

**NOTE: NIKE v. KASKY: LEAVING  
CORPORATE AMERICA SPEECHLESS**

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I. INTRODUCTION

Nike may be able to “Just Do It” in California, but it can’t “Just Say It” anymore. After *Nike v. Kasky*,<sup>1</sup> statements made by a business enterprise are deemed to be commercial speech<sup>2</sup> if they reach any potential consumer within the state of California. Such commercial speech is accorded less First Amendment protection than that which is afforded to noncommercial speech.<sup>3</sup>

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1. *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003); *see also* *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002).

2. *See Kasky*, 45 P.3d at 247 (concluding that Nike’s “messages are commercial speech for purposes of applying state laws barring false and misleading commercial messages”).

3. *Id.*; *see also* *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984) (finding that a noncommercial speaker’s statements criticizing a product

Consequently, Minnesota companies that do business in California—or that merely publish operational statements that may come into contact with a California consumer—have cause for concern: virtually all of a Minnesota company’s public utterances, including press releases and letters to the editor, are now considered to be advertising in California and are subject to prosecution under the state’s False Advertising Law.<sup>4</sup>

Further, if the speech in question is alleged to be false or misleading, or if any true statements have the capacity to deceive or confuse the public, the speech will receive no First Amendment protection at all.<sup>5</sup> Whereas advertising has traditionally been defined in America as speech that informs the public about “who is producing and selling what product, for what reason, and at what price,”<sup>6</sup> the commercial speech doctrine in California now defines advertising as any type of communication through which a corporation publicly releases information about its company, its products, its operations, or its values.<sup>7</sup>

To complicate matters further, any California resident—whether or not suffering personal harm—may bring action under the state’s unfair competition<sup>8</sup> and false advertising<sup>9</sup> laws against any business alleged to have made misleading or confusing statements about its company or products.<sup>10</sup> While the speech of

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are noncommercial speech, for which damages may be awarded only upon proof of both falsehood and actual malice).

4. See generally *Kasky*, 45 P.3d at 253, 260-61 (holding that press releases and letters to the editor constituted advertising and thus were “commercial speech,” affording such speech a lower level of First Amendment protection).

5. See *Kasky*, 45 P.3d at 250 (noting that this court has also recognized that “these laws prohibit ‘not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public’”) (citing *Leoni v. State Bar*, 704 P.2d 183, 193-94 (Cal. 1985) (alteration in original)); see also *id.* at 261 (noting that “commercial speech that is false or misleading receives no protection under the First Amendment”).

6. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

7. See *Kasky*, 45 P.3d at 256-58.

8. CAL. BUS. & PROF. CODE § 17200 (2003) (defining unfair competition as including any unlawful, unfair, or fraudulent business practice, or any unfair, deceptive, untrue, or misleading advertising and stating that any act violating California’s false advertising law—Cal. Bus. & Prof. Code § 17500—necessarily violates the unfair competition law).

9. CAL. BUS. & PROF. CODE § 17500 (2003).

10. *Id.* (stating that it is unlawful to disseminate any statement in connection with an attempt to sell any real or personal property or service “which is untrue or misleading”). See also *Leoni*, 704 P.2d at 193-94 (stating that true statements are

the individuals bringing such charges is given the highest level of protection under the First Amendment to the U.S. Constitution,<sup>11</sup> companies under attack in California no longer are accorded the same level of protection.<sup>12</sup> The *Nike* decision has thus created an unlevel playing field in First Amendment protections and threatens to chill corporate speech across America.<sup>13</sup>

The U.S. Supreme Court agreed in January 2003 to hear the *Nike* case under a writ of certiorari.<sup>14</sup> Commentary on the case suggested that the real question was not whether the Court would overturn the California decision, but how resounding the reversal would be.<sup>15</sup> Discussion centered on the need for the Court to clarify the definition of “commercial speech” in its decision, or possibly to do away with the distinction between commercial speech and fully protected speech altogether.<sup>16</sup> Some First Amendment

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also prohibited if they are likely to confuse the public).

11. See *Bose Corp.*, 466 U.S. at 513 (requiring proof of both falsehood and actual malice).

12. See *Kasky*, 45 P.3d at 250 (indicating that to state a claim under either the UCL or the False Advertising Law, “it is necessary only to show that ‘members of the public are likely to be deceived.’”) (citing Comm. on Children’s Television, Inc. v. Gen. Foods Corp., 673 P.2d 660, 668 (Cal. 1983)); see also *id.* at 267-68 (Chin, J., dissenting) (“The majority today refuses to honor a fundamental commitment and guarantee that both sides in a public debate may compete vigorously—and equally—in the marketplace of ideas . . . . I would give *both* sides in this important public controversy the full protection that our Constitution guarantees.”).

13. See *Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2567 (2003).

That threat means a commercial speaker must take particular care—considerably more than the speaker’s noncommercial opponents—when speaking on public matters . . . . Uncertainty about how a court will view these, or other, statements, can easily chill a speaker’s efforts to engage in public debate—particularly where a “false advertising” law, like California’s law, imposes liability based upon negligence or without fault. At the least, they create concern that the commercial speaker engaging in public debate suffers a handicap that noncommercial opponents do not.

*Id.* (citations omitted).

14. See *Nike, Inc. v. Kasky*, 123 S. Ct. 817 (2003).

15. See Jeffrey L. Fisher, *Nike v. Kasky: Will the Shield of the Commercial Speech Doctrine Become a Sword?*, 20 COMM. LAW. 1, 30 (2003) (“[I]t is quite possible that the biggest question in the *Kasky* case is not whether the U.S. Supreme Court will reverse, but whether it will do so with a bang or a whimper.”).

16. See *id.* at 31 (speculating that the Court may be “willing to use the case to clarify the parameters of the commercial speech doctrine and to ensure . . . that the doctrine is not used as a weapon to silence one side of these public discussions”); see also Michelle Dobrusin, Note, *Crass Commercialism: Is It Public Debate or Sheer Profit? The Controversy of Kasky v. Nike*, 24 WHITTIER L. REV. 1139, 1166 (2003) (stating that “a review by the High Court will result in a clearer test so as to

experts considered the case to be “the most significant free-speech decision since [*New York Times v. Sullivan*]<sup>17</sup> [in 1964].”<sup>18</sup>

Thirty Amicus Curiae briefs were filed with the U.S. Supreme Court regarding the free speech issues at stake in *Nike*.<sup>19</sup> The

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protect the rights of all speakers”).

17. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (establishing “actual malice” as the standard of proof which must be provided in order to recover damages for libel related to the official conduct of a public official). In *N.Y. Times, Co. v. Sullivan*, the publication in question was not a “commercial” advertisement because it “communicated information, expressed opinion, recited grievances, protested claimed abuses . . . on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.” *Id.* at 266. The court further noted that discouraging newspapers from carrying editorial advertisements might “shackle the First Amendment in its attempt to secure ‘the widest possible dissemination of information from diverse and antagonistic sources.’” *Id.* (citation omitted).

18. David Graulich, *Press Release: Write in Haste . . . Repent*, 26 NAT’L L.J. 8, Oct. 14, 2002, at D12; see also Brief of Amici Curiae Ass’n of Nat’l Adver., Inc. et al., *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003), No. 02-575, 2003 WL 835112, at \*1 (U.S. Feb. 28, 2003) (“This case is one of the most important free speech cases to come before this Court since *N.Y. Times Co. v. Sullivan* . . .”).

19. See Briefs of Amici Curiae, *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003) (No. 02-575). Twenty-one amici briefs were filed on behalf of Nike. They were filed by: Center for Individual Freedom; Business Roundtable; Association of National Advertising, American Advertising Federation, American Association of Advertising Agencies; Center for the Advancement of Capitalism; Forty Leading Newspapers, Magazines, Broadcasters, Wire-Services, and Media-related Professional and Trade Associations (including ABC, Inc.; CBS Broadcasting, Inc.; The New York Times Company; U.S. News & World Report, L.P.; The Washington Post Co.); American Civil Liberties Union, ACLU of Northern California; The United States of America; Mountain States Legal Foundation; Pacific Legal Foundation, California Manufacturers and Technology Association, California Chamber of Commerce, New England Legal Foundation; National Association of Manufacturers; Pfizer, Inc.; Defenders of Property Rights, International Sign Association; SRiMedia, CoreRatings; Civil Justice Association of California; Thomas Jefferson Center for the Protection of Free Expression, Media Institute; Arthur W. Page Society, Council of Public Relations Firms, Institute for Public Relations, Public Affairs Council, Public Relations Society of America; Chamber of Commerce of the United States of America; Civil Justice Association of California; Exxonmobil, Microsoft, Morgan Stanley, Glaxosmithkline; Product Liability Advisory Council, Inc.; and Washington Legal Foundation, Allied Educational Foundation. Eight briefs were filed in support of Kasky: Four Congressional Representatives (Dennis Kucinich, Bernard Sanders, Corrine Brown, Bob Filner); Campaign Legal Center; National Association of Consumer Advocates; Reclaimdemocracy.com; Global Exchange; Domini Social Investments, KLD Research & Analytics, Harrington Investments; The Attorney General of California, joined by seventeen other state Attorneys General and the Secretary of Justice of the Commonwealth of Puerto Rico; and Public Citizen Litigation Group. One brief was filed for neither side but supported Nike on the First Amendment issue: American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).

Court, itself, was so interested in the case that it gave both sides an extra five minutes for oral arguments, extending the normal sixty minutes of argument to seventy minutes.<sup>20</sup> Briefs were read, arguments were heard, and the Court did . . . nothing. On June 26, 2003, the U.S. Supreme Court announced its 6-3 decision to dismiss the writ of certiorari as “improvidently granted.”<sup>21</sup> The Court decided not to decide and sent the case back to California for further proceedings.<sup>22</sup> This non-decision sent shock waves through corporate America, public relations firms, the press, labor organizations, and the international corporate responsibility community.<sup>23</sup>

Then things got worse. Nike decided to settle, stating that it would rather spend its money on improving working conditions in its overseas factories than on legal fees.<sup>24</sup> Kasky, meanwhile, was delighted that California got to keep its new commercial speech law.<sup>25</sup>

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20. See Tony Mauro, *Justices Get Nike out of Their Hair—For Now* (March 1, 2003), available at <http://www.firstamendmentcenter.org/analysis.aspx?id=11653> (last visited Apr. 19, 2004).

21. Nike, Inc. v. Kasky, 123 S. Ct. 2554, 2554 (2003).

22. *Id.* at 2559.

