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# FIGHTING FREESTYLE: THE FIRST AMENDMENT, FAIRNESS, AND CORPORATE REPUTATION

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**Abstract:** There are three distinct groups who might want to engage in speech about commercial entities or to constrain those commercial entities from making particular claims of their own. Competitors may sue each other for false advertising, consumers may sue businesses, and government regulators may impose requirements on what businesses must and may not say. In this context, this Article will evaluate a facially persuasive but ultimately misguided claim about corporate speech: that because consumers regularly get to say nasty things about corporations under the lax standards governing defamation of public figures, corporations must be free to make factual claims subject only to defamation-type restrictions on intentionally false statements. The premise that this would further equality ignores the overall structure of advertising law, in which consumers cannot be equated to advertisers, competitors are already on equal footing with one another, and the government as regulator is not supposed to be on equal footing with anyone.

## INTRODUCTION

Who gets to criticize corporations, and under what terms? This Article considers one aspect of the problem: the fact that there are three distinct groups who might want to engage in speech about commercial entities or to constrain those commercial entities from making particular claims of their own. Competitors may sue each other for false advertising under the Lanham Act and parallel state unfair competition laws, consumers may sue businesses using state consumer protection laws and common-law claims, and government regulators may impose requirements on what businesses must and may not say. This tripartite structure must be kept in mind when evaluating First Amendment constraints on any one of the types of regulation. In particular, arguments that consumer-plaintiff suits need to be reassessed to preserve freedom

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\* © 2009, Rebecca Tushnet, Professor, Georgetown University Law Center. Thanks to participants at the Boston College Law School Symposium. Bruce Keller of Debevoise & Plimpton kindly allowed me to use his excellent forthcoming treatise on false advertising law for research purposes. As always, special thanks to Mark Tushnet.

of commercial speech must consider the implications for the other bodies of law.

In this context, I will evaluate a facially persuasive, but ultimately misguided claim about corporate speech: that because consumers regularly get to say nasty things about corporations under the lax standards governing defamation of public figures, corporations must be free to make factual claims subject only to defamation-type restrictions on intentionally false statements—essentially, common-law fraud. The premise that this would put corporations on equal footing with consumers ignores the overall structure of advertising law, in which consumers cannot be equated to advertisers, competitors are already on equal footing with one another, and the government as regulator is not supposed to be on equal footing with anyone.

The interaction between the three regulatory regimes has not been much recognized, in part because false commercial speech currently receives no constitutional protection. Courts have occasionally evaluated whether findings by the Federal Trade Commission (the “FTC”) are consistent with the First Amendment, but have put few limits on the FTC.<sup>1</sup> Likewise, the only courts to consider whether the First Amendment ought to impose restrictions on basic Lanham Act false advertising claims have rejected free speech claims.<sup>2</sup> *Nike, Inc. v. Kasky*, a putative consumer class action, was the first real attempt to apply First Amendment restraints to private consumer protection law at the national level.<sup>3</sup> It was not a success, but it came closer than the others, in part because of a fairness argument unavailable in the other two contexts.

#### I. *NIKE, INC. v. KASKY* AND CONSUMER PROTECTION LAW

Beginning in 1996, Nike was targeted by protesters claiming that the company, via its subcontractors, underpaid and abused workers in developing countries.<sup>4</sup> Nike launched a public relations counteroffen-

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<sup>1</sup> *E.g.*, *Kraft, Inc. v. FTC*, 970 F.2d 311, 321 (7th Cir. 1992) (rejecting a First Amendment challenge to an FTC finding of deception that was not based on evidence of actual consumer deception).

<sup>2</sup> *E.g.*, *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 939 (3d Cir. 1990) (holding that heightened First Amendment scrutiny did not apply to Lanham Act claims against television ads touting the superiority of one health insurer over another).

<sup>3</sup> *See* 539 U.S. 654, 657–65 (2003) (Stevens, J., concurring in the dismissal of the writ of certiorari as improvidently granted).

<sup>4</sup>*Id.* at 656.

sive, including letters to the editor, press releases, letters to college presidents who controlled lucrative athletic contracts, and so on.<sup>5</sup> Nike's communications discussed general issues of globalization, suggesting that what looked exploitative from outside was welcomed by workers in developing areas, and also specifically defended the treatment of its subcontractors' workers.<sup>6</sup> Marc Kasky believed that Nike was not telling the truth in those claims, so he sued, as California law then allowed him to do.<sup>7</sup>

Although lower courts dismissed Kasky's complaint on the ground that Nike's speech was fully protected by the First Amendment, a divided California Supreme Court reversed, holding that Nike's statements about its labor practices—in press releases, letters to universities which had contracts with Nike, paid "advertorials," and letters to the editor—were commercial speech.<sup>8</sup> The U.S. Supreme Court granted certiorari to decide whether Nike's statements were commercial speech and, if so, whether the First Amendment allowed California to empower private attorneys general to sue for damages without having suffered personal injury when the speech was part of a public debate.<sup>9</sup> Unfortunately for Nike, the Court ultimately dismissed the writ of certiorari as improvidently granted because of underlying procedural difficulties, and did not decide the questions presented, though two justices would have found that the First Amendment protected Nike's speech.<sup>10</sup>

The Court's 2003 decision in *Nike, Inc. v. Kasky* could have been a *New York Times Co. v. Sullivan* for consumer class actions.<sup>11</sup> When the Court first applied the First Amendment to defamation in the latter case, it had a number of reasons to be sympathetic to the defendant—the underlying message sought racial equality; the defendant was a public official; the jury was most likely biased; the falsehoods were small, immaterial parts of the overall message; and the newspaper was not in a position to verify every jot and tittle of every ad.<sup>12</sup>

Likewise, several aspects of *Kasky* combined to make the plaintiff's claim troubling. Nike had faced a well-organized campaign determined

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<sup>5</sup> *Id.*

<sup>6</sup> See *Kasky v. Nike, Inc.*, 45 P.3d 243, 248 (Cal. 2002) (4-3 decision).

<sup>7</sup> *Kasky*, 539 U.S. at 656 (Stevens, J.).

<sup>8</sup> *Kasky*, 45 P.3d at 262.

<sup>9</sup> *Kasky*, 539 U.S. at 657 (Stevens, J.).

<sup>10</sup> *Id.* at 657–58, *id.* at 681 (Breyer, J., dissenting in the dismissal of the writ of certiorari as improvidently granted).

<sup>11</sup> See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>12</sup> See *id.* at 256–64.

to make its labor practices a matter of public controversy, and had been seeking to defend itself when it spoke out.<sup>13</sup> California law, like the federal Lanham Act and most state consumer protection laws, lacks any scienter requirement: perfectly good-faith errors, if false, can lead to liability.<sup>14</sup> In addition, California's standing requirement for consumer suits was minimal at best.<sup>15</sup> Kasky had never bought a pair of Nike shoes, which makes his harm from Nike's alleged misstatements a bit hard to identify.<sup>16</sup> California law turned everyone into a private attorney general, increasing an advertiser's uncertainty about what it could say without fear of getting sued.<sup>17</sup> (California subsequently amended the law to add a standing requirement that will preclude future Kaskys from acting as class plaintiffs.<sup>18</sup>)

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<sup>13</sup> See *Kasky*, 45 P.3d at 248.

<sup>14</sup> See, e.g., CAL. BUS. & PROF. CODE § 17200 (West 2008).

<sup>15</sup> See CAL. BUS. & PROF. CODE § 17204 (West 1997) (amended 2008).

<sup>16</sup> See Transcript of Oral Argument at 30, *Kasky*, 539 U.S. 654 (No. 02-575).

