

PATERNALISM, POLITICS, AND
CITIZEN FREEDOM:
THE COMMERCIAL SPEECH
QUANDARY IN *NIKE*

C. Edwin Baker[†]

Constitutional protection of commercial speech has a curious pedigree. Great free speech advocates—especially First Amendment absolutists—have long struggled to expand the scope and strength of speech protection. Often they have won. Many categories of speech now protected were once rejected as not having constitutional status. Prominent First Amendment absolutists often led the legal fight on behalf of what might be called the “people’s darling privilege.”¹ They argued for free speech in the contexts of seditious libel and defamation, of artistic speech generally and sexually explicit speech in particular, of indecent or profane speech, and crucially of speech favoring radical and revolutionary—as well as racist and reactionary—ideologies. Free speech battles still rage around various categories, with great “absolutist” defenders of free speech historically being consistent defenders of broader and stronger protection. Claims of “the people,” that is, political agitators going back to tea parties in Boston and the “people out of doors,”² abolitionists before the Civil War, labor activists, and all sorts of political or moral crusaders (joined by those who merely like a parade) eventually led the Supreme Court in *Hague v. Committee for Industrial Organization* to the counter-

[†] Nicholas F. Gallicchio Professor, University of Pennsylvania Law School.

¹ I take the evocative phrase from MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”*: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000).

² See generally PAULINE MAIER, *FROM RESISTANCE TO REVOLUTION* (1972); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001) (discussing revolutionary activity in colonial America prior to the Declaration of Independence).

³ 307 U.S. 496, 515 (1939).

factual discovery of a tradition “out of mind” that offers people the right to assemble and speak in parks and on the streets.³ This expansive protection of speech freedom has possibly its most elegant and forceful doctrinal elaborations in the work of great defenders of an absolutist First Amendment—people such as the justice Hugo Black, the scholar Thomas Emerson, or (though not so clearly an absolutist) the political theorist John Stuart Mill. Each sought to strengthen and expand the protection given speech freedom.

The curiosity is this: these, our strongest advocates of free speech, each consistently rejected granting any protection to commercial speech.⁴ John Stuart Mill, for example, although arguing that a prohibition on the sale of strong drink should be impermissible, concluded that “[t]he interest . . . of these dealers in promoting intemperance is a real evil and justifies the State in imposing restrictions”⁵ Neither Mill nor Black nor Emerson saw freedom of speech as about, or as including, a business’s speech promoting its sales and profits. Then, after the initial protective decisions in the 1970s that churned sympathy as essentially consumer protection cases,⁶ subsequent popular advocacy of constitutional

⁴ Justice Black joined the decision first rejecting protection for commercial speech in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), a view that he later reaffirmed, writing sometimes for the Court, sometimes for himself, and as far as I can find, never questioned. See *Breard v. City of Alexandria*, 341 U.S. 622, 650 (1951) (Black, J., dissenting) (explicitly approving *Valentine*); *Jamison v. Texas*, 318 U.S. 413, 417 (1943) (distinguishing distribution of handbills raising funds for religion from handbills that are purely commercial); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 311, 447, 640 (1970) (viewing commercial speech as part of the “system of [commerce],” not the “system of freedom of expression”); Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 458-61 (1980). Another absolutist, Alexander Meiklejohn, also rejected First Amendment protection for commercial speech. However, unlike the others mentioned, Meiklejohn was never in either the Court’s or the speech-protective tradition’s mainstream because he believed in limiting First Amendment protection of speech to political speech or speech relevant for democratic self-government. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (Oxford Univ. Press 1966) (1960).

⁵ JOHN STUART MILL, *ON LIBERTY* 99 (Elizabeth Rapaport ed., 1978) (1859) (emphasis added). The quote above concluded a more exploratory discussion. Mill began by arguing in Chapter V that “the principle of individual liberty is not involved in the doctrine of free trade,” which he saw as subject to more and different limitations. *Id.* at 94. Mill asserts people must be free “to exchange opinions” and “advise” about what they are permitted to do, *except* the issue becomes “doubtful,” and Mill does not “venture to decide” whether a different answer applies, “when the instigator derives a personal benefit from his advice, when he makes it his occupation, for subsistence or pecuniary gain, to promote what society and the State consider to be an evil.” *Id.* at 97-99. Mill notes the argument that the State “cannot be acting wrongly in endeavoring to exclude the influence of solicitations which are not disinterested.” *Id.* at 98. That is, his caveat emphasizes that different considerations apply *depending on the identity or role of the speaker, not on the content of the speech*. Implicitly following Mill, these are precisely the factors that the majority in *Nike* use to distinguish commercial and non-commercial speech.

⁶ See generally Alan B. Morrison, *How We Got the Commercial Speech Doctrine: An Originalist’s Recollections*, 54 CASE W. RES. L. REV. 1189 (2004).

protection for commercial speech has been powerfully promoted by corporate interests—from groups such as the American Association of Advertising Agencies.

Recent arguments favoring commercial entities' free speech often sound as if business enterprises are flesh and blood citizens of the republic and, as such, are entitled participants in a public sphere, rather than instrumental creations that we bring into legal existence in order to serve our interests. It is as if society consists of two opposing types of "beings," each equally worthy of moral and legal concern—people and corporations. This is idiocy. Although an opposing view is plausible, many free speech advocates argue—I do—that generally the First Amendment forbids laws restricting the speech of the rich in order to create a better balance between the rich and the poor.⁷ In this debate, however, at least the argument is over the rights of real people—poor people's equality (or speech) claims purportedly on one side and rich people's speech claims on the other. But when claims are made on behalf of commercial entities, the conflict involves people's creations claiming rights over their creators.

Of course, my characterizations above paint too broadly. The actual history of commercial speech is much more nuanced.⁸ This history, however, is adequate for present purposes. I have written extensively explaining why I think, at least in this regard, these great theorists of speech freedom were right.⁹ There is no need to repeat those arguments here. Rather this comment intends only to make two brief points. The first answers an objection to content-based regulation of (truthful) commercial speech that has become much more prominent since I last wrote on the subject.¹⁰ The ob-

⁷ Cf. *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) ("[T]he concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . ."). Despite agreeing with this general principle, I have argued that both doctrinal precedent and First Amendment theory show that this principle is misapplied in the narrow context of campaign speech. See C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1 (1998).

⁸ For example, the first cases unambiguously protecting commercial speech can be seen as essentially consumer protection cases. Moreover, the most intellectually powerful early work favoring protection for commercial speech was a purely scholarly contribution. See Martin H. Redish, *The First Amendment in the Marketplace*, 39 GEO. WASH. L. REV. 429 (1971). Redish shows that for any market place of ideas theory, which focuses on the importance of speech content for listeners trying to find truth, wisdom, or other insight, excluding commercial speech from First Amendment protection is misguided. *Id.*

⁹ See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 194-224 (1989); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646 (1982) [hereinafter *Realizing Self-Realization*]; C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57 [hereinafter *Turner Broadcasting*].

¹⁰ See *supra* note 9.

jection, probably most clearly asserted by Justice Thomas, is that regulation of truthful commercial speech typically involves “an asserted government interest in keeping people ignorant by suppressing expression [that] ‘is *per se* illegitimate.’”¹¹ The second point considers the relation between commercial speech and corporate political speech, an issue of arguably growing relevance.¹² But first, as an ideal entree into these two matters, I will describe the key conceptual point that distinguished the contending sides in the *Nike* litigation.¹³ This description suggests that the majority position in the California Supreme Court not only provides the better understanding at the level of case law of commercial speech, but also provides the logic needed to address the two points I wish to make.

I. THE DISPUTE IN *NIKE*

The key conceptual difference between the majority and dissents in *Nike* concerned whether the central factor in identifying commercial speech relates, as implied by the California Supreme Court majority, to the commercial *identity* or *role* of the speaker, or, as the dissents claimed, to the commercial *content* of the speech. For each, if its side in this disagreement is accepted, its other arguments follow quite persuasively.

