ISSUE 4

Are Corporations Accused of Wrongdoing Protected by the First Amendment?

YES: Joyce L. Kennard, from “Majority Opinion, Marc Kasky v. Nike, Inc. et. al.,” California Supreme Court (May 2, 2002)

NO: Janice Brown, from “Dissenting Opinion, Marc Kasky v. Nike, Inc. et. al.,” California Supreme Court (May 2, 2002)

ISSUE SUMMARY

YES: Justice Joyce Kennard, writing for the majority, argues that Nike's public response to charges they operated sweatshops overseas constituted "commercial" speech and, therefore, is not protected by the First Amendment of the U.S. Constitution.

NO: Justice Janice Brown contends that the U.S. Supreme Court has not provided the courts with an unambiguous definition of commercial speech and, consequently, part of the foundation of the majority's position is undermined. She also calls into question whether there should be a distinction between commercial and non-commercial speech in the first place.

In the late 1990s, press and media were awash with news stories about American corporations engaging in illegal and immoral labor practices overseas. Newspapers and television reported numerous cases of U.S. firms employing underaged children and forcing them to work excessive hours in horrid conditions for virtually no pay. And while the public was outraged to learn that many American firms condoned these sweatshop operations, it was the case involving the Nike Corporation that most captured the public's attention. In this issue, we examine whether or not Nike's First Amendment rights were violated by a lawsuit brought against them as a result of charges that the company was engaging in illegal labor practices overseas. But, before you turn to the two articles here, a little history on the case is necessary.

Public attention on Nike's overseas labor practices was the result, primarily, of a 1996 report by the television news program 48 Hours. In the months that followed this broadcast, newspapers around the country published stories concerning the working conditions of overseas factories where Nike products were made. Typically, the reports alleged that employees working in Nike sanctioned factories were (1) required to work overtime, (2) paid less than required local wage rates, (3) routinely subjected to physical and mental abuse, and (4) exposed to unsafe working conditions. In response, Nike embarked on a well-orchestrated public relations campaign in which they vehemently denied any and all allegations of wrongdoing. The company took out ads in newspapers across the country, issued press releases to the television media, and wrote letters explaining its position to athletic directors at universities across the country.

In 1998, a social activist named Marc Kasky sued Nike for false advertising. And, although Kasky did not sustain personal damages as a result of Nike's rebuttal, as a state citizen he was entitled to sue under California's false advertising laws. Kasky's goal was not to receive monetary damages himself, but rather to have Nike pay the steep fines stipulated by the statutes governing corporate advertising violations.

The issue in this case centers on Nike's public response to the charges that they utilized sweatshops overseas. Specifically, the focus is on the nature of Nike's claims: if they constitute social or political comment, then they are afforded full protection under the First Amendment of the Constitution. Such a determination would thus protect them from Kasky's charges and represent a victory for Nike. If, however, they are deemed to be commercial speech, then Nike's statements would not be protected under the First Amendment. In this instance, Kasky's false advertising charges would be supported, and Nike would be subject to substantial financial penalties (Katch and Rose, in Taking Sides: Legal Issues, McGraw-Hill Dushkin, 2004, p. 255).

Thus, the stage was set for a series of court battles. Two lower courts ruled that Nike's responses were social commentary and not commercial speech, thus handing Kasky two early losses. Not surprisingly, Kasky refused to quit, and the case ended up in the California Supreme Court.

In the first article, Justice Joyce L. Kennard, writing for the majority, argues that Nike's public statements represented commercial speech and, therefore, are not afforded protection under the First Amendment of the U.S. Constitution. In coming to this decision, the justices relied on previous U.S. Supreme Court rulings that attempted to draw a distinction between commercial and non-commercial speech. As you read this article, ask yourself if you agree with the "limited-purpose test" the majority used to reach its decision.

In the second article, Justice Janice Brown presents the dissenting viewpoint. Her argument consists basically of two points: First, she contends that the U.S. Supreme Court has not provided the courts with an unambiguous definition of commercial speech as the majority opinion would have us believe. Consequently, part of the foundation of the majority's position is undermined. Second, Justice Brown calls into question whether there should be a distinction between commercial and non-commercial speech in the first place. To the extent that there should be no distinction, all speech would be protected under the First Amendment. As you read this article, do you find yourself being persuaded by her argument?
Majority Opinion

Kasky v. Nike

... Plaintiff alleged that defendant corporation, in response to public criticism, and to induce consumers to continue to buy its products, made false statements of fact about its labor practices and about working conditions in factories that make its products. ...

The issue here is whether defendant corporation’s false statements are commercial or noncommercial speech for purposes of constitutional free speech analysis under the state and federal Constitutions. Resolution of this issue is important because commercial speech receives a lesser degree of constitutional protection than many other forms of expression, and because governments may entirely prohibit commercial speech that is false or misleading.

Because the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker’s own business operations for the purpose of promoting sales of its products, we conclude that these messages are commercial speech for purposes of applying state laws barring false and misleading commercial messages. ...

Our holding, based on decisions of the United States Supreme Court, in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully. Unlike our dissenting colleagues, we do not consider this a remarkable or intolerable burden to impose on the business community. ...

Facts

This case comes before us after the superior court sustained defendants’ demurrers to plaintiff’s first amended complaint. We therefore begin by summarizing that complaint’s allegations, accepting the truth of the allegations, as we must, for the limited purposes of reviewing the superior court’s ruling.

Allegations of the First Amended Complaint

... Nike manufactures and sells athletic shoes and apparel. In 1997, it reported annual revenues of $9.2 billion, with annual expenditures for advertising and marketing of almost $1 billion. Most of Nike’s products are manufactured by subcontractors in China, Vietnam, and Indonesia. Most of the workers who make Nike products are women under the age of 24. Since March 1993, under a memorandum of understanding with its subcontractors, Nike has assumed responsibility for its subcontractors’ compliance with applicable local laws and regulations concerning minimum wage, overtime, occupational health and safety, and environmental protection.

Beginning at least in October 1996 with a report on the television news program 48 Hours, and continuing at least through November and December of 1997 with the publication of articles in the Financial Times, the New York Times, the San Francisco Chronicle, the Buffalo News, the Oregonian, the Kansas City Star, and the Sporting News, various persons and organizations alleged that in the factories where Nike products are made workers were paid less than the applicable local minimum wage; required to work overtime; allowed and encouraged to work more overtime hours than applicable local law allowed; subjected to physical, verbal, and sexual abuse; and exposed to toxic chemicals, noise, heat, and dust without adequate safety equipment, in violation of applicable local occupational health and safety regulations.

In response to this adverse publicity, and for the purpose of maintaining and increasing its sales and profits, Nike and the individual defendants made statements to the California consuming public that plaintiff alleges were false and misleading. Specifically, Nike and the individual defendants said that workers who make Nike products are protected from physical and sexual abuse, that they are paid in accordance with applicable local laws and regulations governing wages and hours, that they are paid on average double the applicable local minimum wage, that they receive a “living wage,” that they receive free meals and health care, and that their working conditions are in compliance with applicable local laws and regulations governing occupational health and safety. Nike and the individual defendants made these statements in press releases, in letters to newspapers, in a letter to university presidents and athletic directors, and in other documents distributed for public relations purposes. Nike also bought full-page advertisements in leading newspapers to publicize a report that GoodWorks International, LLC., had prepared under a contract with Nike. The report was based on an investigation by former United States Ambassador Andrew Young, and it found no evidence of illegal or unsafe working conditions at Nike factories in China, Vietnam, and Indonesia.