23. See Theresa Howard, *Advertisers Say Ruling Leaves Them in Limbo*, USA TODAY, June 26, 2003, available at [http://www.usatoday.com/money/advertising/2003-06-26-nikeside\\_x.htm](http://www.usatoday.com/money/advertising/2003-06-26-nikeside_x.htm) (quoting Douglas Wood, general counsel to the Association of National Advertisers: “From an advertisers’ standpoint, it’s the worst of both worlds . . . . This case now says everything a business says relative to controversy, but not part of a commercial transaction, is subject to (being ruled) false and deceptive speech.”); see also Graulich, *supra* note 18 (stating that lawyers must now challenge their public relations colleagues to decide “whether the potential marketing gains of a [press] release justify the inevitable litigation risks”); Peter Clarke, *Analysis: California Supreme Court Decision Potentially Devastating for Corporate Responsibility Reporting and SRI Funds Worldwide*, ETHICAL CORPORATION ONLINE, Oct. 17, 2002, available at <http://www.ethicalcorp.com/content.asp?ContentID=242>; (“The California decision is devastating to the efforts of the media, NGO’s, [and] CSR consultancy firms . . . that encourage corporate transparency in many ways, including engagement with multi-national enterprises on corporate social responsibility issues.”); *Even Fibs: The First Amendment’s Far Reach*, STAR TRIBUNE (Minneapolis), Sept. 19, 2003, at A22 (editorializing that the danger of limiting corporate free speech as a result of the Nike decision is worth worrying about: “[W]hile some firms definitely deserve to be challenged for their behavior, they deserve as well the chance to defend themselves . . . . They can’t do so if every public pronouncement is judged to be advertising”).

24. See Press Release, Nike, Inc., *Nike, Inc. and Kasky Announce Settlement of Kasky v. Nike First Amendment Case* (Sept. 12, 2003), at <http://www.nike.com/nikebiz/news/pressrelease.jhtml?year=2003&month=09&letter=f> (last visited Apr. 19, 2004).

25. See Lisa Girion, *Nike Settles Suit over Sweatshop Statements*, STAR TRIBUNE

The concern is, indeed, that a California law thought to be not only bad, but unconstitutional,<sup>26</sup> remains alive and well. The potentially devastating impact of the law derives from the fact that the California economy is the fifth-largest economy in the world.<sup>27</sup> In a technological economy, most companies cannot do business without touching a California consumer.<sup>28</sup> And, under California law, it takes only one California consumer to press a costly and hostile lawsuit against any company inside or outside the state.<sup>29</sup>

To explore the full impact of the California and U.S. Supreme Court decisions in *Nike*, it is necessary to understand the curious transmogrification of free speech tenets in America. This note will examine the history and changes in commercial speech doctrine that have occurred during the twentieth century.<sup>30</sup> The note will then review both the California *Kasky* decision<sup>31</sup> and the U.S. Supreme Court *Nike* decision,<sup>32</sup> presenting an analysis of the ramifications of those decisions on corporate speech, public accessibility to information, and free and open debate.<sup>33</sup> Finally, the note will conclude that these judicial decisions, themselves, are improvident.<sup>34</sup> At a time when the country is striving for more reporting, more corporate disclosure, and more corporate accountability,<sup>35</sup> decisions that muzzle corporate information-

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(Minneapolis), Sept. 13, 2002, at D10 (quoting Kasky's lawyer, Patrick Coughlin: "We get to keep the California Supreme Court decision, which we think is fabulous.").

26. See *Nike*, 123 S. Ct. at 2568 (Breyer & O'Connor, JJ., dissenting) ("[I]t is . . . highly probable that, if this Court were to reach the merits, it would hold that the heightened scrutiny applies; that . . . California's delegation of enforcement authority to private attorneys general disproportionately burdens speech; and that the First Amendment consequently forbids it.").

27. See Clarke, *supra* note 23.

28. See CAL. BUS. & PROF. CODE § 17500 (2003) (adding in 1998 the phrase "including over the Internet" as a prohibited means of dissemination of false advertising to California residents).

29. See CAL. BUS. & PROF. CODE § 17204 (2003) (allowing actions to be prosecuted "upon the complaint of any board, officer, person, corporation, or association or by any person acting for the interests of itself, its members or the general public"). This is commonly known as California's "private attorney general" law. See CENTER FOR INDIVIDUAL FREEDOM, SHAKEDOWN IN "THE GOLDEN STATE," at [http://www.cff.org/htdocs/legal\\_issues/legal\\_activities/policy\\_papers/california\\_u\\_c\\_l.htm](http://www.cff.org/htdocs/legal_issues/legal_activities/policy_papers/california_u_c_l.htm) (last visited Apr. 19, 2004).

30. See *infra* Part II.

31. See *infra* Part III.

32. See *infra* Part IV.

33. See *infra* Parts V-VII.

34. See *infra* Part VIII.

35. See Sarbanes-Oxley Act of 2002, H.R. 3763, 107th Cong. (2002) (requiring

sharing through draconian restrictions on First Amendment rights of free speech clearly lack foresight.

## II. THE TRANSMOGRIFICATION OF COMMERCIAL SPEECH

Before 1942, “commercial speech” did not exist. Almost all forms of speech were thought to be protected by the First Amendment.<sup>36</sup> Commercial speech was invented by the U.S. Supreme Court in *Valentine v. Chrestensen*,<sup>37</sup> a case involving a businessman’s attempt to circumvent the New York Sanitary Code. In this case, an enterprising fellow named Valentine hauled a former U.S. Navy submarine from Florida to New York, hoping to charge admission for tours of the submarine at a city dock.<sup>38</sup> After Valentine was denied wharfage at a city pier, he docked the submarine at a state pier in the East River and distributed handbills advertising the exhibit.<sup>39</sup> Police Commissioner Chrestensen then intervened, citing prohibition under the city’s Sanitary Code of the distribution of advertising matter “in or upon any street or public place.”<sup>40</sup> Valentine was apprised, however, that he might freely distribute handbills that were devoted to “information or a public protest.”<sup>41</sup> Valentine thereupon printed a new handbill with his submarine ad on one side and a protest against his denial of a city wharfage permit on the other.<sup>42</sup> Chrestensen sued, contending that Valentine was merely attempting to circumvent the city statute.<sup>43</sup> The suit eventually made its way to the U.S. Supreme Court, which decided against Valentine.<sup>44</sup>

The question before the Court was whether the enforcement of the ordinance was an unconstitutional abridgement of freedom of the press and freedom of speech.<sup>45</sup> The Court determined that

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more transparent reporting by American corporations, greater financial disclosure, and independent audit and accounting functions).

36. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

37. *Valentine v. Chrestensen*, 316 U.S. 52, 52 (1942).

38. *Id.* at 52-53.

39. *Id.*

40. *Id.* at 53.

41. *Id.*

42. *Id.*

43. *Id.* at 54.

44. *Id.* at 55.

45. *Id.* at 54.

the ordinance could be applied against Valentine, as it was “clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.”<sup>46</sup> The Court did not explain just where or how it discovered this special category of unprotected “commercial” speech.<sup>47</sup> The Court made no mention of prior case law or of the Constitution in arriving at its determination.<sup>48</sup> Indeed, the commercial speech doctrine seemed to be “plucked out of thin air.”<sup>49</sup> Thus emerged a separate category of speech that received no constitutional protection whatsoever.<sup>50</sup>

Commercial speakers languished without First Amendment protection for more than thirty years. It was not until the landmark case of *Bigelow v. Virginia*<sup>51</sup> in 1975 that the Court restored some protection to commercial speech. The *Bigelow* Court determined that such speech was, indeed, protected by the First Amendment—although at a lesser level than non-commercial speech.<sup>52</sup> The Court held that a balancing test should be applied by courts in commercial advertising cases to assess “the First Amendment interest at stake . . . weighing it . . . against the public interest allegedly served by the regulation.”<sup>53</sup>

In 1976, the Court in *Virginia State Board of Pharmacy*<sup>54</sup> made an even stronger case for First Amendment protection of commercial speech, recognizing that a speaker’s commercial interest should not be dispositive in determining whether speech is commercial.<sup>55</sup>

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46. *Id.*

47. See *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring) (“[T]he [*Valentine*] ruling was casual, almost offhand.”).

48. *Valentine*, 316 U.S. at 52.

49. Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 627 (1990).

50. See *Cammarano*, 358 U.S. at 513-14 (Douglas, J., concurring) (describing *Valentine v. Chrestensen* as holding that “business advertisements and commercial matters did not enjoy that protection of the First Amendment, made applicable to the States by the Fourteenth”).

51. *Bigelow v. Virginia*, 421 U.S. 809, 809 (1975).

52. *Id.* at 818 (“Our cases . . . clearly establish that speech is not stripped of First Amendment protection merely because it appears [as a paid commercial advertisement] . . . . The fact that the particular advertisement . . . had commercial aspects or reflected the advertiser’s commercial interests did not negate all First Amendment guarantees.”) (citations omitted).

53. *Id.* at 826.

54. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 748 (1976) (holding that a Virginia regulation prohibiting the advertising of prescription drug prices is void and of no effect; that commercial speech is protected under the First Amendment).

55. *Id.* at 762 (stating that assuming “the advertiser’s interest is a purely

The Court noted that commercial speech should receive protection in order to promote the free marketplace of ideas, providing information to the public so that decisions may be made by an intelligent and well-informed populace.<sup>56</sup> However, the Court also created a hierarchy of protected speech by determining that commercial speech was not equivalent to political or even artistic speech.<sup>57</sup> The Court rationalized that commercial speech needs less protection than other types of speech because it is more easily verifiable by its disseminator than news reporting or political commentary; that it is more durable than other kinds of speech due to commercial companies' dependence on advertising to reap profits; and that commercial speech, therefore, is less likely to be "chilled" by proper regulation than other types of speech.<sup>58</sup>

By this time, the *Valentine* decision had been virtually abandoned. Even Justice Douglas, who sat on the *Valentine* Court and concurred in that opinion, agreed that the ruling had "not survived reflection."<sup>59</sup> Commercial speech was clearly to be protected. However, it was not so easily defined.

In 1973, the Court in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*<sup>60</sup> defined commercial speech as speech that does "no more than propose a commercial transaction."<sup>61</sup> In 1980, the *Central Hudson Gas & Electric, Corp. v. Public Service Commission of New York*<sup>62</sup> Court determined that commercial speech was "expression related solely to the economic interests of the speaker and its audience."<sup>63</sup> In 1983, the *Bolger v. Youngs Drug Products Corp.*<sup>64</sup> Court developed a test establishing three elements, at least

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economic one," the economic interest "hardly disqualifies him from protection under the First Amendment").

56. *Id.* at 765.

57. *See id.* at 772.

58. *See id.*

59. *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

60. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

61. *Id.* at 385.

62. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) (holding that "promotional advertising of electricity might contribute to society's interest in informed and reliable economic decisionmaking" and that "the governmental interest in the prohibition [did not] outweigh[] the . . . constitutional value of the commercial speech at issue").

