

**Just Sue It:
Commercial Speech and the Liberal View of the First Amendment**

by

Thomas (Tom) M.J. Bateman
Political Science Department
St. Thomas University
Fredericton, NB
bateman@stu.ca
506-460-0356

Presented to:

Annual Meeting
Canadian Political Science Association
University of Manitoba
Winnipeg Manitoba
June 3-5, 2004

Draft

Do not quote without permission of the author.

1. Introduction

In 2003 the United States Supreme Court declined an opportunity to clarify the power of government to regulate commercial speech. After granting leave to appeal and conducting an oral hearing in *Nike, Inc. v. Kasky*, it later declared that leave to appeal was “improvidently granted” and remanded the matter to a California trial court where the legal dispute began. This case concerned a challenge under California false-advertising to several factual statements Nike officers made about working conditions in its plants in south-east Asia. Important as this was, the dispute has implications for the constitutional protection of commercial speech in the United States and the degree to which governments can regulate corporate communications. More fundamentally, the dispute was about the nature and extent of public obligations of commercial actors and how these are properly to be encouraged or enforced.

This paper will examine the circumstances of *Nike v. Kasky*, paying particular attention to two parallel discourses. On the one hand, Nike’s operations are for some activists emblematic of unrestrained corporate greed and abuse of workers in sweatshops around the world. The only remedy for this is enforceable regulation of corporate practice, a view that has gained support in the wake of prominent corporate accounting scandals in the US and abroad. On the other hand, in the legal arena, the question is about the rights of commercial actors to respond to criticisms, improve their operations, and generate jobs and wealth while meeting consumer demand. The second discourse is about the discipline provided by the market rather than the hand of the state. This is a classic American public policy debate, now with the twist that people on both sides of the divide argue that corporate social responsibility is at all events the goal. For between these two discourses is a new element, the global corporate social responsibility movement, calling business to its social obligations while maintaining fast faith in business and market as engines of human welfare. How best to advance corporate social responsibility? One side says that Nike must be forced by public regulation to be responsible, in both word and deed. The other side says that Nike must be given the freedom to participate in an economic and speech market to conduct experiments in corporate best practice and contribute to full and informed public debate.

Nike’s case illustrates the continuing tension in American law and politics between liberalism and democracy. The rhetoric of democracy is self-government, public obligation, and the subordination of particular interests to the public good. It is about citizenship and the subordination of the economic to the political. Liberal rhetoric emphasizes the priority of private goals, rights to achieve them, and the achievement of the public good by means market competition. Nike’s case suggests that democratic rhetoric is being assimilated to liberal rights talk with consequences Nike’s critics may not have

anticipated.

2. **Just Sue It: *Kasky v. Nike***

Nike, Inc., is in many ways the poster-child of economic globalization, the brand-based multinational corporation that pioneered the outsourcing of production of its shoes and apparel to low-wage facilities in Southeast Asia. Its production is carried out by 600,00 employees working in 900 factories operating in 51 countries. In 1997, its \$1 billion marketing budget fetched \$9 billion in revenues and the Nike swoosh has become the ubiquitous symbol of star athletes, pudgy, middle-aged joggers, and inner city youth. “[W]e are a company that is based on a brand,” Nike’s 1997 annual report affirms.

Over the course of the 1990s, Nike began to attract the attention of critics who publicized evidence to the effect that Nike products were manufactured by low-paid, under-aged, mostly female worker in sweatshop conditions.¹ Labour monitoring groups and other non-government organizations released reports containing evidence that working conditions at many Nike contractors’ factories failed to meet standards Nike set in memoranda of understanding with contractors and communicated to the public. These criticisms produced a torrent of media attention, especially after 1996. “Nike’s sweatshop scandals have been the subject of over 1,500 news articles and opinion columns.”² Nike responded to the reports by releasing statements defending its practices and by engaging former US ambassador to the United Nations, Andrew Young, to conduct a study of Nike’s overseas operations. His largely favourable report was posted on Nike’s website. The Young report and other communications became the subject of a complaint in a California court under California’s false advertising law. The law allows any person to act on behalf of the general public to lodge a claim against a corporation for “any unlawful or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising....” The complainant need not demonstrate any harm he or she has incurred as a result of the advertising in question. In fact, a conviction does not require evidence that anyone was harmed; advertising which is likely to deceive is

¹ See <<http://www.mallenbaker.net/csr/CSRfiles/nike.html>>

² Naomi Klein, *No Logo: Taking Aim at the Brand Bullies*. (Toronto: Vintage, 2000), 366.

proof enough.

Specifically, Kasky alleged that Nike wrongly claimed in various communications that its products are made in accordance with local laws governing wages and hours of work; that local health and safety laws are upheld; that the average line-worker's wage is double that in Southeast Asia; that its workers receive free meals and health care; that the Young report proves that Nike is doing a good job and "operating morally"; and that a living wage is provided to all Nike workers.³ Nike was accused of misleading statements and misleading or deceitful omissions of material information from its statements. The evidence for Kasky's complaint was found in letters written by Nike executives to colleges and university presidents and athletic directors, letters to the editor of newspapers, press releases, full-page newspaper advertisements Nike took out to publicize Young's report, and in pamphlets distributed for public relations purposes. Kasky sought an order that Nike "disgorge all monies" it acquired by means of its false and misleading statements, and that Nike undertake a corrective public information campaign.⁴

In court in early 1999, Nike demurred to the complaint primarily on the ground that the relief sought by Kasky was contrary to the First Amendment guarantee of freedom of speech. Nike argued that its communications in response to criticisms were not commercial speech subject to reduced constitutional protection against state regulation, but non-commercial speech worthy of full constitutional protection against California's false advertising law. The superior court agreed with Nike and the appeal court affirmed. But in the California Supreme Court in 2002, a narrow majority of 4-3 reversed, defining commercial speech to encompass Nike's communications. Predictably, Nike appealed to the US Supreme

³Complaint, *Kasky v. Nike, Inc, et al*, California Superior Court, July 2, 1998. Available at <<http://www.reclaimdemocracy.org/nike/>>

⁴ It is worth noting that Kasky's statement of claim is as much a political document as a legal complaint. The document details Nike's senior executives' salaries, the corporation's incentive-based compensation scheme, and its meteoric revenue growth over the 1990s. These data are juxtaposed to the wages of its offshore workers.

Court and was joined by a formidable array of associations and corporations worried about the effect of an expansive definition of commercial speech on the ability of the state to regulate corporate communications. Certiorari was granted in October, 2003, and oral arguments were made in April, 2003.

Several weeks later, in an unusual move, the US Supreme Court declared that leave to appeal was “improvidently granted” and remanded the matter to the California trial court. Apparently, the majority of justices determined they could not assess the constitutional claim without an established factual record. For Kasky this was unexpectedly good news. Nike would have to participate in the discovery process and defend itself on the merits of Kasky’s claim, under a law whose terms are favourable to the plaintiff. Perhaps for these reasons, in September, 2003, Nike announced a settlement with Kasky for \$1.5 million, the money to be directed to the Fair Labor Association (an NGO of which Nike was already a member) to improve monitoring of offshore factory working conditions, to improve worker education and training, and to help develop global standards to evaluate corporate social performance. Nike also committed to maintaining its annual \$0.5 million investment in after-hours worker education programs and micro-loan programs.⁵

With the settlement of 2003, Kasky’s 1998 complaint will not be addressed in court, and for now, the constitutional status of California’s false advertising law and the California Supreme Court’s expansive definition of commercial speech made thereunder will stand. Nike has, however, joined others in an attempt to change the California law by means of a November 2004 ballot initiative. The ballot will ask voters to reduce vexatious litigation by removing from California’s unfair competition law the provision allowing private attorneys general like Kasky (who themselves claim no direct harm from false or misleading commercial speech), from lodging complaints against “small businesses.”⁶

The issues in *Kasky v. Nike* were argued not only in the courtrooms but in the media. Media debate was dominated by the rhetoric of responsibility and obligation. In court, however, the debate was about rights, specifically First Amendment rights.

