Pace Law Review

Volume 24
Issue 1 *Fall 2003*

Article 18

September 2003

What is Commercial Speech? An Analysis in Light of Kasky v. Nike

Stephanie Marcantonio

Recommended Citation
Stephanie Marcantonio, *What is Commercial Speech? An Analysis in Light of Kasky v. Nike*, 24 Pace L. Rev. 357 (2003)
DOI: https://doi.org/10.58948/2331-3528.1196
Available at: https://digitalcommons.pace.edu/plr/vol24/iss1/18

Case Note

What is Commercial Speech?: An Analysis in Light of Kasky v. Nike[1]

Stephanie Marcantonio*

1. Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002).

* Stephanie Marcantonio (Villanova University, B.S. 1999) is a J.D. candidate at Pace University School of Law, class of 2004. The author wishes to thank Regina Allegretti-Davenport for calling this case to her attention and the members of the Pace Law Review, especially Vanessa Schoenthaler, Sarah Courtman and Mary Theresa Kenny for their time and effort in editing this article.

I. The Current State of Commercial Speech

The First Amendment of the United States Constitution prohibits the abridgment of the freedom of speech.[2] The due

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

process clause of the Fourteenth Amendment makes this provision applicable to state and local governments.[3] Speech that is protected by the First Amendment can rarely be regulated based on the content of that speech.[4] This means that the Government may not stifle a speaker merely because it does not like, or agree with, the message.[5] The freedom of speech is safeguarded so that people may speak their minds with falsehoods being exposed through education and discussion.[6] This protection is essential to free government.[7] Even some false and misleading statements are entitled to First Amendment protection in order to eliminate the risk of undue censorship and the suppression of truthful material.[8] However, *commercial speech* that is false or misleading is not entitled to First Amendment protection and "may be prohibited entirely."[9] Therefore, the state and federal governments are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.[10]

A. *Protection of Commercial Speech*

Until 1975, commercial speech was not considered a protected form of speech.[11] The government was free to regulate commercial speech in any way it saw fit. This changed when the United States Supreme Court held, in *Bigelow v. Virginia*, that it was an error to assume that advertising was not entitled to First Amendment protection.[12] One year later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the United States Supreme Court held that a ban on advertising prescription drug prices violated the First Amend-

3. U.S. CONST. amend. XIV, §1.

4. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 540 (1980).

5. Young v. Am. Mini Theatres, 427 U.S. 50, 67 (1976).

6. Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

7. *Id.*

8. Herbert v. Lando, 441 U.S. 153, 172 (1979); *Thornhill*, 310 U.S. at 95 ("Noxious doctrines in [the fields of politics and economics] may be refuted and their evil averted by the courageous exercise of the right of free discussion.").

9. *In re* R.M.J., 455 U.S. 191, 203 (1982).

10. Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

11. Kasky v. Nike, Inc., 45 P.3d 243, 250 (Cal. 2002).

12. Bigelow v. Virginia, 421 U.S. 809, 825 (1975).

ment.[13] It further held that "the free flow of commercial information is indispensable" not only "to the proper allocation of resources in a free enterprise system," but also "to the formation of intelligent opinions as to how that system ought to be regulated or altered."[14]

While the First Amendment protects commercial speech, commercial speech is afforded less protection than noncommercial speech.[15] Noncommercial speech may only be regulated based on its content if the regulation can survive strict scrutiny.[16] Strict scrutiny requires that the regulation be narrowly tailored to promote a compelling government interest.[17] In comparison, in 1980 the Court laid down a four-part test in *Central Hudson Gas & Electric Corp. v. Public Service Commission* to determine when commercial speech, that is neither false nor misleading, may be regulated.[18] Under the "Central Hudson Test" the government is free to prohibit commercial speech that it deems false or misleading.[19] The Supreme Court allows content based regulation of commercial speech because (1) commercial speakers have enough knowledge of the market and their product to evaluate the accuracy of the message;[20] (2) commercial speech is based on economic self-interest and therefore is not "particularly susceptible to being crushed by overbroad regulation;"[21] and (3) the government interest in preventing commercial harm justifies the power to regulate speech that is "linked inextricably" to those transactions.[22]

---

13. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 (1976).

14. *Id.* at 765.

15. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983).

16. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 540 (1980).

17. *Id.*

18. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

19. *Id.* at 566.

20. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976).

21. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564 n.6 (quoting Bates v. State Bar of Ariz., 433 U.S. 350 (1977)).

22. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499 (1996).

B. *What is Commercial Speech?*

Since commercial speech can be regulated for its content but noncommercial speech may not, the determination must be made fairly early as to whether the speech is commercial or noncommercial. In *Central Hudson*, the Court articulated two definitions of commercial speech.[23] The Court first describes commercial speech as "expression[s] related solely to the economic interest of the speaker and its audience,"[24] and then later as "speech proposing a commercial transaction."[25] However, even at that time, Justices Stevens and Brennan found these definitions problematic.[26] This lack of a clear definition has created a "gray area" that has left many speakers and courts unclear as to what exactly commercial speech is.

In *Board of Trustees, State University of New York v. Fox*, the Court held that the test for identifying commercial speech was whether that speech proposed a commercial transaction.[27] But the Court has identified certain types of speech as commercial even though the speech in question does not obviously propose a commercial transaction. The Court has accepted that a statement of alcohol content on a bottle of beer[28] and statements on an attorney's letterhead identifying the attorney as a CPA (certified public accountant) and a CFP (certified financial planner)[29] were commercial speech.

1. *Is an Advertisement Commercial Speech?*

While many advertisements are classic examples of commercial speech, an advertisement is not necessarily commercial speech. In *New York Times v. Sullivan*, the Court held that the advertisement at issue was not commercial speech because it "communicated information, expressed opinion, recited griev-

23. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S 557.
24. *Id.* at 561.
25. *Id.* at 562.
26. *See id.* at 579 (Stevens, J. concurring).
27. Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 473 (1989).
28. *See* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (in this case both parties agreed that the information on the can was commercial, and therefore the Court does not discuss its reasoning behind this finding).
29. *See* Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136, 142 (1994) (the Court does not discuss its reasoning behind this finding).

ances, [and] protested claimed abuses . . . ."[30] In *Sullivan*, the New York Times had run a full-page advertisement entitled "Heed Their Rising Voices," which appealed for funds to support a civil rights campaign.[31] The Court found it immaterial that the advertisement was a paid one.[32] It reasoned that to hold otherwise would "shut off an important outlet for the promulgation of information and ideas by persons who do not . . . have access to publishing facilities . . . ."[33]

2. *Is a Pamphlet Commercial Speech?*

A key case in analyzing the definition of commercial speech is *Bolger v. Youngs Drug Products Corp.*[34] In *Bolger,* a federal law prohibited the mailing of unsolicited advertisements for contraceptives. The speaker, Youngs, was a prophylactic manufacturer and the public issue involved was venereal disease and family planning.[35] The information pamphlet affected by the prohibition did more than propose a commercial transaction. These pamphlets discussed the availability of prophylactics in general, and Youngs' product in particular.[36] The Court found that the mere fact that these pamphlets were advertisements did not make them commercial speech.[37] The Court reasoned that sometimes advertisements are used to convey political or other messages that are unrelated to a commercial transaction.[38] The Court also found that references to specific products and the speaker's economic motivation alone were insufficient to convert the statements into commercial speech.[39] The Court held, however, that these three factors in combination—advertising format, product references, and commercial motivation—provided "strong support" for characterizing speech as commercial.[40] In *Bolger*, the Court found all three factors present and

