Nike v. Kasky and the Definition of ''Commercial Speech''

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A Term highlighted by constitutional rulings of lasting significance also produced one monumental disappointment—a dud—in the Supreme Court's failure to resolve the continuing uncertainty about the definition of ''commercial speech'' in First Amendment jurisprudence. The Court had agreed to review the California Supreme Court's holding in *Nike v. Kasky* that essentially any public discussion by businesses of their operations is commercial speech, subject to strict government regulation, even if not included in advertising or product labels. [1] But in the U.S. Supreme Court's last order issued on the last day of the Term, the justices dismissed the writ of certiorari,[2] issuing an ''unexpected 'never mind''' to a case that ''attracted some three dozen briefs and became the focus of an intense debate, on the Internet, in the Court, and elsewhere over the role of multinational corporations, the effects of globalization, and the constitutional contours of commercial speech. ''[3]

The dismissal of the *Kasky* case immediately generated loud criticism from the dissenting justices,[4] newspaper editorial boards,[5] and

[1] Kasky v. Nike, 27 Cal. 4th 939 (2002), *cert. granted*, 123 S. Ct. 817, *and cert. dismissed*, 123 S. Ct. 2254 (2003).

[2] 123 S. Ct. 2554 (2003).

[3] Linda Greenhouse, *Nike Free Speech Case Is Unexpectedly Returned To California*, N.Y. TIMES, June 26, 2003, at A1.

[4] 123 S. Ct. at 2560 (Breyer, J. , dissenting, joined by O'Connor, J.) (''In my view, . . . the questions presented directly concern the freedom of Americans to speak about public matters in public debate, no jurisdictional rule prevents us from deciding those questions now, and delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on.'').

[5] *E.g.*, *Nike Left Speechless*, CHI. TRIB., July 6, 2003, at C-8; *Nike Has the Right to Engage in Debate*, DETROIT NEWS, June 28, 2003, at 8D; *Court Disappoints on Nike Ruling*, ROCKY MTN. NEWS, June 30, 2003, at 34A; *Court Drops the Ball*, ST. PETERSBURG TIMES, June 28, 2003, at 18A.

commentators,[6] all rightly concerned that it was essential for the Court to address the meaning of the commercial speech doctrine and to overturn the lower court's decision, which presented a genuine threat to speech by businesses on the important social and political issues of our day. With the case now returned to the lower courts, speakers are left to wonder whether to limit their speech in light of the California Supreme Court's ruling. That is a genuine concern because a plaintiff can successfully assert jurisdiction in that state's courts based on any communication on the Internet or in a substantial publication, almost all of which are received in California.[7] Indeed, immediately on the heels of the dismissal of certiorari in *Kasky*, People for the Ethical Treatment of Animals sued Kentucky Fried Chicken under the same statutory scheme regarding statements on KFC's Web site about its treatment of chickens.[8]

In this article, I argue that the California Supreme Court's decision is seriously misguided as a matter of First Amendment law and that it will inevitably be overturned by the U.S. Supreme Court. That fact may not give much solace to corporate speakers now facing the prospect of burdensome suits under the *Kasky* regime. But it should

[6] *E.g.*, Caroline Marshall, *Commercially Speaking, Speech Is Not Always Free*, LONDON DAILY TELEGRAPH, July 8, 2003, at 27; Robert J. Samuelson, *A Tax on Free Speech*, WASH. POST, July 9, 2003, at A27; Jim Wooten, *A Non-Ruling on Nike Puts Biz in a Bind*, ATL. J. & CONST., July 1, 2003, at 13A.

[7] Furthermore, because plaintiffs in these cases disavow any personal injury and right to recovery, the suit will almost certainly not be removable to a federal court that would not be bound by the California Supreme Court's ruling. *See, e.g.*, Mortera v. N. Am. Mortgage, 172 F. Supp. 2d 1240 (N.D. Cal. 2001); Toxic Injuries Corp. v. Safety-Kleen Corp., 57 F. Supp. 2d 947 (C.D. Cal. 1999); Mangini v. R.J. Reynolds Tob., 793 F. Supp. 925 (N.D. Cal 1992).

