Kick It up a Notch: First Amendment Protection for Commercial Speech

Deborah J. La Fetra

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/caselrev/vol54/iss4/9
KICK IT UP A NOTCH:
FIRST AMENDMENT PROTECTION FOR COMMERCIAL SPEECH

Deborah J. La Fetra†

In this Information Age,¹ corporate communications join with individual and group speech, the gamut of media from one-person blogs² and pirate radio stations³ to Big Media megacorporations,⁴ government speakers,⁵ and others who engage in public dialogue.

† Principal Attorney, Pacific Legal Foundation. Ms. La Fetra filed amicus briefs in Nike v. Kasky in both the California Supreme Court and the United States Supreme Court in support of Nike’s First Amendment right to speak. The author thanks Robert K. Best and Anthony T. Caso for their valuable comments on earlier drafts, and thanks Bruce La Fetra for his unending support.

¹ See James A. Dewar, THE INFORMATION AGE AND THE PRINTING PRESS: LOOKING BACKWARD TO SEE AHEAD 4, http://www.rand.org/publications/P/P8014/P8014.pdf (1998) (arguing that the term “information age” refers to technological breakthroughs that make it easier to distribute information to a wider audience; the most important component of which is the Internet and networked computers).

² A “blog” is an online diary, the best of which contain serious commentary on current events and links to primary sources and other commentary. Blogs can be general (e.g., www.instapundit.com (culling resources and commenting on a variety of domestic policies and the war on terror)) or very specialized (e.g., www.overlawyered.com (issues relating to tort law and the civil justice system)). Blogs devoted to legal matters are called “blawgs.” See generally David Narkiewicz, Blogs, Bloggers and Blawgs, PA. LAW., May-June 2003, at 49.

³ See John Alderman, Radio “Pirates” Show the Flag, WIRED NEWS (Jun. 15, 1998), at http://www.wired.com/news/culture/0,1284,12991,00.html (describing a convention of small-scale independent radio broadcasters, many of whom dedicate programming to those without a voice in mainstream commercial programming); see also Marc Fisher, Low-Power to the People, AM. JOURNALISM REV., Oct. 1, 2000, at 42, available at 2000 WL 18883442 (noting that political activists, church groups and music fans are seeking low-power radio licenses in ever-increasing numbers).


Some corporate speech is mandated. Some is meant for internal consumption only. Some is traditional advertising. More and more frequently, however, corporate speech also contributes to public debates on matters of general interest, such as the economy, the environment, and foreign trade. As participants in these debates, businesses present a distinct point of view and information that may be unavailable to other participants, or information which other participants may not choose to reveal.

The United States Supreme Court's inconsistent approach to commercial speech has led to confusion in the lower courts. Thus, First Amendment practitioners and scholars saw a real opportunity for clarification when the Supreme Court granted the petition for a writ of certiorari in Nike v. Kasky, which asked the Court to answer the question of whether Nike's image-building public relations campaign in the wake of allegations of overseas sweatshop labor was protected under the First Amendment to the United States Constitution, or whether it was "commercial speech" susceptible to legal challenge under California's Unfair

---

11 Confusion in First Amendment jurisprudence is not limited to cases involving commercial speech. As Professor Robert Post notes, the entire field is rife with contradictions: First Amendment doctrine veers between theory and the exigencies of specific cases. The function of doctrine is both to implement the objectives attributed by theory to the Constitution and to offer principled grounds of justification for particular decisions. Doctrine becomes confused when the requirements of theory make little sense in the actual circumstances of concrete cases, or when doctrine is required to articulate the implications of inconsistent theories. First Amendment doctrine has unfortunately suffered from both these difficulties.

12 See infra notes 77-78 and accompanying text.
14 U.S. CONST. amend. I ("Congress shall make no law respecting . . . the freedom of speech . . . ."). The First Amendment applies to the states by its incorporation through the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).
Competition Law.\textsuperscript{15} The California Supreme Court's split decision in the case starkly revealed the disarray in this aspect of First Amendment jurisprudence. By accepting the petition, the Court embraced an opportunity to revisit the question: To what degree do we value corporate speech, and, consequently, to what degree will corporate speech be protected under the First Amendment? Unfortunately, when the Court dismissed the petition, the opportunity was set aside for another day.

Using \textit{Nike} as a jumping-off point, this Article argues in favor of full First Amendment protection\textsuperscript{16} for corporate speech on two fundamental grounds.\textsuperscript{17} First, corporations and other business interests play a vital role in the American political economy, thus imbuing corporate speech with inherent value in our democratic society. Rather than treating such speech as a hostile intruder in public debate, it should be embraced as presenting a point of view that may well otherwise remain unexpressed.\textsuperscript{18} Second, the line between commercial and noncommercial speech was already fuzzy when Ninth Circuit Judge Alex Kozinski and Stuart Banner published their oft-cited article, "Who's Afraid of Commercial Speech?" in 1990.\textsuperscript{19} Fourteen years later, the line is so blurred as to be indistinguishable. With greater frequency and subtlety, new technologies and innovative marketing strategies introduce corporate profit-motive into what otherwise would be fully-protected speech.\textsuperscript{20} The current commercial speech doctrine cannot predictably resolve disputes resulting from these new modes of expression.

Corporate speech takes many different forms and addresses issues far beyond offering to sell new, improved widgets at low,
low prices. Even when the speech is fairly straightforward in its attempt to bolster the bottom line, it is so frequently intermingled with otherwise protected speech that courts simply cannot determine where the speech falls in the tangled web of cases comprising the “commercial speech doctrine.” A failure to recognize the important public benefits of corporate speech allows courts to ratchet downward the protection due not only to commercial speech, but to any speech that has even the slightest element of commercial gain for the speaker.

I. Nike v. Kasky Through the Courts

In the 1990s, Nike took a shellacking for what activists maintained were substandard labor practices in foreign factories that subcontracted with Nike to make athletic shoes. The allegations of abuse and calls for boycotting were widespread and the subject of many television, radio, and print reports. To defend its corporate image, Nike commissioned former United States Ambassador

21 See infra notes 74-86 and accompanying text.

22 News reports alleged that workers in foreign factories manufacturing Nike products were paid less than the applicable local minimum wage; required to work overtime; allowed and encouraged to work more overtime hours than applicable local law allowed; subjected to physical, verbal, and sexual abuse; and exposed to toxic chemicals, noise, heat, and dust without adequate safety equipment, in violation of applicable local occupational health and safety regulations.


That Saturday, dubbed Anti-Nike Day, protesters demonstrated in 13 countries, 25 states and 50 communities across the United States. In downtown Portland, 75 demonstrators picketed Nike Town. In Manhattan—at the Nike complex on 57th and Madison Avenue—radio personality and activist Jim Hightower introduced a new word into the English language: Swooshtika. “Nike is the perfect corporate villain for these times,” Hightower said, “an example of the new global corporate hegemony.”

Id.

to the United Nations Andrew Young to investigate the complaints. When Ambassador Young returned a report largely exonerating the company, Nike publicized the report through press releases, letters to the editors of major newspapers, and letters to university presidents and directors of college athletic departments.

San Francisco activist Marc Kasky believed these communications contained misleading and false statements about the working conditions at the Southeast Asian factories that manufacture certain Nike products. He sued Nike under California’s Unfair Competition Law. This law does not apply only to false or fraudulent or otherwise illegal statements; any statement deemed to be “misleading" or “unfair" can be the basis for a lawsuit. Kasky disclaimed any personal knowledge of the facts underlying his case; nevertheless, his complaint alleged that Nike’s response

---

25 Kasky, 45 P.3d at 248.
26 Id.
27 Marc Kasky is a former marathon runner and executive director of the Fort Mason Center, a collection of nonprofit educational foundations located on the former Fort Mason Army base in San Francisco. He has “a long history of environmental, volunteer and community service.” Steve Rubenstein, Marc Kasky: S.F. Man Changes from Customer to Nike Adversary, S.F. CHRON., May 3, 2002, at A6.
28 Kasky, 45 P.3d at 247-48.
30 The law prohibits “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” § 17200. For the purposes of the statutory scheme, “advertising” includes any statement relating to the speaker’s products or services that is received in California, regardless of the location where the speech was uttered. § 17500. Any California citizen may bring a lawsuit alleging violations of these provisions. § 17204. No personal injury need be sustained. Gregory v. Albertson’s, Inc., 128 Cal. Rptr. 2d 389, 392 (Cal. Ct. App. 2002). Nor is there any requirement that the public actually relied on the company’s actions. Bank of the West v. Superior Court, 833 P.2d 545, 553 (Cal. 1992). Moreover, even literally true statements can lead to liability if they are deemed “misleading,” notwithstanding the speaker’s attempts to ensure the accuracy of the speech. See Rothschild v. Tyco Int’l (US), Inc., 99 Cal. Rptr. 2d 721, 725 (Cal. Ct. App. 2000) (holding that the Unfair Competition Law is a strict liability statute; defendants’ intent to mislead is irrelevant). If a business is found to violate the Unfair Competition Law, penalties include injunctive relief (including corrective speech) and “restitution,” in which the business must “return money obtained through an unfair business practice to those persons in interest from whom the property was taken.” Kasky, 45 P.3d at 249; see also Searle v. Wyndham Int’l, Inc., 126 Cal. Rptr. 2d 231, 236 (Cal. Ct. App. 2002). There is no requirement that the plaintiff, or the public at large, actually relied on the misstatements. Klein v. Earth Elements, Inc., 69 Cal. Rptr. 2d 623, 626 (Cal. Ct. App. 1997) (“Unlike common law fraud, a section 17200 violation can be established even if no one was actually deceived, relied upon the fraudulent practice or sustained any damage.”).
31 Complaint for Statutory, Equitable and Injunctive Relief at ¶¶ 2, 6, Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002) (No. 994446). This lack of knowledge was the subject of the amicus brief filed by the United States Department of Justice. The Department of Justice argued that:

Regardless of whether Nike’s statements are “commercial” or “non-commercial” speech, they are not actionable in a private suit unless the plaintiff alleges not only that the statements were false, but that he himself relied on them and, as a result, suffered injury in fact warranting judicial relief. In the context of private causes of action, those requirements ensure that any restriction on speech is justified by the gov-
to public criticism of its labor practices consisted of misrepresentations prohibited by the Unfair Competition Law. Nike asked the trial court to dismiss the lawsuit on the grounds that it had a First Amendment right to engage in the public debate over foreign labor practices, in which Nike itself had emerged as the primary example. The trial court agreed and dismissed the lawsuit.

