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

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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.” They argued for free speech in the contexts of odious libel and defamation, of artistic speech generally and sexually explicit speech in particular, of obscenity 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 protections. Claims of “the people,” that is, political agitators moving back to tea parties in Boston and the “people out of doors,” 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-

1. Nicholas F. Gaffney, Predatory, University of Pennsylvania Law School.
2. Id. (citing an article from Michael Kent Curtis, Philip Mueller, THE PEOPLE’S DARING PIONEERS: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2005)).
4. 107 U.S. 496, 515 (1883).
facial discovery of a tradition "out of mind" that offers people the
inguished it. 2 This ex-
t flowed like a river, it was the easiest
tly of justice. Justice Black, the learned Thomas Emerson, or (though not
clearly an absolutist) the political theorist John Stuart Mill. Each
updrawn sympathy and expand the protection given speech free-
dom.

The curiosity is this: these, our strongest advocates of free
speech, each consistently rejected granting any protection to com-
cer llamazos v. Texas, 331 U.S. 52 (1943), a view that he later modified, writing comments
for the Court, espoused it himself, as far as he can find, never questioned. See Isbell v.
rt of his view of the power to suppress and punish speech (1943) distinguishing between freedom of
speech and freedom of commercial speech in the former (as in
summarizes the Texas v. Illinois (1956) (Black, J., dissenting) explicitly approving Val-
stitution, distinguishing between commercial and noncommercial speech.

Neither Mill nor Black or Emerson saw freedom of speech as about, or as including, a business’s speech pro-
motors its sales and profits. Then, after the initial protective de-
ions in the 1970s that charted sympathy as essentially consumer

1 Black, 331 U.S. at 68 (footnote omitted).
2 Black, 331 U.S. at 69.
3 Isbell v. City of Alexandria, 344 U.S. 222, 650 (1952) (Black, J., dissenting) ("[t]he interest of freedom of expression," not the "interest of the community," is the test).
4 Isbell v. City of Alexandria, 344 U.S. 222, 650 (1952) (Black, J., dissenting) ("[t]he interest of freedom of expression," not the "interest of the community," is the test).
5 Isbell v. City of Alexandria, 344 U.S. 222, 650 (1952) (Black, J., dissenting) ("[t]he interest of freedom of expression," not the "interest of the community," is the test).
6 Isbell v. City of Alexandria, 344 U.S. 222, 650 (1952) (Black, J., dissenting) ("[t]he interest of freedom of expression," not the "interest of the community," is the test).
7 Marcus, 368 U.S. at 759 (footnote omitted).
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—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. 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 characterization above paint too broadly. The actual history of commercial speech is much more nuanced. 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. 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 (trashy) commercial speech that has become more prominent since I last wrote on the subject. The objection is 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 pretensions and First Amendment doctrine show that the principle is inapplicable to the narrow context of commercial speech. See C. Edwin Baker, Commercial Speech: A Problem in the Theory of Freedom, 82 YALE L. J. 89 (1972). Though the First Amendment in the Monticello Convention, 39 U. PA. L. REV. 429 (1940). Rather than the First Amendment protects speech from the government, it protects from the government. Moreover, the most historically powerful early restrictions on commercial speech were contained within the commercial protection cases. More recently, the most controversial cases have been commercial protection cases. Moreover, the most controversial cases have been commercial protection cases. More recently, the most controversial cases have been commercial protection cases. More recently, the most controversial cases have been commercial protection cases. More recently, the most controversial cases have been commercial protection cases.
section, probably most clearly asserted by Justice Thomas, is that regulation of truthful commercial speech typically involves "an asserted governmental interest in keeping people ignorant by suppressing expression [that is] per se illegitimate." The second point considers the relation between commercial speech and corporate political speech, an issue of arguably growing relevance. But first, as an ideal entry into these two matters, I will describe the key conceptual point that distinguished the contending sides in the *Nike* litigation. 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.