As the majority emphasized, the expression at issue in *Nike* was certainly sponsored by a corporate entity (although, of course, made by its employees acting in their role as employees) aiming to profit in the market for products or services. Moreover, the corporate entity directed this speech in important part at an audience whose response could give or cost Nike sales and profits, with the speech content directed at achieving the profitable response desired by the speaker—in this case maintaining sales.¹⁴ Of course, if the identity or role of the speaker is the crucial factor making the speech subject to regulation, it is neither disturbing nor surprising that the regulated speech involves matters of public concern. Corporate interest in matters of public concern is often keen. People’s

¹¹ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring in part and concurring in the judgment) (citing 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in the judgment)); see also *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring) (objecting to current commercial speech doctrine that “takes such paternalistic motives seriously”).

¹² *Cf. McConnell v. FEC*, 124 S. Ct. 619 (2003) (restricting corporate expenditures for “electioneering communications”).

¹³ See *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert. dismissed*, 123 S. Ct. 2554 (2003).

¹⁴ *Cf. Kasky*, 45 P.3d at 256.

(and legislators') factual and normative views about matters of public concern often affect the corporation's opportunity for profit. Thus, the majority—paraphrasing and citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹⁵—emphasizes that “commercial speech frequently and even normally addresses matters of public concern.”¹⁶

On the other hand, if the content is central, as the dissents assume, then the challenged speech in *Nike* is as much concerned with matters of public importance as is the clearly protected speech of the media and public interest advocates that claimed that Nike underpaid or mistreated foreign workers. Given a focus on this content, a country with a “profound national commitment” to “debate on public issues” must protect *this* content.¹⁷ “Handicapping one side in this important worldwide debate is both ill considered and unconstitutional.”¹⁸ Once the potentially informative value of the content is the constitutional focus, the dissents properly make their other claim—that at least within public debate, the content of the corporate speaker's contribution is as valuable as that of any other speaker.

This difference between the two approaches is seen in key precedents to which the majority and dissents looked for support. The majority did not bother with either *First National Bank of Boston v. Bellotti*¹⁹ or *Austin v. Michigan State Chamber of Commerce*,²⁰ presumably because these cases are not traditionally considered commercial speech cases and the majority did not need support from this quarter in order to identify Nike's speech as commercial. Rather, both cases involved corporate participation in politics. Not surprisingly, the dissents continually invoked *Bellotti*, each heavily relying on its logic and each citing it five times.²¹ *Bellotti* correctly tells us that the value of the expression in the marketplace of ideas does not depend on its source.²² The immediate (but understandable) curiosity about the dissents, how-

¹⁵ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The Supreme Court is fully aware of this point, frequently repeating it. For example, it observed that “many, if not most, products may be tied to public concerns about the environment, energy, economic policy, or individual health and safety.” *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 n.5 (1980).

¹⁶ *Kasky*, 45 P.3d at 259.

¹⁷ *Id.* at 263 (Chin, J., dissenting); see also *id.* at 267 (arguing in dissent that Nike's speech on public issues should be fully protected).

¹⁸ *Id.* at 263.

¹⁹ 435 U.S. 765 (1978).

²⁰ 494 U.S. 652 (1990).

²¹ *Kasky*, 45 P.3d. at 263-68 (Chin, J., dissenting); *id.* at 268-80 (Brown, J., dissenting).

²² “The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source” *Bellotti*, 435 U.S. at 777.

ever, is that they never mention *Austin*. *Austin* denied protection to market-oriented corporate political speakers,²³ adopting reasoning almost identical to the dissent in *Bellotti*. Both opinions—the dissent in *Bellotti* and the majority in *Austin*—emphasized the lack of any necessary connection between corporate political expression, that is, the *speaker*, and *anyone's* personal political commitments.²⁴

The Court in *Austin* explained that the concern with corruption behind regulation of corporate expenditures was not necessarily *quid pro quo* corruption. Rather, the democratic process could be undermined by “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form *and that have little or no correlation to the public's support for the corporation's political ideas.*”²⁵ According to the Court, the logical disconnect between the corporate treasury and *public* support for the corporation's views is not due simply to a matter of money—some corporations are not wealthy and some individuals are. Moreover, the Court explicitly said the law was not trying to equalize speakers; the law was not preventing expenditures merely because of a corporation's potential wealth.²⁶ Wealthy people are, but corporations are not, part of a democratic public. The reason that “[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas [is because t]hey reflect instead the economically motivated decisions of investors and customers.”²⁷

²³ *Austin*, 494 U.S. at 669-75 (Brennan, J., concurring). I refer to “market oriented” corporate speakers to distinguish them from incorporated, non-profit, advocacy groups—a point that Brennan emphasized in distinguishing his concurrence in *Austin* from his opinion for the Court in *FEC v. Massachusetts Citizens for Life (MCFL)*, 479 U.S. 238 (1986). See also *McConnell v. FEC*, 124 S. Ct. 619, 698-99 (2003) (interpreting statutory restrictions on corporations', including non-profit corporations', electioneering speech as not applying to MCFL corporations, for which the restriction would be invalid). More generally, unless otherwise implied by context, henceforth references in this comment to “corporations” should be understood not to include MCFL corporations but to all market-oriented commercial entities, including partnerships and sole proprietorships and entities receiving their support from (i.e., operating as conduits for) such entities. This usage reflects these enterprises' market orientation. All such enterprises are, to a significant extent, legal creations. For example, no entity that sells products in a market would likely be able to exist without a tax deduction for business expenses.

²⁴ Justice White, in his dissent, stated:

[A]n examination of the First Amendment values that corporate expression further[] . . . reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not. Indeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech.

Bellotti, 435 U.S. at 804-05 (White, J., dissenting).

²⁵ *Austin*, 494 U.S. at 660 (emphasis added).

²⁶ *Id.*

²⁷ *Id.* at 659 (quoting *MCFL*, 479 U.S. at 258).

This is precisely the theory of the *Bellotti* dissent. Although *Austin* claimed to distinguish *Bellotti*,²⁸ its logic totally undermined the earlier case. Thus, it appears that the dissents in *Nike* may have a good argument, but only by relying on a decision no longer authoritative for the point they wish to assert—almost as if they wished to explicitly rely on *Lochner v. New York*.²⁹

Some comment on this dispute between the majority and dissent is appropriate. Isolated quotations from the Supreme Court's commercial speech cases can reasonably be seen to quite directly support both sides. I have no interest here—this is not a brief—in trying to either distinguish or reconcile them.³⁰ Still, in dissent, Justice Brown argues that the majority's "test violates fundamental principles of First Amendment jurisprudence by making the level of protection given speech dependent on the identity of the speaker—and not just the speech's content"³¹ There is no such principle. I put aside the sometimes controversial areas where the law directly distinguishes between speakers³² and where even the legitimacy of a regulation may depend on the speaker's role or identity.³³ Rather, the point important here is that a critical element in *all* regulations of commercial speech upheld by the

²⁸ The Court cited a footnote in *Bellotti* that limited the decision to the ballot measure context. See *Austin*, 494 U.S. at 659, (citing *Bellotti*, 435 U.S. at 788 n. 26).

²⁹ 198 U.S. 45 (1905).

³⁰ This doctrinal incoherency was noted early and clearly by Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983). Little since has diminished the possibility to cite stray statements in commercial speech precedent on either side of most disputes.

³¹ *Kasky*, 45 P.3d 243, 268 (Cal. 2002) (Brown, J., dissenting).

³² The Court says "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas." *Leathers v. Medlock*, 499 U.S. 439, 453 (1991). Of course, as merely a tax on, not a prohibition of, some speaker's speech, *Medlock*'s importance may be limited. Moreover, the tax applied independently of the speech content. But more routine are regulations that apply only to government employees, see note 33 *infra*, or only to some wishful entrants into limited public forums or non-public forums. See, e.g., *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (allowing a public television broadcaster to exclude a qualified political candidate from the candidate debate); *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788 (1985) (allowing government to restrict which charities would be allowed to participate in governmental employee charitable contribution drive); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983) (allowing Congress to distinguish between veteran organizations and other charities in their ability to receive tax exemption even though they engage in political lobbying); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (upholding school district regulation allowing one union access to teacher mailboxes while prohibiting denying access to rival union). An interesting aspect of *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976), is that apparently only adult theatres could show adult films.