30. N.Y. Times v. Sullivan, 376 U.S. 254, 266 (1964).
31. *Id.* at 256.
32. *Id.* at 266.
33. *Id.*
34. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).
35. *Id.* at 68.
36. *Id.* at 62.
37. *Id.* at 66.
38. *Id.*
39. *Bolger*, 463 U.S. at 67.
40. *Id.* at 67.

concluded that the speech at issue was commercial speech.[41] In a footnote, the Court cautioned that each one of these factors may not be necessary in order for speech to be deemed commercial.[42] In a separate footnote the Court noted even though a product is referred to generally, the speech might still be commercial if the company had such control over the market that it could promote its product without reference to its own brand name.[43]

3. *Combination Speech: Commercial Speech Linked with Noncommercial Speech*

In 1983, the *Bolger* Court held that statements may be commercial speech regardless of the fact that they "contain discussions of important public issues."[44] Additionally, it held that advertising that links a product to a current public debate is not entitled to the constitutional protection afforded noncommercial speech.[45] The Court did not want to allow advertisers to immunize false and misleading product information from government regulations simply by including references to public issues.[46]

The 1988 case, *Riley v. National Federation of the Blind of North Carolina,* addressed commercial speech that was "inextricably intertwined" with noncommercial speech.[47] In *Riley*, the North Carolina Charitable Solicitation Act required fundraisers to disclose the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in North Carolina within the preceding twelve months.[48] A coalition of professional fundraisers, charitable organizations, and potential charitable donors brought suit against the government seeking injunctive and charitable relief on the grounds that the statute infringed upon their freedom of speech.[49] The District Court for the Eastern District of

41. *Id.* at 68.
42. *Id.* at 67 n.14.
43. *Id.* at 66 n.13.
44. *Bolger*, 463 U.S. at 67-68.
45. *Id.* at 68 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 n.5).
46. *Id.*
47. *See* Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781 (1988).
48. *Id.* at 786.
49. *Id.* at 787.

North Carolina found this aspect of the statute unconstitutional and enjoined its enforcement.[50] The Court of Appeals for the Fourth Circuit affirmed.[51] The United States Supreme Court affirmed, finding the statute unconstitutional.[52] The state argued that the provision, which required disclosure of the percentage of gross receipts actually turned over to the charity, should be analyzed as a regulation on commercial speech.[53] The state's position was that the speech was commercial because it related to the fundraiser's profit.[54] The Court refrained from deciding that speech is necessarily commercial merely because a person has a financial motivation for speaking.[55] The Court held that even assuming, without deciding, that the speech was commercial, the speech did not retain its commercial character because it was "inextricably intertwined with otherwise fully protected speech."[56] To "parcel out the speech" would be "artificial and impractical."[57] Since all the speech was afforded full First Amendment protection, the state could not compel the speaker to disclose anything.[58] The First Amendment protects both what the speaker says and what the speaker decides not to say.[59]

In the 1989 case *Board of Trustees of the State University of New York v. Fox*,[60] a company called America Future Systems ("AFS") wanted to hold a "Tupperware" style party[61] in a State University of New York ("SUNY" or "the University") dormitory in order to sell dinnerware to the students. The University prohibited private commercial enterprises from operating on campus, unless specifically contracted for by the University.[62] An AFS representative was conducting a demonstration in a SUNY

50. *Id.*
51. *Id.*
52. *Riley*, 487 U.S. at 796.
53. *Id.*
54. *Id.*
55. *Id.* at 795.
56. *Id.* at 796.
57. *Riley*, 487 U.S. at 796.
58. *Id.*
59. *Id.* at 796-97.
60. Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989).
61. A "Tupperware" party consists of a "demonstration and offering of products for sale to groups of ten or more prospective buyers at gatherings assembled and hosted by one of the prospective buyers." *Id.* at 472.
62. *Id.* at 471-72.

dormitory. She was asked to leave and when she refused she was arrested for trespassing, soliciting without a permit, and loitering.[63] At the party the students would have seen a product demonstration and discussed how to be financially responsible and run an efficient home.[64] The students brought suit seeking a declaratory judgment that the University violated their First Amendment rights by prohibiting the AFS demonstration.[65] The students argued that since the speech proposing a commercial transaction (the product demonstration) was combined with pure speech (the information on household economics) the speech in its entirety should be considered noncommercial speech.[66] In this case, the Court found that the noncommercial speech on home economics was not "inextricably intertwined" with the commercial Tupperware sales pitch.[67] In other words, it was not impossible to sell the dinnerware without teaching home economics, or to teach home economics without selling dinnerware, and therefore the sales pitch was not converted to noncommercial educational speech.[68]

The Court has acknowledged that "ambiguities may exist at the margins of the category of commercial speech."[69] In Justice Stevens' concurrence in *Rubin v. Coors Brewing Co.*, he suggested that the distinction between commercial and noncommercial speech should not rest solely on the form or content of the statement, or the motive of the speaker, but instead should rest on the relationship between the speech at issue and the justification for distinguishing the two forms of speech.[70]

4. *Protection of False & Misleading Statements*

The Court has held that there is no constitutional value in false statements of fact since false statements do not materially advance society's interest in "uninhibited, robust, and wide-open debate on public issues."[71] The Court has specifically held

63. *Id.* at 472.
64. *Id.* at 474.
65. *Fox*, 492 U.S. at 472.
66. *Id.* at 474.
67. *Id.*
68. *Id.*
69. Edenfield v. Fane, 507 U.S. 761, 765 (1993).
70. *Rubin*, 514 U.S. at 493.
71. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

that "the States and Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading."[72] However, in some cases, the First Amendment imposes restraints on lawsuits seeking damages for injurious falsehoods "to eliminate the risk of undue self-censorship and the suppression of truthful material."[73]

In *New York Times v. Sullivan*, the Court held this restraint gives the freedom of expression the "breathing space" its needs to survive.[74] In that case the New York Times had run a full-page advertisement entitled "Heed Their Rising Voices," which described a "wave of terror" undertaken by those opposed to the civil rights group and solicited funds.[75] The advertisement specifically spoke of an event allegedly involving the plaintiff, Sullivan, that he claimed was false, and therefore libelous.[76] It was uncontroverted that the descriptions of some of the events were not accurate.[77] The manager of Advertising Acceptability at the New York Times accepted the advertisement because he knew of nothing that would lead him to believe that anything contained in the advertisement was false.[78] No one at the Times made any effort to check the accuracy of the statements in the advertisement.[79] The Supreme Court of Alabama affirmed the trial courts decisions that the statements were "libelous per se," and the defendants could be found liable if the jury found that statements were made "of and concerning" Sullivan.[80] The Supreme Court further held that "[t]he First Amendment of the U.S. Constitution does not protect libelous publications . . . ."[81] The United States Supreme Court held that the rule of law applied by the Alabama courts was "constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a pub-

72. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985).
73. Herbert v. Lando, 441 U.S. 153, 172 (1979).
74. *Sullivan*, 376 U.S. at 272.
75. *Id.* at 256-57.
76. *Id.* at 256.
77. *Id.* at 258.
78. *Id.* at 260-62.
79. *Sullivan*, 376 U.S. at 261.
80. *Id.* at 262.
81. *Id.* at 264 (internal quotations omitted).

lic official against critics of his official conduct."[82] The Court further held that "erroneous statements [are] inevitable in free debate," and "must be protected if the freedoms of expression are to have the breathing space that they need to survive."[83]

Therefore, "some false and misleading statements are entitled to First Amendment protection . . . ."[84] On the contrary, speech, which does not concern public issues and is "wholly false and clearly damaging," is not entitled to First Amendment protection and may be prohibited entirely.[85]

II. *Kasky v. Nike, Inc.*

The definition of commercial speech most recently became an issue in a California Supreme Court case decided in May 2002, *Kasky v. Nike, Inc.*[86]

A. *Facts*

The defendant Nike is a $9.9 billion athletic apparel and running shoe corporation.[87] Nike uses subcontractors to manufacture most of its products.[88] These subcontractors are located in China, Vietnam, and Indonesia.[89] Under an agreement with the subcontractors, Nike assumed responsibility for the subcontractor's compliance with local laws and regulations.[90] Beginning in October 1996, Nike began to receive bad publicity in print and broadcast media for the labor practices in the Southeast Asia factories.[91] Nike responded to the bad publicity

82. *Id.*

83. *Id.* at 271-72 (internal quotations omitted).