63. *Id.*

64. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (holding that a statute prohibiting the mailing of unsolicited advertisement for contraceptives

two of which needed to be present to support a finding of commercial speech: the speech (1) must be in the form of an advertisement, (2) must refer to a specific product, and (3) must show that the speaker has an economic motivation.<sup>65</sup> The *Pittsburgh Press*, *Central Hudson*, and *Bolger* definitions of commercial speech continued to exist concurrently until *Nike*, creating confusion and eliciting requests for one clear, workable definition of commercial speech.<sup>66</sup>

In addition to the confusion over the definition of commercial speech, the issue of government regulation was also a cause for concern as the commercial speech doctrine evolved. Content-based regulation of noncommercial speech was generally thought to be valid under the First Amendment only if it could withstand strict scrutiny; that is, the law required that the regulation be narrowly tailored to use only the least restrictive means possible to promote or compel the government's interest in restricting the speech.<sup>67</sup> However, there was no established law regarding government regulation of commercial speech until the *Central Hudson* ruling in 1980.<sup>68</sup>

In *Central Hudson*, the Court articulated an intermediate scrutiny test for commercial speech by establishing a four-part analysis.<sup>69</sup> Under *Central Hudson*, the first step in the analysis was to determine whether the speech concerned lawful activity and was not misleading.<sup>70</sup> If the commercial speech did not pass this preliminary threshold, then it was not protected by the First Amendment.<sup>71</sup> If the commercial expression did pass the

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violates the First Amendment).

65. *Id.* at 66-68.

66. See Brief of Amicus Curiae Chamber of Commerce of the United States of America, *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003) (No. 02-575), 2003 WL 835350, at \*2 (U.S. Feb. 28, 2003) ("For many years, the Court has sent conflicting signals on the definition of 'commercial speech' and has allowed the lower courts to take divergent approaches on this issue."); see also *id.* at \*3 (noting that the Court's "authoritative guidance on the definition of 'commercial speech' is much needed . . .") see also Fisher, *supra* note 15, at 30 (stating that the Court should finally "issue a clear definition of commercial speech").

67. See *Kasky v. Nike, Inc.*, 45 P.3d 243, 251 (Cal. 2002) (citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, (2000); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 540 (1980)).

68. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

69. *Id.* at 566.

70. *Id.*

71. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 434 (1993)

preliminary threshold, then the government was required to show (1) that the asserted governmental interest in regulating the expression was “substantial,” (2) that the regulation at issue directly advanced that interest, and (3) that the regulation was not more extensive than necessary to serve that interest.<sup>72</sup> Although meant to clarify the commercial speech doctrine, the result of the *Central Hudson* decision was to generate even more confusion and commentary regarding just what types of regulation the four-part test permitted.<sup>73</sup>

The last part of the *Central Hudson* test—requiring that the regulation imposed be no more extensive than necessary to serve the governmental interest—was clarified by *Board of Trustees of State University of New York v. Fox*<sup>74</sup> in 1989. The *Fox* Court determined that the intermediate scrutiny test does not require the least restrictive means of enforcement, but only a “reasonable fit” between the government’s purpose and the means chosen to achieve it.<sup>75</sup>

Throughout this transmutation of the commercial speech doctrine, there were signs of uneasiness on the Court. Justice Stevens expressed his concern in a separate concurring opinion in *Bolger* that the Court was creating the impression that commercial speech “is a fairly definite category of communication that is

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(Blackmun, J., concurring).

72. See *Cent. Hudson*, 447 U.S. at 566.

73. See Kozinski & Banner, *supra* note 49, at 631 (“[E]ver since [*Central Hudson*], judges and Justices have filled quite a bit of space . . . trying to figure out precisely what forms of regulation the four-part test permits . . . . Unless a case has facts very much like those of a prior case, it is nearly impossible to predict the winner.”); see also Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 34 (2000) (noting that the *Central Hudson* test “has subsequently been interpreted from radically different perspectives, and although it has been attacked by numerous justices, it has nevertheless remained the dominant test” (citations omitted)). See also *id.* at 1 (noting that the test is “abstract and unhelpful, because it does not reflect any particular account of the constitutional function of commercial speech”).

74. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989) (declining to impose a “least-restrictive means” requirement on government regulation of commercial speech; requiring the state to affirmatively establish a “reasonable fit”).

75. *Id.* at 480 (stating that the Court requires a “fit” between “the legislature’s ends and the means chosen to accomplish those ends.” The fit does not have to be “perfect,” but “reasonable.” It should represent “not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served.’” It need not employ the least restrictive means but a means “narrowly tailored to achieve the desired objective” (citations omitted)).

protected by a fairly definite set of rules that differ from those protecting other categories of speech.”<sup>76</sup> Moreover, Justice Stevens expressed his concern that the establishment of “rigid classifications” might inadvertently suppress speech entitled to constitutional protection.<sup>77</sup> Then, anticipating the next topic of debate in commercial speech evolution, Justice Stevens broached the issue of mixed speech, noting that “advertisements may be complex mixtures of commercial and noncommercial elements . . . .”<sup>78</sup>

The issue of mixed speech was considered by the Court in *Riley v. National Federation of the Blind of North Carolina, Inc.*<sup>79</sup> and *Fox*<sup>80</sup> in 1988 and 1989, respectively. The essence of the two cases was that the Court did not believe that speech retains its commercial character when the commercial speech is “inextricably intertwined with otherwise fully protected speech.”<sup>81</sup> To determine the degree of scrutiny to be applied, the nature of the speech taken as a whole must be considered, without parceling out the speech and applying one test to one phrase and another test to another.<sup>82</sup> Therefore, in cases of inextricably intertwined speech, the speech is considered to be noncommercial and the Court will apply the test for fully protected speech.<sup>83</sup>

Recent commercial speech decisions have found members of the Court questioning the efficacy of trying to separate commercial from noncommercial speech, as well as the validity of the distinction itself.<sup>84</sup> Through its long and difficult history, the

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76. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 81 (1983) (Stevens, J., concurring).

77. *Id.*

78. *Id.*

79. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 784 (1988) (holding that statutory fee limitations, disclosures, and licenses for professional fundraisers unconstitutionally infringed upon freedom of speech).

80. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989) (holding that governmental restrictions upon commercial speech need not be the absolute least restrictive means to achieve the desired end).

81. *See Riley*, 487 U.S. at 796.

82. *Id.*

83. *Id.*

84. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 520 (1996) (Thomas, J., concurring) (noting “the near impossibility of severing ‘commercial’ speech from speech necessary to democratic decisionmaking”); *see also United Reporting Publ'g Corp. v. Cal. Highway Patrol*, 146 F.3d 1133, 1136 (9th Cir. 1998) (citing Thomas’ concurring opinion in *Liquormart* and stating that “[t]he current debate centers not on whether commercial speech is a form of expression entitled to constitutional protection, but on the validity of the distinction between

evolution of commercial speech has been a contentious undertaking, viewed by some as the most divisive realm of First Amendment law.<sup>85</sup> Consequently, legal scholars eagerly anticipated the resolution of the *Nike* case in 2003, hoping that the Court would bring some long-sought clarity to the commercial speech doctrine.

### III. THE CALIFORNIA CASE: *KASKY V. NIKE, INC.*

The underlying suit in the *Nike* case was brought as a result of Nike's response to a series of allegations that it was mistreating and underpaying workers in foreign facilities. As part of a worldwide campaign against economic globalization, Nike was targeted by a group of non-governmental organizations (NGOs)<sup>86</sup> in a broad and noisy protest against Nike's overseas labor practices.<sup>87</sup> The NGOs capitalized on a series of reports presented by Vietnam Labor Watch, which conducted interviews with thirty-five of Nike's 300,000 to 500,000 workers employed in Asian factories; and the Hong Kong Christian Industrial Committee, which studied several Chinese factories, three of which were used by Nike.<sup>88</sup> These reports were picked up by American media, resulting in widespread public scrutiny and culminating in a series of eight articles in *The New York Times* during 1996 and 1997, as well as a critical report on

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commercial and noncommercial speech"); *see also* *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (Stevens, J., writing for the majority, joined by O'Connor, J., Scalia, J., Kennedy, J., and Souter, J.) ("This very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category.").

85. *See* Post, *supra* note 73, at 2.

86. *See* BOYCOTT NIKE, at <http://www.saigon.com/~nike/index.html> (last visited Apr. 19, 2004) (listing Nike protest organizations as: Press for Change, the National Labor Committee, Global Exchange, Campaign for Labor Rights, National Organization of Women, Clean Clothes Campaign, Community Aid Abroad, The Living Wage Project, Justice Do It Nike, and several other NGOs). *See also* *Living with the Enemy*, THE ECONOMIST (Aug. 7, 2003), available at [http://www.economist.com/business/displayStory.cfm?story\\_id=1975902](http://www.economist.com/business/displayStory.cfm?story_id=1975902) (last visited Apr. 19, 2004) ("NGOs are increasingly pursuing their campaigns within America's notoriously plaintiff-friendly legal system, with its potential for huge payouts.").

87. *See* *Sweatshops*, GLOBAL EXCHANGE, at <http://www.globalexchange.org/campaigns/sweatshops/nike/faq.html> (last visited Apr. 19, 2004) (asking, "Why pick on Nike, if other shoe companies are just as bad?" and answering, "Nike is the biggest shoe company in the world and puts itself forth as an industry leader . . . . By targeting the industry leader, we hoped to make changes throughout the whole industry").

88. *See* *Kasky v. Nike, Inc.*, 93 Cal. Rptr. 2d 854, 856 (Ct. App. 2000).

the CBS television show *48 Hours*.<sup>89</sup> Additionally, NGO websites posted information designed to encourage students to conduct anti-Nike campaigns on their college campuses, to pass city resolutions against Nike, to conduct letters-to-the-editor campaigns, and to engage in Nike boycotts.<sup>90</sup>

None of the allegations against Nike referred to Nike's products.<sup>91</sup> Rather, the charges were that Nike "was an immoral company, generating great profits on the backs of Third World Labor."<sup>92</sup> The charges of moral irresponsibility were coupled with demands for consumer boycotts and legislative action against Nike.<sup>93</sup>

Nike responded to the public outcry with its own public relations campaign.<sup>94</sup> The company commissioned former United Nations Ambassador Andrew Young to conduct an independent review of its overseas operations and issued a number of press releases responding to the sweatshop allegations.<sup>95</sup> The press releases denied exploitation of underage workers, outlined the company's code of conduct, and responded to charges regarding its labor practices with detailed information and footnoted sources.<sup>96</sup> Nike also sent a letter to the presidents and athletic directors of colleges sponsoring Nike products, defending its labor practices.<sup>97</sup> Additionally, Nike officials sent a letter to the editor of

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89. *Id.* at 856-57.

90. *See Campaign Starter Kit*, Global Exchange, at <http://www.globalexchange.org/campaigns/sweatshops/nike/actnow.html.pf> (last visited Apr. 19, 2004).