³³ Consider, for example, restrictions on government employees—rather than government created and empowered business entities—where it is precisely the identity or role of the speaker that permits regulation. *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding the Hatch Act's restriction on government employee's electorally-oriented speech).

Court (or struck down, although not because they distinguish commercial speakers from others saying the same thing³⁴) is a factor almost the exact converse of Justice Brown's "fundamental principle." These regulations do not prohibit all communication of some particular content. Rather, they always only prohibit certain (commercially interested) speakers from communicating the content.

Although in dissent, Justice Rehnquist first made this observation in *Virginia State Board*.³⁵ There, the challenged law *did not* ban publication or communication of drug price information. Newspapers certainly could include a consumer's affair section that provided that information. Good papers might do precisely that. AARP could sensibly benefit its members by purchasing *advertising* space in newspapers in which AARP listed comparative drug prices charged by different pharmacies, a worthy practice and certainly not one restricted by the challenged law.³⁶ *Virginia State Board* is not alone. No other statute regulating the content of commercial speech that has been upheld by the Court ever forbade other, non-commercial speakers from communicating the restricted content—that is, the law always allows communication of the content if communicated by a speaker who is not profiting in the realm of the sale of goods and commercial services. (This is not to imply that profiting turns the speaker's expression into commercial speech. For it to be commercial speech, the speech must relate to an interest in the sale of goods or services *other than the speech itself*. When the speech itself is the product and when the speech is made available to an undifferentiated public, the seller is the press, the one business that itself receives direct constitutional protection.) In the one case where the statute on its face appeared to be a general prohibition on the content, the Court inserted this distinction among speakers. In upholding a law barring publication of lottery information, the Court read the statute to apply only to where the lottery information was presented as an advertisement rather than as news or information by the media entity.³⁷

³⁴ In the one case that might be cited to support the dissent's principle, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the central problem with the law was that regulation of commercial speakers simply did not rationally further the asserted state interest.

³⁵ *Virginia State Board*, 425 U.S. 748, 782-83 (1976) (Rehnquist, J., dissenting).

³⁶ Alternatively, as has been recently proposed in New York, a web site comparing different pharmacies' prices for drugs could be set up. Michael Cooper, *Comparing Drug Prices Online*, N.Y. TIMES, Feb. 2, 2004, at B4.

³⁷ The statute prohibited the broadcast of "any advertisement of or information concerning any lottery." See *United States v. Edge Broad. Co.*, 509 U.S. 418, 422 n.1 (1993). The Court, however, emphasized that the statute was construed not to cover "non-commercial information," presumably including the number of the winning ticket, but only "advertising." *Id.* at 424. Similar distinctions based on the speaker's role in communicating identical content have been

Thus, reflection and example show commercial speech is crucially about the identity of the speaker. Though there is much more to be said here, note that there are at least two, not necessarily inconsistent, reasons why this focus makes sense. First, pragmatically, commercial speech is routinely thought to be both *hardy* and *verifiable*. Business enterprises' profit needs will keep them interested in commercial promotion as long as the promotion is at least minimally within the bounds of law—chill here may not be such a concern as with other speech where alternative communications can serve the publisher or author almost as well as the chilled speech.³⁸ Moreover, unlike newspapers, which even without the time pressures of publishing deadlines will seldom be in position to have certain knowledge of truth or falsity, business enterprises will have more and easier access to the truth about their speech, certainly their speech about their products or organization, than the typical speaker will have when talking about public affairs. Invoking numerous Supreme Court statements, the *Nike* court relied on

central to lower courts' application of the Lanham Act. In these cases, courts typically find a book or article itself to be protected non-commercial speech, despite being published or written by a party who has an interest in a product praised by the publication, or in a product in competition with a product disparaged by the publication. In this situation, the speaker is an author—for example, an academic researcher or a reporter—or publisher. The court, however, then finds the same publication to be unprotected when distributed for free (for example, at trade shows or mailed) to potential customers by the entity whose product is (comparatively) favored. Now the speaker is a commercial promoter of a product. See, e.g., *Gordon & Breach Sci. Publishers v. Am. Inst. of Physics*, 859 F. Supp. 1521, 1544 (S.D.N.Y. 1994) (holding that authors' articles and letters to the editor were protected when initially published, but protection not extended to promotional copies distributed for the purpose of selling authors' work); cf. *Oxycal Lab., Inc. v. Jeffers*, 909 F. Supp. 719, 725 (S.D. Cal. 1995) (explaining that protection of the book followed because the factors, such as promotional use of the book, found relevant in *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 114 (6th Cir. 1995) were not present). Moreover, lack of protection when a party uses the material this way follows even as to the same party who was protected in the role of writer or publisher. In other words, the same content can be commercial speech or an exercise of freedom of the press depending not on its content but on the role of the speaker. Cf. *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 114 (6th Cir. 1995) (finding it clear that even the Lanham Act did not cover authoring the article itself—although in the unusual circumstances of this case, the court thought it did—the Act covered the use of reprints of the article at trade shows). The dissents in *Nike*, which relied (or, I argue, misrelied) on *Gordon & Breach* and *Oxycal*, failed to understand the point emphasized in these cases. See *Kasky*, 45 P.3d 243, 273-74, 276-77 (Cal. 2002). I suspect this failure reflects the dissents' assumption that the relevant concern must be content, not speaker identity or role.

³⁸ Though *Nike* argues that potential liability for false speech will dramatically chill its speech, there is another possibility. When the speech is true, profit concerns will encourage the corporate entity to make the speech. My colleague, Jason Johnston, has argued that liability for falsehood could have a highly beneficial economic effect of encouraging corporate responsibility. By reducing corporations' protection for dissembling in their public statements, the law gives a "clean" firm a competitive advantage by being able to publicize that it acts responsibly. See Jason Johnston, *Signaling Social Responsibility: An Economic Analysis of the Role of Disclosure and Liability Rules in Influencing Market Incentives for Corporate Social and Environmental Performance* (2004) (unpublished manuscript, on file with author). Certainly, encouraging corporate "green" behavior is an important societal interest that could provide a justification in addition to consumer protection for the law challenged in *Nike*.

these two reasons in explaining the propriety of imposing greater duties of accuracy on commercial speakers than on noncommercial speakers discussing the same matters.³⁹

Second, from the beginning, in *Virginia State Board*, the Court never saw protection of commercial speech as based on any normative status of the corporation itself. The Court's concern always reflected *listeners'* interest in "cleanly flowing" information that commercial speakers can presumably provide. That is, the Court treats the corporate speaker as meriting whatever constitutional protection the Court offers because of how the commercial speaker can serve recipients' information needs. The Court reasonably saw the speech limitations struck down in the early cases as merely protecting economic interests at the expense of consumers. In contrast, a free and democratic society must respect its citizen speakers' participation in the public sphere.⁴⁰ Likewise, any moral concept of individual autonomy, respect for which may be implicit in any legal capacity to justify its claim of creating obligatory law,⁴¹ must protect the liberty of individuals to express themselves.

Business enterprises—with their special legal status, for example, their privileged deduction of expenses from income, as well as burdens regularly imposed by countless laws only on commercial engagement in particular activities—are, like commercial speech, instrumentally valuable. Undoubtedly, corporations serve society's material needs and interests, especially when they act as the law proscribes. But it is a perverse notion of either ethics or humanity to think that such instrumentalities have any guaranteed or fundamentally protected place in public discourse—in the discussions in which people have a right to participate when forming their views. Of course, Justice Stewart and Justice Brennan properly remind us that a democracy also depends on giving one type of usually commercial enterprise special constitutional protection.⁴² The Fourth Estate receives First Amendment protection, not in its own behalf, but because of its instrumental contribution

³⁹ *Kasky*, 45 P.3d at 252-53.

⁴⁰ See Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977), for an example of how, for speech purposes, the notion of citizen participation in the public sphere may also apply to at least resident aliens, a conclusion that in any event follows from the next sentence in the text above.

⁴¹ C. Edwin Baker, *Foundations of the Possibility of Legitimate Law* (Nov. 2003) (unpublished manuscript, on file with the author).