But the California Supreme Court reversed. In a 4-3 split decision, the state high court ruled that whether Nike was protected by the First Amendment's guarantee of free speech depends on whether the speech in question is "commercial" or not. 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." The court tried to downplay the nature of its holding, claiming that it merely meant "that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully." Nevertheless, the court

emment's interest in preventing actual fraud and compensating injured individuals. Those same requirements give substantial protection for speech, even by a corporation, that does not injure individuals or materially affect their purchasing decisions. California's contrary regime unduly burdens and deters speech—whether commercial or non-commercial—and is inconsistent with First Amendment values.

Professor Weinstein argues that the Unfair Competition Law is viewpoint-neutral on its face. James Weinstein, Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky, 54 CASE W. RES. L. REV. 1091, 1112 (2004). However, both the language of the statute and the courts' interpretation of the language contradict that view. Section 17200 prohibits any unlawful, unfair or fraudulent business act or practice. Consumer advocacy groups who are not engaged in "business" are not covered by the statute. Section 17500 makes it unlawful for any person or corporation "with intent . . . to dispose of . . . property or to perform services . . . or anything . . . to induce the public to enter into any obligation relating thereto" to make a misleading statement. A person with the intent of purchasing property or services, or a person with the intent of interfering with the purchase of property or services is not covered by the statute. See Isuzu Motors Ltd. v. Consumers Union of U.S., Inc., 12 F. Supp. 2d 1035, 1048 (C.D. Cal. 1998); Hewlett v. Squaw Valley Ski Corp., 63 Cal. Rptr. 2d 118 (Cal. Ct. App. 1997).


Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002) (No. 994446). Professor Weinstein argues that the Unfair Competition Law is viewpoint-neutral on its face. James Weinstein, Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky, 54 CASE W. RES. L. REV. 1091, 1112 (2004). However, both the language of the statute and the courts' interpretation of the language contradict that view. Section 17200 prohibits any unlawful, unfair or fraudulent business act or practice. Consumer advocacy groups who are not engaged in "business" are not covered by the statute. Section 17500 makes it unlawful for any person or corporation "with intent . . . to dispose of . . . property or to perform services . . . or anything . . . to induce the public to enter into any obligation relating thereto" to make a misleading statement. A person with the intent of purchasing property or services, or a person with the intent of interfering with the purchase of property or services is not covered by the statute. See Isuzu Motors Ltd. v. Consumers Union of U.S., Inc., 12 F. Supp. 2d 1035, 1048 (C.D. Cal. 1998); Hewlett v. Squaw Valley Ski Corp., 63 Cal. Rptr. 2d 118 (Cal. Ct. App. 1997).

Kasky, 45 P.3d at 248.

Id.


Kasky, 45 P.3d at 256.

Id. at 301. Regardless of the California court's intent to narrow the context of its holding, there was, of course, nothing to prevent other courts from considering the reasoning persuas-
held that if the speech is "commercial," then the First Amendment does not protect misleading statements, even though such statements would be fully protected when expressed by any other speaker.

The California high court's decision interpreted any type of corporate speech as contributing nothing more to the marketplace of ideas than "Please buy our product." Yet Nike's letters to the editors obviously did not ask the editor to buy sneakers; instead, Nike was defending its overseas labor practices. Did Nike hope that its defense would undermine the activists' calls for boycotts of the company's products? Of course. But the court's expansive definition of "commercial speech" was unprecedented.

Dissenting justices assailed the majority opinion for creating an uneven playing field in matters of public debate. The majority's patronizing assumption that people cannot discount speech made by someone with an interest in a particular outcome led to a California decision in which the corporate side of a public debate is stifled in its entirety. Dissenting Justice Ming Chin argued that Nike's speech was wrongly deprived of First Amendment protection only because the company "competes not only in the marketplace of ideas, but also in the marketplace of manufactured goods." Dissenting Justice Janice Brown went further. She took issue with the Supreme Court's current commercial speech doctrine that is dependent on speech being categorized as either commercial or noncommercial, with little quarter given to speech that contains elements of both. Contemporary marketing, she argued, involves speech far more intermingled than segregated: "With the growth of commercialism, the politicization of commercial interests, and the...

38 The concept of the "marketplace of ideas" was at the foundation of Justice Douglas's dissent in Dennis v. United States:

When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

341 U.S. 494, 584 (1951).

39 See, e.g., Editorial, N.Y. Times, Dec. 10, 2002 at A36 (The California court "applied consumer protection laws to stifle corporate speech in a vital political debate"); Roger Parloff, Can We Talk?, FORTUNE, Sept. 2, 2002 at 110 (quoting former Clinton Administration Solicitor General Walter Dellinger, "The California decision, if upheld, will have both a chilling and a distorting effect on public debate. The public will be the loser . . . . The media . . . , will not be able to present a balanced account of a public controversy if one side of the controversy isn't free to speak out without [risking] substantial sanctions").

40 Kasty, 45 P.3d at 263 (Chin, J., dissenting, with Baxter, J., concurring in the dissent).

41 Id. at 325-27 (Brown, J., dissenting).
increasing sophistication of commercial advertising over the past century, the gap between commercial and noncommercial speech is rapidly shrinking." She further lamented, "I believe the commercial speech doctrine, in its current form, fails to account for the realities of the modern world—a world in which personal, political, and commercial arenas no longer have sharply defined boundaries."

Nike petitioned the Supreme Court to review the decision, and the Court agreed. Unfortunately, after full briefing (including 31 amicus briefs on both sides) and oral argument, the Court dismissed the case as improvidently granted on the last day of the Term. This dismissal, however, was accompanied by two opinions. Justice Stevens, with Justice Ginsberg concurring in full and Justice Souter concurring in part, wrote an opinion explaining why he believed the dismissal was appropriate.

On the other hand, Justice Breyer, with Justice O'Connor concurring, argued that the case should have been decided on the merits. This decision offers few clues to the full Court's evolving jurisprudence in the area of commercial speech, but contains some intriguing suggestions. First, Justice Breyer acknowledges that the Court's refusal to issue an opinion on the merits in this case may have the effect of causing corporations to refrain from speaking when they otherwise would participate in public dialogue. On the merits, Breyer suggested that the principle guiding resolution of the case is the Court's previous recognition that "speech on matters of public concern needs 'breathing space'—potentially incorporating certain false or misleading speech—in order to survive."

Based on the primacy of this principle, Breyer would apply height-

---

42 Id. at 326-27 (Brown, J., dissenting).
43 Id. at 327 (Brown, J., dissenting).
46 Id. The reasons were largely procedural: "(1) the judgment entered by the California Supreme Court was not final within the meaning of 28 U.S.C. § 1257; (2) neither party has standing to invoke the jurisdiction of a federal court; and (3) the reasons for avoiding the premature adjudication of novel constitutional questions apply with special force to this case." Id. at 2555. The third point related to the lack of a factual record. Id.
47 Id. at 2559. Justice Kennedy also appended a one-line opinion that the Court should not have dismissed the case. Id.
48 Id. at 2560 ("In my view, however, the questions presented directly concern the freedom of Americans to speak about public matters in public debate, no jurisdictional rule prevents us from deciding those questions now, and delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on.").
49 Id. at 2565 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272 (1964)).
ened scrutiny to the provisions of the Unfair Competition Law at issue, and would further find those provisions unconstitutional.\textsuperscript{50}

Breyer then turned his attention to the one of the nine challenged Nike communications that he thought veered closest to the "commercial speech" line: a letter to university presidents and athletic directors.\textsuperscript{51} Breyer accepted the California Supreme Court's characterization of the letter as one containing several commercial elements: it was written by a commercial speaker to a commercial audience on the subject of the company's own business practices.\textsuperscript{52} However, Breyer found other, less commercial, elements more compelling: the letters were not in any kind of traditional advertising format, did not present or propose any commercial transaction, and "provide[d] ‘information useful in discussions’ with concerned faculty and students."\textsuperscript{53} Perhaps most importantly, "the letter’s content makes clear that, in context, it concerns a matter that is of significant public interest and active controversy, and it describes factual matters related to that subject in detail."\textsuperscript{54} Breyer further noted that the facts asserted in the communication were central to the public debate, not peripheral.\textsuperscript{55}

Having determined that these communications were worthy of heightened scrutiny,\textsuperscript{56} Justice Breyer opined that "there is no reasonable ‘fit’ between the burden it imposes upon speech and the important governmental ‘interest served.’"\textsuperscript{57} While finding public worth in false advertising statutes as a general matter, Breyer was particularly troubled by the provision in California's Unfair Competition Law that permits a private right of action without any showing of injury and regardless of whether the business acted intentionally.\textsuperscript{58}

Echoing Justice Chin’s dissent, Justice Breyer wrote:

[A] commercial speaker must take particular care—considerably more care than the speaker’s noncommercial opponents—when speaking on public matters. A large organization’s unqualified claim about the adequacy of working conditions, for example, could lead to liability, should a court conclude after hearing the evidence that enough excep-

\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 2565-66.
\textsuperscript{54} Id. at 2566.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. (citation omitted).
\textsuperscript{58} Id. at 2567.
tions exist to warrant qualification—even if those exceptions were unknown (but perhaps should have been known) to the speaker. Uncertainty about how a court will view these, or other, statements, can easily chill a speaker’s efforts to engage in public debate—particularly where a “false advertising” law, like California’s law, imposes liability based upon negligence or without fault. At the least, they create concern that the commercial speaker engaging in public debate suffers a handicap that noncommercial opponents do not.  

Summing up the impact of the California Supreme Court’s decision, Breyer wrote that “[t]he upshot is that commercial speakers doing business in California may hesitate to issue significant communications relevant to public debate because they fear potential lawsuits and legal liability.” Thus, the decision to remand the case ushers in a new period of uncertainty, particularly in California, in which corporate speakers must decide to what extent, if any, they risk responding to attacks or choosing to engage in debate whether initiated by themselves or others.