84. Rubin v. Coors Brewing Co., 514 U.S. 476, 495 (1995).

85. *In re* R.M.J., 455 U.S. 191, 203 (1982).

86. *Kasky*, 45 P.3d 243.

87. David Sokal, *Where the Boys Aren't*, SHOPPING CENTER WORLD, Nov. 1, 2002, at 34.

88. *Kasky*, 45 P.3d at 247.

89. *Id.*

90. *Id.* at 247-48.

91. *Id.* at 248. Some of the media outlets that featured stories about Nike's labor practices were *48 Hours*, the Financial Times, The New York Times, the San Francisco Chronicle, the Buffalo News, the Oregonian, the Kansas City Star, and the Sporting News. *Id.* The publications alleged that the factories that produced Nike's products paid less than the applicable local minimum wage, required employees to work overtime, allowed and encouraged employees to work more overtime than allowed by local law, subjected employees to physical, verbal, and sexual

through public relations material, including: press releases, letters to editors, and letters to university presidents and athletic directors.[92] Nike's press material defended its labor practices, citing specific examples of its employment practices.[93] Nike also bought a full page advertisement to publicize a report that GoodWorks International had prepared under a contract with Nike, stating that GoodWorks has not found evidence of illegal or unsafe working conditions at Nike factories in China, Vietnam, or Indonesia.[94]

The plaintiff, Marc Kasky, is a San Francisco activist who decided to sue Nike for making false and misleading statements of fact after reading a New York Times article about Nike's labor practices.[95] Kasky was authorized to bring suit under California's Business and Professions Code sections 17204 and 17535.[96] Kasky had previously initiated two other class actions suits against corporations alleging false advertising.[97]

B. *Issue*

The central issue in *Kasky v. Nike* was whether the speech involved was commercial in nature. Determining the type of speech involved determines the level of protection this speech is entitled to.[98] Commercial speech receives a lesser degree of protection than noncommercial speech and may be entirely prohib-

---

abuse, and exposed employees to toxic chemicals, noise, heat, and dust in violation of local health and safety regulations. *Kasky*, 45 P.3d at 248.

92. *Id.*

93. *Id.* Nike's response to these allegations was that the workers that make Nike products were protected from physical and sexual abuse, were paid double the applicable local minimum wage, and received free meals and health care. Nike further stated that working conditions were in compliance with applicable local laws and regulations. *Id.*

94. *Id.*

95. Rosemary Feitelberg & Joanna Ramey, *Nike Case Questions Issues of Free Speech (and false advertising)*, WOMEN'S WEAR DAILY, Jan. 23, 2002, at 3.

96. *Kasky*, 45 P.3d at 249. Both section 17200 and section 17500 authorize any person acting for the interests of the general public to bring an action for relief. *Id.*

97. One lawsuit was against Perrier after the company admitted to adding carbonation to its water, and one was against a frozen food producer who advertising its vegetables as "California style" when the food actually came from Mexico. Both cases settled out of court. Feitelberg & Ramey, *supra* note 95.

98. *Kasky*, 45 P.3d at 248.

ited if it is found to be false or misleading.[99] Noncommercial speech is entitled to full First Amendment protection and cannot be regulated based on its falsity.[100]

C. *Superior Court*

Kasky alleged that Nike made false and misleading statements of fact about its labor practices within its press materials because of its negligence and carelessness.[101] Nike argued that the statements contained in the press materials were not commercial speech because they were part of "an international media debate on issues of intense public interest."[102] Kasky sought to disgorge Nike of "all monies . . . acquired by means of any act found . . . to be an unlawful and/or unfair business practice" and to obtain an injunction requiring Nike to undertake a "public-information campaign."[103] Nike demurred on the grounds that Kasky "failed to state facts sufficient to constitute a cause of action" and that the relief Kasky was seeking was barred by the First Amendment of the United States Constitution.[104] The Superior Court found that Nike's statements were noncommercial and therefore were protected by the First Amendment.[105] Based on this reasoning, it sustained Nike's demurs and dismissed the complaint.[106] Kasky appealed from the judgment.[107]

D. *Court of Appeals*

The Court of Appeals affirmed the judgment, concluding that Nike's statements were noncommercial speech and therefore entitled to the greatest level of First Amendment protec-

---

99. *Id.* at 247.

100. *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 495 (1995).

101. *Kasky*, 45 P.3d at 248. The plaintiff brought this suit under section 17200 of the California Business and Professional Code. Section 17200 is known as California's "Little FTC Act" and parallels FTC Act § 5. The law defines unfair competition as any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [§ 17500, the false advertising law]." *Id.* at 249.

102. *Id.* at 259.

103. *Id.* at 248.

104. *Id.*

105. *Id.* at 248-49.

106. *Kasky*, 45 P.3d at 248-49.

107. *Id.* at 249.

tion.[108] The Supreme Court of California granted the plaintiff's petition for review.[109]

E. *The Supreme Court of California*

The Supreme Court of California reversed, finding that the public relations statements qualified as "commercial speech for the purposes of applying state laws barring false and misleading commercial messages."[110] The court held that "when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception, categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message."[111] The court determined that Nike's statements were commercial since the statements were (1) directed by a commercial speaker; (2) to a commercial audience; and (3) the speaker made "representations of fact about the speaker's own business operations for the purpose of promoting the sale of its products . . . ."[112]

1. *The Supreme Court of California's Reasoning*

a. *Determining What is Commercial Speech*

The California Supreme Court reasoned that since commercial speech is speech proposing a commercial transaction, it follows that commercial speech is communication between parties who engage in these transactions.[113] Based on this reasoning, it held that commercial speech is speech by a commercial speaker to a commercial audience.[114] The court then looked to the *Bolger* factors of advertising format and economic motivation.[115] From the presence of these factors the court implied that commercial speech is speech that is directed at persons who "may be influenced by that speech to engage in a commercial transaction

108. *Id.*
109. *Id.*
110. *Id.* at 247.
111. *Kasky*, 45 P.3d at 256.
112. *Id.* at 247.
113. *Id.* at 256.
114. *Id.* at 247.
115. *Id.* at 256.

with the speaker. . . ."[116] The court reasoned that the factual content of the message must be commercial.[117] They held that factual content is commercial when it consists of information about the speaker's business operations, products, or services.[118] The court found this holding to be consistent with the *Bolger* factor of product references.[119] The court interpreted product references to mean any statement "about the manner in which the products are manufactured, distributed, or sold, about repair or warranty services . . . or about the identity or qualifications of persons who manufacture, distribute, sell, service, or endorse the product."[120] To support this definition the California Supreme Court looked at the other cases where the speaker was not clearly proposing a commercial transaction, and yet the United States Supreme Court considered the speech to be commercial. In *Rubin v. Coors Brewing Co.*, the United States Supreme Court accepted the parties' stipulation that a statement of alcohol content on the label of a beer bottle was, in fact, commercial speech.[121] The Court has also held that statements on an attorney's letterhead and business cards identifying the attorney as a CPA (certified public accountant) and a CFP (certified financial planner) were commercial speech.[122] In both of those cases, as in *Kasky*, the speaker was speaking about attributes of their product that may induce someone to purchase the product. Since the statements would induce a consumer to purchase the product, they are by their nature commercial. The court held that commercial speech is speech (1) directed by a commercial speaker; (2) to a commercial audience; and (3) the speaker made representations of fact about the speaker's own business operations for the purpose of promoting the sale of its products.[123]

In applying its test, the California Supreme Court found Nike's speech to be commercial. It concluded that the speaker,

---

116. *Kasky*, 45 P.3d at 256.
117. *Id.*
118. *Id.*
119. *Id.* at 247.
120. *Id.* at 257.
121. *Rubin* 514 U.S. at 481.
122. Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136, 142 (1994).
123. *Kasky*, 45 P.3d at 247.

