Free Speech

in a Commercial World:

The Nike Paradox

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"*Congress shall make no law . . .*
abridging the freedom of speech . . . ."

James Madison penned the Free Speech Clause of the First Amendment to the U.S. Constitution to provide express protection for the fundamental right to speak in a free and open society. Despite the simplicity of Madison's words, the notion of free speech, particularly as it applies to corporate entities, has eluded easy definition and has been the subject of endless legal and political debate.

Rather than simply embracing the Founders' intent to safeguard liberty through the unobstructed flow of ideas and information, Congress, the states and the courts have at times reinterpreted and raised the bar for free speech protections. Complex legal balancing tests for what constitutes protected speech have been crafted, yet are often inconsistently applied by the courts. Exceptions have been carved out and limitations imposed, not just for obscenity and fighting words, but for campaign contributions and "express" political advocacy, among others.[1] Additionally, and the subject of this paper, a category of so-called "commercial speech" was created by the U.S. Supreme Court, denying business entities full free speech protection for much of the 20th Century.

Today, the Supreme Court is inching slowly back toward providing commercial speech the same protection afforded other forms of speech, such as religious and political speech — as we submit the Founders originally intended. But for corporate speech advocates, the road has been exceptionally long, marked by a series of incongruous and contradictory decisions by the High Court, which "expressly refuse[s] to define the elements of commercial speech,"[2] recognizing "that no 'categorical definition of the difference between' commercial and noncommercial speech exists."[3]

The Supreme Court's ambiguous, bifurcated notion of the First Amendment has left an erratic patchwork of case law that urgently begs for intervention, as this article discusses below in the case of *Kasky v. Nike, Inc.*,[4] and a return to first principles to collapse the contrived dichotomy between commercial and noncommercial speech.

"Commercial Speech" Doctrine Yields More Questions than Answers

For the better part of a century, the courts have held that, for the purposes of the 14th Amendment to the U.S. Constitution, a corporation is a "person" entitled to equal protection of the laws, including First Amendment freedoms.[5]

In 1942, the U.S. Supreme Court ruled in the landmark case of *Valentine v. Chrestensen* that while corporations could freely engage in political and other protected forms of speech, the Constitution afforded no special protection to what it called "purely commercial" speech.[6]

The case involved a man who had docked a submarine in New York City's East River for public tours. He sought to circumvent the state's ban on commercial handbills by printing a political statement about the city's docking policies on one side of a handbill with an advertisement for his submarine attraction on the other. The Court concluded that while the First Amendment would forbid a ban on all communication by handbills in the public square, it imposed "no such restraint on government as respects purely commercial advertising."[7]

In 1976, the U.S. Supreme Court paradigmatically shifted its position on commercial speech, ruling in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, *Inc.*, that the simple proposition by a pharmacist, "I will sell you X prescription for Y price," was entitled to some First Amendment protection.[8] In that case, Virginia had banned the advertising of prescription drug prices. In striking down the law, the Supreme Court ruled a 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."[9]

In 1980, in the seminal case of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Court chose to regard commercial speech as "expression related *solely* to the economic interests of the speaker and its audience."[10] The Court ruled: "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression," but nevertheless "[t]he First Amendment . . . protects commercial speech from unwarranted governmental regulation."[11]

To determine the validity of content-based regulation of commercial speech, the Supreme Court established the four-part, intermediate-scrutiny *Central Hudson* test. According to that test, the Court asks "as a threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading," then the Court inquires "'whether the asserted governmental interest is substantial.' If it is, then the Court 'determine[s] whether the regulation directly advances the governmental interest asserted,' and, finally, 'whether it is not more extensive than is necessary to serve that interest.' Each of these latter three inquiries must be answered in the affirmative for the regulation to be found constitutional."[12]

The Supreme Court has resisted addressing the continued validity of the *Central Hudson* test, despite Justice Scalia urging that "those [balancing] modes of analysis be avoided where possible."[13] According to Justice Scalia, balancing tests such as *Central Hudson*, allow judges to "mistake their own predilections for the law."[14]

While *Central Hudson's* vague description of commercial speech as "expression related solely to the economic interests of the speaker and its audience"[15] is broader than that used in

Virginia State Board of Pharmacy, it still requires an arbitrary, content-based approach to commercial speech protection.

Despite the Court's *Central Hudson* test, confusion and inconsistency remain in commercial speech doctrine, not only in the lower courts, but in the High Court as well. For example, in a 1986 case involving casino gambling, the Supreme Court, in a stunning departure from its trend toward greater commercial speech protection, ruled "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[16] The decision in *Posadas de Puerto Rico Associates v. Tourism Company* was eventually called "erroneous" by a Court plurality in *44 Liquormart, Inc. v. Rhode Island*, in which the Court struck down a law that outlawed advertising prices for liquor.[17]

The Court has long referenced — but has never defined — certain "commonsense differences between speech that does 'no more than propose a commercial transaction' and other varieties."[18] Yet in today's highly complex business world, where increasingly companies are (and must be) speaking out on important issues of public concern, those distinctions are often blurred.