91. Brief for Petitioner, *Nike, Inc. v. Kasky* (No. 02-575) 2003 WL 898993 at \*2.

92. *Id.*

93. *Id.*

94. *See Kasky v. Nike, Inc.*, 93 Cal. Rptr. 2d 854, 857 (2000).

95. *Id.* at 856.

96. *Id.* at 857.

97. *Id.* *See also* Tony Mauro, *High Court Appears Ready to Side with Nike in Free-Speech Dispute*, First Amendment Topics (Apr. 24, 2003), at <http://www.firstamendmentcenter.org/analysis.aspx?id=11384&SearchString=kasky> (last visited Apr. 19, 2004) (indicating that this letter, directed to athletic directors who may purchase Nike products, was later referred to in the U.S. Supreme Court oral arguments as the document that came the closest to commercial speech). *See Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2570-71 (2003) for the text of the letter:

June 18, 1996

Dear President and Director of Athletics,

As most of you have probably read, heard, or seen, NIKE, Inc. has recently come under attack from the Made in the USA Foundation and other labor organizers, who claim that child labor is used in the production of its goods. While you may also be aware that NIKE has

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*The New York Times* in response to its series of critical articles.<sup>98</sup>

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gone on the record to categorically deny these allegations as completely false and irresponsible, I would like to extend the courtesy of providing you with many of the facts that have been absent from the media discourse on this issue. I hope you will find this information useful in discussions with faculty and students who may be equally disturbed by these charges.

First and foremost, wherever NIKE operates around the globe, it is guided by principles set forth in a code of conduct that holds its production subcontractors to a signed Memorandum of Understanding. This Memorandum strictly prohibits child labor, and certifies compliance with applicable government regulations regarding minimum wage and overtime, as well as occupational health and safety, environmental regulations, worker insurance and equal opportunity provisions.

NIKE enforces its standards through daily observation by staff members who are responsible for monitoring adherence to the Memorandum. NIKE currently employs approximately 800 staff members in Asia alone to oversee operations. Every NIKE subcontractor knows that the enforcement of the Memorandum includes systematic, unannounced evaluation by third-party auditors. These thorough reviews include interviews with workers, examination of safety equipment and procedures, review of free health-care facilities, investigation of worker grievances and audits of payroll records.

Furthermore, over the past 20 years we have established long-term relationships with select subcontractors, and we believe that our sense of corporate responsibility has influenced the way they conduct their business. After all, it is incumbent upon leaders like NIKE to ensure that these violations do not occur in our subcontractor's [sic] factories.

We have found over the years that, given the vast area of our operations and the difficulty of policing such a network, some violations occur. However, we have been proud that in all material respects the code of conduct is complied with. The code is not just word. We live by it. NIKE is proud of its contribution in helping to build economies, provide skills, and create a brighter future for millions of workers around the world.

As a former Director of Athletics, and currently the Director of Sports Marketing at NIKE, I am indeed sensitive to these issues. I would be more than happy to make myself available to either discuss these issues and/or receive any opinions or insights you may have. We are committed to the world of sports and all that it stands for. I remain at your disposal.

Kindest regards,  
Steve Miller  
Director  
NIKE Sports Marketing

*Id.*

98. See *Kasky*, 93 Cal. Rptr. 2d at 857. See also *The Associated Press, Supreme Court Punts Commercial-Speech Case*, First Amendment Topics (June 26, 2003), at <http://www.firstamendmentcenter.org/news.aspx?id=11648> (last visited Apr. 19,

Enter Marc Kasky, a San Francisco community activist,<sup>99</sup> who had read about Nike's labor practices and decided to file a lawsuit against Nike under California's Unfair Competition and False Advertising Laws.<sup>100</sup> Kasky obtained the support of a "powerhouse" law firm reputed to fuel its success by "filing lawsuits against multinational corporations and receiving massive fees out of any settlements or judgments."<sup>101</sup> Kasky was able to file the suit on behalf of the general public of the State of California<sup>102</sup> as a private citizen alleging "no harm or damages whatsoever regarding himself individually"<sup>103</sup> under California's unique private attorney general law.<sup>104</sup> Unlike other states, where the state's elected Attorney General must file similar complaints, California allows any citizen under section 17204 of its Unfair Competition Law (UCL) to file a complaint in the interest of the general public.<sup>105</sup>

In his complaint, Kasky contended that Nike had made "misrepresentations by the use of false statements and/or material omissions of fact," in seven specific statements contained in its "ubiquitous and successful promotional scheme."<sup>106</sup> Kasky sought, among other things, (a) an injunction ordering Nike to disgorge all monies earned through any unlawful and/or unfair business practice, (b) an order for Nike to undertake a court-approved public information campaign to correct any misleading or deceitful statements, and (c) attorneys' fees and costs.<sup>107</sup>

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2004) (indicating that Nike sent a letter to the editor of *The New York Times*, submitted press releases, and posted information on its corporate Web site).

99. See *NIKE Sued Over Sweatshop Conditions*, SweatshopWatch.Org (Apr. 20, 1998) at [http://sweatshopwatch.org/swatch/headlines/1998/nikesued\\_apr98.html](http://sweatshopwatch.org/swatch/headlines/1998/nikesued_apr98.html) (last visited Apr. 19, 2004) (stating that Kasky was a high-profile activist, fresh from a settlement in the lawsuit that outlawed Joe Camel).

100. See Clarke, *supra* note 23.

101. *Id.*

102. Kasky v. Nike, Inc., Complaint for Statutory, Equitable and Injunctive Relief (Apr. 20, 1998), available at <http://www.corpwatch.org/issues/PRT.jsp?articleid=3448> (last visited Apr. 19, 2004).

103. *Id.*

104. See CAL. BUS. & PROF. CODE § 17204 (2003).

105. *Id.* See also Mauro, *supra* note 97 ("California consumer-protection laws allow 'unelected, unaccountable private enforcers' to sue companies at random . . . [A]nyone with a whim or grievance against a company could become a 'government-licensed censor.'") (quoting Solicitor General Theodore Olson, arguing before the U.S. Supreme Court on Nike's behalf).

106. Kasky v. Nike, Inc., Complaint for Statutory, Equitable and Injunctive Relief (Apr. 20, 1998), available at <http://www.corpwatch.org/issues/PRT.jsp?articleid=3448> (last visited Apr. 20, 2004).

107. *Id.*

The California trial court dismissed the suit, agreeing with Nike's demurrer to the complaint contending that the suit was absolutely barred by the First Amendment.<sup>108</sup> The appeals court agreed, stating that "the case at bar lies in familiar First Amendment territory—public dialogue on a matter of public concern. Though drafted in terms of commercial speech, the complaint in fact seeks judicial intervention in a public debate."<sup>109</sup> The appeals court concluded that Nike's press releases and letters were part of a public dialogue on a matter of public concern "within the core area of expression protected by the First Amendment."<sup>110</sup>

On appeal, the California Supreme Court, in a 4-3 decision, reversed the lower courts, holding that Nike's messages were "directed by a commercial speaker to a commercial audience" and "made representations of fact about the speaker's own business operations for the purposes of promoting sales of its products."<sup>111</sup> The messages therefore were "commercial speech for purposes of applying state laws barring false and misleading commercial messages."<sup>112</sup> The California Supreme Court then sent the case back to the lower courts to determine if, in fact, any of Nike's statements was false or misleading.<sup>113</sup>

Three justices dissented, with Justices Chin and Brown providing lengthy and vigorous rejections of the majority opinion.<sup>114</sup> Both justices (and Justice Baxter, concurring with Justice Chin) concluded that Nike's press releases, letters to the

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108. See *Kasky v. Nike, Inc.*, 93 Cal. Rptr. 2d 854, 857 (2000) (stating that the trial court "regarded the constitutional distinction between commercial and noncommercial speech to be dispositive").

109. *Id.* at 860. The appeals court went on to say:

Nike exemplifies the perceived evils or benefits of labor practices associated with the processes of economic globalization . . . . Nike's strong corporate image . . . places its labor practices in the context of a broader debate about the social implications of employing low-cost foreign labor for manufacturing functions once performed by domestic workers. We take judicial notice that this debate has given rise to urgent calls for action ranging from international labor standards to consumer boycotts. Information about the labor practices at Nike's overseas plants thus constitutes data relevant to a controversy of great public interest in our times.

*Id.* at 861.

110. *Id.* at 863.

111. *Kasky v. Nike, Inc.*, 45 P.3d 243, 247 (Cal. 2002).

112. *Id.*

113. *Id.* at 262-63.

114. *Id.* at 263-80.

editor, and other communications concerning the attacks on its labor practices were not commercial speech and were deserving of full First Amendment protection.<sup>115</sup> Justice Chin also noted the inequitable playing field created by the California ruling, concluding that “[h]andicapping one side in the important worldwide debate is both ill considered and unconstitutional.”<sup>116</sup>

Justice Brown concluded that the commercial elements in Nike’s statements were “inextricably intertwined” with its noncommercial elements.<sup>117</sup> She criticized the U.S. Supreme Court’s inability to define the elements of commercial speech,<sup>118</sup> contending that “the commercial speech doctrine, in its current form, fails to account for the realities of the modern world—a world in which personal, political, and commercial arenas no longer have sharply defined boundaries.”<sup>119</sup> Justice Brown then called on the high court to develop “a more nuanced approach that maximizes the ability of businesses to participate in the public debate while minimizing consumer fraud.”<sup>120</sup>

Nike filed a writ of certiorari with the U.S. Supreme Court, requesting that the Court hear the case without further intervening proceedings. The two questions to be decided were (a) whether the speech of a corporation participating in a public debate could be properly characterized as commercial speech, and (b) whether the First Amendment, as applied to the states through the Fourteenth Amendment, permitted speakers to be subjected to the “legal regime” in California which allows any unharmed, private citizen to sue on behalf of the general public.<sup>121</sup>

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115. *Id.*

116. *Id.* at 263. Justice Chin also noted:

Various persons and organizations have accused Nike of engaging in despicable practices, which they have described sometimes with such caustic and scathing words as “slavery” and “sweatshop.” Nike’s critics and these accusations receive full First Amendment protection . . . . When Nike tries to defend itself from these attacks, the majority denies it the same First Amendment protection Nike’s critics enjoy. Why is this, according to the majority? Because Nike competes not only in the marketplace of ideas, but also in the marketplace of manufactured goods.

*Id.*

117. *Id.* at 269.

118. *Id.* at 268-69.

119. *Id.* at 269.

120. *Id.* at 270.

121. *See Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2555 (2003).

