Nike v. Kasky - What Might Have Been…

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Over the years, Nike’s footwear promotions have been nothing if not provocative. During the 2000 Summer Olympics, Nike briefly aired on NBC a television commercial featuring a well-known female runner. She was shown being attacked while bathing in a remote cabin, and then being pursued through the woods by a presumptive assailant who wielded a chainsaw. The athlete’s survival was apparently attributable to her superb condition—and, not incidentally, to her clearly visible choice of Nike shoes for this perilous journey. International outrage greeted the appearance of this tasteless spoof of The Texas Chainsaw Massacre. Nike and the network responded by withdrawing the ad from the airwaves, though not after having created substantial ill will. Columnist Ellen Goodman, for example, offered to “explain to [Nike] why a slasher ad is as welcome as a fork in the eye of the Olympic family audience,” adding that “[t]his alleged satire of women’s fear on a program [celebrating] strengths didn’t strike my funny bone.”¹

Whatever else may have been in doubt about the Olympic slasher ads, there was not the slightest question that such messages constituted commercial speech, and could have been regulated on that basis. Nike’s most recent controversy involves published material of a very different sort—statements that seek to explain its overseas labor policies in response to extensive criticism of hiring and other personnel practices at offshore manufacturing plants. The California state courts had split sharply on the legal status of those corporate statements, giving the United States Supreme Court a seemingly ideal opportunity to clarify several key issues in

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¹ Ellen Goodman, Sorry, Nike, I Just Don’t Get That Ad, BOSTON GLOBE, Sept. 24, 2000, at F7; see also Lisa D’Innocenzo, What Were They Thinking?, STRATEGY, August 26, 2002, at 7.
the increasingly confusing doctrine of commercial speech. The high Court's failure to pursue that opportunity, by dismissing the case as improvidently granted after extensive briefing and oral argument, deferred such urgently needed and long awaited clarification to a later day and another case.

As we await that later case, it may be useful to focus on several sources of special disappointment about the Nike outcome. One cause of frustration was, of course, the failure to define "commercial speech" with greater clarity, thereby determining more precisely than have prior cases the line that separates commercial and non-commercial expression. Before addressing that issue, however, there is an antecedent concern—the lack of clarity about the basic values and purposes of the commercial speech doctrine, and specifically about the extent to which that doctrine was misunderstood and misapplied by the California Supreme Court majority. Two distinct dimensions merit attention—one hand, the indisputable fact that the recognition of advertising as deserving of partial protection was designed to expand, rather than to impair, the constitutional scope of expression; the other, that the central value of such protection is, as the Supreme Court has consistently stressed, to create a better informed community of consumers. In both respects, the California Supreme Court's resolution seems to have turned back the clock in ways that many in the First Amendment community fervently hoped the Justices would redress.

It may be useful to revisit briefly the origins of commercial speech. Although ordinary advertising was consistently denied First Amendment protection until the mid 1970s, the Supreme Court's earliest recognition of commercial speech revealed an unmistakable design to enlarge the scope of favored expression by adding at least partial protection for a category of material that had hitherto simply been excluded from the constitutional calculus. At no time since the courts first conferred partial protection on commercial speech has there been even a hint that protection would be lessened for messages (even if related in some way to a commerci-

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cial transaction) which were fully protected under the First Amendment before that time. It would be ironic in the extreme if a consequence of raising the level of protection for advertising were to lower or diminish protection for non-advertising corporate messages. Yet that seems to be precisely the effect of the California Supreme Court’s resolution of the Nike case.

There can be little doubt that some (if not all) of the corporate communications at issue in this case would, before 1976, have been fully protected. At such an earlier time, when courts had no middle ground and were forced to choose between total protection and none at all, it seems clear from the content and context of Nike’s labor-policy statements and other communications that most courts would have classified such material as deserving of complete protection. Thus, in the way the California Supreme Court drew the line between commercial and non-commercial speech for the purpose of this case, the net effect seems to have been to reduce protection for arguably pure speech, rather than to enhance protection for commercial expression. Such a result seems markedly at variance with the benign goals of what set out to be, and for most of the past three decades has been, an inherently ameliorative concept.