Nike, was commercial because it is engaged in commerce.[124] It determined that there was an intended commercial audience because (1) the letters sent to the university presidents and athletic directors were addressed to actual or potential customers; and (2) the letters to the editors, while addressed to the general public, were intended to reach and influence actual and potential customers.[125] Finally, it found there were representations of fact of a commercial nature because Nike was describing its own business operations.[126]

b. *This Interpretation is Consistent with the Reason False or Misleading Commercial Speech is Not Protected*

The court found this interpretation to be consistent with the reasons the United States Supreme Court has denied First Amendment protection to false or misleading commercial speech.[127] Namely, that (1) the truth of commercial speech is more easily verifiable by the disseminator, and (2) since commercial speech is motivated by a desire for economic profit it is less likely to be chilled by regulation.[128] The court based this conclusion on the finding that Nike's statements were on matters within its own knowledge and thus, it was in a position to readily verify the truth of the statements.[129] It also found Nike's statements to be "particularly hardy or durable" since they were made in an effort to maintain sales or profits.[130] It rationalized that if Nike becomes more cautious as a result of this ruling that the result would benefit society. This cautiousness would cause Nike to make a greater effort to verify its statements and as a result protect the clean flow of commercial information.[131]

---

124. *Id.* at 258.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Kasky*, 45 P.3d at 257.
129. *Id.* at 257.
130. *Id.*
131. *Id.*

c. *Speech on a Matter of Public Debate may be Commercial in Some Circumstances*

While Nike argues that the speech is not commercial because the statements involved speech on an issue of public debate, the California Supreme Court noted that United States Supreme Court has cautioned that statements may be properly categorized as commercial "notwithstanding the fact that they contain discussions of important public issues."[132] It has also held that commercial speech may concern a "subject of intense public debate."[133]

As stated previously, the Supreme Court allows content based regulation on commercial speech because (1) commercial speakers have enough knowledge of the market and their product to evaluate the accuracy of the message;[134] (2) commercial speech is based on economic self-interest and therefore is not "particularly susceptible to being crushed by overbroad regulation;"[135] and (3) the government interest in preventing commercial harm justifies the power to regulate speech that is "linked inextricably" to those transactions.[136] While Nike's statements included its opinion about labor practices in general in Southeast Asia, the statements also concerned Nike's own practices. The California Supreme Court conceded that Nike's general statements about labor practices in Southeast Asia were protected under the First Amendment.[137] However, the court held Nike's statements do not continue to be protected when it is speaking about itself.[138] The court did not want to enable Nike to "immunize false and misleading product information from government regulation simply by including references to public issues."[139] The court reasoned that the two forms of speech were not "inextricably linked" as in *Riley* because Nike, unlike

132. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67-68 (1983).

133. Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 184 (1999).

134. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976).

135. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980).

136. *44 Liquormart*, 517 U.S at 499.

137. Kasky v. Nike, Inc., 45 P.3d 243, 259 (Cal. 2002).

138. *Id.* at 260.

139. *Id.* (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983)).

the speaker in *Riley*, was not legally or practically required to link the two forms of speech.[140]

The court further found that this decision does not impermissibly restrict or disfavor Nike's point of view since it only suppresses false and misleading statements of fact.[141] Nike is still free to speak generally about labor practices in Southeast Asia with full First Amendment protection.

Nike petitioned for certiorari. The United States Supreme Court granted certiorari on January 10, 2003.

2. *The Dissent*

a. *Justice Chin's Dissent*

Justice Chin objected to the result of the majority opinion and therefore dissented. Under the majority opinion Nike's critics have full First Amendment protection.[142] However, when Nike tries to defend itself it is denied this protection.[143] According to Justice Chin, the reason the majority affords Nike less protection is simply because it engages in commerce.[144] This results in the unconstitutional handicapping of one side of an "important worldwide debate."[145] Justice Chin argues that the public has the right to receive information from both sides of the debate, as the First Amendment "guarantees 'the public access to discussion, debate, and the dissemination of information and ideas.' "[146]

Justice Chin does not agree with the majority's conclusion that Nike's speech was commercial. Justice Chin views the fact that Nike did not include the information at issue on its product labels, inserts, packaging, or commercial advertising intended to only reach actual or potential customers as evidence that this speech was not intended to promote the sale of athletic products.[147] Furthermore, the traditional definition of commercial speech is "speech that does no more than propose a commercial

140. *Id.* at 260-61.
141. *Id.* at 261.
142. *Kasky*, 45 P.3d at 263.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 264 (quoting First Nat'l Bank of Boston v. Belloti, 435 U.S. 765, 782 (1978)).
147. *Kasky*, 45 P.3d at 265.

transaction."[148] Nike's speech clearly went beyond proposing a commercial transaction.[149] Chin recognizes that the United States Supreme Court has cautioned against advertisers immunizing false or misleading speech by including references to public issues.[150] However, Chin interprets this to mean the Supreme Court did not want advertisers to include information on a public issue simply as a means to avoid regulation.[151] That was not the case here, where Nike's statements were "prompted and necessitated by public criticism."[152] "Nike's labor practices . . . were the public issue."[153] Based on this reasoning, Chin finds that Nike's speech should be fully protected as "essential to free government."[154] Chin further finds that even if the speech were commercial, that it is "inextricably intertwined" with noncommercial speech and any attempt to separate the two is "artificial and impractical."[155] Thus, Justice Chin concludes that both sides of a public controversy should have the full protection of the Constitution.[156]

b. *Justice Brown's Dissent*

Justice Brown remarks that the struggle to differentiate between commercial and noncommercial speech had created confusion since the United States Supreme Court created the commercial doctrine in 1942.[157] She further notes that even though the United States Supreme Court has refrained from defining the elements of commercial speech, the *Kasky* majority proposes a new test, which does just that.[158] Brown argues that the majority's test "violates fundamental principles of First Amendment jurisprudence by making the level of protection . . . dependent on the identity of the speaker . . . ."[159]

148. *Id.* (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)).
149. *Id.*
150. *Id.* at 265-66.
151. *Id.* at 266.
152. *Kasky*, 45 P.3d at 266.
153. *Id.*
154. *Id.* at 267.
155. *Id.* (internal quotations omitted).
156. *Id.* at 268.
157. *Kasky*, 45 P.3d at 268.
158. *Id.*
159. *Id.*

Justice Brown agrees with Justice Chin, finding that "Nike's statements are more like noncommercial speech . . . ."[160] Nike's labor practices are the public issue and therefore its commercial speech cannot be separated from its noncommercial speech.[161] Brown distinguishes *Bolger* on the grounds that in *Bolger* the speaker's products "had not become a public issue."[162] Additionally, unlike Nike, the manufacturer in *Bolger* could have spoken about venereal disease without discussing its own products.[163] Realistically, Nike could not comment on labor exploitation without commenting on its own practices.[164]

Justice Brown argues that while the United States Supreme Court has distinguished commercial speech by its content, the majority distinguishes it by the identity of the speaker and the intended audience.[165] Brown notes that contrary to the majority opinion, the identity of the speaker should not be dispositive since the worth of the speech does not depend on the identity of the speaker.[166] Furthermore, the test is overbroad and when "taken to its logical conclusion renders all corporate speech commercial speech."[167] The test "stifl[es] the ability of speakers engaged in commerce . . . to participate in [public] debate."[168] The majority, therefore, "unconstitutionally chills a corporation's ability to participate in a [public] debate and favors certain speakers over others."[169]

Justice Brown finds the current system, where all speech is either commercial or noncommercial, and all commercial speech is afforded the same limited protection, to be rigid, unrealistic, and constraining.[170] The gap between commercial and noncommercial speech is shrinking, but the commercial speech doctrine

160. *Id.*

161. *Kasky*, 45 P.3d at 269.