IV. THE U.S. SUPREME COURT CASE: *NIKE, INC. V. KASKY*

The U.S. Supreme Court did not answer the questions presented to it in the writ, nor did it decide the *Nike* case on its merits. Instead, the Court dismissed the case on procedural grounds, issuing an unsigned one-sentence statement: “The writ of certiorari is dismissed as improvidently granted.”<sup>122</sup> Although such procedural dismissal is not uncommon—the same statement has been used to dismiss cases accepted upon a writ of certiorari approximately seventy-five times since 1945<sup>123</sup>—the Court’s decision surprised commentators attending the oral arguments, who felt that Nike had won.<sup>124</sup>

Also surprising was the fact that lengthy opinions were issued on both sides of the controversy.<sup>125</sup> Justices Stevens, Ginsburg, and Souter wrote that the case was not properly before the Court and that dismissal was therefore warranted.<sup>126</sup> Justices Breyer, O’Connor, and Kennedy wrote in dissent, stating that the Court should have rendered a decision on the merits.<sup>127</sup> The three remaining Justices remained silent but joined in the decision to dismiss.

Justice Stevens (joined by Justices Ginsburg and Souter) determined that the Court had three valid reasons for its decision to dismiss the writ: (1) the judgment entered by the California Supreme Court was not final within the meaning of 28 U.S.C. section 1257; (2) neither party had standing in federal court; and (3) the Court was averse to “premature adjudication of novel constitutional questions.”<sup>128</sup>

Justice Breyer (joined by Justice O’Connor) disagreed regarding all three reasons for dismissal, asserting the existence of

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122. *Id.* at 2554.

123. See Westlaw Search for Supreme Court cases after 1944: “writ of certiorari is dismissed as improvidently granted.”

124. See Mauro, *supra* note 97 (“At the end of 70 minutes of oral argument yesterday, the Supreme Court appeared ready to agree that under the First Amendment, Nike should not be subjected to a lawsuit by California activist Marc Kasky . . .”). See also *id.* (quoting First Amendment Center scholar Ronald Collins as saying “[i]f they get through the jurisdictional thicket, I think Nike wins”).

125. Of the last twenty cases dismissed because the “writ of certiorari was improvidently granted,” only five cases, including *Nike*, have included a written opinion. The other fifteen cases provided no reasoning for the Court’s decision and no opinion.

126. *Nike*, 123 S. Ct. at 2554.

127. *Id.* at 2559.

128. See *id.* at 2555.

a clear constitutional issue that demanded resolution.<sup>129</sup> Further, the dissenting judges contended that the Court's delay in issuing a decision on the underlying free speech issues would impose a serious burden upon speech<sup>130</sup> and would "limit the supply of relevant information available to those, such as journalists, who seek to keep the public informed about important public issues."<sup>131</sup>

In the dissent, Justice Breyer also opined that the communications at issue, as in *Riley*, were best characterized as a mixture of commercial and noncommercial speech.<sup>132</sup> He focused particularly on Nike's letter to university presidents and athletic directors<sup>133</sup> as containing several commercial elements, thereby serving as the Nike document least likely to warrant protection.<sup>134</sup> However, Justice Breyer noted, the letter also contained substantial noncommercial characteristics: it appeared outside a traditional advertising format, it did not propose the sale of a product or any other commercial transaction, and on its face it sought to provide information to a "diverse audience" regarding the public controversy surrounding Nike.<sup>135</sup> As these noncommercial characteristics were "inextricably intertwined" with the commercial characteristics, the speech did not represent core commercial speech and should be afforded full First Amendment protection.<sup>136</sup>

Further, Justice Breyer concluded that the regulatory regime in California—involving the use of private attorneys general to press false advertising lawsuits—could not survive heightened scrutiny in the matter.<sup>137</sup> The Justice noted that "there is no

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129. *See id.* at 2562 ("No federal statute prevents us from hearing this case . . . . [T]his Court has interpreted the . . . phrase 'final judgment' to refer . . . to a state court's final determination of a federal issue, even if the determination of that issue occurs in the midst of ongoing litigation."); *see also id.* at 2563 (stating that "[t]he California Supreme Court [has] 'finally decided' the federal issue—whether the First Amendment protects the speech in question from legal attack on the ground that it is 'false or misleading'").

130. *Id.* at 2560 (noting that the issues in question "directly concern the freedom of Americans to speak about public matters in public debate," that "no jurisdictional rule prevents us from deciding those questions now," and that "delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on").

131. *Id.* at 2568.

132. *See id.* at 2565.

133. *See* text of letter, *supra* note 97.

134. *See Nike*, 123 S. Ct. at 2565.

135. *Id.* at 2565-66.

136. *See id.*

137. *See id.* at 2566.

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reasonable 'fit' between the burden it imposes upon speech and the important governmental 'interest served.'<sup>138</sup> "The delegation of state authority to private individuals authorizes a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of political battle better waged in other forums."<sup>139</sup>

Justice Breyer concluded that it was likely, if not highly probable, that if the Court were to reach a decision on the merits of the *Nike* case, it would hold that California's delegation of enforcement authority to private attorneys general is unconstitutional under the First Amendment.<sup>140</sup> Additionally, Justice Breyer speculated that reversal of the California Supreme Court on the federal issue of commercial speech would be a serious possibility.<sup>141</sup>

After the case was dismissed and sent back to California for further proceedings, the parties decided to settle out of court.<sup>142</sup> In the settlement, Nike agreed to contribute \$1.5 million to the Fair Labor Association,<sup>143</sup> a consortium of companies, universities, and NGOs promoting respect for labor rights.<sup>144</sup> Nike also agreed to maintain its existing funding at a minimum of \$500,000 over the next two years to continue its after-hours worker education programs and micro-loan programs.<sup>145</sup> The law firm representing Kasky received substantial fees for its services, and Kasky retained the ability to individually sue other corporations in California as a private attorney general under California's new commercial speech

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138. *Id.*

139. *Id.* at 2567. Justice Breyer added that when a political battle is being fought, "such plaintiffs potentially constitute a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks that tend to keep the energies of public enforcement agencies focused upon more purely economic harm." *Id.*

140. *See id.* at 2568.

141. *See id.*

142. *See Nike, Inc. and Kasky Announce Settlement of Kasky v. Nike First Amendment Case, supra* note 24.

143. *Id.*

144. *See About Us*, FAIR LABOR ASSOCIATION, at <http://www.fairlabor.org/all/about/index.html> (last visited Apr. 19, 2004) (noting that there are currently thirteen leading brand-name participants in the coalition: Adidas-Salomon, Eddie Bauer, GEAR for Sports, Gildan Activewear, Liz Claiborne, New Era Cap, Nordstrom, Nike, Patagonia, Puma, Reebok, Phillips-Van Heusen, and Zephyr Graf-X).

145. *See Nike, Inc. and Kasky Announce Settlement of Kasky v. Nike First Amendment Case, supra* note 24.

law.<sup>146</sup>

## V. ANALYSIS: OPPORTUNITY LOST

By dismissing *Nike*, the Court lost its opportunity to review and potentially overturn the California commercial speech ruling. It also lost the opportunity to declare the California private attorney general law unconstitutional. Perhaps most importantly, the Court lost its opportunity to clarify and refine the country's perplexing commercial speech doctrine.

### A. *The California Commercial Speech "Limited Purpose Test"*

Noting that the U.S. Supreme Court had not adopted an "all-purpose" test to distinguish commercial from noncommercial speech, the California Supreme Court decided to create its own test.<sup>147</sup> The court referred to its new test as a "limited purpose test" to be used "when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception."<sup>148</sup> The court took the *Bolger* test and fashioned it to fit its own needs. Whereas *Bolger* required that the speech in question must be in the form of an advertisement, referring to a specific product, and showing that the speaker has an economic motivation, the new *Kasky* test eliminated the advertising format requirement, added the element of the speaker's identity, and broadened the definition of products or services.<sup>149</sup> The resulting three elements became the *Kasky* "limited purpose test" for commercial speech: (1) There must be a speaker engaged in commerce, speaking to (2) an intended audience of actual or potential buyers or customers or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers, stating (3) a commercial message representing facts about the business operations, products, or services of the speaker, made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services.<sup>150</sup>

Under the *Kasky* test, product references are deemed to

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146. See Girion, *supra* note 25, at D10.

147. See *Kasky v. Nike, Inc.*, 45 P.3d 243, 256 (Cal. 2002).

148. *Id.*

149. See *id.* at 311-12.

150. See *id.*

include not only statements about price, quality, or availability of products, but “statements about the manner in which the products are manufactured, distributed, or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manufacture, distribute, sell, service, or endorse the product.”<sup>151</sup> References to services would include not only statements about the price, availability, and quality of the services, but also “statements about the education, experience, and qualifications of the persons providing or endorsing the services.”<sup>152</sup>

This broad definition was necessary, according to the *Kasky* court, to protect consumers from the modern image campaigns, which have become a popular vehicle for promoting products and services.<sup>153</sup> However, as the speech in question did not meet the requirements of any of the three existing Supreme Court commercial speech tests, it is clear that the California court could not find for *Kasky* without creating a new definition of commercial speech. Certainly, Nike’s speech did more than “propose a commercial transaction” (*Pittsburgh Press*). It was not speech “related solely to the economic interests of the speaker and its audience” (*Central Hudson*), and it was not in the form of an advertisement, nor did it refer to a specific product (*Bolger*). Consequently, the California court could not overturn the lower court rulings without devising a new test that cast a much wider net.

The problem, of course, is that the new *Kasky* definition of commercial speech is so broad that virtually any statement made by a corporation will fall under it. Every business is engaged in commerce in some fashion, so every company meets the first requirement. Under *Kasky*, press releases, newspaper editorials, websites, and other forms of communication with the general public are deemed to reach prospective buyers, so all communications released by a business—no matter how general in nature—seem to satisfy *Kasky*’s second requirement. In terms of commercial content, it is easily argued that everything a company does or says is ultimately geared to selling products or services and producing revenue for the company. All corporate speech is designed to promote profitability and therefore can be construed to satisfy the third requirement of the *Kasky* limited purpose

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151. *Id.* at 312.

152. *Id.*

153. *See id.* at 312-13.

commercial speech test. Thus, under *Kasky*, no corporate speaker can escape the limited purpose test in any of its public utterances.

In casting its wide net in a “limited” manner, the California court not only expanded its own prior definition of commercial speech, but it precluded consideration of Supreme Court cases that directly conflict with the *Kasky* result. Previously, the court had defined commercial speech as speech “which has but one purpose—to *advance an economic transaction*.”<sup>154</sup> In deciding *Kasky*, the court disapproved that definition as “ill-considered.”<sup>155</sup> Further, the court was able to circumvent *Riley*, the seminal case pertaining to intermingled speech, as being outside of its own limited purpose definition. In refusing to apply *Riley*, the court noted that the *Riley* decision “concerned regulation of charitable solicitations, a category of speech that does not fit within our limited-purpose definition of commercial speech . . . .”<sup>156</sup> It would appear, then, that the California court purposely fashioned its new definition, at least in part, to allow it to reach its desired outcome.