Plaintiff alleges that Nike and the individual defendants made these false and misleading statements because of their negligence and carelessness and “with knowledge or reckless disregard of the laws of California prohibiting false and misleading statements.” ...

The False Advertising Law

California’s false advertising law ($ 17500 et seq.) makes it “unlawful for any person, ... corporation ... , or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services ... or to induce the public to enter into any obligation relating thereto, to make or disseminate ... before the public in this state, ... in any newspaper or other
publication...or in any other manner or means whatever...any statement, concerning that real or personal property or those services...which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading..."

Constitutional Protections for Speech

Federal Constitution

Constitutional Text and Its Application to State Laws
The United States Constitution’s First Amendment, part of the Bill of Rights, provides in part that “Congress shall make no law...abridging the freedom of speech...” (U.S. Const., 1st Amend.) Although by its terms this provision limits only Congress, the United States Supreme Court has held that the Fourteenth Amendment’s due process clause makes the freedom of speech provision operate to limit the authority of state and local governments as well.

Constitutional Protection of Commercial Speech
Although advertising has played an important role in our nation’s culture since its early days, and although state regulation of commercial advertising and commercial transactions also has a long history, it was not until the 1970’s that the United States Supreme Court extended First Amendment protection to commercial messages. In 1975, the court declared that it was error to assume “that advertising, as such, was entitled to no First Amendment protection.” The next year, the court held that a state’s complete ban on advertising prescription drug prices violated the First Amendment. The high court observed that “the free flow of commercial information is indispensable” not only “to the proper allocation of resources in a free enterprise system” but also “to the formation of intelligent opinions as to how that system ought to be regulated or altered.”

Tests for Commercial and Noncommercial Speech Regulations

“[T]he Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.”

For noncommercial speech entitled to full First Amendment protection, a content-based regulation is valid under the First Amendment only if it can withstand strict scrutiny, which requires that the regulation be narrowly tailored (that is, the least restrictive means) to promote a compelling government interest.

“By contrast, regulation of commercial speech based on content is less problematic.” To determine the validity of a content-based regulation of commercial speech, the United States Supreme Court has articulated an intermediate-scrutiny test. The court first articulated this test in Central Hudson Gas & Elec. v. Public Serv. Comm’n (1980) and has since referred to it as the Central Hudson test. The court explained the components of the test this way: “At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that protection, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.” The court has clarified that the last part of the test—determining whether the regulation is not more extensive than “necessary”—does not require the government to adopt the least restrictive means, but instead requires only a “reasonable fit” between the government’s purpose and the means chosen to achieve it.

Regulation of False or Misleading Speech

“[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in uninhibited, robust, and wide-open debate on public issues.” For this reason, “[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake.”

Nevertheless, in some instances the First Amendment imposes restraints on lawsuits seeking damages for injurious falsehoods. It does so “to eliminate the risk of undue self-censorship and the suppression of truthful material” and thereby to give freedom of expression the “breathing space” it needs to survive. Thus, “some false and misleading statements are entitled to First Amendment protection in the political realm.”

But the United States Supreme Court has explained that the First Amendment’s protection for false statements is not universal. (Stating that when speech “concerns no public issue” and is “wholly false and clearly damaging,” it “warrants no special protection” under the First Amendment.) In particular, commercial speech that is false or misleading is not entitled to First Amendment protection and “may be prohibited entirely.” (In re R.M.J. (1982)."

Reasons for the Distinction

The United States Supreme Court has given three reasons for the distinction between commercial and noncommercial speech in general and, more particularly, for withholding First Amendment protection from commercial speech that is false or actually or inherently misleading.

First, “[t]he truth of commercial speech...may be more easily verifiable by its disseminator than...news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else.”

Second, commercial speech is harder than noncommercial speech in the sense that commercial speakers, because they act from a profit motive, are less likely to experience a chilling effect from speech regulation.

Third, governmental authority to regulate commercial transactions to prevent commercial harms justifies a power to regulate speech that is “linked inextricably” to those transactions. The high court has identified “preventing commercial harms” as “the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.”

Distinguishing Commercial From Noncommercial Speech

The United States Supreme Court has stated that the category of commercial speech consists at its core of “speech proposing a commercial transaction.”
Although in one case the court said that this description was “the test for identifying commercial speech,” in other decisions the court has indicated that the category of commercial speech is not limited to this core segment. For example, the court has accepted as commercial speech a statement of alcohol content on the label of a beer bottle, as well as statements on an attorney’s letterhead and business cards identifying the attorney as a CPA (certified public accountant) and CFP (certified financial planner).

_Boylgor, supra, 463 U.S. 60_, presented the United States Supreme Court with the question whether a federal law prohibiting the mailing of unsolicited advertisements for contraceptives violated the federal Constitution’s free speech provision as applied to certain mailings by a corporation that manufactured, sold, and distributed contraceptives. One category of mailings consisted of informational pamphlets discussing the desirability and availability of prophylactics in general or [the corporation’s] products in particular. The court noted that these pamphlets did not merely propose commercial transactions. Although the pamphlets were conceded to be advertisements, that fact alone did not make them commercial speech because paid advertisements are sometimes used to convey political or other messages unconnected to a product or service or commercial transaction. The court also found that references to specific products and the economic motivation of the speaker were each, considered in isolation, insufficient to make the pamphlets commercial speech. The court concluded, however, that the combination of these three factors—advertising format, product references, and commercial motivation—provided “strong support” for characterizing the pamphlets as commercial speech.

In two important footnotes, the high court provided additional insight into the distinction between commercial and noncommercial speech. In one footnote, the court gave this caution: “[W]e do not mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial. For example, we express no opinion as to whether the reference to any particular product or service is a necessary element of commercial speech.”

In the other footnote, after observing that one of the pamphlets at issue discussed condoms in general without referring specifically to the corporation’s own products, the court said: “That a product is referred to generically does not, however, remove it from the realm of commercial speech. For example, a company with sufficient control of the market for a product may be able to promote the product without reference to its own brand name. Or a trade association may make statements about a product without reference to specific brand names.”

Thus, although the court in _Boylgor, supra, 463 U.S. 60_, identified three factors—advertising format, product references, and commercial motivation—that in combination supported a characterization of commercial speech in that case, the court not only rejected the notion that any of these factors is sufficient by itself, but it also declined to hold that all of these factors in combination, or any one of them individually, is necessary to support a commercial speech characterization.

The high court also cautioned, as it had in past cases, that statements may properly be categorized as commercial “notwithstanding the fact that they contain discussions of important public issues,” and that “advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech,” explaining further that “[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.”