162. *Id.* at 278.

163. *Id.*

164. *Id.*

165. *Id.* at 270 (citing Bates v. State Bar of Ariz., 433 U.S. 350, 363 (1977)).

166. *Kasky*, 45 P.3d at 270-71 (citing Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n, 475 U.S. 1, 8 (1986); First Nat'l Bank of Boston v. Belloti, 435 U.S. 765, 783 (1978)).

167. *Id.* at 272.

168. *Id.* at 271.

169. *Id.* at 272-73.

170. *Id.* at 268-69.

remains the same.[171] Justice Brown calls on the United States Supreme Court to create a more nuanced approach to the commercial speech doctrine that accounts for the realities of the modern world.[172]

F. *The United States Supreme Court*

The United States Supreme Court granted certiorari to decide (1) "whether a corporation participating in a public debate may 'be subjected to liability for factual inaccuracies on the theory that its statements are commercial speech because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions;" and (2) "whether the 'First Amendment, as applied to the states through the Fourteenth Amendment, permit[s] subjecting speakers to the legal regime approved by [the California Supreme Court].' "[173] In June 2003, the Supreme Court dismissed the writ of certiorari as improvidently granted.[174] Justice Stevens, joined by Justice Ginsberg, and in part by Justice Souter wrote the concurrence. Justices Kennedy, Breyer, and O'Connor dissented from the dismissal.

1. *Justice Steven's Concurrence*

Justice Stevens agreed that certiorari had been improvidently granted for three reasons: (1) the California Supreme Court's judgment was not final within the meaning of 28 U.S.C. § 1257; (2) neither party had standing to invoke federal court jurisdiction; and (3) to avoid the premature adjudication of novel constitutional questions.[175]

Generally, the United States Supreme Court only has appellate jurisdiction with respect to state litigation "after the highest state court in which judgment could be had has rendered a final judgment or decree."[176] The Court accepts jurisdiction in certain " 'situations in which the highest court of a State has finally determined the federal issue present in a particular

171. *Kasky*, 45 P.3d at 269.
172. *Id.* at 269-70.
173. Nike, Inc. v. Kasky, 123 S. Ct. 2554, 2555 (2003).
174. *Id.* at 2555.
175. *Id.*
176. *Id.*

case, but in which there are further proceedings in the lower state courts to come.' "[177] In *Cox Broadcasting Corporation v. Cohn*,[178] the Court outlined certain categories of cases which would merit review by the Court even though additional proceedings were anticipated in the lower courts. Nike argued that this case fell into the fourth category, which includes cases in which " 'the federal issue ha[d] been finally decided in the state courts with further proceedings pending in which the party seeking review' might prevail on nonfederal grounds, 'reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action,' and 'refusal immediately to review the state-court decisions might seriously erode federal policy.' "[179] Stevens distinguished the Nike case from the cases set forth in this category in *Cox* because in the cases in *Cox* the federal issues had been finally decided by the state court and would have been finally resolved by the Supreme Court, regardless of whether the Court affirmed or overruled the lower court's decision. In contrast, Stevens finds that the *Nike* case could "take a number of other paths" which could include further proceedings in the lower courts and would not necessarily resolve the First Amendment issues in the case.[180]

Stevens also finds that the Supreme Court lacks jurisdiction to hear Nike's claims because neither party has standing to invoke the jurisdiction of the federal courts.[181] Kasky does not have standing because he has no personal stake in the outcome of the case and is acting as a private attorney general seeking to enforce California statutes on behalf of the general public of the State of California. He has not made any federal claim and has not alleged any injury to himself that is "distinct and palpable."[182] Nike relied on the Court's holding in *ASARCO, Inc. v. Kadish*,[183] to establish standing. In *ASARCO* the Court held:

> When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction

177. *Id.* (citing Cox Broad. Corp. v. Cohn, 420 U.S. 469, 477 (1975)).
178. *Cox Broad. Corp.*, 420 U.S. at 477.
179. *Nike*, 123 S. Ct. at 2556 (citing *Cox Broad. Corp.*, 420 U.S. at 482-83).
180. *See id.*
181. *Id.* at 2557 (internal citations omitted).
182. *Id.*
183. ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989).

> on certiorari if the judgment of the state court cases causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.[184]

Stevens distinguishes *ASARCO* because in that case the state court proceedings ended in a declaratory judgment invalidating a state law. In contrast, there was no "final judgment altering tangible legal rights" in the Nike case because "the California Supreme Court merely held that [Kasky's] complaint was sufficient to survive Nike's demurrer and allowed the case to go forward."[185] In Steven's opinion *ASARCO* was not to be applied to interlocutory rulings that simply allowed a trial to proceed.[186]

Stevens also bases the decision to dismiss the writ as improvidently granted on the Court's policy "not [to] anticipate a question of constitutional law in advance of the necessity of deciding it."[187] The First Amendment issues presented by this case are both novel and important because it involves the blending of commercial speech, noncommercial speech, and debate on an issue of public importance. The case involves balancing of two interests. The first is the regulatory interest in protecting consumers from being misled by corporate misstatements. The second is the interest in protecting participants involved in ongoing discussion and debate on public issues from the chilling effect of the prospect of expensive litigation. Stevens feels the correct answers to the questions presented by the case would be better answered in a review of the full factual record and not just a review of unproven allegations in a pleading.[188]

2. *Justice Breyer's Dissent*

Justices Breyer, Kennedy, and O'Conner dissented from the order dismissing the writ of certiorari as improvidently granted. Justice Breyer, joined by Justice O'Connor, wrote a dissenting opinion because "the questions presented directly concern the freedom of Americans to speak about public matters

184. *Nike*, 123 S. Ct. at 2557 (citing *ASARCO Inc.*, 490 U.S. at 623-24).
185. *Id.* at 2558.
186. *Id.*
187. *Id.*
188. *Id.* at 2558-59.

in public debate."[189] He further finds that "no jurisdictional rule prevents [the Court] 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."[190]

Breyer disagrees with Steven's conclusion that both parties lack standing. Breyer finds that while Kasky would have trouble proving he has standing, it was Nike that brought the case to the Supreme Court and Nike has standing.[191] Kasky's enforcement of the California law threatens to discourage Nike from engaging in speech, which would be an "injury in fact." In the past, the Court has found that "the enforcement of such a law [causes] a constitutional injury even if the enforcement proceedings are not complete."[192] Unlike Stevens, Breyer sees no meaningful difference between the *ASARCO* case and the instant case.[193]

Breyer finds that although the Court's jurisdiction is limited to "final judgments or decrees rendered by the highest court of a State in which a decision could be had," the California Supreme Court's decision, while technically interim, is a "final judgment or decree" for jurisdictional purposes.[194] *Cox Broadcasting v. Cohn* set forth four criteria to determine if a decision falls within the "fourth category." They are:

> (1) "[T]he federal issue has been finally decided in the state courts";
> (2) in further pending proceedings, "the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by [the Supreme] Court";
> (3) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or de-

189. *Nike*, 123 S. Ct. at 2560.

