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## Lessons From a Story Untold: Nike v. Kasky Reconsidered

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54 Case W. Res. L. Rev. 1049-1089 (2004)

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# LESSONS FROM A STORY UNTOLD: *NIKE V. KASKY* RECONSIDERED

David C. Vladeck<sup>†</sup>

## INTRODUCTION—A STORY UNTOLD

The Supreme Court's recent dismissal, apparently on jurisdictional grounds,<sup>1</sup> of the writ of certiorari it had granted to review *Nike, Inc. v. Kasky* has brought into sharp focus a number of critiques of the commercial speech doctrine—some new, some longstanding. At issue in *Nike* were communications Nike made to customers, newspaper editors, college presidents and athletic directors, and others responding to allegations that Nike had engaged in, or was complicit in, the mistreatment of foreign workers. Respondent Marc Kasky contended that Nike's communications contained significant misstatements of fact and thus were actionable

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<sup>†</sup> Associate Professor of Law and Director, Institute for Public Representation, Georgetown University Law Center. In the interest of full disclosure, as an attorney with Public Citizen Litigation Group, a public interest law firm, I have participated as counsel for parties on both sides of commercial speech cases. I represented parties opposing restraints on commercial speech in a number of the cases discussed in this article, including *Edenfield v. Fane*, 507 U.S. 761 (1993), and was co-counsel in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). I also submitted amici briefs in cases supporting speech restraints, including *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003) and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). Public Citizen Litigation Group also represented the plaintiffs in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and submitted amici briefs in many of the commercial speech cases discussed in this article. My former colleague Alan B. Morrison has recounted the history of some of these cases in his contribution to this symposium. See Alan B. Morrison, *How We Got The Commercial Speech Doctrine: An Originalist's Recollections*, 54 CASE W. RES. L. REV. 1189 (2004).

<sup>1</sup> I say "apparently" because the Court's per curiam order states only that "[t]he writ of certiorari is dismissed as improvidently granted." *Nike*, 123 S. Ct. at 2554 (2003). Justice Stevens's separate opinion explains his view that the Court lacked jurisdiction because the judgment of remand entered by the California Supreme Court was not "final" under 28 U.S.C. § 1257 (2000) and that neither party to the case had Article III standing to invoke the jurisdiction of a federal court. *Id.* at 2556-58. Justice Stevens also suggested that dismissal was warranted because "the reasons for avoiding the premature adjudication of novel constitutional questions apply with special force to this case." *Id.* at 2555.

under California's unfair competition and false advertising laws.<sup>2</sup> Nike countered that, even if it had made factual misstatements, its communications were part of an ongoing public debate about the labor practices of multinational corporations generally and, for that reason, they were fully protected under the First Amendment.<sup>3</sup> A sharply divided California Supreme Court rejected Nike's theory,<sup>4</sup> but the United States Supreme Court agreed to review Nike's First Amendment claim. After full briefing and argument, a divided Court dismissed the writ as improvidently granted, much to the disappointment of Nike and its supporters who had forecast a Nike victory.<sup>5</sup>

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<sup>2</sup> See CAL. BUS. & PROF. CODE §§ 17200-17210 (concerning unfair competition), 17500-17594 (proscribing false advertising) (West 2000). Although Kasky's initial complaint identified a large number of contested statements, his First Amended Complaint narrowed the focus of the litigation to six statements by Nike that Kasky alleged to be false: (1) that Nike's "products are manufactured in compliance with applicable local laws and regulations governing wages and working hours," (2) that "the average line-workers in the factories are paid double the applicable local minimum wage," (3) that "the workers receive free meals and health care," (4) that Nike "guarantee[s] a living wage for all workers," (5) that "the workers are protected from corporal punishment and abuse," and (6) that "working conditions in the factories are in compliance with applicable local laws and regulations governing occupational health-and-safety." Brief for Respondent Kasky at 3-4, *Nike* (No. 02-575) (citing Plaintiff's First Amended Complaint at ¶¶ 75, 79, 82(b) and 84). As Kasky explained, these allegations were based on a number of sources, including "studies and reports issued by human-rights groups," news reports, and, perhaps most importantly, an Ernst & Young "Report on Environmental and Labor Practices Audit" prepared for Nike but eventually "leaked to the public." *Id.* at 3.

<sup>3</sup> Nike characterized the question presented as follows:

When a corporation participates in a public debate—writing letters to newspaper editors and to educators and publishing communications addressed to the general public on issues of great political, social, and economic importance—may it be subjected to liability for factual inaccuracies on the theory that its statements are 'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions?

Brief for the Petitioners Nike, Inc., et. al. at (i), *Nike* (No. 02-575). Not surprisingly, Kasky framed the issue quite differently: "Whether Nike's factual representations about the conditions under which its products are made, as alleged in the complaint, are commercial speech subject to laws regulating false or misleading commercial messages." Brief for Respondent at (i), *Nike* (No. 02-575).

<sup>4</sup> *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), cert. denied, *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003).

<sup>5</sup> See, e.g., Eugene Volokh, *Nike and the Free-Speech Knot*, WALL ST. J., June 30, 2003, at A16, available at 2003 WL-WSJ 3972562 (stating that many expected the U.S. Supreme Court to overturn the California Supreme Court's holding that Nike's statements were commercial speech).

Although *Nike* will not return to the Supreme Court,<sup>6</sup> the case plainly piqued the Court's interest, so much so that the Court is likely to look for another case presenting similar issues. After all, the opinion of Justice Stevens, joined by Justice Ginsburg and Justice Souter in part, cites "the importance of the difficult First Amendment questions raised in this case" as a reason not to reach the merits in the absence of a fuller factual record.<sup>7</sup> Justice Breyer's dissent, joined by Justice O'Connor, notes that "the questions presented directly concern the freedom of Americans to speak about public matters in public debate" and suggests that, were the Court to review a *Nike*-like case in the future, he would urge the Court to "apply a form of heightened scrutiny to the speech regulations in question" under which "those regulations cannot survive."<sup>8</sup> Justice Kennedy also dissented from the dismissal, signaling that he too wanted to resolve the case on its merits.<sup>9</sup>

The business community also is anxious for another opportunity to persuade the Court to dismantle the commercial speech doctrine or at least limit the categories of expression that fall within the doctrine. Of the thirty-one amicus briefs filed in *Nike*, twenty-two were from Nike's supporters, mostly corporations or business interests urging the Court to cut back on the scope of the commercial speech doctrine or to scrap the doctrine altogether.<sup>10</sup> Thus, there will be no shortage of *Nike*-clones asking the Court to "Just Do It" and reconsider the commercial speech doctrine.

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<sup>6</sup> Shortly after the case was remanded to the California Supreme Court, the parties entered into a settlement, the terms of which went undisclosed, other than an acknowledgment by the parties that Nike had paid \$1.5 million dollars, not to Mr. Kasky, but to the Fair Labor Association, a Washington, D.C.-based organization that monitors labor practices abroad and helps educate workers. See, e.g., Adam Liptak, *Nike Move Ends Case over Firms' Free Speech*, N.Y. TIMES, Sept. 13, 2003, at A8; David F. Pike, *Activist Lawyer Questions Nike Pact on Labor: Letters by Attorney Demand Whole Story, Details on Settlement*, L.A. DAILY J., Nov. 26, 2003, at 1.

<sup>7</sup> *Nike*, 123 S. Ct. at 2558 (Stevens, J., concurring).

<sup>8</sup> *Id.* at 2560, 2565 (Breyer, J., dissenting).

<sup>9</sup> *Id.* at 2559 (Kennedy, J., dissenting).

<sup>10</sup> Among the business organizations supporting Nike were the National Association of Manufacturers, the Business Roundtable, the Chamber of Commerce of the United States, ExxonMobil, Microsoft, Morgan Stanley, GlaxoSmithKline, Pfizer, and forty media organizations (including ABC, CBS, NBC, CNN, Fox, *The New York Times*, *The Washington Post*, *The Seattle Times*, and National Public Radio). Nike also had the support, among others, of the United States and the AFL-CIO (although its brief was nominally filed in support of neither party, it sought reversal of the California Supreme Court's judgment in the case).