<sup>17</sup> The concern for the speech-suppressive effects of private attorney general actions is comprehensively analyzed—and refuted—in Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 675 (2005). The Solicitor General of the United States filed a brief supporting Nike, though attempting to distinguish California's law from the various and sundry federal laws, including the Federal Trade Commission Act, regulating false and misleading speech. See Brief for the U.S. as Amicus Curiae Supporting Petitioners, *Kasky*, 539 U.S. 654 (No. 02-575), 2003 WL 899100, at \*14–21 [hereinafter Brief of the U.S.].

As a practical matter, we can expect more litigation, and thus more of a speech-deterrent effect, when anyone with a grudge and a willingness to risk the expense can litigate compared to a regime that forces the government, with its always limited resources, to pick and choose what advertising to assail. But by First Amendment logic a cause of action unsound in private hands is at least equally so in government hands. The Solicitor General suggested that the government was more appropriate as a plaintiff—bringing to mind the once-serious phrase Ronald Reagan mocked, “I’m from the government and I’m here to help you”—but, unsurprisingly, found little support in the case law for this proposition. See, e.g., *id.* at \*7 (arguing that “[t]he government’s enforcement powers are constrained by statutory and institutional limitations that avoid intrusions on protected speech” as compared to the illegitimate breadth of California’s private cause of action); *id.* at \*18 (“[T]he institutional checks on government enforcement provide ample protection for protected speech. . . . Because the government has exclusive authority to prosecute false advertising, because its prosecutions must meet materiality standards, and because it has limited resources to prosecute consumer fraud, federal officials must exercise their discretion so as to select for prosecution those cases that represent the best use of public resources. Unlike private parties, federal officials are politically accountable for their decisions.”). In fact, the only citation the brief offered for this argument was a “*cf.*” to *Alden v. Maine*, 527 U.S. 706, 759–60 (1999)—an Eleventh Amendment sovereign immunity case, not a First Amendment case. *Id.* at \*18.

<sup>18</sup> CAL. BUS. & PROF. CODE § 17204 (West 2008). A few existing state laws still relax the traditional standing requirements, as California’s did. Colorado, Illinois, and Kansas also do not require a showing of injury and causation as a precondition for a private action. See COL. REV. STAT. § 6-1-113 (2008); 815 ILL. COMP. STAT. ANN. 510/3 (West 2008) (private

*Kasky* seemed to many to exemplify the strongest case for First Amendment limits on false advertising law. Unfortunately, some of the most intuitively persuasive arguments for Nike provide no distinction between *Kasky*'s claims and those of any other false advertising plaintiff, or the government regulating drug claims or securities filings.<sup>19</sup> For example, Nike pressed hard on the argument that the conditions of production of its shoes were not legitimate subjects of commercial speech regulation, because consumers could only have a legitimate interest in whether the goods or services met advertised *physical* standards.<sup>20</sup> Yet advertising law pervasively, for good reason, regulates advertisers' speech about nonphysical attributes even when the conditions of production do not affect the cost, quality, or functions of the resulting goods or services.<sup>21</sup>

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action for injunctive relief without proof of damage); KAN. STAT. ANN. § 50-634 (2005) (consumer aggrieved by violation may bring an action, whether or not entitled to damages). Relatedly, some states do not require proof that consumers relied on the deceptive advertising for their claim to succeed. *See, e.g.*, *Prishwalko v. Bob Thomas Ford, Inc.*, 636 A.2d 1383, 1388 (Conn. App. Ct. 1994) (no showing of individual reliance required); *cf. In re Tobacco II Cases*, 207 P.3d 20, 39–41 (Cal. 2009) (holding that, in a class action concerning a long-term ad campaign, the reliance requirement does not require an individualized showing of reliance on specific misrepresentations, and reliance can be presumed from material falsehood).

<sup>19</sup> Oral argument featured several questions from the Justices asking how an opinion could be written to distinguish the communications Nike sent from other types of advertising that the Justices agreed ought to remain regulated. *See* Transcript of Oral Argument, *supra* note 16, at 11–13, 26, 49–50 (asking petitioners and respondent to distinguish *Kasky*'s situation from that of the FTC). Likewise, the United States, though it took Nike's side, argued that it was only the unlimited nature of citizen standing under California's law, along with the supposedly unconstrained remedies that the law afforded, that made the lawsuit problematic—not any other issue related to commercial speech. *See* Brief for the U.S., *supra* note 17, at 20–30.

<sup>20</sup> Reply Brief for the Petitioners at 6–11, *Kasky*, 539 U.S. 654 (No. 02-575), 2003 WL 1922453. This position attracted the endorsement of a number of amici, as well as Justice Brown in her dissent from the California Supreme Court's decision:

[S]uch 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? . . . 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.

*Kasky*, 45 P.3d at 280 (Brown, J., dissenting).

<sup>21</sup> *See, e.g.*, Brief for the U.S., *supra* note 17, at 27–29.

Conditions of product production that make a difference to consumers include “Made in America,”<sup>22</sup> “EPA approved,”<sup>23</sup> “dolphin-safe tuna,”<sup>24</sup> “Union Made,” “shade-grown coffee,” “organic,” “cruelty-free,”<sup>25</sup> “rBST-free/hormone-free,”<sup>26</sup> and many others. Some consumers consider general corporate behavior relevant to purchasing decisions, even when it has nothing to do with the production process.<sup>27</sup> Likewise, the FTC regulates product endorsements by celebrities and other authorities, even though they often have no connection with product characteristics, because the FTC believes that endorsement matters to consumers.<sup>28</sup> Courts will enjoin commercials that falsely claim that one shampoo beat another in a consumer preference test, no matter how good the shampoo is.<sup>29</sup> Fundamentally, if the protection of consumers’ interests in getting what they think they’re getting is not a sufficient government interest to suppress speech, we will have to get rid of rather a lot of regulation, including a healthy chunk of trademark law (for goods of equivalent quality).

Nor is regulation of truthfulness of production claims difficult to justify on consumer protection grounds. As Douglas Kysar has persuasively articulated, distinguishing matters that consumers can *legitimately* care about from those that are irrational is inconsistent with a basic

<sup>22</sup> See FED. TRADE COMM’N, *COMPLYING WITH THE MADE IN THE USA STANDARD* (1998), available at <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus03.pdf>; FED. TRADE COMM’N, *ENFORCEMENT POLICY STATEMENT ON U.S. ORIGIN CLAIMS* (1997), available at <http://www.ftc.gov/os/1997/12/epsmadecusa.htm>. Research suggests that this claim influences a substantial number of purchasers. See C. Min Han, *The Role of Consumer Patriotism in the Choice of Domestic Versus Foreign Products*, J. ADVERTISING RES., June/July 1988, at 25, 28–31; John S. Hulland, *The Effects of Country-of-Brand and Brand Name on Product Evaluation and Consideration: A Cross-Country Comparison*, J. INT’L CONSUMER MKTG., Issue 1 1999, at 23, 23; cf. Gillian Sullivan Mort & Matthew Duncan, “Owned By . . .”: *Country of Origin’s New Cue*, J. INT’L CONSUMER MKTG., Issue 3 2003, at 49, 61–64 (finding that “owned by” country of origin labels had independent effects on consumer evaluations distinct from “made in” labels).

<sup>23</sup> See *Performance Indus. Inc. v. Koos Inc.*, 18 U.S.P.Q.2d (BNA) 1767, 1771 (E.D. Pa. 1990) (“In today’s environmentally conscious world, [false claims regarding EPA approval] are serious misrepresentations. Consumers these days seem to favor products that are environmentally benign and to disdain those that are environmentally harsh.”).