3. Corporate Social Responsibility : Enforced by the Market or the State?

Increasing awareness of the social responsibility of business goes by many names – Corporate Responsibility, Corporate Citizenship, Corporate Sustainability – but perhaps the overarching name is Corporate Social Responsibility (CSR). Corporate social responsibility (CSR) addresses the ethical

⁵ Nike press release, September 12, 2003. Available at <http://www.nike.com/nikebiz/news/pressrelease.jhtml?year=2003&month=09&letter=f>

⁶ See ReclaimDemocracy.org for information on this and other matters associated with the Kasky case. http://www.reclaimdemocracy.org/corporate_accountability/california_unfair_business_practices_attack.html

obligations of business and its fundamental alignment with society.⁷ The CSR movement emerged in the latter half of the twentieth century, taking as its point of departure the period in which ethical conduct in business was understood primarily in terms of retirement philanthropy: CSR is about the integration of ethical concerns into the operations and strategies of business, the exercise of social obligations beyond legal compliance. As the noted CSR activist Mallen Baker puts it, “regulation is for minimum standards. CSR is about best practice.”⁸

⁷ H.R. Bowman, *Social Responsibilities of the Businessman*. (New York: Harper & Row, 1953). See also Archie B. Carroll, “Corporate Social Responsibility: Evolution of a Definitional Construct” *Business & Society*. 38:3 (September 1999), 268-95; Sandra Waddock, “The Multiple Bottom Lines of Corporate Citizenship: Social Investing, Reputation, and Responsibility Audits” *Business and Society Review*. 105:3 (2000), 323-345; Hans Nieuwlands, “Heeding the Call” *Internal Auditor*. (August, 2003), 80-87.

⁸ Mallen Baker, <<http://www.mallenbaker.net/csr/nl/70.html>>; also Abigail McWilliams, “Corporate Social Responsibility: A Theory of the Firm Perspective” *Academy of Management Review*. 26:1 (January 2001), 117-128.

CSR advocates seek to widen the circle of obligation of corporate managers beyond shareholders to stakeholders more generally: customers, suppliers, local communities in which corporations operate, governments, the 'environment', and employees – all groups affected by a firm's operations. Accordingly, companies are not single-mindedly to pursue the "bottom line" by maximizing profit; they are to pursue what is often called the "triple bottom line", the simultaneous and long-term pursuit of social, environmental, and financial performance. CSR enables businesses to effect a better, more stable, productive, and lasting alignment with society, producing quality of life and well-being, not merely greater, but unequally-distributed, wealth.⁹

There is much enlightened self interest in all this.¹⁰ Indeed, the CSR movement has burgeoned among the very large transnational corporations that suffered withering attacks based on their labour and environmental practices, particularly in the developing world. CSR functions as a reaction to the myriad risks to reputation and sales a firm can suffer when criticized for poor practice. As studies indicate, it is no longer enough for a corporation to declare that it complies with the law. In the international environment, few laws govern corporate activity. Legal standards in developing countries are scant and poorly enforced. Regulatory regimes in the developed economies have become leaner. At the same time, consumer culture has become more sophisticated, and a variety of ethical considerations combine with price and quality factors to influence purchasing decisions.¹¹ Boycotts and other forms of direct consumer action can threaten a business's viability. Corporations increasingly realize that their own long-term

⁹ N. Craig Smith, "Corporate Social Responsibility: Whether and How?" *California Management Review*. 45:4 (Summer, 2003), 52-76.

¹⁰ Duane Windsor, "The Future of Corporate Social Responsibility" *International Journal of Organizational Analysis*. 9:3 (2001), 225-256; John Roberts, "The Manufacture of Corporate Social Responsibility: Constructing Corporate Sensibility" *Organization*. 10:2 (2003), 249-265. An interesting article linking corporate CSR practice to the anticipation of legal change in tort law is David Silverstein, "Managing Corporate Social Responsibility in a Changing Legal Environment," *American Business Law Journal*. 25 (1987), 523-566.

¹¹ Rob Harrison, "Corporate Social Responsibility and the Consumer Movement" *Consumer Policy Review*. 13:4 (July-August, 2003), 127-131

interests are linked to the advancement of stakeholder interests and the projection of an ethical corporate personality.

Of course this is also the basis for the view that CSR is merely public relations taken to new, ironic heights.¹² Criticisms to this effect from the political left are legion, but the same is heard from some on the right, like Milton Friedman, who argue that the corporate social responsibility of business is to make profits for principals, and that other social institutions and government shall assert other groups' interests. Chief executives should be moral on their own time, and not commit shareholders' money to causes whose morality they may not support.¹³

Exceptions exist, but a general claim can be made that CSR in the United States has a stronger voluntaristic streak than CSR elsewhere, particularly Europe.¹⁴ Whether out of conviction or narrowly defined business interest, American CSR advocates prefer CSR best practice to develop outside the terms of public policy. Some still wonder if the takeover of CSR by public policy will not crush the spirit of the movement and instead foster a mere rule-compliant mentality that will stifle creative experimentation into ways to bring commercial, social, and environmental interests fully into accord. Imposing uniform public policy on all will deprive the seriously responsible businesses from the market advantages associated with such forward thinking. CSR best practice should remain, in this view, a voluntary matter rewarded by the market rather than compelled by the state. The idea here is that over time CSR will produce a market-induced race to the top rather than a profit-fixated race to the bottom decried by business's critics.

European CSR advocates assume a subtler, more complementary relationship between CSR and public policy. They suggest that the early development of CSR best practice can be characterized by voluntary experimentation, but that over time, governments should both encourage CSR by favouring firms practicing it and by enforcing universal standards for social and environmental performance. They see the incorporation of CSR standards into public policy as a natural evolution from the development of laws governing financial reporting. Requiring all enterprises to adhere to mandatory rules will remove the competitive disadvantage responsible businesses inevitably experience when they make investments in technology, processes or working conditions their competitors will shirk in order to achieve a price

¹² Jarol B. Manheim and Cornelius B. Pratt, "Communicating Corporate Social Responsibility" *Public Relations Review*. 12 (Summer, 1986), 9-18. See Christian Aid, *Behind the Mask: The Real Face of Corporate Social Responsibility*. (2003) Available at <<http://www.christian-aid.org.uk/indepth/0401csr/>>

¹³ See Friedman's *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), and his famous essay, "The social responsibility of business is to increase its profits" *New York Times Magazine*. (September 13, 1970), 32-32, 122, 124, 126.