⁴² Justice William J. Brennan, Jr., *Address*, 32 RUTGERS L. REV. 173 (1979); Potter Stewart, "Or of the Press", 26 HASTINGS L.J. 631 (1975). Generally, the practical and normative difficulty of distinguishing the media from other commercial enterprises is, I think, a red herring routinely brought up by those opposing regulation of corporate speech. See generally *Turner Broadcasting*, *supra* note 9.

to democracy and to a non-governmentally dictated culture. This feature, for example, easily justifies protection of media commentary from regulation that is constitutional if imposed on other business enterprises.⁴³

On this view that the lesser status of commercial speech reflects the identity or role of the speaker, the *Nike* dissents' continual worry about "[h]andicapping one side in [an] important worldwide debate"⁴⁴ or stifling certain speakers⁴⁵ is factually contentious and normatively misguided. No individual, no citizen, and no press entity *on either side* of any debate is prevented from speaking, from saying or publishing what they want. "Capitalists" or passionate supporters of unregulated markets—or of *Nike* in particular—are just as free to speak as are workers or public interest groups or tax-and-spend liberals. Of course, such debates will often be somewhat unbalanced, if not incredibly one sided—plenty of people are handicapped in their participation in the public sphere due to lack of wealth. Rather, those who have greater wealth, often due to their ownership of business entities (or their salaries as managers' of corporate entities), as well as the normally very pro-establishment press,⁴⁶ will typically be vastly overrepresented in debate. Nevertheless, rather than call this distortion, the Court wisely concludes that this situation neither violates the free speech of those less well situated nor in itself justifies restricting anyone's speech.⁴⁷ Any regulation of commercial speech leaves people on all sides of the world-wide debate completely free to present their views and their understanding of the facts.

In contrast, the lesser status of commercial speech does contradict a different value asserted by Justice Brown—to "maximize[] the ability of businesses to participate in the public debate."⁴⁸ But this value is simply not one that a free and democratic people need recognize. A limitation on this speech is not a distor-

⁴³ *McConnell v. FEC*, 124 S. Ct. 619, 697-98 (2003). In addition to collecting other examples, the Court quoted and relied upon *Austin's* statement: "A valid distinction . . . exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public." *Id.* at 697 (citation omitted). Many otherwise difficult-to-justify cases would have been easy if courts had recognized the constitutional relevance of this distinction.

⁴⁴ *Kasky*, 45 P.3d at 263 (Chin, J., dissenting).

⁴⁵ *Id.* at 268, 271 (Brown, J., dissenting); *see also Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2567-68 (2003) (Breyer, J., dissenting).

⁴⁶ *See, e.g.*, EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* 1-35 (Pantheon Books 2d ed. 2002) (describing mechanisms producing dominance by establishment and conservative corporate interests in the mass media); ROBERT M. MCCHESENEY, *THE PROBLEM OF THE MEDIA* (2004).

⁴⁷ *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

⁴⁸ *Kasky*, 45 P.3d at 270 (Brown, J., dissenting).

tion of debate⁴⁹ but a reservation of the debate for the free flesh and blood people whose moral status, as well as whose interests, must be seen as underlying the Constitution.

II. PATERNALISM—GOING BACK TO *VIRGINIA STATE BOARD*⁵⁰

With these observations about *Nike*, I can return to the first of the two points of this comment. If Justice Thomas is right that regulation of the content of truthful commercial speech is based on “an asserted government interest in keeping people ignorant,” his objection should have, as it appears to increasingly have,⁵¹ considerable appeal. Essentially the objection is to paternalism. Of course, a government interest in keeping people ignorant (e.g., non-disclosure of information in its files) is often entirely legitimate, approved by virtually everyone. The Privacy Act of 1974⁵² is merely one example of the government acting to keep people ignorant of information within its files.⁵³ Government non-disclosure of information in national security, financial regulation, and law enforcement contexts also are designed to keep the public, at least for a while, ignorant. Still, in the commercial speech context, the sting of Thomas’ complaint is that, to many observers, content-based restrictions on non-misleading, truthful commercial speech seldom seems explicable except on paternalistic grounds or on the view that (some) consumers cannot be trusted to respond to

⁴⁹ Distortion, of course, has no natural meaning. Is debate distorted when the poor have less resources with which to participate than the rich? Rather, the First Amendment as implemented by the Court is more concerned with suppression than distortion. Of course, this poses the question of whether commercial entities, other than the press, have the same right not to be suppressed that individuals have. No Supreme Court opinion suggests that conclusion—rather, the limited protection given corporate speech typically is justified instrumentally.

⁵⁰ The Court in *Virginia State Board*, 425 U.S. 748, 770 (1976), critiqued regulation of truthful, non-misleading commercial speech as paternalistic and held that the First Amendment required a non-paternalistic approach. The most theoretically significant shift made by *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), was to approve the notion that the government could have a proper interest in keeping a commercial speaker from participating, even truthfully, in the public discussion of matters important to an individual decision maker. See Shiffrin, *supra* note 30. Of course, whether *Virginia State Board* was correct initially to characterize the regulation of truthful commercial speech as a paternalistic effort to keep people ignorant is precisely the question raised in the text.

⁵¹ Though going back to *Virginia State Board*, 425 U.S. at 770, the appeal of the anti-paternalism argument has taken off more recently. Doing a LEXIS search of “commercial speech w/15 paternalis!”, I found an average of 2.1 articles annually during the 1983 to 1991 period, but 12.1 articles annually during the 1994 to 2003 period. For someone who has long advocated seeing freedom of speech through the perspective of liberty or autonomy, the paternalism trope should be pleasing—*except*, I argue, that it misconceives the context of commercial speech.

⁵² 5 U.S.C. § 552a (2000).

⁵³ See C. Edwin Baker, *Autonomy and Informational Privacy or Gossip: The Central Meaning of the First Amendment*, 21 SOC. PHIL. & POL’Y (forthcoming 2004). Consider also all the other exceptions to typical Freedom of Information Acts (“FOIAs”).

information in a socially responsible way. That is, the government acts on the belief that a consumer cannot be trusted to take care of herself in deciding about tobacco use or gambling or buying from irresponsible cut-rate pharmacists, or to act in a socially responsible fashion in deciding on electricity usage, especially during periods of peak demand. Certainly, anyone who sees the underlying premise of the First Amendment to involve a demand that the government respect individual autonomy should find such paternalism offensive.

A distinction—between descriptive and ascriptive (or formal) autonomy—that has been either explicit or implicit in various assertedly autonomy-based theories of free speech helps make initial sense of the paternalism claim.⁵⁴ An analysis emphasizing descriptive autonomy or an instrumental concern with autonomy is likely to value information that commercial speech (potentially) provides⁵⁵—just as it would give a basis for a rebuttable demand that government provide information or grant access to government facilities or records.⁵⁶ In contrast, an ascriptive or formal conception of the expressive autonomy makes no general, instrumentalist demands for the availability of information as a matter of constitutional right as opposed to as a sometimes appropriate public policy. Instead, the only claim of this formal conception of autonomy is that the person, the autonomous agent, must be allowed to act or, more specifically, to speak and listen, as she chooses.

Both senses of autonomy, however, should be offended by government paternalism *as a reason* to restrict the rights that their respective view of autonomy requires protecting. A goal of keeping people ignorant for their own good or because they cannot

⁵⁴ Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994); cf. Baker, *supra* note 53; Baker, *Turner Broadcasting*, *supra* note 9, at 72-79.

⁵⁵ See, e.g., T. M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991); see also, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). In its implications for First Amendment theory, this descriptive sense of autonomy differs little from the marketplace of ideas or, although limited to the political sphere, what Robert Post describes as the Meiklejohnian theory of the First Amendment, which Post critiques in favor of a public discourse or participatory theory of democracy. The later is almost identical to what I describe as the formal or ascriptive theory of autonomy, the position I defend as most basic to free speech. See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 13-14 (2000). This descriptive conception of autonomy—a market place of ideas or a Meiklejohn theory of democracy—clearly provides the best basis for understanding the Court's original protection of commercial speech in *Virginia State Board*.

⁵⁶ Despite his expressed concerns, Justice Thomas sometimes strains to approve of government attempts to keep people ignorant even when statutes (here, federal labor laws) appear to give certain members of the public (here, those associated within a labor union) a right to information. See *U.S. Dept. of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487 (1994).

properly handle the truth should at best be, as Justice Thomas suggests,⁵⁷ offensive. Thus, any defender of restricting truthful, non-misleading commercial information should wonder whether there is, should hope there is, a more persuasive—and more acceptable—description of the government's interest than Thomas' characterization.

