

# CASENOTE

## *KASKY v. NIKE*: THE EFFECT OF THE COMMERCIAL SPEECH CLASSIFICATION ON CORPORATE STATEMENTS

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### I. INTRODUCTION

Commercial speech is a relatively new member of the family of First Amendment protected speech.<sup>1</sup> The United States Supreme Court first adopted the commercial speech doctrine in 1976<sup>2</sup> and ever since has had difficulty defining it.<sup>3</sup> In its purest and most simple form, commercial speech is speech proposing a commercial transaction.<sup>4</sup> Unlike content-based regulations,<sup>5</sup> the

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This Note is dedicated to the loving memory of my mother Incha Dozier who will forever be my source of inspiration. Additionally, I would like to thank my family and friends, especially my father John Dozier and my grandmother Millicent Dozier, for their unconditional support throughout my life. Also, I would like to thank Priya Persaud for her encouragement and kindness over the last few years. Finally, I am grateful to Professor Thomas Marks for his assistance as my faculty advisor on this Note and the *Stetson Law Review* advisors, editors, and associates, particularly Wendy Short and Cindy Betancourt, for their help in publishing this Note.

1. *Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976) (extending First Amendment protection to pure commercial speech for the first time). For a complete discussion on *Va. St. Bd. of Pharmacy*, see *infra* notes 53–63 and accompanying text.

2. *Id.* at 770.

3. For the historical development of the commercial-speech doctrine, see *infra* notes 26–114 and accompanying text.

4. *Id.* at 762. An example of commercial speech would be a television advertisement that promotes a specific product.

5. Content-based speech regulations examine the substance of the message conveyed. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 190 (1983) (analyzing the content-based and content-neutral distinction). Such regulations restrict what one can actually state. *Id.* An example of such a regulation is a law that prohibits the display of the swastika in certain areas of a city. *Id.* Conversely, content-

majority of which must pass strict First Amendment scrutiny,<sup>6</sup> regulations of commercial speech must pass only intermediate scrutiny under the First Amendment.<sup>7</sup> The reason for this inferior level of protection is that commercial speech is low-value speech, meaning the importance of regulating it outweighs any benefit the speech may have to society.<sup>8</sup>

Applying subordinate protection to commercial speech is adequate when one can classify speech solely as commercial.<sup>9</sup> However, speech often contains a mix of commercial and noncommercial elements.<sup>10</sup> Yet under the rigid constraints of the commercial-speech doctrine, courts must classify speech as either commercial or noncommercial.<sup>11</sup> This “either-or” classification essentially subjects many fully protected noncommercial statements to lower First Amendment protection, simply because they are intertwined with commercial statements.<sup>12</sup>

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neutral regulations do not examine the substance of the message, but instead examine the method by which the message is conveyed. *Id.* at 189. They restrict how one can state his or her message. *Id.* Examples of such restrictions are laws that require permits for protests, or prohibit parades on large roads during rush hour. *Id.* at 190. Unlike content-based regulations, content-neutral regulations still allow one to disseminate his or her message. *Id.* at 189–190.

6. A content-based regulation satisfies strict First Amendment scrutiny if it meets three requirements. *U.S. v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 813 (2000). First, the government must have a compelling interest to regulate the speech. *Id.* Second, the proposed regulation must be narrowly tailored to promote the compelling government interest. *Id.* Third, regulating the speech must be the least restrictive means of accomplishing the government’s compelling interest; a less restrictive way of accomplishing the government’s compelling interest cannot exist. *Id.*

7. Stone, *supra* n. 5, at 194. The intermediate First Amendment protection requires that the commercial speech is lawful and not misleading. *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564 (1980). Then, the government must prove that it has a substantial interest in regulating the speech, that the regulation advances that interest, and that the regulation is not more extensive than necessary. *Id.*

8. Stone, *supra* n. 5, at 194 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572 (1942)). The United States Supreme Court has classified numerous other types of speech as low-value speech, including fighting words, false statements of fact, child pornography, and obscenity. *Id.* at 194–195. Each type of low-value speech receives a different level of First Amendment protection. *Id.* at 195. The United States Supreme Court’s reasons for classifying commercial speech as low-value speech are discussed *infra* notes 60–61 and accompanying text.

9. *Infra* nn. 59–62 (discussing why commercial speech receives subordinate protection).

10. For a discussion on cases dealing with mixed speech, see *infra* notes 86–114 and accompanying text.

11. *Kasky v. Nike, Inc.*, 45 P.3d 243, 268 (Cal. 2002) (Brown, J., dissenting), *cert. dismissed*, 123 S. Ct. 2554 (2003).

12. For an overview of the problems created by mixing commercial and noncommercial speech, see *infra* notes 86–114 and accompanying text.

The United States Supreme Court's current definitions for commercial speech do not account for the potential problems of mixed speech.<sup>13</sup> *Kasky v. Nike*<sup>14</sup> illustrates an example of the dangers in attempting to squeeze mixed speech into the Court's pre-existing framework for commercial speech.<sup>15</sup> In *Kasky*, Nike was the subject of an intense international media debate involving its overseas factories and practices.<sup>16</sup> In response, Nike made statements defending its operations.<sup>17</sup> Kasky sued under California's false advertisement law and unfair competition law alleging that Nike's statements were misleading and false.<sup>18</sup> Even though Nike was commenting on an international public debate, the California Supreme Court, using its own test, determined that Nike's statements were commercial and therefore within the purview of California's unfair competition law and false advertisement law.<sup>19</sup> In doing so, the Court ignored United States Supreme Court precedent in defining commercial speech and improperly stripped away Nike's opportunity to engage in a public debate.

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13. Mixed speech refers to speech that combines commercial and noncommercial speech.

14. 45 P.3d 243.

15. See *id.* at 256–262 (holding that Nike's speech was commercial).

16. *Id.* at 248.

17. *Kasky v. Nike, Inc.*, 93 Cal. Rptr. 2d 854, 857 (Cal. App. 1st Dist. 2000), *rev'd*, 45 P.3d 243 (Cal. 2002).

18. *Kasky*, 45 P.3d at 247–248. California's unfair competition law states that unfair competition is "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law beginning in § 17500]." Cal. Bus. & Prof. Code Ann. § 17200 (West 2003). Additionally, California's false advertising law states,

it is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services . . . or to induce the public to enter into any obligation relating thereto, to make or disseminate . . . before the public in this state, . . . in any newspaper or other publication . . . or in any other manner or means whatever, . . . any statement, concerning that real or personal property or those services . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.

*Id.* at § 17500.

19. *Kasky*, 45 P.3d at 259. Because the California Supreme Court deemed Nike's statements to be commercial speech, the statements received only intermediate First Amendment protection and were subject to regulation under California's unfair competition law and false advertisement law if found false or misleading. *Id.* at 251. The intermediate First Amendment protection that commercial speech receives is discussed *infra* notes 64–71 and accompanying text. Conversely, if the Court deemed Nike's statements to be noncommercial, then any California law attempting to regulate Nike's statements must pass strict First Amendment protection. *Id.* at 251. For a discussion of strict First Amendment protection, see *supra* note 5 and accompanying text.

*Kasky's* ramifications extend far beyond California's border, even reaching into Florida. This is because Florida's false advertisement law<sup>20</sup> is very similar to California's false advertisement law, under which *Kasky* sued.<sup>21</sup> Similarly, the case has the potential to affect corporations throughout the country by restricting their ability to discuss issues of public debate.<sup>22</sup> By expanding the definition of commercial speech to include noncommercial statements, *Kasky* subjects most corporate statements to lower commercial speech protections; thus, the decision increases the likelihood that corporate statements will be regulated.<sup>23</sup> This has the potential to open the floodgates for litigation alleging a false or misleading advertisement every time a corporation makes a statement, even if it concerns an issue of public debate.<sup>24</sup> As a result, this decision will promote corporate silence on issues of public debate.<sup>25</sup>

This Note examines why mixed speech does not meet the definition of commercial speech. Section II provides an overview of the commercial-speech doctrine's historical development, emphasizing the United States Supreme Court's difficulty in classifying mixed speech as commercial speech. Section III will summarize *Kasky's* facts and procedural history, and Section IV will discuss the California Supreme Court's reasoning for the *Kasky* decision. Section V will provide a critical analysis of the California Supreme Court's reasoning, and offer an alternative to the current commercial-speech framework.

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20. Florida's false advertisement law states as follows:

No person, persons, association, copartnership, or institution shall . . . knowingly or intentionally make, publish, disseminate, circulate or place before the public . . . in this state in a newspaper or other publication or in the form of a book, notice, handbill, poster, bill, circular, pamphlet or letter or in any other way, an advertisement of any sort . . . which is untrue, deceptive, or misleading.