¹⁴ For general discussions, see Thoms A. Hemhill, *Business Horizons*. 40:2 (March/April, 1997), 53-9; Ans Kolk and Rob van Tulder, "The Effectiveness of Self-Regulation: Corporate Codes of Conduct and Child Labour" *European Management Journal*. 20:3 (2002), 26-27.

advantage on a good or service. Certainly, a great deal of efforts is expended on the development of universal standards. Industry associations are involved but so are NGOS and international organizations like the United Nations, the International Standards Organization, the EU, and the OECD.¹⁵

¹⁵ John Gerard Ruggie, "The United Nations and Globalization: Patterns and Limits of Institutional Adaptation" *Global Governance*. 9 (2003), 301-321; Malcolm McIntosh and Ruth Thomas, *Corporate Citizenship and the Evolving Relationship Between Non-Governmental Organisations and Corporations*. (London: British-North American Committee, 2002); Ethan B. Kapstein, "The Corporate Ethics Crusade" *Foreign Affairs*. 80:5 (September/October, 2001), 105-119.

It is clear on what side Nike places itself. Nike combines its marketing of its brand image with a variety of initiatives to place itself in the global corporate social responsibility movement.¹⁶ Its website boasts a plethora of initiatives in community development. Nike, like many firms, styles itself a “corporate citizen.” Its public relations exercises emphasize its obligations as a corporate citizen. Its legal department, meanwhile, has pursued the citizenship theme with equal alacrity, suggesting in submissions to the courts that its public interventions debates concerning its corporate practices should have the constitutional protection accorded to political speech. This is an argument for more civil freedom from state regulation, not necessarily to avoid the obligations of corporate responsibility but to see that the marketplace of ideas is the enforcer of the responsibility rather than the regulatory arm of the state. It is an argument to which the US Supreme Court has been increasingly receptive.

4. The First Amendment and Commercial Speech

This section considers the Supreme Court’s development of commercial speech doctrine in the past thirty years. It will emerge that commercial speech has acquired increasing constitutional protection over time, approaching a point where commercial speakers enjoy the full panoply of First Amendment rights, effectively conflating commercial discourse and other speech of a traditionally political character. Alongside this broad trend is a record of confusion, inconsistency, and dissent. These points suggest that the doctrine was ripe for consideration in *Nike v. Kasky*.

When the US Supreme Court first considered the question directly, it declared in 1942 in *Valentine v. Chrestenson* that “the Constitution imposes no such restraint on government as respects purely commercial advertising.”¹⁷ Soon after *Valentine*, members of the Court began to raise doubts about the blanket exclusion of commercial speech from constitutional protection. But serious reconsideration did not begin until the 1970s when majorities of the Supreme Court began to accord constitutional protection to commercial speech. This embroiled the Court in struggles to draw clear, justiciable

¹⁶ See Nike’s website: <<http://www.nike.com/nikebiz/nikebiz.jhtml?page=24>>

¹⁷ *Valentine v. Chrestenson*, 316 U.S. 52 (1942), 52.

distinctions between commercial and non-commercial speech and to arrive at a consistent understanding of the level of First Amendment protection commercial speech should enjoy.

Why maintain a distinction between commercial and non-commercial speech? Why not simply accord commercial speech full constitutional protection? One answer is that the Bill of Rights protects the rights of individual natural persons, not artificial entities existing by legislative fiat. (On this more will be said later.) A second answer is that governments have an interest in preventing commercial harms created by false or deceptive commercial statements. Normally, “counterspeech” – the exchange of contrary opinions to separate truth from falsehood – remedies false or deceptive speech in politics, academic debate, and other spheres, but counterspeech takes time and consumers do not have the time to test the truth of all commercial claims.¹⁸ The Court’s answer is found in a footnote to one of the Court’s most important commercial speech decisions. While the constitution protects speech, there is no constitutional value at all in false, deceptive, or misleading speech.¹⁹ The problem is in the crafting of public policies that separate true from false speech. Much speech is opinionated, occupying a grey zone between certifiable truth and falsehood. Prohibition of false speech in these contexts risks catching much comment that is not false. Political commentary and speech on matters of public concern is opinionated but nonetheless vital to democratic self-government. Banning falsehood here risks banning much valuable speech. Laws banning false speech have a chilling effect on valuable as well as invaluable speech. As a result, speech on matters of public concern should be given breathing space and some falsehood and deception must be tolerated in order to allow valuable speech to flourish.

Commercial speech, according to the Court, is different. “The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely....Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate

¹⁸ *Cincinnati v. Discovery Network, Inc.* 507 U.S. 410 (1993).

¹⁹ *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976), 771, note 24.

inaccurate statements for fear of silencing the speaker.”²⁰ So commercial speech, according to the Supreme Court in its seminal modern decision on commercial speech, is legitimately subject to greater state regulation as to its truth than other forms of speech.

- A. Commercial speech mixed with matters of public interest.

²⁰ Ibid.

The Court's first modern foray into the field occurred in *Bigelow v. Virginia* (1975)²¹ when it considered a case in which a newspaper editor was charged under a Virginia law prohibiting the encouragement through advertising or other means of abortion services, even if these were to be legally obtained out of state. The editor challenged the law on First Amendment grounds. A majority held that the law was unconstitutional, citing a famous earlier decision²² to the effect that "[t]he fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees."²³ The ad communicated more than "a purely commercial transaction" and concerned a "matter of the highest public interest and concern."²⁴ "To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."²⁵

William Rehnquist dissented in this case, arguing for adherence to *Valentine* and refusing to link advertising for products and services with the broader principle of the protection of the marketplace of ideas. Stated in simple terms, his position is that the First Amendment was not intended to extend to commercial speech.²⁶ His view did not prevail. *Bigelow* established that commercial speech as such merits

²¹ 421 U.S. 809 (1975).

²² *New York Times v. Sullivan*, 376 U.S. 254, (1964).

²³ *Bigelow v. Virginia*, 818.

²⁴ *Ibid.*, 820.

²⁵ *Ibid.*, 826.

²⁶ See also his dissent in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), at 404-6: "...the appellants'

constitutional protection, that the commercial form does not determine the constitutional status of speech, and more importantly that participation in the market for products and services can readily mix with participation in the marketplace of ideas more generally.

advertisement, however truthful or reasonable it may be, is not the sort of expression that the Amendment was adopted to protect.”

In *Central Hudson Gas & Electric v. Public Service Commission* (1980)²⁷ the waters muddied. Here the issue was a regulation prohibiting a state-regulated utility from advertising to promote electricity use. At the height of the North American energy crisis, the state regulatory authority did not want utilities to encourage higher consumption. The utility argued that it was promoting off-peak versus peak energy use and also touting the efficiency benefits of electricity over other forms of energy. It was the state interest in energy conservation pitched against the utility's ability to engage in "informational" advertising. The majority opinion written by Justice Powell defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." This is obviously more expansive than the definition contained in *Virginia Pharmacy Board*. While the "solely" acts as a limiting term, economic interests can be sweeping indeed. One could plausibly argue that all communicative activities of commercial actors are directed to their economic interests. This would subsequently cause confusion.²⁸

Central Hudson's other major contribution to the commercial speech debate was the majority's creation of a four-part test for determining the constitutional status of state regulation of commercial speech, founded on the informational function of advertising. First, a court has to determine if commercial speech is involved, and this involves determining whether the speech concerns lawful activity and whether the speech is not misleading. Then, the court must ask whether the government interest in regulation is substantial. If so, the court must ask if the regulation directly advances the government interest. If it does, then the court must finally determine if the regulation is more extensive than necessary to achieve the government interest.²⁹

Under this new balancing test, some justices rejected the New York law because it caught more speech than is justified by the government interest in energy conservation. Not only would the law prohibit ads promoting electricity; it would also prohibit ads promoting conservation. Justice Blackmun

²⁷ 447 U.S. 557 (1980).