For example, in response to anti-globalization sentiment, McDonald's publicly issued a 46-page *Social Responsibility Report*, which "provides a global perspective on where social responsibility fits into the company's business strategies."[19] It also provides regular "social responsibility" updates as "a constructive contribution to dialogue about important issues."[20]

McDonald's, the target of lawsuits filed by consumers over the fat content of fast food, is also "diving into an issue that is in the news — and stirring quite a lot of debate: nutrition."[21] The company is educating the public on important nutritional issues while promoting a worldwide initiative to eliminate trans fatty acids from its cooking oil.

Other examples include Archer Daniels Midland, a leading agricultural company, which develops and speaks out on products that "not only advance our business, but advance the battle to end global hunger as well."[22] And, the Southern Company, which produces "Energy to Serve Your World," is publicly advocating for diverse fuel sources in order to "provide the reliable and affordable power our nation demands, while continuing to preserve and protect our environment."[23]

In cases before the Supreme Court where there are not "commonsense differences" between commercial and noncommercial speech, the Court has done little, if anything, to provide a bright line distinction. Indeed, the Court readily acknowledges that "ambiguities may exist at the margins of the category of commercial speech."[24]

Justice Stevens, in a concurring opinion in *Central Hudson*, wrote that "it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed."[25] But in failing to provide a clearer definition of commercial speech, the Court has left open an enormous vacuum to be filled by the lower courts.

As Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit and one of his then-law clerks, Stuart Banner, point out: "Unless a case has facts very much like those of a prior

[commercial speech] case, it is nearly impossible to predict the winner."[26] That leads to the very problem of inadvertent suppression of protected speech that Justice Stevens warned against, as evidenced by the recent *Nike* decision from the California Supreme Court.

Competing in the Marketplace of Ideas

In May 2002, the California Supreme Court held in *Kasky v. Nike*, *Inc.*, that Nike's responses to public criticism of its overseas labor practices constituted commercial speech for purposes of applying state laws barring false and misleading commercial messages.[27]

Several years ago, Nike came under attack in the press and on the airwaves by various anti-business individuals and organizations, who alleged the company was engaged in unfair labor practices overseas. In effect, the company "became the 'poster child' in the international campaign for labor rights and reform."[28]

In public statements, including press releases, newspaper advertisements and letters to editors, as well as letters to university presidents and athletic directors, Nike sought to defend itself against the avalanche of criticism and threatened boycotts. The company widely disseminated studies it commissioned that demonstrated the fair treatment of its overseas employees. It also pointed out that Nike employees received health coverage and other benefits not normally enjoyed by employees of other companies in those countries.

California resident Marc Kasky, believing Nike's defense to contain false statements of fact, filed a claim under the private attorney general provision of the state's Unfair Competition Law (UCL), which allows "any person acting for the interests of . . . the general public" to bring an action.[29] The UCL prohibits "'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.'"[30]

Kasky's complaint called for Nike to "'disgorge all monies . . . acquired by means of any act found . . . to be an unlawful and/or unfair business practice,'" and to "'undertake a Court-approved public information campaign' to correct any false or misleading statement, and to cease misrepresenting the working conditions under which Nike products are made."[31]

The trial court and court of appeals characterized the messages as fully protected noncommercial speech, finding that even if the communications were assumed to be false, the First Amendment protects Nike's statements because they did not promote a particular product, but were part of a general discussion concerning a matter of public interest and public debate.

The California Supreme Court reversed (4-3) and characterized Nike's messages as commercial speech by relying almost exclusively on a U.S. Supreme Court commercial speech case involving the advertising of contraceptives.

Fashioning a "limited purpose test" from the U.S. Supreme Court's *Bolger v. Youngs Drug Products Corporation* decision,[32] the California Supreme Court specified the parameters that define commercial speech by requiring consideration of three elements: the speaker, the intended

audience, and the content of the message. Applying this test, the court found that "the messages in question were directed by a commercial speaker to a commercial audience, and . . . they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products."[33]

Relying on the *Bolger* decision, the court added: "Nike's speech is not removed from the category of commercial speech because it is intermingled with noncommercial speech. . . . Nike may not 'immunize false or misleading product information from government regulation simply by including references to public issues.' . . . Here, the alleged false and misleading statements all relate to the commercial portions of the speech in question — the description of actual conditions and practices in factories that produce Nike's products — and thus the proposed regulations reach only that commercial portion."[34]

As a further example of inconsistencies in commercial speech doctrine, the California Supreme Court once defined commercial speech as that "which has but one purpose — to advance an economic transaction," and suggested that "an advertisement informing the public that the cherries for sale at store X were picked by union workers" would be noncommercial speech.[35] In the *Nike* ruling, the court dismissed those prior viewpoints as "ill-considered dicta."[36]

The *Nike* case was remanded back to the lower court for a determination of whether Nike's statements were false or misleading.[37] Because the focus of the case thus far has been on the constitutional issues, there has not yet been a trial on the facts, nor a judgment on the merits. Nike plans to seek review of the California Supreme Court's decision by the U.S. Supreme Court.