1. 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. 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.

10. Loewenstein Tobacco Co. v. Raley, 533 U.S. 325, 377 (2001) (Thomas, J., concurring in part and dissenting in the judgment); id. at 345 (Thomas, J., dissenting); id. at 347 (Thomas, J., dissenting); id. at 349 (Thomas, J., dissenting); id. at 353 (Thomas, J., dissenting); id. at 354 (Thomas, J., dissenting).
(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. 425 U.S. 748 (1976)—emphasizes that "commercial speech frequently and even normally addresses matters of public concern." 20

On the other hand, if the content is central, as the dissenters assert, 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. Gives a focus on this content, a country with a "profound national commitment" to "debate on public issues" must protect this content. 21 "Handicapping one side in this important worldwide debate is both ill considered and unconstitutional." 22 Once the potentially informative value of the content is the constitutional focus, the dissenters 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 dissenters looked for support. The majority did not bother with either First National Bank of Boston v. Bellotti 23 or Austin v. Michigan State Chamber of Commerce, 24 presumably because these cases are not traditionally considered commercial speech cases and the majority did not need support from this quartet in order to identify Nike's speech as commercial. Rather, both cases involved corporate participation in politics. Not surprisingly, the dissenters most clearly invoked Bellotti, each heavily relying on its logic and each citing it five times. 25 Bellotti correctly tells us that the value of the expression in the marketplace of ideas does not depend on its source. The immediate (but understandable) curiosity about the dissent's how-

20 Va. State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The Supreme Court is fully aware of this point, frequently quoting 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." Coe v. Philadelphia & E. I. Corp., 351 U.S. 686, 692 (1956).

21 Id. at 283. (O'Connor, J., dissenting); see also id. at 267 (plurality opinion). The dissent's speech on public issues should be fully protected.

22 Id. at 265.


25 Kurtz, 46 P.3d at 263-64 (Chin, J., dissenting); id. at 268-69 (Brown, J., dissenting).

26 "The inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source... ." Bellotti, 425 U.S. at 777.
ever, is that they never mention Austin. Austin denoted protection to market-oriented corporate political speakers, 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.25

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.” 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 [i.e., because they reflect instead the economically motivated decisions of investors and customers].”27

25. Austin, 496 U.S. at 666-67 (O’Connor, 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 McCutcheon v. FEC, 124 S. Ct. 619, 688-89 (2003) (interpreting antitrust restrictions on corporations, including non-profit corporations, electorally speech as not applying to MCFL corporations, for which the restriction would be invalid). More generally, unless otherwise implied by context, henceforth references to this comment in “corporations” should be understood not to include MCFL corporations but 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 essay reflects these enterprises’ market orientation. All such enterprises are to a significant extent, legal creations. For example, no entity that sells re-elects in a market would likely be able to exist without the deduction for business expenses.
26. Justice White, in his dissent, stated:
[An examination of the First Amendment values and corporate expression for, [t]he . . . speaks that it is an impermissibly litigious process under individuals and in subject to restraints which individual expression is not. Indeed, what must have considered to be the principal interest of the First Amendment, the use of communication as a means of self-expression, self-identification, and self-fulfillment, is not at all, threatened by corporate speech.

27. Austin, 496 U.S. at 804-05 (White, J., dissenting).

28. Austin, 496 U.S. at 666 (emphasis added).

29. Id.

30. Id. at 659 (quoting MCFL, 479 U.S. at 258).
This is precisely the theory of the Bellotti dissent. Although Austen claimed to distinguish Bellotti, it is logic totally undermined the earlier case. Thus, it appears that the dissent 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*.

