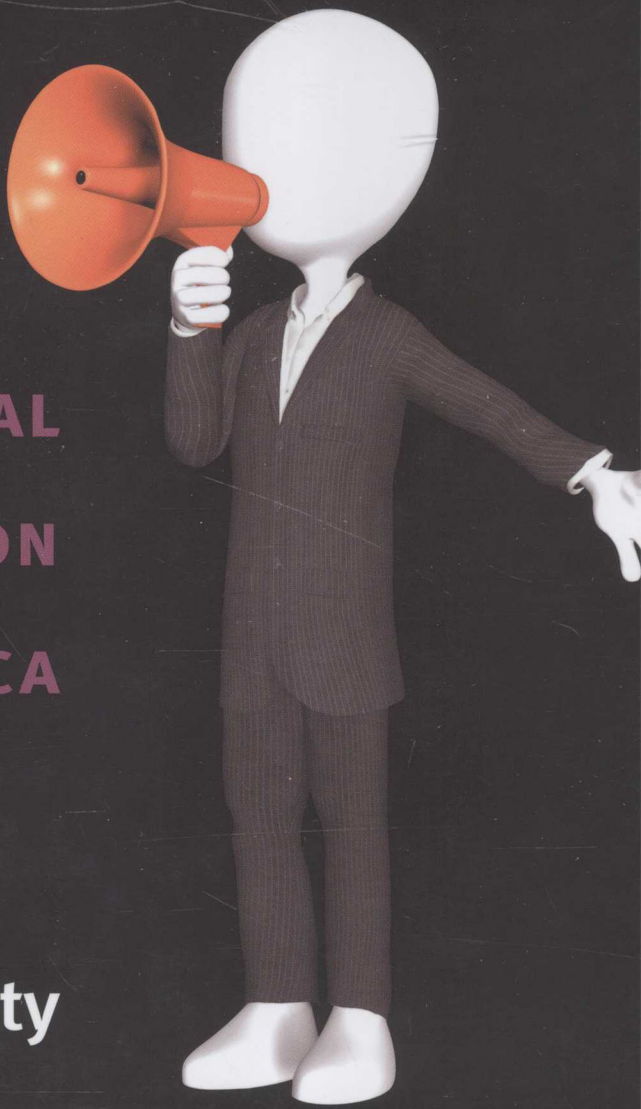
Brandishing the First Amendment



COMMERCIAL EXPRESSION IN AMERICA

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BRANDISHING THE FIRST AMENDMENT

To Gerald

Acknowledgments

This book is the result of many years of research, writing, talking, and thinking about its topic. Some of the arguments and some of the text throughout the book have appeared previously, in a somewhat different form, in my article "Against Freedom of Commercial Expression," 29 *Cardozo L. Rev.* 2583 (2008).

Although I have written extensively on the topic of commercial and corporate speech, the process of generating a book on the subject at times seemed too much for me. It is a very large subject and a more sustained exploration of some aspects of the problem had to be sacrificed in the interest of keeping this book to a manageable length. For those interested in the subject the bibliography offers a wealth of resources for further reading, including my earlier articles.

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INTRODUCTION

The Problem of Commercial Expression

> [P]rotection of commercial speech, particularly in robust form, is a recent occurrence.
>
> —Lawrence O. Gostin,
> *Public Health Law: Power, Duty, Restraint*

In 2009 *Advertising Age* reported that advertising and marketing were taking a "beating" in Washington.[1] Several legislative proposals that would either directly or indirectly threaten to put more limits on the industry were receiving serious attention in Washington. Marketing folk opposed these proposals because they wanted "an unencumbered advertising and marketing environment."[2] Despite this new interest in regulation, the marketing environment is likely to remain relatively unencumbered for some time to come because efforts to restrain it are likely to encounter a formidable obstacle in the courts—the First Amendment. Although the situation is little known outside of the litigation circles involved, industry has been engaged for the last forty years or so in strategic litigation raising First Amendment challenges to governmental attempts to regulate commercial speech. These efforts have met with some success because, although they did not always result in a win in a particular case, cumulatively they have successfully changed judicial and public attitudes toward governmental regulation of commercial speech.