The hint of a better description of the government's interest can be found in my earlier discussion of *Nike*. If, as the dissents in *Nike* thought, commercial speech were identified solely on the basis of its content, what other than a government interest in preventing recipients from getting the suppressed content could explain the law? But this method of identifying commercial speech and the consequent plausible government interests in its regulation is descriptively simply wrong. An interest in keeping people in ignorance would require the law to bar all speech with the specified content. As noted, that never occurs. The restrictions never broadly cover a category of content. Rather, they always apply to particular speakers—those engaged in a commercial activity who have a commercial interest in that content and who would communicate the content. Therefore, the law cannot rationally be understood to have, as its goal, keeping people in ignorance. Thus, the questions become: (1) What government interest could there be in restricting this *speaker*; and (2) does this speaker have constitutional grounds for complaint?

The simple answer is that an appropriate government concern is with the integrity of a discourse in which people develop their own views on the basis of dialogue with other individuals who have views on the subject. Partly because the views of a commercial speaker are structurally determined, the state could reasonably want to exclude this speaker from the discourse—that was essentially John Stuart Mill's suggestion.⁵⁸ The state concern need not reflect an inherent objection to the content of any view—nor to an interest in *keeping people ignorant* of any content. The reason for regulation is presumably a concern that participation *by this speaker* distorts the (constitutionally protected and valued) dialogue. Of course, the exclusion might produce bad consequences—but evaluations of this type of trade-off is the normal task of legislative bodies. But, emphatically, the government interest is precisely in restricting those speakers, which the law does precisely, not in keeping people in ignorance of certain content, a task for which the law is overtly ill-designed. The law allows all

⁵⁷ See *supra* note 11.

⁵⁸ See *supra* note 5.

content to be supplied and any ignorance removed by the speech of other individuals, non-commercial organizations, and the press.

Several observations might elaborate the above characterization of this state interest. The first relates to the commercial enterprise's presumed (and often legally required) profit-oriented interest in its speech. Elsewhere I have emphasized that this orientation of its speech is structurally determined and is causally independent of any other substantive values in a way that is not true for what might otherwise seem parallel situations.⁵⁹ Consider, for example, the charity soliciting contributions, the politician soliciting votes, or the preacher who, while seeking to save souls, "passes the collection plate." Structurally, it is always possible—and in practice sometimes, probably often, the case—that charities choose to engage in speech and other activities that they realize will be unpopular in some quarters and may diminish their fund raising appeal. They do so precisely because their members or volunteers believe in this speech or those activities. Much of the legal system's treatment of charities—for example, the tax status of the charity and the contributions of their contributors—may be premised precisely on the belief, first, that the nature of these entities leaves them free to make value-based, not profit- or revenue-based, choices, and second, that the opportunity to make such public-oriented, value-based choices merits societal support.⁶⁰ Likewise, a democratic political order assumes that a politician can, and in some cases will, choose her speech not merely with the design to get elected, but rather to present her ideas and ideals. She, of course, often does this with the hope that it will, but sometimes with an honest recognition that it will not, lead to her election. Finally, the preacher might, usually it is hoped she does, formulate her sermon, just as she passes the plate, out of a belief that both these acts express and further values to which she is committed but without regard to whether what she says increases or deters contributions.

In contrast, the general orientation of the commercial speaker's message is structurally and legally determined. Enterprise survival in a competitive market and, even in non-

⁵⁹ See sources cited, *supra* note 9.

⁶⁰ The situation is more mixed when the charity relies on a professional fund raising business that differs little from a telemarketer. The Court's analysis gave protection to the speech in this context, saying that the commercial element was "inextricably intertwined" with the charitable aspects. *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796 (1988). I will not try to analyze this complex issue here, but the immediate observation is that, normally, an individual (or presumably an association) who has speech freedom does not lose that freedom because she hires a profit-oriented business to help her get her message out. If that were not true, many cases, including *Buckley v. Valeo*, 424 U.S. 1 (1976), would make little sense.

competitive markets, rests upon legal obligations to owners typically requiring efficient pursuit of profits. But put aside this distinction between speech that is chosen and presumptively represents a person's values and speech that, though it may happen to coincide with a person's values, has no such necessary or intrinsic connection to a person's values but instead is structurally or legally determined. Rather, consider the possibility that a society values a public sphere in which flesh and blood people form and express their values, possibly not just about politics but also about culture and even about individual consumption goals or aims or preferences. If a free society must, or a given society does, value such a sphere, the law should not abridge these flesh and blood people's right to participate in this sphere. But expression coming from speakers who have no rightful (or constitutional) basis to be part of this public sphere is different.⁶¹ No doubt their speech, like all communications, can be influential—can effect people's decisions. And, like the speech of government (another legal creation designed to serve people), its speech sometimes serves public discourse. But an economic entity, a commercial speaker (that is, a person acting in that role), is like a governmental entity⁶² but unlike flesh and blood individuals in what might be called the "lifeworld." Commercial entities, like governmental entities, are instrumentally valued legal creations and function in ways provided (and restricted) by law. There is no reason to grant such an entity *influence* or empowerment in the public sphere. Allowing this entity to speak in the dialogue among individuals could be seen as unfairly advantaging one viewpoint in the discussion—the view favoring maximum consumption of goods and services or favoring any other acts or attitudes that are profitable for the

⁶¹ A central theme of one of the best recent articles on commercial speech explains that, although commercial speech may have First Amendment value when contributing useful information to "public discourse," this quality provides a lesser First Amendment status as compared to the more central First Amendment rights guaranteed to those who must be considered rightful participants in that discourse, a distinction that the author shows explains much of the more concrete aspects of commercial speech doctrine. Post, *supra* note 55; see also Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK.L.REV. (1989) (offering a similar two level theory that justifies some but limited protection of commercial speech for serving an informational function, a instrumental role that can be contrasted to the more basic individual liberty justification for greater protection of other speech).

⁶² See *Anderson v. City of Boston*, 380 N.E.2d 628 (Mass. 1978), *appeal dismissed*, 439 U.S. 1060 (1979) (upholding Massachusetts' restriction on Boston's speech). The issue of whether government participation in public discourse should be allowed has been canvassed, but the clear answer is that, like corporate participation, government participation can make valuable contributions and, therefore, people should be able to democratically decide when, and to what extent, to allow it. See generally MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980).

commercial entity. Commercial speech would then unfairly “distort” public discourse. In a free society, the (in this respect, stupid) peer group of a teenage girl has a right to try to convince her, just as I have a right to write (an equally stupid) book to convince her, that smoking is “cool.” But there is no reason why a free society need give that right to a (non-media) economic entity, such as a tobacco company.

Thus, freedom requires the possibility of expressing views favoring, as well as opposing, the consumption or other acts or attitudes favored by the commercial entity. But this norm only requires expressive freedom for freely-choosing individuals—people whose freedom properly has moral status and, in the First Amendment view that emphasizes autonomy and objects to paternalism, constitutional status. A free individual should also have the right to listen—or not be prevented from listening—to these peoples’ communications (or at least to speakers who want her to hear). Moreover, she may have an *interest* in hearing from other entities—advertisers or the government—just as she might have an interest in such entities devoting resources to the further development of scientific or other types of information that she would find useful. When enough people have any of these interests, they can adopt laws that allow or require these uses of resources by either corporations or government. Security laws and FOIAs commonly require—or restrict—speech and sometimes require use of resources to develop information on the part of either corporations or government. Alternatively, a free individual might find communications (or development of new information by these entities) either to distort public discussion or to waste societal resources. The speech (or information development) roles of these instrumentally valuable entities that best serve people’s interests is a political issue about which people disagree but which they have a right to determine collectively. In any event, the state’s possible interest in regulating this commercial speaker is not an interest in keeping people in ignorance, not paternalism about what a person should know or hear. Rather an appropriate interest in regulating particular truthful content could involve a judgment about proper participation in discourse on the particular subject and about the proper use and role of resources routinely subject to public, political control. The state must decide whether to reject or allow this participatory role on behalf of its own creation, on behalf of instrumentally valued entities whose orientation is generally structurally determined by the market.