## I. WHY NIKE? A BRIEF HISTORY OF THE COMMERCIAL SPEECH DOCTRINE

On one level, the controversy surrounding *Nike v. Kasky* is not surprising. Even prior to *Nike*, deep fissures in the Court's commercial speech doctrine had become evident, although not for the precise reasons raised in *Nike*. Eight years earlier, in *44 Liquormart, Inc. v. Rhode Island*,<sup>11</sup> four Justices explicitly called for the reformulation of the doctrine in cases where the government imposed a categorical ban on the dissemination of truthful information about a lawful product.<sup>12</sup> These Justices argued that restraints on truthful commercial speech that keep consumers "in the dark" about lawful goods and services should come before the Court with a burden of justification approaching, if not reaching, strict scrutiny review.<sup>13</sup> Since *44 Liquormart*, the Court has made it clear that it would be willing to revisit the doctrine should the appropriate case come along.<sup>14</sup>

Nor is the Court's dissatisfaction with the commercial speech doctrine new. The Court's opening chapter of the doctrine—its 1976 landmark decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*<sup>15</sup>—provoked a strong dissent by then-Justice Rehnquist.<sup>16</sup> Few of the early commercial speech

<sup>11</sup> 517 U.S. 484 (1996).

<sup>12</sup> *Id.* at 501-04 (Stevens, J., concurring, along with Kennedy and Ginsburg, JJ.), 526-28 (Thomas, J., concurring).

<sup>13</sup> *Id.* at 503 (Stevens, J., concurring), 523 (Thomas, J., concurring).

<sup>14</sup> *See, e.g.*, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 & n.3 (1999) (stating that while many scholars, judges, and amici curiae have advocated the repudiation of the *Central Hudson* test, the Court would not make such a broad pronouncement when the case at hand could be resolved without doing so).

<sup>15</sup> 425 U.S. 748 (1976).

<sup>16</sup> *Id.* at 781. Justice Rehnquist challenged the Court's idea that purely commercial expression falls within the protective sphere of the First Amendment, remarking that to the extent that the primary purpose of the First Amendment is "to enlighten public decisionmaking in a democracy," that purpose "relate[s] to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo." *Id.* at 787. With considerable foresight, Justice Rehnquist predicted that the Court's ruling would pave the way for direct-to-consumer advertising of prescription drugs, and forecast, among other things, that an enterprising pharmacist might run an advertisement that stated: "Don't spend another sleepless night. Ask your doctor to prescribe Seconal without delay." *Id.* at 788. Justice Rehnquist warned that

[u]nless the State can show that these advertisements are either actually untruthful or misleading, it presumably is not free to restrict . . . commercial efforts on the part of those who profit from the sale of prescription drugs to put them in the widest possible circulation. But such a line simply makes no allowance whatever for . . . a considered legislative judgment in most States that while prescription drugs are a necessary and vital part of medical care and treatment, there are sufficient dangers attending their widespread use that they simply may not be promoted in the same manner as hair creams, deodorants, and toothpaste.

*Id.* The FDA has decided to permit the type of advertising decryed by Justice Rehnquist because it believes it is compelled to do so by the First Amendment. Using FDA-Approved Patient

cases were unanimous.<sup>17</sup> The Court's first attempt to formulate an enduring legal standard to evaluate restraints on commercial speech—Justice Powell's 1980 opinion in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*<sup>18</sup>—mustered the support of only five Justices and provoked a firestorm of academic criticism.<sup>19</sup> Justice Blackmun, the author of *Virginia State Board of Pharmacy*, complained that “the test now evolved and applied by the Court is not consistent with our prior cases and does not provide adequate protection for truthful, non-misleading, noncoercive commercial speech.”<sup>20</sup> Justice Stevens, in

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Labeling in Consumer-Directed Print Advertisements, 66 Fed. Reg. 20468 (Apr. 23, 2001). The FDA has recently announced that it will permit food and dietary supplement manufacturers to make claims that their products prevent, treat, or cure diseases, even where the scientific evidence supporting the claim is unreliable or inconclusive, on the theory that the First Amendment compels the agency to allow these claims, so long as they are accompanied by an appropriate disclaimer. Advance Notice of Proposed Rulemaking on Food Labeling: Health Claims; Dietary Guidance, 68 Fed. Reg. 66040 (Nov. 25, 2003); see also Guidance for Industry and FDA: Interim Evidence-Based Ranking System for Scientific Data; Interim Procedures for Health Claims on the Labeling of Conventional Human Food and Human Dietary Supplements, 68 Fed. Reg. 41387 (July 11, 2003) (providing guidelines for properly labeling food and supplements within regulations).

<sup>17</sup> Of the cases the Court decided in the first five years following *Virginia State Board of Pharmacy*, only two, *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), were decided by a unanimous Court. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) was five-to-four on the First Amendment question; *In re Primus*, 436 U.S. 412 (1978) was seven-to-one on the First Amendment question (Justice Brennan did not participate); *Friedman v. Rogers*, 440 U.S. 1 (1979) was seven-to-two on the First Amendment question; *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980) was seven-to-two on the First Amendment question; and *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), was eight-to-one on the First Amendment question. It was not until the Court's unanimous ruling in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), that Justice Rehnquist was willing to join the Court in striking down a statute on commercial speech grounds. Justice Rehnquist did not participate in *Linmark Associates*, which might explain why it was unanimous.

<sup>18</sup> 447 U.S. 557 (1980).

<sup>19</sup> *Central Hudson* established the now-familiar four-part test for evaluating the constitutionality of restrictions on commercial speech. The test's inquiry proceeds as follows: (1) whether the speech concerns a lawful activity; if not, it may be suppressed outright; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the asserted governmental interest; and (4) whether the regulation is more extensive than necessary. *Id.* at 563-66. The *Central Hudson* test has been the subject of intense academic criticism. See, e.g., Ronald A. Cass, *Commercial Speech, Constitutionalism and Collective Choice*, 56 U. CIN. L. REV. 1317, 1374-75 (1988) (stating that the Court further complicated the commercial speech test in *Central Hudson*); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 631, 641-50 (1990) (stating that courts were unsure what type of regulation *Central Hudson*'s four-part test permitted); Matthew L. Miller, Note, *The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements*, 85 COLUM. L. REV. 632, 633-35 (1985) (noting the difficulty courts had in applying the *Central Hudson* commercial speech test); Brian J. Waters, Comment, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech*, 27 SETON HALL L. REV. 1626, 1628 (1997) (noting courts' inconsistent application and results of the test for commercial speech); Jonathan Weinberg, Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 730 (1982) (arguing that *Central Hudson* created a shifting rule that resulted in mere *ad hoc* adjudication).

<sup>20</sup> *Central Hudson*, 447 U.S. at 573 (Blackman, J., concurring).

his concurrence, argued that the Court's effort to formulate a catch-all test for commercial speech was misguided and that the speech at issue in *Central Hudson*—Central Hudson's promotion of "off-peak" pricing to consumers—concerned important economic matters and thus was entitled to rigorous First Amendment protection.<sup>21</sup> In his dissent, Justice Rehnquist argued against constitutionalizing speech unrelated to political or social discourse and accused the Court of "return[ing] to the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies."<sup>22</sup>

The chorus of criticism of the *Central Hudson* test only deepened in 1986 with the Court's five-to-four decision in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,<sup>23</sup> upholding the constitutionality of a Puerto Rican law forbidding the advertising of casino gambling to residents of Puerto Rico, but not to visitors. In so ruling, the Court deferred uncritically to the judgment of the Puerto Rican legislature that local residents could ill afford to lose their hard-earned dollars at gaming tables and that casino gambling "would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime."<sup>24</sup> The *Posadas* Court's unquestioning acceptance of the dire legislative judgment underlying the restraint was seen by many as an effort to wipe away the gains made in *Virginia State Board of Pharmacy* and *Central Hudson* and return the Court to the era when it permitted commercial speech to be suppressed for transparently paternalistic reasons.<sup>25</sup>

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<sup>21</sup> *Id.* at 579-81 (Stevens, J., concurring).

<sup>22</sup> *Id.* at 589 (Rehnquist, J., dissenting) (citation omitted).

<sup>23</sup> 478 U.S. 328 (1986).

<sup>24</sup> *Id.* at 341.