The other notable irony is closely related. From the outset, the U.S. Supreme Court has stressed that the basic rationale for protecting commercial speech is not to enrich producers of products, or the news media that advertise those products, but to inform consumers and to enable those consumers to make better choices among available products and services. Time and again, the Court has viewed with disfavor “commercial speech bans [that] not only hinder consumer choice, but also impede debate over central issues of public policy.” The Court has consistently disapproved of “regulations [of advertising] that seek to keep people in the dark for what the government perceives to be their own good.” However, such a result seems the inescapable consequence of the California Supreme Court’s decision. That decision was sharply criticized both by the California Supreme Court’s own dissenters, and by Justices Breyer and O’Connor, who not only faulted the dismissal of the case on procedural grounds, but expressed their

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8 Id.
disapproval of the substantive result left intact by their colleagues' refusal to review the merits.  \(^1\)

Troubling though both these concerns remain, many months after the disposition of the Nike case, by far the greatest of the lost opportunities lay in the conceptual realm. It has been clear since the mid 1970s that we lack a reliable definition of "commercial speech." One cannot even say, with Justice Stewart's intuitive confidence about obscenity, "I know it when I see it." All we understand with reasonable certainty is the outcome of relatively easy cases at the margins. At one extreme, we know that not all paid advertising copy is properly classified as "commercial speech"; as Justice Brennan explained in New York Times Co. v. Sullivan, the sponsored civil rights appeal was "not a 'commercial' advertisement in the sense in which the word was used in Chrestensen, [since, inter alia] [i]t communicated information, expressed opinion, recited grievances [and] protested claimed abuses . . . ."\(^11\) At the other end of the spectrum, we know that a published message which "does no more than propose a commercial transaction"\(^12\)—seeking solely the purchase of a product or service—is core or classic commercial speech, partially if less than fully protected since the mid 1970s, but never likely to be confused with fully protected expression. That is about as far as existing precedent will take us with confidence; virtually all the cases that have reached the Supreme Court have involved concededly commercial speech, creating no need to address the definitional issue, as the Nike case clearly would have done had the Justices addressed the merits.

The slate was not totally blank, however. As early as 1980, the Supreme Court recognized an important distinction among communications that public utilities had sent their customers. By placing product-linked promotional messages on the commercial-speech side of the line, the majority in Central Hudson Gas & Electric Co. v. Public Service Commission of New York\(^13\) rejected Justice Stevens's rather lonely plea that full protection should extend to "any advertising that links a product to a current public debate."\(^14\) But the majority also recognized the risks of permitting states to regulate, as commercial speech, an inappropriately broad

\(^{10}\) Nike, 123 S. Ct. 2554, 2559 (2003) (Breyer and O'Connor, JJ., dissenting).
\(^{13}\) 447 U.S. 557 (1980) (holding that advertising, which promoted greater use of electricity, qualified as commercial speech).
\(^{14}\) Id. at 563 n.5.
range of corporate communications. And in a companion case decided the very same day, the Court ruled that "utilities enjoy the full panoply of First Amendment protections for their direct comments on public issues." In the process, Justice Powell perceptively cautioned against a more lenient standard which might "blur further the line the Court has sought to draw in commercial speech cases"—a clear and early recognition that the waters had already become murkier than they were when commercial speech made its promising debut.

Three years later, the Court came even closer to tackling the definitional issue. In Bolger v. Youngs Drug Products Corp., the Justices recognized that certain of the corporate communications, the regulation of which they had agreed to review, did not reside unambiguously on either side of this increasingly elusive line. Most of a condom manufacturer's unsolicited mailings pertained unmistakably and directly to products for which it sought potential customers, and thus seemed to the Court to fall "within the core notion of commercial speech." But the mailings also included two informational pamphlets about contraception, which contained no more than passing references to the manufacturer's own brand of condom.