Fla. Stat. § 817.06 (2003).

21. *Kasky*, 45 P.3d at 251.

22. Jonathan A. Loeb & Jeffrey A. Sklar, *Practice Tips: The California Supreme Court's New Test for Commercial Speech*, 25 L.A. Law. 13, 16 (Nov. 2002) (stating that, when a corporation wants to speak out on a noncommercial issue, the best thing it can do is remain silent).

23. *Id.* at 14.

24. *Id.* at 16.

25. *Id.*

## II. HISTORICAL DEVELOPMENT OF COMMERCIAL SPEECH

### A. Recognition of Commercial Speech

The United States Supreme Court first addressed the interplay between commercial speech and noncommercial speech in *Valentine v. Chrestensen*.<sup>26</sup> In *Valentine*, the plaintiff owned and operated a submarine tour in New York City.<sup>27</sup> He printed fliers that contained advertisements for the tour on one side and a protest against the City on the other side.<sup>28</sup> The authorities advised Chrestensen that the fliers violated the State Sanitary Code, which prohibited the distribution of advertising fliers.<sup>29</sup> Therefore, according to the Code, Chrestensen could distribute only the portion concerning the City protest.<sup>30</sup> Chrestensen sued to enjoin the City from interfering with the fliers' distribution.<sup>31</sup> The Court held that the United States Constitution provides no protection for purely commercial speech,<sup>32</sup> therefore, the City could regulate the advertisements.<sup>33</sup>

Even in the rudimentary development of commercial speech, the Court was concerned about the potential problem of mixed speech.<sup>34</sup> The Court reasoned that Chrestensen deliberately added the information concerning the public protest to circumvent the ordinance; therefore, the public protest information was not inextricably linked to the submarine advertisement.<sup>35</sup>

### B. Moving Closer to Protecting Commercial Speech

The United States Supreme Court moved closer to providing protection for commercial speech in *Pittsburgh Press Co. v.*

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26. 316 U.S. 52 (1942).

27. *Id.* Chrestensen owned the submarine and docked it at a state pier on the East River. *Id.* at 52–53.

28. *Id.* at 53. This was Chrestensen's second attempt to advertise. *Id.* He first attempted to distribute fliers that only advertised his tour. *Id.* After the police informed him that he could only distribute fliers concerning information about a public protest, he printed the double-sided flier. *Id.* The protest involved an action against the City Dock Department, which refused to give Chrestensen docking facilities for his submarine. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 54.

32. *Id.* The Court stated that "the Constitution imposes no such restraint on government as respects purely commercial advertising." *Id.*

33. *Id.* at 55.

34. *Id.*

35. *Id.*

*Pittsburgh Commission on Human Relations*.<sup>36</sup> In *Pittsburgh*, a Pennsylvania ordinance prohibited employment discrimination based on sex.<sup>37</sup> The National Organization for Women filed a complaint with the Pittsburgh Commission on Human Relations alleging that Pittsburgh Press violated the ordinance by printing "help wanted" advertisements in the sex-designated columns of its newspapers.<sup>38</sup> Pittsburgh Press argued that the ordinance was an impermissible restriction of speech that violated the First Amendment, while the Pittsburgh Commission argued that the advertisements were commercial speech and, under *Valentine*, should receive no First Amendment protection.<sup>39</sup> Although the Court held that the "help wanted" advertisements were commercial speech and subject to no First Amendment protection,<sup>40</sup> it acknowledged that speech in advertising format is not necessarily commercial speech devoid of First Amendment protection.<sup>41</sup> The Court seemed to agree with Pittsburgh Press' argument that commercial speech should receive a higher level of First Amendment protection than *Valentine* affords, just not in this particular case.<sup>42</sup> Thus, the Court acknowledged that commercial speech was entitled to some First Amendment protection.<sup>43</sup>

In 1975, the United States Supreme Court expanded protection for commercial speech in *Bigelow v. Virginia*.<sup>44</sup> In *Bigelow*, a Virginia newspaper published an advertisement for a New York abortion clinic, which stated that abortions were legal in New York and residency was not required to obtain one.<sup>45</sup> The State

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36. 413 U.S. 376 (1973).

37. *Id.* at 378.

38. *Id.* at 379. The column heading titles were "Male Help Wanted," "Female Help Wanted," and "Male-Female Help Wanted." *Id.*

39. *Id.* at 384.

40. *Id.* at 387. The Court stated it was "not persuaded that either the decision to accept a commercial advertisement which the advertiser directs to be placed in a sex-designated column or the actual placement there lifts the newspaper's actions from the category of commercial speech." *Id.*

41. *Id.* at 384.

42. *Id.* at 388. Pittsburgh Press argued that, because "the exchange of information is as important in the commercial realm as in any other," commercial speech should receive some level of protection under the First Amendment. *Id.* In response, the Court stated, "Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case." *Id.*

43. *Id.*

44. 421 U.S. 809 (1975).

45. *Id.* at 812. Abortion became legal in 1973, with the United States Supreme Court decision of *Roe v. Wade*, 410 U.S. 113 (1973).

charged Bigelow, the managing editor, with violating a Virginia statute that prohibited the sale or circulation of any publication that encouraged or promoted abortion.<sup>46</sup> Bigelow argued that the statute violated the First Amendment, and the State argued the speech was commercial.<sup>47</sup>

The Court differentiated the *Bigelow* advertisements from those in *Valentine*.<sup>48</sup> Here, the Court stated that the advertisement did more than merely propose a commercial transaction.<sup>49</sup> The advertisement contained information relating to an issue of public importance and therefore invoked the “exercise of the freedom of communicating information and disseminating opinion.”<sup>50</sup> The Court concluded that the advertisement was entitled to some First Amendment protection, but did not state how much protection it should receive.<sup>51</sup> While the Court’s decision did not state whether the advertisement was commercial speech, the holding opened the door for commercial speech to receive some degree of First Amendment protection.<sup>52</sup>

### C. Providing Protection for Commercial Speech

The United States Supreme Court finally overturned *Valentine* with its decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>53</sup> and extended First Amendment protection to pure commercial speech.<sup>54</sup> In *Virginia State Board of Pharmacy*, the plaintiffs<sup>55</sup> attacked a statute that prohibited pharmacists from advertising or promoting prices of prescription drugs.<sup>56</sup> The plaintiffs claimed that the First Amendment entitled prescription-drug users to receive pricing

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46. *Bigelow*, 421 U.S. at 812.

47. *Id.* at 814–818.

48. *Id.* at 821–822.

49. *Id.* at 822.

50. *Id.*

51. *Id.* at 825.

52. *Id.*

53. 425 U.S. 748 (1975).

54. *Id.*

55. The plaintiffs were a Virginia prescription-drug user and two not-for-profit corporations, the Virginia Citizens Consumer Council, Inc. and the Virginia State American Federation of Labor and Congress of Industrial Organizations. *Id.* at 753.

56. *Id.* at 749–750. The statute applied to the prescription drug price, fee, premium, discount, rebate, and credit terms. *Id.* at 750.

information in the form of advertisements or promotions.<sup>57</sup> The defendants argued that the advertisements were outside the First Amendment's purview because they constituted commercial speech.<sup>58</sup> For the first time, the Court concluded that commercial speech received protection under the First Amendment.<sup>59</sup>

However, the Court noted that there are obvious differences between noncommercial speech and commercial speech.<sup>60</sup> The Court defined commercial speech as "speech that does 'no more than propose a commercial transaction.'"<sup>61</sup> Because of these differences, the Court reasoned that commercial speech should receive a different degree of protection under the First Amendment, but did not decide what degree of protection it should receive.<sup>62</sup> In deciding that the prescription-drug advertisements were protected under the First Amendment, the Court held that the statute was unconstitutional because it did not promote the government's justifications for implementing it.<sup>63</sup>

#### D. Applying Intermediate Scrutiny to Commercial Speech

In its 1980 landmark decision, *Central Hudson Gas and Electric Corp. v. Public Service Commission*,<sup>64</sup> the United States Supreme Court afforded commercial speech intermediate protection

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57. *Id.* at 754.

58. *Id.* at 758.

59. *Id.* at 762.

60. *Id.* at 771-772 n. 24.