It is somewhat surprising that the California Supreme Court chose to rely so heavily on the *Bolger* decision in *Nike*. That case involved a contraceptives manufacturer who mailed unsolicited packets of information to the general public containing advertising inserts on the products it produced and sold along with a discussion of pertinent issues such as venereal disease and family planning.

The U.S. Supreme Court recognized in that case that "[m]ost of appellee's mailings fall within the core notion of commercial speech — 'speech which does "no more than propose a commercial transaction."'"[38] This is remarkably different from Nike's public statements and mailings which clearly would fall outside of the Court's "commonsense" standards of commercial speech.

California Supreme Court Justice Chin, in dissent, differentiated between the expression which occurred in *Bolger* from that in *Nike*: "Far from promoting the sale of its athletic products, Nike did not include [its] information through product labels, inserts, packaging, or commercial advertising intended to reach only Nike's actual or potential customers," and "[t]he high court's concern in *Bolger* . . . was that advertisers refrain from inserting information on public issues *as a pretext* to avoid regulations governing their commercial speech. That is simply not the case here. Nike's speech . . . was not in any sense pretexual, but prompted and necessitated by public criticism."[39]

In fact, one might even argue the unsolicited mailings in *Bolger* may be closer to the clearly distinguishable commercial and noncommercial speech aspects of the submarine exhibitor's handbills in *Valentine*.

The case which comes closest to defining Nike's public statements is *Riley v. National Federation of the Blind*.[40] The U.S. Supreme Court ruled in that case that "[i]t is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking. . . . But even assuming, without deciding, that such speech in the abstract is indeed merely 'commercial,' we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech."[41] The Court further held that "where . . . the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression."[42]

Even if portions of Nike's public statements are eventually deemed to be false or misleading, or bore some resemblance to commercial speech, they would still remain "inextricably intertwined" with fully protected political speech.

As Justice Chin cites: "'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.' . . . According to the majority, if Nike utters a factual misstatement, unlike its critics, it may be sued for restitution, civil penalties, and injunctive relief under these sweeping statutes. . . . Handicapping one side in this important worldwide debate is both ill considered and unconstitutional."[43]

It is critical to note that Nike did not solicit the intense public debate that was thrust upon it over its corporate labor practices. We find it hard to believe that any company would view public attack as a welcome marketing opportunity. Nike was merely defending itself in the marketplace of ideas. And, the U.S. Supreme Court has acknowledged the right of the public to "'receive information and ideas,' and that freedom of speech 'necessarily protects the right to receive.'"[44]

Moreover, the Supreme Court has long "rejected the contention that a State may confine corporate speech to specified issues," and has recognized that the "'inherent worth of [free] speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.'"[45]

Indeed, as Justice Stevens noted in *Central Hudson*: "Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward."[46]

Conclusion

The trend for the U.S. Supreme Court in recent years has been to provide a level of protection for commercial speech that comes somewhat closer to the strict scrutiny standards for

fully protected speech. In *Greater New Orleans Broadcasting Association v. United States*, the Court struck down a federal prohibition on broadcast advertisements for casino gambling.[47] In *Lorillard Tobacco Company v. Reilly*, the Court struck down Massachusetts' restrictions on outdoor and point-of-sale advertising for tobacco products.[48] And, most recently, in *Thompson v. Western States Medical Center*, the Court overturned a federal statute placing restrictions on free speech rights of pharmacies to advertise "compounded" drugs.[49]

Arguably, the above referenced cases fit neatly into commercial speech categories already established by the U.S. Supreme Court and therefore, as Justice O'Connor explained in *Thompson v. Western States Medical Center*, "there [wa]s no need . . . to break new ground."[50]

With the California Supreme Court's fallacious decision in *Kasky v. Nike*, we submit the time may be ripe to do so.

We are a nation of consumers and in our rapidly-expanding free-market society it becomes more difficult, if not impossible, to continue to draw any line — let alone a bright line — between the noncommercial and lesser-protected commercial speech of corporations. As California Supreme Court Justice Brown wisely observed in her dissent in the *Nike* case: "Although the world has become increasingly commercial, the dichotomous nature of the commercial speech doctrine remains unchanged."[51]

Because of a varied and increasing number of attacks on corporations, as well as the public's demand for corporations to speak out on controversial issues, the paradox for Nike and other corporate entities is how to engage in the public debate without fear of being dragged into a courtroom to defend their statements.