Three months later, Kasky and Nike settled the lawsuit. Nike’s agreement to contribute substantial funds to the Fair Labor Association to assist workers internationally was applauded by that organization’s Executive Director, Auret van Heerden, as “a long-

59 Id. (internal citations omitted).


61 See Henry Gomez, High Court’s Nike Decision Worries Area PR Companies, SACRAMENTO BEE, July 17, 2003, available at http://www.sacbee.com/content/news/courts_legal/story/7047508p-7995812c.html (last visited Apr. 16, 2004) (noting that lawsuits have left little room for differences of opinion between activists and companies and pointing specifically to a lawsuit filed by People for the Ethical Treatment of Animals against Kentucky Fried Chicken and its parent company over the companies’ assertions about the treatment of chickens destined for the restaurants).

62 Press Release, Nike, Inc., Nike, Inc. and Kasky Announce Settlement of Kasky v. Nike First Amendment Case (Sept. 12, 2003), available at http://www.nike.com/nikebiz/news/pressrelease.html?year=2003&month=09&letter=f (last visited Apr. 16, 2004). Nike agreed to contribute $1.5 million to the Fair Labor Association (www.fairlabor.org) to fund (1) “increased training and local capacity building to improve the quality of independent monitoring in manufacturing countries;” (2) “[w]orker development programs focused on education and economic opportunity, and;” (3) “[m]ulti-sector collaboration to advance a common global standard to measure and report on corporate responsibility performance among companies.” Id. Nike also agreed to continue funding its existing worker education programs and micro-loan program for two years. Id.
term plus for corporate accountability and improved consumer information. But if the contributions benefit consumers in the long-term, short-term gains are not so apparent: Nike chose not to release its fiscal year 2002 corporate responsibility report outside the company and announced it would "continue to limit its participation in public events and media engagement in California."

II. THE CURRENT COMMERCIAL SPEECH DOCTRINE LEADS TO UNPREDICTABLE—AND UNACCEPTABLE—RESULTS

Over the past 60 years, the Supreme Court's approach to speech uttered by business interests has ranged from zero protection, to very high protection, to a four-part test, which has itself undergone revision. There have been conflicting analyses depending on the speaker and the social worth of the activity promoted. The commercial speech doctrine as currently applied by the Supreme Court and lower courts can lead to highly unpredictable results, with the California Supreme Court majority opinion in Kasky v. Nike holding the dubious title of Exhibit A. Pulling a little of this and a little of that from a variety of the Supreme Court's opinions, the California Supreme Court developed a new

63 Id.
64 Id. Five days after the settlement was announced, the California Supreme Court granted review in Kids Against Pollution v. California Dental Ass'n, which presents the question, inter alia, of whether a trade association's ethical code is commercial speech. 76 P.3d 843 (Cal. 2003). The California Court of Appeals held that an association's advisory opinion disseminating the standards set in the ethical code (relating to claims about the levels or toxicity of mercury in "silver" fillings) was protected speech. 134 Cal. Rptr. 2d 373, 389-90 (Cal. Ct. App. 2003). The petitioners claim that the communications made to enforce the ethical code are commercial speech and therefore not entitled to First Amendment protection under the Kasky analysis. Id. at 385. Thus, the court has an opportunity in Kids to revisit Kasky.
68 See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 504 (1996) (holding that when a regulation constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product and the ban serves an interest unrelated to consumer protection, it will be subject to a heightened form of First Amendment scrutiny akin to strict scrutiny); Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989) (upholding a regulation outlawing Tupperware parties on a university campus).
70 Compare Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 342, 348 (1986) (restrictions on advertisements for legal gambling facilities do not violate the First Amendment), with Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) (restrictions on solicitations for charity struck down). But see Illinois ex rel. Madigan v. Telemarketing Assocs., 123 S. Ct. 1829, 1840-42 (2003) (holding that telemarketing raising funds for charity is subject to liability under laws against fraud, where telemarketers made false statements directly to potential donors; Schaumburg was distinguished because the issue there was whether the percentage actually made available to the charity could be a proxy for fraud).
doctrine unlike any that the Supreme Court—or any other court—ever articulated.\(^7^1\) This unpredictability by itself is sufficient reason to scrap the existing doctrine.\(^7^2\)

The Supreme Court’s approach to commercial speech has been oft-changing, but mostly derisive. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Court formulated a four-part test against which restrictions on commercial speech would be weighed:

> For commercial speech to come within [the First Amendment], [1] it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.\(^7^3\)

The Supreme Court later expanded *Central Hudson’s* inherent flexibility.\(^7^4\) Unfortunately, this flexibility “left both sides of the debate with their own well of precedent from which to draw.”\(^7^5\)

The call to reform the commercial speech doctrine has been growing in intensity in recent years. The Supreme Court itself has been unable to apply *Central Hudson* in any predictable way\(^7^6\) and

---

\(^7^1\) The petition for a writ of certiorari filed in the United States Supreme Court characterized the test as breathtaking in scope and “outlandish.” Petition for Writ of Certiorari at 10, 24, Nike, Inc. v. Kasky, 123 S. Ct. 817 (2003) (No. 02-575).


\(^7^3\) 447 U.S. 557, 566 (1980).

\(^7^4\) *See*, e.g., Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989) (requiring a “reasonable fit” rather than the least restrictive means to comply with the fourth prong); *see also* Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1222 (1983) (“[C]ommercial speech” was “an empty vessel into which content is poured” even before Fox.).


\(^7^6\) *See*, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 527 (1996) (Thomas, J., concurring) (noting that courts have had difficulty in applying the *Central Hudson* balancing test “with any uniformity”); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419-20 (1993) (“This very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category . . . . The absence of a categorical definition . . . is also a characteristic of our opinions considering the constitutionality of regulations of commercial
many lower courts have expressly noted their struggle to apply Central Hudson. Moreover, the Court has noted the entreaties of "certain judges, scholars, and amici curiae" to repudiate Central Hudson and "implement[] . . . a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." The commercial speech doctrine has become nearly impossible to apply because "commercial speech" is often extremely difficult, if not impossible, to identify. The Supreme Court has long recognized that speech can serve dual functions:

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

The duality of commercial and noncommercial speech becomes critically important when overlaid with the Court's treatment of false or misleading speech. With regard to noncommercial speech, the government traditionally is restrained from acting as the arbiter of truth and falsity. Moreover, the state may not punish its citizens for disseminating false noncommercial information. Thus,

---

77 See, e.g., Nordyke v. Santa Clara County, 110 F.3d 707, 712 (9th Cir. 1997) (striking down a fairground lease term prohibiting gun shows, the appellate court described this Court's commercial speech cases, concluding that "the Central Hudson is not easy to apply"); see also Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n, 149 F.3d 679, 684 (7th Cir. 1998) (quoting Discovery Network, Inc., 507 U.S. at 419).
79 See Kozinski & Banner, supra note 19, at 631.
81 See, e.g., Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").
82 See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964) ("[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"); see also Morales v. Trans World Airlines, Inc., 504 U.S. 374, 389-90 (1992) (noting the difficulty in regulating only "false" advertising); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 771, 783 (1978) (holding that corporations enjoy the same degree of constitutional protection as individuals for direct comments on public issues; thus, corporate sponsored editorials which address the merits of pending legislation should not be subject to government regulation of falsity); Licata & Co. v. Goldberg,
if courts cannot distinguish between commercial and noncommercial speech, punishments for false speech are likely to be arbitrarily imposed—an unacceptable result in a society which values fairness and due process, and abhors selective enforcement of the law. Whenever the boundaries are uncertain, there is an increased probability of abuse. The targets of prosecution or of private attorney general lawsuits (such as permitted by California's Unfair Competition Law) may be determined simply by who has the biggest axe to grind and the resources to pursue.

812 F. Supp. 403, 408 (S.D.N.Y. 1993) ("Robust debate between competitors ... [is] encouraged as part of the hurly-burly inherent in a free market system, and indeed an open society."); Procter & Gamble Co. v. Chesebrough-Pond's Inc., 588 F. Supp. 1082, 1093-94 (S.D.N.Y.), aff'd, 747 F.2d 114 (2d Cir. 1984) ("Courts are not always able to determine whether an advertising claim is true or false."); cf. Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893, 898-99 (D.C. Cir. 1984) (suggesting that the First Amendment prohibits any governmental assessment of the deceptiveness of political speech); Rudisill v. Flynn, 619 F.2d 692, 694 (7th Cir. 1980) ("We do not regard intentional misstatements of fact made during an election campaign as 'election frauds' in the ordinary sense. The merits of a ballot issue are matters reserved for public and private discussion and debate between opponents and proponents. It is for the voters, not this court to decide whom to elect and what ballot issues to approve.").

83 See, e.g., Doe v. Univ. of Mich., 721 F. Supp. 852, 867-68 (E.D. Mich. 1989) (striking down the university's speech code as overbroad, vague, and susceptible to selective enforcement); Kenneth Lasson, Political Correctness Askew: Excesses in the Pursuit of Minds and Manners, 63 TENN. L. REV. 689, 718 (1996) (some speech codes have been "struck down as being unconstitutionally broad or vague in prohibiting speech that would otherwise be protected, or as being too arbitrary in the manner in which punishments are meted out"). Professor Michael Dorf argues that the risk of an overbroad statute cloaking illegitimate ends or unbridled prosecutorial discretion extends beyond the First Amendment rights and other fundamental rights. Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 STAN. L. REV. 235, 261-62 n.96 (1994). He notes that the Supreme Court has held that the danger of selective enforcement is a significant reason for the Due Process Clause's prohibition on vague. Id. ("[T]he void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness ... in a manner that does not encourage arbitrary and discriminatory enforcement."); see also Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) ("This ordinance is unconstitutionally vague because it subjects the exercise of the right to assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.").


85 See Karen C. Daly, Balancing Act: Teachers' Classroom Speech and the First Amendment, 30 J.L. & EDUC. 1, 60 n.322 (2001) (noting that most controversies over a teacher's speech begin with a single complaint, and that other teachers using the same speech may or may not be targeted with complaints; moreover, if many teachers engage in the same speech, it may be evidence that the teachers are not under notice that the particular speech at issue is prohibited).
III. SPEAKERS WITH COMMERCIAL CONCERNS PLAY AN IMPORTANT ROLE IN A FREE SOCIETY

Expressive associations have a long-standing, constitutionally protected role as part of the political process. Corporate speech is one form of expressive association. The Court acknowledges this for media corporations, but then makes an inappropriate content-based distinction to give other types of corporations lesser protection. Corporations are not an alien force requiring a barrier to protect the political process from its influence. The open political process of a democratic society is the clash of all sorts of different viewpoints, many driven by economic interests and many driven by noneconomic interests. To allow entrenched politicians to pick and choose which among the disparate interests will be hobbled is antidemocratic. The fact that private associations have been a dynamic and sometimes positive influence on politics over our nation's history does not mean that modern economic organizations are not.