190. *Id.*

191. *Id.*

192. *Id.* at 2560-61 (citing Houston v. Hill, 482 U.S. 451, 459 n.7 (1987); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785 n.21 (1978); Steffel v. Thompson, 415 U.S. 452, 459 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52-53 (1971)).

193. *Id.* at 2561-62.

194. *Nike,* 123 S. Ct. at 2562 (internal quotations omitted).

termining the admissibility of evidence in, the state proceedings still to come"; and
(4) "a refusal immediately to review the state-court decisions might seriously erode federal policy."[195]

Breyer analyzes each of the four criteria and finds that each "is satisfied in this case."[196]

The first criterion is whether the federal issue has been finally decided in the state courts.[197] The California Supreme Court considered nine specific Nike communications and determined that all of the speech in question was commercial, and therefore may be prohibited if deemed false or misleading.[198] According to Breyer, the California Supreme Court finally decided the federal issue and nothing remains to be decided on that federal question. The possibility that related federal questions might arise upon remand for trial should not bar review since this possibility is always present in ongoing litigation and was even present in *Cox*.[199]

The second criterion is that "in further pending proceedings, 'the party seeking review . . . might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by [the Supreme] Court.' "[200] This criterion is satisfied because if Nike were to show that its statements are neither false nor misleading, then it could prove that the statements do not constitute unfair competition or false advertising under the California law and it would prevail on nonfederal grounds.[201]

The third criterion is that " 'reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.' "[202] This is technically satisfied as well. If the Supreme Court were to reverse the California Supreme Court, it would reinstate the judgment of

195. *Id.* (citing Cox Broad. Corp. v. Cohn, 420 U.S. 469, 482-83 (1975)).
196. *Id.* at 2562.
197. *Id.* (citing *Cox Broad.Corp.*, 420 U.S. at 482-83).
198. *Id.* at 2563 (citing Kasky v. Nike, Inc., 45 P.3d 243, 247 (Cal. 2002)).
199. *Nike*, 123 S. Ct. at 2563.
200. *Id.* at 2562.
201. *Id.* at 2564.
202. *Id.* at 2562 (citing *Cox Broad. Corp.*, 420 U.S. at 482-83).

the California intermediate court and affirm dismissal of the complaint with no leave to amend.[203] Breyer concedes that the Supreme Court may not reverse the California Supreme Court outright and may take some middle ground. However, Breyer does not see this as significant since the criteria specifies the effect of reversal and not some other disposition.[204] Further, Breyer sees reversal as a serious possibility for a number of reasons. First, he would apply the public speech principle because the speech involves a mixture of commercial and noncommercial elements. The speech regulation would likely not survive this heightened scrutiny and would therefore merit a reversal.[205] Second, the speech involved has predominantly noncommercial characteristics concerning matters of significant public interest and active controversy, with which the commercial characteristics are "inextricably intertwined."[206] Third, a private "false advertising" action by a person who has suffered no injury imposes a serious burden upon speech when extended to encompass the type of speech at issue. The burden is even greater because the California law imposes liability based on negligence, without fault.[207]

The fourth criterion is that "a refusal immediately to review the state-court decisions might seriously erode federal policy."[208] Breyer considers this criterion satisfied because refusal to immediately review the California Supreme Court's decision will seriously erode the federal constitutional policy in favor of free speech.[209] Breyer finds that "[i]f permitted to stand, the state court's decision may well "chill" the exercise of free speech rights."[210] Corporations doing business in California may hesitate to participate in public debate in fear of potential lawsuits and legal liability. The failure of these corporations to commu-

203. *Id.* at 2564.

204. *Nike*, 123 S. Ct. at 2564.

205. *Id.* at 2565.

206. *Id.*

207. *Id.* at 2566.

208. *Id.* at 2568 (citing Cox Broad. Corp. v. Cohn, 420 U.S. 469, 482-83 (1975)).

209. *Nike*, 123 S. Ct. at 2568.

210. *Id.*

nicate on issues of public debate may limit the supply of information to journalists and consequently the public.[211]

Breyer, finding "no good reason for postponing the decision," would not dismiss the writ as improvidently granted.[212]

III. Significance of the Case to the Definition of Commercial Speech

A. *An Overbroad Definition of Commercial Speech*

Because the Supreme Court of the United States did not review the Supreme Court of California's decision in *Kasky* v. *Nike* the definition of commercial speech remains significantly altered. The *Bolger* Court held that the presence of advertising format, product references and economic motivation is "strong evidence" that speech is commercial.[213] In *Kasky*, the Supreme Court of California redefined these terms. It held that speech in advertising format is speech about a product or service, by the person offering that product or service, directed at those who would be willing to purchase that product or service.[214] The court defined product references as not merely statements about price, quality, and availability, but also statements about the how the product is manufactured and distributed, and the identity and qualifications of those manufacturing and selling the product.[215] The court further extended this definition to statements made in a public relations campaign in an effort to enhance the image of the product, its manufacturer, or its seller.[216] Since most, if not all, public relations campaigns are intended to have a positive effect on a corporation's image, under this rule all statements contained in press releases would be considered product references. The court in *Kasky* also held that speech has an economic motivation when it is intended to lead to commercial transactions.[217]

The court then determined, based on these definitions, that the *Bolger* holding supported its own holding that commercial

211. *Id.*
212. *Id.* at 2569.
213. *Bolger*, 463 U.S. at 67.
214. *Kasky*, 45 P.3d at 256.
215. *Id.* at 257.
216. *Id.*
217. *Id.* at 256.

speech is speech by a commercial speaker to an intended commercial audience making representations of fact of a commercial nature.[218] The court held that although Nike addressed the public generally, the statements were also intended to reach potential consumers.[219] As long as the decision of the Supreme Court of California remains good law, any public statement by a corporation is a statement made to an intended commercial audience since the message could potentially reach customers. Affirming *Kasky* and upholding these definitions would broaden the definition of commercial speech and allow extensive regulation of speech by corporate speakers.

B. *Corporate Speakers will be Chilled*

The *Kasky* majority claims that their decision "in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices" as long as they speak truthfully.[220] This claim fails to take into account two points: (1) the *Kasky* decision does not just apply to knowingly false speech, but to negligently misleading speech; and (2) corporations must often speak out before all of the facts are known.

In the past, corporations often spoke out in response to critics. For example, McDonalds has publicly spoken out against critics who claim that "fast-food jobs are dead-end jobs" and that the company encourages obesity.[221] A much more dramatic example of a company speaking out to the public was the Tylenol tampering incident. In 1982, seven people died after taking Tylenol capsules laced with cyanide.[222] Johnson and Johnson chose to speak to the public within hours of the first news of the deaths, before they were fully aware where the cyanide had

218. *Id.* at 258.

219. *Kasky*, 45 P.3d at 258.

220. *Id.* at 247.

221. *See, e.g.*, Bonnie Harris, *In Fast Food, Some See Fast Track Jobs: A chance for stability, career growth and higher salaries is luring many Latinos to the industry*, L.A. TIMES, Mar. 12, 2001, at C1 (quoting a McDonald's spokesman about jobs with the company); Meredith May, *Teachers Sizzle Over Fast Food Fund-Raiser*, S.F. CHRON., Oct. 15, 2002, at A1 (in which a McDonald's spokeswoman responded to claims that McDonald's encourages obesity).