The Justices eventually ruled that these messages also constituted commercial speech, though recognizing the difficulty of the classification process. Such a conclusion was clearly not compelled by exclusive reliance on any one of what the Court identified as the three key factors—the company's concession that the pamphlets were advertisements, occasional references to one of its specific products, and an economic motivation for the mailings. Yet, concluded the Court, "[t]he combination of all these characteristics . . . provides strong support for the . . . conclusion that the informational pamphlets are properly characterized as commercial speech." Justice Marshall, writing for the Bolger majority, added a crucial qualification: "[A]dvertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." This opinion also cau-
tioned in a prescient footnote, "[W]e express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech," thus deferring the elusive if vital process of classifying promotional materials that were unmistakably product-specific. Justice Stevens, who concurred but felt that more needed to be said on the matter of definition and classification, has urged—far more than any of his colleagues—a sharper focus on that dimension of commercial speech, although ironically it was the same Justice Stevens who most recently offered, in Nike, the principal explanation for the very dismissal of the case which would finally have forced that issue.

Meanwhile, the lower courts have done their best to chart a course through this tangled thicket. Of special interest and relevance is the protracted litigation involving federal regulation of the mailing by drug companies to physicians of textbook excerpts and medical journal reprints designed to promote off-label uses of FDA-approved drugs. Though much of this case's protracted and devious journey through the federal courts reflects jurisdictional and procedural disputes, the district judge came about as fully as any court to date to tackling the daunting task of clarifying ambiguous or multi-purpose promotional materials. In the summer of 1998, Judge Royce Lamberth squarely addressed the issue of how such materials should be classified for regulatory and First Amendment purposes. In Washington Legal Foundation v. Friedman, the court initially rejected the FDA's puzzling claim that such mailings enjoyed no constitutional protection whatsoever because, as "promotions," they involved "conduct" rather than "speech." Conversely, the drug companies argued (with support from several amici) that the mailings were fully protected speech—a status which no one would deny when those same articles had been published in peer-reviewed medical journals and textbooks, or when distributed by their authors to academic colleagues. Judge Lamberth recognized the materials in issue as (using Justice Stevens' language from Bolger) a "complex mixture[] of commercial and non-commercial elements." He ac-

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22 Id. at 67 n.14.
23 See id. at 80-84 (Stevens, J., concurring) (arguing that the offensiveness of the mailing in question did not justify government interference).
25 Id. at 59-60.
26 The Thomas Jefferson Center for the Protection of Free Expression, which the author directs, was one of the organizations filing as amici in support of this position throughout the WLF litigation.
27 WLF, 13 F. Supp. 2d at 62 (quoting Bolger, 463 U.S. at 81 (Stevens, J., concurring)).
knowned that such materials would be fully protected during academic or scientific publication and distribution. Moreover, the court recognized that merely adding an economic motive to the actual mailing scenario did not by itself forfeit such protection. Judge Lamberth also observed that sending these reprints and excerpts to physicians for the purpose of encouraging their off-label prescription of FDA-approved drugs was certainly not a familiar form of product promotion.

Yet, in the end, the district court invoked Bolger’s three desiderata to conclude that such mailings were properly classified as commercial speech. Among the crucial factors was the status of these materials as “advertisements as that term is commonly understood,” in that each referred to a specific product of the manufacturer who mailed them. Moreover, the drug companies “clearly have an economic motivation for providing the information” since “the promotional efforts at issue have a positive effect on a physician’s prescription practices and therefore on sales.” Possibly pertinent to that ruling, if less explicit, were the court’s declared (though not fully developed) concerns both for the substantial health interests on which the FDA’s regulations relied, and its recognition of the “considerable financial resources available to pharmaceutical companies.” Judge Lamberth also remarked that “manufacturers will likely seek only to disseminate information that presents their product in a favorable light”—an observation which ought not, strictly speaking, push otherwise ambiguous materials over the commercial-speech line, but did nonetheless offer valuable insight into the court’s view of the drug makers’ promotional efforts.