---

87 See, e.g., Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986) (plurality opinion) ("Corporations . . . contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster.").
88 See Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 667. Media companies can run procandidate editorials as easily as nonmedia corporations can pay for advertisements. Candidates can be just as grateful to media companies as they can be to corporations and unions. In terms of "the corrosive and distorting effects" of wealth accumulated by corporations that has "little or no correlation to the public's support for the corporation's political ideas" . . . there is no distinction between a media corporation and a nonmedia corporation. Media corporations are influential. There is little doubt that the editorials and commentary they run can affect elections. Nor is there any doubt that media companies often wish to influence elections. One would think that the New York Times fervently hopes that its endorsement of Presidential candidates will actually influence people. McConnell v. Fed. Election Comm'n, 124 S. Ct. 619, 740-41 (2003) (Thomas, J., dissenting) (citations omitted).
89 See Austin, 494 U.S. at 667.
90 See Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting) ("[T]he prospect that voters might be persuaded by . . . endorsements is not a corruption of the democratic political process; it is the democratic political process.").
91 See Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1038 n.12 (5th Cir. 1982), cert. denied, 460 U.S. 1023 (1983) ("Freedom of speech is not good government because it is in the First Amendment; it is in the First Amendment because it is good government."). However, in Federal Election Commission v. Beaumont, 123 S. Ct. 2200 (2003), the High Court upheld the current incarnation of a century-old ban on direct corporate contributions to federal election campaigns, even when the corporation is a nonprofit, advocacy group without shareholders. The Court permitted Congress to regulate these contributions in response to fears of "war-chest corruption" and the corporation's potential for circumventing other campaign finance laws as a conduit for contributions. Id. at 2207, 2209. Justices Thomas and Scalia dissented, opining in a single paragraph that the law should be reviewed under strict scrutiny and could not pass muster under that demanding standard. Id. at 2212 (Thomas, J., dissenting).
The First Amendment is first and foremost a denial of government power. It is not a catalogue of favored and disfavored forms of speech. It is by no means a vehicle for rendering a prejudice against profit-motivated speech the supreme law of the land. It leaves to each of us the choice of what and how to communicate and whether to communicate at all. There exists no lawful “preferred” mix of ideas, no required speech or disallowed speech. No free speech and press model is mandated by the First Amendment. Rather, each model is descriptive of that government-free environment mandated by the First Amendment.92

Free speech adds three types of value to society. First, free speech bolsters the pursuit of truth. Second, free speech provides a check on other sources of power, thus supporting a stable, progressive, uncorrupt, and responsive democratic government.93 Third, free speech serves values of self-realization, personal and cultural development, autonomy, and autonomous decision-making.94 Accordingly, the First Amendment guarantees that citizens may speak, publish, and join together in groups to engage in political activity to try to achieve the substantive ends they deem desirable.95 They may attempt to persuade others and to acquire political influence, and the government may not interfere with, punish, repress, or otherwise impede their efforts.96

Corporations add to societal values in numerous ways. Corporations can give money to organizations having no relation to their business. There is a spectrum of causes for the public good to which corporations contribute with little or no unique self—or class—interest.97 They are significant underwriters of charitable

93 See Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").
96 Id. (citing Hague v. CIO, 307 U.S. 496 (1939)).
97 Programming produced by the Public Broadcasting Service (PBS) has long been underwritten by corporations, often with little connection between the corporate mission and the underwritten shows. For example, ExxonMobile underwrote “Masterpiece Theater” for nine years. General Electric is underwriting “Freedom: A History of US.” Chubb Insurance underwrites Antiques Roadshow, and Volkswagen is the sole corporate sponsor of a seven part series on “The Blues.” Elizabeth Jensen, When Image Isn’t Enough, L.A. TIMES, Jan. 31, 2003, at E1, available at 2003 WL 2381973.
and cultural activities. For example, Consolidated Edison in New York supports a diverse assortment of charitable, public health, environmental, and cultural organizations: American Museum of Natural History; American Red Cross; Arts & Business Council; Brooklyn Philharmonic; Channel Thirteen; Cooper Union; Fresh Air Fund; Manhattan College; New York Blood Center; New York Botanical Garden; New York Hall of Science; New York Public Library; Queens Theatre in the Park; United Way; Wildlife Conservation Society; and the YMCA.98

Moreover, corporations play an important role in diffusing and checking societal and governmental accumulations of power.99 For example, the Pharmaceutical Research and Manufacturers Association ("PhRMA") provides expert testimony before Congress and the Food and Drug Administration relating to pending legislation that impacts the availability and cost of pharmaceuticals.100 Viewed in this light, governmental suppression of corporate speech takes on potentially ominous implications for avoiding the centralization of political power. One can never be sure whether restrictions on corporate expression are in reality nothing more than governmental attempts to curb or intimidate a potential rival for societal authority. Hence, excluding corporate speech from the First Amendment's reach would almost inevitably have a detrimental impact on the most fundamental values underlying the protection of free speech.101

A message's overall nature may change when the messenger changes; similarly, the degree of effectiveness and credibility may change depending on the source.102 The same statement from different speakers may constitute a different message. As the Court has noted, an "espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich

100 See generally Pharmaceutical Research and Manufacturers of America website, at http://www.phrma.org (containing press releases describing testimony and comments to agencies).
102 See First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791-92 (stating that the people in a democracy "may consider . . . the source and credibility of the advocate"); C. Edwin Baker, Turner Broadcasting: Content-Based Regulation of Persons and Presses, 1994 SUP. CT. REV. 57, 65 ("Many listeners find that the identity of the source affects the worth or at least their evaluation of the speech.").
Corporate speech thus provides both a message and a messenger of value to public debate. Corporate speech counteracts the dominance of the few media megacorporations, and of government officials who can command free access to the press and other means of disseminating information simply by virtue of their position. Given that most individual citizens either cannot, or choose not to, compete in public debates dominated by the press and the government, adding a component of corporate speech provides “a more diverse discourse than a debate dominated by two, so long as the third does not merely echo the others.” Government may not silence one side of a public debate because it disagrees with it. Relegating speech by those who have commercial interests to second-class status silences one side of debate in just this way. In so doing, the government creates a bias in the democratic process designed to achieve the state’s desired result, which is exactly the opposite of what the First Amendment is intended to do. Moreover, silencing commercial speech “for the good of the citizenry” reflects a patronizing and offensive mistrust of citizens’ ability to make personal choices based on the greatest range of information.

---

103 City of Ladue v. Gilleo, 512 U.S. 43, 56-57 (1994); see also Redish & Wasserman, supra note 101, at 257.

104 See Matthew Benjamin, Fewer Voices, Fewer Choices?, U.S. NEWS & WORLD REP., June 9, 2003, at 29 (noting that the four big network owners are “News Corp., Walt Disney, General Electric, and Viacom, all of which also own cable channels as well as substantial numbers of TV stations. Disney and Viacom have large radio holdings, too, while News Corp. owns the New York Post and is about to acquire DirecTV satellite television”).


107 Shelledy, supra note 106, at 571-72.


109 See Martin H. Redish, First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy, 24 N. KY. L. REV. 553, 580 (1997) [hereinafter Smoking Controversy]; see also Weinstein, supra note 32, at 1103 (arguing that when free speech is tied to democracy, “the government must treat each of us, in our capacities as the ultimate source of political authority, as equal and rational agents”).

110 Weinstein, supra note 32, at 1104-06. Professor Baker argues that corporate speech is unworthy of protection because (1) while corporations are created by people, they are not themselves “flesh and blood,” and (2) corporate participation in public debate would “distort public discourse.” C. Edwin Baker, Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike, 54 CASE W. RES. L. REV. 1161, 1176-77. But to deny the people who comprise the corporate entity to demand a legal fiction. Consider: Could Phillip Knight, in his personal capacity, write a letter to the editor extolling Nike’s virtues? Sure, but would anyone believe that Mr. Knight’s views bore no relation to his position in the company? Or would Professor Baker argue that officers or employees could not speak out to defend their
The Supreme Court is not unfamiliar with the types of debates spawned by commercial enterprises. For example, in *Bose Corp. v. Consumers Union of United States, Inc.*, the Court held that an article in Consumer Reports making unflattering comments about stereo speakers was entitled to full First Amendment protection. As a matter of constitutional law, it makes no sense to hold that the assertions in Consumer Reports Magazine are so much more objectively verifiable and valuable to society than Bose's press releases in response to those same magazine articles. Yet, under the California Supreme Court's version of the commercial speech doctrine, the former receive full First Amendment protection while the latter do not.

Worse, by permitting restrictions on commercial speech, the Court assumes that consumers are unable to separate the wheat from the chaff. There are two problems with this approach. First, consumers frequently demonstrate their ability to view corporate speech with an awareness of the self-interested source of the information. For example, a marketing trend arose in the 1980s and company because the public would not perceive them to be acting as individuals, but as corporate spokespeople? If the people most knowledgeable about corporate facts and positions cannot express them, the conversation is limited to those who either do not know the facts and/or do not support the corporate point of view. Professor Baker further argues "[t]here is no reason to grant such an entity influence or empowerment in the public sphere." *Id.* at 1176 (first emphasis added). This is not a question of "grant" or "not grant." Corporations—and the individuals who run them, have stock in them, and are otherwise interested in their affairs—will influence the public debate regardless of whether they do it straightforwardly or with a certain degree of subterfuge. Professor Baker's approach would lead us perilously close to the swamp currently inhabited by campaign finance reform statutes and the decisions interpreting them; which is to say, no campaign finance "reform" has ever succeeded in removing—or even substantially reducing—money in politics. They simply demand greater creativity. See, e.g., Thomas B. Edsall, *Liberal Donors Back Anti-Bush Groups: FEC Regulatory Plan Targets Efforts to Fill Vacuum Created by Soft-Money Ban*, WASH. POST, Jan. 31, 2004, at A8 ("Major liberal donors are demonstrating their willingness to fund a new shadow Democratic Party, according to reports filed yesterday by a network of nominally independent organizations committed to defeating President Bush in November."). Distortion comes from subterfuge, not from straightforward expression of a position, where the listener can both consider the message and the messenger. Professor Robert Sitkoff argues that

the bad politics argument amounts to nothing more than a complaint that people with more money can buy more speech. But that is no reason to limit all corporate political speech. It is rather an argument either for limiting the political speech of all the wealthy, including people and other business associations in addition to corporations, or for subsidizing the political speech of the poor.