Since its decision in _Boylgor, supra, 463 U.S. 60_, the United States Supreme Court has acknowledged that “ambiguities may exist at the margins of the category of commercial speech.” Justice Stevens in particular has remarked that “the borders of the commercial speech category are not nearly as clear as the Court has assumed,” and he has suggested that the distinction cannot rest solely on the form or content of the statement, or the motive of the speaker, but instead must rest on the relationship between the speech at issue and the justification for distinguishing commercial from noncommercial speech. In his words, “any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech’s potential to mislead.”

**Analysis**

**The United States Constitution**

The United States Supreme Court has not adopted an all-purpose test to distinguish commercial from noncommercial speech under the First Amendment, nor has this court adopted such a test under the state Constitution, nor do we propose to do so here. A close reading of the high court’s commercial speech decisions suggests, however, that it is possible to formulate a limited-purpose test. We conclude, therefore, that when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception, categorizing a particular statement as commercial or non-commercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message.

In typical commercial speech cases, the speaker is likely to be someone engaged in commerce—that is, generally, the production, distribution, or sale of goods or services—or someone acting on behalf of a person so engaged, and the intended audience is likely to be actual or potential buyers or customers of the speaker’s goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers. Considering the identity of both the speaker and the target audience is consistent with, and implicit in, the United States Supreme Court’s commercial speech decisions, each of which concerned a speaker engaged in the sale or hire of products or services conveying a message to a person or persons likely to want, and be willing to pay for, that product or service. The high court has frequently spoken of commercial speech as speech proposing a commercial transaction, thus implying that commercial speech typically is communication between persons who engage in such transactions.
In Balzer, moreover, the court stated that in deciding whether speech is commercial two relevant considerations are advertising format and economic motivation. These considerations imply that commercial speech generally or typically is directed to an audience of persons who may be influenced by that speech to engage in a commercial transaction with the speaker or the person on whose behalf the speaker is acting. Speech in advertising format typically, although not invariably, is speech about a product or service by a person who is offering that product or service at a price, directed to persons who may want, and be willing to pay for, that product or service. Citing New York Times v. Sullivan, supra, 376 U.S. 254, which concerned a newspaper advertisement seeking contributions for civil rights causes, the court cautioned, however, that presentation in advertising format does not necessarily establish that a message is commercial in character. Economic motivation likewise implies that the speech is intended to lead to commercial transactions, which in turn assumes that the speaker and the target audience are persons who will engage in those transactions, or their agents or intermediaries.

Finally, the factual content of the message should be commercial in character. In the context of regulation of false or misleading advertising, this typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker’s products or services. This is consistent with, and implicit in, the United States Supreme Court’s commercial speech decisions, each of which has involved statements about a product or service, or about the operations or qualifications of the person offering the product or service.

This is also consistent with the third Balzer factor—product references. By “product references,” we do not understand the United States Supreme Court to mean only statements about the price, qualities, or availability of individual items offered for sale. Rather, we understand “product references” to include also, for example, statements about the manner in which the products are manufactured, distributed, or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manufacture, distribute, sell, service, or endorse the product. Similarly, references to services would include not only statements about the price, availability, and quality of the services themselves, but also, for example, statements about the education, experience, and qualifications of the persons providing or endorsing the services. This broad definition of “product references” is necessary, we think, to adequately categorize statements made in the context of a modern, sophisticated public relations campaign intended to increase sales and profits by enhancing the image of a product or of its manufacturer or seller.

Our understanding of the content element of commercial speech is also consistent with the reasons that the United States Supreme Court has given for denying First Amendment protection to false or misleading commercial speech. The high court has stated that false or misleading commercial speech may be prohibited because the truth of commercial speech is “more easily verifiable by its disseminator” and because commercial speech, being motivated by the desire for economic profit, is less likely than noncommercial speech to be chilled by proper regulation. This explanation assumes that commercial speech consists of factual statements and that those statements describe matters within the personal knowledge of the speaker or the person whom the speaker is representing and are made for the purpose of financial gain. Thus, this explanation implies that, at least in relation to regulations aimed at protecting consumers from false and misleading promotional practices, commercial speech must consist of factual representations about the business operations, products, or services of the speaker (or the individual or company on whose behalf the speaker is speaking), made for the purpose of promoting sales of, or other commercial transactions in, the speaker’s products or services. The United States Supreme Court has never decided whether false statements about a product or service of a competitor of the speaker would properly be categorized as commercial speech. Because the issue is not presented here, we offer no view on how it should be resolved.

Here, the first element—a commercial speaker—is satisfied because the speakers—Nike and its officers and directors—are engaged in commerce. Specifically, they manufacture, import, distribute, and sell consumer goods in the form of athletic shoes and apparel.

The second element—an intended commercial audience—is also satisfied. Nike’s letters to university presidents and directors of athletic departments were addressed directly to actual and potential purchasers of Nike’s products, because college and university athletic departments are major purchasers of athletic shoes and apparel. Plaintiff has alleged that Nike’s press releases and letters to newspaper editors, although addressed to the public generally, were also intended to reach and influence actual and potential purchasers of Nike’s products. Specifically, plaintiff has alleged that Nike made these statements about its labor policies and practices “to maintain and/or increase its sales and profits.” To support this allegation, plaintiff has included as an exhibit a letter to a newspaper editor, written by Nike’s director of communications, referring to Nike’s labor policies practices and stating that “[c]onsumers are savvy and want to know they support companies with good products and practices” and that “[d]uring the shopping season, we encourage shoppers to remember that Nike is the industry’s leader in improving factory conditions.”

The third element—representations of fact of a commercial nature—is also present. In describing its own labor policies, and the practices and working conditions in factories where its products are made, Nike was making factual representations about its own business operations. In speaking to consumers about working conditions and labor practices in the factories where its products are made, Nike addressed matters within its own knowledge. The wages paid to the factories’ employees, the hours they work, the way they are treated, and whether the environmental conditions under which they work violate local health and safety laws, are all matters likely to be within the personal knowledge of Nike executives, employees, or subcontractors. Thus, Nike was in a position to readily verify the truth of any factual assertions it made on these topics.
In speaking to consumers about working conditions in the factories where its products are made, Nike engaged in speech that is particularly hard or durable. Because Nike's purpose in making these statements, at least as alleged in the first amended complaint, was to maintain its sales and profits, regulation aimed at preventing false and actually or inherently misleading speech is unlikely to deter Nike from speaking truthfully or at all about the conditions in its factories. To the extent that application of these laws may make Nike more cautious, and cause it to make greater efforts to verify the truth of its statements, these laws will serve the purpose of commercial speech protection by “insuring that the stream of commercial information flow[s] cleanly as well as freely.”

Finally, government regulation of Nike's speech about working conditions in factories where Nike products are made is consistent with traditional government authority to regulate commercial transactions for the protection of consumers by preventing false and misleading commercial practices. Trade regulation laws have traditionally sought to suppress and prevent not only false or misleading statements about products or services in themselves but also false or misleading statements about where a product was made, or by whom.