222. *See, e.g.*, Michael Waldholz, *Johnson & Johnson Says It Is Convinced Tylenol Poisoning Was Isolated Incident*, WALL ST. J., Feb. 12, 1986, *available at* 1986 WL-WSJ 268506.

originated.[223] The *Kasky* decision, as it now stands, will chill much of this type of speech. Under the *Kasky* decision both McDonalds and Johnson and Johnson would be caught between the proverbial "rock and a hard place." If the company speaks out against its critics it risks a potential lawsuit under the strict liability standard of *Kasky*.[224] If they do not speak out they risk the public perceiving their silence as indicia of guilt.[225]

The majority reasoned that economic motivation will lessen the chilling effect of the *Kasky* decision.[226] In other words, companies will risk a potential lawsuit in order to avoid being tried in the court of public opinion. However, since the *Kasky* ruling the number of United States companies that have publicly issued corporate responsibility reports has significantly decreased.[227] Furthermore, small companies are more at risk of having their speech chilled. A large corporation has the financial and public relations resources to withstand a public lawsuit. Smaller companies, without these resources, will not be able to take the risk of a lawsuit and will refrain from speaking out against their critics.

IV. Criticism

A. *Nike's Statements are Not Commercial Speech*

1. *Nike's Statements Did Not Propose a Commercial Transaction*

If speech is not commercial in nature it is entitled to full First Amendment protection and cannot be prohibited for being

223. *See, e.g.*, Tamar Lewin, *Tylenol Posts an Apparent Recovery*, N.Y. TIMES, Dec. 25, 1982, at A30.

224. The plaintiff in *Kasky* alleged that Nike's false and misleading statements were the result of "negligence and carelessness." *Kasky*, 45 P.3d at 248.

225. *See, e.g.*, Sandi Sonnenfeld, *Media Policy–What Media Policy?*, HARV. BUS. REV., Aug. 1, 1994, at 18, 20. ("There was a time when 'no comment' meant simply 'no comment.' But today when a company spokesperson says 'no comment,' it implies the organization has something to hide."). *See also* Al Frank, *No Comment = No Credibility*, N.J. STAR-LEDGER, Aug. 6, 2002 (62% of respondents to an Opinion Research Corp. study equated "no comment" with guilt).

226. *Kasky*, 45 P.3d at 257.

227. *See* Gary Young, *Nike Ruling: Just How Chilling Is It?*, NAT'L L. J., Jan. 20, 2003, at A9 (the number of corporate responsibility reports has dropped from seventy-eight (78) in 2001 to fifty-eight (58) in 2002).

false or misleading.[228] In *Board of Trustees, State University of New York v. Fox,* the Court held that the "Central Hudson" definition of "speech proposing a commercial transaction" was the "test for identifying commercial speech."[229] The speech involved in this case does not propose a commercial transaction. Nike's press material presented its side of an ongoing argument concerning its labor practices in Southeast Asia. The statements did not specifically mention any of Nike's products.

While the Court has deemed alcohol content labels and statements on letterhead to be commercial speech, in both *Rubin* and *Ibanez* the speech in question was closely connected with the product being sold.[230] The statements were intended to be seen by potential consumers.[231] In the instant case, the statement was not attached in any way to the product being sold, but instead was published in newspapers for all interested parties to read, not just potential consumers. Additionally, in *Rubin* and *Ibanez* the category of the speech—commercial or noncommercial—was not at issue.[232] In both instances the speakers themselves considered the speech to be commercial in nature and the Court did not see fit to disagree.[233]

2. *Nike's Statements Do Not Satisfy the Bolger Test*

In *Bolger v. Youngs Drug Products Corp.* the Court addressed the issue of whether informational pamphlets discussing the desirability and availability of prophylactics were commercial speech.[234] The Court held that the fact that the pamphlets were advertisements did not make them commercial speech since paid advertisements are sometimes used to convey political or other messages unconnected to a product, service, or commercial transaction.[235] Similarly, the fact that Nike participated in the debate through the use of paid advertisements does

228. Rubin v. Coors Brewing Co., 514 U.S. 476, 495 (1995) ("Some false and misleading statements are entitled to First Amendment protection in the political realm.") (Stevens, J., concurring).

229. *Fox,* 492 U.S. at 473-74.

230. *See Rubin*, 514 U.S. at 476; *Ibanez*, 512 U.S. at 136.

231. *Id.*

232. *Id.*

233. *See Rubin*, 514 U.S. at 475; *Ibanez*, 512 U.S. at 136, 142.

234. *Bolger*, 463 U.S. at 65.

235. *Id.* at 66.

not automatically make their statements commercial in nature. The Court also held that references to specific products and the economic motivation of the speaker were each, by themselves, insufficient to make the speech commercial.[236] The Court concluded that three factors—advertising format, product references, and commercial motivation—combined provided strong support for characterizing speech as commercial.[237] Many of Nike's statements were in the form of letters to the editor and letters to athletic directors of Universities, which are not traditional advertising formats. Additionally, there were no specific product references. The statements referred to company practices in general. Admittedly, Nike may have had an economic motivation for speaking out. The bad publicity that Nike was receiving may have caused them to fear a decline in sales, as Nike consumers tend to be brand loyal.[238] But in spite of this loyalty, many consumers do not want to feel that they are supporting irresponsible labor practices and may choose to purchase another brand that does not carry with it the guilt of indirectly supporting these practices.[239] However, economic motivation would be present for any company being publicly criticized. Public scrutiny can easily result in decreased sales and a lower stock price, and therefore there will always be an economic motivation for a company to defend itself. The Court noted that each *Bolger* factor does not need to be present for speech to be commercial.[240] However, it would be a far stretch to think that Nike's economic motivation was the type of "strong evidence" the Court was referring to in *Bolger*. It is only by expanding the definitions of the factors used in *Bolger*, as the Su-

236. *Id.* at 67.

237. *Id.*

238. *See, e.g.*, David Lazarus, *Corporate Tribalism: Just Can't Do It*, S.F. CHRON., Apr. 28, 2002, at G1 (profiling Nike customer, Alexander Capito, who wears Nike head-to-toe because it makes him "feel good"); Shelly Branch, *What's in a Name: Not Much According to Clothes Shoppers*, WALL ST. J., July 16, 2002, at B4 (Twenty-three percent (23%) of men and twenty-six percent (26%) of women rate Nike as their favorite brand.).

239. Maureen Tkacik, *Just How Far Does First Amendment Protection Go?*, WALL ST. J., Jan. 10, 2003, at B1 (Student activists at the University of North Carolina lobbied coaches and administrators to cancel its contract with Nike because of Nike's allegedly unfair labor practices.).

240. *Bolger*, 463 U.S. at 68 n.14.

preme Court of California did, that an argument can be made that Nike's speech is commercial.

Furthermore, in Justice Stevens' concurrence in *Bolger,* he stated that "governmental suppression of a specific point of view strikes at the core of First Amendment values."[241] The speech at issue here was Nike's point of view on an issue of public debate–its own labor practices. Clearly, this is the type of speech that the First Amendment was intended to protect.