*Smoking Controversy*, supra note 109, at 568-69.

Consumer Reports is not immune to charges that it engages in biased reporting. Suzuki Motor Corp. v. Consumers Union of U.S., Inc., 330 F.3d 1110, 1133 (9th Cir. 2003) (finding that a jury could plausibly determine that the publisher of Consumer Reports had a financial motive to falsify test results related to the propensity of a Suzuki Samurai to rollover on sharp turns).
1990s in which many companies sought to profit from appearing ecologically sensitive by "frantically relabeling, repackaging, and repositioning products" as ecologically sensitive or environmentally sound.\textsuperscript{114} In 1990, a survey noted that 26\% of all new household items "boasted that they were ozone-friendly, recyclable, biodegradable, compostable, or some other shade of green."\textsuperscript{115} Despite these claims, an environmental research organization found that "nearly 47\% of consumers dismiss environmental claims as 'mere gimmickry.'"\textsuperscript{116}

Given the time and space limitations of the various media outlets, advertising copy is necessarily incomplete. Most advertisements contain more than one message with different meanings to different people.\textsuperscript{117} "Consumers are wary whenever they discern that the self-interest of the advertiser would be served by their own uncritical belief in what the advertiser asserts."\textsuperscript{118}

---


\textsuperscript{115} Id.

\textsuperscript{116} Id.


If advertising that provides valuable information for the consumer increases the efficiency of the market, deceptive advertising correspondingly decreases market efficiency by taking information away from the consumer. When a consumer is misled, his search costs needed to find the good he desires may increase and he may purchase goods for prices above his utility or alter his behavior from what it would have been without the deceptive advertising. In addition, the existence of false advertising causes consumers to become skeptical of advertisements in general or a particular class of goods or advertisements. This skepticism leads to market inefficiency because the truthful content within advertisements is no longer trusted, leaving consumers without the information they need. In addition, it takes energy to act as a skeptic. Therefore, when consumers become skeptics, advertising in general becomes less valuable.

As with any activity, there is likely to be an "optimal" level of false advertising. False advertising can be over-deterrred and under-deterrred. While under-deterrrence would lead to too much false advertising, over-deterrrence can lead to externalities by trying to avoid false advertising. For example, a harsh penalty for false advertising could result in over-precaution by advertisers. In other words, firms will take excessive measures to avoid committing an over-deterrred activity. In the context of over-deterrred false advertising, a firm may stop advertising altogether or avoid giving any information in advertisements in order to avoid a strict penalty for false advertising. The result is a dearth of information in the hands of consumers. Therefore, it becomes a tradeoff between the amount of false advertising that society is willing to tolerate and the amount of information desired. Although consumer skepticism creates inefficiencies, it could be optimal to have some level of consumer skepticism rather than going to the expense of eliminating all false or misleading advertising.

\textit{Id.}
People are not only quite capable of looking out for their own interests, but are also capable of organizing counter-speech to corporate communications. Frequently, this takes the form of boycotts.\(^{119}\) Boycotting is such a popular tactic\(^{120}\) that an organization called “Boycott Watch” keeps track of all the major boycott actions.\(^{121}\) Boycotting also has the approval of the Supreme Court as a counter-speech tactic.\(^{122}\)

Second, denying full protection to commercial speech for this reason is underinclusive. Rational people need to listen to speech from non-commercial sources with an equal amount of skepticism; even core political speech can be rife with falsehoods and misleading statements.\(^{123}\) Most, if not all, speakers have some self-


\(^{120}\) See Andre L. Smith, Comment, Consumer Boycotts Versus Civil Litigation: A Rudimentary Efficiency Analysis, 43 HOW. L.J. 213, 229 (2000): United States’ history is replete with groups redressing grievances or lobbying for rights through the use of consumer boycotts. A defining moment in American history, the Boston Tea Party, can be characterized as a boycott against the British... [emanating] “from a desire by the colonists to protest Britain’s imposition of ‘taxation without representation.’” Since then, and with considerable usage by labor unions, boycotts have been a hallmark of American social movements.

\(^{121}\) See Boycott Watch, at http://www.boycottwatch.org.

\(^{122}\) See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 909-10 (1982) (“Petitioners admittedly sought to persuade others to join the boycott through social pressure and the ‘threat’ of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.”); see also Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 904 (1st Cir. 1988), cert. denied, 488 U.S. 1043 (1989) (“The freedom of mediating institutions, newspapers, universities, political associations, and artistic organizations and individuals themselves to pick and choose between ideas, to winnow, to criticize, to investigate, to elaborate, to protest, to support, to boycott, and even to reject is essential if ‘free speech’ is to prove meaningful.”); cf. James D. Hurwitz, Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr, 74 GEO. L.J. 65, 115 (1985) (noting different antitrust implications depending on whether a boycott has an overriding political purpose targeting government versus economic manipulation directed solely at a private actor).

\(^{123}\) Courts are unwilling to permit lawsuits challenging broken campaign promises or even deliberate falsehoods uttered in the heat of a political campaign. Instead, the courts enthrust the voters with the responsibility of sifting through competing political statements to discern the truth. See Williams v. Police Jury of Concordia Parish, 107 So. 126, 129 (La. 1926) (refusing to give legal weight to a promise made to voters by supporters of a bond measure; finding that “[t]he breach of such promises is to be reckoned with at the ballot box and not in the courts of this state”); City of Farmers Branch v. Hawkco, Inc., 435 S.W.2d 288, 292 (Tex. Civ. App. 1968) (plaintiffs tried to enjoin city council from considering changes to a zoning ordinance because certain officials had campaigned on a platform against such changes; the court held that elected officials cannot be precluded from voting on an issue due to a previously made campaign promise, but “[i]n any event public officials are not legally required to keep their campaign promises and whether they do or not they are answerable to the voters at the next election”); see generally Stephen D. Sencer, Note, Read My Lips: Examining the Legal Implications
interest, whether financial or personal, in having their views accepted by their audience. This self-interest does not diminish the First Amendment protection sheltering “political candidates seeking elective office, consumer organizations seeking increased consumer protection, welfare recipients seeking increases in benefits, farmers seeking subsidies, and American auto workers seeking higher tariffs on foreign automobiles.”

Instead, First Amendment values of truth-seeking and democratic participation are advanced when the substance of the debate contains elements from all interested parties. The simple fact that all sides of a debate can participate is “likely to spur expression’s thoroughness, thoughtfulness, and breadth of distribution. To exclude all self-interested expression from the scope of the constitutional guarantee, then, would effectively gut free speech protection.”

In fact, the blurry, shifting line between political and commercial speech defies capture and definition. While commercial speech “may not affect how people are governed as directly as political speech does, it indirectly influences people’s attitudes and values about how they should be governed.” Furthermore, the free flow of commercial speech allows advertisers and consumers to economize their time and effort in deciding how to allocate their resources.

The operation of commercial enterprises and the quality of their products and services give rise to inescapable social and political implications. The very fact that those who seek to reduce free speech protection for “commercial speech” are today so anxious to exclude from that less protected category expression about such products and services other than advertising tends to confirm the inherently ideological message of all commercial speech.

Reducing the First Amendment protection of corporate speech threatens to chill protected speech especially when a business has to respond to adverse publicity. News magazines such as ABC’s PrimeTime Live or public interest organizations have the luxury of spending as much time and money as they wish on investigative

---


124 Redish & Wasserman, supra note 101, at 269-70.

125 Id.


127 Id. at 270.

128 Smoking Controversy, supra note 109, at 578.
reporting before airing adverse publicity. By contrast, an effective corporate response must be made almost immediately to avert or minimize harm, or simply to avoid being defined by its detractors. The Supreme Court has previously exhibited concern for corporations placed in the position of having to respond to the speech of others. In Pacific Gas & Electric Co. v. Public Utilities Commission, the issue was whether a state regulatory commission could require a utility company to permit an activist group to use its billing envelopes to distribute an insert expressing views with which the utility vehemently disagreed. The plurality found that the utility would “feel compelled to respond,” and characterized the Commission’s order as one that actually “forced a response.”

The California Supreme Court in Kasky failed to consider this complication when it concluded that the facts underlying Nike’s campaign were “more easily verifiable by the disseminator” and “less likely to experience a chilling effect from speech regulation.” “A strict standard of ‘absolute truthfulness’ means a besieged corporate speaker with little time to investigate allegations responds at its own risk, creating a ‘Hobson’s choice’ where responding or not responding carries different but equally serious consequences.” As Justice Chin noted in a Kasky dissent:

While Nike’s critics have taken full advantage of their right to “uninhibited, robust, and wide-open” debate, the same cannot be said of Nike, the object of their ire. When Nike tries to defend itself from these attacks, the majority denies it the same First Amendment protection Nike’s critics enjoy.

---


130 475 U.S. 1 (1986).

131 Id. at 15 n.11.

132 Id. at 16; see also David Graver, Comment, Personal Bodies: A Corporeal Theory of Corporate Personhood, 6 U. CHI. L. SCH. ROUNDTABLE 235, 241 (1999) (“The ‘chilling’ of corporate speech that an oppositional voice in the envelope might create was deemed a harm not offset by the increased exchange of ideas that would have been possible in this no-cost public forum.”).

133 Kasky, 45 P.3d at 252-53.

134 Richard O. Faulk, A Chill Wind Blows: California’s Supreme Court Muzzles Corporate Speech, 15 ANDREWS AIDS LITIG. REP. 10 (2002).