Because in the statements at issue here Nike was acting as a commercial speaker, because its intended audience was primarily the buyers of its products, and because the statements consisted of factual representations about its own business operations, we conclude that the statements were commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception. Whether these statements could properly be categorized as commercial speech for some other purpose, and whether these statements could properly be categorized as commercial speech if one or more of these elements was not fully satisfied, are questions we need not decide here.

Nike argues that its allegedly false and misleading statements were not commercial speech because they were part of “an international media debate on issues of intense public interest.” In a similar vein, our dissenting colleagues argue that the speech at issue here should not be categorized as commercial speech because, when Nike made the statements defending its labor practices, the nature and propriety of those practices had already become a matter of public interest and public debate. This argument falsely assumes that speech cannot properly be categorized as commercial speech if it relates to a matter of significant public interest or controversy. As the United States Supreme Court has explained, commercial speech commonly concerns matters of intense public and private interest. The individual consumer's interest in the price, availability, and characteristics of products and services “may be as keen, if not keener by far, than his interest in the day's most urgent political debate.” And for the public as whole, information on commercial matters is “indispensable” not only “to the proper allocation of resources in a free enterprise system” but also “to the formation of intelligent opinions as to how that system ought to be regulated or altered.”

In her dissent, Justice Brown states that our logic “erroneously assumes that false or misleading commercial speech ... can never be speech about a public issue.” On the contrary, we assume that commercial speech frequently and even normally addresses matters of public concern. The reason that it is “less necessary to tolerate inaccurate statements for fear of silencing the speaker” of commercial speech is not that such speech concerns matters of lesser public interest or value, but rather that commercial speech is both “more easily verifiable by its disseminator” and “less likely to be chilled by proper regulation.”

In support of their argument that speech about issues of public importance or controversy must be considered noncommercial speech, our dissenting colleagues cite Thomas v. Collins (1945) and Thornhill v. State of Alabama (1940). The United States Supreme Court issued these decisions three decades before it developed the modern commercial speech doctrine in Bigelow v. Virginia and Va. Pharmacy Bd. v. Va. Consumer Council. Moreover, neither decision addressed the validity of a law prohibiting false or misleading speech. To the extent they hold that truthful and nonmisleading speech about commercial matters of public importance is entitled to constitutional protection, they are consistent with the modern commercial speech doctrine and with the decision we reach today. We find nothing in either decision suggesting that the state lacks the authority to prohibit false and misleading factual representations, made for purposes of maintaining and increasing sales and profits, about the speaker's own products, services, or business operations.

For purposes of categorizing Nike's speech as commercial or noncommercial, it does not matter that Nike was responding to charges publicly raised by others and was thereby participating in a public debate. The point is illustrated by a decision of a federal court of appeals about statements by a trade association denying there was scientific evidence that eating eggs increased the risk of heart and circulatory disease. The court held that these statements were commercial speech subject to regulation by the Federal Trade Commission (FTC) to the extent the statements were false or misleading, even though the trade association made the statements “to counteract what the FTC described as 'anti-cholesterol attacks on eggs which had resulted in steadily declining per capita egg consumption.'” Responding to the argument that the statements were noncommercial because they concerned a debate on a matter of great public interest, the federal court of appeals responded that “the right of government to restrain false advertising can hardly depend upon the view of an agency or court as to the relative importance of the issue to which the false advertising relates.”

Here, Nike's speech is not removed from the category of commercial speech because it is intermingled with noncommercial speech. To the extent Nike's press releases and letters discuss policy questions such as the degree to which domestic companies should be responsible for working conditions in factories located in other countries, or what standards domestic companies ought to observe in such factories, or the merits and effects of economic "globalization" generally, Nike's statements are noncommercial speech. Any content-based regulation of these noncommercial messages would be subject to the strict scrutiny test for fully protected speech. But Nike may not "immunize false or misleading product information from government regulation simply
by including references to public issues.” Here, the alleged false and misleading statements all relate to the commercial portions of the speech in question—the description of actual conditions and practices in factories that produce Nike’s products—and thus the proposed regulations reach only that commercial portion.

Assigning that the commercial and noncommercial elements in Nike’s statement were “inextricably intertwined,” our dissenting colleagues maintain that it must therefore be categorized as noncommercial speech, and they cite in support the United States Supreme Court’s decision in Riley v. National Federation of the Blind of North Carolina. That decision concerned regulation of charitable solicitations, a category of speech that does not fit within our limited-purpose definition of commercial speech because it does not involve factual representations about a product or service that is offered for sale. More importantly, the high court has since explained that in Riley “the commercial speech (if it was that) was ‘inextricably intertwined’ because the state law required it to be included” and that commercial and noncommercial messages are not “inextricable” unless there is some legal or practical compulsion to combine them. No law required Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization, nor was it impossible for Nike to address those subjects separately.

We also reject Nike’s argument that regulating its speech to suppress false and misleading statements is impermissible because it would restrict or disfavor expression of one point of view (Nike’s) and not the other point of view (that of the critics of Nike’s labor practices). The argument is misdirected because the regulations in question do not suppress points of view but instead suppress false and misleading statements of fact. As we have explained, to the extent Nike’s speech represents expression of opinion or points of view on general policy questions such as the value of economic “globalization,” it is noncommercial speech subject to full First Amendment protection. Nike’s speech loses that full measure of protection only when it concerns facts material to commercial transactions—here, factual statements about how Nike makes its products.

Moreover, differential treatment of speech about products and services based on the identity of the speaker is inherent in the commercial speech doctrine as articulated by the United States Supreme Court. A noncommercial speaker’s statements criticizing a product are generally noncommercial speech, for which damages may be awarded only upon proof of both falsehood and actual malice. A commercial speaker’s statements in praise or support of the same product, by comparison, are commercial speech that may be prohibited entirely to the extent the statements are either false or actually or inherently misleading. To repeat, the justification for this different treatment, as the high court has explained, is that when a speaker promotes its own products, it is “less necessary to tolerate inaccurate statements for fear of silencing the speaker” because the described speech is both “more easily verifiable by its disseminator” and “less likely to be chilled by proper regulation.”

Our dissenting colleagues are correct that the identity of the speaker is usually not a proper consideration in regulating speech that is entitled to First Amendment protection, and that a valid regulation of protected speech may not handicap one side of a public debate. But to decide whether a law regulating speech violates the First Amendment, the very first question is whether the speech that the law regulates is entitled to First Amendment protection at all. As we have seen, commercial speech that is false or misleading receives no protection under the First Amendment, and therefore a law that prohibits only such unprotected speech cannot violate constitutional free speech provisions.

We conclude, accordingly, that here the trial court and the Court of Appeal erred in characterizing as noncommercial speech, under the First Amendment to the federal Constitution, Nike’s allegedly false and misleading statements about labor practices and working conditions in factories where Nike products are made. . . .

As we have explained, the United States Supreme Court has indicated that economic motivation is relevant but not conclusive and perhaps not even necessary. The high court has never held that commercial speech must have as its only purpose the advancement of an economic transaction, and it has explained instead that commercial speech may be intermingled with noncommercial speech. An advertisement primarily intended to reach consumers and to influence them to buy the speaker’s products is not exempt from the category of commercial speech because the speaker also has a secondary purpose to influence lenders, investors, or lawmakers.