<sup>24</sup> See Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385 (2006) (defining “dolphin safe” and making it unlawful to deceptively claim “dolphin safe” status).

<sup>25</sup> See Delcianna J. Winders, Note, *Combining Reflexive Law and False Advertising Law to Standardize “Cruelty-Free” Labeling of Cosmetics*, 81 N.Y.U. L. REV. 454, 458–59 (2006).

<sup>26</sup> See Rebecca Tushnet, *It Depends on What the Meaning of “False” Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY L.A. L. REV. 227, 244–45 (2007).

<sup>27</sup> See Lois A. Mohr & Deborah J. Webb, *The Effects of Corporate Social Responsibility and Price on Consumer Responses*, 39 J. CONSUMER AFF. 121, 142 (2005).

<sup>28</sup> See 16 C.F.R. § 255.5 (2009).

<sup>29</sup> See *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 278 (2d Cir. 1981).

premise of advertising regulation, which is that consumers should be able to fulfill their preferences (or have their preferences changed by truthful claims).<sup>30</sup> Getting rid of all the regulations mentioned in the previous paragraph might be satisfactory to believers in a strong, libertarian First Amendment. But for libertarians, the product characteristics/conditions of production division makes even less sense. What is a product characteristic? Consumers are probably better suited to determining that than courts. If consumers find information relevant to their purchase decisions, then there is no non-paternalistic reason to disregard their preferences. Ironically, the product/process distinction, although superficially attractive as a means of limiting the scope of false advertising law, is far more regulatory at heart than a blanket prohibition on misleading consumers because it requires the government to decide what consumers should legitimately care about. Modern consumer protection law has gone in the opposite direction: giving consumers a satisfactory product doesn't make up for deceiving them to close the sale, as the Supreme Court has held.<sup>31</sup>

Consumer protection is about more than consumer health, safety, or even pocketbooks. It includes consumers' interest in getting what they paid for, be it cruelty-free beauty products or low-calorie ice cream, regardless of whether their preferences are rational or not.<sup>32</sup> Even the value-free rationales of law and economics recognize this: products touted as made by well-paid and well-treated workers can command a price premium, as can other goods claiming some moral superiority to standard production processes. Allowing deception about conditions of production distorts the market and disadvantages truthful sellers who do produce non-sweatshop goods.<sup>33</sup> A market that cannot support a

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<sup>30</sup> See Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 540, 569 (2004).

<sup>31</sup> *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 389 (1965).

<sup>32</sup> See, e.g., *id.* at 387 (“[T]he public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance.”) (internal quotation and citation omitted); *JR Tobacco of Am., Inc. v. Davidoff of Geneva (CT), Inc.*, 957 F. Supp. 426, 436 (S.D.N.Y. 1997) (“Although the broader context—the current trends within the cigar market—reveals that perhaps a number of people smoke cigars for sheerly cosmetic reasons and may very well be unable to distinguish a Cuban Cohiba from a JR Alternative, this cannot excuse the falsity of the statements contained in JR’s brochure.”); *Peabody v. P.J.’s Auto Vill., Inc.*, 569 A.2d 460, 461–62 (Vt. 1989) (where consumer would not have purchased a car had she known that it was made by welding the front of a 1974 Saab to the back of a 1972 Saab, the representation that the car was a 1974 Saab was a material misrepresentation under Vermont law even though it had no undesirable effects on reliability, safety, or fair market value).

<sup>33</sup> See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488, 495–96 (1970).



price premium for more carefully produced goods may then pressure producers to cut corners in worker safety or environmental sensitivity, producing the health and safety harms that consumers were trying to avoid subsidizing through their purchases. In the end, the product/process distinction simply cannot help distinguish *Kasky* from standard advertising cases, either on theoretical or functional grounds.

Relatedly, Nike's defenders suggested that product characteristics are more readily verifiable by an advertiser than conditions of manufacture in our modern, subcontractor economy, and thus it was unjustified to apply strict liability to an advertiser's misstatements about conditions of production.<sup>34</sup> This, too, cannot be the law because it does not fit the facts. Some product characteristics are almost impossible to verify, such as the absolute and relative performances of analgesics, a topic that has generated decades of litigation among the competitors and the FTC.<sup>35</sup> Some conditions of manufacture and production are simple to verify, such as the type of net used to catch fish or the place a computer was assembled.<sup>36</sup> Yet courts routinely apply the Lanham Act, and the FTC

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<sup>34</sup> See, e.g., Brief Amicus Curiae of the Chamber of Commerce of the U.S. of Am. in Support of Petitioners at 12–17, *Kasky*, 539 U.S. 654 (No. 02-575), 2003 WL 835350 [hereinafter Brief of the Chamber of Commerce]; Brief of Amici Curiae the Ass'n of Nat'l Adver., Inc. et al. in Support of Petitioners at 10–22, *Kasky*, 539 U.S. 654 (No. 02-575), 2003 WL 835112 [hereinafter Brief of the Ass'n of Nat'l Adver.].

<sup>35</sup> See generally *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146 (9th Cir. 1984); *Bristol-Myers Co. v. FTC*, 738 F.2d 554 (2d Cir. 1984); *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681 (3d Cir. 1982); *Am. Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160 (2d Cir. 1978); *Am. Home Prods. Corp. v. Procter & Gamble Co.*, 871 F. Supp. 739 (D.N.J. 1994); *Am. Home Prods. Corp. v. Johnson & Johnson*, 654 F. Supp. 568 (S.D.N.Y. 1987); *Upjohn Co. v. Am. Home Prods. Corp.*, 598 F. Supp. 550 (S.D.N.Y. 1984); *Am. Home Prods. Corp. v. Abbott Labs.*, 522 F. Supp. 1035 (S.D.N.Y. 1981); *McNeilab, Inc. v. Am. Home Prods. Corp.*, 501 F. Supp. 517 (S.D.N.Y. 1980); *FTC v. Sterling Drug, Inc.*, 215 F. Supp. 327 (S.D.N.Y. 1963), *aff'd*, 317 F.2d 669 (2d Cir. 1963); *In re Novartis Corp.*, No. 9279, 1999 WL 33913005 (F.T.C. May 13, 1999), *aff'd*, 223 F.3d 783 (D.C. Cir. 2000). Litigation over the best treatment for heartburn has likewise produced an entire subfield of false advertising law. See generally *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578 (3d Cir. 2002); *Johnson & Johnson-Merck Consumer Pharms. Co. v. Procter & Gamble Co.*, 285 F. Supp. 2d 389 (S.D.N.Y. 2003); *Glaxo Warner-Lambert OTC G.P. v. Johnson & Johnson Merck Consumer Pharms. Co.*, 935 F. Supp. 327 (S.D.N.Y. 1996); *SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, No. 95 Civ. 7011 (HB), 1996 U.S. Dist. LEXIS 7257, (S.D.N.Y. May 24, 1996); *SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 906 F. Supp. 178 (S.D.N.Y. 1995), *aff'd*, 100 F.3d 943 (2d Cir. 1996) (table).