[8] *See* Elizabeth Becker, *Animal Rights Group to Sue Fast-Food Chain*, N.Y. TIMES, July 7, 2003, at A11; Valerie Elliott, *KFC in Court Over Chicken Warfare*, LONDON TIMES, July 8, 2003, at 4; Patrick Howington, *Animal-Rights Group Sues KFC*, LOUISVILLE COURIER-J., July 8, 2003, at 1F. PETA dropped the suit after KFC agreed to change the statements on its web-site and its responses to consumers' questions. *See Rights Group for Animals Drops Lawsuit Against KFC*, N.Y. TIMES, Sept. 2, 2003 at A19. But suits characterizing businesses' discussion of matters of public importance as ''commercial speech'' entitled to lesser First Amendment protection are not uniformly brought by individuals or public interest groups against corporations. Monsanto, for example, has recently sued a small dairy over its statements regarding the use of hormones in milk. *E.g.*, David Barboza, *Monsanto Sues Dairy in Maine Over Label's Remarks on Hormones*, N.Y. TIMES, July 12, 2003, at C1; J.M. Lawrence, *Monsanto Sour on Milk Marketers' Hormones Claim*, BOSTON HERALD, July 4, 2003, at 10.

provide some reassurance to companies reviewing their communications policies in light of the decision.

I. Background of the *Kasky* Case

Nike v. Kasky arose out of the passionate worldwide debate over globalization. Nike, the world's leading athletic, footwear, and apparel manufacturer, has for years been at the center of moral and political disagreements about the impact and regulation of multinational investment in the developing world because of its 900 factories in 51 countries with more than 600,000 employees. Beginning in 1995, Nike was the target of allegations that it maintained dangerously unsafe factories and mistreated and underpaid workers in its Southeast Asian factories, frequently accompanied by demands for legislative action and calls for boycotts of Nike products.

Nike responded by commissioning former United Nations Ambassador Andrew Young to conduct an independent review of its operations. When Ambassador Young concluded that the charges against Nike were largely false, Nike publicized the results, purchasing ''editorial advertisements,'' issuing press releases, and writing letters to newspapers around the country and to officers of national universities. These various statements conveyed the view that Nike does act morally because its investments produce substantial economic and political benefits for workers and because it puts its best effort toward ensuring that employees at its contract facilities are paid fairly and treated well. None of the statements at issue appeared in advertisements of Nike's products or urged consumers to buy those products.

In 1998, Marc Kasky, a resident of California, sued Nike under California's Unfair Competition Law (UCL)[9] and False Advertising Law (FAL)[10] on behalf of the general public of the State of California. Kasky alleged that Nike responded to the public allegations against it by making misstatements about working conditions at the Southeast Asian factories that manufacture certain Nike products. In particular, Kasky identified six classes of allegedly false or misleading statements:

[9] CAL. BUS. & PROF. CODE § 17200 *et seq.* (West 2002).

[10] *Id.* § 17500 *et seq.* (West 2002).

- Claims that workers who make Nike products are protected from and not subjected to corporal punishment and/or sexual abuse
- Claims that Nike products are made in accordance with applicable governmental laws and regulations governing wages and hours
- Claims that Nike products are made in accordance with applicable laws and regulations governing health and safety conditions
- Claims that Nike pays average line-workers double the minimum wage in Southeast Asia
- Claims that workers who produce Nike products receive free meals and health care
- Claims that the Andrew Young report proves that Nike is doing a good job and operating morally.

Equally notable is what Kasky did not allege. Kasky did not claim that he or any other California citizen had suffered harm or damages by purchasing products in reliance upon Nike's statements. Nor did Kasky claim that Nike made a false or misleading statement in a label or advertisement. Finally, Kasky did not claim that Nike was anything more than negligent in making the challenged statements, that is, he did not claim that Nike misspoke knowingly or with reckless disregard of the truth. Kasky sought an injunction requiring Nike to disgorge all monies it acquired from selling its products in California in violation of the UCL and FAL and to undertake a court-approved public information campaign to correct any statement deemed false or misleading, and barring Nike from misrepresenting the working conditions under which Nike products are made. Kasky also sought attorneys' fees and costs.