The *Nike* decision warrants review by the U.S. Supreme Court in order to clear up the confusion and ambiguity surrounding its commercial speech doctrine. On review, the Supreme Court should reverse the California Supreme Court's ruling, directly confront the growing conflict that has arisen from the contrived dichotomy between commercial and noncommercial speech, and reestablish the fundamental right of corporations to fully and freely contribute to the open flow of information in the marketplace of ideas.

Endnotes

1. *See*, *e.g.*, *Miller v. California*, 413 U.S. 15, 23 (1973) (obscenity falls outside of First Amendment protection); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942*)* (fighting words is a class of speech not protected by Constitution); *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (upheld campaign contribution limits and allowed restrictions on express political advocacy in the face of a constitutional challenge).

2. *Kasky v. Nike*, *Inc.*, 45 P.3d 243, 268 (2002) (Brown, J., dissenting) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 n.14 (1983)).

3. *Nike*, 45 P.3d at 268 (Brown, J., dissenting) (quoting *City of Cincinnati v. Discovery Network*, *Inc*., 507 U.S. 410, 420 (1993)).

4. *Kasky v. Nike*, *Inc.*, 45 P.3d 243 (2002).

5. *Gitlow v. New York*, 268 U.S. 652 (1925); *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886).

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

7. *Id.* at 54.

8. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, *Inc.*, 425 U.S. 748 (1976*).*

9. *Id.* at 763.

10. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980) (emphasis added) (citations omitted).

11. *Id.* at 563, 561 (citation omitted).

12. *Thompson v. Western States Med. Ctr.*, 122 S. Ct. 1497, 1504 (2002) (quoting *Central Hudson,* 447 U.S. at 566).

13. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1187 (1989).

14. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 863 (1989).

15. *Central Hudson*, 447 U.S. at 561.

16. *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 345-46 (1986).

17. *44 Liquormart*, *Inc. v. Rhode Island,* 517 U.S. 484, 509 (1996).

18. *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24 (citation omitted).

19. McDonald's, "McDonald's Issues First Worldwide Social Responsibility Report" (Apr. 15, 2002) <http://www.mcdonalds.com/corporate/press /corporate/2002/04152002/index.html>.

20. McDonald's, "Social Responsibility Update" (visited Sept. 9, 2002) <http:// www.mcdonalds.com /corporate/social/update/index.html>.

21. *Id.*

22. Archer Daniels Midland, "Welcome to ADM World" (visited Sept. 9, 2002) <http://www.admworld.com>.

23. Full-page advertisement for The Southern Company, Roll Call, Sept. 9, 2002, at p. B-7.

24. *Edenfield v. Fane*, 507 U.S. 761, 765 (1993) (citation omitted).

25. *Central Hudson*, 447 U.S. at 579 (Stevens, J., concurring).

26. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?* 76 Va. L. Rev. 627, 631 (1990).

27. *Nike*, 45 P.3d at 247.

28. *Id*. at 264 (Chin, J., dissenting) (citation omitted).

29. *Id.* at 250 (citing Cal. Bus. & Prof. Code § 17535).

30. *Id.* (citation omitted).

31. *Id.* at 248 (quoting Pl.'s First Am. Compl.).

32. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

33. *Nike*, 45 P.3d at 247.

34. *Id.* at 260 (citations omitted).

35. *Spiritual Psychic Science Church v. City of Azusa*, 703 P.2d 1119, 1125 (1985).

36. *Nike*, 45 P.3d at 261.

37. *Id.* at 262.

38. *Bolger*, 463 U.S. at 66 (citations omitted).

39. *Nike*, 45 P.3d at 265-66 (Chin, J., dissenting) (footnote omitted) (emphasis in original).

40. *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988) (North Carolina Act requiring professional fundraisers to state the percentage of fees retained declared unconstitutional infringement upon freedom of speech).

41. *Id.* at 795-96 (citation omitted).

42. *Id.* at 796 (footnote omitted).

43. *Nike*, 45 P.3d at 263 (Chin, J., dissenting) (citations omitted).

44. *Virginia State Bd. of Pharmacy*, 425 U.S. at 757 (citation omitted).

45. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 533 (1980) (citation omitted).

46. *Central Hudson*, 447 U.S. at 580.

47. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999).

48. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

49. *Western States Med. Ctr.,* 122 S. Ct. 1497.

50. *Id*. at 1504.

51. *Nike*, 45 P.3d at 269 (Brown, J., dissenting).

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