, the ruling in *New York Times* was simply overkill, and that ordinary negligence ought to be the governing First Amendment principle in *all* defamation cases involving issues of public concern, whether the plaintiff is a private figure or a public one. Or more radically, imagine that the Supreme Court held that the whole doctrinal course launched in *New York Times* was a mistake, and common-law rules (including strict liability) ought again be permitted to operate. If the Supreme Court rolled-back the law, how different would American culture be? There is no empirical data to guide us, but it is at least plausible that the most honest answer is, "not much." Would a different ruling in *Gertz* have caused the Internet to evolve in a manner less wide-open? Would a different ruling in *Gertz* have altered the combustible tenor of CNN's *Crossfire*, the outrageous-push-the-envelope irreverence of radio shock jocks, the over-the-top-anti-liberal bombasts of the radio right, or the daily stuff of Fox News, ESPN, MSNBC, MTV, HBO—of *any* of the whole booming buzzing modern mass confusion of modern mass media? England has not adopted *New York Times v. Sullivan* as the rule of decision for British libel law.[47] Walk down the streets of London and take a look at what appears in British tabloids, or turn on British television, and ask whether the absence of the actual malice standard in the United Kingdom has made English mass culture excessively shy.

The point being made here is that the traditional claim that commercial speech is somehow *uniquely* hardy is far from self-

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[45] *See* SMOLLA, *supra* note 16, at § 2:3.
[46] 418 U.S. 323, 341 (1974).
[47] *See* SMOLLA, *supra* note 16, at § 1:9.

evident. And its uniqueness is far from self-evident in *either direction.* The speech that appears on *The Sopranos* or *Sex in the City* is plenty hardy. The profit motive that is often cited as the source of the hardiness of advertising also powers HBO, AOL/Time Warner, the New York Times Company, Universal City Studios, and Disney/ABC. This leads to the third style of argument, hierarchical claims that simply place commercial speech low in the rankings of what deserves constitutional protection.

D. Hierarchical Arguments

To the extent that diminished protection for commercial speech is justified on hardiness grounds, one may be suspicious that this is but a camouflage for a deeper judgment that is in fact moving things—a judgment that in some gestalt sense commercial speech is either not as valuable or not as trustworthy as other forms of expression. This bias against commercial speech is worth examining against the foil of the broad arc of modern commercial speech cases, against the growing hostility toward paternalism in commercial speech regulation, and against the paradigm shift in commercial speech cases from consumer-protection rationales to speaker-protection rationales.

1. The Arc of Commercial Speech Protection

At least as a descriptive matter, the hierarchical arguments made to justify low levels of protection for commercial speech run against the tide of modern commercial speech decisions. While nominally the Supreme Court continues to apply the intermediate scrutiny standard of *Central Hudson*, examination of the actual case decisions demonstrates that the trajectory of modern commercial speech law has been an accelerating rise of protection for advertising. David Vladeck's statistical compendium is quite telling.[48] The sheer number of Supreme Court commercial speech cases is impressive—at least twenty-four since *Virginia Pharmacy*, a level of activity difficulty to match in any other narrow field of constitutional law. The arc of the cases is unmistakable: in decision after decision the Supreme Court has advanced protection for advertising, repeatedly striking down regulations grounded in paternalistic motivations or speculative judgments by government regulators.[49] This is not to say that there have not been "blips" in

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[48] Vladeck, *supra* note 11, at 1067-68.

[49] *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002) (striking down restrictions on pharmaceutical advertising); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (striking down some and sustaining some restrictions on tobacco advertising); Greater New

this progression, cases in which the Court has sustained regulation of advertising.[50] Yet the win-loss record for commercial speech remains striking—of the two-dozen cases, the Court has ruled against commercial speech only five times, and not all of those defeats would stand up to present doctrine.[51] The cases sustaining restrictions on commercial speech pale, however, in number and in force, when compared to the overwhelming body of precedent striking restrictions down.[52]

One of the most important themes in this movement has been the notion that government may not "pick on" commercial speech just because it *is* commercial speech. If the government chooses to regulate commercial speech less favorably than non-commercial