61. *Id.* at 771 n. 24 (citing *Pittsburgh Press*, 413 U.S. at 385). According to the Court, commercial speech is more easily verifiable by its speaker because the speech usually involves a product that the speaker knows more about than any other person does. *Id.* at 772 n. 24. Another difference is that commercial speech is more durable than other types of speech because its speakers act out of profit. *Id.* Therefore, the chilling effect of a regulation is minimized, and it is less critical to tolerate false statements. *Id.* Finally, the Court noted that the prevention of commercial harms justifies the power to regulate speech that is linked to commercial transactions. *Id.*

62. *Id.*

63. *Id.* at 768-769. The government asserted the following justifications for the ban on price advertisements: (1) the advertisements will make pharmacists cut corners in the compounding, handling, and dispensing of drugs; (2) the advertisements will allow people to shop around for the lowest price, which will destroy the pharmacist-customer relationship and individual attention; and (3) the pharmacists' professional images will suffer from price advertisement because customers will view them as mere retailers. *Id.* at 768. The Court reasoned that the advertising ban did not accomplish these goals and affected pharmacists' professional standards only "through the reactions it is assumed people will have to the free flow of drug price information." *Id.* at 769.

64. 447 U.S. 557 (1980).



under the First Amendment.<sup>65</sup> In *Central Hudson Gas*, the plaintiff alleged that a New York regulation, which banned all promotional advertising by electrical companies, violated the First Amendment.<sup>66</sup> The Court deemed the potential advertisements commercial speech, defining such speech as “expression[s] related solely to the economic interests of the speaker and its audience.”<sup>67</sup>

The Court constructed a four-part test to determine when the First Amendment would protect commercial speech.<sup>68</sup> First, the commercial speech must concern lawful activity and not be misleading.<sup>69</sup> If the speech passes this first hurdle, then the government can regulate the speech only if: (1) the government interest in regulating the speech is substantial; (2) the proposed regulation directly advances the substantial government interest;<sup>70</sup> and (3) the regulation is not more extensive than necessary to support the interest.<sup>71</sup>

### E. Corporate Speech

Two related corporate-speech cases merit discussion. Corporate speech, or speech from a corporation, is entitled to the same First Amendment protection as speech from an individual.<sup>72</sup> In *First National Bank of Boston v. Bellotti*,<sup>73</sup> First National attempted to spend money to promote its view on an upcoming proposed amendment to the Massachusetts Constitution that would permit a graduated income tax.<sup>74</sup> The State charged First National with violating a statute that prohibited specified corpora-

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65. *Id.* The Court applied intermediate scrutiny to commercial speech because of the inherent differences between commercial and noncommercial speech. *Id.* at 562–563.

66. *Id.* at 558. The commission originally ordered electrical utilities to stop advertising because there was a fuel shortage. *Id.* However, after the shortage was over, the commission continued to ban advertising that promoted electricity use. *Id.* at 559.

67. *Id.* at 561.

68. *Id.* at 564.

69. *Id.* False or misleading commercial speech does not receive any First Amendment protection and may be prohibited entirely. *Kasky*, 45 P.3d at 252.

70. *Central Hudson Gas*, 447 U.S. at 564. The regulation must directly advance the State’s interest; if it merely indirectly furthers the State’s interest, the Court will not uphold the regulation. *Id.*

71. *Id. Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), discussed *infra* notes 106–114 and accompanying text, modified the last prong of the *Central Hudson Gas* test.

72. *First Natl. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

73. 435 U.S. 765.

74. *Id.* at 769.

tions from making contributions or expenditures for the purpose of influencing voters on issues.<sup>75</sup> First National argued that the statute violated the First Amendment, and the lower court held that corporations have First Amendment protection for their speech only when the issue materially affects their business.<sup>76</sup>

The United States Supreme Court reversed, holding that the speech First National proposed “[was] at the heart of the First Amendment’s protection.”<sup>77</sup> First National was commenting on an issue of public importance, which should be made “without previous restraint or fear of subsequent punishment.”<sup>78</sup> The Court further stated that the speaker’s identity has no bearing on the level of protection the speech will receive under the First Amendment.<sup>79</sup>

The second relevant corporate speech case is *Consolidated Edison Co. of New York v. Public Service Commission of New York*.<sup>80</sup> In *Edison*, an electric company placed literature in its monthly bills discussing the benefits of nuclear power.<sup>81</sup> The Public Service Commission disallowed “utilities from using bill inserts to discuss political matters, including . . . nuclear power.”<sup>82</sup>

Edison sought review of the Service Commission’s order.<sup>83</sup> The Court applied full First Amendment protection to Edison’s literature.<sup>84</sup> Furthermore, the Court stated that Edison’s speech was at the heart of the First Amendment because it was participation in a public debate and “controversial issues of national interest and importance.”<sup>85</sup>

#### F. Commercial Speech Mixed with Noncommercial Speech

Problems with mixed speech surfaced in *Bolger v. Youngs Drug Corp.*<sup>86</sup> In that case, a statute prohibited the unsolicited

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75. *Id.*

76. *Id.* at 770–771.

77. *Id.* at 776.

78. *Id.* (citing *Thornhill v. Ala.*, 310 U.S. 88, 101–102 (1940)).

79. *Id.* at 777.

80. 447 U.S. 530 (1980).

81. *Id.* at 532.

82. *Id.* at 532.

83. *Id.* at 533.

84. *Id.* at 533–534. The Court stated, “the regulation could not stand absent a showing of a compelling state interest.” *Id.*

85. *Id.* at 535.

86. 463 U.S. 60 (1983).

mailing of advertisements for contraceptives.<sup>87</sup> Youngs Drug Corp., the plaintiff, was a manufacturer, seller, and distributor of contraceptives that mailed the public informational pamphlets that discussed sexually transmitted diseases and the advantages of condoms in preventing such diseases.<sup>88</sup> The pamphlet mentioned, “at the bottom of the last page,” a specific brand of condom along with Youngs’ name indicating it was a distributor of that brand.<sup>89</sup> The plaintiff argued that the mailings were noncommercial speech because they did more than propose a commercial transaction, while the defendants argued that the proposed mailings were wholly commercial speech.<sup>90</sup>

The United States Supreme Court concluded that the pamphlet constituted commercial speech and stated that the “core notion” of commercial speech is “speech which does ‘no more than propose a commercial transaction.’”<sup>91</sup> The Court seemed especially concerned with the merging of advertisement and public debate, stating that an advertisement that merely links itself to a current public debate does not remove the speech from the commercial classification.<sup>92</sup> Thus, implicit in the Court’s reasoning was its previous decision in *Valentine*, where it held that an advertisement was subject to regulation because the advertiser intentionally attached an issue of public importance to the advertisement to avoid regulation.<sup>93</sup> This concern of intentionally attaching an issue of public importance to an advertisement to remove it from the commercial classification seems to be the Court’s greatest fear with commercial speech.

The Court in *Bolger* held that three factors indicate whether speech is commercial.<sup>94</sup> According to the Court, speech is commercial when it is in advertising format, it references a specific product, and the speaker has economic motivation for making the

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87. *Id.* at 61.

88. *Id.* at 62.

89. *Id.* at 62–63 n. 4.

90. *Id.* at 65–66.

91. *Id.* at 66 (citing *Va. St. Bd. of Pharmacy*, 425 U.S. at 762).

92. *Id.* at 68. The Court further stated, “Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.” *Id.*

93. *Id.* (discussing the concern of advertisers integrating public issues with commercial speech to immunize the speech from regulation); *Valentine*, 316 U.S. at 55.

94. *Bolger*, 463 U.S. at 66–67.

statements.<sup>95</sup> Any one of these factors by itself is insufficient to turn the statements into commercial speech.<sup>96</sup>

In *Riley, District Attorney v. National Federation of the Blind of North Carolina, Inc.*,<sup>97</sup> the United States Supreme Court tackled commercial speech inextricably intertwined with noncommercial speech.<sup>98</sup> A North Carolina law required charitable fundraisers to disclose, in their solicitation to potential donors, the percentage of charitable contributions given to charities and not retained as fees.<sup>99</sup> The Court considered this a content-based speech regulation because the State law altered the speech's content by mandating speech that the charitable fundraisers would not otherwise make.<sup>100</sup> The State argued that, "even if charitable solicitations [were] fully protected," the regulation did not impose upon charitable solicitations, but regulated the fundraiser's profit from the contributions because it affected the fundraiser's fee percentages.<sup>101</sup> Therefore, according to the State, the law regulated only commercial speech, and the lesser commercial-speech protection applied.<sup>102</sup>

The Court reasoned that, even assuming the speech was commercial, it did not retain "its commercial character when it [was] inextricably intertwined with otherwise fully protected speech."<sup>103</sup> The Court also stated that, when fully protected speech is inextricably intertwined with speech receiving less protection, the Court cannot separate the mixed speech and apply different tests to the different phrases.<sup>104</sup> Consequently, the Court concluded that the entire bundle of speech was fully protected speech and should receive strict scrutiny.<sup>105</sup>

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95. *Id.*

96. *Id.* "The combination of *all* these characteristics, however, provides strong support for the . . . conclusion that the informational pamphlets are properly characterized as commercial speech." *Id.* at 67 (emphasis in original).