At least one other court had applied Bolger in similar fashion to material that fell into the gray zone between commercial and non-commercial expression. In Association of National Advertisers v. Lungren, the Ninth Circuit applied a California statute that forbade manufacturers and distributors to represent certain environmental attributes of their products without having met specific statutory definitions for such terms as “ozone friendly” and “biodegradable.” The advertisers argued unsuccessfully that such claims for their products were fully protected expression; the appeals court found, however, that all three of the Bolger criteria had

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28 id. at 62.
29 id. at 63-64.
30 id. at 64-65.
31 44 F.3d 726 (9th Cir. 1994).
been satisfied and that these statements were properly classified as commercial speech.\textsuperscript{32}

Thus, by the time the Nike dispute reached the California court of appeals in early 2000, such limited consensus as had emerged did seem to favor treating borderline promotional materials as commercial speech, whatever might be their extenuating qualities. Yet, as that court immediately recognized, the few potentially helpful precedents—like Bolger itself—involved material that was product-specific and had been distributed as part of a focused marketing program. Moreover, it was by now abundantly clear that Bolger—albeit the best potential source in Supreme Court jurisprudence—offered no workable definition. Nor could clearer guidance be found elsewhere on an issue that, however infrequent, could and did assume major importance in the application of the commercial speech doctrine.

Where else, one might well ask, had a category of expression been welcomed into the family of constitutionally protected interests without ever having been properly defined or identified? Though one must sympathize with the frustrations that led Justice Stewart to remark of the classification of sexually explicit material, “I know it when I see it,” his colleagues had offered as early as the Roth v. United States\textsuperscript{33} case no fewer than eight separate and distinct definitions for obscenity. The fault in that troubled and confusing field has not been one of too few, but rather of too many definitions. In the realm of commercial speech, by contrast, the failing has been one of too few (if any) definitions.

I. DEFINING COMMERCIAL SPEECH: WHYS AND WHEREFORES

Although it may seem obvious, a few words might be in order to give substance and urgency to the quest for an adequate definition of commercial speech. As with any line that must be drawn between expression that is fully protected, and material that claims only partial protection, precision in the location of that line, and consistency among those who must draw it, are vital to the preservation of First Amendment interests.\textsuperscript{34} The hazards of imprecise definitions or vague standards are legion, and need hardly be recounted here. At a more practical level, the Nike case graphically illustrates the need for, and the potential value of, a far more reli-

\textsuperscript{32} Id. at 728.

\textsuperscript{33} 354 U.S. 476 (1957).

\textsuperscript{34} Cf. Smith v. California, 361 U.S. 147, 155 (1959) (finding unconstitutional a statute criminalizing the sale of obscene books that did not contain a scienter requirement on the theory that the statute was overbroad and would inhibit protected expression as well).
able definition than currently exists. If the California Supreme Court majority could, after reviewing the relevant precedents, plausibly classify Nike's corporate communications as commercial speech simply because they were “directed by a commercial speaker to a commercial audience and . . . made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products,” then we are indeed in trouble. The case for a better definition should need no further elaboration. The critical question is what should be the contents of that definition.