<sup>25</sup> One feature of Justice Rehnquist's *Posadas* opinion drew especially withering criticism. Justice Rehnquist asserted that because Puerto Rico had the power to ban casino gambling altogether, it necessarily had the "lesser" power to ban casino advertising in Puerto Rico. *Id.* at 346. As Justice Rehnquist put it:

It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.

*Id.* The two dissenting opinions challenged Justice Rehnquist's assertion that a ban on casino gambling is "less intrusive" of First Amendment rights than an outright prohibition on the activity itself and maintained that Rehnquist's "greater includes the lesser theory" threatened to swallow the commercial speech doctrine whole. See *id.* at 348 (Brennan, J., dissenting); *id.* at



The controversy that enveloped the early commercial speech decisions has not abated. Since the doctrine was first announced, it has been subject to two related strands of criticism by those who believe that it affords inadequate protection to commercial expression—criticisms that formed the core of Nike’s argument to the Court.

The first objection goes to the standard’s *substance*. This argument contends that the commercial speech doctrine should be overhauled because it gives government too powerful a weapon to suppress or control truthful commercial speech that it disfavors. This argument does not challenge government’s broad authority to limit or even outlaw commercial speech that is false or misleading. Rather, this criticism is that, having recognized that commercial speech is entitled to First Amendment protection, the Court should be far more rigorous in its review of government restraints on truthful commercial speech, upholding only those restraints that are narrowly tailored to further genuinely important governmental interests. Many of these critics favor abandoning the commercial speech doctrine altogether and evaluating restraints on truthful commercial speech using the same strict scrutiny rules that apply to other content-based restraints.<sup>26</sup>

This line of argument has had considerable influence on the commercial speech doctrine’s evolution. Although the commercial speech doctrine has not been discarded, it has changed fundamentally since *Central Hudson* was first announced. As articulated in *Central Hudson* and applied in many of the cases that followed, the early commercial speech doctrine was in a real sense an intermediate standard of review, with courts giving considerable deference to legislative and administrative judgments that restraints on speech—even truthful speech—were needed to further legitimate governmental interests.<sup>27</sup> Under this approach, the Court upheld a

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359 (Stevens, J., dissenting); see also Phillip B. Kurland, *Posadas de Puerto Rico v. Tourism Co.*: “’Twas Strange, ’Twas Passing Strange, ’Twas Pitiful, ’Twas Wondrous Pitiful,” 1986 SUP. CT. REV. 1, 12-15 (suggesting that *Posadas* may have been intended to enable the government to restrict speech that may lead to immoral conduct); Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 29 n.78 (1989) (calling *Posadas* “unfortunate” and noting that it “comes close to endorsing information manipulation as a tool for government attempts to control behavior”).

<sup>26</sup> See, e.g., Kozinski & Banner, *supra* note 19, at 651-52 (arguing that speech, commercial or not, should be treated as such, and only an important government interest justifies governmental regulation); cf. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 634-35 (1982) (arguing that the distinctions between commercial and other forms of expression are unjustified beyond regulation of false and misleading advertising).

<sup>27</sup> Three cases, *Posadas, Board of Trustees v. Fox*, and *United States v. Edge Broadcasting Co.*, seem to be the high-water mark in terms of the Court’s deference to legislative judgments. In *Fox*, the Court rejected the argument that the government in commercial speech cases had to meet a “least restrictive means” standard. *Bd. of Trs. v. Fox*, 492 U.S. 469, 476-77

number of government-imposed restraints on commercial speech.<sup>28</sup> But the Court's deference was not unbounded. Restraints that swept too broadly or that were imposed for less-than-substantial reasons, such as economic protectionism (e.g., dampening competition for professional services) or paternalistic social engineering (e.g., keeping the public away from disfavored or "sinful" products like alcohol, tobacco, contraceptives, and gambling), were subject to invalidation.<sup>29</sup>

That standard, however, did not endure. The first recalibration of the standard came in 1993 in *Edenfield v. Fane*,<sup>30</sup> where Justice Kennedy, writing for a nearly unanimous Court,<sup>31</sup> gave teeth to *Central Hudson's* third prong, namely the requirement that a regulation of commercial speech must directly serve a governmental interest. In language not before seen in commercial speech cases, the *Edenfield* Court emphasized that it is not enough for the government simply to point to a substantial governmental interest; the government also bears the burden of demonstrating that the restriction furthers the interest "in a direct and material way."<sup>32</sup> The government's burden cannot be met by "mere speculation or conjecture."<sup>33</sup> Rather, the government "must demonstrate that the

(1989). As the Court put it:

What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served" . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.

Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

*Id.* at 480 (citations omitted). As noted earlier, in *Posadas*, the Court accepted without serious question the seemingly strained determination of the Puerto Rican legislature that permitting casino advertising directed at Puerto Rican residents would lead to "the disruption of moral and cultural patterns" and could therefore be banned. *Posadas*, 478 U.S. at 341-42. And in *Edge Broadcasting*, the Court resigned itself to Congress's judgment that it was necessary to ban lottery broadcasting within states that do not sponsor lotteries, even where, as in *Edge Broadcasting*, over ninety percent of the broadcaster's listeners resided in a state that sponsored lotteries. *United States v. Edge Broad. Co.*, 509 U.S. 418, 428-29 (1993).

<sup>28</sup> The cases that fall into this category are *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), *Edge Broadcasting*, *Fox*, *Posadas*, and *Friedman v. Rogers*, 440 U.S. 1 (1979).

<sup>29</sup> See, e.g., *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990) (upholding a lawyer's right to advertise his or her specialty); *Fox*, 492 U.S. 469 (1989) (remanding to determine whether restrictions imposed by the State University of New York on commercial enterprises on campus were overbroad); *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466 (1988) (holding states may not categorically prohibit lawyers from advertising for business by sending out truthful letters); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (partial invalidation of regulation of attorney advertising); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (invalidating regulation of contraceptive advertising); *In re R.M.J.*, 455 U.S. 191 (1982) (striking down regulations on advertising by lawyers).

<sup>30</sup> 507 U.S. 761 (1993).

<sup>31</sup> Only Justice O'Connor dissented. *Id.* at 778 (O'Connor, J., dissenting).

<sup>32</sup> *Id.* at 767.

<sup>33</sup> *Id.* at 770.

harms it recites are real and that its restriction will in fact alleviate them to a material degree.”<sup>34</sup> Without this requirement, the Court stressed, “a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.”<sup>35</sup>

The next modification came in 1996 in *44 Liquormart, Inc. v. Rhode Island*, which drove home the Court’s skepticism about paternalistic and anti-competitive bans on truthful commercial speech, suggesting that they were ripe targets for invalidation.<sup>36</sup> Although the Court unanimously held invalid a Rhode Island law forbidding the advertising of the price of alcohol, the Court devoted fifty pages in U.S. Reports to wrangling over the correct standard of review. The plurality opinion drew a line between cases that should be addressed under *Central Hudson* and cases that should be assessed under a more demanding standard of review. “When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”<sup>37</sup> The opinion quickly added, however, that “when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.”<sup>38</sup> This passage marked the first time at least four Justices expressed a willingness to reconsider the wisdom of *Central Hudson* in cases involving categorical bans on truthful speech.<sup>39</sup>

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<sup>34</sup> *Id.* at 771.

<sup>35</sup> *Id.* Since *Edenfield*, the Supreme Court has ruled in the government’s favor only twice—in *Edge Broadcasting*, a case decided the same Term as *Edenfield*, and in *Florida Bar*, which split the Court 5-to-4. The only other case that might arguably fall into this category is *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997), in which the Court rejected a compelled speech challenge by fruit producers required to pay a fee for mandatory product advertisements because the disputed regulations were found not to implicate free speech rights.

<sup>36</sup> 517 U.S. 484 (1996).

<sup>37</sup> *Id.* at 501 (Stevens, J., along with Kennedy and Ginsburg, JJ.).

<sup>38</sup> *Id.* This point was echoed in Justice Thomas’s concurrence, which explicitly called for overruling *Central Hudson* in cases involving all-out bans on truthful speech. *Id.* at 518-26 (Thomas, J., concurring). Justice Thomas also made the point discussed in the text, namely that the Court’s opinions in *44 Liquormart* made the *Central Hudson* test more demanding. As Justice Thomas put it, “[b]oth Justice Stevens and Justice O’Connor appear to adopt a stricter, more categorical interpretation of the fourth prong of *Central Hudson* than that suggested in some of our other opinions, one that could, as a practical matter, go a long way toward the position I take.” *Id.* at 524 (footnote omitted).