<sup>36</sup> Whether the net is really bad for dolphins, or whether a preference for goods made in the U.S. is legitimate, are separate questions. The answers may be probabilistic or dependent on moral judgments. But the underlying fact being advertised is not itself hard to confirm or deny.

continues to regulate, in such circumstances, and the Food and Drug Administration (the “FDA”) imposes stringent requirements on difficult-to-prove drug claims even as the underlying scientific evidence changes rapidly.<sup>37</sup>

There were numerous other arguments for Nike in the case, but they all had similar troubles; accepting any one of them would have thrown significant aspects of the modern advertising regulatory apparatus into doubt. In the end, the reasons offered for why this case was special cannot distinguish core false advertising cases. Because false advertising law has strong historical, moral, and utilitarian justifications, the costs of First Amendment invalidation of a large chunk of false advertising law would have been quite high.<sup>38</sup> This, in the end, was most likely why Nike failed to get the Supreme Court to intervene on its behalf against California’s consumer protection law, and why false advertising law offers a useful perspective from which to examine the continuing appeal of treating commercial speech as a distinct class of speech subject to regulation, particularly regulation that protects consumers.

This dynamic, in which an apparently marginal case actually raises issues going to the core of modern regulation of the commercial marketplace, is highlighted by a specific argument made by Nike: it was unfair that Nike’s critics could say almost anything, subject only to the lax constraints of defamation law, while Nike’s responses were subject to strict liability for falsehood.<sup>39</sup>

## II. OFF-SIDES: EQUALITY AND FALSITY

Nike’s main claim was that its letters were not commercial speech but political speech, whose truth or falsity was therefore not a matter for governmental determination.<sup>40</sup> The commercial/political divide clearly produces hard cases when a for-profit entity weighs in on a matter of public interest with an opinion that just happens to coincide with

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<sup>37</sup> See, e.g., *Wyeth v. Levine*, 129 S. Ct. 1187, 1192–93 (2009) (discussing imposed FDA requirements); *Knipe v. SmithKline Beecham*, 583 F. Supp. 2d 553, 557–60 (E.D. Pa. 2008) (discussing FDA labeling of new drugs).

<sup>38</sup> See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–64 (1980) (explaining the informational function of advertising and how false information can be banned); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–65 (1976) (discussing societal interest in the free flow of commercial information).

<sup>39</sup> See Respondents’ Brief on the Merits at 28–31, *Kasky*, 45 P.3d 243 (No. S087859), 2000 WL 1508256.

<sup>40</sup> See Brief for Petitioners at 21–37, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 898993.

its private interest.<sup>41</sup> This private-public collision produced a particular argument about inequality in *Nike, Inc. v. Kasky*.

From Nike's perspective, one significant problem with calling its speech commercial was its effect on the balance between Nike and its critics. When antiglobalization forces condemn Nike for its labor practices, such speech—concededly noncommercial—is subject only to general libel laws, with their heightened standards of proof for speech directed against public figures, as Nike surely is. Absent malicious lies, Nike can't silence the protesters. But under *Kasky*, Nike's response, if targeted to the consumers on whom it depends for economic survival, is commercial speech and must be truthful—as determined by a court—or Nike may be liable for large sums of money.<sup>42</sup> One side gets to fight freestyle while the other is limited to Marquis of Queensberry rules, to use Justice Scalia's memorable analogy.<sup>43</sup> This position ties into Kenneth Karst's reconceptualization of equality as a fundamental principle of the First Amendment:<sup>44</sup> apparently, two speakers—equal by virtue of being on opposite sides of an argument—are treated differently based on

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<sup>41</sup> False advertising cases increasingly confront similar issues. *See, e.g.*, *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 552 (5th Cir. 2001) (finding that Amway distributor spreading rumor that a competitor supported Satanism may have engaged in commercial speech, notwithstanding the fact that religious discussion is protected by the First Amendment); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120–21 & n.8 (8th Cir. 1999) (concluding that advertiser's letter to customers stating that its competitor's product posed a health risk was commercial speech, which “need not originate *solely* from economic motives”); *Birthright v. Birthright, Inc.*, 827 F. Supp. 1114, 1138–39 (D.N.J. 1993) (holding that advertising that misrepresented how donations to a nonprofit were used was actionable under the Lanham Act); *Marcus v. Jewish Nat'l Fund (Keren Kayemeth Leisrael), Inc.*, 557 N.Y.S.2d 886, 889 (App. Div. 1990) (same result under New York law); *cf. United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86, 90–91, 93 (2d Cir. 1997) (applying trademark law to the names of competing political parties and finding actionable confusion despite First Amendment defense).

<sup>42</sup> *See Kasky v. Nike, Inc.*, 45 P.3d 243, 259 (Cal. 2002).

<sup>43</sup> *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (holding that, by banning only certain types of fighting words, targeting racist but not anti-racist speakers, a city violated the First Amendment, and that “St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules”). This pithy sentence from Justice Scalia's majority opinion understandably showed up in the *Kasky* briefs. *See, e.g.*, Brief Amicus Curiae of the Chamber of Commerce, *supra* note 34, at 16; Brief for the Nat'l Ass'n of Mfrs. as Amicus Curiae in Support of Petitioners at 4, *Kasky*, 539 U.S. 654 (No. 02-575), 2003 WL 835884.

<sup>44</sup> *See generally* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) (arguing for the “[p]roper appreciation of the importance of the equality principle in the First Amendment”).

identity, which seems to many uncomfortably similar to viewpoint discrimination.<sup>45</sup>

The main reaction of those defending Kasky's claim was, naturally, to dispute that there was any viewpoint discrimination.<sup>46</sup> Some responses cast the matter as one of David confronting Goliath, so that it was not unfair for the little guy to go more heavily armed.<sup>47</sup> *Substantive* equality required a check on the ability of large corporations to dominate discourse as against individual consumers, who are in a much worse position to determine the actual facts.<sup>48</sup> The businesses on Nike's side therefore often framed the issue as one of organized interest groups, distinct from consumers, attacking businesses.<sup>49</sup> The image of

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<sup>45</sup> See, e.g., Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 123–25 (2007) (arguing that the differential treatment of commercial speakers and their critics constitutes viewpoint discrimination).

<sup>46</sup> See, e.g., Sonia K. Katyal, *Trademark Intersectionality* (unpublished article, on file with author).

<sup>47</sup> See, e.g., Tamara R. Piety, *Why the ACLU Was Wrong About Nike, Inc. v. Kasky*, 41 TULSA L. REV. 715, 731 (2006). Piety argues that:

[I]t seems to stretch credulity to argue imbalance in the context of a multi-billion dollar corporation, which spends enormous sums on communications with the public where no other speaker spends anything approaching the same amount of money in counter speech. Moreover, because of these expenditures, Nike has far more access to speech outlets and media than any of its adversaries, except perhaps columnists like Bob Herbert.

*Id.* (footnote omitted); see, e.g., Rodney A. Smolla, *Free the Fortune 500! The Debate over Corporate Speech and the First Amendment*, 54 CASE W. RES. L. REV. 1277, 1288–89 (2004) (discussing this reaction).

<sup>48</sup> James Boyle argues that courts and general American ideology have historically been more sympathetic to disparities in information than disparities in other resources, and thus willing to regulate the informational aspects of transactions:

When we are analyzing SEC mandated disclosure statements or the extent of a tort law duty to warn of the dangerous tendencies in a product, there is more of a willingness to look at outcomes and results rather than formally equal access—to take into account the actual education level, social class, and native language of those who are the targets of the warnings, rather than conclusively assuming a formal equality.

JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* 181 (1996); see also Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 24–25 (2000) (arguing that commercial speech has only received constitutional protection when it occurs between “strangers who can be conceived as independent and rational”; when one party is dependent on the other in some way, the court treats the speech as part of the easily regulable commercial transaction).