Nor is speech exempt from the category of commercial speech because it relates to the speaker’s labor practices rather than to the price, availability, or quality of the speaker’s goods. An advertisement to the public that cherries were picked by union workers is commercial speech if the speaker has a financial or commercial interest in the sale of the cherries and if the information that the cherries had been picked by union workers is likely to influence consumers to buy the speaker’s cherries. Speech is commercial in its content if it is likely to influence consumers in their commercial decisions. For a significant segment of the buying public, labor practices do matter in making consumer choices. . . .

**Conclusion**

As the United States Supreme Court has explained, false and misleading speech has no constitutional value in itself and is protected only in circumstances and to the extent necessary to give breathing room for the free debate of public issues. Commercial speech, because it is both more readily verifiable by its speaker and more hardy than noncommercial speech, can be effectively regulated to suppress false and actually or inherently misleading messages without undue risk of chilling public debate. With these basic principles in mind, we conclude that when a corporation, to maintain and increase its sales and profits, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements are commercial speech that may be regulated to prevent consumer deception.

Sprinkled with references to a series of children’s books about wizardry and sorcery, Justice Brown’s dissent itself tries to find the magic formula or
incantation that will transform a business enterprise's factual representations in defense of its own products and profits into noncommercial speech exempt from our state's consumer protection laws. As we have explained, however, such representations, when aimed at potential buyers for the purpose of maintaining sales and profits, may be regulated to eliminate false and misleading statements because they are readily verifiable by the speaker and because regulation is unlikely to deter truthful and nonmisleading speech.

In concluding, contrary to the Court of Appeal, that Nike's speech at issue here is commercial speech, we do not decide whether that speech was, as plaintiff has alleged, false or misleading, nor do we decide whether plaintiff's complaint is vulnerable to demurrer for reasons not considered here. Because the demurrers of Nike and the individual defendants were based on multiple grounds, further proceedings on the demurrers may be required in the Court of Appeal, the superior court, or both. Our decision on the narrow issue before us on review does not foreclose those proceedings.

The judgment of the Court of Appeal is reversed, and the matter is remanded to that court for further proceedings consistent with this opinion.

NO

Janice Brown

Dissenting Opinion
by Janice Brown

I respectfully dissent.

In 1942, the United States Supreme Court, like a wizard trained at Hogwarts, waved its wand and "plucked the commercial doctrine out of thin air." (Kozinski & Banner, Who's Afraid of Commercial Speech (1990) 76 Va. L.Rev. 627, 627.) Unfortunately, the court's doctrinal wizardry has created considerable confusion over the past 60 years as it has struggled to define the difference between commercial and non-commercial speech. The United States Supreme Court has, in recent years, acknowledged "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." After tracing the various definitions of commercial speech used over the years, the court conceded that no "categorical definition of the difference between" commercial and non-commercial speech exists. Instead, the difference is a matter of "common sense," and restrictions on speech "must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." Consistent with these pronouncements, the United States Supreme Court has expressly refused to define the elements of commercial speech. Indeed, "the impossibility of specifying the parameters that define the category of commercial speech has haunted its jurisprudence and scholarship."

Despite this chaos, the majority, ostensibly guided by Bolger, has apparently divined a new and simpler test for commercial speech. Under this "limiting-purpose test," "categorizing a particular statement as commercial or non-commercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message." Unfortunately, the majority has forgotten the teachings of H.L. Mencken: "every human problem" has a "solution" that is "neat, plausible, and wrong." Like the purported discovery of cold fusion over a decade ago, the majority's test for commercial speech promises much, but solves nothing. Instead of clarifying the commercial speech doctrine, the test violates fundamental principles of First Amendment jurisprudence by making the level of protection given speech dependent
fails to account for the realities of the modern world—-a world in which personal, political, and commercial arenas no longer have sharply defined boundaries. My sentiments are not unique; many judges and academics have echoed them. Even some justices on the high court have recently questioned the validity of the distinction between commercial and noncommercial speech. Nonetheless, the high court has apparently declined to abandon it. Given that the United States Supreme Court is not prepared to start over, we must try to make the commercial speech doctrine work—warts and all. To this end, I believe the high court needs to develop a more nuanced approach that maximizes the ability of businesses to participate in the public debate without minimizing consumer fraud.

II

According to the majority, all speech containing the following three elements is commercial speech: (1) “a commercial speaker”; (2) “an intended commercial audience”; and (3) “representations of fact of a commercial nature.” The first element is satisfied whenever the speaker is engaged in “the production, distribution, or sale of goods or services” or “someone acting on behalf of a person so engaged.” The second element is satisfied whenever the intended audience is “actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence” of actual or potential buyers or customers.” The third element is satisfied whenever “the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services.”

Although the majority constructed this limited-purpose test from its “close reading of the high court's commercial speech decisions,” it conveniently dismisses those decisions that cast doubt on its formulation. As explained below, a closer review of the relevant case law reveals that the majority's test for commercial speech contravenes long-standing principles of First Amendment law.

First, the test flouts the very essence of the distinction between commercial and noncommercial speech identified by the United States Supreme Court. “If commercial speech is to be distinguished, it must be distinguished by its content.” Despite this caveat, the majority distinguishes commercial from noncommercial speech using two criteria wholly unrelated to the speech’s content: the identity of the speaker and the intended audience. In doing so, the majority strays from the guiding principles espoused by the United States Supreme Court.

Second, the test contravenes a fundamental tenet of First Amendment jurisprudence by making the identity of the speaker potentially dispositive. As the United States Supreme Court stated long ago, “[the] identity of the speaker is not decisive in determining whether speech is protected,” and “speech does not lose its protection because of the corporate identity of the speaker.” This is because corporations and other speakers engaged in commerce “contribute to
the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.” Thus, “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.” Despite these admonitions, the majority has made the identity of the speaker a significant, and potentially dispositive, factor in determining the scope of protection accorded to speech under the First Amendment. As a result, speech by “someone engaged in commerce” may receive less protection solely because of the speaker’s identity. Indeed, the majority’s limited-purpose test makes the identity of the speaker dispositive whenever the speech at issue relates to the speaker’s business operations, products, or services, in contravention of United States Supreme Court precedent.

Third, the test violates the First Amendment by stifling the ability of speakers engaged in commerce, such as corporations, to participate in debates over public issues. The United States Supreme Court has broadly defined public issues as those issues “about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” “The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled.” “Speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection,” because such speech “is more than self-expression; it is the essence of self-government.” “The First and Fourteenth Amendments remove government restraint from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity.” Thus, the First Amendment “both fully protects and implicitly encourages” public debate on “matters of public concern.”

To ensure “uninhibited, robust, and wide-open” “debate on public issues,” the United States Supreme Court has recognized that some false or misleading speech must be tolerated. Although “[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake,” “[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.” The “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they need to survive.” “Because a rule that would impose strict liability on a speaker ‘for false factual assertions’ in a matter of public concern ‘would have an undoubted chilling’ effect on speech ‘that does have constitutional value,’ ‘only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions.’”