<sup>39</sup> *Id.* at 501-04 (Stevens, J., concurring, along with Kennedy and Ginsburg, JJ.), 518, 526-

The Court's 2001 five-to-four decision in *Lorillard Tobacco Co. v. Reilly*,<sup>40</sup> which invalidated a Massachusetts regulation restricting outdoor advertising of tobacco products to shield impressionable minors, further altered the *Central Hudson* test. A majority of the Justices had found that the regulations satisfied the third part of the *Central Hudson* test by directly and materially advancing Massachusetts's interest in deterring tobacco usage by minors.<sup>41</sup> But a different majority of the Court concluded that the regulations were not sufficiently narrowly tailored to satisfy *Central Hudson*'s fourth prong because the regulations would effectively ban outdoor tobacco advertising in portions of the state's urban areas. This holding is hard to square with the Court's earlier rulings that the fourth prong required only a "reasonable fit" between the regulation and the problem it sought to address and that significant overinclusiveness was not simply tolerated, but expected, in the regulation of commercial speech.<sup>42</sup>

The latest step in the reformulation of the *Central Hudson* test came with the Court's most recent commercial speech decision—its 2002 ruling in *Thompson v. Western States Medical Center*,<sup>43</sup> where the Court five-to-four struck down a federal law authorizing pharmacists to "compound" drugs, but prohibiting pharmacists from advertising that service. The law had been crafted to permit pharmacists to compound specialty drugs needed by a handful of patients and not generally available in the market. But Congress was wary that pharmacies were not equipped to engage safely in the mass compounding of drugs and thus wanted to ensure that

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28 (Thomas, J., concurring). I say "at least" four Justices because Justice Scalia's concurrence is opaque on whether he intended to join this block of Justices in calling for the overhaul of the commercial speech doctrine. See *id.* at 517 (Scalia, J., concurring). <sup>44</sup> *Liquormart* is also notable because it formalized the Court's rejection of the "greater includes the lesser" theory advanced by the majority in *Posadas*, but not followed and largely discredited thereafter. *Id.* at 510-13 (rejecting the notion that a state may regulate commercial speech about a product simply because a state may regulate that product itself).

<sup>40</sup> 533 U.S. 525 (2001).

<sup>41</sup> *Id.* at 555-61.

<sup>42</sup> *Id.* at 561-66; *cf., e.g., Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 633 (1995) (recognizing that in the commercial speech area some degree of over-inclusiveness is acceptable); *United States v. Edge Broad. Co.*, 509 U.S. 418, 432-34 (1993) (same); *Bd. of Trs. v. Fox*, 492 U.S. 469, 479 (1989) (emphasizing that a regulation will be set aside only when it is "substantially excessive, disregarding far less restrictive and more precise means"). Indeed, only two years earlier, in *Greater New Orleans Broadcasting Ass'n v. United States*, the Court relied on *Fox* to describe the requirement of *Central Hudson*'s fourth prong: namely, that the government is not required to use the least restrictive means, but must instead demonstrate "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (quoting *Fox*, 492 U.S. at 480).

<sup>43</sup> 535 U.S. 357 (2002).

pharmacy compounding was limited to special circumstances.<sup>44</sup> In ruling against the FDA, the majority discounted Congress's judgment that public health imperatives justified the advertising restriction, finding that Congress would have to find non-speech means to achieve its objective of limiting compounding activities by pharmacies.<sup>45</sup> Taken together, *Lorillard* and *Western States* mark a sea change in the Court's commercial speech jurisprudence because, in both cases, the Court was willing to place the free speech rights of commercial speakers above public health interests deemed by the Court to be valid and significant.

As is evident, in the span of less than two decades, the Court has markedly transformed the *Central Hudson* test without doing so explicitly. The *Central Hudson* test no longer gives deference to government judgments or upholds restraints on commercial speech as long as they are reasonable and proportionate to the interests served, as it did as recently as a decade ago.<sup>46</sup> The *Central Hudson* test the Court now employs is a demanding one—a standard so rigorous that it results in the virtually automatic invalidation of laws restraining truthful commercial speech.<sup>47</sup> I will call this the “modern” commercial speech doctrine.

But even this “modern” doctrine does not strip the government of all regulatory authority over commercial speech. While the modern doctrine makes it far more difficult for government to ban or strictly regulate commercial speech, it nonetheless retains three central features of the early doctrine: (1) the government may act to restrain but not ban truthful commercial speech where, but only where, there are paramount interests of public welfare hanging in the balance; (2) the government's power to restrain potentially misleading or deceptive speech remains substantial; and (3) the government may suppress outright false commercial speech.<sup>48</sup> There is, for the moment anyway, no constitutional protection for falsehoods in the realm of commercial speech.

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<sup>44</sup> *Id.* at 363-66.

<sup>45</sup> *Id.* at 375-76.

<sup>46</sup> *Fox*, 492 U.S. at 479-80 (emphasizing that *Central Hudson* requires the government to show only that there is a “reasonable fit” between the regulation and the interest it is designed to serve).

<sup>47</sup> See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 375-76 (2002) (stating that a statute regulating expressive rights must directly advance a state interest); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556-62 (2001) (invalidating regulations promulgated by the Massachusetts Attorney General because, although the Court found ample evidence of problems posed by smokeless tobacco and cigars, the regulations were not narrowly tailored to fit the ends of the scheme).

<sup>48</sup> See *Western States*, 535 U.S. at 367 (setting out the test for determining what commercial speech may be suppressed).

That brings us to the second strand of the argument against the commercial speech doctrine, which attacks the *breadth* or the *domain* of the doctrine. Critics contend that the doctrine should be scrapped or limited because, in many cases, there is no meaningful way to differentiate between commercial and noncommercial speech.<sup>49</sup> These critics argue that the test the Court has devised for determining whether speech is commercial—namely, whether it proposes a commercial transaction—is unworkable because often the line between commercial speech on the one hand and artistic, social, and political expression on the other is at best indistinct and at worst illusory.<sup>50</sup> These critics also point out that commercial speech conveys important information, and, for that reason, a less-protective standard of review should not be triggered merely by labeling speech “commercial.” In their view, a more particularized and probing evaluation of the informational content of the communication should precede a determination of the speech’s status. Judge Kozinski and his law clerk Stewart Banner argued in an influential 1990 law review article that the doctrine should be discarded because the definition is too easily manipulated and thus “gives government a powerful weapon to suppress or control speech by classifying it as merely commercial.”<sup>51</sup>

Although this suppression-by-classification criticism of the commercial speech doctrine played out extensively in the academic literature, it went essentially untested because most of the cases before the Court involved classic advertising for goods or services, and thus fell comfortably within the Court’s commercial speech definition. To be sure, there were a few cases in the early 1980s where the Court had to grapple with the definitional question.<sup>52</sup> But those cases rejected arguments that the commercial speech doctrine did not apply to communications made by corpora-

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<sup>49</sup> See, e.g., Kozinski & Banner, *supra* note 19, at 652 (suggesting that the Court should “abandon[] the commercial speech distinction”); Redish, *supra* note 26, at 634 (suggesting that the commercial speech doctrine be limited to “consciously false or misleading assertions about commercial products or services”); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1222-23 (1984) (describing the difficulty the Court has had in trying to define the various forms of speech).

<sup>50</sup> Shiffrin, *supra* note 51, at 1222-23.

<sup>51</sup> Kozinski & Banner, *supra* note 19, at 653.

<sup>52</sup> See, e.g., *Bd. of Trs. v. Fox*, 492 U.S. 469, 473-74 (1989) (holding that the inclusion of noncommercial speech in commercial speech does not automatically render protection to the commercial speech); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-68 (1983) (noting that some of the informational material at issue in the case did not readily fit into the category of commercial speech as the Court had previously defined it but nevertheless holding the pamphlets were commercial speech); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562-64 (1980) (noting that protection afforded commercial speech depends on the nature of the speech and the government’s interest in regulating that speech).

tions about their products to consumers, even where the communications also addressed political and social matters. Over time, the criticism going to the breadth of the commercial speech doctrine died down. That is, until April 1998, when Marc Kasky sued the Nike Corporation for misrepresenting the facts about Nike's treatment of its foreign workforce.