The quest for a better definition should begin with the three factors that the Bolger Court invoked, and which have been relied upon by lower courts in subsequent cases. For starters, as Bolger itself suggested, an economic motive may be a necessary ingredient of such a definition, but is hardly sufficient, much less dispositive. Even paid advertisements, such as the civil rights appeal in the New York Times\textsuperscript{35} libel case, should on this basis (at the very least) be removed from the commercial speech category. Interestingly, this element cuts both ways: The need to begin the analysis by finding an economic motive strongly implies that where such a motive is absent, even when the communications more closely resemble advertising than did the Times civil rights appeal, a finding of commercial speech may not logically follow. This obverse situation is not hypothetical. Consider, for example, a challenge currently pending in the Ninth Circuit to California's special tobacco distribution tax, and especially to the use of a portion of the proceeds to fund state-created anti-smoking ads and commercials.\textsuperscript{36} The tax-affected distributors have contested the funding mechanism as coerced expression, claiming specifically that anti-smoking messages disseminated by government must be deemed pure, not commercial, speech because the state clearly has no “economic motive” for posting such health-related communications. The tobacco distributors' challenge may ultimately fail on other grounds, but among the obstacles should not be any doubt that the subsidized government messages to which they object could properly be classified as commercial speech in the absence of any economic motive on the speaker's part.

The second of the Bolger criteria fares much less well under close scrutiny. To ask whether the messages at issue are or are not "advertisements" as that term is commonly understood seems, at

\textsuperscript{36} R.J. Reynolds Tobacco Co. v. Bonta, 272 F. Supp. 2d 1085, 1094-110 (E.D. Cal. 2003), appeal docketed, Civ. No. 03-16535 (9th Cir.).
best, tautological. This question is the very one to be decided—not an analytic component in the decisional process. Moreover, there unmistakably are some "advertisements" that cannot be deemed commercial speech—notably the sponsored civil rights appeal published in the New York Times, clearly labeled as "advertising" and for other purposes treated as an "advertisement." Conversely, there may be sponsored messages that one would not normally regard as "advertising" (e.g., the medical reprints and excerpts in the Washington Legal Foundation case) to which, nonetheless, the commercial speech standard could apply to certain promotional uses or novel forms of dissemination. Thus, to ask whether a message looks or acts like an advertisement does no more than pose or restate the crucial question, and surely does not help us answer it.

Bolger's third desideratum—whether the material refers to a specific product—is only slightly more helpful than the second. As the Bolger Court itself recognized, this factor is inevitably somewhat ambiguous—reason enough why Justice Marshall, in a footnote, expressly reserved the question "whether reference to any particular product or service is a necessary element of commercial speech." If the material contains no such reference to a product or service, one might indulge a presumption against classifying it as commercial speech, recognizing as one of the complicating factors that a speaker's motivations for mentioning a product or service could vary for reasons unrelated to the rationale of why messages should be classified as commercial or non-commercial speech.

The Bolger factors thus offer at most a starting point in the definitional process, but leave close and difficult cases without adequate guidance. The quest for a more useful standard involves three additional elements—the speaker, the context, and the audience. We might begin with a brief assessment of the source of the communications. To the California Supreme Court in Nike, there seemed something vaguely sinister about the fact that "a commercial speaker" was making "representations about [its] own business operations." Apart from the obvious fact that most commercial speech comes from a commercial or business source, disparagement of corporate speakers seems inappropriate to the constitutional analysis.

Although remarkably little has been written on this potentially important topic, Professor Martin Redish and a former student offered invaluable guidance in a law review article from the late

37 463 U.S. at 67 n.14.
1990s, which exhaustively analyzes the role and nature of business speech, and effectively refutes myriad potential reasons for disparaging corporate communications. While much more could be said on this issue, it should suffice for present purposes to establish the neutrality, at least, of the speaker's identity, and to recognize that a corporate source should not be inherently suspect in such cases.

The matter of context deserves a more detailed analysis. As Justice Stevens has urged on several occasions, commercial speech analysis should focus far more on context than our current preoccupation with content seems to permit. Whether or not a message reflects an economic motive, or refers to a specific product or service, the setting in which that message is disseminated merits more substantial attention than the courts at any level have accorded it. Among the reasons for denying full First Amendment protection to messages that "merely propose a commercial transaction" are at least two factors that implicitly reflect a judicial concern about the context in which the typical sales pitch takes place. On one hand, the risks of distorting a consumer's judgment through deception or misinformation are far greater when the message is part of a "hard sell," whether or not it occurs face-to-face or caller-to-caller. The Supreme Court's recurrent and quite appropriate insistence that only non-deceptive commercial speech merits constitutional protection clearly evidences such a concern.