135 Kasky, 45 P.3d at 263 (Chin, J., dissenting) (internal citations omitted).
Companies—and even entire industries—routinely are called upon for rapid response to attacks upon their business practices. For example, the past few years have seen self-proclaimed health advocates excoriate certain restaurant chains for “supersizing” meal portions and thus “causing” obesity in their patrons. With accusations multiplying, the National Restaurant Association created a “Rapid Response Program” specifically designed to “rebut denigrating and negative portrayals of the restaurant industry wherever they occur in the media.” Fortune magazine reported that McDonald’s launched a public relations campaign to counteract the adverse publicity surrounding the filing of a lawsuit seeking to fault the company for encouraging obesity in children. The article cautions, however, that in California, such defensive claims that food products can be a part of a nutritious diet may lead to liability under the Unfair Competition Law.

In each of these instances, the speech uttered by corporations would not be uttered by anyone else—either because they lack the information to present it to the public, or because it is not in their self-interest to present a communication that would undermine their own messages. The inclusion of the corporate point of view in ongoing debates thus serves an important public purpose.

IV. CENTRAL HUDSON CANNOT ADEQUATELY PROTECT THE INTERMINGLED SPEECH PREVALENT IN MODERN, INNOVATIVE CORPORATE SPEECH

A profit motive, in and of itself, does not render speech unprotected. Instead, the Supreme Court held in Virginia Pharmacy that the speech is reduced to less-favored status only when it

---

136 See Bruce Horovitz, Under Fire, Food Giants Switch to Healthier Fare, USA TODAY, July 1, 2003, at C1, available at http://www.usatoday.com/money/industries/food/2003-07-01-junkfood_x.htm (last visited Apr. 16, 2004) (“Junk food’s best consumers are kids—increasingly obese kids. So that’s not the dinner bell you hear. It’s an alarm bell raising Oreo-size goose bumps for the giant makers of now-unfashionable sugary, fatty and calorie-laden foods. All are faced with this new reality: As concern about obesity rises, they’re within a few cookie crumbs of becoming the next Big Tobacco for trial lawyers.”).


139 Id.; see also Comm. On Children’s Television, Inc. v. Gen. Foods Corp., 673 P.2d 660 (Cal. 1983) (permitting consumer group’s lawsuit against supermarkets, cereal manufacturer, and advertising agency to go forward under CAL. BUS. & PROF. CODE § 17200, where lawsuit alleged that advertising for Super Sugar Crisp, Cocoa Crispies and similar cereals misled parents and children into thinking these “candy breakfasts” provided a nutritional start to the day).

does "no more than propose a commercial transaction."\textsuperscript{141} The Court has thus far relied on "common sense" to differentiate between commercial and noncommercial speech.\textsuperscript{142} The two "common sense" distinctions are (1) that commercial speech is more verifiable than other types of speech; and (2) that commercial speech is more durable than other types of speech.\textsuperscript{143} Given that these distinctions no longer appear to be a solid foundation for diminished constitutional protection, and given the innovative new methods of advertising and marketing in contemporary society, reliance on a "common sense" approach can lead only to confusion.

In \textit{Bolger v. Youngs Drug Product Corp.},\textsuperscript{144} the Supreme Court held that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech" because "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues."\textsuperscript{145} The Court reiterated this holding in \textit{Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio},\textsuperscript{146} in which a lawyer challenged the state supreme court's ability to sanction him for running deceptive newspaper advertisements for his services in bringing personal injury actions related to the use of Dalkon Shield contraceptives. Because some of the advertisements contained statements regarding the legal rights of persons injured by the Dalkon Shield, the Supreme Court recognized that such statements "in another context, would be fully protected speech."\textsuperscript{147}

\begin{itemize}
\item \textsuperscript{141} Id. at 771 n. 24.
\item \textsuperscript{143} Va. State Bd. of Pharmacy, 425 U.S. at 771 n.24; see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980). Both distinctions have been criticized by judges and scholars. See, e.g., Kozinski & Banner, \textit{supra} note 19, at 635-38 (questioning the notion that it is easy to ascertain the truth of commercial speech); Donald E. Lively, \textit{The Supreme Court and Commercial Speech: New Words with an Old Message}, 72 MINN. L. REV. 289, 296-97 (1987) (dissecting the weaknesses of the Supreme Court's position on commercial speech); Robert Post, \textit{The Constitutional Status of Commercial Speech}, 48 UCLA L. REV. 1, 31-32 (2000) (applying the overbreadth doctrine to commercial speech).
\item \textsuperscript{144} 463 U.S. 60 (1983).
\item \textsuperscript{145} Id. at 68 (quoting \textit{Cent. Hudson Gas & Elec. Corp.}, 447 U.S. at 563 n.5).
\item \textsuperscript{146} 471 U.S. 626 (1985).
\item \textsuperscript{147} Id. at 637 n.7. In deciding whether spreading rumors of a competitor's alleged involvement with Satanism mingled "religious" speech with "commercial speech," the Fifth Circuit offered the following example to explain how it would approach such a mixture:
\end{itemize}
Based on Bolger and Zauderer, the Third Circuit Court of Appeals found that advertisements by rival health care insurance companies that included information about health care insurance and delivery—matters indisputably at the center of public debate—do not escape the commercial speech category.\(^{148}\) In each of these cases, the court suppressed noncommercial speech related to important public debates for the sole reason that it was coupled with commercial speech.\(^{149}\)

A. Marketing and Advertising Are No Longer Necessarily Identifiable or Separable from Noncommercial Speech

As a corollary to the government’s ability to regulate commercial transactions, the government also assumes the ability to regulate commercial speech.\(^{150}\) The Court has already conceded that “commercial speech” is not easily defined.\(^{151}\) These “ambiguities” however, threaten to overcome the rest of the category.

A woman who owns a small religious book and music store tells customers that most rock and roll music is influenced by the devil and that the only kind of rock music they should buy is “Christian rock,” which is, of course, the only kind she sells. The determination of whether a Lanham Act suit could be brought will turn on her motivation. Evidence that she started the bookstore because of strongly-held religious beliefs that Christian books and music need to be made available to combat the evils of rock and roll and pulp fiction would be compelling evidence of a primarily religious, rather than economic, motivation for her speech. On the other hand, evidence showing that she is agnostic and opened the bookstore only after a case study in her MBA program showed that Christian bookstores can be extremely profitable when set up in the right locations would be strong evidence that her speech was economically motivated and thus commercial.


\(^{149}\) R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), suggests a different approach. In that case, the Court held that even speech that normally receives less First Amendment protection may not be regulated in such a way that the state discriminates on the basis of content or viewpoint. Id. at 385. A number of lower courts have either applied or considered applying R.A.V. to content-based commercial speech restrictions. See Valley Broad. Co. v. United States, 107 F.3d 1328, 1331 (9th Cir. 1997) (acknowledging the potential application of R.A.V. to content-based commercial speech regulation); Hornell Brewing Co. v. Brady, 819 F. Supp. 1227, 1232-33 (E.D.N.Y. 1993) (applying both R.A.V. and Central Hudson to speech regulation without deciding which is required); Citizens United for Free Speech v. Long Beach Township Bd. of Comm’rs, 802 F. Supp. 1223, 1232 (D.N.J. 1992) (“It is clear from the Supreme Court’s decision in R.A.V. [], that commercial speech must be protected by the usual strictures against content-based distinctions.”).


\(^{151}\) See, e.g., Rubin v. Coors Brewing Co., 514 U.S. 476, 493 (1995) (Stevens, J., concurring) ("[T]he borders of the commercial speech category are not nearly as clear as the Court has assumed."); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 81 (Stevens, J., concurring) ("[T]he impression that 'commercial speech' is a fairly definite category of communication . . . may not be wholly warranted.").
The speech in *Nike v. Kasky* involved press releases, letters to the editor, letters to university athletic directors and the like describing Nike's overseas labor practices. Far from the prototypical commercial speech of offering to sell X product for Y price, the speech at issue in the *Nike* case was intended to rehabilitate a corporate image as well as provide information to the public on a matter of broad concern. Extending the lesser protection of the commercial speech doctrine to this type of speech threatens a wide variety of public relations communication. These include:

**"Product placement,"** an arrangement whereby a movie studio incorporates certain commercial products into its film in exchange for cash or free use of the product. For example, in 1990, Disney reportedly charged advertisers $20,000 to show the product without comment, $40,000 to show the product and have an actor mention the product's name, and $60,000 for an actor to be shown using the product. Product placement began in feature films and television, but other media have followed suit. For example, author Beth Ann Herman featured a Maserati in her novel Power City. The protagonist drives a Maserati whose "V-6 engine had two turbochargers, 185 horsepower and got up to 60 in under 7 seconds." In exchange, a Beverly Hills Maserati dealership threw a $15,000 party for Herman that attracted nationwide television coverage. Even record albums are not exempt. Country music star Barbara Mandrell's album, *No Nonsense*, was made with the financial support of the No Nonsense panty-hose manufacturer.

**Sponsorships**, by which a company underwrites the production of a television show, concert, or sporting event. The early days of television were marked by shows like Texaco Star Thea-

---

152 *Kasky*, 45 P.3d at 248.
154 Especially for large corporations, the corporate image has a significant impact on sales and success. Mary Jo Hatch & Majken Schultz, *Are the Strategic Stars Aligned for Your Corporate Brand?*, 79 *HARV. BUS. REV.* 128 (2001) ("C)ompanies with strong corporate brands can have market values that are more than twice their book values.").
156 *Id.* at 305 (citing *Ad Follies*, *ADVERTISING AGE*, Dec. 24, 1990, at 24).
158 *Id.*
"Soap operas" were so called because they were sponsored originally by Proctor & Gamble. Animal lovers will remember "Mutual of Omaha's Wild Kingdom." R.J. Reynolds has sponsored the Winston Cup series since 1970.

Testimonials became part of main-stream marketing in the 1920s, when Pond's cold cream paid "Great Ladies" (including Mrs. Reginald Vanderbilt, Queen Marie of Rumania, and the Duchess de Richelieu) to sing the praises of the moisturizer in exchange for contributions to charity. Lately, however, it is not necessarily apparent that those giving testimony are paid to tout the product. For example, actress Kathleen Turner appeared on CNN in August, 2002, to discuss her struggles with rheumatoid arthritis. She failed to mention that the makers of Enbrel, a drug that battles the condition, paid her to appear. Similarly, Lauren Bacall appeared on "NBC Today," telling the story of a friend who had gone blind due to macular degeneration and then discussed a new drug that could prevent blindness from that cause. Novartis, the maker of the drug, paid for Ms. Bacall's appearance on the show, a fact revealed to the audience by neither Ms. Bacall nor NBC.