Although for the first 200 years or so of this country's existence most observers took it for granted that the government could regulate commercial speech as a function of its power to regulate commerce, by the mid-1970s this was no longer obviously the case. Regulation had gotten a bad name, and the

marketplace was increasingly trusted to take care of many problems formerly thought to be the preserve of government.

After the events of the last couple of decades however, regulation is starting to look good again. We have seen the spectacular failure of some of the world's largest companies (e.g., Enron and AIG); the discovery of widespread corruption and incompetence of private contractors like Halliburton and Blackwater in the conduct of two wars; repeated shocks in the financial and credit markets; the mining accidents and the explosion of the Deepwater Horizon oil drilling rig in which inadequate regulatory oversight is alleged to have played a role; and a seemingly endless stream of news about recalled cars, tainted food, children's toys contaminated with lead, poisoned dog food, and heavily advertised drugs removed from the market after widespread use revealed more dangers than their manufacturers disclosed.

All these events have prompted calls for regulatory reform. However, the foundation laid by industry through strategic litigation during the period of relative regulatory inertia may make it very difficult for government to reassert control. This litigation around commercial speech and the rights of businesses to engage in protected expression have made an argument seem natural and inevitable that only fifty years or so ago would have seem absurd—that commercial speech is entitled to full First Amendment protection.

Beginning in 1976 and then accelerating into the early part of the new century, courts have been increasingly willing to entertain arguments that governmental attempts to regulate commercial speech violate the First Amendment. This is a disturbing development, because if the government cannot regulate commercial speech, it cannot regulate commerce—period.[3]

Marketing is big business, perhaps one of the biggest businesses in the United States. According to one estimate, it generates an annual $6 trillion in economic activity.[4] But all this economic activity may come at a steep price. Marketing has been implicated in virtually every major news story of the past few years—spiraling health care costs, spectacular corporate meltdowns like Enron and AIG, financial reform, the mortgage crisis, tainted foods, environmental safety, global warming, increasing childhood obesity, and many others. Sometimes it has played a central role in creating or exacerbating a crisis, sometimes only a supporting one. But it is always a part of the problem. Although marketing practices are regulated in a number of ways, enforce-

ment has often been uneven. It is becoming obvious that plugging gaps and greater oversight are long overdue.

The realization that more regulation is in order is at odds with the increased willingness of the courts to grant commercial speech (and commercial speakers) greater First Amendment protection from regulation. That judicial willingness is the product of several decades during which industry has engaged in strategic litigation, brandishing the First Amendment as a means of fending off regulatory efforts of all types—for cigarette labels, the marketing of junk food to children, disclosure rules on financial instruments, do-not-call registries, pharmaceutical advertising, and many other regulations. This is extremely significant because the First Amendment can be a legal trump card. Ever since the Supreme Court proclaimed in *Marbury v. Madison*[5] that courts have the power to overturn acts of Congress or of the executive branch on the grounds that they are unconstitutional, a constitutional defense has become a potential game ender, particularly in the hands of a wealthy and powerful litigant. Any renewed efforts by Congress or by federal agencies to regulate commercial expression could be struck down by a Supreme Court sympathetic to calls for an "unencumbered" marketing environment.

This is not idle speculation. Several individual members of the Supreme Court have already signaled their belief that commercial speech ought to enjoy more protection than it currently does.[6] In 2010 the Court as a body rendered a decision in *Citizens United v. Federal Election Commission*[7] that strongly suggests that the majority of the Court favors fewer restrictions on commercial speech. In one of the most aggressive examples of judicial activism in recent times, the Court affirmatively reached out to decide the *Citizens United* case and overruled earlier precedents that limited expenditures by corporations in elections.[8] Central to the reasoning in the majority opinion in *Citizens United* is the rhetorical framing of corporations as "citizens" whose participation in political speech should not be limited because of their corporate status.