Moreover, the Court's readiness to permit government regulation of "in your face" solicitations such as those of ambulance-chasing attorneys offers further evidence of a special concern that consumers need protection at the moment when they may be most susceptible to just such appeals. Finally, the importance of context largely explains the Justices' greater willingness to sustain even fairly onerous disclosure requirements imposed on advertisers, where such burdens would almost certainly fail if applied to comparable non-commercial speakers.

40 E.g., Bolger v. Youngs Drugs Prods. Corp., 463 U.S. 60, 80-84 (Stevens, J., concurring).
41 See Friedman v. Rogers, 440 U.S. 1, 8-10 (1979) (explaining why the regulation of deceptive commercial speech in cases involving the usage of trade names is permissible).
42 See, e.g., Fla. Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995) (upholding a prohibition on direct-mail solicitations by lawyers to accident victims during the first thirty days following an accident).
43 See, e.g., Zauderer v. Office of Disciplinary Council, 471 U.S. 626, 650-51 (1985) (dis-
Conversely, statements that are made to the public at large, or in the abstract, by a manufacturer or distributor, even when they reflect a clear and indisputably economic motive, pose such risks to a far lesser degree. Moreover, the opportunities for inquiry, refutation, and counter speech so central to the full protection of non-commercial speech are clearly much greater when statements are made apart from an immediate sales pitch or product- and consumer-specific appeal. To the extent that the process of classifying messages as commercial or non-commercial should reflect broader First Amendment values, such as the potential for "robust debate," the obvious and substantial differences between an immediate sales pitch on one hand, and general corporate communications on the other hand, surely deserve a place in the definitional process. While consideration of content of course remains an essential part of the definitional process, the heretofore largely neglected dimension of context seems at least as clearly deserving of consideration.

The third potentially valuable, but largely neglected, factor is the audience—specifically, the consumers to whom a message is directed. In a very real sense, that is what commercial speech is all about. Without consumers, it is far from clear that commercial speech would have any meaning—and surely the rationale for its protection would be vastly different and greatly diminished from the one that courts have recognized. To appreciate the importance of the audience in the equation, we need to revisit the roots of commercial speech. We do know that advertising was unprotected—a sort of First Amendment pariah—until the mid 1970s, although (unlike other unprotected categories such as obscenity and child pornography) without the benefit of any exposition of why such messages were undeserving. While the Supreme Court never explained its denial of even minimal protection to commercial speech before the mid 1970s, we may assume that so disparaging a view must have reflected at least in part the perceived absence of ideas or substance. For further elaboration elsewhere in this Symposium of a compatible view, see Deborah J. La Fetra, Kick It Up a Notch: First Amendment Protection for Commercial Speech, 54 CASE W. RES. L. REV. 1205, 1226-28 (2004).

Despite the omission of any mention of advertising in Chaplinsky, the Supreme Court would many years later imply a connection between the two cases: "Our question is whether speech which does 'no more than propose a commercial transaction' is so removed from any 'exposition of ideas' . . . that it lacks all protection." Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973) and Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
Indeed, the *Chrestensen* ruling followed by only a matter of weeks the Court's decision in *Chaplinsky v. New Hampshire* sustaining a conviction for "fighting words," and in the process excluding from the First Amendment "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." The ensuing litany specifically mentioned "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"—the last item on the list being the focus of the immediate judgment. The absence of advertising from this seemingly comprehensive list of disfavored types of expression seems puzzling in view of the close proximity of the two decisions. The anomaly was compounded by the complete absence in the *Chrestensen* opinion of even so rudimentary an explanation for refusing protection as the Justices had offered a few weeks later, in the specific context of fighting words, for relegating a category of speech to the realm of least-favored expression.