<sup>49</sup> See, e.g., Brief of the Ass'n of Nat'l Adver., *supra* note 34, at 5–6; Brief Amici Curiae of Forty Leading Newspapers, et al. in Support of Petitioners at 13–14, *Kasky*, 539 U.S. 654 (No. 02-575), 2003 WL 835613 [hereinafter Brief of Forty Leading Newspapers].

the interest group is one of informed, perhaps overinformed and biased, individuals banding together; politically correct Goliath versus business Goliath (or even small business David).<sup>50</sup> Unlike blank-slate consumers, interest group members' preferences seem unlikely to change because of advertising, so it may seem unfair of them to complain about false advertising. That knocks out the substantive equality claim and brings us back to viewpoint discrimination.

But it's a little peculiar to call the commercial/noncommercial distinction viewpoint discrimination, which is a term usually applied to the suppression of a particular message.<sup>51</sup> Commercial actors may still tout their wares, subject only to the requirement that their speech not be false or misleading.<sup>52</sup> In other words, Nike still gets to fight, and by the same rules as its competitors in the market. Moreover, private speakers were free to defend Nike's practices and criticize the labor protestors, subject only to defamation law. So there was some equality on the battlefield even in Nike's terms.

There are other instances in which the government goes around tying one metaphorical combatant's hand behind its metaphorical back. For example, the FTC Telemarketing Sales Rule,<sup>53</sup> promulgated pursuant to the 1994 Telemarketing Consumer Fraud and Abuse Prevention Act,<sup>54</sup> requires many disclosures by telemarketers about their identities and intentions.<sup>55</sup> On the other hand, recipients can lie, abuse, and taunt the telemarketers at will, as many a humorist has noted.<sup>56</sup> More seriously, some states have additional "no rebuttal" laws requiring telemarketers to discontinue a call if at any point the customer gives a negative response to the offer.<sup>57</sup> Further persuasion is not allowed, which seems to raise serious First Amendment concerns if the underlying speech is truthful and nonmisleading. Yet it is difficult to think of the telemarketing law as allowing one side to fight freestyle

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<sup>50</sup> See, e.g., Brief of Forty Leading Newspapers, *supra* note 49, at 13–14.

<sup>51</sup> See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995).

<sup>52</sup> E.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

<sup>53</sup> 16 C.F.R. §§ 310.1–.9 (2009).

<sup>54</sup> 15 U.S.C. § 610.2 (2006).

<sup>55</sup> See 16 C.F.R. § 310.3.

<sup>56</sup> See, e.g., Business Humorist: Telemarketers, [http://www.comedytime.tv/view\\_video.php?viewkey=eda77f3638aca858421e](http://www.comedytime.tv/view_video.php?viewkey=eda77f3638aca858421e) (last visited Nov. 2, 2009).

<sup>57</sup> See, e.g., KAN. STAT. ANN. § 50-670(b)(4) (2005); KY. REV. STAT. ANN. § 367.46953(3) (LexisNexis 2002); MISS. CODE ANN. § 77-3-603(c) (2000); OR. REV. STAT. § 646.611(1)(d) (2007); WASH. REV. CODE ANN. § 19.158.110(1)(b) (West 2007).

and requiring the other to comply with Marquis of Queensberry rules, because the sides are simply too different to justify the comparison.

Similarly, the distinction in First Amendment defamation law between public figures and private figures inherently contemplates the application of different standards to different speakers, at least if they are in direct conflict. Imagine a case in which a public figure and a private figure defame one another; the public figure may be subject to liability for negligence,<sup>58</sup> whereas the private figure can only be liable if the public figure can show actual malice by clear and convincing evidence.<sup>59</sup> The U.S. Supreme Court's justification for this distinction began with the argument that public figures are differently situated by virtue of their public status: they have more access to the media and a greater ability to fight back without the aid of law.<sup>60</sup> In the language of equal protection law, the parties are not similarly situated, and equality does not require treating unlikes alike.<sup>61</sup>

False advertising claims by competitors or consumers pose very different circumstances than standard public figure defamation cases. The reasons for making it harder for public figures to win defamation cases than private figures—that they can fight back in the media more easily and that they voluntarily placed themselves in the public eye—are generally true of both sides in a Lanham Act case involving two businesses.<sup>62</sup> And in a consumer action, self-defense capability and voluntary exposure are more likely to be characteristics of a defendant trying to avoid liability for an allegedly false claim and not of the plaintiff trying to establish falsity. Applying public figure standards to Lanham Act cases or consumer protection cases detaches the category from its justification.

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<sup>58</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

<sup>59</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

<sup>60</sup> See *Gertz*, 418 U.S. at 344. The Court in *Gertz* stated that:

The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.

*Id.*

<sup>61</sup> The debate then shifts to what counts as likeness, or to equality as antisubordination; proponents of increased protection for commercial speech understandably rely more on making commercial speech seem like noncommercial speech than on claiming that corporate interests are subject to pervasive discrimination and oppression.

<sup>62</sup> See, e.g., *Truck Components, Inc. v. K-H Corp.*, 776 F. Supp. 405, 407–08 (N.D. Ill. 1991).

More generally, there is a fundamental difficulty with the fisticuffs metaphor: Advertising law allows many different actors to challenge an ad. Inequality is therefore either absent or not meaningful. In the case involving a dispute between two businesses, the Lanham Act requires both sides to refrain from foul blows under pain of strict liability for falsehood, so there's no unfairness at all. This insight accounts for the convoluted reasoning in the one case that extensively analyzed the proper constitutional standard to be applied to Lanham Act product disparagement claims by competitors, *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, decided by the U.S. Court of Appeals for the Third Circuit in 1990.<sup>63</sup> The parties in the case engaged in a comparative advertising war over their respective health insurance offerings, including ads that implied that one side's poor services led to an insured's death.<sup>64</sup> Standard defamation law would treat both parties as public figures, thus imposing an actual malice requirement before either one's false statements could give rise to liability.<sup>65</sup> The Third Circuit, however, reasoned that applying the general defamation rule wouldn't make sense in the context of false commercial advertising.<sup>66</sup> Both parties were commercial speakers, interacting in the market in order to take business from one another;<sup>67</sup> both were subject to the Lanham Act, and imposing liability based on falsity alone was consistent with the constitutional status of commercial speech. Adding an actual malice requirement, by contrast, would unravel the Lanham Act scheme, because the facts of the case were entirely typical for commercial speech battles between competitors.<sup>68</sup>

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<sup>63</sup> See 898 F.2d 914, 927–39 (3d Cir. 1990).

<sup>64</sup> See *id.* at 918–19.

<sup>65</sup> See *id.* at 938–39.

<sup>66</sup> See *id.* at 939.

<sup>67</sup> The court distinguished a previous case, *Steaks Unlimited, Inc. v. Deaner*, where a business sued a television station for defamation based on the station's consumer reporting. See *Blue Cross*, 898 F.2d at 938 n.29 (citing *Steaks Unlimited*, 623 F.2d 264, at 266–68 (3d Cir. 1980)). The *Steaks Unlimited* court found that the business was a public figure for purposes of its lawsuit and thus needed to show actual malice. 623 F.2d at 272. The *Blue Cross* court distinguished the business-versus-reporter scenario from the business-versus-business situation, indicating that reporters need heightened First Amendment protection. 898 F.2d at 938 n.29.