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. Still, in dissent, Justice Brown argues that the majority’s “tests violate 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

30 The Court’s footnote in *Bellotti* first linked the decision to the ballot measure context. See Austen, 196 U.S. at 569 (citing *Goldon*, 435 U.S. at 788 n. 26).
31 198 U.S. 55 (1905).
32 *Fundamental capacity* was noted early and clearly by Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a Superficial Theory of the First Amendment*, 76 NW U. L. Rev. 1212 (1983). Little since has diminished the possibility that new state statutes in commercial speech questions do not treat all speakers alike.
Court (or snuck down, although not because they distinguish, commercial speakers from others saying the same thing) 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 allow only troth in certain (commercially interested) speakers from communicating the content. Although in dissent, Justice Rehnquist first made this observation in Virginia State Board.31 There, the challenged law did not ban publications 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.32 Virginia State Board is not alone. No other statute regulating the content of commercial speech 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 pete; the other business that itself] retains direct constitutional protection.) In the one case where the statute on its face appeared to be a general prohibition on the content, the Court reversed this distinction among speakers. In upholding a law barring publication of lottery information, the Court held 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.33

31 In the one case that might be cited to support the dissent’s principle, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 451 (1993), the central problem with the law was that regulation of commercial speech simply did not extend further than actual product interest.


33 Alternatively, as has been recently proposed in New York, a web site containing different pharmacies’ prices for a drug could be set up. Michael Cooper, Comparing Drug Price Online, N.Y. TIMES, Feb. 2, 2004, at 84.

34 The statute prohibited the broadcast of “any ad retireniment, or information concerning any lottery.” See United States v. Sales Bros., Co., 499 U.S. 410, 423 n.1 (1991). The Court, however, emphasized that the statute was intended 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 not lawsuited within the bounds of law—chill base 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. Moreover, unlike newspapers, which even without the state 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
these two reasons in explaining the propriety of imposing greater duties of accuracy on commercial speakers than on noncommercial speakers discussing the same matters. 30

Second, from the beginning, in Virginia State Board, the Court never viewed protection of commercial speech as based on any normative status of the corporation itself. The Court’s concern always reflected listeners’ interest in “clearly flowing” information that commercial speakers can presumably provide. That is, the Court treated the corporation as serving whatever constitutional protection the Court offers because of how the commercial speech 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 citizens speakers’ participation in the public sphere. 31 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, 32 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. Unadorned, corporations serve society’s material needs and interests, especially when they act as the law proscribes. But it is a pernicious 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. 33 The Fourth Estate receives First Amendment protection, not in its own behalf, but because of its instrumental contribution

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30. Am. 45 F.3d 252, 53.
31. See Kenneth L. Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 B. A. F. L. Rev. 1 (1971), for an explication of how, for speech purposes, the notion of citizens participation in the public sphere now also apply to at least minority a conclusion that in may event follows from the tax question in the tax above.
to democracy and to a non-governmentally dictated culture. This feature, for example, easily justifies protection of media commentary from regulation that is imposed on other business enterprises. 66

On this view that the status of commercial speech reflects the identity or role of the speaker, the Nike dissenters' constitutional worry about "[h]andicapping one side in [an] important worldwide debate" 67 or stifling certain speakers 68 is factually controversial and normatively misguided. No individual, no citizen, need press entity on either side of any debate is prevented from speaking, from saying or publishing what they want. "Cuppiness" or passionate support of unregulated markets— of Nike in particular—are just as free to speak as are workers or public interest groups or tax-aid-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, 69 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. 70 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." 71 But this value is simply not one that a free and democratic people need recognize. A limitation on this speech is not a dis-
tion of debate but a reservation of the debate for the free flesh and blood people whose moral states, as well as whose interests, must be seen as underlying the Constitution.

II. PATERNALISM—GOING BACK TO VIRGINIA STATE BOARD

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, 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 1974 is merely one example of the government acting to keep people ignorant of information within its files. 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 slant 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 as the view that (some) consumers cannot be trusted to respond to

40 Discord, of course, has no natural meaning. In debate discussed with the press have less substance with which to persuade than the rich. Rather, the First Amendment as implemented by the Courts is more concerned with suppression than information. Of course, this poses the question of whether communicative activities, other than the press, have the same right not to be suppressed that individuals have. No Supreme Court opinion suggests that conclusion; rather, the implied protection given corporate speech explicitly is qualified tormentiously.