97. 487 U.S. 781 (1988).

98. *Id.*

99. *Id.* at 786.

100. *Id.* at 795.

101. *Id.*

102. *Id.* However, commercial speech receives intermediate scrutiny review. *Central Hudson Gas*, 447 U.S. at 563–564.

103. *Id.* at 796.

104. *Id.* This means the Court cannot separate the commercial speech, apply lesser First Amendment protection to it, and then apply full protection to the remaining non-commercial speech.

105. *Id.*

Conversely, in *Board of Trustees of the State University of New York v. Fox*,<sup>106</sup> a State University of New York regulation prohibited private commercial businesses from operating on the campus.<sup>107</sup> In this case, campus police arrested a houseware products company representative, after attempting to hold a “Tupperware party”<sup>108</sup> in a campus dormitory, and charged her with trespass, loitering, and soliciting without a permit.<sup>109</sup> The Court reasoned that the “Tupperware party” was commercial speech, which the Court defined as speech proposing a commercial transaction.<sup>110</sup>

The houseware products company argued that “Tupperware parties” also contained educational speech on topics like financial responsibility and running an efficient home.<sup>111</sup> The houseware products company contended that in this case, pure speech was inextricably intertwined with commercial speech, and therefore the Court must consider everything as noncommercial speech.<sup>112</sup> However, the Court disagreed and concluded that the speech was not inextricably intertwined.<sup>113</sup> The Court stated, “No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares.”<sup>114</sup>

### III. FACTUAL AND PROCEDURAL BACKGROUND

#### A. Factual Background

Nike, Inc., an Oregon corporation, manufactures and sells athletic apparel and equipment.<sup>115</sup> Nike is one of the world’s most

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106. 492 U.S. 469 (1989).

107. *Id.* at 471.

108. Tupperware parties consist of “demonstrating and offering products for sale to groups of [ten] or more prospective buyers at gatherings assembled and hosted by one of those prospective buyers (for which the host or hostess stands to receive some bonus or reward).” *Id.* at 472.

109. *Id.*

110. *Id.* at 473–474.

111. *Id.* at 474.

112. *Id.*

113. *Id.*

114. *Id.* *Fox* is also significant because it clarified the last prong of the *Central Hudson Gas* test, which states that a commercial speech regulation should not be more extensive than is necessary to support the government interest. *Id.* at 476. *Fox* concluded that the word “necessary” is not indicative of a “least restrictive means test,” rather it evidences a less restrictive test. *Id.* at 476–477.

115. *Kasky*, 45 P.3d at 247. Nike’s corporate headquarters is located in Beaverton,

recognized multinational corporations, operating on six continents and employing close to 23,000 individuals.<sup>116</sup> In 2003, Nike reported annual revenues of \$10.7 billion dollars.<sup>117</sup> Much of Nike's success is due to its marketing strategy, which focuses on a positive brand image associated with its logo.<sup>118</sup> The strategy includes sponsorship agreements with professional and collegiate athletics.<sup>119</sup> Subcontractors in countries with low-labor costs such as China, Vietnam, and Indonesia manufacture most of Nike's goods.<sup>120</sup> Through agreements with its subcontractors, Nike is responsible for their compliance with local laws regarding wages, overtime, workplace health and safety, and environmental protection.<sup>121</sup>

In 1996 and 1997, numerous reports surfaced about working conditions in Nike's Southeast Asia facilities.<sup>122</sup> The reports alleged the presence of dangerous conditions in the facilities, underpaid and poorly treated workers, and underage employees.<sup>123</sup> The reports ignited a media frenzy centered on the central theme that Nike was an immoral corporation profiting from the exploitation of child labor in third-world countries.<sup>124</sup>

Nike responded with a public-relations campaign asserting the benefits of globalization and defending its labor practices.<sup>125</sup>

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Oregon. Nike, *Company Overview: The Company*, <http://nike.com/nikebiz/nikebiz.jhtml?page=3> (accessed Jan. 25, 2004).

116. *Id.* Additionally, Nike's suppliers, shippers, retailers, and service providers employ approximately one million people. *Id.*

117. *Id.* at <http://www.nike.com/nikebiz/nikebiz.jhtml?page=3&item=facts>.

118. *Kasky*, 93 Cal. Rptr. 2d at 855.

119. *Id.* at 856. Most notably, former National Basketball Association star Michael Jordan has a sponsorship agreement.

120. *Kasky*, 45 P.3d at 247. Women under the age of twenty-four constitute the bulk of Nike's workers in these manufacturing facilities. *Id.*

121. *Id.* at 247-248. To ensure compliance with local laws, Nike employs accounting firms to perform random spot audits of subcontractors. *Kasky*, 93 Cal. Rptr. 2d at 856.

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

123. *Id.* One accounting firm's spot audit of a Vietnamese factory discovered violations of local pollution regulations that resulted in respiratory problems in seventy-seven percent of employees. *Kasky*, 93 Cal. Rptr. 2d at 856. The Vietnam Labor Watch conducted interviews of thirty-five employees and reported extensive abuses. *Id.* Furthermore, the Hong Kong Christian Industrial Committee reported conditions in Chinese factories that included eleven to twelve hour days, mandatory overtime, child labor, underpaid labor, and exposure to toxic substances. *Id.*

124. *Kasky*, 93 Cal. Rptr. 2d at 856-857. Much of the commentary focused on the horrors of economic globalization and multinational investment. *Id.*

125. *Id.* at 857. Nike made the public relations campaign through press releases, letters to newspapers, letters to university presidents and athletic directors, and advertisements.

Nike stated that its workers suffered no physical or sexual abuse, wages complied with applicable local laws and were double the local minimum wage, and that working conditions complied with the local laws.<sup>126</sup> Furthermore, Nike issued a press release that drew attention to an independent investigation that Andrew Young, former Ambassador to the United Nations, performed which indicated no evidence existed of illegal or unsafe working conditions in factories located in China, Vietnam, or Indonesia.<sup>127</sup>

Marc Kasky,<sup>128</sup> a California resident, sued Nike under California's false advertising and unfair competition laws.<sup>129</sup> Kasky alleged that Nike, in its public-relations campaign, made six misrepresentations regarding its labor practices with knowledge or reckless disregard of California's laws prohibiting false or misleading statements.<sup>130</sup> Kasky sought an injunction requiring Nike to "disgorge all monies" obtained from the unlawful and unfair practices, engage in another public relations campaign to fix the misinformation, and stop misrepresenting its labor practices.<sup>131</sup> Nike asserted that the First Amendment of the United States Constitution, and the equivalent provision in the California Constitution, barred Kasky's complaint.<sup>132</sup>

## B. Procedural Background

Kasky first filed suit in the California Superior Court of San Francisco County in 1998.<sup>133</sup> Nike demurred, asserting a defense

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

126. *Kasky*, 45 P.3d at 248. Additionally, Nike stated that workers received a living wage, free meals, and health care. *Id.*

127. *Id.* In 1977, President Jimmy Carter named Andrew Young as Ambassador to the United Nations. United Nations Foundation, *About Us*, [http://www.unfoundation.org/about/board/bio\\_young.htm](http://www.unfoundation.org/about/board/bio_young.htm) (accessed Jan. 25, 2004).

128. Marc Kasky is a California environmental activist who is the executive director of the Fort Mason Center in San Diego, California. Fort Mason Center, *About Fort Mason*, <http://www.fortmason.org/about/board.html> (accessed Jan. 25, 2004).

129. *Kasky*, 45 P.3d at 247. For the relevant text of California's unfair competition law and false advertisement law, see *supra* note 18 and accompanying text.