Nike filed a demurrer to the complaint, contending that Kasky's suit was barred by the First Amendment.[11] The California Superior Court agreed with Nike and dismissed the complaint. Kasky appealed, and the California Court of Appeal affirmed, holding that Nike's statements ''form[ed] part of a public dialogue on a matter of public concern within the core area of expression protected by the First Amendment.''[12]

[11]Nike also contended that the suit was barred by the California Constitution. *See* CAL. CONST. art. I, § 2(a). The California Supreme Court held that the federal and state constitutions are co-extensive on this question. 27 Cal. 4th 939, 958–59 (2002).

[12]Kasky v. Nike, Inc., 79 Cal. App. 4th 165, 178 (Cal. Ct. App. 2000).

The California Supreme Court reversed, four to three, and remanded the case for further proceedings.[13] The court held that Nike's statements constituted ''commercial speech'' under a three-part test the majority found ''consistent with, and implicit in'' the Supreme Court's ''commercial speech decisions.''[14] The court explained that ''categorizing a particular statement as commercial or non-commercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message.''[15]

First, the court found that Nike is a commercial speaker because the company manufactures, distributes, and sells athletic shoes and apparel worldwide.[16]

Second, the court reasoned that Nike's statements were made to a commercial audience. The court explained that the ''intended audience [of commercial speech] is likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for 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 or customers.''[17] Even if the speaker ''has a secondary purpose to influence lenders, investors, or lawmakers,'' the speech is nevertheless commercial so long as it is ''primarily intended to reach consumers and to influence them to buy the speaker's products.''[18] Because Nike sent letters ''directly to actual and potential purchasers,'' namely, university presidents and directors of athletic departments,'' and because Nike's press releases were ''intended to reach and influence actual and potential purchasers of Nike products,''[19] the second prong of the commercial speech test was satisfied.

Third, the court concluded that in ''describing its own labor policies, and the practices and working conditions in factories where its products are made, Nike was making factual representations about

[13] 27 Cal. 4th 939 (2002).

[14] *Id.* at 960.

[15] *Id.*

[16] *Id.* at 963.

[17] *Id.* at 960.

[18] *Id.* at 968.

[19] *Id.* at 963.

its own business operations.''[20] The court reasoned that statements ''made for the purpose of promoting sales'' could include ''statements about the manner in which . . . 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,'' as well as ''statements about the education, experience, and qualifications of the persons providing or endorsing the service.''[21]

The court was unconcerned with the potential chilling effect its ruling would have on speech by corporations like Nike: ''To the extent that application of these laws may make Nike more cautious, and cause it to make greater efforts to verify the truth of its statements, these laws will serve the purpose of commercial speech protection by 'insuring that the stream of commercial information flow[s] cleanly as well as freely.' ''[22]

Three justices dissented. They concluded that Nike's statements were fully protected as speech on an important public issue. ''Nike's labor practices and policies, and in turn, its products, *were* the public issue.''[23] As Justice Janice Rogers Brown explained:

> Nike faced a sophisticated media campaign attacking its overseas labor practices. As a result, its labor practices were discussed on television news programs and in numerous newspapers and magazines. These discussions have even entered the political arena as various governments, government officials and organizations have proposed and passed resolutions condemning Nike's labor practices. Given these facts, Nike's overseas labor practices were undoubtedly a matter of public concern, and its speech on this issue was therefore ''entitled to special protection.''[24]

[20] *Id.*

[21] *Id.* at 961.

[22] *Id.* at 963–64 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 (1976)).

[23] *Id.* at 975 (Chin, J., dissenting).

[24] *Id.* at 990 (Brown, J., dissenting) (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).

In these circumstances, ''Nike could hardly engage in a general discussion on overseas labor exploitation and economic globalization without discussing its own labor practices.''[25]

The majority's legal regime, the dissenters explained, chills speech on this important issue. ''[T]he corporation [can] never be sure whether its truthful statements may deceive or confuse the public and would likely incur significant burden and expense in litigating the issue.''[26] Further, the majority's ruling distorts the marketplace of ideas by discriminating against a particular viewpoint. ''Under the majority's test, only speakers engaged in commerce are strictly liable for their false or misleading representations. . . . Meanwhile, other speakers who make the same representations may face no such liability, regardless of the context of their statements.''[27] ''Handicapping one side in this important worldwide debate,'' the dissenters concluded, ''is both ill considered and unconstitutional.''[28]

After the California Supreme Court denied Nike's petition for rehearing, the U.S. Supreme Court granted certiorari.[29] Nike's argument for reversal was supported not only by the media and the business community but also by the United States (which enforces the Federal Trade Commission Act) and organized labor (which had generated much of the vituperative allegations regarding Nike's labor practices).[30]

After briefing and argument, the Court dismissed the case.[31] Of note, however, a *majority* of the Court rejected the California

[25] *Id.* at 980 (Chin, J., dissenting).