A third of a century later, when the Court was finally ready to confer partial protection on commercial speech, one might reasonably have expected some explanation for the absence of past protection, as well as a statement of rationale for the more favorable view now being announced. The latter was indeed forthcoming; the former, however, remained as obscure as it had ever been. Curiously, Justice Blackmun not only offered no such explanation, but actually recast what little history there was. The Bigelow Court now insisted that *Chrestensen* had been "distinctly a limited" holding, concerned mainly with time, place and manner and the degree of deference due to municipal regulation of use of the streets—a judgment which could not fairly "support any sweeping proposition that advertising is unprotected per se." The few intervening cases hardly support so benign a view—else, for example, there would have been no need for Justice Brennan to explain at such length in the *New York Times* libel case why the published civil rights appeal at issue there could not possibly be deemed "purely commercial advertising" to which the First Amendment was categorically inapplicable.

Given the complete absence of any explanation for having historically denied First Amendment protection to advertising, the rationale for partial acceptance now assumes even greater impor-

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47 *Chaplinsky*, 315 U.S. at 571-72 (March 9, 1942).
48 *Id.* at 571-72.
Providentially, the plaintiffs in the *Virginia State Board* case—the first occasion to declare the current standard—were consumers, not producers or distributors. That circumstance made even easier a course to which the Court was clearly committed—recognizing as the primarily protected interests those of consumers to receive information of potential value in making informed decisions, rather than (as with other expressive freedoms) the interests of the speaker, writer or publisher. That all the major challenges after *Virginia Pharmacy* were brought by producers or distributors, or by media who publish or broadcast advertising, has in no sense undermined or diluted the importance of that initial focus upon the presence of a well-informed consumer population as the principal beneficiaries of partial protection for commercial speech.

Indeed, the important exceptions which the Court initially imposed on that protection—that the product or service must be lawful, and that the advertising not be deceptive or misleading—clearly reflect such a solicitude for the consumer. In later cases, the Court's sympathy for disclosure requirements elaborated that primarily consumer focus; a readiness, for example, to compel an advertiser to reveal information in ways that might elsewhere be vulnerable to First Amendment challenge as "coerced expression" reflects the high Court's acceptance of policies that maximize the flow to consumers of potentially helpful information pursuant to "disclosure requirements [that] are reasonably related to the State's interest in preventing deception of consumers." Virtually every application and refinement of the commercial speech doctrine during the past thirty years has been driven by such a primary solicitude for an optimally informed consumerate. What has been curiously lacking is any comparable judicial recognition of that central value in framing the test that distinguishes between commercial and non-commercial speech.

To the extent that the audience matters in this equation, the judgment whether or not a specific message is commercial speech should assess the message's impact upon that audience, or its potential value to them. If the consumer's only conceivable benefit from his or her receipt of a corporate message is an enhanced capacity to decide whether to engage a service or buy a product—information about price, availability, durability and other specific qualities, warranties and other protections, etc.—then the message would seem properly classified as commercial speech. If, however, the potential value of the message extends beyond the imme-

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diate judgment whether or not to buy the product or service—
general information about the company’s environmental policies,
for example—the fact that a consumer may be favorably (or unfavorably) disposed to buy on the basis of such information should not, by itself, cause the message to be classified as commercial speech.

A more complete definition of commercial speech would, therefore, start with the Bolger factors—or at least the two of them that are potentially helpful (omitting the tautological “does it look like advertising?”). An economic motive, and specific reference to a particular product or service, may indeed usefully begin the process, but (as the confusion in Nike itself illustrates) hardly serve to differentiate logically or consistently between corporate messages that are properly classified as commercial speech and those that are not. If we add to the mix, as proposed here, consideration of speaker, context and audience, we have a far better chance of emerging with workable standards that will help resolve difficult cases falling somewhere between the familiar messages at both ends of the spectrum.