41 The Court in 1979's State Board v. 425 U.S. 104, 770 (1979), critiqued regulation of truthful, non-misleading commercial speech as paternalistic and held that the Ohio Amendment imposed a non-paternalistic approach. "The most theoretical, 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 not get personal interest in keeping a commercial speaker from participating, even mildly, in the public discussion of neglige important to an individual decision maker. See Shaffer, supra note 39. 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 of its explicit purpose, the point is well to the text.

42 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 LEAKS search of "commercial speech v. paternalism," I found an average of 2.1 articles annually during the 1983 to 1993 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, argue, that it misconceives the content of commercial speech.

information is 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 ant-competitive pharmacies, or to act in a socially responsi-
ble fashion in deciding on electricity usage, especially during peri-
ods of peak demand. Certainly, anyone who sees the underlying
premise of the First Amendment to involve a demand that the gov-
ernment 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 as-
sertedly autonomy-based theories of free speech helps make initial
sense of the paternalism claim. 34 As analysis emphasizing descrip-
tive autonomy or an instrumentality concern with autonomy is likely
to value information that commercial speech (potentially) pro-
vides, 35 just as it would give a basis for a rebuttable demand that
government provide information or grant access to government facili-
ties or records. 36 In contrast, an ascriptive or formal concep-
tion of expressive autonomy makes no general, instrumentalist
demands for the availability of information as a matter of constitu-
tional right as opposed to as a sometimes appropriate public
policy. Instead, the only claim of this formal conception of autonomy
is that one 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 sanction to restrict the rights that their
respective view of autonomy requires protecting. A goal of keep-

34 See, e.g., Y. M. Scalfni, Jr., Freedom of Expression and Categories of Expression, 46
U.科. L. Rev. 739 (1991); David A. Strauss, Persuasion, Autonomy and Freedom of Expres-
sion, 91 Colum. L. Rev. 754 (1991); see also, Martin H. Redish, The Value of Free Speech, 130
U. Pa. L. Rev. 531 (1982). In its implications for First Amendment theory, the descriptive
views of autonomy differ little from the marketplace of ideas or, although limited to the poli-

cal sphere, what Robert Post describes in the deliberative democratic theory of the First
Amendments, which Post argues is in favor of a public discourse on particular theory of democracy. The

descriptive conception of autonomy—rather than speech itself, in a Misesian notion of democracy—clearly provides
the best basis for understanding the Court's original protections of commercial speech in Virginia State
Board.

36 Despite his espoused concerns, Justice Thurgood sometimes urges to approve of gov-
ernment attempts to keep people ignorant even when reasons (here, failed labor law appeal) appear
to give certain members of the public little or no basis for understanding the Court's original protections of commer-
properly handle the truth should at best be, as Justice Thomas suggests, offensive. Thus, any defender of restricting truthful, non-misleading commercial speech would wonder whether there is, should there be, a more persuasive—and more acceptable—description of the government's interest than Thomas' characterization.

The heart of a better description of the government's interest can be found in my earlier discussion of Nike. If, as the dissenters 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 descripтивively 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 governance 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.29 The true concern need not reflect an inherent objection to the content of any view—not 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

27 See supra note 11.
28 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 illustrate 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. 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.