Citizens United was greeted with widespread public criticism.[9] It may well have the pernicious effects on elections that its critics predict,[10] but its most serious and far-reaching implications are more likely to be its effect on the regulation of commercial speech.[11] At present the commercial speech that most affects the public welfare is, by and large, issued by large, multinational

corporations. *Citizens United,* by framing such corporations as citizens with distinct rights of expression, provides ammunition to collapse the distinction between commercial speech, which currently only has limited constitutional protection, and protected political or artistic expression, which enjoys heightened protection. Such a collapse would imperil existing consumer protection legislation and strangle in their infancy any efforts to assert greater regulatory supervision over critical industries like banking, pharmaceuticals, insurance, and many others. The connections between the *Citizens United* case and more First Amendment protection for commercial speech may not be obvious. To better understand why *Citizens United* may prove threatening to our ability to regulate commerce, not just to limit corporate participation in politics, we must go back a few years to another case, one that, like *Citizens United,* the Supreme Court reached out for but that, unlike *Citizens United,* the Court ultimately did not decide: *Nike v. Kasky.*

In 1996, Phil Knight, CEO of Nike, faced a problem. His company had been the undisputed leader in the athletic apparel market, with annual revenues in the billions. Hundreds of professional and college athletes wore Nike clothing and gear under exclusive endorsement contracts. Yet all was not well. The company had been the subject of a series of exposés about its labor practices. Various groups charged that workers making Nike products in factories in Southeast Asia were working brutal hours for wages of approximately $40 a month. They alleged that Nike's workers were exposed to unsafe levels of toxic chemicals like toluene and subjected to regular physical, psychological, and sexual abuse. In 1997, Bob Herbert of the *New York Times* wrote a column criticizing Nike for what he called its "abusive" labor practices.[12]

These charges hurt Nike's public image, endangering not only its sales but also its stock price. As some student groups began calling for boycotts of Nike on college campuses, analysts speculated about how these developments would affect the company's endorsement deals and its market share. Nike responded to the crisis with a concerted public relations effort. Its representatives sent letters to the editors of major newspapers defending Nike's labor practices. It also sent letters to organizations like the YWCA and to college presidents and athletic directors. It issued press releases about the issue and posted them on its website. At a public event, CEO Knight claimed that

the air in the factories of many of Nike's contractors was cleaner than that in Los Angeles. Nike even funded a "fact-finding tour" of its own overseas operations. The tour was put together by a PR firm and led by former UN ambassador Andrew Young. At a press conference afterward, Young reported that although Nike could still do better, it was basically doing a good job with improving the conditions for the workers who made its products. In many of these communications, Nike made specific, factual claims about its labor practices (e.g., that workers received free lunches)—claims that could be checked. Apparently, some of these claims were not true.

Marc Kasky, a California consumer activist, read Nike's claims and got angry. He believed that many of Nike's statements were misleading (at best) and maybe knowingly false. So, although Kasky admitted he had never purchased a pair of Nike shoes himself, he sued Nike in a California court for violations of California's unfair trade practices and unfair competition laws, as well as for fraud and deceit. Kasky claimed he was suing on behalf of the consumers of California. He could do this because, at the time, California law allowed any citizen to sue as a private attorney general—in other words, to sue on behalf of all of the citizens of California—for an injury to the public.[13]

Nike responded to Kasky's suit with a demurrer, the legal equivalent of saying "So what?" By filing a demurrer, Nike was arguing that even if everything Kasky said was true—including his claim that Nike had engaged in fraud and deceit—those statements could not be the basis of a legal claim for relief, because the allegedly false statements were protected by the First Amendment. It is worth repeating this defense to underscore its audacity: *Nike argued that Kasky's claim for fraud and deceit did not state a cause of action because the speech was protected by the First Amendment.*

This is a bold assertion—that the First Amendment insulates fraud. It is important to highlight this aspect of the suit because supporters of more protection for commercial speech, when faced with objections that such protection might insulate more fraud, respond that "of course" the First Amendment does not protect fraud. Nike's response to Kasky's lawsuit illustrates the emptiness of those reassurances.