[26] *Id.* at 985 (Brown, J., dissenting).

[27] *Id.* (Brown, J., dissenting).

[28] *Id.* at 971 (Chin, J., dissenting).

[29] 123 S. Ct. 817 (2003).

[30] *See* Brief for U.S. at 7, *Nike v. Kasky*, *supra* (No. 02-575) (''Respondent seeks judicial relief for allegedly false statements that have concededly caused respondent no harm whatsoever. The First Amendment does not countenance that novel form of private action in light of its severe threat to freedom of speech.''); Brief for AFL-CIO as *Amicus Curiae* at 3, *Nike v. Kasky*, *supra* (No. 02-575) (''From all that appears in the complaint, then, the AFL-CIO stands on the same side of the debate over Nike's labor practices as the plaintiff in this case. Where we part company with the plaintiff, however, is that we are certain that this debate is, and in the interest of the disputants and the public should be, an open free speech debate under the First Amendment and not one subject to legal regulation under the commercial speech doctrine.'').

[31] 123 S. Ct. 2554 (2003) (per curiam). Three Justices—O'Connor, Kennedy, and Breyer—openly dissented from the dismissal, suggesting that the vote was six to three.

Supreme Court's holding that Nike's statements were pure commercial speech. The three justices who wrote in support of the dismissal on the ground that further factual development was required—Stevens, Souter, and Ginsburg—agreed that ''the speech at issue represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance.''[32] Justices Breyer and O'Connor similarly concluded that ''the communications at issue are not purely commercial in nature,'' but rather ''are better characterized as involving a mixture of commercial and noncommercial (public issue-oriented) elements.''[33]

II. The California Supreme Court's Definition of Commercial Speech Is Insupportable

Nike v. Kasky gave the U.S. Supreme Court the perfect opportunity to clarify the definition of commercial speech. Since 1980, the Court has articulated three inconsistent tests for identifying ''commercial speech,'' generating substantial uncertainty and confusion regarding the boundaries of commercial speech. For its part, the California Supreme Court in *Nike* defined ''commercial speech'' to cover everything said by anyone ''engaged in commerce,'' to an ''intended audience'' of ''potential . . . customers'' or ''persons (such as reporters . . .)'' likely to influence actual or potential customers that conveys factual information about itself ''likely to influence consumers in

[32] *Id.* at 2558 (Stevens, J., concurring); *see also id.* at 2559 (''On the other hand, the communications were part of an ongoing discussion and debate about important public issues that was concerned not only with Nike's labor practices, but with similar practices used by other multinational corporations. *See* Brief for AFL-CIO as *Amicus Curiae* at 2. Knowledgeable persons should be free to participate in such debate without fear of unfair reprisal. The interest in protecting such participants from the chilling effect of the prospect of expensive litigation is therefore also a matter of great importance. *See e.g.* , Brief for ExxonMobil *et al.* as *Amici Curiae* at 2, *Nike v. Kasky*, *supra* (No. 02-575); Brief for Pfizer, Inc., as *Amicus Curiae* at 11-12, *Nike v. Kasky*, *supra* (No. 02-575). That is why we have provided such broad protection for misstatements about public figures that are not animated by malice. *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964).'').

[33] 123 S. Ct. at 2565 (Breyer, J., dissenting); *see also id.* at 2566 (''These three sets of circumstances taken together—circumstances of format, content, and regulatory context—warrant treating the regulations of speech at issue differently from regulations of purer forms of commercial speech, such as simple product advertisements, that we have reviewed in the past. And, where all three are present, I believe the First Amendment demands heightened scrutiny.'').

their commercial decisions.''[34] This novel definition, which gives Nike's statements in the *New York Times* about labor conditions in its Southeast Asian factories no more protection under the First Amendment than a supermarket flyer advertising Nike shoes, cannot be reconciled with any of the U.S. Supreme Court's tests. Thus, by reversing the California court's decision, the Supreme Court could have clarified the ambiguities and conflicting signals in its own precedents.