²⁸ In his opinion concurring in the result, Justice Blackmun argued that this definition of commercial speech was too broad. *Ibid.*, 578.

²⁹ *Ibid.*, 565.

disliked the majority's four-part test, worrying that it would too often tilt the balance against the free exchange of information too easily. For him it was categorically wrong for government to restrict information in order to condition the choices of citizens. He preferred debate, persuasion, counterspeech, or direct regulation of conduct to advance the state interest. Absent a clear and present danger, "government has no power to restrict expression because of the effect its message is likely to have on the public." Should the court agree, he asked, with regulations banning advertising of air conditioners?³⁰

³⁰ Ibid., 575-8. Here Blackmun anticipates the consistent objection to *Central Hudson's* balancing test by a future Court appointee, Clarence Thomas.

While Blackmun found the majority's test too solicitous of government regulation, Rehnquist considered the Court to be walking a path whose destination is the granting of full First Amendment protection to commercial speech, a veritable return to the *Lochner* era.³¹ Rehnquist found the marketplace metaphor of free speech wrongheaded. If we are to have such confidence in the contest of ideas to produce truth and efficiency in both society and economy, he suggested, why do we insist upon the state's undisputed interest in regulating misleading or deceptive commercial speech? Why cannot the competition of the market, the free flow of information, eventually correct this? Sure, some innocents may be harmed while public debate concentrates its attention on the deceivers, but such collateral damage is also done in non-commercial realms of debate. In fact, the courts do not take the marketplace metaphor seriously, since they approve limits on speech absent clear and present danger. Consider pornographic speech, for example.³² "The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim 'caveat emptor'[I]n a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence."³³

This republican flourish – that the constitution is a political charter for popular self-government, defining the terms of citizen participation and rendering economic activity as properly subordinate to higher matters of government – sets commercial speech doctrine in a helpful context. For Rehnquist, the First Amendment is a charter for free political speech for natural persons. Corporations, as artificial

³¹ *Ibid.*, 589.

³² *Ibid.*, 591-6.

³³ *Ibid.*, 598-9.

persons, are not subjects of constitutional rights, unless as in the case of newspapers and other media of the “press”, they are expressly granted constitutional status. Commercial speech attaches to natural persons. The state’s broad post-New Deal economic policy powers extend to the regulation of the discursive activities of corporations.³⁴

³⁴ In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the issue was the ability of corporations to participate in state referendum debates on a constitutional amendment affecting their interests. The majority of the Court, deciding in favour of the corporations, held that “[t]he inherent worth of the 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.” The alternative view, supported by three dissenters was that corporations “are artificial entities created by law for the purpose of furthering certain economic goals.... It has long been recognized...that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process.” Rehnquist sided with the dissenters.

The ability of corporations to participate in the public forum of political debate was affirmed in 1980 when the Supreme Court struck down a New York public services commission order prohibiting an electrical utility from including inserts in its bill mailings that contained editorial content of public interest – advocating the use of nuclear power.³⁵ In a similar case from California, *Pacific Gas & Electric*,³⁶ a public utilities commission was asked by a citizens group to prohibit the utility from including containing political opinions and other information in billing envelopes to customers. The commission denied the request but instead ordered the utility to grant some of its free envelope space to the citizens group so it could solicit donations and air its views, provided it indicate its messages were not those of the utility. A majority of the Supreme Court considered this a form of compelled expression contrary to the First Amendment. For dissenter Rehnquist and his colleague Justice White, the fundamental problem with the Court’s decision was its identification of the First Amendment rights of corporations and those of natural persons. “This Court has recognized,” Rehnquist argued, “that natural persons enjoy negative free speech rights [the right not to be compelled to speak, or to be associated with speech with which one disagrees] because of their interest in self-expression; an individual’s right not to speak or to associate with the speech of others is a component of the broader constitutional interest of natural persons in freedom of conscience.” The problem is that this right has been extended by the Court to corporations without comment, even though corporations as artificial persons have no conscience or intellect. Corporate First Amendment rights are justified not because corporations have an interest in self-expression but because corporations can be instruments for furthering the First Amendment purpose of “fostering a broad forum of information to facilitate self-government.”³⁷ The corporation here “is not an individual or a newspaper publisher; it is a regulated utility. The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same.”³⁸

³⁵ *Consolidated Hudson Co. V. Public Service Commission*, 447 U.S. 530 (1980).

³⁶ *Pacific Gas & Electric v. Public Utilities Commission*, 475 U.S. 1 (1986).

³⁷ *Ibid.*, 33.

³⁸ *Ibid.*, 35.

B. “Pure” Commercial Speech

The above cases deal with commercial speech mixed with noncommercial elements. The Court also dealt with commercial speech in ‘purer’ form. Significantly, even in these cases, commercial speech has enjoyed increasing constitutional protection.

The first case involving unmixing commercial speech was *Virginia Pharmacy Board v. Consumer Council*³⁹ (referred to above). A state law prohibited pharmacies from advertising the prices of prescription drugs. The “‘idea’ [the pharmacist] wishes to communicate is simply this: ‘I will sell you the X prescription at the Y price.’” Does speech, the majority asked, “which does ‘no more than propose a commercial transaction’ lack First Amendment protection?”⁴⁰ No. Consumer and society generally have an interest in the free flow of information. “Even an individual advertisement, though entirely ‘commercial,’ may be of general public interest.”⁴¹ Further:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.⁴²

In other words, the free flow of commercial information aids economic exchange but is also essential to

³⁹ 425 U.S. 748 (1976).

⁴⁰ *Ibid.*, 761.

⁴¹ *Ibid.*, 764.

⁴² *Ibid.*, 765.

the free-enterprise system and this economic fact is itself a matter of public interest and concern. Even purely commercial messages touch a “matter of public interest”: the operation of the free-enterprise economic system.

In these cases as in the mixed speech cases, the Supreme Court has been at pains to develop a consistent jurisprudence. In *Posadas de Puerto Rico Association v. Tourism Co.*⁴³ the Court dealt with a Puerto Rico law which, as interpreted by the Puerto Rico Supreme Court, banned casino advertising directed at residents of Puerto Rico. The legislature considered casino gambling good for tourism and government revenues but potentially harmful to residents. Justice Rehnquist delivered the majority judgment, attracting four judges to a position reflecting the relatively low constitutional status he attached to commercial speech. He held that it was “reasonable” for the legislature to think that advertising would increase demand for casino gambling and that increased gambling may create social problems the government would have a legitimate interest in preventing. While the law did not ban advertising targeting residents for lotteries, cock-fights, and horse-racing, the majority held that an underinclusive law is not an unconstitutional one. As for the fourth prong of the *Central Hudson* test, Rehnquist wrote that the speech limitation should be “no more extensive than necessary” to serve the state interest, and that it was the legislature’s province to determine whether an ad ban or the promulgation of “counterspeech” was the preferred means to addressing the state objective. In any event, ban advertising is less intrusive than banning casino gambling which it is within the power of the government to do. “In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling...”⁴⁴

The three dissenting justices in the case, led by Justice Brennan, took exception to the majority’s highly deferential *Central Hudson* analysis. Brennan argued that restriction of commercial speech require proof – proof that the government’s policy interest is substantial, that its policy advances that interest, and proof that a less intrusive policy would not advance that interest. The majority required no such proof. More fundamentally, Brennan could see “no reason why commercial speech should be afforded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity....[N]o differences between commercial and other kinds of speech justify protecting commercial speech less extensively where, as here, the government seeks to manipulate private behavior by depriving citizens of truthful information concerning lawful activities.”⁴⁵

⁴³ 478 U.S. 328 (1986).