The broadness of the *Kasky* “limited purpose test,” alone, is very problematic as it relates to First Amendment protections. Because the Court also failed to follow precedential Supreme Court doctrine and chose to create an unlevel playing field for public debate, the result in *Kasky* does not appear to be viable under the First Amendment.

#### B. *The California Private Attorney General Law*

Perhaps even more troubling is the matter of California’s Unfair Competition Law (UCL), also known as the “private, attorney general” law.<sup>157</sup> Justice Breyer made it clear in his dissent in *Nike* that using the private attorney general law to press false advertising lawsuits could not withstand heightened scrutiny, as there is no “reasonable fit” between the government interest served by the regulation and the burden it imposes upon speech.<sup>158</sup>

The Civil Justice Association of California (CJAC) posed an even broader challenge to the UCL in its *Nike* amicus brief.<sup>159</sup> The

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154. *See id.* at 261.

155. *Id.*

156. *See id.* at 260.

157. *See* CAL. BUS. & PROF. CODE § 17204 (allowing actions to be prosecuted upon complaint by any person acting for the interests of the general public).

158. *See Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2566 (2003).

159. Brief of Amici Curiae Civil Justice Association of California, *Nike v. Kasky*,

CJAC maintained that the UCL violates a number of other constitutional rights beyond the First Amendment. Specifically, the CJAC explained that the UCL violates due process because it fails to provide adequate notice of prohibited conduct.<sup>160</sup> It also violates due process by allowing defendants to be subjected to repeated lawsuits for the same conduct.<sup>161</sup> Additionally, the UCL impermissibly delegates governmental power to private persons,<sup>162</sup> allowing any unelected, unaccountable person to prosecute independent of the Attorney General or District Attorney. Further, the UCL permits private persons to sue on federal issues even if the federal statute does not allow for private suits, raising a clear issue regarding separation of powers.<sup>163</sup> The UCL also impermissibly imposes its own state law on other states, allowing California to sue parties “extraterritorially” under the UCL for acts that are not illegal in the states where the conduct occurs.<sup>164</sup> Given the multitude of potential constitutional violations accorded to the UCL, it seems quite remarkable that the law has managed to survive in California for the past sixty years.

The CJAC also appended to its brief a chart detailing the reasons why Kasky’s claim would fail under the unfair trade practice and/or false advertising laws currently in place in every other state.<sup>165</sup> The most prominent reason for failure is “no injury” or “no likelihood of injury.”<sup>166</sup> Other reasons for failing to meet

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123 S. Ct. 2554 (2003) (No. 02-575), 2003 WL 835411 (U.S. Feb. 28, 2003).

160. *Id.* at \*11-17 (“[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . .”) (citing *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966)).

161. *See id.* at \*18-21 (“The UCL creates an impermissible risk of repetitive punishment because there is no finality to that litigation. A suit by one plaintiff does not prevent another self-appointed ‘private attorney general’ from suing the same defendant on precisely the same theory.”).

162. *See id.* at \*21-26 (noting that, while states are ordinarily free to determine their own standing rules, the UCL “obliterates any semblance of a standing requirement—[and] it turns over the machinery of state government to politically unaccountable private plaintiffs acting as bounty hunters”).

163. *See id.* at \*24 (noting that the UCL also undermines the powers of the Executive regarding enforcement of federal law, thus violating Article II, Section 3 of the U.S. Constitution) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992)).

164. *See id.* at \*26-30 (noting that the UCL extends California law to cover “nationwide business conduct”; it authorizes California courts to “punish conduct or speech that offends the UCL’s vague provisions no matter where it occurs”).

165. *Id.* at \*30.

166. *See id.*

state requirements are: no private cause of action, no product reference, not a victim, not an actual/potential consumer, no purchase, no ascertainable loss of money or property, no reliance, representative capacity not allowed, not material, enforcement only allowed by Attorney General, no remedy available other than actual damages, no prior notice, no causal connection.<sup>167</sup>

Under this analysis, the *Kasky* suit could not have prevailed in any state other than California. Although that fact alone does not make the California law bad law, it does give a whole new spin to the “caveat emptor” maxim: Buyers and sellers, alike, must “beware” when doing business in California.

Given the plethora of constitutional issues raised by commentators, friends of the Court, and the Supreme Court, itself, it seems unlikely that the UCL would survive a constitutional challenge if the issue were decided on the merits.

### C. *The Perplexing Commercial Speech Doctrine*

In attempting to make sense of the current commercial speech doctrine, three particular areas of discussion are of interest: (1) reasons for the distinction between commercial and noncommercial speech, (2) changes in the world of communication and advertising since 1942, and (3) the public’s right to receive information.

#### 1. *Why Is There a Separate Commercial Speech Doctrine?*

Because the *Valentine* Court provided no reasoned support or justification for the commercial speech doctrine at the time of its creation, successors have been challenged to make some sense of it. Some say that a separate commercial speech category is necessary to overcome the danger of “uninformed acquiescence.”<sup>168</sup> Others justify the need for a distinction between commercial and noncommercial speech based on the need to prevent “commercial harm.”<sup>169</sup>

The idea of “uninformed acquiescence” encompasses the possibility that consumers may respond to false advertisements “before there is time for more speech and considered reflection to

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167. *Id.*

168. *See* *Edenfield v. Fane*, 507 U.S. 761, 774-75 (1993) (citing *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 465-66 (1978)).

169. *See* *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993).

minimize the risks of being misled.”<sup>170</sup> Theoretically, government regulation of commercial speech is necessary because it is the only way to keep uninformed consumers from being led astray. The antidote, of course, is counterspeech—the dissemination of more information to consumers, not less. Counterspeech is provided by competitors, the media, organized consumer groups, politicians, and even neighbors conversing over the back fence. In the new age of advertising, where consumers are inundated with information regarding product claims and characteristics, counterspeech is a powerful influence in protecting consumer interests and in assisting consumer decisionmaking. Modern consumers also have access to the Internet, through which they can investigate virtually any product claim. It takes little effort for a savvy consumer to become informed on most issues.

“Commercial harm” is the presumed result of commercial speech’s potential to mislead<sup>171</sup> and is the “typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.”<sup>172</sup> Looking back to the birth of the commercial speech doctrine in *Valentine*, one might ask, “Where’s the commercial harm?” Indeed, the underlying issue in *Valentine* was littering, not speech. The statute being challenged was the New York Sanitary Code, which dictated that handbills containing advertising were apparently more unsightly or more apt to despoil the city streets than handbills that did not contain advertising. It is unclear how the harm created from distributing a commercial handbill would be any greater than the harm from distributing a noncommercial handbill. It is also unclear how a statute banning the distribution of commercial handbills but allowing the distribution of noncommercial handbills would keep the streets free of litter. If the *Valentine* case had been heard by the Court in *City of Cincinnati v. Discovery Network, Inc.*<sup>173</sup> in 1993, the

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170. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring). Justice Stevens also notes that “[t]he evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explain why we tolerate more governmental regulation of this speech than of most other speech.” *Id.*

171. *See id.* at 494-96 (Stevens, J., concurring) (“[F]alse commercial speech can be particularly severe: Investors may lose their savings, and consumers may purchase products that are more dangerous than they believe or that do not work as advertised.”).

172. *Discovery Network*, 507 U.S. at 426.

173. *Id.*

result would have been markedly different.

In *Discovery Network*, the City of Cincinnati had granted permission to a publisher to place its free promotional magazine in a number of city news racks on public property, alongside news racks selling various newspapers.<sup>174</sup> Subsequently, the city passed an ordinance banning the promotional magazines but allowing the newspapers to remain.<sup>175</sup> The city based its ban on a municipal code that prohibited the distribution or sale of “commercial handbills” in any public place; the same code specified that it was not unlawful to distribute non-commercial handbills.<sup>176</sup> The city argued that its preferential treatment of newspapers over commercial publications permissibly served its interest in “ensuring safe streets and regulating visual blight.”<sup>177</sup>

The Court disagreed, noting that there was insufficient justification to discriminate against the use of a specified category of news racks that was no more harmful than the use of the permitted news racks.<sup>178</sup> Further, the Court stated that the distinction between commercial and noncommercial speech “bears no relationship *whatsoever* to the particular interests that the city has asserted.”<sup>179</sup> Because commercial and noncommercial handbills were both equally responsible for the “safety concerns and visual blight” and because the distinction of commercial versus noncommercial speech bore no relationship to the city’s interests, the ordinance was “an impermissible means of responding to those interests.”<sup>180</sup> The city had not asserted an interest in preventing commercial harms by regulating the information distributed by *Discovery Network*; therefore, there was no “reasonable fit” between the government’s interest and the means of regulation employed.<sup>181</sup> Consequently, the city’s ordinance against commercial handbills was overturned based on the protection

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174. *Id.* at 412.

175. *Id.* at 413-14.

176. *Id.* at 414.

177. *Id.* at 415.

178. *See id.* at 425 (stating that “[t]he city has asserted an interest in esthetics, but respondent publishers’ newsracks are no greater eyesore than the newsracks permitted to remain on Cincinnati’s sidewalks.”).

179. *Id.* at 424.

180. *Id.* at 411.

181. *Id.* at 426. *See also id.* at 414 (stating that the city had the burden of establishing “a reasonable ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends”) (quoting *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989)).

afforded by the First Amendment.<sup>182</sup>

Given the remarkable similarities between the modern-day *Discovery Network* “commercial handbill” case and its forerunner, *Valentine*, it seems almost certain that the *Discovery Network* Court would have overturned *Valentine*’s “commercial handbill” ordinance based on the same First Amendment protections. Had the Court found for *Valentine*, the new commercial speech doctrine invented by that Court in 1942 would not have materialized. Perhaps this new and lesser-privileged category of speech might have been created at some future date, but it seems likely that it would have occurred a great deal later and in a more defined form, if at all. Given the constitutional vagaries of the commercial speech doctrine, one might wonder whether the distinction between commercial and noncommercial speech would ever have occurred, had it not been for Mr. *Valentine* and his submarine.

## 2. *The Changing World of Advertising*

The *Kasky* court, in devising a new “limited purpose” definition of commercial speech, did raise legitimate concerns regarding modern image campaigns.<sup>183</sup> The existing commercial speech doctrine governing anything other than standard product advertising is cloudy at best. “Direct image advertising,” which “treats the company as a product,”<sup>184</sup> has grown in popularity over the years, concurrent with the explosion of advertising through multiple modes of modern delivery. Hundreds of television channels, thousands of radio stations, a proliferation of print media, the Internet, and even movie theatres offer expanded outlets for the avalanche of advertising that descends upon the American consumer daily. With this growth in the industry has come considerable change in the methodology and psychology of selling products and services.<sup>185</sup> Often, the company itself is being “sold.”<sup>186</sup> Modern examples include the Philip Morris television

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182. *Id.* at 431.

183. *See Kasky v. Nike, Inc.*, 45 P.3d 243, 257 (Cal. 2002) (noting that modern, sophisticated public relations campaigns often seek to enhance the image of products, the manufacturer, or the seller of the product).

184. Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 120 (1999).

185. *See id.* at 124-26 (discussing other modern forms of advertising that are difficult to categorize, such as “camouflaged promotion” and “product placements”).

186. *See id.* at 119-20 (noting that such advertisements seek merely to project a

advertisements touting the various good works of the company (but not mentioning its manufacture and sale of cigarettes) or the glowing advertisements for the Kingdom of Saudi Arabia, emphasizing the country's long, supportive bond and enduring friendship with the United States (but not mentioning that fifteen of the nineteen September 11th terrorists were Saudi Arabian).<sup>187</sup> As these advertisements are not selling a product, it is unlikely that they would be considered "commercial speech" for First Amendment purposes. But aren't these ads selling something? Perhaps what they are selling is inherently political and thereby fully protected by the First Amendment.<sup>188</sup>

Other companies simply sell their "brand."<sup>189</sup> They don't present specific product information but, rather, a feeling about their company, as designated by a memorable symbol, song, or catch phrase. (Think "I'd like to teach the world to sing in perfect harmony." Doesn't it make you want to reach for a Coke?) Still other companies make implied representations about their products in their advertising, intimating that whiter teeth (or darker hair, or a special shampoo, or a better beer) will endow a person with increased sex appeal.<sup>190</sup> All of these forms of advertising are very different from those of 1942, when *Valentine* was decided, or even from those of 1975, when the modern commercial speech doctrine came into being. Yet, the commercial speech doctrine has not changed to accommodate the changing times. In an information age that moves at Mach speed, a judicial system that purposely plods and ponders may have difficulty keeping up with the pace of commercial evolution.

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favorable impression of the sponsoring corporation).

187. Saudi Arabia spent more than \$17 million on advertising and lobbying in the United States after the attacks on September 11, 2001, of which about \$16 million went toward television, radio, and print ads. According to Saudi officials, the ads were designed to "impress upon the American people that Saudis really are allies against terror." Joe Carey, *Since 9/11, Saudis Have Spent Millions on Image in U.S.*, STAR TRIBUNE (Minneapolis), Oct. 29, 2003, at A4.

188. See Kozinski & Banner, *supra* note 49, at 645-46 (highlighting the earlier Philip Morris commercials discussing the importance of the Bill of Rights and offering a free copy of the document to anyone requesting one).

189. See *id.* at 639-44 (discussing commercials that don't "propose a transaction" but merely sell brand, or tell a story; noting other commercial forms, such as the music video and the "advertorial").

190. See Stern, *supra* note 184, at 133 (dubbing this type of commercial "The Romantic Fallacy").

### 3. *The Public's Right to Receive Information*

In attempting to differentiate between commercial speech and other types of speech, it has been said that commercial speech is constitutionally valued merely as information that does not, itself, form part of public discourse.<sup>191</sup> If one adheres to this theory, then the impact of commercial speech on public opinion occurs only as a byproduct of the effort to sell goods.<sup>192</sup> In his decision in *Virginia Pharmacy*, Justice Blackmun relied on the words of Alexander Meiklejohn to support this idea.<sup>193</sup> Meiklejohn argued that constitutional protections should focus on “the rights of citizens to receive information, rather than on the rights of speakers to express themselves.”<sup>194</sup> He concluded that “[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said.”<sup>195</sup> Commercial speech, then, may be constitutionally protected not so much because it relates to the seller’s business, but because it furthers “the societal interest in the ‘free flow of commercial information.’”<sup>196</sup> This analysis begs the question of how speech can provide information of relevance to public decisionmaking without being part of public discourse,<sup>197</sup> creating yet another fuzzy doctrinal line. Nonetheless, the Court has recognized that the consumer’s interest in the free flow of commercial information may be “as keen, if not keener by far, than his interest in the day’s most urgent political debate.”<sup>198</sup> Thus, both the ability to provide commercial information and the opportunity to receive commercial information in a free market economy may be as important as expression relating to political, artistic, or religious matters.<sup>199</sup>

Protection of corporate speech rights under the First Amendment can therefore be seen as protecting the “public’s right of access to information.”<sup>200</sup> The free flow of ideas and information

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191. See Post, *supra* note 73, at 14-15.

192. *Id.* at 13.

193. *Id.*

194. *Id.*

195. *Id.* (quoting Alexander Meiklejohn, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960)).

196. *Id.* at 14 (citing *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978)).

197. See *id.* at 15.

198. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976).

199. See Kozinski & Banner, *supra* note 49, at 652.

200. *Kasky v. Nike, Inc.*, 93 Cal. Rptr. 2d 854, 862 n.7 (2000) (quoting Dan

assists the public not only in political decisionmaking but in making decisions “significant to the conduct of life.”<sup>201</sup> A chilling of the process that assists such decisionmaking is harmful not only to those providing the information, but also to the public.

In applying these ideas to the *Nike* case, it is clear that the commercial speech doctrine, formed as it was from nothingness, has struggled to keep pace with the changes in modern society relating to information flow and economic decisionmaking. As a result of the *Nike* decision—where state regulation of speech was substituted for public scrutiny and counterspeech<sup>202</sup>—the public has been deprived of the information on one side of an important public debate. The information void thus created interferes with the consumer’s ability to make political as well as economic “buying” decisions, thus disempowering the citizenry of its basic First Amendment right of access to information.

#### VI. ANALYSIS: IMPACT ON CORPORATE SOCIAL RESPONSIBILITY AND MEDIA REPORTING

A primary concern raised by this potential “chilling effect” on the flow of information is that corporations may cut back or eliminate reports and publications previously provided to the media, corporate social responsibility (CSR) organizations, and rating agencies. Indeed, following the California decision, Nike decided to “restrict severely all of its communications on social issues that could reach California consumers.”<sup>203</sup> Nike ceased publishing its annual Corporate Responsibility Report. Additionally, Nike decided not to pursue a listing in the Dow Jones sustainability index and refused dozens of speaking invitations on corporate responsibility topics.<sup>204</sup>

European companies SRiMedia and CoreRatings viewed this situation with alarm in their amicus brief filed with the U.S. Supreme Court on Nike’s behalf.<sup>205</sup> The London-based

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Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229, 1233, 1245-48 (1991)).

201. *Id.* at 862.

202. *See* Fisher, *supra* note 15, at 29.

203. *Nike, Inc., v. Kasky*, 123 S. Ct. 2554, 2568 (2003).

204. *Id.*

205. Brief of Amici Curiae SRiMedia and CoreRatings, *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003) (No. 02-575), 2003 WL 836303 (U.S. Feb. 28, 2003).

companies<sup>206</sup>—concerned with the potential impact on their ability to continue providing corporate responsibility reporting to their international community—expressed fear that potential lawsuits in California against European companies would deter the corporate transparency required to produce their reports.<sup>207</sup> The companies asserted that the California decision operates in direct opposition to the European Union’s movement toward increased corporate social responsibility.<sup>208</sup> Whereas European governments encourage or require businesses to report on social, ethical, and environmental issues, the California court’s decision threatens to impose liability on any statements made in annual reports or to rating agencies that are incomplete or misleading.<sup>209</sup> The potential imposition of liability in California against a foreign corporation raises the possibility that “a European business could be punished for complying with its own laws.”<sup>210</sup>

Because CSR reporting in the United States is voluntary,<sup>211</sup> the *Nike* ruling creates a high level of uncertainty regarding the continued availability of CSR data at home as well as abroad. A main concern is that companies may decide it is better to say nothing about their CSR practices than to risk “endless battles in court.”<sup>212</sup> A further concern is that companies with poor social or environment records will “hide behind” the California ruling, using the decision to prevent publication of any information about their practices.<sup>213</sup> Indeed, there is concern that, “[f]ollowed to its logical conclusion, the ruling would represent the end of social reporting

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206. *Id.* at \*1. SRiMedia and its affiliates are the largest publishers of corporate social responsibility news in Europe; the company says its reports are read by European lawmakers and corporate executives of 1200 multinational enterprises, as well as by investment analysts of the top 275 financial institutions in Europe. CoreRatings reports are used by leading European asset management groups to make investment decisions; clients control in excess of \$2 trillion in investment assets worldwide. *Id.*

207. *Id.* at \*2.

208. *Id.* at \*2-3.

209. *Id.*

210. *Id.* at \*2.

211. See Clarke, *supra* note 23.

212. See *id.* (quoting Elliott Schrage, Columbia University Law Professor, former Senior Vice President of GAP, Inc., and member of the Council on Foreign Relations).

213. See *id.* (noting that “[a] substantial risk has arisen out of this case that companies will simply stonewall any efforts by CSR stakeholders for information or heightened transparency in the CSR policies and procedures”).

in America.”<sup>214</sup>

Ironically, although increased corporate reporting and enhanced transparency are high-profile goals both of the international community and of anti-globalization activists, the result in *Nike* seems to stifle such reporting and transparency. The *Nike* decision provides only “short-term point scoring” through penalizing behavior that should be encouraged.<sup>215</sup> By refusing to foster open debate and a free flow of information, Nike’s opponents appear to have acted against the very interests they claimed to represent.<sup>216</sup>

Concern regarding a depleted information flow as a result of the *Nike* decision also extends to the media and to organized labor. The media has expressed concern that it may not be able to accurately report on issues of public importance regarding corporate America if it receives information on only one side of an issue.<sup>217</sup> A review of press coverage over the past several years demonstrates a “vast array of corporate speech—on issues ranging from race discrimination to environmental sustainability to personal health and safety—that would now be subject to California’s new strict liability dragnet.”<sup>218</sup>

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) expressed similar concerns in its amicus brief supporting Nike’s First Amendment rights.<sup>219</sup> Although the AFL-CIO’s support of Nike’s position may seem to fall under the heading of “strange bedfellows,” it is clear that organized labor cannot debate labor practices if its opponents refuse to speak. The AFL-CIO noted that because the majority of Nike’s manufacturing facilities were overseas and were merely outsourced operations, the

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214. Mallen Baker, *Comment: Nike and Short-sighted Victories in Free Speech*, ETHICAL CORPORATION ONLINE (Nov. 13, 2002), at [http://www.ethicalcorp.com/content\\_print.asp?ContentID=261](http://www.ethicalcorp.com/content_print.asp?ContentID=261) (last visited Apr. 19, 2004).

215. *See id.*

216. *See id.*

217. *See* Brief of Amici Curiae Forty Leading Newspapers, Magazines, Broadcasters, Wire-Services, and Media-Related Professional and Trade Associations, *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003) (No. 02-575), 2003 WL 835613, at \*4-6 (U.S. Feb. 28, 2003) (“Accurate and useful reporting depends on considering all sides of an issue . . . . [A]ttaining such a complete picture requires newsgatherers to get information not only from interest groups and the company’s detractors, but also from the company itself.”).