The first of the Supreme Court's tests was articulated in *Central Hudson Gas & Electric Co. v. Public Service Commission*, in which the Court defined ''commercial speech'' as ''expression related solely to the economic interests of the speaker and its audience.''[35] Under the ''*Central Hudson* definition,'' Nike's speech was clearly not commercial, for it principally targeted consumers who purchase (or boycott) goods for *non*economic reasons. And Nike's motivation for speaking was principally the prospect of government action restricting foreign investment or condemning the company and increasing company morale,[36] concerns that can be considered ''solely'' economic only in the sense that virtually *everything* a company does is ultimately intended to improve its financial bottom line.

The Supreme Court articulated a second test for identifying commercial speech three years after *Central Hudson* in *Bolger v. Youngs*

[34]Kasky v. Nike, 27 Cal. 4th 939, 960 (2002).

[35]Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980)

[36]*E.g.*, *March Down Fifth Avenue in New York City Protesting the Use of Child Labor Abroad to Make Products Which American Consumers Buy Relatively Cheap* (Nat'l Pub. Radio broadcast, Dec. 11, 1998) (linking proclamation by President Clinton urging ''an end to sweatshop conditions both in the United States and abroad'' to protests against Nike); Bernie Sanders, *Webwire—Nike Corporate Practices Come Under Attack,* Congressional Press Release, Oct. 24, 1997 (reporting on letter from 53 U.S. congressional representatives seeking meeting with Nike to address overseas labor issues and asserting that ''Nike believes that workers in the United States are good enough to purchase [its] shoe products, but are no longer worthy enough to manufacture them''); Paula L. Green, *Nike, Jordan Challenged on Conditions Indonesian Worker in Court Battle*, J. COM., July 25, 1996, at 3A (describing efforts to pressure Nike by, *e.g.*, an AFL-CIO youth group and Rev. Jesse Jackson, as well as attempts to link issue to ''crusade'' by U.S. Department of Labor to eliminate domestic sweatshops); Robin Bulman, *Nike's Tainted Cash?*, J. COM., July 23, 1996, at 7A (reporting on resolution of Portland Metropolitan Human Rights Commission urging local school board to decline Nike donation of $500,000 to cover budget shortfall on the basis of ''alleged human rights abuses by the company's overseas suppliers'').

Drug Products Corp.[37] Bolger concluded that a pamphlet advertising condoms was commercial speech based on three factors in ''combination'': (1) advertising format, (2) explicit reference to a product, and (3) economic motivation.[38] The California Supreme Court's decision in *Nike* fared no better under this revised standard, however, for two reasons. The California Supreme Court's conclusion that the format and the forum of a statement are irrelevant to the commercial speech inquiry is plainly inconsistent with *Bolger*'s reasoning that an advertisement has less communicative value than a statement with the same message contained in a newspaper editorial that plays a role in broader public discussion. In effect, the California Supreme Court would have collapsed the *Bolger* inquiry into a single prong: economic motivation.[39]

Just as important, Kasky never asserted that Nike had made a false or misleading statement about its *products*, and indeed none of the statements at issue even referred to characteristics (such as price, availability, or suitability) of Nike's products. But in an Orwellian ipse dixit, the California Supreme Court held that ''product references'' require *no* reference to *any* product, instead encompassing every factual statement a business makes about its operations or the conditions in which employees supplying its firms work.[40]

Finally, the California Supreme Court's decision is inconsistent with the third (and most often-repeated) definition of commercial speech offered by the U.S. Supreme Court: ''speech that does no more than propose a commercial transaction.''[41] The California court omitted any requirement that the speech make a commercial proposal at all, much less that it do so exclusively. Kasky argued that Nike's speech met this definition because it sought to induce a sales transaction and therefore ''propose[d] a commercial transaction.''But that argument, if correct, would have eliminated the requirement of a ''proposal'' entirely from the definition of commercial speech

[37] 463 U.S. 60 (1983).

[38] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 & n.13 (1983).

[39] *Contra* Hustler v. Falwell, 435 U.S. 46, 53 (1988) (constitutional protection of public discourse does not depend on the motivation for expression); New York Times v. Sullivan, 376 U.S. 254, 265 (1964) (same).