⁴⁴ *Ibid.*, 345.

⁴⁵ *Ibid.*, 350-51.

Rehnquist's *Posadas* doctrine – that government can ban advertising for conduct they may also ban – was roundly repudiated ten years later in *44 Liquormart v. Rhode Island* (1996)⁴⁶ in which the Court considered a law banning price advertising for liquor except at point of sale. The legislature justified the ban in name of temperance, theorizing that advertising will stimulate price competition and that lower prices will increase consumption. The Court made the distinction between state regulations limiting commercial speech and those banning it altogether. Laws of the second type should be scrutinized with “special care”:

When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

The state defended the law by referring directly to *Posadas*. But the Court now considered that decision aberrant. The nub of the *Posadas* doctrine is that state limitation of conduct is a greater intrusion on citizen rights than state limitation of speech concerning it. To that the Court now had this to say: “Although we do not dispute the proposition that greater powers include lesser ones, we fail to see how that syllogism requires the conclusion that the State's power to regulate commercial activity is "greater" than its power to ban truthful, nonmisleading commercial speech. Contrary to the assumption made in *Posadas*, we think it quite clear that banning speech may sometimes prove far more intrusive than banning conduct. As a venerable proverb teaches, it may prove more injurious to prevent people from teaching others how to fish than to prevent fish from being sold. Similarly, a local ordinance banning bicycle lessons may curtail freedom far more than one that prohibits bicycle riding within city limits. In short, we reject the assumption that words are necessarily less vital to freedom than actions, or that logic somehow proves that the power to prohibit an activity is necessarily "greater" than the power to suppress

⁴⁶ Accessible at <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=U10183>>

speech about it.”

The implications of this position are far-reaching, as Justice Thomas indicated in his concurring opinion in the case. If speech restrictions are suspect whenever the state could restrict the conduct as a less intrusive measure, then any reasonably stringent application of the fourth prong of the *Central Hudson* test would invalidate state speech regulations. Banning an activity would always be less intrusive than banning speech about it. If, then, a state allows an activity, it must allow information to circulate about it. The Court, then, moved substantially toward Thomas’s consistent position on commercial speech, namely that any state attempt to keep people in ignorance about an activity in order to manipulate their marketplace conduct is offensive, paternalistic, and contrary to First Amendment principles. For these reasons, Thomas rejected the whole of the *Central Hudson* framework, a position he repeated in case after case subsequently.

From *Posadas* to *Liquormart*, then, the Court heightened its scrutiny of advertising bans, applying the *Central Hudson* test stringently and narrowing the constitutional differences between commercial and noncommercial speech.⁴⁷

A similar pattern is evident in two cases involving mandatory agricultural advertising schemes. In 1997 the Court upheld a public scheme requiring farmers to contribute to a mandatory generic industry advertising campaign. The Court upheld the requirement as a part of a comprehensive economic regulation policy. Four years later it struck down a similar requirement, distinguishing its 1997 holding unconvincingly.⁴⁸

Even when the *Central Hudson* test has been applied in commercial speech cases, the Court has been criticized for failing to apply it consistently and clearly.⁴⁹ The fourth prong of the test has been especially problematic. Some justices have argued that a “reasonable fit” is all that the test requires governments to show when they compare legislative means and ends. Others argue that the means must

⁴⁷ The *Liquormart* doctrine was applied in *Greater New Orleans Broadcasting Association et al v. United States et al* (1999), accessible at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=98-387> Here the Court struck down a federal law banning private commercial casino advertising in states where gambling is illegal when that advertising originates in a state where gambling is legal. The Court found federal policy fatally pierced with exceptions for non-profit, tribal, and lottery gambling, making it impossible for the federal government to argue that the law advanced a state interest in mitigating the social harms of gambling.

⁴⁸ See *Glickman v. Wileman Brothers and Elliott, Inc et al* (1997), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=95-1184>; and *United States v. United Foods Inc. (2001)*, available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=00-276>

⁴⁹ For example, Jonathan W. Emord, “Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence” *Cato Policy Analysis No. 161* (1991). Available at <http://www.cato.org/pubs/pas/pa-161es.html>

be “narrowly tailored” to achieve the objectives. Others suggest that the “least restrictive means” must be chosen in order for commercial speech limits to pass muster. Justices have said that different types of regulation engage different standards of scrutiny. In 1989 in *Board of Trustees, SUNY v. Fox*,⁵⁰ Justice Scalia for the Court sorted out the conflicting standards that had developed by that time and declared that “Whatever the conflicting tenor of our prior dicta may be, we now focus upon this specific issue for the first time, and conclude that the reason of the matter requires something short of a least-restrictive-means standard.” Yet this did nothing to stem differences on the *Central Hudson* test subsequently.

⁵⁰ Available at <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=492&invol=469>>

Justices have been unable agree on the standard to be applied to instant cases. In *Thompson et al v. Western States Medical Center et al (2002)*,⁵¹ the issue was the constitutionality of a federal law allowing pharmacists to compound drugs for customers without formal FDA approval only if they do not advertise the compounded drugs they produce. The FDA did not want pharmacy-level compounding services to reach a level of mass distribution that would threaten the integrity of the existing drug-approval process, but nonetheless wanted pharmacists to be able to provide compounded drugs to particular customers without the delays associated with formal drug approval. The majority held that the government must show that the advertising restriction must be “no more extensive than necessary to serve [government] interests.” Even Justice Thomas was able to agree with the “Court’s application of the test set forth in *Central Hudson*...” though he disagreed with the test in principle because of its implicit paternalism. For the dissenters in the case:

the Constitution demands a more lenient application, an application that reflects the need for distinctions among contexts, forms of regulation, and forms of speech, and which, in particular, clearly distinguishes between "commercial speech" and other forms of speech demanding stricter constitutional protection. Otherwise, an overly rigid "commercial speech" doctrine will transform what ought to be a legislative or regulatory decision about the best way to protect the health and safety of the American public into a constitutional decision prohibiting the legislature from enacting necessary protections. As history in respect to the Due Process Clause shows, any such transformation would involve a tragic constitutional misunderstanding.

Even a given standard can be applied with surprising results. In *Lorillard*,⁵² the majority of the Court applied a deferential rule to smokeless tobacco and cigar ads directed at children and were tantamount to time, place, and manner restrictions. Even so, the rules were struck down for failing to be a “reasonable fit” between state objectives and legislative means chosen to attain them. So even the precise fourth prong standard can yield disparate results. Regardless of unpredictable application in particular

⁵¹ Available at <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=01-344>>

⁵² *Lorillard Tobacco et al v. Reilly*, (2001), available at <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=00-596>>

cases, the trend is that the *Central Hudson* test is approaching Justice Thomas's stringent application of First Amendment scrutiny to commercial speech regulations.