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 decreases 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-

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59 See supra, note 2, supra note 9. The context is not made clear when the charity relies on a professional fund raising firm that drives little truck to a school auditorium. The Court's analysis gives protection to the speech in this context, viewing the commercial element as "inherently intertwined" with the charitable purpose. Riley v. Nat'l Fed'n of C.C., 486 U.S. 781, 796 (1988). I will not try to analyze this complex issue here, for the example given here, in an individual or potentially an organization, who has speech freedom does not lose that freedom because she has a profit-oriented motive to help her get her message out. If that were not true, sixty 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 purchase of profits. But put aside this distinction between speech that is chosen and prescriptively 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.12 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 entity13 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 as 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 any 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

12 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 whom is considered rightful participants in that discourse, a distinction that the author draws explains much of the more concrete aspects of commercial speech doctrine. Post, supra note 55; see also Rust, supra.

13 The First Amendment and Government Regulation of Capital Markets, 55 B. & 1. L. 429 (1985) (offering a similar two level theory that justifies more but limited protection of commercial speech for serving an informational function, a testimonial role that can be contrasted to the more basic individual liberty justification for greater protection of other speech).

14 See Acosta v. City of Boston, 104 N.E.2d 628 (Mass. 1952) (affirming Massachusetts' restriction on Bogus' speech). The issue of voluntary government participation in public discourse should be viewed here 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 autonomously decide when, and to what extent, to allow it. See generally Mark O. Yoo, When GovernmentSpeaks POT," U.S. LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983); Steven Shiffrin, Government Speech, 37 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 FOIA's 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 speech is not an interest in keeping people in ignorance, nor paternalism about what a person should know or hear. Rather an appropriate interest in regulating particular stuffful content could involve a judgment about proper participation in discourse on the particular subject and about the proper use and role of resources routininely subject to public, political control. The state must decide whether to reject or allow this participation 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 would otherwise be undermined by unregulated pursuit of interests 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—compel 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 (of 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-
our relevance to issues of public importance and debate. That is, Nike's "assuredly 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. 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."

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 plaintiffs see, 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 connotation to the public's support for the corporation's political ideas." 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."

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 PAC'sirut money from individual contributors. This option transforms the political expenditure from one rooted in the corpo-

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197 May be assumed that a speech context has attributes of more than one category, it should be analyzed under the more protected category. For example, sexually explicit speech, despite offensive and intimate content, requires protection if it has serious impact of a variety of types. See Miller v. California, 413 U.S. 15 (1973). However, aside from being otherwise fully protected context, the law restricts one-corporate pocket book in that use of others person's expression. And despite its political relevance, the law cannot regard political speech that banks the阪第三圣徒, 499 U.S. 103 (1990). The additional assumption may require more powers argument for it when it is applicable. Under the assumption both these the initial probability of Nike's claim given again mentioned focus on content.


23 In McConnell, the majority clarified that the PAC's option meant there was no complete ban on corporate expression. Id. at 108. Still, Justice Kennedy's dissent, using Justice Scalia's dissent in *Nebbia*, strung out the role that the free speech by the corporation as a corporation, id. at 795-96 (Kennedy, J., dissenting). For my purposes, the *Nebbia* point is that requiring the money go through the PAC means that individuals, acting as individuals, are just those as corpora
tive roles, choose to support the speech.
ration to our ultimate decision 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 election-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 corporations 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." These features assure, as the Court emphasizes, that their "political resources reflect political support."

Despite Belkis's crucial point that the capacity of speech to inform does not depend on the identity of the source, the Court in \textit{Austin} and \textit{McConnell} showed that corporate commercial identity is crucial in the constitutional justification of the regulations. The Nike dissents simply ignored \textit{Austin}'s implicit rejection of the relevance of this point of Belkis (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 \textit{McConnell} did not ignore \textit{Austin}—instead he confirmed that it has the importanace I attribute to it here. Kennedy saw how much of the McConnell majority's reasoning depended on \textit{Austin}'s rejection of Belkis'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 \textit{Austin} should be overruled.\footnote{\textit{Id.} at 762 (Kennedy, J., dissenting); see also id. at 763-66 (Kennedy, J., dissenting) (criticizing \textit{Austin} and suggesting what I intimated earlier, that \textit{Austin} effectively rejects Belkis).} 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—commercial speech and corporate