Music videos also blur the line between commercial and non-commercial speech. Music itself, of course, is entitled to full First Amendment protection. A primary function of a music video is to promote the artist and the song, in hopes of persuading consumers to buy the album on which the song appears. Yet

---

160 See Does Product Placement Have To Be Stealth Or Can Sightings Still Make A Good Impression?, ENT. MARKETING LETTER, July 15, 2001, 2001 WL 8994864 (noting that the 1950s brought such programming as "Kraft Playhouse," "Texaco Star Theater with Milton Berle," and "Jack Benny Brought To You By Jell-O" and that those companies owned every commercial (often woven into the content of the show by the host) and some of the program content).


162 In the age of TiVo, in which viewers can use computer technology to download broadcasts minus the commercials, advertisers have used product placement and other ways to inject favorable mentions of their products into the programs themselves. See Daniel Lyons, Play it Again, TiVo, (Jan. 28, 2003), at http://www.forbes.com/2003/01/28/cz_dl_0128tivo.html.


166 Id.; see also Melody Peterson, Side Effects of Celebrity Drug Pitches Debated, N.Y. TIMES, Aug. 18, 2002, § 3, at 1. In response to public outcry, CNN now requires full disclosure of commercial endorsements for any guest who appears on the network.

167 See Kozinski & Banner, supra note 19, at 641.


169 See Ray Waddell, More On The Way: The Next Generation Of Teen Pop Acts Up-And-Coming Youths Take 'N Sync's Lead, Hoping To Break Through TV., BILLBOARD, Sept. 2,
whether the video is treated as lesser-protected commercial speech is not obvious under the Court’s current jurisprudence. The Kentucky Supreme Court, apparently the only court to consider this issue, held in *Montgomery v. Montgomery*, that:

While music videos are not produced primarily for the sale of the video but, rather, the underlying song, this does not strip them of their First Amendment protection. Music videos are in essence mini-movies that often require the same level of artistic and creative input from the performers, actors, and directors as is required in the making of motion pictures. Moreover, music videos are aired on television not as advertisements but as the main attraction, the airing of which, consequently, is supported by commercial advertisements. Simply put, the commercial nature of music videos does not deprive them of constitutional protection.

This holding provoked a dissent that seems equally plausible:

A music video stands to an album the same way that a movie “trailer” or “teaser” stands in relation to a movie; it represents an attempt to entice a customer to purchase the right to hear or see the larger work. Indeed, music videos are “doubly” commercial speech. MTV, VH1, the Nashville Network, and other music-video cable channels select and show the videos that they believe will generate the highest advertising revenue. The video channels’ unwillingness to broadcast controversial materials—materials likely to spook boycott-wary advertisers—provide [sic] additional evidence of the essentially commercial nature of the undertaking.

The disagreement between the majority and dissent in *Montgomery* is significant only because the categorization of the video impacts the level of protection to which it is entitled under the First Amendment.

“Virtual advertising” is a form of digital technology that allows advertisers to insert computer-generated brand names, logos, or animated images into previously recorded television programs or movies. It uses computers to place still or video images into

---

2000, at 1 (noting the impact of video exposure on album sales). Another function is to sell a movie in which the song appears. For example, the videos featuring songs from the soundtrack of *Moulin Rouge* had heavy rotation on MTV, which contributed to the number of tickets sold at the box office. Gloria Goodale, *Movie Musicals are Back, but Think MTV*, CHRISTIAN SCl. MONITOR, Mar. 21, 2002, at 1 (2002).

170 60 S.W.3d 524, 529 (2001).

171 Id. at 534 (Keller, J., dissenting).

172 Askan Deutsch, *Sports Broadcasting and Virtual Advertising: Defining the Limits of*
live video broadcasts in real time so that they look as if they are part of the original scene.\textsuperscript{173} For example, several Major League Baseball teams have made use of virtual advertisements along the wall behind home plate.\textsuperscript{174} Virtual advertising blurs the line between television programming and commercials.\textsuperscript{175}

"Stealth" or "guerilla" marketing uses undercover actors to promote a product without the public being aware that the actors are paid by the product’s manufacturer.\textsuperscript{176} For example, the United States arm of Sony Ericsson Mobile Communications Ltd. hired men and women to pose as tourists at tourist attractions in New York City, then ask passersby to take their picture with Sony’s new phone/digital camera.\textsuperscript{177} Sony also hired attractive women to sit at opposite ends of a bar in a nightclub and play a computer game on their phones while engaging other patrons in conversation about their cool new toy. Under no circumstances are the actors supposed to tell the passersby or club patrons that they are employed by Sony.\textsuperscript{178} Moreover, the actors do not make any type of sales pitch, they simply demonstrate the product and make flattering comments about it.\textsuperscript{179} Similarly, the public relations firm representing a flavored-water brand dispatched young women fitting the target demographic to trendy Manhattan bars and clubs to be seen drinking the specific brand and making favorable comments about it to unsuspecting bar patrons.\textsuperscript{180}

This type of marketing—a new-fangled take on the old-fashioned whisper campaign—is not restricted to high-tech gadg-

\textsuperscript{173} Id.
\textsuperscript{174} Id. (citing Stuart Elliott, \textit{Real or Virtual? You Call It}, N.Y. TIMES, Oct. 1, 1999, at C1). For example, televised San Francisco Giants games on the Fox Sports Network frequently feature virtual ads touting Fox network programming. Each inning, the wall behind home plate promotes a different show.
\textsuperscript{175} Id. at 44.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
ets and liquor. Record companies may plant attractive young women in record shops, paid to notice the album in a customer’s hand and helpfully suggest other artists the customer may like.\footnote{Thomas Nord, \textit{Stealth Marketing—Is It the Next Big Thing or Just a Big Fat Flop?}, \textit{Courier-Journal.com}, Aug. 3, 2001, \textit{at} http://www.courier-journal.com/featuress/columns/popculture/fe20010803pop.html (last visited Apr. 16, 2004).} Scooter companies pay college students to hang outside coffee shops, striking up conversations with customers and casually mentioning their new rides.\footnote{Gerry Khernouch & Jeff Green, \textit{Buzz Marketing}, \textit{BusinessWeek}, July 30, 2001, at 54.} Children are given copies of hot new portable video games, and are urged to bring them to class and show all their friends.\footnote{\textit{Id.} at 55.}

Providing helpful advice (while selling a little something on the side) is also a time-honored method of marketing\footnote{For example, magazines targeted to homemakers (\textit{e.g.}, \textit{Better Homes and Gardens, Ladies Home Journal}) frequently contain single or multi-page advertisements or “supplements” that contain helpful hints for cleaning, child-rearing, and related concerns amidst promotions for the advertisers’ products (which are especially designed to ease the burdens of those cleaning and child-rearing concerns).} that is evolving into a particularly powerful tool on the Internet. Using this method, an entrepreneur seeks out chat groups on the Internet that discuss issues related to what he has to sell. For example, someone who wants to sell bookkeeping software will find (\textit{e.g.}, through Yahoogroups) groups of people who talk about finances. He will “lurk” long enough to get a feel for the group’s discussions, and then start contributing. He will spend the bulk of his time joining in the discussion and some percentage correctly answering questions related to his product. Each of his posts will link to his own webpage where he offers software for sale. After becoming a trusted member of the group, he will find occasional opportunities to suggest a “meeting” via private e-mail to discuss how the software can meet a particular person’s special needs.\footnote{Rex Tincher, \textit{Stealth Marketing in Usenet News Groups}, at http://www.tincher.to/stealth.htm (last visited Apr. 16, 2004).}

Another common incarnation of this technique is found on websites geared toward parents, mothers in particular. Baby food manufacturers have websites chock full of helpful information as to when a baby should achieve developmental milestones, advice on how to encourage a baby to eat new foods, health advice for the expectant and breastfeeding mother, and so on. Some even have a doctor on staff to answer e-mail inquiries.\footnote{For example, Earth’s Best organic baby food provides the services of an obstetrician/gynecologist and a pediatrician to answer consumers’ questions online regarding everything from fertility and pregnancy to teething, allergies and immunization. \textit{See} The Doctor’s Corner, \textit{at} http://www.earthsbest.com/md_corner/doctorscorner.html (last visited Apr. 16, 2004).} Of course, the web-
sites also provide information for purchasing products, but one may peruse the sites at length without ever making a purchase. \(^1\)

Websites as commercial speech have not yet generated much case-law, \(^8\) but, especially as regards lawyer advertising, they have generated some law review articles concerned about whether law firms' websites are subject to state rules regarding solicitation. \(^9\)

B. Speech Intended to Bolster a Corporate Image Should Be Fully Protected Under the First Amendment

Corporate image advertising "describes the corporation itself, its activities or its views, but does not explicitly describe any products or services sold by the corporation." \(^10\)

There are, generally, two types of image advertising. The first is advertising that treats the company itself as a product to be sold. For example, lumber giant Weyerhaeuser has been reviled by environmentalists for clear-cutting certain forest areas. \(^9\)

Promoting its image as a responsible steward of the earth, Weyerhauser publicized its part-


\(^{189}\) See, e.g., Drew L. Kershen, Professional Legal Organizations on the Internet: Websites and Ethics, 4 DRAKE J. AGRIC. L. 141, 145 (1999) ("Even if a website is primarily informational, if the content suggests a solicitation for a commercial relationship, the website is commercial speech subject to state regulation."); Jesse H. Sweet, Attorney Advertising on the Information Superhighway: A Crash Course in Ethics, 24 J. LEGAL PROF. 201, 210 (2000). In Planned Parenthood Fed'n of America, Inc. v. Bucci, No. 97 Civ. 0629, 1997 WL 133313 (S.D.N.Y. 1997), aff'd 525 U.S. 834 (1998), cert. denied, 525 U.S. 834 (1998), the defendant, doing business as Catholic Radio, registered a website at "plannedparenthood.com." However, the website was actually dedicated to the pro-life position and opposed abortion. \(^{191}\) The court disagreed for two reasons: First, although the use of "plannedparenthood.com" was arguably non-commercial in and of itself, it impacted the plaintiff's ability to offer its own services over the Internet. Second, the very use of the Internet is "in commerce" because it requires interstate phone lines to connect. \(^{190}\) See, e.g., Gina Binole, After Buying MacBlo, Weyerhaeuser Won't Commit on Clear-Cutting, BUS. J. PORTLAND, June 25, 1999, available at http://portland.bizjournals.com/portland/stories/1999/06/28/story6.html (last visited Apr. 16, 2004).
nership with CARE, one of the world’s largest international relief and development organizations. Together, they propose to teach “sustainable forestry practices and environmental stewardship to improve living conditions of people in developing countries for current and future generations.”