<sup>68</sup> See *Blue Cross*, 898 F.3d at 939. The court in *Blue Cross* stated that:

The express analysis in *Gertz* is not helpful in the context of a comparative advertising war. Most products can be linked to a public issue. And most advertisers—including both claimants here—seek out the media. Thus, it will always be true that such advertisers have voluntarily placed themselves in the public eye. It will be equally true that such advertisers have access to the media. Therefore, under the *Gertz* rationale, speech of public concern that im-

Likewise, inequality can be an unhelpful concept in describing a regulator's role. The FTC, state attorneys general, and similar government actors are referees—cousins to that familiar government agent, the night watchman.<sup>69</sup> If First Amendment doctrine requires application of a defamation standard to false advertising claims in the name of equality, it will disrupt other coherent regulatory schemes that are already equal; the referee will go home, and the rules of the game between competitors will change drastically.<sup>70</sup>

The answer might be to require only consumers to show fault because it is only in the consumer lawsuit situation that the Marquis of Queensberry problem arises. But such a rule would be even more bizarre. The core justification for state regulation and competitor lawsuits is to protect consumers from harm.<sup>71</sup> If consumers themselves can only stop deliberate or negligent falsehood, what justification do others—who have interests that will never quite align with consumers'—have for suppressing nonnegligent speech? False advertising, much more than defamation law, is everybody's business.

Another way of looking at the equality argument is that there is a second symmetry that is key to Nike's argument from fairness: nice

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plicates corporate advertisers—i.e., typical comparative advertising—will always be insulated behind the actual malice standard.

*Id.* (internal citation omitted); see also *Procter & Gamble Co.*, 242 F.3d at 556 (reaching the same conclusion with regard to Lanham Act and trade libel claims).

<sup>69</sup>See, e.g., Alex W. Cannon, *Regulating AdWords: Consumer Protection in a Market Where the Commodity Is Speech*, 39 SETON HALL L. REV. 291, 313 (2009). Cannon asserts that:

FTC regulation is intended to place businesses on a somewhat equal footing when it comes to their ability to propose commercial transactions; it prevents a dominant firm from misleading consumers as to a competitor's product, an act that may harm competition by preventing or discouraging new market entry. It also places businesses on level ground, because once an FTC regulation is in place, it prohibits businesses from falling below the FTC standard, thereby protecting the communications medium itself.

*Id.*

<sup>70</sup> Thus, the U.S. Court of Appeals for the Seventh Circuit rejected an egg industry group's attempt to claim *Sullivan*-level protection for itself when it, on behalf of its members, entered the debate about the health risks and benefits of eggs. See *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 162 (7th Cir. 1977) (rejecting organization's analogy between its statements about the nutritional and health benefits of eggs and defamatory statements about a public official on the ground that the former was commercial speech).

<sup>71</sup> In the competitor's case, it's the deception of consumers that harms the competitor by taking away its business. One can also fruitfully conceive of this as a distinct injury to the competitor, one that would not be redressed merely by redressing the consumer harm, but that separate harm still depends on a consumer being deceived and changing his or her behavior as a result.



things versus nasty things. The argument is that, if consumers can attack Nike, Nike must be allowed to defend itself with non-defamatory speech using the same standards. This symmetry is vitally important to the other two regulatory schemes because the usual false advertising scenario involves someone challenging nice things that the advertiser says about itself. The FTC will essentially never get involved if there is a specific target of negative speech that can take care of itself (sometimes with a Lanham Act lawsuit), and competitor suits are regularly about positive superiority claims.<sup>72</sup> There was a point at which commentators thought that perhaps the First Amendment posed different constraints on false self-aggrandizement than on false disparagement when it came to competitor-on-competitor suits,<sup>73</sup> but courts never showed much in-

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<sup>72</sup> The general factors underlying FTC exercise of discretion are set forth at FED. TRADE COMM'N, FTC POLICY STATEMENT ON DECEPTION (1983), *appended to In re Cliffdale, Assocs., Inc.*, 103 F.T.C. 110, 174 (F.T.C. Mar. 23, 1984), *available at* <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>, and the FTC now generally encourages comparative advertising. *See* 16 C.F.R. § 14.15(b) (2009); *see also* Barry J. Cutler, *The Criminalization of Consumer Protection—A Brave New World for Defense Counsel*, 22 ANTITRUST 61, 61 (2007). Cutler argues that:

Playing “the cop on the beat” to maintain high standards among national advertisers largely has given way to efforts at recovering money for defrauded consumers and addressing online security and privacy breaches. One sees fewer household names in advertising and other cases brought to maintain fair competition, but more “operations,” “projects,” and “sweeps” that produce larger numbers of cases of lesser competitive significance—the companies and individuals bound by permanent injunctions being quickly replaced by new actors using similar practices.

*Id.*

<sup>73</sup> J. Thomas McCarthy summarized the rationale that might have justified the development of two sub-branches of Lanham Act false advertising:

The distinction is that while [traditional] false advertising laws prohibit certain false claims about one’s *own* goods or services, product disparagement law prohibits certain false claims about *another’s* goods or services. The distinction is more than one of form. The law has traditionally treated the two kinds of commercial false statements very differently, with two separate sets of laws governed by different rules.

... While constitutional free speech principles have had relatively little impact upon false advertising law, they have a considerably greater impact on product disparagement law. One explanation for the distinction is that free speech principles have relatively little to do with the determination of the truth or falsity of allegedly misleading advertising claims about a company’s own goods and services because who should know better than the advertiser as to what is true and false about its own products?

On the other hand, product disparagement claims concern a publication critical of another person’s or corporation’s goods and services. Likely target defendants include not only competitors, but media, business, and academic commentators. The content of such messages are likely to be of public con-

terest, preferring to treat all falsity the same way under the Lanham Act.<sup>74</sup> This makes sense because where there is competition, self-aggrandizement shades readily into other-disparagement—“buy our product because it’s safe” is not much different from “buy our product because it’s safer than the alternatives” or “buy our product because the alternatives are unsafe.” Nike’s attempt to speak positively about itself subject only to *New York Times Co. v. Sullivan* constraints was therefore a dagger aimed at the heart of false advertising law generally.

Given this complicated and interlocking structure, the superficial appeal of the symmetry argument must be rejected. When government acts as a regulator—as with the FTC—or allows consumers to act as regulators—by using the courts—it is simply inappropriate to frame the issue as one of treating likes alike. Equality claims always require us to ask the criteria on which equality is being judged: being on opposing sides of a particular argument is not always enough to constitute equality, even if it would be sufficient in some circumstances. Indeed, the equality argument, as Kenneth Karst developed it, was based on the idea that the government cannot *selectively* regulate less than the amount of speech it could *constitutionally* regulate—it cannot ban only racially inflammatory fighting words<sup>75</sup> or ban use of a U.S. Army uniform only in plays that criticize the government,<sup>76</sup> even if it can ban all fighting words or all theatrical uses of actual Army uniforms.<sup>77</sup> Here, as

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cern and interest. These are all good reasons for the First Amendment’s concern for providing breathing space for the exercise of free speech.

The issue facing the federal courts is whether the 1989 federalization of the tort of product disparagement in section 43(a) will mean the incorporation of the common law elements of the product disparagement tort such as intent and a detailed proof of special damages or, on the other hand, adoption of the false advertising principles of section 43(a), which do not require such elements.

J. Thomas McCarthy, *Lanham Act § 43(a): The Sleeping Giant Is Now Wide Awake*, LAW & CONTEMP. PROBS., Spring 1996, at 72–73 (footnotes omitted); cf. Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1269 & n.330 (1983) (suggesting that critical comparative advertising ought to be given more leeway than standard positive advertising claims, including a scienter requirement for product disparagement, because most advertising is positive and thus the marketplace of ideas is unbalanced in favor of positive claims).

<sup>74</sup> See, e.g., *Blue Cross*, 898 F.2d at 937 (disparagement claims against competitor’s ads not subject to heightened standards because the alleged disparagement occurred in purely commercial speech).

<sup>75</sup> *R.A.V.*, 505 U.S. at 392.

<sup>76</sup> *Schacht v. United States*, 398 U.S. 58, 62–63 (1970).