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Orleans Broad. Ass'n, Inc., v. United States, 527 U.S. 173 (1999) (striking down casino gambling advertising limitations); 44 Liquormart, Inc., v. Rhode Island, 517 U.S. 484 (1996) (striking down liquor advertisement restrictions); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (striking down beer advertising regulations); Ibanez v. Fla. Dep't of Bus. and Prof's Regulation, 512 U.S. 136, 147 (1994) (striking down restrictions on accountancy advertising); Edenfield v. Fane, 507 U.S. 761 (1993) (striking down commercial speech limitations on accountants); Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (striking down restrictions on newsracks for commercial flyers and publications); Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91 (1990) (regulation banning lawyer advertisement of certification by the National Board of Trial Advocacy as misleading unconstitutional); Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988) (regulation banning solicitation for legal business mailed on a personalized or targeted basis to prevent potential clients from feeling undue duress to hire the attorney unconstitutional); Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626 (1985) (striking down some and upholding some restrictions on lawyer advertising); Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60 (1983) (statute banning unsolicited mailings advertising contraceptives to aid parental authority over teaching their children about birth control unconstitutional); *In re* R.M.J., 455 U.S. 191 (1982) (regulations limiting the precise names of practice areas lawyers can use in ads and identifying the jurisdictions lawyer is licensed in as misleadingly unconstitutional); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (striking down restrictions on advertising statements by public utilities); *In re* Primus, 436 U.S. 412 (1978) (striking down restrictions on solicitation of legal business on behalf of ACLU); Bates v. State Bar, 433 U.S. 350 (1977) (regulation banning lawyer advertisement of prices for routine legal services as misleadingly unconstitutional); Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977); (regulation banning placement of "for sale" signs in the front lawns of houses in order to prevent the town from losing its integrated racial status unconstitutional); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (striking down restrictions on pharmaceutical advertising); Bigelow v. Virginia, 421 U.S. 809 (1975) (striking down restrictions on abortion advertising).

[50] *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (sustaining thirty-day ban on direct mail solicitation by lawyers to accident victims or families); Ohralik v. Ohio State Bar Assoc., 436 U.S. 447 (1978) (sustaining bar restrictions on in-person solicitation); United States v. Edge Broad. Co., 509 U.S. 418 (1993) (sustaining restrictions on broadcasting of lotteries in states that do not permit lotteries); Bd. of Trs. v. Fox, 492 U.S. 469 (1989) (sustaining state university restriction on "Tupperware parties.").

[51] Vladeck, *supra* note 11, at 1067-68.

[52] It is especially significant that the one commercial speech decision widely regarded as the most hostile to protection of advertising, *Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), a case sustaining restrictions on casino advertising in Puerto Rico, was entirely discredited and effectively overruled in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

speech, it must justify that discrimination for reasons *relating to the commercial character of the speech.* This principle is now well-entrenched in First Amendment law, and has been forcibly stated by the Supreme Court even when applying the standards of *Central Hudson.* A leading example is *Cincinnati v. Discovery Network, Inc.*,[53] in which the Court struck down a law that treated commercial magazine and newspaper kiosks and news racks less favorably than similar facilities used to sell traditional newspapers.[54] This rationale of *Discovery Network* partakes of a more ubiquitous First Amendment principle: Government may not impose penalties on a class of speech by category when the interest it seeks to advance are not related in any way to the attributes of the speech within that category. First Amendment law treats such "disconnects" with great suspicion.[55]

2. Paternalism

Hierarchical arguments are difficult to emancipate from paternalism. The Supreme Court's war on paternalism in the regulation of advertising has been consistent and unremitting. In *Thompson v. Western States Medical Center*,[56] for example, the Court reiterated a theme that has been prominent in the Court's decisional law for decades, observing that

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that

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[53] 507 U.S. 410 (1993).

[54] As the Supreme Court explained in *Discovery Network*:

> The major premise supporting the city's argument is the proposition that commercial speech has only a low value. . . . In our view, the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech. . . . Not only does Cincinnati's categorical ban . . . place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship whatsoever to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests.

Id. at 419-24 (internal citations omitted).

[55] *See* Simon & Schuster, Inc. v. Members of N.Y. York State Crime Victims Bd., 502 U.S. 105 (1991) (striking down New York's "Son of Sam" law because the income derived from a criminal's descriptions of his crime and other sources "has nothing to do with" New York's interest in transferring proceeds of crime from criminals to victims); Carey v. Brown, 447 U.S. 455, 465 (1980) (holding that state's interest in residential privacy cannot sustain statute permitting labor picketing, but prohibiting nonlabor picketing, when "nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy").

[56] 535 U.S. 357 (2002).