## II. *NIKE V. KASKY*—A NEW FRONT IN THE BATTLE OVER THE COMMERCIAL SPEECH DOCTRINE

*Nike v. Kasky* provided corporations and others intent on expanding constitutional protection for commercial speech an opportunity to open new fronts in their battle against both the substance and the reach of the doctrine. Until *Nike*, it was accepted as orthodox that false statements made in the course of a commercial transaction by a seller of a product or service were not entitled to any constitutional protection. But Nike was unwilling to concede that point because the communications at issue in *Nike v. Kasky* were not conventional advertisements, but were statements about corporate practices aimed at persuading consumers and opinion-makers that Nike is a "good corporate citizen."<sup>53</sup> Rather than arguing for constitutional protection for *false* commercial speech, Nike took the high road and argued that its speech was not "commercial" speech at all, but core speech about an urgent political and social matter.<sup>54</sup> Thus, Nike maintained, even if some of its statements were inaccurate, they were not actionable as a matter of fundamental constitutional law.<sup>55</sup> And even if the statements were actionable, Nike contended, because its speech concerned matters of public importance, liability could be imposed only if the plaintiff could surmount the *New York Times*<sup>56</sup> public figure standard—that is, prove that Nike's statements were made with knowledge of falsity, or with reckless disregard for truth or falsity.<sup>57</sup>

Nike's first argument urged a substantial reformulation of the domain of the commercial speech doctrine. Stripped to its essentials, Nike's contention was that "context" is all-important in assessing whether speech is "commercial."<sup>58</sup> Nike claimed that speech that might be deemed "commercial" when aimed at consumers may not be so characterized if directed towards other audi-

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<sup>53</sup> Brief for the Petitioners at (i), *Nike* (No. 02-575).

<sup>54</sup> *Id.* at 22-30 (describing the errors of the California Supreme Court in holding that Nike's speech was commercial speech).

<sup>55</sup> *Id.* at 44-45.

<sup>56</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>57</sup> Brief for the Petitioners at 44-45, *Nike* (No. 02-575).

<sup>58</sup> *Id.* at 22-26.

ences. Relying on its context-based arguments, Nike contended that statements responding to charges it exploited foreign workers could not be categorized as commercial speech because they were made in press releases, letters to newspaper editors, and letters to athletic directors, rather than in direct-to-consumer ads promoting specific Nike products.<sup>59</sup> Opinion-makers, Nike pointed out, are not consumers, and efforts to persuade them that Nike is a fair-minded corporation is hardly equivalent to hawking the newest “Air Jordans” to consumers for \$100 a pair.<sup>60</sup> Moreover, Nike argued, these statements were speech on an important political and social issue—the treatment of foreign workers by major multinational corporations—and thus they were entitled to the virtually absolute protection the First Amendment gives to core speech.<sup>61</sup> Under Nike’s theory, even if Nike’s statements were inaccurate, the corporation could not be called on to account for them in court.<sup>62</sup> The marketplace of ideas, Nike contended, would sort out truth and falsity, but only if spirited debate could proceed uninhibited by the threat of government intervention.

As a fallback, Nike attacked the substance of the commercial speech test. Nike recognized a serious vulnerability in its argument. Core speech on political and social matters, even if false, may not, except under rare circumstances, be suppressed or regulated by the government.<sup>63</sup> For that reason, Nike’s theory would apply with equal force to deliberate, calculated lies as well as un-

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<sup>59</sup> *Id.* Nike’s context-based argument was not aided by its insistence that Kasky’s case be decided on a motion to dismiss, which provided the Court with little background information with which to judge the parties’ context-based contentions. For his part, Kasky contended that the six allegedly false statements made by Nike appeared in nine separate communications, including “a two-page letter with Nike’s logo from Nike’s Director of Sports Marketing to university presidents and directors of athletics;” postings on Nike’s Web site; a press release; a “33-page illustrated pamphlet;” a “two-page letter with Nike’s logo from Nike’s PR Manager, Europe, to International Restructuring Education Network Europe;” full-page advertisements in leading newspapers (including *The New York Times*, *The Washington Post*, *USA Today*, and *The San Francisco Chronicle*) quoting former U.N. Ambassador Andrew Young, who had conducted an investigation for Nike on its operations abroad, that Nike was “operating morally”; and a “letter to the editor of *The New York Times* from Nike’s Chairman and Chief Executive Officer.” Brief for Respondent at 5-6, *Nike* (No. 02-575). Nike’s brief, on the other hand, described the communications in terms of press accounts, Nike press releases, letters to university administrators, letters to newspaper editors, and advertisements in major newspapers. Brief for the Petitioners at 2, 9-12, *Nike* (No. 02-575).

<sup>60</sup> Brief for the Petitioners at 21, *Nike* (No. 02-575) (arguing that under the California Supreme Court’s decision, Nike’s statements about “labor conditions in its Southeast Asia factories have no more protection under the First Amendment than a supermarket flyer advertising Nike ‘Shox’ shoes for \$69”).

<sup>61</sup> *Id.* at 27.

<sup>62</sup> *Id.*

<sup>63</sup> *See, e.g.*, *Connick v. Myers*, 461 U.S. 138, 145 (1983) (reaffirming the special protection given to speech concerning public issues); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 278-79 & n.19 (1964) (noting that even false statements bear some value in public debate).



intentional falsehoods. Nike would thus be open to the charge that it was asking the Court to give corporations a “right to lie”—an accusation Nike understandably was anxious to avoid. But Nike also did not want its speech held to a negligence standard,<sup>64</sup> because in that case Nike might face a trial that could demonstrate that its statements were indeed false, even if not negligently made.<sup>65</sup>

Nike therefore added a second leg to its argument: it acknowledged that false statements of fact made by a commercial speaker on a matter of political or social importance *could* be actionable, but only if the rigorous “actual malice” standards of *New York Times*<sup>66</sup> were met.<sup>67</sup> According to Nike’s theory, if Nike know-

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<sup>64</sup> Nike argued that the California laws invoked by the plaintiff established a “strict liability” standard by imposing liability for any misstatement of fact Nike may have made, regardless of “fault.” Brief for the Petitioners at 3, 44-45, *Nike* (No. 02-575). By the time the case reached the Supreme Court, however, the California Supreme Court had made clear that a private plaintiff like Kasky, who claimed no individualized harm, could not recover damages or force disgorgement of profits in a case brought under the state’s unfair competition and false advertising laws. See *Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 725 (Cal. 2000). Moreover, Kasky’s amended complaint alleged that Nike’s misstatements were made intentionally and did not claim that liability could be imposed regardless of fault. Brief for Respondent at 6, *Nike* (No. 02-575). Nor does it appear that the California Supreme Court had ever addressed the question of whether the laws at issue permitted liability to be imposed without a showing of fault. For these reasons, it is doubtful that the Court would have adopted Nike’s reading of California law as imposing a strict liability regime; that question is quintessentially one of California law and the United States Supreme Court generally avoids pronouncements on state law questions in the absence of a definitive ruling on the question by a state court of last resort. Cf. *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496 (1941) (stating that federal courts should not intervene except when there is no means to secure a definitive ruling in the state court without constitutional violations).

<sup>65</sup> Of course, under a “strict liability” standard, any falsehood might expose Nike to a judgment. But even a fault-based negligence standard was unacceptable to Nike, both because negligence is a question for a trier-of-fact and thus is determined after a trial (which Nike wanted to avoid) and because Nike may well have negligently made false statements, as one might infer from the fact that Nike settled the case for \$1.5 million. It is also telling that Nike did not invoke California’s anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute, section 425.16 of the California Civil Procedure Code, which applies to actions “arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue.” CAL. CIV. PROC. CODE § 425.16(b)(1) (West Supp. 2004). California’s “anti-SLAPP statute was enacted to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation,” by requiring a libel plaintiff “to demonstrate a probability of prevailing on the challenged claims” prior to discovery. *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1109, 1110 (9th Cir. 2003) (citations omitted). Had Nike been confident that Kasky could not demonstrate that Nike’s statements were false, Nike could have invoked California’s anti-SLAPP law, which, as the Ninth Circuit noted in *Vess*, has been used by many major corporations to bring a swift and inexpensive end to such litigation. *Id.*; see also *DuPont Merck Pharm. Co. v. Superior Court*, 92 Cal. Rptr. 2d 755 (Cal. Ct. App. 2000).