130. *Kasky*, 93 Cal. Rptr. 2d 857. The six alleged misrepresentations were as follows: (1) Nike workers were not subject to physical or sexual abuse; (2) Nike's wages and hours complied with local laws and regulations; (3) Nike's manufacturing methods complied with local laws governing health and safety conditions; (4) Nike paid employees on average double the local minimum wage; (5) Nike workers received free meals and health care; and (6) Nike guaranteed a living wage. *Id.*

131. *Id.*

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

133. *Id.*

based on the First Amendment.<sup>134</sup> The superior court sustained Nike's demurrer and dismissed the case.<sup>135</sup> Kasky appealed, and the California Court of Appeal affirmed the superior court's holding.<sup>136</sup>

The appellate court focused on whether Nike's statements constituted commercial or noncommercial speech.<sup>137</sup> The appellate court held that Nike's statements were noncommercial speech and entitled to full protection under the First Amendment.<sup>138</sup> To determine whether Nike's speech was commercial or noncommercial, the court attempted to apply the three *Bolger* factors—advertising format, reference to a specific product, and economic motivation—to Nike's statements.<sup>139</sup> However, the court concluded that the factors were inapplicable to Nike's statements because the factors apply only to instances in which statements convey information or representations about a specific product.<sup>140</sup> The court determined that Nike's statements did not reference a specific product, but rather referenced the company as a whole in an attempt to give Nike a better corporate image in consumers' minds.<sup>141</sup>

The court noted that Nike's statements constituted public discussion on a matter of public concern.<sup>142</sup> It stated that, at the center of the First Amendment is the ability to discuss matters of public debate.<sup>143</sup> The appellate court further stated that this was not a case in which commercial speech was linked to noncommercial speech or in which commercial speech and noncommercial speech were inextricably intertwined.<sup>144</sup> Rather, the court held that, because of Nike's notoriety, its labor practices were subsumed in the larger debate of globalization and low-cost foreign labor; therefore, the statements were noncommercial speech, fully

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134. *Kasky*, 93 Cal. Rptr. 2d at 857.

135. *Id.*

136. *Id.* at 863.

137. *Id.* at 858.

138. *Id.* at 862–863.

139. *Id.* at 859. The combination of all three of these factors is strong evidence that the speech in question is commercial. *Id.* (citing *Bolger*, 463 U.S. at 66–67).

140. *Id.* at 860.

141. *Id.* at 863.

142. *Id.* at 861.

143. *Id.* at 860 (citing *First Natl. Bank of Boston*, 435 U.S. at 776).

144. *Id.* at 862–863.



protected under the First Amendment.<sup>145</sup> Kasky appealed the decision to the California Supreme Court, which reversed in Kasky's favor.<sup>146</sup>

#### IV. THE CALIFORNIA SUPREME COURT'S REASONING

##### A. The Majority Opinion

When the California Supreme Court granted review and reversed the California Court of Appeal's decision, it narrowed the issue to whether Nike's statements constituted commercial speech.<sup>147</sup> The Court also described the State's authority under the First Amendment to regulate or prohibit commercial speech that is false or misleading.<sup>148</sup> It further recognized the need for distinguishing commercial speech from noncommercial speech.<sup>149</sup>

In determining whether Nike's statements were commercial speech, the California Supreme Court adopted its own limited-purpose test.<sup>150</sup> The test involves three factors: "the speaker, the intended audience, and the content of the message."<sup>151</sup> According to the Court, to classify speech as commercial, the speaker must be someone engaged in commerce,<sup>152</sup> the audience must be actual

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145. *Id.* at 863.

146. *Kasky*, 45 P.3d at 247, 262.

147. *Id.* at 247.

148. *Id.* at 251. The Court differentiated between commercial speech that is actually or inherently misleading and commercial speech that is potentially misleading. *Id.* at 252. A state may completely ban false commercial speech. *Id.* (citing *In re R.M.J.*, 455 U.S. 191, 203 (1982)). Additionally, a state may completely ban actually or inherently misleading commercial speech. *Id.* (citing *In re R.M.J.*, 455 U.S. at 203). However, a state may not completely ban potentially misleading speech if stricter limitations can guarantee that the information presents itself in a non-misleading manner. *Id.* (citing *Ibanez v. Fla. Dept. of Bus. & Prof. Reg., Bd. of Accountancy*, 512 U.S. 136, 150 (1994)).

149. *Id.* at 252. The Court stated that the distinction is necessary because (1) commercial speakers are in a better position to verify the speech's truth because they know more about it than any other person; (2) commercial speakers are less likely to experience a chilling effect from a regulation because they are motivated by profit; and (3) regulating commercial speech is justified by preventing commercial harms. *Id.* at 252–253.

150. *Id.* at 256. The Court acknowledged that there was not an all-purpose test to differentiate commercial and noncommercial speech. *Id.*

151. *Id.*

152. Being engaged in commerce includes the production, distribution, or sale of goods or services. *Id.*

or potential customers of the speaker's products,<sup>153</sup> and the content of the message must be commercial in nature.<sup>154</sup>

In developing this limited-purpose test, the Court reasoned that its factors were implicit in previous United States Supreme Court decisions.<sup>155</sup> In *Central Hudson Gas*, the United States Supreme Court described commercial speech as speech proposing a commercial transaction.<sup>156</sup> The California Supreme Court reasoned that the United States Supreme Court's definition implied that commercial speech was conversation between individuals engaged in commercial transactions.<sup>157</sup> In *Bolger*, the United States Supreme Court considered the advertising format of speech and the economic motivation of the speaker as indicators for commercial speech.<sup>158</sup> The California Supreme Court inferred that these factors imply that commercial speech directs itself toward an audience of potential customers, whom the speech may influence.<sup>159</sup> The California Supreme Court also considered another *Bolger* factor, product reference, and reasoned that this included statements not only about product price, quality, or availability, but also statements about how products are made, distributed, and sold.<sup>160</sup>

The Court then applied its limited-purpose test to Nike's statements to determine whether they constituted commercial speech.<sup>161</sup> The Court found that the first element of the test, a commercial speaker, was satisfied because Nike was engaged in commerce.<sup>162</sup> The second element, an intended commercial audience, was satisfied because the statements went to potential buyers of Nike products.<sup>163</sup> Finally, the Court concluded that the third element, commercial content, was satisfied because Nike made

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153. This includes individuals such as reporters or reviewers, who have the ability to influence actual or potential buyers or customers. *Id.*

154. *Id.* Being commercial in nature includes "representations of fact about the business operations, products, or services of the speaker . . . [that are] made for . . . promoting sales of, or other commercial transactions in, the speaker's products or services." *Id.*

155. *Id.* at 256–258.

156. *Central Hudson Gas*, 447 U.S. at 562 (citing *Ohralik v. Ohio St. Bar Assn.*, 436 U.S. 477, 455–456 (1978)).

157. *Kasky*, 45 P.3d at 256.

158. *Bolger*, 463 U.S. at 66–67.

159. *Kasky*, 45 P.3d at 256.

160. *Id.* at 257.

161. *Id.* at 258–259.

162. *Id.* at 258.

163. *Id.*

factual representations about its business operations.<sup>164</sup> Therefore, the Court found that Nike's statements constituted commercial speech because they satisfied the elements of the limited-purpose test and therefore were unprotected under the First Amendment if found to be misleading or false.<sup>165</sup>

The Court, responding to Nike's argument that its statements were not commercial speech because they were part of an international media debate, reasoned that Nike's argument incorrectly assumed that speech could not be commercial when it related to a matter of public importance.<sup>166</sup> According to the Court, Nike's commercial statements did not change into noncommercial speech merely because they commented on or linked themselves to an issue of public debate.<sup>167</sup> The Court stated that Nike was able to comment on the public debate without interjecting commercial statements about its own factories and vice versa.<sup>168</sup> The Court removed the noncommercial aspects of Nike's statements and applied full First Amendment protection to them.<sup>169</sup> However, the Court deemed Nike's remaining speech, concerning its factories and methods, to be commercial speech and subject to less protection under the First Amendment.<sup>170</sup>

### B. Justice Chin's Dissenting Opinion

Justice Ming W. Chin's dissent focused on the premise that the First Amendment ensures "that debate on public issues should be uninhibited, robust, and wide-open."<sup>171</sup> The dissent argued that Nike's attackers sought shelter under this right to engage in wide-open debate, while the majority prohibited Nike from receiving the same protection under the First Amendment.<sup>172</sup> According to the dissent, this handicapped one side in a public debate, which is unconstitutional.<sup>173</sup> The dissent also emphasized

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164. *Id.* Nike described its labor practices and working conditions in its factories. *Id.*

165. *Id.* at 259.

166. *Id.*

167. *Id.* at 260.

168. *Id.* at 260–261.

169. *Id.* at 260. The Court stated that any content-based regulation of this noncommercial speech must pass strict scrutiny under the First Amendment. *Id.*

170. *Id.* at 261.