\footnote{\textit{Id.} at 762 (Kennedy, J., dissenting); see also id. at 763-66 (Kennedy, J., dissenting) (criticizing \textit{Austin} and suggesting what I intimated earlier, that \textit{Austin} effectively rejects Belkis).}
political speech—but one meaningful category, speech of market-oriented commercial enterprises (and the non-profit entities that they in a sense sponsor). These remain for consideration theominous appeal of the majority position. One approach would simply repeat arguments that theoists have offered for why commercial speech in general should not receive protection. But possibly more to the point is citizenship, 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 as additional contribution they can make to people's lives—they can provide (and can be required to provide) useful information. The Court, however, has recognized that this contribution is not beyond legal regulation, especially if people are reasonably concluded 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. In Central Hudson the Court saw that there may be addi-
tional reasons to think the business enterprise's 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 distasteful 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 NLRA, 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.

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 hardship 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. Thus, these 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. Especially since the demise of *Loretto*, 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

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

71 This benefit is hardly unattainable—advertising can also produce huge donations and corruption of media content. See C. EDWARD BAER, ADVERTISING AND A DEMOCRATIC PRESS, at x (1994) ("Advertising seriously distorts and distastefully the mass media's contribution to a free and democratic society").

72 *Virginia State Board of Bar Examiners v. Updike*, 846 F.2d 137 (4th Cir. 1988), cert. denied, 490 U.S. 1017 (1989) (noting that the term "governmental" was intentionally employed to distinguish the court's case from the "governmental" issue in *McConnell*).
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 "advertisers spend some sixty billion dollars per year," suggested that these "who would expose the materialist message must combat forces that have a massive economic advantage."

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. In 1996, a single company, Philip Morris, spent more on advertising and related marketing practices than all the candidates, including the presidencial candidates, reportedly spent on their campaigns. These expenditures may reflect 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 converted among ourselves—among rich and poor, producers 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.

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60 Shiffrin, supra note 39, at 1281.
61 I have not stated, but would like to see a comparative study of similar (e.g., women, industrialized, democratic, countries to determine if there is a converse relationship between the percent of GDP spent on advertising and communicative speech more broadly construed) and the percent spent on non-military governmental expenditures.
62 C. SIDNEY BAXTER, MEDIA, MARKETS, AND DEMOCRACY 39 (Cambridge 1991; Press 2002). Actually, in the late 1990's, the biggest advertiser (Philip Morris, aka Lorillard) 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 metes 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 apply. 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 unseemly environment, or regulating commercial solicitation to maintain a proper "atmosphere," or regulating utility advertising to prevent the corruption of the discourse between actual individuals concerning wise, as opposed to excessive, use of electric energy, or protecting people's privacy, or requiring support for a federal agricultural marketing scheme. 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 or McConnell. These last prohibitions on corporate candidate-related political speech are hardly less restrictive on corporate participation in public discourse than rules that

10 Int'l Tel. & Tel. v. FCC, 482 U.S. 486 (1987).
12 See LA Police Dep't v. United Publ'g Corp., 538 U.S. 429 (2000) (upholding statute re-districting only certain commercial "zones" to prevent "mind-numbing" advertising), Massey-Manning Mfg. Service v. FTC, 334 F.3d 1228 (2004) (upholding "do not call" registry that applied to commercial but not to charitable or political calls); Yost v. Fyler, 68 F.3d 729, 738-39 (9th Cir. 1994) (upholding statute providing for civil liability only for commercial use of "telemarketing dialing and annealing devices").
13 Glucksberg v. Wilkins, 521 U.S. 702 (1997). Whether this represents a permissible speech zone is another, but is how Collins and Skover categorize it. Collins & Skover, supra note 1, at 1254 n.269.
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 some content to their frequently invoked "free speech principle." In a world where such 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 disseminator as the best organizing symbol of the First Amendment. 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 disseminator than the First Amendment must protect. Despite reporting Nike's billion dollar budget for advertising and promotions in 1997 (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." (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 exorcise the means 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 it, I suspect (read?) the analysis I present, they broadly...