Of course, any legal rule, certainly any legal regulation of “willing” interactions or exchanges, can be characterized as paternalistic. This is certainly true for all the economic regulations routinely approved by the Court in the post-*Lochner* world. The point of such regulations, however, is alternatively described as regulating uses of economic power in behalf of some public good that could otherwise be undermined by unregulated pursuit of interest by various economic actors. The “public good” might be safety, aesthetics, economic fairness, a collective view of proper market behavior and competition, or empowerment of particular groups—each determined on the basis of collective (political) conclusions of desirability. In the case of regulation of commercial entities’ speech, the interest is not and should not be seen as keeping people in ignorance. Rather, it is often an interest in structuring a dialogic and economic environment in a manner that people acting collectively believe best serves their discursive and material interests. These interests might be served by barring participation by these entities. Alternatively, they might be served by compelling speech—compare mandated disclosures and labeling. Or they might be served by allowing expressive participation on particular terms—for example, when the commercial entities take special responsibility for the truth or non-misleading quality of their contributions. All legal regulation of commercial entities (or people acting in commercial roles) involves collective judgments about conditions under which community self-definition, distributive fairness, and individual freedom (including substantive discourses) will best flourish.

Limiting people’s opportunity to use legislative power to regulate commercial actors, including these actors’ speech, out of some view that the regulation is not really in people’s interest, is what should be described as paternalism. This is the judicial paternalism rejected ever since the demise of *Lochner*. From this view, it would be the Court, if it protects commercial speech and invalidates rationally designed legislative (presumably people’s) choices to regulate these commercial entities’ participation, that should be tagged with the paternalistic label.

III. A CORPORATION IS NOT A CITIZEN

Obviously vital to the proper resolution of *Nike* is whether commercial content or, alternatively, commercial speaker-identity is the feature justifying reduced constitutional protection for commercial speech. If the focus is narrowed to content, *Nike*’s speech must receive full First Amendment protection because of its obvi-

ous relevance to issues of public importance and debate. That is, Nike's (assertedly false) communications obviously involved important public issues even though they were also obviously and equally related to Nike's economic interests, i.e., its all-important image among present and potential customers.⁶³ The point was well made in *Bellotti*: "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source"⁶⁴ And, as noted earlier, the dissents in *Nike* continually relied on this observation.

The problem is that not only in the context of explicitly commercial speech do statutes say, but also in explicitly political contexts the Court holds, that the speaker's identity is crucial. Thus, as noted earlier, although the Court in *Austin* could hardly deny the truth of *Bellotti*'s observation, it totally rejected the observation's constitutional relevance. Instead, *Austin* emphasized that funds in the corporate treasury "have little or no correlation to the public's support for the corporation's political ideas."⁶⁵ The Court has more recently explained, "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law."⁶⁶

In contrast, even in the corporate context, the First Amendment provides protection when the speech *is* based on flesh and blood individuals' (financial—that is, the system still favors those with wealth) support. Thus, whenever the Court upholds restrictions specifically on corporate political speech, the restriction still allows speech of PACs connected to the corporation, as long as the PACs get their money from individual contributors.⁶⁷ This option transforms the political expenditure from one rooted in the corpo-

⁶³ It may be assumed that if speech content has attributes of more than one category, it should be analyzed under the more protected category. For example, sexually explicit speech, despite offensiveness and prurency concerns, receives protection if it has serious importance of a variety of types. See *Miller v. California*, 413 U.S. 15 (1973). However, despite being otherwise fully protected content, the law restricts non-copyright holders in their use of another person's expression. And despite its political relevance, the law can regulate political speech that flunks the *Brandenburg* test. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Thus, this assumption may require more precise analysis for when it is applicable. I offer the assumption here only to show the initial plausibility of Nike's claim given a single-minded focus on content.

⁶⁴ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

⁶⁵ *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990).

⁶⁶ *McConnell v. FEC*, 124 S. Ct. 619, 694 (2003).

⁶⁷ In *McConnell*, the majority claimed that the PAC option meant there was no complete ban on corporate expression. *Id.* at 695. Still, Justice Kennedy's dissent, citing Justice Scalia's dissent in *Austin*, seems persuasive that the law bars speech by the corporation as a corporation. *Id.* at 765-66 (Kennedy, J., dissenting). For my purposes, the crucial point is that requiring the money go through the PAC means that individuals acting as individuals, not just those in corporate roles, choose to support the speech.

ration to one ultimately decided upon by an individual who uses her own money and initiates the expenditure independently of the corporation. In other words, the law makes the identity of the ultimate source of the speech determinative for whether the electioneering speech is allowed. It is allowed if it is financed by an individual, but not if by the corporation itself. The point could not be more obvious. Identity, not content, is crucial to constitutional protection. Likewise, presumably the constitution requires exemption for so-called MCFL corporations⁶⁸ precisely because their use of treasury funds for speech *can* be assumed to represent actual support of individuals who make the contributions. These corporations are identified not merely by being non-profit, but by not receiving corporate or union contributions and by being created for the “express purpose of promoting [their] political ideas.”⁶⁹ These features assure, as the Court emphasizes, that their “political resources reflect political support.”⁷⁰

Despite *Bellotti*'s crucial point that the capacity of speech to inform does not depend on the identity of the source, the Court in *Austin* and *McConnell* showed that corporate commercial identity is crucial in the constitutional justification of the regulations. The *Nike* dissents simply ignored *Austin*'s implicit rejection of the relevance of this point of *Bellotti* (and, of course, given the timing, the *Nike* dissents had no reason to address how *McConnell* contradicts their analysis). In contrast, Justice Kennedy's dissent in *McConnell* did not ignore *Austin*—instead he confirmed that it has the importance I attribute to it here. Kennedy saw how much of the *McConnell* majority's reasoning depended on *Austin*'s rejection of *Bellotti*'s premise that the identity of the speaker does not matter. But rather than conclude, as the *Nike* dissents should have, that this undermined his position, he could do what these California judges could not do. Justice Kennedy argued that *Austin* should be overruled.⁷¹ He implicitly shows that the *Nike* dissents may make doctrinal sense—but only if those on the Supreme Court who have dissented for the last thirteen years had prevailed.

These cases make evident that there are not two doctrinally distinct categories—corporate commercial speech and corporate

⁶⁸ See *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986). Protection for MCFL corporations was treated as necessary in *McConnell*. In interpreting an ambiguous statute, the Court assumed Congress would not have written the statute to restrict such corporations, since that would make the statute unconstitutional. *McConnell*, 124 S. Ct. at 698-99.

⁶⁹ *McConnell*, 124 S. Ct. at 699 (quoting *MCFL*, 479 U.S. at 264).

⁷⁰ *Id.*

⁷¹ *Id.* at 762 (Kennedy, J., dissenting); see also *id.* at 762-66 (Kennedy, J., dissenting) (critiquing *Austin* and suggesting what I asserted earlier, that *Austin* effectively rejects *Bellotti*).

political speech—but one meaningful category, speech of market-oriented commercial enterprises (and the non-profit entities that they in a sense sponsor).⁷² There remains for consideration the normative appeal of the majority position. One approach would simply repeat arguments that theorists have offered for why commercial speech in general should not receive protection.⁷³ But possibly more to the point is citizenship,⁷⁴ the public sphere, and the proper extent of the public's power, acting through the state, to establish the boundaries of that sphere.

Business entities, of course, make absolutely essential contributions to our material life. They provide jobs, income, and products and services to purchase with that income. The Court in *Virginia State Board* emphasized an additional contribution they can make to people's lives—they can provide (and can be required to provide) useful information.⁷⁵ The Court, however, has recognized that this contribution is not beyond legal regulation, especially when people can reasonably conclude that the contribution is not useful. Thus, the public's interest in information would not likely apply if the information were false or misleading. Such attributes would be sufficient, the Court said in *Virginia State Board*, to justify regulation of commercial speech. This follows since it is the public's interest in the speech, according to the Court, that justifies providing First Amendment protection. In contrast, these listener interests in the quality of information received are insufficient to justify regulation of speakers who have rights in their own behalf.⁷⁶ In *Central Hudson* the Court saw that there may be addi-

⁷² In addition to the Chamber of Commerce in *Austin*, and the Court's carving out of MCFL corporations from other non-profits, consider O'Connor's argument that the reason for the Jaycees' reduced associational rights is tied to the Jaycees' connection with the commercial sector. *Roberts v. United States Jaycees*, 468 U.S. 609, 631 (1984) (O'Connor, J., concurring); cf. *NAACP v. Button*, 371 U.S. 415 (1963) (granting greater First Amendment protection to non-profit advocacy association).