171. *Id.* at 263 (Chin, J., dissenting) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

172. *Id.*

173. *Id.* Justice Chin stated that "[w]here . . . suppression of speech suggests an at-

the public's right to receive information on public debates.<sup>174</sup> It reasoned that the public has a right to receive both sides of a public issue, and denying them this right punishes everyone.<sup>175</sup>

Additionally, the dissent argued that Nike's statements were not traditional commercial speech because they did more than merely propose a commercial transaction, by providing information on a public issue.<sup>176</sup> Furthermore, the dissent stated that the commercial speech in this case was inextricably intertwined with noncommercial speech, and the majority's attempt to remove the noncommercial parts was ineffective.<sup>177</sup>

### C. Justice Brown's Dissenting Opinion

Justice Janice R. Brown's dissent concentrated on the majority's limited-purpose test.<sup>178</sup> The dissent reasoned that the test violated the First Amendment because it looked at the speaker's identity and the intended audience in determining the level of protection afforded rather than just at the speech's content.<sup>179</sup> Additionally, the dissent stated that the majority's test suppressed a corporation's ability to engage in a public debate, which violated a primary principle of First Amendment protection.<sup>180</sup> Echoing Justice Chin's dissent, Justice Brown's dissent further reasoned that the limited-purpose test unfairly favored certain speakers because only commercial speakers are liable for false or misleading statements under the California Business Code.<sup>181</sup>

Next, the dissent argued that Nike's speech was more non-commercial than commercial and reasoned that the speech's

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tempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Id.* (quoting *First Natl. Bank of Boston*, 435 U.S. at 785–786).

174. *Id.* at 264–265.

175. *Id.* at 264.

176. *Id.* at 265. According to the dissent, traditional commercial speech "does 'no more than propose a commercial transaction.'" *Id.* (quoting *Va. St. Bd. of Pharmacy*, 425 U.S. at 762).

177. *Id.* at 266–267 (citing *Riley*, 487 U.S. at 796).

178. *Id.* at 268–274 (Brown, J., dissenting).

179. *Id.* at 270. According to the dissent, "the test contravenes a fundamental tenet of First Amendment jurisprudence by making the identity of the speaker potentially dispositive." *Id.*

180. *Id.* at 271. The dissent stated that speech on public issues is one of the most important First Amendment values and requires full protection. *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

181. *Id.* at 273.

commercial aspects were inextricably intertwined with the speech's noncommercial aspects.<sup>182</sup> The dissent contended that Nike's overseas labor practices became a public issue; therefore, Nike's statements concerning the public issue were entitled to full protection.<sup>183</sup> According to Justice Brown, Nike could not comment on this public issue without engaging in commercial speech regarding its own labor practices.<sup>184</sup> Therefore, the commercial and noncommercial speech was inextricably intertwined.<sup>185</sup> The dissent concluded with a plea asking the United States Supreme Court to re-examine the commercial speech doctrine and reflect the merging of commercial and noncommercial speech.<sup>186</sup>

#### D. United States Supreme Court's Dismissal

The United States Supreme Court granted Nike's writ of certiorari on January 10, 2003.<sup>187</sup> Oral arguments took place on April 23, 2003.<sup>188</sup> On June 26, 2003, the Court dismissed the case, stating that it improvidently granted Nike's writ of certiorari.<sup>189</sup>

Justice Stevens, with whom Justices Ginsberg and Souter joined, concurred in the per curiam dismissal of the writ of certiorari.<sup>190</sup> Justice Stevens offered the following three reasons for the dismissal: (1) the California Supreme Court did not enter a final judgment, so the United States Supreme Court did not have jurisdiction; (2) neither Nike nor Kasky had standing to call on the jurisdiction of a federal court; and (3) the avoidance of "the premature adjudication of novel constitutional questions" was necessary.<sup>191</sup> Regarding the third reason, Justice Stevens stated that the "case presents novel First Amendment questions because the speech at issue represents a blending of commercial speech, non-commercial speech and debate on an issue of public impor-

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182. *Id.* at 274.

183. *Id.* at 276.

184. *Id.*

185. *Id.*

186. *Id.* at 279. Justice Brown stated that, the distinction between commercial speech and noncommercial speech is blurring "Due to the growing politicization of commercial matters and the increased sophistication of advertising campaigns." *Id.*

187. *Nike, Inc. v. Kasky*, 537 U.S. 1099, 1099-1100 (2003).

188. *Nike, Inc. v. Kasky*, 156 L. Ed. 2d 580, 580 (2003).

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

190. *Id.* (Stevens, J., concurring).

191. *Id.* at 2555.

tance.”<sup>192</sup> Justice Breyer’s dissent, with which Justice O’Connor joined, argued that the Court should decide the case at that stage.<sup>193</sup>

## V. CRITICAL ANALYSIS

The California Supreme Court incorrectly decided *Kasky* for two reasons. First, the Court did not follow United States Supreme Court precedent in defining commercial speech and instead developed its own test, which expanded the definition of commercial speech beyond the parameters that the United States Supreme Court established.<sup>194</sup> Second, the California Supreme Court incorrectly separated Nike’s speech into commercial and non-commercial categories, ignoring United States Supreme Court precedent involving inextricably intertwined speech.<sup>195</sup>

### A. Defining Commercial Speech

Justice Chin’s dissent correctly stated that Nike’s speech was not traditional commercial speech.<sup>196</sup> In declaring that Nike’s statements constituted commercial speech,<sup>197</sup> the California Supreme Court departed from United States Supreme Court precedent when it defined commercial speech.<sup>198</sup> The California Supreme Court’s attempt to squeeze Nike’s statements into the existing definition of commercial speech is like trying to fit a square peg into a round hole.

The United States Supreme Court has offered several definitions of commercial speech. First, in *Virginia State Board of Pharmacy*, the Court defined commercial speech as “speech which does ‘no more than propose a commercial transaction.’”<sup>199</sup> Next, in *Central Hudson Gas*, the Supreme Court defined commercial

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192. *Id.* at 2558.

193. *Id.* at 2560 (Breyer, J., dissenting).

194. *Infra* pt. V(A) (arguing that the California Supreme Court’s decision incorrectly defined commercial speech).

195. *Infra* pt. V(B) (contending that the California Supreme Court ignored United States Supreme Court precedent regarding inextricably intertwined speech).

196. *Kasky*, 45 P.3d at 265 (Chin, J., dissenting).

197. *Id.* at 262.

198. For prior United States Supreme Court commercial speech definitions, see text accompanying *infra* notes 199–201.

199. *Va. St. Bd. of Pharmacy*, 425 U.S. at 762 (quoting *Pittsburgh Press*, 413 U.S. at 385). For a detailed discussion on *Virginia State Board of Pharmacy*, see *supra* notes 53–63 and accompanying text.

speech as an “expression related solely to the economic interests of the speaker and its audience.”<sup>200</sup> Finally, in *Bolger*, the Supreme Court held that speech is commercial when the speech is in advertising format, the speech references a specific product, and the speaker has economic motivation for communicating the statements.<sup>201</sup>

Regarding the *Virginia State Board of Pharmacy* definition, Nike’s statements did not even involve a commercial transaction.<sup>202</sup> The statements contained no information about any of their products, nor engaged in any form of salesmanship or puffing.<sup>203</sup> The California Supreme Court stated that Nike’s statements were commercial speech because Nike attempted to appear more ethical and moral by informing the public of the good working conditions in its factories, thus influencing customers to buy Nike products.<sup>204</sup> Even if the speech proposed a commercial transaction, Nike’s speech still does not meet the definition. The applicable words in the *Virginia State Board of Pharmacy* definition are “no more.”<sup>205</sup> Here Nike’s statements do “more” than merely propose a commercial transaction.<sup>206</sup> The statements comment on a public debate by supplying information on the benefits of globalization and conditions in Nike factories.<sup>207</sup> Therefore, Nike’s statements do not meet the *Virginia State Board of Pharmacy* definition.

Regarding the *Central Hudson Gas* definition, Nike’s statements did not solely relate to economic interests. Nike had many interests, including the public’s perception of the company as a whole, and its moral and ethical reputation. While Nike had some level of economic interest, almost every corporate statement involves an element of profit. However, that does not make every

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200. *Central Hudson Gas*, 447 U.S. at 561. For a detailed discussion on *Central Hudson Gas*, see *supra* notes 64–71 and accompanying text.

201. *Bolger*, 463 U.S. at 66–67. For a detailed discussion on *Bolger*, see *supra* notes 86–96 and accompanying text.

202. The statements mentioned only wages and working conditions of Nike’s overseas workers. See *supra* notes 125–127 (discussing the content of Nike’s statements).

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

204. *Id.* at 258–259 (stating Nike’s purpose for making the statements was “to maintain its sales and profits”).

205. *Va. St. Bd. of Pharmacy*, 425 U.S. at 762 (quoting *Pittsburgh Press*, 413 U.S. at 385).

206. *Kasky*, 45 P.3d at 265 (Chin, J., dissenting).