However, what was arguably more shocking than Nike's claim of a First Amendment defense was that the trial court agreed with Nike and dismissed Kasky's suit. A California court of appeals affirmed. Only when the case reached the California Supreme Court was Nike's argument subjected to

closer scrutiny and rejected. The California Supreme Court found that some of Nike's statements appeared to be commercial speech and, as such, were not entitled to full First Amendment protection in the first place, let alone insulation from a fraud claim.

Pursuant to the commercial speech doctrine, commercial speech is not entitled to any protection at all unless it is true. Therefore, if any of Nike's contested statements were "commercial speech," then their truth or falsity mattered. Kasky claimed that some of Nike's statements were false and that Nike's management knew they were false. Pursuant to the doctrine, the First Amendment does not protect false commercial speech. Since the case had been dismissed prior to any discovery, it was possible, the majority wrote, that evidence produced through discovery would prove Kasky's claims had merit. Over some vigorous dissents, the majority held that, because some of the speech at issue in the case appeared to be commercial speech, the lower courts had erred in dismissing the case and that Kasky was entitled to go forward with discovery. This was bad news for Nike because it meant the company would have to turn over some of its internal documents about the conditions in its factories to Kasky. Anything produced to Kasky through discovery was likely to become a matter of public knowledge and possibly lead to more public relations problems.

Rather than submit to discovery, Nike chose to ask the Supreme Court of the United States to review its case. It wanted the Court to reinstate the trial court's dismissal. The Supreme Court accepted the case for review and heard oral argument. It was one of the most closely watched cases of that term, because Nike argued for more than just a resolution of its dispute with Kasky. It sought a definitive opinion from the Supreme Court that statements such as those it had made in defense of its labor practices were fully protected speech under the First Amendment.

At stake was whether a company could be held legally accountable for the accuracy of its statements about its labor, environmental, or other practices. If the Court's answer was that corporations could not be held accountable for these statements, it would be a green light for major corporations to continue their carefully massaged public relations campaigns regarding social responsibility practices, without fear of having those campaigns later be a basis for liability if some part of them turned out to be untrue. If Nike could get a ruling that all such speech was entitled to a constitutional shield, it would

ensure that the advertising and marketing environment would remain "unencumbered." The commercial benefits of being free to engage in promotional activities unfettered by any accountability for the accuracy of those representations are obvious. What Nike tried to obtain was the freedom to issue whatever speech it deemed was in its best interest, even if some of its statements were false and even if the company (or some of its employees) knew they were false.[14] If, however, the Court ruled in favor of Kasky, companies issuing corporate social responsibility reports—press releases about issues like their labor, environmental, and human rights practices—could no longer leave the content of such statements to the marketing and public relations departments. Instead, they would have to make sure their statements were accurate, or they would face the possibility of legal liability.

Thus, in its appeal to the Supreme Court, Nike argued that none of the speech in question was commercial speech, rather, it was all speech fully protected by the First Amendment. Because Nike's statements about its labor practices had been issued in a public relations format and contained arguments (or, more accurately, references to arguments) about globalization, Nike argued that these statements constituted speech about matters of public concern and therefore ought to be protected from fraud claims to the same extent as political speech, which is largely not regulatable for its truth or falsity. Nike claimed it should be entitled to contribute what it characterized as valuable information to the debate about globalization, a matter of public concern. (Note that Justice Kennedy's majority opinion in *Citizens United* made this same argument with respect to his assertion that corporations ought to be able to contribute to the political debates of the day on an equal basis.) Of course, arguing that knowing falsehoods ought to be protected by the First Amendment is not a terribly attractive position.