> the best means to that end is to open the channels of communication rather than to close them.[57]

> Justices from both the liberal and conservative wings of the Court have expressed a strong antipathy for any government regulation of advertising smacking of paternalism.[58]

3. *Paradigm Shifts from Consumer Protection to Speaker Protection*

The arguments against corporate speech are also in tension with the fundamental paradigm shift that has taken place in commercial speech law, in which the focus has moved from consumer

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[57] *Id.* at 375 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 770 (1976); *see also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996) ("[B]ans against truthful, nonmisleading commercial speech . . . usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.") (citation omitted); *id.* at 508 ("Such speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends."); Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91, 105 (1990) ("We reject the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television."); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791-92 & n.31 (1978) (criticizing State's paternalistic interest in protecting the political process by restricting speech by corporations); Linmark Assoc., Inc. v. Willingboro, 431 U.S. 85, 97(1977) (criticizing, in the commercial speech context, the State's paternalistic interest in maintaining the quality of neighborhoods by restricting speech to residents).

[58] As Justice Stevens stated in *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995):

> Any "interest" in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment; more speech and a better informed citizenry are among the central goals of the Free Speech Clause. Accordingly, the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good.

Id. at 497 (Stevens, J., concurring). And in the words of Justice Thomas:

> In case after case following *Virginia Bd. of Pharmacy*, the Court, and individual Members of the Court, have continued to stress the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate "commercial" information; the near impossibility of severing "commercial" speech from speech necessary to democratic decisionmaking; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly.

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 520 (1996) (Thomas, J., concurring); *see also id.* at 495-96 ("[A] State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it."); Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) ("But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."); Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 790-91 (1988) ("The State's remaining justification—the paternalistic premise that charities' speech must be regulated for their own benefit—is equally unsound. The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.").

protection to speaker protection. Commercial speech doctrine in its early years often justified the extension of First Amendment protection for advertising by emphasizing the rights of consumers within the free enterprise system, an argument that was also often couched in terms of the broad interest of society in protecting the free flow of information. While the argument contained much of the rhetoric of open markets and the value of the free enterprise system, this rhetoric was wrapped up in notions of informed consumer choice and social utility. The case was not speaker-based but recipient-based. Thus, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[59] the Court stated:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[60]

The Court also observed that for many individuals, and indeed for society generally, commercial speech is often every bit as important as speech on such issues as politics, religion, science, or the arts: "As to the particular consumer's interest in the free flow of commercial information," the Court in *Virginia Pharmacy* thus noted, "that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[61] This individual interest in turn translated into a broader societal interest in protecting the robust flow of commercial information in our wide-open and vigorous economy. Some may love advertising, finding that it spices and enriches life; others may seek to avoid it. But it is a vital part of our national life, and a vital part of the speech protected by the Constitution. In the words of the Court in *Virginia Pharmacy*:

> Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely 'commercial,' may be of general public interest. . . . Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of

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[59] 425 U.S. 748 (1976).
[60] *Id.* at 765.
[61] *Id.* at 763.

> information as to who is producing and selling what product, for what reason, and at what price.[62]

Especially in the 1990s, however, the emphasis seemed to change, with greater attention paid to the rights of the commercial speaker.[63] The shift in justification from consumer to speaker naturally worked to the benefit of advertisers. When the consumer's interests are paramount, the argument for paternalistic protection of consumers will be at its most resonate. When the speaker's rights are paramount, the argument against paternalism will gain traction. And indeed, this is precisely what has happened. As paternalism has become increasingly discredited, the intermediate scrutiny standard of *Central Hudson* has come under escalating pressure. As David Vladeck notes,[64] many Supreme Court Justices, and many legal commentators, began to call for the complete abandonment of *Central Hudson*, arguing that commercial speech should be elevated to the same levels of protection applicable to other forms of speech in society, such as political, religious, scientific, or artistic expression.[65] In *44 Liquormart, Inc. v. Rhode Island*,[66] the shift in focus reached genuine maturity. In *44 Liquormart* rhetoric was not about consumers but about advertisers and their role in culture:

> Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on "commercial speech" for vital information about the market. Early newspapers displayed advertisements for goods and services on their front pages, and town criers called out prices in public squares. Indeed, commercial messages played such a central role in public life prior to the Founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.[67]

The opinions of several Justices in *44 Liquormart* seemed to signal the possibility that the Court was willing to expand even

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[62] *Id.*

[63] Vladeck, *supra* note 11, at 1070.