[40] 27 Cal. 4th at 961.

[41] United States v. United Foods, Inc., 533 U.S. 405, 409 (2001); *see also* Edenfield v. Fane, 507 U.S. 761, 767 (1993); Bd. of Trustees v. Fox, 492 U.S. 469, 473–74 (1989).

because virtually everything a business says or does is intended to increase its sales in some ultimate sense.

Thus, although the California Supreme Court characterized its result as ''consistent with'' and ''implicit in'' the Supreme Court's decisions,[42] in fact the definition it proposed went well beyond the Court's definitions of commercial speech. By declining to decide the case, the U.S. Supreme Court also left in place a definition of commercial speech that runs afoul of three core First Amendment values.

First, the California court's definition of commercial speech restricted speech on public issues that have traditionally been entitled to full First Amendment protection. Though it has substantial value for listeners, commercial speech does not receive full First Amendment protection because it has been thought to lack the communicative value of fully protected speech to the speaker and to society generally and in that sense has been said to make less of a ''direct contribution to the interchange of ideas.''[43] By contrast, ''speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.''[44] Through fully protected speech, individuals participate in the polity,

[42]27 Cal. 4th at 960.

[43]Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 780 (1976). That argument has been subjected to heavy criticism from Justice Thomas and from commentators who would abandon the commercial versus non-commercial speech distinction. *See, e.g.*, 44 Liquormart v. Rhode Island, 517 U.S. 484, 522–23 (1996) (Thomas, J., concurring in part and concurring in the judgment): ''I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech. Indeed, some historical materials suggest to the contrary.''); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part and concurring in the judgment) (''I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.' ''); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990); Barbara M. Mack, *Commercial Speech: A Historical Overview of Its First Amendment Protections and an Analysis of Its Future Constitutional Safeguards*, 38 DRAKE L. REV. 59 (1988); Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212, 1223 (1983); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777 (1993).

[44]Connick v. Myers, 461 U.S. 138, 145 (1983) (citation omitted).

expressing views and engaging in debate that collectively makes up the nation's social and political consciousness, triggering our ''profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.''[45]

The California court's decision in *Nike* is irreconcilable with this distinction between commercial speech and fully protected ''speech on public issues.'' The court concluded that statements on matters of public importance are nevertheless ''commercial speech'' for purposes of the First Amendment whenever they involve the company's business practices. That theory cuts the heart out of the First Amendment's protections for statements by commercial entities on nearly *every* public issue—from a company's diversity policy to its community relations efforts to its political activities—all of which can be said to ''matter in making consumer choices.''[46] The California court's decision thus swallows up public discussion of *all* ''matter[s] of political, social, or other concern to the community,'' as distinguished from the narrow categories of ''matters only of personal interest''[47] and of ''speech solely in the individual interest of the speaker and its specific business audience.''[48]

Consider the facts of *Nike*. Unlike a traditional false advertising complainant, Kasky did not claim that petitioner misled consumers

[45]New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

[46]27 Cal. 4th at 969. To be sure, advertising does not receive the full protections of the First Amendment when it merely uses the *artifice* of ''link[ing] a product to a current public debate.'' *Cent. Hudson Gas & Elec. Co.*, 447 U.S. at 563 n.5. *See also, e.g.*, Zauderer v. Office of Disciplinary Counsel of Ohio Supreme Court, 471 U.S. 626, 637 n.7 (1985). But, as the Court recognized in *Bolger*, the state's augmented power to regulate commercial speech coexists with the principle that speech on matters of public importance (including that by corporations) loses none of its protection by virtue of the fact that it may alter consumer behavior. 463 U.S. at 86. Indeed, it is precisely *because* ''[a] company has *the full panoply of constitutional protections* available to its *direct comments on public issues*, [that] there is no reason for providing similar constitutional protection when such comments are made in the context of commercial transactions.''*Id.* at 68 (emphasis added). Thus, when a corporation's statements on public issues do not appear in ''commercial speech''—which petitioner's statements plainly do not under any of the three tests announced by the Court—they are fully protected by the First Amendment.

[47]*Connick*, 461 U.S. at 146–47.