This type of image advertising also includes companies that project an ethos of social responsibility and a political philosophy that consumers presumably can share and support through the purchase of the companies’ products. For example, The Body Shop sells cosmetics and one might reasonably presume that its communications with the public are intended to sell soap and moisturizers. The company’s owner contends that the central mission of business is to improve the world by not only caring for its work force and customers, but also for its communities and the environment. She believes that business should be a force for social good first, and consider bottom line profits second. Thus, The Body Shop’s mission statement specifies that social, environmental, and political values are the fundamental bases of exchange with its constituents. Specifically, the company’s first commitment is to “social and environmental change,” and, second, to the “financial and human needs” of its stakeholders. Further, its product pledge involves “the protection of the environment, human and civil rights” within the cosmetics industry. Whether it is Weyerhaeuser’s forest management or the Body Shop’s focus on “natural” skin care reflecting broader environmental concerns, these businesses are speaking on relevant issues that do not come close to asking consumers to buy their products.

The second type of image advertising is when a company takes a position on public issues, which is viewed as reflecting corporate values. As such, it is even further removed from actual

---


196 Id.
commercial transactions than advertising to promote the company itself as a product. For example, when inexpensive Japanese compact cars began to flood the market, American automakers responded by urging consumers to "buy American." When the president of General Motors takes out newspaper advertisements or buys air time on television to urge people to "buy American," he may argue that purchasing foreign automobiles puts Americans out of work, and, therefore, that buying his company's cars is a patriotic act. The speech is both profit motivated and proposes a commercial transaction. The speaker has direct economic interests at stake, however, the speech also contributes to the significant public debate over consumer choice, protectionism, and free trade. "Information about the quality and price of some products may relate to important political issues. For example, a belief that American cars are overpriced influences views on foreign car import restrictions, on inflationary price increases for domestic cars, and on the effects of oligopoly . . . ."

Whether or not a court can draw these lines has important legal consequences. For example, in Quinn v. Aetna Life & Casualty Co., a state court trial judge ruled that an insurance company's advertisements blaming high insurance premiums on large tort damage awards was commercial speech, and thus, could be enjoined if found to be false or misleading. Plaintiffs involved in ongoing personal injury actions sought to enjoin Aetna from continuing publication of statements in certain magazines that criticized the tort system and what Aetna perceived to be excessive damages awarded in many personal injury cases. The plaintiffs argued that the advertisements contained misleading statements violating New York law. Aetna responded that its publications advocating tort law reform were political expression and fully protected by the First Amendment. The fundamental disagreement was whether the mixed commercial/political speech should be deemed one or the other. This case, as well as the General Motors example

---

197 To assist consumers in complying with this exhortation, Congress passed the American Automobile Labeling Act, which requires passenger vehicles manufactured after October 1, 1994 to have labels specifying their percentage value of U.S./Canadian parts content, the country of assembly, and countries of origin of the engine and transmission. See Juanita S. Kavalaukas & Charles J. Kahane, Evaluation of the American Automobile Labeling Act (Nat'l Highway Traffic Safety Admin. Report No. DOT HS 809 208, 2001).

198 See EMORD, supra note 92.

199 Id. at n.25 (quoting Daniel Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. REV. 372, 382 (1979)).


201 Id. at 474-75.

202 Id. at 475.

203 Id.
above, demonstrates that sometimes there is no getting around the fact that speech may be both.\textsuperscript{204}

Nonetheless, the state judge ruled that the statements were commercial speech that could be enjoined if false or misleading.\textsuperscript{205} The court made its ruling despite the fact that Aetna’s purpose was to influence potential jurors to give lower damage awards, rather than targeting its statement at consumers who might purchase insurance products.\textsuperscript{206} When the case was removed to federal district court,\textsuperscript{207} the district court judge concluded that the advertisements were not commercial speech,\textsuperscript{208} and the Second Circuit affirmed.\textsuperscript{209} The federal district judge concluded that the state court judge had “engaged in a fundamental misconception by calling the advertisements here in question ‘commercial speech.’”\textsuperscript{210}

Corporate communications intended to reflect well on the company, highlighting either its internal functions or the way it interacts with the local, national, and global communities of which it is a part, should be protected under the First Amendment. This type of communication does not propose a transaction, even though it can certainly be construed to set the stage for future transactions. Nonetheless, the failure to protect this type of speech—and the consequent chilling effect—deprives potential and current customers, potential and current investors, potential and current competitors, and potential and current neighbors from important information they can use to judge whether they wish to further associate with the company, or whether they wish to challenge it.


\textsuperscript{205} 409 N.Y.S. 2d at 478.

\textsuperscript{206} Id.


\textsuperscript{208} Id.

\textsuperscript{209} Id., 616 F.2d at 40. The pharmaceutical industry has also sponsored political advertisements—“issue ads”—that praise certain candidates’ stands on prescription drug legislation. The advertisements are prepared and placed by a nonpartisan group called United Seniors Association, but that group is funded largely by unrestricted educational grants from the Pharmaceutical Research and Manufacturers of America. See Thomas B. Edsall, Drug Industry Financing Fuels Pro-GOP TV Spots, WASH. POST, Oct. 23, 2002, at A11. The drug companies that are members of PhRMA undoubtedly would benefit economically if the positions they are advertising are enacted into law.

\textsuperscript{210} Quinn, 482 F. Supp. at 29; see also Rutledge v. Liability Ins. Indus., 487 F. Supp. 5 (W.D. La. 1979) (involving insurance company advertising statements). The court similarly held that the advertisements were not commercial speech because “[t]he ads [made] no attempt to sell insurance or to recommend any particular type of insurance coverage . . . .” Id. at 8. Finding the speech to be fully protected noncommercial speech, the district court concluded that issuing an injunction in the case would be tantamount to imposing a prior restraint on publication in violation of the First Amendment. Id. at 8-9.
CONCLUSION

While hard cases may make bad law,\textsuperscript{211} sometimes “it is bad law that is creating the hard cases.”\textsuperscript{212} \textit{Central Hudson} falls into this category. The issue before the California Supreme Court in Nike should not have been “hard.” But until the United States Supreme Court simplifies First Amendment jurisprudence by protecting corporate engagement in public debate, lower courts will continue to struggle and the citizenry will be deprived of all sides of important controversies. Unfortunately, with its refusal to overturn the decision of the California Supreme Court, the Nike case remains a precedent sure to be cited in other jurisdictions by other litigants seeking to silence their corporate opponents. The risk is particularly great because the California Supreme Court is not a backwater tribunal lacking in influence. On the contrary, California jurisprudence commands a deserved reputation for being ahead of the curve.\textsuperscript{213}

The Supreme Court should treat all speech as deserving the same protection under the First Amendment. The government then could regulate commercial speech and mixed speech just as it would political speech: regulation is constitutional where it furthers an important governmental interest, the governmental interest is unrelated to the suppression of free expression, and the restriction on expression is no greater than necessary.\textsuperscript{214} Consumer fraud statutes could still exist, albeit in much narrow form than California’s unfair competition law. There is no question that preventing consumer fraud furthers a substantial governmental interest.\textsuperscript{215}

\textsuperscript{211} See Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).


\textsuperscript{213} For example, in \textit{Foster-Gardner, Inc. v. National Union Fire Insurance Co.}, 959 P.2d 265 (Cal. 1998), the California Supreme Court adopted the minority view that insurers do not have a duty to defend administrative agency proceedings, declaring that the term “suit” means a legal proceeding initiated by the filing of a lawsuit, as opposed to the initiation of administrative proceedings. This ruling was then followed by the Ninth Circuit Court of Appeals (Granite Mgmt. Corp. v. Aetna Cas. & Sur. Co., No. CV-97-04022-SI, 2002 WL 1192572 (9th Cir. June 4, 2002)), and the State of Illinois (W.C. Richards Co. v. Hartford Accident & Indem. Co., 724 N.E.2d 63 (Ill. App. Ct. 1999)). See also Victoria L. Rees, \textit{AIDSphobia: Forcing Courts to Face New Areas of Compensation for Fear of a Deadly Disease}, 39 VILL. L. REV. 241, 249 n.41 (1994), noting that the trend towards recovery for emotional distress without accompanying physical injury began with the California Supreme Court’s decision in \textit{Dillon v. Legg}, 441 P.2d 912 (Cal. 1968), which established the standard for recovery by a third party who witnessed the negligent injury of another. A subsequent case, \textit{Molien v. Kaiser Foundation Hospitals}, 616 P.2d 813 (Cal. 1980), established the California Supreme Court as a trendsetter in this area of recovery.


\textsuperscript{215} Thus, when the authors to the Foreword of this Symposium posit a situation in which Nike misrepresents its overseas working conditions to college coaches who indicated that they
The critical point is that while the seller is free to make true, false, or misleading claims, he will be liable if buyers rely on those claims to make purchases. When there is no reliance, and no harm, then private counterspeech will serve to remedy falsehoods placed before the public.

would no longer purchase its products absent clear assurances that the workers were neither underpaid nor physically abused, see Ronald Collins & David Skover, Foreword, 54 CASE W. RES. L. REV. 965 (2004), Nike could not necessarily seek refuge in the First Amendment. Under California law, if the workers were in fact underpaid and physically abused and Nike knew it and Nike deliberately lied for the purpose of causing the coaches to rely on the lies and the coaches purchased Nike products in reliance on those specific statements, then there would be a cause of action for fraud for which the First Amendment could be no defense. See Lazar v. Superior Court, 909 P.2d 981, 984 (Cal. 1996) ("The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.").

216 See Kozinski & Banner, supra note 19, 76 VA. L. REV. at 651.