Perhaps with the fraud issue in mind, Nike had a fallback position. The company's lawyers argued in the alternative that even if some of its statements were commercial speech and thus testable for their truth, judicial review of those statements should be subject to strict scrutiny review under the actual malice standard of *New York Times v. Sullivan*.[15] Under the *Sullivan* test, plaintiffs like Kasky must show that a speaker's false statements were made with actual malice.[16] This standard was adopted to prevent the "chilling" of debate thought to result from the specter of liability for even honest mistakes. Nike argued that this specter of liability would lead it to refuse to

issue corporate social responsibility statements or to offer its opinion on issues of public concern, thereby impoverishing the public debate. It asserted that the actual malice standard was necessary to ensure "balance" in debate on matters of public concern.[17] The company claimed that Kasky's complaint had not alleged facts or claims sufficient to meet the *Sullivan* standard and therefore that the case should be dismissed as inadequately pleaded. These arguments turned out to be entirely without merit. There was little evidence that the case had chilled Nike's public relations efforts or social responsibility reporting except to the extent that it was posturing for the pending case. More important, since so many of Kasky's claims were later corroborated by some of Nike's own statements, it is hard to argue that Nike had contributed much to the public debate beyond obfuscation.[18]

Had the Court accepted this argument, it would have presented Kasky with an interesting challenge on remand. It might be easy to prove that certain statements were false, but how would Kasky prove that these statements, promotional statements that Nike made about itself and that were intended to enhance its own image and bottom line, were made with "actual malice"?[19] The argument did not make sense. The *New York Times* test did not fit Kasky's case, because it was designed for the situation where a defendant makes false statements about someone else, statements that the defendant knows to be false and that are made with the intent to harm. Nike's statements—whether false or not—were intended to rehabilitate Nike's public image, not to harm it. So Nike's argument is best understood as a request for the Court to limit liability to knowing misstatements—in other words, to intentional torts. And notwithstanding Nike's suggestion to the contrary, Kasky had already pleaded an intentional tort when he included a count for fraud and deceit.[20]

As it turned out however, Kasky and the lower courts were spared the legal gymnastics of attempting to apply the *Sullivan* standard to his case. To the surprise of all and the dismay of many,[21] the Court abruptly dismissed *Nike,* announcing that certiorari had been "improvidently granted." Some observers had thought that the *Nike* case would break new ground in the commercial speech doctrine. Perhaps the Court would even, as some had urged, set the doctrine aside altogether and require that commercial speech be protected to the same extent as political speech.[22] But it was not to be. The dismissal meant that the California court's decision would be reinstated and

that the case would be sent back to the trial court to proceed to discovery. Facing the prospect of protracted discovery and the potential for more public relations nightmares, Nike settled.

The Court's about-face was disappointing to many supporters of commercial speech. They had had reason to be optimistic that the issue would be decided in their favor. But even though the dismissal itself was a disappointment for commercial speech's supporters, the opinions issued with the dismissal contained reasons for optimism. The order dismissing *Nike* included dissenting and concurring opinions, all of which appeared to accept many of Nike's characterizations of the commercial speech issues. This suggested that the Court was indeed poised to expand First Amendment protection for commercial expression—just not with this case. So the issues raised by the case remained unsettled.

Scope of Corporations' First Amendment Rights

One of those issues was whether a corporation enjoys the same First Amendment rights as a human being. Nike had argued that the corporation was, for First Amendment purposes, a speaker just like any other speaker and therefore entitled to defend itself against criticism. Nike framed the dispute as one of simple fairness. Without protection, it would be left to the mercy of its critics, with no way to respond, and an important "perspective"—Nike's perspective—on a matter of public concern would be lost to the public. If Nike were just a person on a soapbox in the public square, this claim might have some force. However, this argument overlooked some important facts.

Nike was not powerless to air its views. Indeed, until the controversy over its labor practices had erupted, Nike had largely controlled its public image through spending millions, if not billions, of dollars to mold public opinion about the company and its products. The negative reports were only a small portion of the speech available to the public about Nike. Moreover, the corporation's critics did not have millions to spend to investigate Nike or to publicize the results. Nor did they have a profit motive directly related to pursuing investigation of Nike. The scales seemed already weighted heavily in Nike's favor. In addition, "balance" in the discussion of public concerns hardly seems to require insulation from liability for false statements, particularly false statements made in connection with commerce.[23]