The majority contends its limited-purpose test for commercial speech does not violate these principles because false or misleading commercial speech may be prohibited “entirely.” This logic is, however, faulty, because it erroneously assumes that false or misleading commercial speech as defined by the majority can never be speech about a public issue. Under the majority’s test, the content of commercial speech is limited only to representations regarding “business operations, products, or services.” But business operations, products, or services may be public issues. For example, a corporation’s business operations may be the subject of public debate in the media. These operations may even be a political issue as organizations, such as state, local, or student governments, propose and pass resolutions condemning certain business practices. Under these circumstances, the corporation’s business operations undoubtedly become a matter of public concern, and speech about these operations merits the full protection of the First Amendment. Indeed, the United States Supreme Court has long recognized that speech on a public issue may be inseparable from speech promoting the speaker’s business operations, products or services.

The majority, however, creates an overbroad test that, taken to its logical conclusion, renders all corporate speech commercial speech. As defined, the test makes any public representation of fact by a speaker engaged in commerce about that speaker’s products made for the purpose of promoting that speaker’s products commercial speech. A corporation’s product, however, includes the corporation itself. Corporations are regularly bought and sold, and corporations market not only their products and services but also themselves. Indeed, business goodwill is an important asset of every corporation and contributes significantly to the sale value of the corporation. Because all corporate speech about a public issue reflects on the corporate image and therefore affects the corporation’s business goodwill and sale value, the majority’s test makes all such speech commercial notwithstanding the majority’s assertions to the contrary.

In so doing, the majority violates a basic principle of First Amendment law. By subjecting all corporate speech about business operations, products and services to the strict liability provisions of sections 17204 and 17535, the majority’s limited-purpose test unconstitutionally chills a corporation’s ability to participate in the debate over matters of public concern. The chilling effect is exacerbated by the breadth of sections 17204 and 17535, which “prohibit not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.” This broad definition of actionable speech puts a corporation “at the mercy of the varied understanding of its[its] hearers and consequently of whatever inference may be drawn as to its[its] intent and meaning.” Because the corporation could never be sure whether its truthful statements may deceive or confuse the public and would likely incur significant burden and expense in litigating the issue, “[m]uch valuable information which a corporation might be able to provide would remain unpublished . . . .” As the United States Supreme Court has consistently held, such a result violates the First Amendment.

Finally, in singling out speakers engaged in commerce and restricting their ability to participate in the public debate, the majority unconstitutionally favors certain speakers over others. Corporations “have the right to be free from government restrictions that abridge [their] own rights in order to enhance the relative voice of [their] opponents.” The First Amendment does not permit favoritism toward certain speakers “based on the identity of the interests that [the speaker] may represent.” Indeed, “self-government suffers when those in power suppress competing views on public issues from diverse
and antagonistic sources.” The majority, however, does just that. Under the majority’s test, only speakers engaged in commerce are strictly liable for their false or misleading representations pursuant to sections 17204 and 17535. Meanwhile, other speakers who make the same representations may face no such liability, regardless of the context of their statements. Neither United States Supreme Court precedent nor our precedent countenances such favoritism in doling out First Amendment rights.

III

The majority’s limited-purpose test is not only problematic in light of controlling high court precedent, the test appears to conflict with the analysis used by other courts in analogous contexts. These conflicts belie the majority’s claim of doctrinal consistency and underscore the illusory nature of its so-called solution to the commercial speech quandary.

For example, the majority opinion conflicts with Gordon & Breach Science Publishers v. AIP. In Gordon & Breach, the defendant, a nonprofit publisher of scientific journals, published scientific articles touting its journals as “both less expensive and more scientifically important than those of for-profit publishers such as” the plaintiff. The defendant, as part of an advertising campaign designed to promote its journals, touted and defended the conclusions of these articles by, among other things, issuing press releases and writing letters to the editor responding to attacks on these articles. In light of these promotional activities, the plaintiff sued the defendant for false advertising under the Lanham Trademark Act and New York law.

In determining whether the defendant’s advertising campaign constituted commercial speech, the district court identified the following dilemma: how to characterize “speech which, from one perspective, presents the aspect of protected, noncommercial speech addressing a significant public issue, but which, from another perspective, appears primarily to be speech ‘proposing a commercial transaction.’” After analyzing the relevant United States Supreme Court precedent, the court concluded that the articles, press releases and letters to the editor constituted noncommercial speech fully protected by the First Amendment. According to the court, this speech fell “too close to core First Amendment values to be considered ‘commercial advertising or promotion’ under the Lanham Act.”

Application of the majority’s test would, however, result in a different outcome. The defendant was engaged in commerce; it sold journals. The intended audience was undoubtedly potential customers. The articles, press releases and letters contained representations of fact about the defendant’s products—its journals. Thus, they contain the three elements of commercial speech identified by the majority. The majority would therefore classify this speech as commercial speech even though it constitutes “fully protected commentary on an issue of public concern.”

Similarly, the majority’s test creates a conflict with Oxycal Laboratories, Inc. v. Jeffers. In Oxycal, the defendants published a book that denigrated the plaintiffs’ products while promoting the defendants’ products. The defendants allegedly promoted the book in an effort to boost the sales of their own products. The plaintiffs sued, alleging false advertising. Finding this case easy, the court concluded that the book was noncommercial speech because there were “sufficient noncommercial motivations” notwithstanding the commercial motivations. To the extent the book contained commercial elements promoting the defendants’ products, these commercial elements were “intertwined” with and secondary to the noncommercial elements.

Once again, the majority’s test would yield a contrary result. The defendants were engaged in commerce, and the intended audience for the book was potential consumers. The book contained representations of fact about the defendants’ products, and the defendants undoubtedly made these representations for the purpose of promoting their products. Thus, under the majority’s test, the book was commercial speech, and the defendants would have been strictly liable for any false or misleading statements about their products in the book.

Although we are not bound by these decisions, they are instructive and highlight the deficiencies in the majority’s limited-purpose test for commercial speech. In divining a new test for commercial speech, the majority finds a deceptively simple answer to a complicated question. Unfortunately, the answer is flawed. By failing to recognize that a speaker’s business operations, products, or services may be matters of public concern, the majority ignores controlling principles of First Amendment law. As a result, the majority erroneously draws a bright line when “a broader and more nuanced inquiry” is required.

IV

Of course, my rejection of the majority’s limited-purpose test does not resolve the central issue in this case: What level of protection should be accorded Nike’s speech under the First Amendment? To answer this question, this court, as the majority correctly notes, must determine whether Nike’s speech is commercial or noncommercial speech. Following the existing framework set up by the United States Supreme Court, I would conclude that Nike’s speech is more like noncommercial speech than commercial speech because its commercial elements are inextricably intertwined with its noncommercial elements. Thus, I would give Nike’s speech the full protection of the First Amendment.