207. *Id.*

corporate statement commercial speech. Nike may have intended its statements to comment on the benefits that globalization produces for everyone and to inform the public of its necessity. Therefore, because Nike's statements do not solely relate to economic interests, but rather inform the public on an issue of worldwide debate, they fail to meet the *Central Hudson Gas* definition of commercial speech.<sup>208</sup>

Nike's statements also fail to meet the *Bolger* definition that the United States Supreme Court created, which requires that the speech is in advertising format, that it references a specific product, and that the speaker has economic motivation.<sup>209</sup> In fact, the first two requirements of the *Bolger* test are not satisfied.<sup>210</sup> Nike's statements were not in advertisement format; rather, they were in newspaper editorials, press releases, and letters to university presidents and athletic directors.<sup>211</sup> Furthermore, none of Nike's statements referenced any specific product.<sup>212</sup> Also, Nike does meet the third *Bolger* factor because it had economic motivation for making its statements; however, under *Bolger*, economic motivation is not sufficient to establish that the speech is commercial in nature.<sup>213</sup> All three factors must be present for such a classification.<sup>214</sup>

Nike's statements do not fit any of the commercial speech definitions that the United States Supreme Court has articulated.<sup>215</sup> As such, the California Supreme Court's limited-purpose test, which expands the United States Supreme Court's definition of commercial speech, is not in agreement with precedent. The limited-purpose test declares that any statement that an individual engaged in commerce makes to any potential customer concerning representations about the speaker's own business operations is commercial speech.<sup>216</sup> Thus, the test incorporates speech

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208. For the *Central Hudson Gas* definition of commercial speech, see text accompanying *supra* note 200.

209. *Bolger*, 463 U.S. at 66–67.

210. *Id.*

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

212. *Kasky*, 93 Cal. Rptr. 2d at 860.

213. *Bolger*, 463 U.S. at 67.

214. *Id.*

215. See text accompanying *supra* notes 199–201 for the commercial speech definitions that the United States Supreme Court has established.

216. *Kasky*, 45 P.3d at 256–257.



that the United States Supreme Court did not intend to include in its definitions of commercial speech.

### B. Inextricably Intertwined Speech

The California Supreme Court incorrectly separated all of the noncommercial elements of Nike's speech.<sup>217</sup> The Court removed Nike's statements concerning the responsibility corporations should shoulder for factory conditions in other countries and the effects of globalization.<sup>218</sup> The Court concluded that the remaining speech was commercial and subject to California's false or misleading advertisement law.<sup>219</sup> In doing so, the Court refused to follow United States Supreme Court precedent, which holds that commercial and noncommercial messages that are inextricably intertwined cannot be separated and are treated as wholly non-commercial speech.<sup>220</sup>

Justice Brown's dissent was correct in stating, "Nike's speech is more like noncommercial speech than commercial speech because its commercial elements are inextricably intertwined with its noncommercial elements."<sup>221</sup> In *Riley*, the United States Supreme Court stated that when fully protected speech is inextricably intertwined with lesser speech, the speech cannot be separated, and the entire speech is treated as fully protected speech.<sup>222</sup> The California Supreme Court did not follow *Riley* because it stated that the United States Supreme Court in *Fox* explained that the speech in *Riley* was inextricably intertwined because state law required it.<sup>223</sup> Therefore, the California Supreme Court incorrectly assumed that speech can be inextricably intertwined only when the law requires it.<sup>224</sup>

The United States Supreme Court, in *Fox*, stated that *Riley* involved an instance in which law required the commercial speech

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217. *Id.* at 260.

218. *Id.*

219. *Id.* at 262.

220. *See Fox*, 492 U.S. at 474 (noting that First Amendment scrutiny will depend on the speech's content taken as a whole); *Riley*, 487 U.S. at 796 (stating that inextricably intertwined speech cannot be parceled out, and that the court cannot apply "one test to one phrase and another test to another phrase").

221. *Kasky*, 45 P.3d at 274 (Brown, J., dissenting).

222. *Riley*, 487 U.S. at 796. For a detailed discussion on *Riley*, see *supra* notes 97–105 and accompanying text.

223. *Kasky*, 45 P.3d at 260.

224. *Id.*

to be inextricably intertwined with noncommercial speech.<sup>225</sup> However, that is not why the Court decided the commercial statements in *Fox* were not inextricably intertwined with non-commercial statements.<sup>226</sup> *Fox* held that nothing was inextricably intertwined because it was possible for the plaintiff to engage in the commercial speech without combining noncommercial speech elements, and vice versa.<sup>227</sup> It was possible to sell housewares without teaching “financial responsibility” and explaining “how to run an efficient home.”<sup>228</sup> Therefore, a law is not required for commercial speech to be inextricably intertwined with noncommercial speech. All that is required is the incapability of disseminating one without the other.

Here, Nike could not have discussed the working conditions in its factories without discussing the importance of globalization, and vice versa.<sup>229</sup> Justice Brown’s dissent correctly states that “Nike could hardly condemn exploitation of overseas workers and discuss the virtues of economic globalization without implying that it helps overseas workers and does not exploit them.”<sup>230</sup> Because Nike’s publicity about its factories’ conditions spawned the public debate on globalization and treatment of foreign workers, the two were not mutually exclusive.<sup>231</sup> Therefore, Nike could not talk about one without the other; the commercial elements are inextricably intertwined with the noncommercial elements, and the entire speech must receive full protection.<sup>232</sup>

Furthermore, the noncommercial elements of Nike’s speech represent corporate speech on an issue of public importance. Applying the principles in *Bellotti* and *Edison*, when a corporation makes statements for participation in a public debate, the statements are at the “heart of the First Amendment’s protection.”<sup>233</sup> This is exactly what Nike did. It participated in a public debate on globalization and corporate responsibility, which centered

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225. *Fox*, 492 U.S. at 474. For a detailed discussion on *Fox*, see *supra* notes 106–114 and accompanying text.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Kasky*, 45 P.3d at 277–278 (Brown, J., dissenting).

230. *Id.* at 277.

231. *Id.*

232. *Id.*

233. *Bellotti*, 435 U.S. at 776.

around its own factories and practices.<sup>234</sup> Under *Bellotti*, Nike's statements are exactly the type of speech that the First Amendment desires to protect because they comment on an issue of public importance.<sup>235</sup> Therefore, following *Bellotti*, Nike should not hesitate to make such statements out of fear of punishment.<sup>236</sup> Instead, Nike should be able to participate in the public debate, and the commercial elements of its speech should not strip it of this opportunity.

The California Supreme Court offered *Bolger* as an argument against inextricably intertwined speech, stating that companies may not "immunize false or misleading product information from government regulation simply by including references to public issues."<sup>237</sup> Justice Brown's dissent was correct when it stated that *Bolger* did not apply.<sup>238</sup> *Bolger* involved a corporation trying to attach an advertisement to an already existing issue of public importance, in an attempt to advertise its product.<sup>239</sup> In Nike's case, the issue of public importance, that of the horrors of globalization, did not exist until reports began to surface about Nike's own factories.<sup>240</sup> The issues were born at the same time. Therefore, Nike was not trying to link its speech to a public issue; rather, Nike was the issue, so *Bolger* should not apply.

Additionally, Nike's statements did not involve a situation like that in *Valentine*, in which a corporation attempted to attach an issue of public debate to already existing commercial speech.<sup>241</sup> In *Valentine*, to circumvent an ordinance prohibiting advertising leaflets in public areas, a businessperson tried to attach information concerning a public protest to the back of his brochure that advertised his submarine tour.<sup>242</sup> *Valentine* does not apply for the same reasons that *Bolger* does not apply. Nike did not attach information concerning the benefits of globalization and corporate

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234. See *Kasky*, 45 P.3d at 260 (explaining that Nike discussed policies such as economic globalization and responsibility for overseas working conditions).

235. *Bellotti*, 435 U.S. at 776 (citing *Thornhill*, 310 U.S. at 101–102).

236. *Id.*

237. *Kasky*, 45 P.3d at 260 (quoting *Bolger*, 463 U.S. at 68).

238. *Id.* at 278 (Brown, J., dissenting).

239. See *Bolger*, 463 U.S. at 67–68 (stating that an advertisement will not be constitutionally protected when it is added to a current issue of public debate).

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

241. *Valentine*, 316 U.S. at 53, 55. For a detailed discussion on *Valentine*, see *supra* notes 26–35 and accompanying text.

242. *Id.*

responsibility for globalization to its speech concerning conditions in its own factories in some devious plan to have its speech classified as noncommercial. Nike was unable to disseminate information on one issue without including the other issue.<sup>243</sup> Nike's conditions in its factories essentially were the issue of public importance.<sup>244</sup>

Nike's speech is more similar to the speech in *Bigelow* in which the United States Supreme Court refused to declare that advertisements, concerning abortion clinics, were commercial speech.<sup>245</sup> The Court stated that the advertisements did more than merely propose a commercial transaction because they contained information relating to an issue of public importance, and therefore should receive protection.<sup>246</sup> The advertisements were in advertising format, but represented political speech because they discussed the controversial topic of abortion.<sup>247</sup> The Court's reasoning implies that being able to discuss and offer an opinion on issues that are in public debate is so important that the commercial characteristics of the speech should not strip the disseminator of this opportunity.<sup>248</sup> This was before commercial speech received protection under the First Amendment,<sup>249</sup> but the principle is the same.