Application of such a more refined standard to cases like Nike should be relatively easy. The presence of an economic motive at first makes the disputed messages look like commercial speech, while the absence of specific product or service references pushes strongly in the other direction. More important, the presence of a corporate speaker is hardly disabling. The context is clearly one in which general information is being imparted, far from any immediate or specific sales pitch to which a commercial speech classification appropriately follows. Finally, and perhaps most important, the audience—consumers of many products including footwear—receive a broad array of information about corporate labor policies. Whether that information makes them more or less likely to buy Nike shoes, or to recommend to others the purchase of Nike products, should never be dispositive in such a case. A conscientious application of these desiderata would confirm the judgment reached by California’s two lower courts and its Supreme Court dissenters, and urged by Justices Breyer and O’Connor. Such a process also shows how very far the California Supreme Court majority strayed from the central values on which the commercial speech doctrine rests.

A final and novel prospect deserves brief consideration: Might there be some merit in recognizing a third category of expression—one that is neither classically commercial speech, nor fully protected speech? Consider the possibility of treating messages
such as the overseas labor bulletins in the *Nike* case (or the utility promotions in *Central Hudson*, the off-label drug reprints in *WLF*, and the contraceptive pamphlets in *Bolger*) as less than fully protected speech on one hand, yet on the other hand as more protected than pure advertising. One of the limitations of the current analysis is the absence of any middle ground or intermediate option between the two poles—a disjunction which artificially compels courts to choose one extreme or the other, with drastic consequences, when in fact the real-world spectrum of corporate communications is far more varied and complex. At least one possibly useful analogy comes to mind: In the realm of libel, the *New York Times* case seemed at first to create a sharp distinction (for purposes of the fair-comment privilege) between defamatory statements about public officials and public figures on one hand, and on the other hand statements about private individuals—suggesting that the former would be fully privileged, while the latter would remain unconditionally actionable. What emerged in the ensuing decisions was a sort of hybrid, in which libelous statements about private individuals are partially privileged if they involve a “matter of public concern,” but are essentially unprivileged (and actionable upon proof only of fault or negligence) if no matter of public concern is present. By analogy, it might be useful to differentiate between those corporate communications that “simply propose a commercial transaction” and those that involve a “matter of public concern”—even if messages of the latter type might enhance consumer demand for a product or service, and might even contain references to the speaker’s market brands.

The consequences of recognizing such a middle ground—a category of what might be termed “public interest corporate speech”—need to be much further refined. Perhaps, for example, such messages would enjoy a stronger presumption of non-deceptiveness than would attach to purely commercial advertising. Noting that the Supreme Court has allowed states to forbid advertising of professional services under a trade name, on the presumption that such generic titles are inherently deceptive or misleading

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54 See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985) (holding that recovery of punitive damages in a defamation case, absent actual malice, is permissible when the defamation in question does not involve a matter of public concern).

to consumers,\textsuperscript{56} perhaps any such blanket presumption would not be indulged in the course of reviewing the regulation of public-concern communications. It might also be appropriate for courts to require demonstration of a more substantial governmental interest in support of constraints upon public concern messages than the current test requires in regulating ordinary advertising. Such a standard would respond to the deep concern that Justices Blackmun and Brennan raised in their \textit{Central Hudson} concurrence, where they warned that, had there been a better "fit" between means and end, the majority ruling would have allowed New York's Public Service Commission to forbid promotional mailings by regulated utilities that were designed to increase air conditioning consumption.\textsuperscript{57} If, instead, something approaching a "compelling interest" were required before government could constitutionally constrain corporations in their dissemination of public concern communications, the options open to courts in the ambiguous or middle ground so well illustrated by the \textit{Nike} case would be greatly enhanced. Consequently, the risks of having to choose between two extremes, neither of which really suits the facts, would be substantially mitigated. Some such creative corollary seems long overdue, if not indeed essential, to preserve the commercial speech doctrine from another judicial disaster of \textit{Nike} proportions.

\textsuperscript{56} See Friedman v. Rogers, 440 U.S. 1, 12-13 (1979) (noting the significant possibility of trade names being used in a misleading manner).