<sup>77</sup> See Geoffrey R. Stone, *Kenneth Karst’s Equality as a Central Principle in the First Amendment*, 75 U. CHI. L. REV. 37, 39 (2008). Stone argues that:

long as there is a separate commercial speech doctrine, the government can ban all false and misleading commercial speech, which is what advertising law purports to do;<sup>78</sup> the fact that this restricts commercial speakers more than their noncommercial critics is central to the entire structure of commercial speech doctrine.<sup>79</sup>

As long as we have a commercial speech doctrine at all, that is, the inequality argument will be available and cannot be limited to cases in which there is an active public policy dispute connected to a corporate speaker. Law is full of contradictions that somehow remain stable, but courts tend to want to make the law in any particular field coherent.<sup>80</sup>

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[T]he core of the equality claim under the First Amendment is one of under-inclusion. That is, the equality claim arises when the government has sufficient justification to restrict the individual's speech under traditional First Amendment analysis, but the government creates a separate and distinct equality issue if it decides voluntarily to restrict *less* speech than it is constitutionally entitled to restrict. That is, by allowing more speech than it is constitutionally required to allow, the government creates an inequality that . . . must be independently justified.

*Id.*

<sup>78</sup> This description is oversimplified. Some states' consumer protection laws exclude various classes of businesses, such as insurance, and some Lanham Act caselaw indicates that a sufficiently comprehensive regulatory scheme, such as the FDA regulations, preempts application of the Lanham Act to certain subject matters. *See, e.g.*, MD. CODE ANN., COM. LAW § 13-104 (LexisNexus 2005); OHIO REV. CODE ANN. § 1345.01(A) (West 2008); *Summit Tech., Inc. v. High-Line Med. Instruments Co., Inc.*, 922 F. Supp. 299, 306 (C.D. Cal. 1996) (barring a Lanham Act claim when the FDA had not yet approved a competitor's product). But the rationale for disallowing a claim under those laws is always that some other regulatory entity is better suited to identify and deter falsity as part of administering a comprehensive regulatory scheme. *See, e.g.*, *Summit Tech., Inc.*, 922 F. Supp. at 306 (stating that the Lanham Act cause of action would usurp the FDA's discretionary role to interpret its own regulations) (citing *Fender v. Medtronic, Inc.*, 887 F. Supp. 1326 (E.D. Cal. 1995)). Thus, even false and misleading commercial speech outside the specific coverage of the laws discussed in the text is always banned, at least in theory. One might construct a First Amendment argument that the regulatory entity has to be identical in all similar cases, but—as indicated by the failure of Nike's argument in *Kasky* that private plaintiffs were inappropriate enforcers—that is not a mainstream First Amendment argument presently. (And, of course, this argument would also require the proponent to address the claim that pervasively regulated fields like insurance and prescription drugs are relevantly different from less-regulated fields.)

<sup>79</sup> Karst thought that commercial speech doctrine, as it had begun to develop when he first wrote, was in tension with the equality principle he identified. *See* Karst, *supra* note 44, at 34–35. He did, however, suggest that regulating false commercial advertising was appropriate, implicitly recognizing that some special treatment for advertising is justified. *See id.* at 34 n.75.

<sup>80</sup> Harry Kalven “celebrated the evolution of First Amendment doctrine over the course of the twentieth century as an example of the law working itself pure.” OWEN M. FISS, *THE IRONY OF FREE SPEECH* 6 (1996) (discussing HARRY KALVEN, *A WORTHY TRADI-*

Success for Nike in defining the relevant field as noncommercial First Amendment law would therefore have risked destabilizing all regulation of the truth of commercial claims.

### III. FAIRNESS AS SYMMETRY: COMPETITION UNDER THE LANHAM ACT

The Lanham Act, in its way, acted as a kind of First Amendment backstop. *Nike, Inc. v. Kasky* arguably ended up being dismissed as improvidently granted because the U.S. Supreme Court didn't want to affirm—oral argument was far from favorable to Kasky<sup>81</sup>—but reversing posed obvious threats to other regulatory regimes that did not have equality problems. These regimes prominently included the Lanham Act and the FTC Act.

The Lanham Act is particularly significant here because, as the primary federal law allowing nongovernment actors to regulate commercial entities' speech, it plays a substantial role in ordering American economic life. Moreover, the Lanham Act uses language to protect trademarks that is virtually identical to its false advertising provisions.<sup>82</sup> Yet trademarks are usually popular with the same people who distrust consumer class actions and government advertising regulation.<sup>83</sup> Trademark infringement, however, is just a specific type of false advertising: infringement causes consumer deception about the source or

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TION: FREEDOM OF SPEECH IN AMERICA (1987)). On the drive to work the law pure, see Judge Frank's concurring opinion in *Granz v. Harris*, 198 F.2d 585, 590–91 (2d Cir. 1952).

<sup>81</sup> See Transcript of Oral Argument, *supra* note 16, at 40–42, 52–54, 58–61.

<sup>82</sup> 15 U.S.C. § 1125(a)(1) (2006) bars the use in commerce of “any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact” which either (A) “is likely to cause confusion, or to cause mistake, or to deceive” consumers “as to the affiliation, connection, or association of [the parties] . . . , or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities” (the trademark provision) or (B) “in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of . . . goods, services, or commercial activities” (the false advertising provision). Thus, the language barring falsity and misleading representation is the same in the statute, and courts have interpreted both provisions to require a showing of likely deception, though there are some significant differences in the details of the doctrine. See, e.g., *Homeowners Group, Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 1107 (6th Cir. 1991) (stating that in the trademark context, the “ultimate question remains whether relevant consumers are likely to believe that the products or services offered by the parties are affiliated in some way”); *Hesmer Foods, Inc. v. Campbell Soup Co.*, 346 F.2d 356, 359 (7th Cir. 1965) (noting that in the commercial advertising context, in order to receive equitable relief, only a likelihood of deception must be shown).

<sup>83</sup> Businesses have substantial self-interest in making it difficult for consumers and the government to sue them for false advertising, but much more mixed incentives as to expansive trademark law because businesses themselves often benefit from making trademark claims.

sponsorship of particular goods, supposedly leading consumers to make mistaken decisions about what to buy—though trademark law has essentially abandoned any requirement that a trademark owner show any actual effect on a purchasing decision.<sup>84</sup>

If libel-like First Amendment protections were applied to false advertising claims, the application of these protections to trademark law would naturally seem to follow. Even conceding that protecting consumers against deception as to the source of a good or service is a compelling government interest,<sup>85</sup> many of trademark law's core presumptions would disappear if the field were constitutionalized—and trademark dilution, a concept much beloved of many businesses, might disappear entirely.<sup>86</sup> Dilution posits that nonconfusing uses of a trademark, or uses of a symbol too similar to a trademark, can slowly diminish the value of the trademark by diffusing or tarnishing the positive associations generated by the trademark.<sup>87</sup> Trademark and false advertising lawsuits allow businesses to regulate relations between one another with government and consumers playing bit parts; symmetry seems inherent in the enterprise. As a result, though businesses that sell creative works have argued for First Amendment limits on trademark as applied to defendants selling movies and music,<sup>88</sup> there has been no significant pres-

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<sup>84</sup> See, e.g., *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1024 (3d Cir. 2008) (finding false endorsement liability established by showing likely confusion without requiring any showing of effect on purchasing decisions).