<sup>66</sup> *New York Times* announced the rule that a “public official” is barred “from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The rule has been extended to “public figures” who are “involved in issues in which the public has a justified and important interest.” *Curtis Publ’g Co. v. Butts*, 388 U.S.

ingly lied or recklessly made an assertion of fact that was untrue and an individual reasonably relied on that assertion to her detriment, then such a falsehood might be actionable.<sup>68</sup> Nike's submissions provided no hint as to how such a case might arise or how a plaintiff would have sufficient knowledge of Nike's state of mind to meet the demanding pleading and proof requirements in an actual malice case. But Nike used this concession to contest any claim that it was seeking a license to lie to the public.<sup>69</sup>

Although no court had ever applied the *New York Times* test in a traditional commercial speech case, Nike presented a sophisticated justification for giving its speech the highest degree of First Amendment protection. Nike argued that the commercial speech doctrine rendered the playing field between Nike and its critics uneven.<sup>70</sup> While Nike could be held liable for misstatements of fact that were made in error, its critics could be sanctioned for making unfounded allegations about Nike only if Nike, plainly a "public figure," could overcome the rigorous *New York Times* standard. This asymmetry, Nike noted, would apply even though the statements addressed the same issue of political and social concern, albeit from opposite perspectives.<sup>71</sup> Nike argued that the First Amendment prohibited the government from playing favorites in dispensing free speech rights, and emphasized the unfairness of a legal regime that subjected participants in the same debate to two wholly different standards of liability in the event they misstated facts relevant to their arguments.<sup>72</sup>

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130, 134 (1967). The Court, however, has construed the "public figure" category narrowly. See, e.g., *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979) (holding that petitioner was not a "public figure" merely because he was involved with a matter that drew public attention); *Hutchinson v. Proxmire*, 443 U.S. 111, 134 (1979) (holding that a research behavioral scientist was not a "public figure" because he did not occupy a special role of prominence or power). Large corporations generally qualify as "public figures." See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (holding that a credit reporting agency was not liable where false statements were not a matter of public concern).

<sup>67</sup> Brief for the Petitioners at 44-45, *Nike* (No. 02-575) (arguing that some amount of error in speech is inevitable and protection must be given to that error).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 40-42.

<sup>72</sup> *Id.* Many of Nike's corporate amici made the same point. The brief submitted by the National Association of Manufacturers, for example, stated that the thesis of this brief is that, when a manufacturer is responding to a public attack on its product or the product is otherwise the focus of public debate or controversy, the manufacturer's statements are due the same full First Amendment protection as those of its critics. The reduced protections afforded to commercial speech are insufficient to prevent the substantial chilling of useful speech by manufacturers that would, if not inhibited, inform and enrich the public debate.

Brief for the National Association of Manufacturers as Amicus Curiae in Support of Petitioners at 2, *Nike* (No. 02-575); see also *id.* at 12 ("[A] double standard of constitutional protection

Not surprisingly, Kasky and his supporters saw *Nike v. Kasky* as a garden-variety commercial speech case. From their standpoint, the issue in *Nike* was whether the First Amendment protects a company's false statements about its products made to stimulate sales and likely to matter greatly to some consumers in their purchasing decisions.<sup>73</sup> The answer to that question was, in their view, plainly, "No." Kasky and his amici dismissed Nike's contention that the speech at issue was political speech intended to influence policy, not commercial speech, on two grounds.

To begin with, Kasky and his supporters argued that the facts refuted Nike's claim that it was seeking to influence policymakers and not consumer purchasing decisions. They pointed out that many of Nike's communications were sent to present and former customers—college and university administrators and athletic directors—and to newspapers, at times in the form of paid advertisements, for the purpose of maintaining and increasing sales.<sup>74</sup>

As to the substance of the communications, Kasky and his supporters took aim at Nike's effort to draw a line between statements about price, safety, and "the essential functions" of a product that Nike admitted constituted commercial speech and statements about political and social issues that Nike claimed were core speech. That line, Kasky argued, was wholly subjective and at odds with factors that actually influence consumer purchasing decisions.<sup>75</sup> For many of Nike's customers, Nike's treatment of its foreign labor force is as or more important than price, appearance, durability, or other features or characteristics of Nike's products—

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would necessarily give a significant advantage to one side of a public debate, a constitutionally impermissible result."); *see also, e.g.*, Brief of the Business Roundtable as Amicus Curiae in Support of Petitioners at 2, *Nike* (No. 02-575) (arguing that providing protection to only one side in a debate decreases the value of the debate); Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Petitioners at 16-17, *Nike* (No. 02-575) (arguing against a rule that discriminates based on the speaker's identity); Brief of ExxonMobil, Microsoft, Morgan Stanley, and GlaxoSmithKline as Amici Curiae in Support of Petitioners at 13-14, *Nike* (2003) (No. 02-575) (arguing that a speaker on one side may not be discriminated against by government regulation).

<sup>73</sup> Brief for Respondent at (i), *Nike* (No. 02-575) (stating as the issue whether Nike's speech is commercial and subject to laws governing false commercial speech); *see also* Brief of Amici Curiae State of California et al. in Support of Respondent at 2, *Nike* (No. 02-575) (describing the complaint as alleging "that Nike engaged in a publicity campaign asserting objectively verifiable false facts to mislead consumers about Nike's labor practices in order to assuage consumer concerns and promote the sale of Nike products"); Brief of Amicus Curiae Public Citizen at (i), *Nike* (No. 02-575) (reformulating the question presented, "more properly stated," as "Does the First Amendment immunize a company from a lawsuit alleging that the company made specific false factual representations, as part of a campaign to persuade consumers that its labor practices were lawful and proper, merely because those practices are also the subject of public controversy?").

<sup>74</sup> Brief for Respondent at 3-5, 29-36, *Nike* (No. 02-575).

<sup>75</sup> *Id.* at 33-36.

a point underscored by the fact that Nike's public relations campaign was an effort to reverse the tide of consumer defections made in protest of Nike's foreign labor practices.<sup>76</sup>

Kasky and his amici also contended that Nike's argument was beside the point because Nike did not simply engage in an academic debate about the impact of globalization on developing countries, but had instead made specific assertions of objective and verifiable facts about its labor practices, and Nike could be held accountable if its factual assertions were false.<sup>77</sup> After all, Nike had asserted *as a matter of fact* that it paid workers in subcontracted factories "double" the minimum wage, complied with all applicable worker health and safety and environmental standards, and provided workers with free meals and health care.<sup>78</sup> Kasky and his supporters also dismissed Nike's contention that consumer concerns about such matters were just "moral judgments that only indirectly affect consumer behavior" or influence purchasing decisions "only secondarily, if at all."<sup>79</sup> They pointed out that many product attributes that could be characterized in moral or political terms are crucial in purchasing decisions. For example, just like sneaker customers who will vote with their dollars against Nike if they believe that Nike exploits its workers, many consumers will seek to buy only tuna caught in a dolphin-safe manner, or to purchase only clothing bearing a union or "Made in the USA" label, because those labels signify respect for and compliance with labor-friendly wage and worker-protection laws.<sup>80</sup> Yet, Kasky argued, under Nike's theory, sellers could make false claims about these characteristics but nonetheless escape liability by characterizing

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<sup>76</sup> *Id.*; see also Amicus Curiae Brief in Support of Respondent by Members of the United States Congress at 2, 10-14, *Nike* (No. 02-575) (noting that moral concerns may be more important than price in a wide variety of contexts).

<sup>77</sup> Brief for Respondent at 37-38, *Nike* (No. 02-575) (arguing that motivation for Nike's speech was not social issues but rather to increase sales and profits).

<sup>78</sup> See *supra* note 2.

<sup>79</sup> Brief for the Petitioners at 19, 36, *Nike* (No. 02-575).