When determining whether speech is commercial or noncommercial, courts must “ensure that speech deserving of greater constitutional protection is not inadvertently suppressed.” In following this philosophy in cases involving hybrid speech containing both commercial and noncommercial elements, the United States Supreme Court has assessed the separability of these elements to determine the proper level of protection. If the commercial elements are separable from the noncommercial elements, then the speech is commercial and receives lesser protection. Thus, advertising that merely “links a product to a current public debate” is still commercial speech notwithstanding its noncommercial elements. Where the speaker may comment on a public issue without promoting its products or services, the speech is also commercial, even if the speaker combines a commercial message with a noncommercial message. Indeed, “[a]dvoters should not be permitted to immunize false or misleading
product information from government regulation simply by including references to public issues."

The United States Supreme Court has, however, recognized that commercial speech may be "inextricably intertwined" with noncommercial speech in certain contexts. Where regulation of the commercial component of certain speech would stifle otherwise protected speech, "we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical." In such cases, courts must apply the "test for fully protected expression" rather than the test for commercial speech.²

Although the United States Supreme Court has mostly found this intertwining of commercial and noncommercial speech in the charitable solicitation context, it has also done so in a factual context analogous to the one presented here. In Thomas v. Collins,³ the United States Supreme Court held that a speech made by a union representative promoting the union’s services and inviting workers to join constituted noncommercial speech fully protected by the First Amendment. Although the court acknowledged that the speech promoted the services of the union and sought to solicit new members, it found that these commercial elements were inextricably intertwined with the noncommercial elements addressing a public issue—unionism. "The feat would be incredible for a national leader, addressing such a meeting, lauding unions and their principles, urging adherence to union philosophy, not also and thereby to suggest attachment to the union by becoming a member." Indeed, "whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation."

Finding that the commercial elements of the union representative’s speech should be accorded the full protection of the First Amendment, the court concluded that distinguishing between the speech’s commercial and noncommercial elements "offers no security for free discussion." "In these conditions," making such a distinction "blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. "When legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussion of the virtues of trade unions and so becloud even this with doubt, uncertainty and the risk of penalty, freedom of speech for them will be at an end. A restriction so destructive of the right of public discussion... is incompatible with the freedoms secured by the First Amendment."

This case presents a similar scenario because Nike’s overseas labor practices have become a public issue. According to the complaint, Nike faced a sophisticated media campaign attacking its overseas labor practices. As a result, its labor practices were discussed on television news programs and in numerous newspapers and magazines. These discussions have even entered the political arena as various governments, government officials and organizations have proposed and passed resolutions condemning Nike’s labor practices. Given these facts, Nike’s overseas labor practices were undoubtedly a matter of public concern, and its speech on this issue was therefore "entitled to special protection." Because Nike could not comment on this public issue without discussing its overseas labor practices, the commercial elements of Nike’s representations about its labor practices were inextricably intertwined with their noncommercial elements. As such, these representations must be fully protected as noncommercial speech in the factual context presented here.

The majority’s assertion that Nike’s representations about its overseas labor practices are distinct from its comments on "policy questions" is simply wrong. The majority contends Nike can still comment on the policy issues implicated by its press releases and letters because it can generally discuss "the degree to which domestic companies should be responsible for working conditions in factories located in other countries, or what standards domestic companies ought to observe in such factories, or the merits and effects of economic globalization generally..." The majority, however, conveniently forgets that Nike’s overseas labor practices are the public issue. Thus, general statements about overseas labor exploitation and economic globalization do not provide Nike with a meaningful way to participate in the public debate over its overseas labor practices.

Even if the majority correctly characterizes the public issues implicated by Nike’s press releases and letters, its assertion is still wrong. In light of the sophisticated media campaign directed at Nike’s overseas labor practices and the close association between Nike’s labor practices and the public debate over overseas labor exploitation and economic globalization, Nike could not comment on these public issues without discussing its own labor practices. Indeed, Nike could hardly condemn exploitation of overseas workers and discuss the virtues of economic globalization without implying that it helps overseas workers and does not exploit them. By limiting Nike to "innocuous and abstract discussion," the majority has effectively destroyed Nike’s "right of public discussion." Under these circumstances, Nike no longer "has the full panoply of protections available to its direct comments on public issues..." Accordingly, the factual representations in Nike’s press releases and letters are fully protected under current First Amendment jurisprudence.

Such a conclusion is consistent with the commercial speech decisions of the United States Supreme Court. Most of these decisions involve core commercial speech that does "no more than propose a commercial transaction." Because speech that just proposes a commercial transaction, by definition, only promotes the sale of a product or service and does not address a public issue, these decisions are inapposite.

The United States Supreme Court decisions finding hybrid speech containing both commercial and noncommercial elements to be commercial are also distinguishable. In these cases, the court found that the commercial elements of the speech were separable from its noncommercial elements and were therefore unnecessary for conveying the noncommercial message. Because the commercial message was merely linked to—and not inextricably intertwined with—the noncommercial message, the court concluded that restrictions on the commercial message would not stifle the speaker’s ability to engage in protected speech. As explained above, this case is different. Nike’s overseas business operations have become the public issue, and Nike cannot comment on important public issues like overseas worker exploitation...
and economic globalization without implicating its own labor practices. Thus, the commercial elements of Nike’s press releases, letters, and other documents were inextricably intertwined with their noncommercial elements, and they must be fully protected as noncommercial speech.

Finally, *Bolger*, the primary case relied on by the majority, is distinguishable. In *Bolger*, a contraceptive manufacturer wished to mail, among other things, informational pamphlets that discussed the problem of venereal disease and the benefits of condoms and referenced the manufacturer. The United States Postal Service banned the mailings, and the manufacturer challenged the constitutionality of the ban. In assessing the constitutionality of the ban, the United States Supreme Court concluded that the informational pamphlets constituted commercial speech “notwithstanding the fact that they contain discussions of important public issues.” Unlike Nike’s overseas business operations, however, the products at issue in *Bolger* had not become a public issue. Moreover, in the factual context of *Bolger*, the manufacturer could have commented on the issues of venereal disease and family planning through avenues other than promotional mailings and without referencing its own products. By contrast, Nike has no other avenue for defending its labor practices, given the breadth of sections 17204 and 17535, and Nike cannot comment on the issues of labor exploitation and economic globalization without referencing its own labor practices. Given these differences, *Bolger* does not compel the majority’s conclusion.

Constrained by the United States Supreme Court’s current formulation of the commercial speech doctrine, I would therefore conclude that Nike’s press releases, letters, and other documents defending its overseas labor practices are noncommercial speech. Based on this conclusion, I would find the application of sections 17204 and 17535 to Nike’s speech unconstitutional. Accordingly, I would affirm the judgment of the Court of Appeals. . . .

VI

In today’s world, the difference between commercial and noncommercial speech is not black and white. Due to the growing politicization of commercial matters and the increased sophistication of advertising campaigns, the intersection between commercial and noncommercial speech has become larger and larger. As this gray area expands, continued adherence to the dichotomous, all-or-nothing approach developed by the United States Supreme Court will eventually lead us down one of two unappealing paths: either the voices of businesses in the public debate will be effectively silenced, or businesses will be able to dupe consumers with impunity.