[48]Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985 (plurality). For a discussion of ''ethical purchase behavior,'' which posits that some consumers purchase products based not just on price and quality but also on their ''moral judgment'' about the seller, *see* N. CRAIG SMITH, MORALITY AND THE MARKET 177 (1990).

into believing that Nike offers them a ''better deal,'' that its products are better made, or even that they are ''cooler'' than the competition's. Rather, he claimed that petitioner's labor practices in Southeast Asia raise so important a social issue that citizens make moral judgments on that basis about Nike, and that those judgments, in turn, influence their purchasing decisions.

But that simply shows why Nike's statements belong at the very core of the First Amendment's protections: It presents a classic dispute between business and labor of the precise sort that the Court has located squarely ''within that area of free discussion that is guaranteed by the Constitution,''[49] reasoning that ''labor relations are not matters of mere local or private concern,'' and that ''[f]ree discussion concerning the conditions in industry and the causes of labor disputes [is] indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.''[50] Thus, although both Nike's statements and traditional advertising may address matters of public importance, only the former are integrally related to public *dialogue*, dealing with public issues in a different and deeper sense than mere advertising.[51]

Second, the California court's definition applied to public statements unrelated to any state regulatory scheme governing advertisements and representations of product qualities.[52] Another reason

[49] Thornhill v. Alabama, 310 U.S. 88, 103 (1940).

[50] *Id.*; *see also* Linn v. United Plant Guard Workers, 383 U.S. 53, 58 (1966) (characterizing labor disputes as inevitably producing ''bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations, and distortions.'' For examples of fully protected speech by the other side in the Nike labor debate, *see e.g.*, *Big Labor Rips Nike at Big PR's Annual Outing*, O'Dwyer's PR Services Report, July 1998, at 1; Bob Herbert, *In America; Nike's Bad Neighborhood*, N.Y. Times, June 14, 1996, at A29.

[51] *See* Bob Herbert, *Let Nike Stay in the Game*, N.Y. Times, May 6, 2002, at A21 (''Whatever one thinks of Nike, it is a crucial participant in this continuing debate.'').

[52] It bears emphasizing that Kasky did not allege that he or any other California resident in fact relied on any false statement by Nike in purchasing its products, and therefore the case raised no issue regarding the power of government to prosecute those who use deliberate deception to extract money from the public, *see* Cantwell v. Connecticut, 310 U.S. 296, 306 (1940), to enjoin swindling schemes, *see* Donaldson v. Read Magazine, 333 U.S. 178, 191 (1948), or to provide a remedy for consumers who were otherwise fraudulently induced to purchase a product.

commercial speech receives less than full First Amendment protection is that, because advertising does not ordinarily generate the intense media scrutiny and public discussion and reflection typically associated with editorials and other speech on social, political, and moral matters of public moment, direct government regulation may be the only mechanism to ensure that consumers receive accurate information about the products and services they might wish to purchase.[53]

This defining linkage between commercial *speech* and commercial *activity*[54] is completely absent from the California Supreme Court's ''commercial speech'' test. The speech by Nike targeted for regulation by the court's ruling is not tethered to the state's authority to regulate commercial transactions—although Nike sells products in California, no resident of that state need have purchased any product manufactured by Nike in Southeast Asia for *Kasky* liability to attach.

Thus, under the California court's ruling, the state may regulate all statements of ''fact'' by a commercial entity about its operations that are ''likely to influence consumers in their commercial decisions.''[55] But the protection afforded to discussion of matters of public importance certainly extends to such statements of ''fact.'' Facts are the bedrock on which judgments about public issues are reached. ''Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues 'about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'''[56] A contrary rule would produce ''innocuous and abstract discussions'' and, because the line between fact and opinion is so hazy, would ''so becloud even this with doubt, uncertainty and the risk of penalty'' that ''freedom of speech . . . [would] be at an end.''[57]

[53] *See Edenfield*, 507 U.S. at 767; *Bolger*, 463 U.S. at 69.

[54] Friedman v. Rogers, 440 U.S. 1, 10 n.9 (1979) (''By definition, commercial speech is linked inextricably to commercial activity.'').

[55] 27 Cal. 4th at 969.

[56] First Nat'l Bank v. Bellotti, 435 U.S. 765, 776 (1978) (quoting Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940)).