<sup>80</sup> Brief for Respondent at 37-41, 44-46, *Nike* (No. 02-575) (arguing that even though Nike claims the purpose of the speech was not economically motivated, some consumers rely on such speech to make economic decisions); Brief of Amici Curiae State of California et al. in Support of Respondent at 7-9, *Nike* (No. 02-575) (claiming that Nike's speech on social issues is a tool for generating sales); Amicus Curiae Brief in Support of Respondent by Members of the United States Congress at 2, 10-14, *Nike* (No. 02-575) (claiming that Nike is wrong to believe that social concerns are less important to consumers than price); see also Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,756, 63,767-71 (Dec. 2, 1997) (Federal Trade Commission policy that products bearing "Made in USA" must in fact have been made in the United States); Su-Ping Lu, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT'L L. 603, 624 (2000) (noting that the "human rights practices" of a manufacturer are undoubtedly part of consumers' decisions).

their statements as “core” speech about matters of social and political importance.<sup>81</sup>

*Nike v. Kasky* thus presented the Court with a provocative, sweeping critique of the commercial speech doctrine. It is no surprise that the Court thought that *Nike* might help clarify and make more coherent a doctrine that had long frustrated the Court. But with *Nike*’s dismissal and settlement, that reconsideration will have to await another case and another day.

### III. LESSONS FROM *NIKE V. KASKY*

The remainder of this Article explores the implications of the Court’s non-ruling in *Nike v. Kasky* and anticipates the likely fate of the commercial speech doctrine once the next *Nike* case comes along. It is, of course, hazardous to base predictions on a case undecided. Nonetheless, among the many arguments rehearsed before the Court in *Nike*, three lessons clearly emerge.

#### A. Lesson Number One: There Is No Credible Argument That the Commercial Speech Doctrine Gives Government a “Powerful Weapon of Suppression”

Despite the impassioned rhetoric of Nike and other critics of the commercial speech doctrine, the doctrine is no longer a powerful weapon of suppression in the hands of government,<sup>82</sup> if indeed it ever was such a weapon after the Court’s declaration in *Virginia State Board of Pharmacy* that commercial speech is entitled to First Amendment protection. Certainly the statistics do not bear out the critics’ claim. In the twenty-eight years since *Virginia State Board of Pharmacy*, the Court has decided two dozen commercial speech cases.<sup>83</sup> In only five cases has the Court upheld a

<sup>81</sup> Brief for Respondent at 37-41, 44-46, *Nike* (No. 02-575).

<sup>82</sup> Kozinski & Banner, *supra* note 19, at 653.

<sup>83</sup> Of course, the exact tally depends on what is counted. The core commercial speech cases include the following: *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bates v. State Bar*, 433 U.S. 350 (1977); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978); *Friedman v. Rogers*, 440 U.S. 1 (1979); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980); *In re R.M.J.*, 455 U.S. 191 (1982); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986); *Shapiro v. Kentucky Bar Ass’n*, 486 U.S. 466 (1988); *Board of Trustees v. Fox*, 492 U.S. 469 (1989); *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990); *Edenfield v. Fane*, 507 U.S. 761 (1993); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993); *Ibanez v. Florida Department of Business and Professional Regulation*, 512 U.S. 136 (1994); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173 (1999); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Thompson v. Western*

restraint on commercial speech, and there is reason to doubt that the Court today would rule the same way in at least three of those cases.<sup>84</sup> The Court has not upheld a single restraint in the past decade.<sup>85</sup> Although the Court retains the shell of the intermediate scrutiny/*Central Hudson* test, critics have already won the first battle of the commercial speech war, because the *Central Hudson* test that the Court actually applies routinely results in the invalidation of restraints on truthful commercial speech.<sup>86</sup>

As originally conceived, the commercial speech doctrine was an attempt by the Court to reconcile two competing interests. On the one hand, the Court wanted to increase the flow of accurate commercial information to consumers about the goods and services they purchase. This goal of listener empowerment or autonomy, the Court thought, was compatible with one well-settled First Amendment theory—namely, that the First Amendment was intended to promote the flow of information to citizens about important matters to enable them to make better choices.<sup>87</sup> For the ordi-

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*States Medical Center*, 535 U.S. 357 (2002). Some might add a few other decisions, including those addressing billboards and news racks. *Compare* *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981) (upholding city's ban on commercial billboards but striking it down with regard to noncommercial billboards), *with* *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993) (invalidating ordinance that prohibited use of news racks for "commercial handbills" but not newspapers). Additionally, there are those cases dealing with claims of compelled commercial speech. *Compare* *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 473 (1997) (finding no compelled speech violation for fruit growers forced to help pay for government-sponsored advertisements), *with* *United States v. United Foods*, 533 U.S. 405, 415-16 (2001) (finding compelled speech violation for mushroom growers forced to help pay for government-sponsored advertisements). *See also* *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 544 (1980) (finding compelled speech violation for rule prohibiting utilities from including bill inserts discussing controversial issues).

<sup>84</sup> The Court upheld restraints in *Ohralik*, *Friedman*, *Posadas*, *Edge Broadcasting*, and *Florida Bar*, and it might reach the same result were *Florida Bar* and *Ohralik* heard today. On the change of heart side of the ledger, it is hard to see how, in light of its more recent ruling in *Greater New Orleans Broadcasting Ass'n*, the Court would uphold today the restraints sustained in *Edge Broadcasting* and *Posadas*. The Court in *44 Liquormart* explicitly casts doubt on the validity of *Posadas*. And the Court's ruling in *Greater New Orleans Broadcasting Ass'n* is at odds with *Edge Broadcasting*. It is also unlikely that the Court would reach the same result in *Friedman*, especially in light of its rulings in *Ibanez*, *Peel*, and *In re R.M.J.* While the Court might rule the same way in *Ohralik* and *Florida Bar*, even those decisions would be open to question. The Court in *Edenfield* was careful to limit *Ohralik*'s reach to direct, in-person solicitation by lawyers, and the Court split five-to-four in *Florida Bar*, suggesting that even that ruling might be subject to reconsideration. Indeed, in light of *Western States*, the Court might well require the *Florida Bar* to use non-speech-limiting means to ensure that lawyers do not disturb the privacy of recent accident victims and their families.

<sup>85</sup> The Court's 1994 decision in *Florida Bar* marked the last time that Court upheld a restraint on commercial speech.

<sup>86</sup> Even the Court acknowledges the transformation of the *Central Hudson* test. The Court explained in *Western States* that, although parties had questioned whether the *Central Hudson* test should apply, "there is no need in this case to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision." *Western States*, 535 U.S. at 368 (citation omitted).

<sup>87</sup> According to the Court, because commercial speech is

nary person, the Court thought, finding out about low-price pharmaceuticals might be every bit as important as learning the day's latest news on the most pressing social and political matters.<sup>88</sup> While the Court was unwilling to equate speech about commercial matters with core political speech, and therefore gave commercial speech a "subordinate" place in the First Amendment hierarchy, the Court was ready to break with prior precedent and afford commercial speech a fair measure of First Amendment protection.

On the other hand, the Court understood that the marketplace had historically been rife with half-truths and falsehoods and that, absent strong measures, the government could not effectively police the marketplace. The Court did not want to pull back the regulatory throttle too far and risk opening a Pandora's Box of false, misleading, and deceptive speech that might inflict more harm than good on consumers. As a result, the Court fashioned a test that gave commercial speech a measure of First Amendment protection, but left intact substantial governmental authority to impose speech restraints—even on truthful speech—when necessary to serve important governmental interests. As originally conceived, the *Central Hudson* test was a reasonable accommodation of those interests. It said, in essence, that the government could restrain commercial speech if, but only if, the government could show that the restraint addressed a real problem and did so in a reasonable way. The regulation had to be commensurate with the problem it was imposed to solve, but the precision that is the touchstone of most First Amendment regulation was not required.<sup>89</sup>

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indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Va. State Bd. of Pharmacy, 425 U.S. at 765 (footnotes omitted). As support for this theory, the Court cited ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) and *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270 (1964). *Id.* at 765 n.19. The theory that listener autonomy is the central value advanced by protection of commercial speech was first set out, with considerable prescience, in Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 433, 441-44 (1971); see also Neuborne, *supra* note 25, at 16 (asserting that there is a certain level of tolerance even for false speech because society is skeptical of the government's ability to control properly the flow of ideas in speech); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 49, 53-54 (2000) (noting that commercial speech is protected to facilitate a free flow of ideas); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 356-57 (1991) (suggesting that false statements may do more to inhibit autonomy than restricting speech).