3. *The Contingencies of Our Time Necessitate The Free Dissemination of Facts Regarding International Labor Conditions*

Thornhill v. Alabama involved the right of a person to picket a company over a labor dispute.[242] On the morning of his arrest Byron Thornhill was seen on the picket line outside of the Brown Wood Preserving Company with six or eight other men.[243] Several weeks earlier a strike order had been issued by a Union and since that time a picket line had been maintained at the plant twenty-four hours a day.[244] Thornhill was convicted under an Alabama statute, which made it illegal to "picket the works or place of business of other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, interfering with or injuring any lawful business or enterprise."[245] Thornhill argued that the law was unconstitutional because it deprived him of, *inter alia*, the freedom of speech.[246] The Supreme Court reversed the conviction and held that the "dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."[247] The Court further held that the "[f]reedom 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 pe-

241. *Id.* at 84 (Stevens, J. concurring).
242. 310 U.S. 88 (1940).
243. *Id.* at 94.
244. *Id.*
245. *Id.* at 91.
246. *Id.* at 92-93.
247. *Thornhill*, 310 U.S. at 102.

riod."[248] The Court felt that the "circumstances of [the] times" in 1940 necessitated the free dissemination of the facts regarding a labor dispute.[249] The Court based this determination on the fact that satisfactory hours, wages, and working conditions were benefits to be bargained for in order to benefit that generation and the next.[250] The Court stated "the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing."[251] Because of this, the free discussion of labor conditions was found to be "indispensable to the effective and intelligent use of the process of popular government to shape the destiny of modern industrial society."[252] Similarly, the circumstances of our times necessitate the dissemination of information regarding corporate responsibility, including labor practices. Many American companies have moved their manufacturing divisions overseas or, as Nike does, receive their manufactured goods from subcontractors.[253] This has spurred a new issue of public debate: the level of responsibility American companies have for the labor practices of the international subcontractors, the supervision of these companies, and whether American companies abide by their own codes of conduct when it comes to these overseas subcontractors.[254] Arguably, with many average citizens invested in the stock market, corporate governance is more of a concern to some people than politics.[255] Additionally, with the legislature passing laws such as the Sarbanes-Oxley Act,[256] corporate governance has become a political issue.[257]

---

248. *Id.* (emphasis in original).

249. *Id.*

250. *Id.* at 103.

251. *Id.*

252. *Thornhill*, 310 U.S. at 103.

253. *See, e.g.*, Fred Dickey, *Levi Strauss and the Price We Pay: The Cost of Apparel Has Declined for a Quarter Century, Helping Make Americans the Best-Clothed People in History; All is Right in the World, Unless You Ask How it Happened*, L.A. TIMES MAG., Dec. 1, 2002, at I14.

254. *See generally id.*

255. *See* Michael Weiser & Jeff Zilka, *Nader for CEO: Sarbanes-Oxley makes running a corporation like campaigning for elective office*, BARRON'S, Jan. 27, 2003, at 33.

256. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (instituting several measures designed to improve corporate governance).

257. Weiser & Zilka, *supra* note 255.

4. *Corporate Speakers Should Not be Deprived of their First Amendment Rights*

The 1978 case of *First National Bank of Boston v. Bellotti*, involved national banking associations and business corporations that wished to publicize their views opposing a referendum proposal to amend the Massachusetts Constitution.[258] Massachusetts had a statute which made it a crime for "specified business corporations from making contributions or expenditures 'for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.' "[259] A group of businesses brought an action to challenge the constitutionality of the Massachusetts statute.[260] Specifically, the businesses alleged that the statute violated the First Amendment, and the Due Process and Equal Protection clauses of the Fourteenth Amendment.[261] The Massachusetts Supreme Judicial Court held that the First Amendment rights of a corporation are limited to issues that materially affect its business, property, or assets.[262] The United States Supreme Court found that the speech proposed by the businesses was at the heart of First Amendment protection.[263] The Court found the issue in *Bellotti* to be "whether the corporate identity of [the] speaker deprives the proposed speech of what otherwise would be its clear entitlement to protection."[264] The Court found the fact that the speakers were corporations did not make the speech any less "indispensable to decision making in a democracy."[265] It held "the inherent worth of the speech in terms of its capacity to inform the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[266] In addition, the Court held that where the legislature suppresses speech, in an attempt to give one side of a debatable issue an advantage in expressing its views, the First

258. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 765 (1978).
259. *Id.*
260. *Id.*
261. *Id.* at 769.
262. *Id.* at 767.
263. *Bellotti*, 435 U.S. at 776.
264. *Id.* at 778.
265. *Id.* at 777.
266. *Id.*

Amendment is plainly offended.[267] Similarly, when the California statute is applied to Nike it suppresses its views on a debatable issue—Nike's labor practices in Southeast Asia. In *Bellotti*, the Court felt there was no danger in letting a wealthy corporation speak out on an issue of public debate because:

> [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They must consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced . . . it is a danger contemplated by the Framers of the First Amendment.[268]

The Court's rational still holds true today. In fact, even one of Nike's most vocal critics, Bob Herbert of the New York Times, feels that Nike should be free to participate in this debate with the full protection of the First Amendment.[269] Those interested in Nike's labor practices should be allowed to hear both sides of the issue and make a determination as to the credibility of the source for themselves. Critics may argue that Nike's statements, if false, may have caused consumers who would be morally opposed to purchasing Nike's products if they knew the truth, to purchase the products and unknowingly support irresponsible labor practices. However, due to the extensive media coverage of the criticism it is unlikely that a potential consumer would have been exposed to Nike's side of the debate, but not that of the critics. The general consumer is likely to understand that Nike has some economic motivation to speak out against its critics and can consider this when evaluating Nike's credibility.

V. Conclusion and Suggestion

The source of the problem is the test the United States Supreme Court laid down in *Bolger*.[270] This test gives too much

---

267. *Id.* at 785-86.

268. *Bellotti*, 435 U.S. at 792.

269. Bob Herbert, *Let Nike Stay in the Game*, N.Y. TIMES, May 6, 2002, at A21.

270. *See Bolger*, 463 U.S. at 67 (holding that the presence of advertising format, product references, and commercial motivation provide "strong support" for characterizing speech as commercial).

discretion for the circuit courts to label speech commercial. This discretion results in speech being regulated with a lack of uniformity. The First Amendment's protection of the freedom of speech should be applied broadly. Because commercial speech is entitled to less protection than noncommercial speech, the distinction between the two should be made carefully and uniformly. The Supreme Court of the United States should have taken the opportunity presented by *Kasky v. Nike* to articulate a new rule. Because the Court declined this opportunity a clear definition of commercial speech is still needed.

There are reasons to keep the definition amorphous. At one time an advertisement, a classic form of commercial speech, was easily identified. Today it is sometimes difficult to determine when advertising ends and entertainment begins. One need only watch reality programming such as "American Idol" to see examples of corporate sponsorship raised to such a level that the argument could be made that the show itself is merely proposing a commercial transaction (the sales of Coca-Cola beverages and Ford cars) and the talent show is just a device to induce consumers to watch the commercial.[271] With advertising format changing so rapidly, an amorphous definition of commercial speech would allow the courts to change with it. However, for the same reason, the growing entanglement of advertisement and entertainment, the Court should be careful not to regulate more speech than necessary.

The Court can create an amorphous test, provided there is an exception for speech on public issues. When a company's practices have become an issue of public debate, the company itself should be entitled to participate in that debate with the same full First Amendment protection enjoyed by others who speak on the topic. The fact that the topic involved is the company's practices should not convert the statement into commercial speech. This rule would not permit a company to have free reign to knowingly speak about its corporate practices in a false or misleading way. By applying the "actual malice" standard

271. *See generally* Stuart Elliot, *I have seen the future of advertising and it is . . . American Idol?*, CAMPAIGN, Sept. 20, 2002, at P17; Theresa Howard, *Real Winner of "American Idol": Coke*, USA TODAY, Sept. 9, 2002, at B6; Wayne Friedman, *Madison + Vine: Product Integrators Manage Learning Curve: Marriages of Marketers, Media Hot, But Risks are Still Plenty*, AD. AGE, Oct. 21, 2002, at 18.

found in *New York Times v. Sullivan*[272] consumers will be protected from knowingly false statements while corporations will have the freedom they need to participate in public debates. Under this rule, if a company speaks on a matter of public debate, which concerns its own practices, it will only be liable for false statements that it knew or should have known were false or misleading. To hold otherwise would chill commercial speakers unnecessarily.

272. N.Y. Times v. Sullivan, 376 U.S. 254 (1964).