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11 Collins & Skover, supra note 81, at 104 n.152.
12 In the book they cite, Shiffrin says the "claimant's view receives at least some recognition from the Court's second-tier treatment of commercial advertising." STEPHEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND REASON ABLE SPOKEN WORDS (1995). Later in arguing the notion of "true efforts to place exact limits on the discourse-commercialization of American society" should be encouraged, Shiffrin argues that this shows the Court's "practice as a tradition of "the Court rightfully rechanneling commercial advertising to a low position in the hierarchy of 'true communication values." Id. at 131. Shiffrin thus not only suggests that his perspective makes "it easy to understand why powerful corporate corporations should be subject to broader regulatory authority where they seek to distort political competition," he also says that "the regulation of ... large corporate conglomerates does not ordinarily impinge on ... the individual self-expression at all." Id. "emphases added."
13 I had written that Collins and Skover, who have their defense of Nike on the possibility that in speech should be characterized as patent—suggest but Shiffrin might well agree with all that they say when they invoke the image of an disseminator. Collins & Skover, supra note 81, at 104 n.152.
14 Collins & Skover, supra note 83, at 976.
15 Id. at 1041.
16 Three specific points Collins and Skover make about my position suggest neither of them read my Essay. First, they attribute my position is a "breath of fresh air..." (emphasis added) grounded in my search of self-regulation. -- Collins & Skover, supra note 83, at 2032 (emphasis added). The only use of the term "self-regulation" in the Essay was 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." Before knowing whether to admit or deny my "socialist" credentials, I need to know what they mean by "the liberty of socialism." The most socialist 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 cultural context," two observations seem appropriate. First, in this Essay...

footnote citation of an opinion written by Justice White when he enunciates the subject's importance, yet agrees with 29, and it refers to an opinion that had come in its turn. Remarkably, though I do refer to having previously developed an exposition of why a robust theory of free speech would not alter any presumption in commercial speech, see article cited supra note 6, 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 "broad strokes." Starting and proceeding to suggest how it can be understood—rather than argue that it should be rejected as I had asserted in earlier writings. Collins and Skover's objection of any prior writings or the subject is simply irrelevant to the current Essay. Second, they report in one of its premises a fact that my "self-identification principle is applicable to the profit Corporations, other than for-profit corporations that trade in speech." Collins & Skover, supra note 83, at 1022 n.30 (emphasis in original). Actually, I argue here (as I have consistently since my first article in commercial speech that stolen emblems exceed First Amendment protection because they absolutely vital inhuman role in service of democracy, broadly conceived. See supra notes accompanying 42-43); journalists cited supra note 9. Notice that this Essay use any earlier work do I say that the self-identification principle is applicable "to for-profit corporations that trade in speech." Thus, they "wonder" whether my approach would protect (and, if I read it right, Skover would) the individual defendant (officer and director) in White because I make the identity of the speaker crucial. They seem to have equally extreme assumptions to the point that the case of a speaker has been consistently treated by the court is crucial to whether his speech is fully protected or is considered less protected commercial speech. See supra notes 37, 44-45 and accompanying text. (Their view that this cannot be a problem, foster one or the other, suggest a world view of the case law as well as of my analysis) In other words, virtually everyone Collins and Skover know, as do I, why my position implies positions that did not advance in this Essay, as it involves questions that I specifically assumed in the Essay. Finally, should note that, though this fact might be intimated through the obvious seriousness of their own writing, the totally ignore rather than continue my critique of virtually all their affirmative claims—for example, that protection of Wit is required because its speech is political or required in order to avoid badmouthing the subject in the public debate.

Collins & Skover, supra note 55, at 1022 n.30 (emphasis added).
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.