⁷³ I took this approach in *Realizing Self-Realization*, *supra* note 9.

⁷⁴ I use "citizenship" not in terms of strict legal definitions but more metaphorically to refer to flesh and blood individuals who have a stake in our legal order and are presumably bound by our laws. See Karst, *supra* note 40, at 43-45. Compare the statutory language in the Act challenged in *McConnell* purporting to provide an exception "if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence." *McConnell*, 124 S. Ct. at 698.

⁷⁵ The Court in *Virginia State Board* was quite explicit about protecting commercial speech not on the basis of business entities having rights as such, but because of their provision of information to the public. 425 U.S. 748, 763-73 (1976); see also *id.* at 771-2 (stating that the state can assure that commercial information "flow cleanly as well as freely," presumably because the reason for protecting the speech is to provide information to the public); *Central Hudson*, 447 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising").

⁷⁶ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (protecting the *Times* as well as the individuals who placed the advertisement from liability unless they knew of the falsity or were in reckless disregard of its falsity). I have a constant bemused daydream. Think of the silence

tional reasons to think the business enterprises' speech is not serving us. Though individuals' speech and media communications on issues such as whether to smoke, gamble, or use more electricity must remain unrestricted, the Court saw that whether the commercial enterprise's contribution to these discussions should be seen as useful or distortive is properly a political decision on how we want to structure the dialogue. The Court in *Austin* and *McConnell* reached the same conclusion.

There can be no doubt. Corporate communications, whether directed to investors where they presently are subject to numerous legal conditions on what they must and must not say, or to employees where the speech is subject to considerable content regulation by the NLRB, to their customers, or to the broader public, serve very valuable functions. Corporate communications often provide valuable information. Moreover, commercial advertising sometimes promotes a more vibrant economy. It also often helps support the non-advertising content of the mass media that play such a vital role in the public sphere.⁷⁷

Thus, why would a society want, as it obviously often does, to regulate corporate speech? First, it is only their truthful, non-misleading speech that serves the public. That caveat, however, might be said to apply to all speakers—though, as the Court has indicated, attributes of hardiness and a corporation's greater, more unique access to the truth of the information it provides might justify imposing greater demands of truthfulness on commercial speakers.⁷⁸ Thus, there must be an additional factor. Unlike individuals, economic entities have no ultimate moral worth. Unlike the individual people who have roles within them, corporations are not citizens. They have no right to vote.⁷⁹ Especially since the demise of *Lochner*, they have been generally subject to regulation to make them better serve the public's (legally expressed) conception of the public's interest. As (instrumentally valuable) creatures

in the political realm we would have if candidates for office were barred from making misleading statements.

⁷⁷ This benefit is hardly unambiguous—advertising can also produce huge distortions and corruption of media content. See C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS*, at ix. (1994) (“[A]dvertising seriously distorts and diminishes the mass media’s contribution to a free and democratic society.”).

⁷⁸ *Virginia State Board*, 425 U.S. at 771 n.24.

⁷⁹ In the most prominent case where corporations were granted a vote in an American political unit, individual residents were denied a vote, unless they owned property. The case, however, should probably be seen as the legislature and the Court treating these “governmental” units as essentially commercial enterprises that merely took the outward form of a municipal corporation. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (piercing the “government veil”).

of law, society should allow their speech—or other activities—only when and in ways that it serves human aims.

Second, even truthful corporate communications can be problematic. Regulation can be favored because corporate communications can be disruptive or distortive of the dialogue between individuals that, along with the explicitly constitutionally protected communications of the press, make up a democratic public sphere. Some twenty years ago, Steve Shiffrin, after reporting that “[a]dvertisers spend some sixty billion dollars per year,” suggested that those “who would oppose the materialist message must combat forces that have a massive economic advantage.”⁸⁰ Commercial expenditures on promoting private possession of material goods and private provision of services may well be at least part of the explanation why the United States spends so little of its national wealth on (non-military) public goods, paid for with tax dollars, and so much on private, individual market purchases.⁸¹ In 1996, a single company, Philip Morris, spent more on advertising and related marketing practices than all the candidates, including the presidential candidates, reportedly spent on their campaigns.⁸² These expenditures may reflect that the choice among tobacco products (and other consumer goods) is vastly more important to our happiness, our welfare, our country and the future of the world than is the choice of a Congress and a President. But I do not think so.

As a society and as individuals, we should and can often benefit from corporate communications. For this reason, they often should be, as they usually are, allowed. But sometimes we might want to have a conversation among ourselves—among rich and poor, owners and workers, men and women, blacks and whites—about government leadership or about smoking or gambling or electricity usage. If so, we might want to place restrictive terms on business enterprises’ communicative participation in the public sphere, for example, in terms of its accuracy or its prevalence. When we do, as a democratic nation, we should be able to do so. It is paternalistic to think otherwise.

⁸⁰ Shiffrin, *supra* note 30, at 1281.

⁸¹ I have not made, but would like to see a comparative study of similar (e.g., western, industrialized, democratic) countries to determine if there is a (reverse) relationship between the percent of GNP spent on advertising (or commercial speech more broadly conceived) and the percent spent on non-military governmental expenditures.

⁸² C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 88 (Cambridge Univ. Press 2002). Actually, at the time, Proctor & Gamble was the country’s largest advertiser (Philip Morris was second) and also spent more on marketing than all the candidates combined.

Postscript Reply to Ronald K.L. Collins & David Skover

After a generally entertaining and informative narrative of the Nike litigation, Ronald Collins and David Skover conclude with a disturbingly bad attempt at constitutional analysis—a point I will illustrate only briefly here before turning to their equally bad mischaracterization of my Essay. Their primary suggestion is that “absent any harm to consumers [which they later make clear means relatively direct harm to the consumer engaged in the transaction that the corporate speech promoted], there is little, if any, justification for regulating the communications of sellers,” largely because then the speech is a candidate for the label of political speech where they believe the teachings of *New York Times v. Sullivan*⁸³ apply.⁸⁴ This is simply wrong. Harm to the immediate consumer is hardly the only harm that the Court sees as justifying regulation of commercial speech. Consider narrowly regulating only commercial billboards as a means to protect against an unsightly environment,⁸⁵ or regulating commercial solicitation to maintain a proper dorm atmosphere,⁸⁶ or regulating utility advertising to prevent the corruption of the discourse between actual individuals concerning wise, as opposed to excessive, use of electric energy,⁸⁷ or protecting people’s privacy,⁸⁸ or requiring support for a federal agricultural marketing scheme.⁸⁹ Further, consider the examples that I emphasized in this Essay pertaining to prohibitions on corporate speech that, merely by its “loudness” (quantity), corrupts the quality of public political discourse—regulations held to be proper in *Austin*⁹⁰ or *McConnell*.⁹¹ These last prohibitions on corporate candidate-related political speech are hardly less restrictive on corporate participation in public discourse than rules that

⁸³ 376 U.S. 254 (1964).

⁸⁴ Ronald K.L. Collins & David M. Skover, Foreword, *The Landmark Free-Speech Case that Wasn't: The Nike v. Kasky Story*, 54 CASE W. RES. L. REV. 965, 1028 (2004).

⁸⁵ *Metromedia v. San Diego*, 435 U.S. 490 (1981); see also *City of Ladue v. Gilleo*, 512 U.S. 43, 59 n.17 (1994).

⁸⁶ *Bd. of Trustees v. Fox*, 492 U.S. 469 (1989).

⁸⁷ *Cf. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980) (indicating in dicta that this would justify a narrowly-drawn statute).