Rather than continue down this path, I believe the high court must reassess the commercial speech doctrine and develop a more nuanced inquiry that accounts for the realities of today’s commercial world. Without abandoning the categories of commercial and noncommercial speech, the court could develop an approach better suited to today’s world by recognizing that not all speech containing commercial elements should be equal in the eyes of the First Amendment.

For example, the United States Supreme Court could develop an intermediate category of protected speech where commercial and noncommercial elements are closely intertwined. In light of the conflicting constitutional principles at play, this intermediate category could receive greater protection than commercial speech but less protection than noncommercial speech. Under such an approach, false or misleading speech that falls within the intermediate category could be actionable so long as states do not impose liability without fault.

Alternatively, the court could abandon its blanket rule permitting the proscription of all false or misleading commercial speech. Instead, the court could devise a test for determining whether governmental restrictions on false or misleading speech with commercial elements survive constitutional scrutiny. In doing so, the court could develop a more nuanced approach that maximizes the ability of businesses to participate in the public debate without allowing consumer fraud to run rampant.

Even if these suggestions are unworkable or problematic, the practical realities of today’s commercial world require a new “accommodation between First Amendment concern[s] and the limited state interest present in the context of” strict liability actions targeting speech with inextricably intertwined commercial and noncommercial elements. Given the growing intersection between advertising and noncommercial speech, such as political, literary, scientific and artistic expression, this observation is equally cogent where the commercial speech is false or misleading.

I realize the task is not easy. Indeed, Justice Scalia has recently alluded to the intractability of the problem. Nonetheless, a new accommodation of the relevant constitutional concerns is possible, and the United States Supreme Court can and should devise a more nuanced approach that guarantees the ability of speakers engaged in commerce to participate in the public debate without giving these speakers free rein to lie and cheat.

For example, such an accommodation could permit states to bar all false or misleading representations about the characteristics of a product or service—i.e., the efficacy, quality, value, or safety of the product or service—without justification even if these characteristics have become a public issue. In such a situation, the governmental interest in protecting consumers from fraud is especially strong because these representations address the fundamental questions asked by every consumer when he or she makes a buying decision: does the product or service work well and reliably, is the product or service harmful and is the product or service worth the cost? Moreover, these representations are the traditional target of false advertising laws. Thus, the strong governmental interest in this context trumps any First Amendment concerns presented by a blanket prohibition on such false or misleading representations.

By contrast, the governmental interest in protecting against consumer fraud is less strong if the representations are unrelated to the characteristics of the product or service. In some situations involving these representations, the First Amendment concerns may trump this governmental interest. A blanket prohibition of false or misleading representations in such a situation would be unconstitutional because the prohibition may stifle the ability of businesses to comment on public issues. Indeed, this case offers a prime example. Making Nike strictly liable for any false or misleading representations about its labor
practices stifles Nike's ability to participate in a public debate initiated by others. Accommodating the competing interests in this context precludes the blanket prohibition favored by the majority. Although strict liability is inappropriate, an actual malice standard may be too high because these representations undoubtedly influence some consumers in their buying decisions, and the government has a strong interest in minimizing consumer deception. Thus, a well-crafted test could give states the flexibility to define the standard of liability for false or misleading misrepresentations in this context so long as the standard is not strict liability.  

VII

The majority accuses me of searching for my own “magic formula or incantation” because I urge a reevaluation of the commercial speech doctrine. To this charge, I plead guilty. Unlike the majority who finds nothing unsettling about doctrinal incoherence, I readily acknowledge that some wizardry may be necessary if courts are to adapt the commercial speech doctrine to the realities of today's commercial world. Unfortunately, Merlin and Gandalf are busy, so the United States Supreme Court will have to fill the gap.  

Although I make these magical references in jest, my point is serious: the commercial speech doctrine needs and deserves reconsideration and this is as good a place as any to begin. I urge the high court to do so here.

Notes

1. The court did find that the defendant's distribution of preprints of the articles to potential customers and its repeated dissemination of the conclusions of these articles to potential customers constituted commercial speech. (Gordon & Breach, supra, 859 F.Supp. at p. 1544.)

2. The majority's attempts to distinguish Riley are not persuasive. First, “charitable solicitations" do "involve factual representations about a product or service that is offered for sale," where, as in Riley, the charitable solicitations are made by professional fundraisers who solicit contributions for a fee. Second, for does not preclude the application of Riley in this case. It is "impossible for Nike to address" certain public issues without addressing its own labor practices, because these practices are the public issue and symbolize the current debate over overseas labor exploitation and economic globalization.

3. The majority contends Thomas and Thornhill are not relevant because “[t]he United States Supreme Court issued these decisions three decades before it developed the modern commercial speech doctrine in Bigelow v. Virginia ([1975]), and Va. Consumer Council." The majority, however, conveniently neglects to mention that both Bigelow and Va. Consumer Council cite Thomas and Thornhill with approval. Thus, the United States Supreme Court, in developing the commercial speech doctrine, did not intend to overrule or diminish the relevance of Thomas and Thornhill. In any event, the binding effect of a high court opinion does not diminish with age.

4. States may, however, adopt a strict liability standard for false and misleading representations unrelated to the characteristics of a product or service where the representations are not inextricably tied to a public issue.

POSTSCRIPT

Are Corporations Accused of Wrongdoing Protected by the First Amendment?

In September 2003, Nike announced that it was settling its dispute with social activist Marc Kaskey. Nike had appealed the decision of the California Supreme Court to the U.S. Supreme Court. The Supreme Court Justices, after agreeing previously to hear the case, abruptly changed their minds and dismissed Nike's appeal. In light of this development, Nike decided not to continue the fight against Kaskey and agreed to pay $1.5 million to the Fair Labor Association, a Washington-based special interest organization involved in promoting international labor causes (Oliva, 2003). It's interesting to note that the settlement does not contain an admission of guilt or wrongdoing from the Nike Corporation nor does it provide any legal precedent.

In the dissenting opinion, California Supreme Court Justice Brown raised two important points that supporters of the current separation between economic and social speech need to address. First, she argued that there is no historical or philosophical justification for the concept of "commercial" speech as distinct from other forms of speech. Thus, the responsibility lies with supporters of this idea to prove their case, something that, thus far, they have failed to do. Secondly, she argues that previous court decisions involving this issue have been so inconsistent and ambiguous as to render the distinction between commercial and non-commercial speech virtually meaningless.

Regardless of which side of this case you support, the decision of the U.S. Supreme Court not to hear Nike's appeal can only be described as disappointing. Numerous social critics have suggested the Supreme Court missed an excellent opportunity to help clarify and define the concept of "commercial" speech. As a result, our understanding of how far First Amendment protection extends to such corporate behavior has not been furthered, nor has the debate on whether there should be a legal distinction between commercial and non-commercial speech in the first place.

Beyond the immediate impact on the two parties involved, a decision of some sort would have gone a long way toward the establishment of a coherent framework capable of guiding future court decisions involving corporate speech and First Amendment protections.

Suggested Readings

Center for the Advancement of Capitalism, Supreme Court should end the distinction between political and economic speech. Center for the Advancement of Capitalism, 2003. http://www.cpmag.com/article.asp?id=2542