Unlike the advertisements in *Bigelow*, Nike's statements were not in conventional advertising format and contained fewer commercial characteristics. The California Supreme Court asserted that the statements have commercial aspects because Nike was attempting to improve its corporate image, and thus entice customers to continue purchasing Nike products.<sup>250</sup> The statements, however, included corporate speech that disseminated information concerning an issue of public debate.<sup>251</sup> Therefore, Nike's opportunity to respond and comment on public issues was so important that it should not have been taken away just be-

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243. *Kasky*, 45 P.3d at 277 (Brown, J., dissenting).

244. *Id.* at 276.

245. *Bigelow*, 421 U.S. at 822, 825. For a detailed discussion on *Bigelow*, see *supra* notes 44–52 and accompanying text.

246. *Id.*

247. *Id.* at 822.

248. *Id.*

249. Commercial speech received First Amendment protection for the first time in 1976. *Va. St. Bd. of Pharmacy*, 425 U.S. at 762.

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

251. *Id.* at 258, 260.

cause some of its statements contained commercial elements.<sup>252</sup> Consequently, all of Nike's statements should have received full protection.

### C. Simplifying Commercial Speech

Eventually, the United States Supreme Court will have to develop a different approach for analyzing commercial speech to quell the potential problems involved with mixed speech.<sup>253</sup> If it does not, then "either the voices of businesses in the public debate will be effectively silenced, or businesses will be able to dupe consumers with impunity."<sup>254</sup> One alternative is to do away with the commercial-speech classification altogether. This would subject all commercial speech to full First Amendment protection, and any regulation of such speech would have to pass strict scrutiny. This alternative would simplify the issue and give full First Amendment protection to mixed speech.

However, there are many drawbacks to this option. Commercial speech is given less protection than noncommercial speech because of the potential for false or misleading statements, which are intended to influence the consuming public.<sup>255</sup> If commercial speech received full First Amendment protection, then many regulations intended to protect consumers from false advertisement, like Florida's false advertisement law, would be unconstitutional.<sup>256</sup> Consequently, the consuming public would receive less protection from deceptive advertisements.

Justice Brown's dissent, which implores the United States Supreme Court to develop a better approach to deal with commercial speech, suggests another approach.<sup>257</sup> The dissent suggests that the United States Supreme Court develop an intermediate category of speech, which encompasses mixed speech.<sup>258</sup> The First

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252. See *Riley*, 487 U.S. at 796 (suggesting that if speech contains noncommercial and commercial portions, the entire speech should receive full First Amendment protection).

253. See *Kasky*, 45 P.3d at 279 (Brown, J., dissenting) (stating that the "court must reassess the commercial speech doctrine and develop a more nuanced inquiry that accounts for the realities of today's commercial world").

254. *Id.*

255. *Id.* at 257.

256. However, the regulation could be constitutional if it passed a strict scrutiny analysis under the First Amendment. *Playboy Ent. Group*, 529 U.S. at 813.

257. *Kasky*, 45 P.3d at 279 (Brown, J., dissenting).

258. *Id.*

Amendment protection for this intermediate category, according to Justice Brown, should be greater than commercial speech, but less than noncommercial speech.<sup>259</sup>

Justice Brown's approach is a viable option. It would keep the needed classification of commercial speech and provide protection for mixed speech. However, this approach also has disadvantages. First, it may have the effect of making the issue even more complicated by adding a new level of protection to commercial speech. Under this approach, there would be an intermediate level of protection designated for pure commercial speech and then a higher level of protection designated for mixed speech. Additionally under this approach, inextricably intertwined speech would not receive full First Amendment protection, as it should, and instead would receive some level of protection just below full protection.

Another approach is to keep the commercial speech classification and grant full First Amendment protection only to inextricably intertwined speech. The drawback is that corporations would have an incentive to add information concerning a public debate to their commercial speech, like in *Valentine*,<sup>260</sup> or link the commercial speech to an existing public debate, like in *Bolger*.<sup>261</sup> To solve this problem, the United States Supreme Court could use the existing framework for inextricably intertwined speech.<sup>262</sup> Thus, the Court would simply determine whether the corporation could disseminate the commercial statements without disseminating information concerning a public issue.<sup>263</sup> If so, then the corporation should make two separate statements subjecting its commercial speech to less protection.<sup>264</sup>

The last approach is the best option. It is simple and keeps the needed commercial speech classification, yet extends full protection to inextricably intertwined speech. For this approach to function, the Court must develop a new working definition of

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259. *Id.*

260. 316 U.S. at 53. For a detailed discussion on *Valentine*, see *supra* notes 26–35 and accompanying text.

261. 463 U.S. at 68. For a detailed discussion on *Bolger*, see *supra* notes 86–96 and accompanying text.

262. *Kasky*, 45 P.3d at 260–261 (concluding that Nike's speech was not inexplicably intertwined).

263. *Id.*

264. *Id.*

commercial speech that incorporates the concerns of mixed speech.

The Court has defined commercial speech as: (1) “speech [that] does ‘no more than propose a commercial transaction’”;<sup>265</sup> (2) speech that is an “expression related solely to the economic interests of the speaker and its audience”;<sup>266</sup> and (3) speech that is in advertising format, references a specific product, and provides economic motivation for the making of the statements.<sup>267</sup> It seems that in defining commercial speech, the Court is concerned with speech that influences a consumer for the benefit of the corporation.<sup>268</sup> A better definition of commercial speech is *speech that financially benefits the speaker by proposing a commercial transaction, and that involves neither issues of public debate nor is inextricably intertwined with otherwise fully protected speech*. This definition would narrow the scope of the commercial speech doctrine and allow many forms of mixed speech to receive the proper protection under the First Amendment.

## VI. CONCLUSION

Commercial speech receives less protection than noncommercial speech so that regulations can exist to prevent commercial harms. In other words, courts are fearful of speech that may defraud consumers into engaging in transactions. However, in *Kasky*, Nike’s statements exhibited no potential commercial harm. At worst, Nike intended its statements to give the company a better corporate image in consumers’ minds. This is quite different from a Nike commercial with Michael Jordan advertising a new pair of shoes. In the latter example, the purpose is clearly to induce consumers into purchasing products; thus, the need for consumer decisions to be based on correct information is evident.

Conversely, Nike did not make its statements to induce consumers to purchase Nike’s products. Nike’s overseas labor practices became an issue of public debate.<sup>269</sup> Therefore, Nike was

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265. *Va. St. Bd. of Pharmacy*, 425 U.S. at 762 (citing *Pittsburgh Press Co.*, 413 U.S. at 385).

266. *Central Hudson Gas*, 447 U.S. at 561.

267. *Bolger*, 463 U.S. at 66–67.

268. *Kasky*, 45 P.3d at 258–259.

269. For a detailed discussion on the factual background in *Kasky*, see *supra* notes 115–132 and accompanying text.

merely asserting its First Amendment right to comment on an issue of public importance, which the United States Supreme Court recognized in *Bellotti*<sup>270</sup> and *Edison*.<sup>271</sup>

Nike's statements contained commercial and noncommercial elements. However, Nike could not have discussed its factory-working conditions, the commercial element, without discussing globalization, the noncommercial element, because Nike's factory conditions caused the public debate on globalization. Therefore, Nike's commercial and noncommercial elements were inextricably intertwined, and the entire speech should have received full First Amendment protection.

The California Supreme Court in *Kasky* separated Nike's commercial and noncommercial elements and applied the limited-purpose test to Nike's statements regarding its factories and methods to determine whether the statements constituted commercial speech.<sup>272</sup> While the California Supreme Court held that Nike's statements constituted commercial speech,<sup>273</sup> the California Supreme Court's limited-purpose test incorrectly expanded the United States Supreme Court's commercial speech definition, which Nike's statements do not meet.

Because Nike's statements do not meet the United States Supreme Court's commercial speech definition and contain commercial elements inextricably intertwined with noncommercial elements, the statements are noncommercial speech, and therefore are entitled to full First Amendment protection. As such, any law attempting to regulate Nike's speech, like California's unfair competition law or false advertisement law, must pass strict scrutiny under the First Amendment.

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270. For a detailed discussion on *Bellotti*, see *supra* notes 72–79 and accompanying text.

271. For a detailed discussion on *Edison*, see *supra* notes 80–85 and accompanying text.

272. *Kasky*, 45 P.3d at 258–261.

273. *Id.* at 259.