Several general points can be made about commercial speech doctrine under the First Amendment. First, corporations can avail themselves of the constitutional protection for commercial speech available to any natural person. Justice Rehnquist's early and consistent objections to this went unheeded and he gave up the fight many years ago. The principle enunciated in *Virginia Pharmacy Board* that the identity of the speaker is irrelevant for purposes of constitutional protection for commercial speech, is now well-established. Second, commercial speech has acquired greater constitutional protection with time. Courts often cite precedents concerning cases of individual noncommercial speech in support of greater First Amendment status of commercial speech. Third, the Court's *Central Hudson* test for discerning the constitutionality of state limits on commercial speech has lacked clarity and consistency but its critics on the bench have not presented a persuasive alternative. This jurisprudential record made the fate of *Nike v. Kasky* in California difficult to predict.

5. The California Supreme Court Decision in *Kasky. V. Nike*

One part of the *Central Hudson* test that has withstood criticism is that the constitution protects commercial speech that concerns lawful activity and is not misleading. This begs the all-important definitional question of what is commercial speech: on the answer depends whether a particular communication is subject to regulation as to its truthfulness or whether it may occupy the "breathing space" afforded public comments whose truthfulness is more difficult to establish. The United States Supreme Court, to make a long story short, has said that statements proposing a commercial transaction (*Bolger*) are quintessential commercial speech. Yet it departed from this narrow view on occasion, considering, for example, statements about qualifications on business cards and letterhead, and labels on beer bottles describing alcohol content, to be regulable commercial speech.⁵³

⁵³ *Ibanez v. Florida Department of Business and Professional Regulation, Bd of Accountancy* 512 U.S. 136 (1994); *Rubin v. Coors Brewing Co.* 514 U.S. 476 (1995)

In *Nike*⁵⁴, the definitional issue was the central question before the California Supreme Court. It concluded that the issue had not received systematic attention and proposed a limited purpose three-part test. First, speech is commercial if the speaker is engaged in commerce. Second, the intended audience will include those who are actual or potential buyers of the speaker's product or service. Typically the format of such communication will be advertising and the motivation of the speaker will be economic. But "advertising format is by no means essential to characterizing as commercial speech." Third, the factual content of the speech will be commercial in character; the speech will contain "representations of fact 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." This third prong will contain product references broadly considered to include, "for example, 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." The Court deliberately created a "broad" definition of product references "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." The majority in this case defined commercial speech broadly to take account of the evolution of advertising. Marketing is no longer about the description of the attributes of the product. It is now also about the image, reputation, and operations of the company making it.

The Court applied to Nike's circumstances and found its various defenses of its offshore contractors' operations to be commercial speech for the purposes of California's false advertising law. That meant that Nike would be responsible for the factual basis of its claims in its various communications. Nike's argument throughout was that its public statements on the matter of overseas working conditions were responses to critics on "a matter of public concern", and such matters lift commercial speech to the level of political comment attracting full First Amendment protection. The majority conceded that public issues were "intermingled" with Nike's commercial speech but that this does not alter the commercial character of Nike's communications. The majority cited the Supreme Court in *Virginia Pharmacy Board* to the effect that people's interest in commercial matters can be as intense as their interest in public affairs. So commercial speech on matters of public interest is still commercial speech. To the extent that commercial speech is intermingled with noncommercial speech, only the commercial elements –factual representations about Nike's products, operations, and so on – are subject to California false advertising law.

Critics of the Court's judgment allege that it creates an unlevel playing field, allowing Nike's

⁵⁴ *Marc Kasky v. Nike, Inc.* (2002) 02 C.D.O.S. 3790. Available at <<http://www.law.com/regionals/ca/opinions/may/s087859.shtml>>

critics to criticize it without regard for the truth of their assertions, while Nike must respond under a tighter regulatory regime. Anticipating this, the majority maintained that Nike's commercial comments are factual representations, and as such both verifiable and hardy or durable. Further, factual representations do not express a "point of view", a political or social or religious ideology requiring "breathing space." To those who say Nike is making public statements about the merits of globalization, the majority responded by declaring that Nike is making verifiable assertions about whether workers in its contractors' factories make a minimum wage, whether they receive free health care, whether they are subject to harassment or sexual abuse, whether they are forced to work overtime – claims whose truth can be established.

The majority opinion assumes that while commercial and noncommercial elements are "intermingled", they are not "inextricably intertwined." If noncommercial elements are inseparable from the commercial ones, then the commercial element garners full constitutional protection. Separability means the commercial elements receive less constitutional protection. The majority opinion also assumes that the reasons for reduced protection of commercial speech – verifiability and durability – are sound. The majority at one point considers the chilling effect and dismisses it. But its dismissal is less than convincing. "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.'"⁵⁵

The result of the majority's opinion was to uphold the California law against First Amendment challenge and remand the matter to trial in the lower court. But the decision was a close one, 4-3, and the two dissenting opinions honed in on issues crucial to this paper. Justice Chin's opinion begins with the simple but important observation that Nike's labour practices themselves have become "a subject of considerable public interest and scrutiny." Chin suggested that Nike's speech is not "traditional commercial speech" because it did not use a traditional advertising format in many of its communications and did not make references to its products' qualities. In addition, to the extent its communications were commercial in character, the noncommercial elements were "inextricably intertwined" with the commercial elements. Essentially, this case is on par with an old US Supreme Court decision in which a union organizer's speech soliciting was protected against state action by the First Amendment.⁵⁶

The second dissenting opinion was even more forceful. Commercial and noncommercial elements in Nike's communications were inseparable because Nike's labour practices were themselves the public issue. While the US Supreme Court has said that the content of the speech, not the identity of the speaker,

⁵⁵ The internal quoted passage is from *Virginia Pharmacy Board*.

⁵⁶ *Thomas v. Collins* 323 U.S. 516 (1945).

is dispositive, here the majority virtually defines any comment by a corporation as commercial. The majority's test is too broad. Corporations themselves may be products for sale on capital markets. The reputation of a corporation is connected to the value of its shares. So everything it says can be considered a product reference for purpose of the commercial speech. This would silence corporations. Anything a corporation says is then potentially actionable. This would chill corporate speech, and thus deprive the public of contributions of actors in the economic and public square whose views can contribute to the flow of information of both a public and commercial character.

More fundamentally, the commercial speech doctrine in general, not just the majority's version of it in this case, wrote Justice Brown, divides speech too neatly between commercial and noncommercial:

This simple categorization presupposes that commercial speech is wholly distinct from noncommercial speech and that all commercial speech has the same value under the First Amendment. The reality, however, is quite different. With the growth of commercialism, the politicization of commercial interests, and the increasing sophistication of commercial advertising over the past century, the gap between commercial and noncommercial speech is rapidly shrinking. As several commentators have observed, examples of the intersection between commercial speech and various forms of noncommercial speech, including scientific, political and religious speech, abound.

The world "has become increasingly commercial...." We live in a world, Brown wrote, "in which personal, political, and commercial arenas no longer have sharply defined boundaries." "In today's world, the difference between commercial and noncommercial speech is not black and white. Due to the growing politicization of commercial matters and the increased sophistication of advertising campaigns, the intersection between commercial and noncommercial speech has become larger and larger. As this gray area expands, continued adherence to the dichotomous, all-or-nothing approach developed by the United States Supreme Court will eventually lead us down one of two unappealing paths: either the voices of businesses in the public debate will be effectively silenced, or businesses will be able to dupe consumers with impunity."

Justice Brown suggested several options, including granting mixed speech a higher level of constitutional protection than false or misleading speech confined to the bargaining process in which a seller proposes a commercial transaction; or confining false or misleading advertising laws to communications involving characteristics of a product or service.