⁸⁸ See *LA Police Dep't v. United Publ'g Corp.*, 528 U.S. 32 (1999) (upholding statute restricting only certain commercial users' access to government held information); *Mainstream Mktg. Service v. FTC*, 358 F.3d 1228 (2004) (upholding “do not call” registry that applied to commercial but not to charitable or political calls); *Bland v. Fessler*, 88 F.3d 729, 738-39 (1996) (upholding statute providing for civil liability only for commercial use of “automatic dialing and announcing devices”).

⁸⁹ *Glickman v. Wileman Bros. & Eliot*, 521 U.S. 457 (1997). Whether this represents a commercial speech case is unclear, but that is how Collins and Skover categorize it. Collins & Skover, *supra* note 83, at 1024 n.269.

⁹⁰ *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990).

⁹¹ *McConnell v. FEC*, 124 S. Ct. 619, 694 (2003).

allow full participation on condition that corporate claims about themselves—claims whose accuracy the corporation more than anyone else should have access to evaluate—are truthful.

Worse than their simplistic, misguided account of the reasons for regulating commercial speech is their minimal attempt to give content to their frequently-invoked “free speech principle.” In a world where much speech is inevitably and properly regulated—consider, to begin, perjury or verbal price fixing agreements—the content of any free speech principle(s) must be at least implicitly theory driven. In describing their favored approach, Collins and Skover invoke Steve Shiffrin’s powerful image of the dissenter as the best organizing symbol of the First Amendment.⁹² That image can be the touchstone of a forceful theoretical understanding, but one searches Shiffrin’s book in vain to find a place where he would suggest Nike as exemplifying the dissenter that the First Amendment must protect.⁹³ Despite reporting Nike’s billion dollar budget for advertising and promotions in 1997⁹⁴ (and lack of reason to believe Kasky’s suit has caused any reduction in that budget), Collins and Skover insist that “the law remains stacked in favor of anti-corporate speech.”⁹⁵ (Of course, neither the law involved in the litigation nor any other law prevents any individual—possibly a stockholder or maybe just an ideologically pro-corporate citizen—moved to extol the merits of either Nike or more general corporate practices from doing so.)

Perhaps more troubling to *me* is Collins’ and Skover’s mischaracterization of my Essay. Rather than either summarize or reply to (or, I suspect, read⁹⁶) the analysis I present, they broadly

⁹² Collins & Skover, *supra* note 83, at 1042 n.352.

⁹³ In the book they cite, Shiffrin suggests that the “dissent value provides at least a partial explanation for the Court’s second-class treatment of commercial advertising.” STEPHEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 82 (1990). Later, in endorsing the romantics’ view “that efforts to place limits on the excessive commercialization of American society should be encouraged,” Shiffrin argues that this shows the deep roots in tradition of “the Court rightly relegat[ing] commercial advertising to a low position in the hierarchy of first amendment values.” *Id.* at 152. Shiffrin then not only suggests that his perspective makes “it easy to understand why powerful business corporations should be subjected to burdensome regulation when they seek to dominate *political* campaigns,” but also that “the regulation of . . . the large corporate conglomerate does not ordinarily inspire concern . . . that individual self-expression is at risk.” *Id.* (emphasis added). Small wonder that Collins and Skover, who base their defense of Nike on the possibility that its speech should be characterized as political, suggest that Shiffrin might not agree with all that they say when they invoke his image of the dissenter. Collins & Skover, *supra* note 83, at 1042 n.352.

⁹⁴ Collins & Skover, *supra* note 83, at 976.

⁹⁵ *Id.* at 1043.

⁹⁶ Three specific points Collins and Skover make about my position suggest neither of them read my Essay. First, they attribute my position to a “theory of free speech ostensibly grounded in [my] notion of *self-realization*” Collins & Skover, *supra* note 83, at 1032 n.300 (emphasis added). The only uses of the term “self-realization” in *this* Essay were in a

dismiss it with a rhetorical characterization. Their main claim—backed up with neither argument nor example—is that my approach is “rooted more in the liberty of socialism than of capitalism” and “is on a collision course with the capitalism of contemporary American culture and *the legal system that makes that culture possible*.”⁹⁷ Before knowing whether to admit or deny my “socialist” credentials, I need to know what they mean by “the liberty of socialism.” The most *socialistic* claim made in my Essay is that government regulation of business enterprises is, under existing law, often constitutionally permissible. If this is what Collins and Skover mean by socialism, they must consider everyone from Holmes to Rehnquist to be socialists. If distinguishing one’s views from those of the majority in *Lochner* makes a person a socialist, the label surely has no sting worth considering.

As for their claim that my approach is “on a collision course with . . . the legal system that makes [capitalist] culture possible,” or their further claim that my theory “seems extreme” because my free speech principles are not those of “the American commercial culture,”⁹⁸ two observations seem appropriate. First, in this Essay

footnote quotation of an opinion written by Justice White where he endorses the notion’s importance, see *supra* note 24, and in reference to an article that had that term in its title. Moreover, though I do refer to having previously developed an explanation of why a robust theory of free speech would not offer any protection to commercial speech, see articles cited *supra* note 9, I think I made clear that this theory is not the subject of this Essay. Rather, this Essay largely accepts, for purposes of the present analysis, all existing Supreme Court First Amendment case law and its most important “black letter” doctrine and proceeds to suggest how it can be best understood—rather than argue that it should be rejected as I had argued in earlier writings. Collins’s and Skover’s rejection of my prior writings on the subject is simply irrelevant to the current Essay. Second, they report as one of my positions a claim that my “self-realization principle is inapplicable to for-profit corporations, *other* than for-profit corporations that trade in speech.” Collins & Skover, *supra* note 83, at 1032 n.301 (emphasis in original). Actually, I argue here (as I have consistently since my first article on commercial speech) that media enterprises receive First Amendment protection because of their absolutely vital instrumental role in service of democracy, broadly conceived. See *supra* text accompanying notes 42–43; sources cited *supra* note 9. Neither in this Essay nor in any earlier work do I say that the self-realization principle is applicable “to for-profit corporations that trade in speech.” Third, they “wonder” whether my approach would protect (and, if I read them right, suggest it would) the individual defendants (officers and/or directors) in *Nike* because I make the identity of the speaker crucial. They seem not to have noticed my extensive attention to the point that the *role* of a speaker has been consistently treated by the courts as crucial to whether her speech is fully protected or is considered less protected commercial speech. See *supra* notes 37, 44–47 and accompanying text. (Their view that this creates some problem, either for me or the law, suggests a woeful ignorance of the case law as well as of my analysis.) In other words, virtually everything Collins and Skover say about my position involves positions that I did not advance in this Essay or involves questions that I specifically answered in the Essay. Finally, I should note that, although this fault might be excused due to the obvious sketchiness of their conclusion, they totally ignore rather than answer my critique of virtually all their affirmative claims—for example, that protection of *Nike* is required because its speech is political or required in order to avoid handicapping one side in the public debate.

⁹⁷ Collins & Skover, *supra* note 83, at 1032 n.300 (emphasis added).

⁹⁸ *Id.*

I have primarily described the possible logic of existing Supreme Court precedent, which, I argue, fully justifies the California Supreme Court's approval of allowing Kasky's legal challenge to Nike's allegedly *false* speech to go forward. Absent objections to my interpretation or explanation of existing Supreme Court cases, I can see no possible collision course with the legal system. Second, if their characterization is based instead on my earlier, intentionally more exploratory, theoretical writings where I do argue that non-media corporate speech does not merit First Amendment protection, it should be observed that my conclusion was virtually unchallenged in American courts until the last quarter of the twentieth century. That is, my view certainly lived comfortably with the commercial culture that Collins and Skover are likely to agree existed in the country even before 1976. And as for my purported extremism, my conclusions about *commercial speech* were shared by great free speech theorists and judges ranging from John Stuart Mill, Justice Hugo Black, Alexander Meiklejohn, and Thomas Emerson. As for my first amendment views more generally, I am probably more properly criticized for the extremism of my defense of free speech. In the end, I am inclined, until I see more argument, to conclude that Collins and Skover ignored my present Essay and could only resort to a rhetorical ad hominem rejection of my earlier more theoretical analyses because those analyses are persuasive.