[57] Thomas v. Collins, 323 U.S. 516, 536–37 (1945). The California Supreme Court expressly declined to follow *Thomas* and *Thornhill* on the ground that they had been superseded by ''the modern commercial speech doctrine.'' 27 Cal. 4th at 965. But the U.S. Supreme Court has cited *Thornhill* and *Thomas* favorably more than 125 times, often in leading free speech precedents. In particular, those decisions undergird the recognition of the First Amendment right to speak on matters of public importance,

The California Supreme Court seemed principally motivated by a desire ''to adequately categorize statements made in the context of a modern, sophisticated public relations campaign intended to increase sales and profits by enhancing the image of a product or of its manufacturer or seller.''[58] But the commercial speech doctrine needs no expansion to accommodate government's legitimate interest in regulating ''image campaigns.'' Many ''image *advertisements*'' are commercial speech in the classic sense. Nor may an advertiser circumvent the commercial speech doctrine through the nicety of ''link[ing] a product to a current public debate.''[59] And the fact that some ''image campaigns'' fall outside of the ''commercial speech'' category does not render them altogether immune either from regulation or from the marketplace consequences of whatever misstatements are uncovered.

Nor has a new and more expansive view of government's regulatory authority been shown necessary to protect consumers, given how readily matters of public importance that concern consumers draw media attention. The media and the Internet provide innumerable outlets through which the Kaskys of the world may voice their accusations—accusations to which corporations already feel pressure to respond. And those responses do not go unexamined. When they are revealed in the press to be false or misleading, those responsible are likely to suffer not just embarrassment but substantial losses in sales. That prospect, in turn, gives companies a powerful incentive to ensure that they speak accurately. The proper operations of the marketplace of ideas and the marketplace of goods are thus mutually reinforcing.

Kasky argued that Nike's statements should receive reduced First Amendment protection because Nike knew that some consumers would be influenced by its statements in their purchasing choices. This rationale, however, is both overinclusive, because the California

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including the right to engage in social protest. *E.g.*, Meyer v. Grant, 486 U.S. 414, 421 (1988); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8–9 (1986); FCC v. League of Women Voters, 468 U.S. 364, 381–82 (1984); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 534–35 (1980); *Bellotti*, 435 U.S. at 783; Branzburg v. Hayes, 408 U.S. 665, 705 n.40 (1972); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

[58]27 Cal. 4th at 962.

[59]Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557, 563 n.5 (1980).

law imposes liability even without reliance, and underinclusive, because it excludes a manufacturer's statements of opinion and political views, which may also influence consumer choices. In short, California's determination to police speech affecting consumers' ethical conclusions is unrelated to the traditional state power to regulate commercial dealings.

Finally, the California Supreme Court's definition of commercial speech amounted to viewpoint discrimination. Traditional governmental regulation of commercial advertising applies neutrally to the class of statements on which consumers directly rely in making purchasing decisions. By contrast, the California statutes apply to commercial sellers but *not* to persons and entities that launch accusations against those sellers—despite the fact that the accusations appear in the identical fora and have an indistinguishable effect on consumer behavior. The government's power ''to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there'' does *not* imply the power to engage in ''viewpoint discrimination.''[60] To the contrary, ''discrimination between commercial and noncommercial speech'' is forbidden as a form of viewpoint-based censorship when ''the distinction bears no relationship *whatsoever* to the particular interests that the [government] has asserted.''[61] That rule respects the basic First Amendment principle that ''[t]here is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard.''[62]

Under such a legal regime, the discovery of truth is the loser. For the ''best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .''[63] That is why a core purpose of the First Amendment is to foreclose public authority from attempting to control the public mind through regulating speech.[64] In the classic words of Judge Learned Hand, the First Amendment ''presupposes that right conclusions are more likely to be gathered out

[60] R.A.V. v. St. Paul, 505 U.S. 377, 388–89 (1992).

[61] City of Cincinnati v. Discovery Network, 507 U.S. 410, 424 & n.20 (1993).

[62] Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

[63] Consol. Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 (1980) (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[64] *See* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 791 (1988).

of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.''[65]

III. Conclusion

It is deeply unfortunate that the U.S. Supreme Court did not seize the opportunity presented by *Nike v. Kasky* to bring greater coherence to the commercial speech doctrine. But until the justices return to the issue, the lower courts should recognize that the California Supreme Court's decision in the case is unpersuasive and destined ultimately to be rejected.

[65]United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).