<sup>85</sup> This may not be the case if the goods or services are of equal quality or if the mark is used on noncompeting goods. See Mark P. McKenna, *Testing Modern Trademark Law's Theory of Harm*, 95 IOWA L. REV. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1348746](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348746). It is interesting to compare Judge Kozinski's reasoning in *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 905 (9th Cir. 2002), in which he describes trademark infringement as "essentially a fraud on the consuming public" and thus enjoined without concern for the First Amendment, with his analysis in Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 653 (1990), in which he and his coauthor condemn most advertising regulation for insufficient attention to the strict requirements of proof for common-law fraud.

<sup>86</sup> See Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381, 388 (2008); Rebecca Tushnet, *Trademark Law as Commercial Speech Regulation*, 58 S.C. L. REV. 737, 738–39 (2007).

<sup>87</sup> See generally Rebecca Tushnet, *Gone in 60 Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507 (2008) (explaining and criticizing dilution theory).

<sup>88</sup> See *Mattel*, 296 F.3d at 906–07 (protecting song "Barbie Girl" against trademark infringement and dilution accusations by makers of the doll, Barbie); *Rogers v. Grimaldi*, 875 F.2d 994, 1001, 1005 (2d Cir. 1989) (protecting movie title *Ginger & Fred* against trademark infringement claim by the performer Ginger Rogers).

sure from the business community to apply First Amendment doctrines to the Lanham Act as a whole.<sup>89</sup>

Is there any role for symmetry in imposing First Amendment constraints on regulations of commercial speech? Where they actually disadvantage particular groups systematically, perhaps. Some asymmetries in trademark law are very much like the asymmetries posited by Nike's proponents in *Kasky*: trademark owners get to take advantage of every non-false sales pitch possible, including appeals to our emotions and the seductive likability of the familiar.<sup>90</sup> But dilution protection, particularly protection against tarnishment, means that competitors—and sometimes critics—cannot appeal to our negative emotions, and cannot use over-familiarity, disgust, or other emotions to get us to abandon a brand.<sup>91</sup> To the extent that dilution actually does force competitors to fight on different terms, it might be subject to the viewpoint discrimination/Marquis of Queensberry objection.<sup>92</sup>

There is an obvious response to such a claim: to the extent that each trademark owner is entitled to dilution protection, then everyone is arguably playing by the same rules. Current federal dilution law, however, protects only “famous” marks (and state laws generally also

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<sup>89</sup> Speculatively, another possible reason the Lanham Act seems such a poor target for wholesale reformation via the First Amendment might be lingering uncertainty about the rule of *New York Times Co. v. Sullivan* outside its application to public officials. Perhaps there is simply less to worry about when the government, in the form of the courts, aids a private entity to suppress the speech of another private entity pursuant to a facially viewpoint neutral law governing speech. Relatedly, perhaps speech about consumer goods such as razors and antacids (two frequent flyers in the Lanham Act airspace) is truly not as important to democratic discourse as the categories of speech involved in defamation cases.

<sup>90</sup> See generally Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227 (2008) (arguing that trademark law should be updated to reflect the role of emotion on consumers' decisions).

<sup>91</sup> See, e.g., *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 45 (2d Cir. 1994) (finding that competitor's use of John Deere's deer trademark, by which the deer was made to look weak and frightened, was actionable tarnishment). See generally Katya Assaf, *The Dilution of Culture and the Law of Trademarks*, 49 IDEA 1 (2008) (offering an analysis of the way in which dilution protection treats trademarks better than other competing cultural symbols and thus promotes the continued commercialization of culture and society).

<sup>92</sup> See Tushnet, *supra* note 87, at 561. There I argue that:

[T]he aim of dilution law . . . [is] to allow trademark owners to stabilize the meaning of a mark. . . . In general, First Amendment doctrine favors robust competition in the marketplace of ideas rather than simplification that makes certain already-successful ideas easier to understand. Dilution is a doctrine that favors meanings approved by established producers above meanings offered by challengers. It is anticompetitive, and to the extent that truthful commercial speech promotes democratic values, antidemocratic.

*Id.* (footnotes omitted).

have some sort of heightened distinctiveness requirement).<sup>93</sup> Once again, we are forced to examine equality more closely and ask whether the differences between famous and nonfamous marks are sufficient to justify giving famous marks distinct treatment, even if that means that the owner of a famous mark can tarnish a nonfamous mark and the owner of the nonfamous mark cannot respond in kind.<sup>94</sup> I do not wish to argue that First Amendment equality principles make dilution protection unconstitutional; I have argued elsewhere that dilution is unconstitutional on other grounds.<sup>95</sup> The point is that the superficial appeal of equality arguments in the commercial speech context dissolves on closer examination. Commercial speech regulation will remain a difficult problem as long as there is a commercial speech doctrine.

#### CONCLUSION

The argument from fairness failed for Nike as a commercial speaker because asymmetry does not properly describe the way in which Nike is subject to regulation of the truthfulness of its speech. More broadly, if commercial speech is to be treated differently from noncommercial speech, then the state will inevitably treat commercial *speakers* differently, producing the apparent asymmetry seen in *Nike, Inc. v. Kasky*. Too narrow a focus on the particular dispute in *Kasky*—whether Marc Kasky could sue based on representations Nike made about labor conditions at its subcontractors' plants in response to a campaign to draw public attention to those conditions—would prevent us from understanding the way in which the equality argument fits into (or destabilizes) the overall architecture of the First Amendment.<sup>96</sup>

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<sup>93</sup> See, e.g., 15 U.S.C. § 1125(c) (2006); FLA. STAT. ANN. § 495.151 (West 2008); 765 ILL. COMP. STAT. ANN. 1036/65 (West 2001).

<sup>94</sup> Numerous commentators, both proponents and opponents of dilution, have concluded that limiting dilution protection to famous marks is inconsistent with the basic premises of dilution law because fame and vulnerability to dissipation of distinctiveness are not correlated and may in fact be inversely correlated. See, e.g., Barton Beebe, *A Defense of the New Federal Trademark Antidilution Law*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1143, 1161 (2006) (deeming this an “irony” of the law); Graeme B. Dinwoodie & Mark D. Janis, *Dilution's (Still) Uncertain Future*, 105 MICH. L. REV. FIRST IMPRESSIONS 98, 100 (2006) (pointing out the disconnect between the theory of dilution and the fame requirement); Maureen Morrin et al., *Determinants of Trademark Dilution*, 33 J. CONSUMER RES. 248, 253 (2006) (dilution proponent); Tushnet, *supra* note 87, at 562 (dilution critic).

<sup>95</sup> See Tushnet, *supra* note 87, at 554–58.

<sup>96</sup> Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1202–03 (1988) (arguing for analyzing First Amendment problems with an eye towards the way in which resolution of a particular case affects the general structure of the doctrine).

Some may conclude that the rejection of the Marquis of Queensberry argument necessary to sustain commercial speech doctrine is yet another reason that the doctrine should be abandoned. My own commitments, however, lead me to support the continued vitality of false advertising law in its varied forms. Of course the result is line-drawing and hard cases; it could hardly be otherwise. Nonetheless, regulation of false and misleading commercial speech plays a vital role in our free market economy.

Government agencies, such as the FTC, the Securities and Exchange Commission, and the FDA, engage in direct government regulation of speech using rulemaking and enforcement actions. But the courts that enforce the Lanham Act and consumer protection laws such as the one considered in *Kasky* are also regulators, setting the terms on which efforts to influence consumers occur. For constitutional purposes, as *New York Times Co. v. Sullivan* established, there is generally no difference between courts and agencies as regulators. Thus, without a justification to treat them differently, invalidating judicial regulation via consumer protection laws will throw into doubt these other bodies of law. And that in itself is a reason to apply the general rule—false commercial speech is subject to injunction and, sometimes, to damages—to consumer actions even when that makes an individual case seem unfair to the corporate advertiser.