218. *Id.* at \*1.

219. Brief of Amicus Curiae AFL-CIO, *Nike Inc. v. Kasky*, 123 S. Ct. 2554 (2003), (No. 02-575) 2003 WL 835038 (U.S. Feb. 27, 2003).

labor union could not have learned the locations of the operations without receiving the information directly from Nike.<sup>220</sup> Nike's cooperation in the sharing of information was therefore instrumental to the union's ability to engage in any type of debate. The union is undoubtedly concerned, as well, about the implications of placing limits upon Nike's speech. If Nike's speech on the issue of labor practices is "commercial," might not the union's speech on the same issues also be deemed "commercial"? As the underlying debate in *Nike* concerned labor practices, the ramifications of the decision, if not reversed, may ultimately have as much impact on the speech of organized labor as on the speech of corporations.

The effects of the *Nike* decision, then, are far-reaching. Labor unions, the media, and CSR organizations alike fear the effects of "chilled speech" that the decision may produce. The impact on international corporate responsibility is of paramount concern, as the potential deterrence of corporate transparency runs contrary to the result that the international community is seeking. As one commentator noted, "the ultimate irony is that [*Nike*] . . . served only to set corporate accountability and transparency back [fifty] years."<sup>221</sup>

## VII. ANALYSIS: WHAT WAS THE COURT THINKING?

The U.S. Supreme Court had many options in deciding *Nike*—perhaps too many. Given the growing debate concerning the perplexing commercial speech doctrine, it may seem surprising that the Court did not take this opportunity to clarify, change, or even scrap the doctrine altogether. On the other hand, given the challenge of years of *stare decisis* as well as the checkered precedential value of many of its earlier commercial speech rulings, the Court's decision to decline the task may not seem surprising. The Court may have been hesitant merely to issue a narrow decision overturning *Nike*, understanding the larger scope of the problem it was being asked to resolve. There is some speculation that the Court had the votes to overturn, but could not agree on the underlying doctrinal reasoning.<sup>222</sup> There is also speculation

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220. *Id.* at \*16.

221. Douglas K. Spong, *Golden State Silence: High Court Non-decision Puts Chill on Corporate Speech*, STAR TRIBUNE (Minneapolis), July 21, 2003, available at <http://www.prfirms.org/resources/nike/nike072103.asp> (last visited Apr. 19, 2004).

222. See Mauro, *High Court Appears Ready to Side with Nike*, *supra* note 97 (noting

that the Court—with its other high-profile cases absorbing so much of its time and energy<sup>223</sup>—merely ran out of time for *Nike*.<sup>224</sup> Whatever the reason, the Court opted to disengage itself.

In his opinion explaining the justification for dismissing the writ, Justice Stevens intimated several underlying reasons for not attempting to reach a decision.<sup>225</sup> First, he indicated that the Court did not feel a necessity for deciding the case just then, as the issues were too novel and important.<sup>226</sup> Second, because of the novelty and importance of the case, Justice Stevens felt that the correct answer was more likely to result from a full factual record rather than from mere unproven allegations.<sup>227</sup> Third, Justice Stevens felt that the matter was basically a state issue that would benefit from “further development below.”<sup>228</sup> Overall, the decision seemed to be one of judicial efficiency, at least at the U.S. Supreme Court level.<sup>229</sup> Indeed, efficiency was ultimately served, as the case was settled. However, justice did not seem to be served, nor was a sense of finality provided.

Justice Stevens’s reasoning did not impress the dissenting Justices, who were eager to resolve the First Amendment issues in *Nike*.<sup>230</sup> They felt the case could and should have been decided by

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that there may not be five votes for one rationale).

223. During this session the Court also heard three other closely watched cases. One case involved a Texas anti-sodomy law: *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (holding that the Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause). The other two cases concerned affirmative action: *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) (holding that the manner in which the University of Michigan considered the race of applicants in its undergraduate admissions guidelines violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964) and *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (holding that the narrowly tailored use of race in admissions decisions at the University of Michigan Law School to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause or Title VI).

224. See Mauro, *Justices Get Nike out of Their Hair*, *supra* note 20 (noting that chief Justice Rehnquist is “notorious” for disposing of all pending cases before the Court adjourns for the summer, “no matter how ragged or unsatisfying the resolution is”).

225. See *Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2555-59 (2003).

226. *Id.* at 2558.

227. *Id.* at 2559. Indeed, Justice Stevens speculated that development of such a record might contribute in a positive way to the public debate. *Id.*

228. *Id.* at 2559.

229. See *id.* at 2557.

230. See *id.* at 2559-70 (Breyer, J., dissenting).

the Court.<sup>231</sup> Understanding that the Court's opportunity to decide particular issues comes only infrequently—and perhaps on this issue, not again for years—the dissenting Justices felt a sense of urgency to act.<sup>232</sup> However, the Court did not seem to have the will to move forward even when it had the opportunity to do so.<sup>233</sup>

The ideological makeup of the Court may provide insight into the Court's inability to act decisively. The Justices voting to decide the case (O'Connor, Kennedy, and Breyer) are purported to be in the ideological middle, with Breyer somewhat to the left of center. The Justices who voted to dismiss were those thought to be firmly to the right of center (Rehnquist, Scalia, and Thomas) as well as those firmly to the left of center (Stevens, Ginsburg, and Souter—though Souter is often a centrist).

Stevens, who wrote the opinion to dismiss, had been vocal in the past regarding the danger of drawing bright lines in the commercial speech doctrine. He often expressed concern, as in his concurring opinion in *Central Hudson*, that commercial speech should not be defined too broadly “lest speech deserving of greater constitutional protection be inadvertently suppressed.”<sup>234</sup> Justice Rehnquist, on the other hand, dissented in *Central Hudson*, noting the substantial state and national interest in the matter of energy conservation.<sup>235</sup> Justice Rehnquist also expressed his view that “the Court unlocked a Pandora's Box when it ‘elevated’ commercial speech to the level of traditional political speech by according it First Amendment protection in *Virginia Pharmacy Board* . . . .”<sup>236</sup>

Although these opinions were rendered more than twenty years ago, it remains of interest that Justice Stevens seemed to reside on one end of the commercial speech continuum, favoring a narrowing of the commercial speech definition to facilitate a broader reading of First Amendment protections, while Justice Rehnquist resided on the other end of the continuum, favoring a dilution of commercial speech protection and an enhancement of the states' power to regulate speech.<sup>237</sup> This divergence of opinion

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231. *Id.* at 2569.

232. *See id.* at 2560.

233. *See id.*

234. *Cent. Hudson Gas & Elec. Co. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 579 (1980) (Stevens, J., concurring).

235. *Id.* at 599.

236. *Id.* at 598.

237. It is of interest that Justice Rehnquist also dissented in *Bigelow*, which was reaffirmed by *Central Hudson*. In *Bigelow*, Justice Rehnquist noted that the

on the basic underpinnings of the commercial speech doctrine may go far in explaining why no decision was reached in *Nike*. Perhaps Justices on the ideological right could not agree with those on the ideological left, leaving those in the center to voice their frustration over the subsequent inability of the Court to move forward.

Nonetheless, it takes only five Justices to agree, and it has been noted that at least four Justices (Stevens, Kennedy, Ginsburg, and Thomas) have seemed to be edging toward an alternative approach where commercial speech would be protected as “a kind of public discourse subject to regulations designed to serve specific state interests in preserving ‘a fair bargaining process.’”<sup>238</sup> Justice Thomas, in particular, has been widely quoted in other court decisions and commentary as stating that it is nearly impossible to sever commercial speech from “speech necessary to democratic decisionmaking.”<sup>239</sup> For his part, Justice Breyer declared during oral arguments in *Nike* that Nike’s speech was a combination of both commercial and noncommercial speech and that Nike was trying to contribute to an important public debate as well as to sell products.<sup>240</sup> He also chided Kasky’s counsel for seeming to indicate that consumer protection “trumps the First Amendment.”<sup>241</sup> Justice O’Connor joined Justice Breyer in the *Nike* dissent, determining that Nike should have been afforded full First Amendment protection.<sup>242</sup>

It would appear from the writings and recorded arguments of the Justices, then, that there would have been at least six votes to overturn *Nike* and to clarify and redefine the commercial speech doctrine. Had the Court decided for Nike, it would likely have opted to continue narrowing the gap between commercial and noncommercial speech as well. But history will be silent on the matter. Given potential changes in the makeup of the Court, as well as the lack of viable cases to challenge the California law, it is

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advertisement in question was purely commercial and therefore the state was allowed to exercise its legitimate public interest in its regulation. *See Bigelow v. Virginia*, 421 U.S. 809, 832 (1975).

238. *See Post*, *supra* note 73, at 55 (referring to 44 *Liquormart, Inc. v. State of Rhode Island*, 517 U.S. 484, 501 (1990) (Stevens, J., joined by Kennedy, J., and Ginsburg, J.) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993) (Thomas, J., concurring))).

239. 44 *Liquormart*, 517 U.S. at 520 (Thomas, J., concurring).

240. *See Transcript of Oral Argument, Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003) (No. 02-575), 2003 WL 21015068 at \*58 (U.S. Apr. 23, 2003).

241. *Id.* at \*59.

242. *See Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2565-68 (2003).

unlikely that this Court will have another opportunity to reach a satisfactory resolution regarding the issues raised in *Nike*.

### VIII. CONCLUSION

The inability of the Court to reach a decision in *Nike* has been the source of much frustration and concern throughout the world. In a globally connected economy where data is transmitted instantaneously with the click of an icon, a remarkable volume of information is continuously available to consumers everywhere. Once a press release or other data hits the free Web services, it achieves “digital immortality.”<sup>243</sup> This means “perpetual exposure” for any type of information distributed by a corporation.<sup>244</sup>

The challenge for the U.S. court system is to determine how best to protect consumers from invalid or even fraudulent speech, while still allowing the free flow of information—commercial or otherwise—to continue. In a world where advertising has become more of an artform than a direct proposal to do business,<sup>245</sup> the job becomes much more complicated. However, the difficulty of the task does not justify an unwillingness to undertake it. The Court should have decided the *Nike* case. It should have sought judicial efficiency not by dismissing the writ, but by making a decision. It should have provided clarity to the muddled commercial speech doctrine. And, most importantly, it should have provided certainty to corporations around the world that wish to participate in the social, political, and economic discourse of the times without fear of endless, costly litigation in a remote state where no harm has been alleged.

Only time will tell if the predictions of a broader “chilling” of corporate speech will occur as a result of *Nike*. In the interim, the business community faces the possibility that the government may now use the commercial speech doctrine as a weapon to limit or even suppress unwelcome speech. Should the Court again have an opportunity to review the California law, it must not stumble or hesitate; instead, it must “Just Do It!”

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243. See Graulich, *supra* note 18, at D12.

244. *Id.*

245. See Fisher, *supra* note 15, at 31.