6. Appeal to the US Supreme Court

Nike's brief to the US Supreme Court, by Laurence Tribe, stressed that under the terms of the California decision, "Nike's statements in *The New York Times* about labor conditions in its Southeast Asia factories have no more protection under the First Amendment than a supermarket flyer advertizing Nike 'Shox' shoes for \$69." All of Nike's communications would be "swallowed up" by the definition of commercial speech in the California decision.

Nike enjoyed the support of an impressive array of associations and firms in support of its constitutional argument. The American Chamber of Commerce, the Business Roundtable, a coalition of forty news outlets, Exxonmobil, Microsoft, Pfizer, GlaxoSmithKline, associations of public relations firms, the Center for Individual Freedom, a variety of legal foundations, the Center for the Advancement of Capitalism, the Product Liability Advisory Council, advertising associations, and many others lined up against the California law as interpreted by the California Supreme Court. Even organizations opposed to Nike's business practices like the AFL/CIO and the American Civil Liberties Union weighed in on the side of the First Amendment. The United States government took particular issue with procedural provisions of the California law allowing private attorneys general to launch suits when they themselves experienced no injury as a result of the corporate practices of which they complain.

Most briefs opposing the California decision attacked the grounds of the decision, going to the heart of the commercial speech debate. Several briefs challenged the received view that commercial speech is durable in the face of regulation as to its false or misleading character. Nike's brief claimed that Nike's own speech has been chilled as a result of the California decision, since it has stopped issuing CSR reports, withdrawn from the Dow Jones Sustainability Index, and its officers have refused invitations to speak publicly on Nike's activities around the world. Others argued that precisely because corporations are in business, they are acutely sensitive to the effect of bad publicity on their sales; their speech is more likely to be chilled than that of noncommercial speakers.⁵⁷

In addition, briefs attacked the notion that commercial speech is more verifiable than noncommercial speech. Much noncommercial speech consists of representations of fact and much commercial speech consists of statements whose truth is highly debatable.⁵⁸ Pfizer argued that in health matters, "it is demonstrably not true that economic speech is more likely to be factual and verifiable (and therefore more subject to regulation) than political speech...."⁵⁹ Debates in which commercial enterprises engage on matters of health take in place in the absence of scientific consensus, yet are valuable sources

⁵⁷ See briefs by Nike, Association of National Advertisers, Inc, et al, Arthur Page Society et al, and the brief submitted by Forty Media Outlets.

⁵⁸ See briefs by Center for Individual Freedom, Pacific Legal Foundation, Arthur Page Society, and ExxonMobil et al.

⁵⁹ Brief by Pfizer, 12.

of public information nonetheless. Some briefs suggest that corporations under this California decision would be foreclosed from making spontaneous, ‘heat-of-the-moment’ responses to criticisms, depriving the public of valuable information.

Several briefs took issue with the procedural elements in California unfair competition law, particularly the provisions allowing ‘private attorneys general’ to initiate actions on behalf of the public when they themselves allege no personal injury as a result of an impugned statement. The law allows courts to impose penalties having no relation to the actual harm a false or misleading statement may have caused. And corporations could be subject to multiple claims for the same act, clogging the courts, abetting ambulance-chasing lawyers, and submitting corporations to vexatious legal actions.⁶⁰

All briefs attacking the California Supreme Court decision criticized it for imposing too sweeping a definition of commercial speech on the law. Virtually everything a corporation might say would be caught because, virtually everything a corporation says can be connected in some way to its ultimate concern to advance its economic interests. Briefs declaimed the notion that speech uttered with an economic motivation should enjoy reduced constitutional protection. Most speech currently protected to the full by the First Amendment is often economically motivated. Books are written partly for royalties; movies are made for box office returns; citizens groups’ criticisms of welfare cutbacks are made to increase payments to welfare recipients.⁶¹ The ACLU argued that Nike’s statements at issue in this case were not “transaction-driven” and contained no references to its products, prices, sale, purpose, or function. Nike’s statements concerned matters of public concern with “a subordinate commercial aspect.”⁶²

Many briefs relied on the full, unfettered competition of ideas in the marketplace to police corporate speech in a manner that avoids the paternalism of legal regulation of speech. Confining commercial speech to those statements proposing a commercial transaction and those statements concerning the qualities of a product or service would protect consumers from fraud, and would also free up breathing space for corporate communications on matters of public interest. As it is, the California decision creates a paradox. The greater the media attention attracted to a corporate practice, the greater the interest a corporation has to respond to it. But such responses will invite legal actions like Kasky’s. So the greater the public interest in a corporate issue, the greater will be the corporate liability for responses

⁶⁰ See briefs by United States Government, Association of National Advertisers, Inc. et al, Civil Justice Association, Product Liability Council, Arthur Page Society, and the National Association of Manufacturers. One senses the faint tones of the tort reform movement in these briefs.

⁶¹ Briefs by Nike, American Chamber of Commerce, Washington Legal Foundation, Forty Media Outlets, Product Liability Advisory Council, Business Roundtable, Association of national Manufactures, ExxonMobil et al, and Association of National Advertisers, Inc. et al.

⁶² Brief by ACLU, 13-14.

to it.⁶³

⁶³ See briefs by Nike and Forty Media Outlets.

Some briefs went further, arguing that the crucial distinction between commercial and noncommercial speech on which the whole of the commercial speech doctrine rests is impossible to draw and misconceived in any event. According to the Arthur Page Society, any public regulation that chills speech will dampen corporate participation in American democracy. “Corporate speech,” according to a coalition of public relations firms, “is vitally important to a functioning democracy....the public has come to expect a new level of civic engagement from corporations.”⁶⁴ Commercial speech and corporate advocacy “play a significant role in shaping public debate and shaping public opinion and policy.”⁶⁵ This view suggests that all corporate speech enjoy highest First Amendment protection because corporate speech is inherently civic in character. Another amicus brief calls for the rejection of the distinction because corporate marketing has permeated the very fibre of artistic and political speech enjoying the highest constitutional protection. The Pacific Legal Foundation brief draws attention to new corporate marketing strategies involving the placement of products in artistic and entertainment works such as movies, and corporate commission of novels, thereby mixing commercial with noncommercial speech inextricably.⁶⁶

But is it not a contemporary corporate marketing strategy to emphasize a company’s image, reputation, identity, and social responsibility credentials? After all, Nike CEO Phil Knight, speaking as a leader in the American CSR movement, said in 1998 that “I truly believe the American consumer doesn’t want to buy products made under abusive conditions.”⁶⁷ He seems to link consumer purchasing decisions to company operations, not the qualities of the products themselves. If Knight’s statement is true, then it could be argued that even a definition of commercial speech limited to that which proposes a commercial transaction could encompass company statements about its operations. Statements about operations cultivate a corporate image, and this image is as much a product as the products acting as vehicles for that image. Communications cultivating or defending the image are also proposals to pay for and consume that image.

Several briefs supporting Nike resisted this link between corporate operations and consumer purchasing decisions. Nike’s own brief claimed that there is “only the most attenuated link between public statements on important social, political, and moral issues – which generate heated responses and

⁶⁴ Brief by Arthur Page Society et al, 8

⁶⁵ Ibid.

⁶⁶ Brief by Pacific Legal Foundation. See also briefs by Center for the Advancement of Capitalism, and Arthur Page Society.