[64] *Id.* at 3.

[65] At various times as many as four different Justices have expressed doubts about adhering to *Central Hudson*. *See, e.g.*, Greater New Orleans Broadcasting Association, Inc. v. United States, 527 U.S. 173, 197 (1999) (Thomas, J., concurring in judgment); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501, 510-514 (1996) (opinion of Stevens, J., joined by Kennedy, and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and concurring in judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in judgment).

[66] 517 U.S. 484 (1996).

[67] *Id.* at 495.

more the already substantial First Amendment protection granted to commercial speech. That possibility was raised again in a 1999 decision, *Greater New Orleans Broadcasting Ass'n v. United States*,[68] in which the Court observed that "certain judges, scholars, and amici curiae have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech."[69] The Court did not take up this invitation. But the fact that it keeps talking this talk must mean that it is feeling tempted to walk the walk.

Thus, while the Court continues to apply *Central Hudson*, it does so against the backdrop of growing momentum for doctrinal change that would provide even greater protection for advertising.[70] At a time in American life in which a revival of entrepreneurial enterprise is a core national concern, the argument goes, the nation ought not treat commercial speech as beneath the dignity of the First Amendment.[71]

CONCLUSION

Robert O'Neil offers the brilliant insight that, contrary to our surface intuitions, corporate speech of the sort at issue in *Nike* would, in all probability, have enjoyed *more* constitutional protec-

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[68] 527 U.S. 173 (1999).

[69] *Id.*

[70] This was the approach taken in the Court's most recent commercial speech case, *Thompson v. Western States Medical Center*, 122 S.Ct. 1497, 1505 (2002) ("Although several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases, there is no need in this case to break new ground. '*Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.'" (quoting Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-555 (2001))); *see* Linda Greenhouse, *Justices to Hear Challenge to Cigarette Ad Restrictions*, N.Y. TIMES, January 9, 2001, at A16 ("The court has grown increasingly protective of commercial speech in the past 20 years, and in recent cases most of the current justices have indicated in one way or another that the *Central Hudson* test is inadequate.").

[71] *See* Kozinski & Banner, *supra* note 42 (arguing for strong commercial speech protection); Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437, 448-53 (1980) (arguing that commercial speech deserves greater protection than it currently receives to ensure that data necessary for economic and political decision-making is available); Martin Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553 (1997); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 431 (1971) (arguing that certain commercial speech should receive heightened protection); Martin Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998); Jeffrey Shaman, *Revitalizing the Clear-and-Present-Danger Test: Toward a Principled Interpretation of the First Amendment*, 22 VILL. L. REV. 60 (1977) (arguing in favor of treating all speech as protected under rigorous heightened review standards, without regard to categories such as "commercial speech" or "libel"); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEXAS L. REV. 777 (1993) (arguing for strong commercial speech protection).

tion *prior* to the creation of modern commercial speech doctrines in the mid 1970s, because we would not have thought to treat it differently from other kinds of speech on political or social issues.[72] The Supreme Court may have momentarily tabled resolution of the issues posed by *Nike*, but the Court will inevitably face them again. When it does, a key atmospheric will involve notions of constitutional interpretation and process, notions that might be reduced to the simple question: Who has the burden of persuasion?

If one starts from the perspective that commercial speech has no *entitlement* to First Amendment shelter at all, and is lucky to get what crumbs it can, one might well be inclined to say that *Central Hudson* is all that commercial speakers need, and they ought not look a gift horse in the mouth. If the burden is placed on corporate speakers to demonstrate why they deserve high levels of protection for false speech, they will start the case having to come from behind. And if the corporate advocate happens to be another multi-million dollar international conglomerate such as Nike, it would be hard to gin up many sympathy votes.

If instead the argument is framed from the beginning on the assumption that corporate speech on matters of public concern is, after all, *speech on public concern*, and thus presumptively entitled to full First Amendment protection, then the burden of proof is on the government as to why such speech should be *disqualified* from otherwise applicable First Amendment shelter. It would then be the government that begins the case from behind, and the government that would have to demonstrate how commercial speech is substantially different *in kind* from other forms of protected expression.

When these debates again resurface, the fine efforts of the lawyers and scholars who contributed to this symposium will certainly enrich the quality of the deliberative process.

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[72] O'Neil, *supra* note 6, at 1260.