⁶⁷ Quoted in brief by Domini Social Investments LLC et al, 6.

debate – and consumer purchasing decisions.”⁶⁸ Whatever Phil Knight may believe, his lawyers attempted to bracket corporate statements about operations – how their products are made, under what conditions, and with what effects on others – from statements about products or services themselves that do influence purchasing decisions.

Nike’s opponents, predictably, find all this disastrous. Kasky’s brief to the US Supreme Court was largely devoted to the argument that the Court did not have jurisdiction to hear the case prior to the establishment of a factual record. It also suggested that the California Court’s decision was consistent with US Supreme Court decisions on commercial speech. Kasky’s lawyers were pining for a court battle on the truth of Nike’s public communications.

⁶⁸ Brief by Nike, Inc., 36. See also briefs by ACLU, Association of National Manufacturers, and American Chamber of Commerce.

A coalition of ethical investment firms, part of the socially responsible investing movement that has grown alongside the CSR movement, worried that a repudiation of the essentially sound California decision would threaten the integrity of existing regulations under securities legislation requiring companies to report on financial performance. Financial reporting is not just crunching numbers but disclosing qualitative information as well – information that is subject to debate and (increasingly in a post-Enron business environment) public concern. A narrow definition of commercial speech would endanger this. Since the CSR movement depends in significant part on progress in developing universal and enforceable standards of corporate social and environmental performance analogous to existing public standards on financial performance, a reversal of the California decision would stop the movement in its tracks and indeed reverse it. Unfettered public debate in a marketplace of ideas is no substitute for enforceable standards assuring consumers that the information on which they base their purchasing and investment decisions is accurate and complete.⁶⁹

ReclaimDemocracy.org's brief was as much a political as a legal statement. It squarely attacked the heightened public role of corporations implied in Nike's brief and those supporting it. It recalled (then) Justice Rehnquist's early claims that artificial legal persons lack the constitutional protections due natural persons. Corporations are created by the state, and exist by state privilege. They have a life extending indefinitely, and their shareholders are shielded from personal liability. They are powerful, highly resourced entities as a result and must be regulated. Corporations are not citizens and on many fronts do not speak for their shareholders. As the discussion above suggests, however, this argument is so much water under the bridge. ReclaimDemocracy.org seeks to reclaim a democracy lost in the mists of time.

If a tally of the briefs is of any significance, then on the substantive question of the First Amendment status of commercial speech, the California decision will not stand. Of course Kasky 'won' on the technical ground that the Court ultimately declined to decide the matter without a full-developed factual record. That the Supreme Court granted cert., heard the appeal, then remanded, suggests that it was concerned about the factual context of the constitutional issue. The *Central Hudson* test is itself a highly

⁶⁹ See brief by Domini Social Investments LLC et al, 4-5. See also Adam Kanzer and Cynthia Williams, "The Future of Social Reporting is on the Line" *Business Ethics*. (Summer, 2003).

context-dependent constitutional standard. This suggests that a majority of the Court had no particular inclination to overturn the *Central Hudson* test, whatever its faults, in favour of a more categorical test. Kasky also won in the narrow sense that he and Nike settled out of court before a commencement of a trial on the merits. Kasky exacted a symbolic sum of money for corporate social responsibility monitoring and perhaps some tacit admission of responsibility.

There is reason to think that Nike would have ultimately won on the constitutional issue, convincing the US Supreme Court to define commercial speech narrowly, consistent with the Court's increasing inclinations.⁷⁰ But to get to that destination it would have had to run a gauntlet of intense media scrutiny of evidence disclosed to Kasky over as many as four court proceedings. In the end, Nike's efforts to have the California law as applied invalidated might fail or instead produce only a victory on factual grounds. For a corporation so solicitous of its public image and reputation, even a legal victory may present a public relations risk too great to assume.

These procedural complexities make it difficult to decide a winner in this conflict. Those who argue for heightened First Amendment protection for corporate speech often rely on the winnowing effects of unhindered public debate in the marketplace of ideas. Here Nike was subjected to intense media scrutiny and bent under its weight. In a sense the media did their job and public criticism reined in a big bad corporation. Nike's settlement with Kasky is evidence that intense public debate and media scrutiny can be effective.

7. Conclusion

Nike v. Kasky brought together two parallel debates about corporate activity in the contemporary world. The first public and media debate is about the responsibilities corporations must exercise to society at large and their myriad stakeholders in particular. The severest critics of global corporations insist that they will be brought to heel only by the coercive arm of enforceable regulations. Others suggest that consumer pressure, public criticism, proper risk analysis, enlightened self-interest, and perhaps a growing conviction about the intrinsic merits of ethical corporate practice, combine to direct corporations to look beyond regulatory minima and implement policies reflecting the interests of all those affected by a corporation's activity. In either case, the emphasis is on obligation of economic actors to integrate non-

⁷⁰ Michelle Dobrusin, "Crass Commercialism: Is it Public Debate or Sheer Profit? The Controversy of *Kasky v. Nike*" *Whittier Law Review*. 24 (2002-2003), 1139-1166.

economic factors into the decision-making. Commercial enterprises must advance noncommercial goals.

The second, parallel debate unfolded in the courts. In this constitutional litigation, it was corporations' very engagement in issues "of public concern" beyond commercial transactions that stood to heighten constitutional protection of commercial entities against state regulation. The paradox is readily apparent: in the public debate the assertion of the responsibilities of corporations to the community implies limitations on the freedoms of corporations; in the courts, corporate engagement of community concerns means heightened First Amendment protection against the state. Such is the consequence of calling economic actors to responsibilities likening them to citizens. The rhetoric of "corporate citizenship" has come to have a legal meaning perhaps unanticipated by those who consider corporate citizenship a brake on naked economic power.

Perhaps this is a particularly liberal democratic problem. Democracies require their citizens to assume public responsibilities for collective self-government, while liberal societies organize themselves to allow individuals freedom to pursue their private goals. Political rhetoric and public policy swing back and forth between the principles of public obligation and private right. On First Amendment matters, this tension has a noble pedigree. In his famous dissent in which he considered the constitutional status of the Espionage Act, under which several persons were charged with distributing leaflets encouraging workers to oppose the American effort during the First World War, Justice Holmes articulated a view of the First Amendment that artfully mixed republican and liberal economic elements. Free speech is properly founded on the principle that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market..."⁷¹ This is the exceptional American confidence reflected in much First Amendment jurisprudence – that unfettered debate by individuals with various motivations, not all of them noble, produces a salutary public result consistent with the principles of limited government.

Commercial speech jurisprudence has depended on a clear distinction between what is merely commercial and what communications contain information 'beyond' the merely commercial. Implicit in this distinction is another, more basic distinction between economic affairs on the one hand and civic affairs associated with citizenship and political debate on the other. The older, republican view is that economic remains subordinate to the political. In some formulations, messages flogging products and services are not about ideas and ideologies, and accordingly less constitutional status. But if Calvin Coolidge was correct when he said that "the chief business of the American people is business" the whole basis for commercial speech doctrine is undermined. When marketing is as much about ideas and "matters of public concern" as about how many grams of fat are contained in a chocolate bar or the alcohol content of a can of beer, then commercial speech merges with other types of speech enjoying full First

⁷¹ *Abrams v. United States*, 250 U.S. 616 (1919).

Amendment status. Commercial actors become political actors – citizens, in a way. And like other citizens, they are often more interested in exercising their rights than their responsibilities.