<sup>88</sup> *Western States*, 535 U.S. at 373; *Va. State Bd. of Pharmacy*, 425 U.S. at 763.

<sup>89</sup> When one examines the early cases closely, the lopsided results are not surprising for at least two reasons, which may be related. First, with few exceptions, the early commercial speech cases were aimed at state laws that were designed either to stifle competition for professional services or to engage in puritanical social engineering by discouraging consumers from

By the mid-1990s, the Court had begun to ratchet up the standard of review considerably, and the caution that marked the Court's early commercial speech cases began to disappear.<sup>90</sup> This doctrinal shift was not necessitated by difficult cases. Indeed, the shift came first in Justice Kennedy's opinion for the Court in *Edenfield*, with only Justice O'Connor dissenting, and then in *44 Liquormart*, where the Court was unanimous as to disposition but splintered as to rationale.

This turn of events raises an obvious question: Why did the Court focus on the standard of review in two cases where the standard had no discernable influence on the cases' outcomes?

One possible reason is that by the mid-1990s the Court had engaged in an unstated, but seismic, shift in the rationale supporting the commercial speech doctrine. Remarkably absent from the early cases is any discussion of the expressive rights of the commercial speaker. The speakers' rights, if any, were not part of the Court's calculus in deciding that commercial speech merited constitutional protection.<sup>91</sup> The Court instead focused on the rights of

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getting their hands on "sinful" products, such as alcohol, tobacco or contraceptives or wasting money on gambling. The Court was unwilling to sustain restraints on speech for such flimsy and paternalistic reasons. Second, most of these cases dealt with antiquated statutes and regulations that long pre-dated *Virginia State Board of Pharmacy* and had been drafted at a time when government had free rein in economic regulation. See, e.g., *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955) (deferring to the legislature as having the power to control speech of certain groups with the remedy being the power of the affected groups to exercise their right to vote). By and large, these restraints were not merely insensitive to First Amendment considerations, they were oblivious to them. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489-90 (1996) (pointing out that the statute's constitutionality had been upheld by the Rhode Island Supreme Court in *S & S Liquor Mart v. Pastore*, 497 A.2d 729, 730 (R.I. 1985), where the Court traced the law back to 1956, if not earlier); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 480-81 (1995) (pointing out that the statute at issue there was passed shortly after the ratification of the Twenty-First Amendment, which took place in 1933); *Edenfield v. Fane*, 507 U.S. 761, 769-73 (1993) (pointing out that all but three states had abandoned regulating in-person solicitation of certified public accountants); see also Brief for Respondent at 16-17, *Edenfield* (No. 91-1594) (noting that the Florida Rule at issue was based on the "anti-poaching" provision of the 1917 Code of Professional Ethics of the American Association of Public Accountants, which provided that "[n]o member shall directly or indirectly solicit nor encroach upon the business of another member . . ."). It was not until *Florida Bar, Lorillard*, and *Western States* that the Court began to confront modern statutes and regulations that were enacted with an eye towards constitutional review.

<sup>90</sup> Indeed, the Court itself recognized in the early commercial speech cases that it must "act with caution" in moving into "this as yet uncharted area." *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979).

<sup>91</sup> One striking example of this point is the Court's opinion in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). *Bates* was brought by the Arizona State Bar as an enforcement action against two lawyers, John R. Bates and Van O'Steen, who were alleged to have violated Arizona's disciplinary rules by publishing an advertisement offering to handle legal services for "very reasonable fees." *Id.* at 354. Although Bates and O'Steen were parties to the suit, the Court barely acknowledged their interest in the matter, or their interest in communicating information about their practice to prospective clients. All the Court wrote about their interests was that, "[e]ven though the speaker's interest is largely economic, the Court has protected such speech in certain contexts." *Id.* at 364. By way of contrast, the Court then emphasized that the



the listener/consumer and the importance of the free flow of commercial information to better inform consumer choice. Listener autonomy—not the interests of the commercial speaker—was the theory driving these cases.<sup>92</sup> Where the Court perceived a risk to consumers (as it did in *Ohralik*, *Posadas* and *Florida Bar*), it was willing to uphold broad speech restraints even when they suppressed truthful and non-deceptive speech.<sup>93</sup> In this vein, it is hardly a coincidence that the first successful commercial speech case, *Virginia State Board of Pharmacy*, was brought by consumers interested in purchasing low-cost drugs, not pharmacists seeking to engage in price advertising. Indeed, a case brought by pharmacists challenging on due process grounds the same Virginia statute at issue in *Board of Pharmacy* had failed only a few years earlier.<sup>94</sup>

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listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.

*Id.* (citations omitted); see also Neuborne, *supra* note 25, at 31-32 (observing that in *Bates*, “the Court explicitly recognized the hearer-centered nature of its emerging commercial speech jurisprudence, and it . . . [made] clear that, unlike traditional speaker-centered settings, commercial speech cannot claim free speech protection if it impedes consumer choice” (footnotes omitted)).

<sup>92</sup> In none of the commercial speech cases prior to *Edenfield* and *44 Liquormart* did the Court advert to or otherwise invoke the seller's “right” of self-expression. This may be a reflection of the Court's apprehension about ascribing a First Amendment “right” of self-expression to sellers, who are mainly inanimate corporate entities—an apprehension that is played out in the Court's five-to-four ruling in *First National Bank v. Bellotti*, 435 U.S. 765, 779-80 (1978) (holding that corporations have First Amendment rights but reserving the question of whether those rights are coextensive with those of natural persons), replayed in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 530 (1980) (invalidating a rule prohibiting public utilities from including in their monthly bills inserts discussing controversial issues), and most recently revisited in *McConnell v. Federal Election Commission*, 124 S. Ct. 619, 644-45 (2003) (reaffirming prior rulings upholding strict prohibition on the use of corporate monies to finance candidate elections). Professor Baker's contribution to this Symposium powerfully lays out the theoretical problems in shifting to a rationale for First Amendment protection of commercial speech that depends on safeguarding the expressive rights of corporate speakers. C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161 (2004).

<sup>93</sup> As the Court often repeated, the goal of the doctrine was to ensure that commercial information flows “cleanly as well as freely.” See, e.g., *Edenfield*, 507 U.S. at 768; *In re R.M.J.*, 455 U.S. 191, 201 n.12 (1982); *Va. State Bd.*, 425 U.S. at 771-72.

<sup>94</sup> *Patterson Drug Co. v. Kingery*, 305 F. Supp. 821 (W.D. Va. 1969) (three-judge court) (holding that a statutory provision forbidding advertising drug prices was valid as not intruding on free speech). As the *Virginia State Board of Pharmacy* Court noted, the difference in plaintiffs was of crucial importance to the way the lower court viewed the case (and perhaps the way the Supreme Court itself viewed the case):

The District Court seized on the identity of the plaintiff-appellees as consumers as a feature distinguishing the present case from *Patterson Drug Co. v. Kingery*, *supra*.

By the time the Court decided *Edenfield* and *44 Liquormart*, it was ready to embrace a broader justification for protecting truthful commercial speech. The Court's new approach is based at least in part on a First Amendment theory that focuses on the rights of self-expression of the commercial actor. This new focus can be seen clearly in *Edenfield*, where the Court held as unconstitutional Florida's all-out ban on in-person solicitation by certified public accountants, not just because the ban impeded the flow of information to the accountant's prospective customers, but also because it interfered with an accountant's First Amendment right to meet with and discuss his services with potential clients.<sup>95</sup> The same concern is evident in the Court's debate in *44 Liquormart*. Although the Court did not hold that *Central Hudson* no longer applies in that circumstance, the message delivered in *44 Liquormart* is that broad restraints on truthful speech bear a heavy presumption of invalidity, not just because they deprive consumers of information, but also because they muzzle commercial speakers who have a First Amendment right to convey truthful information to willing listeners.

The Court's recent decisions in *Lorillard* and *Western States* underscore just how dramatic the shift has been. At the core of each case was the Court's concern for the expressive rights of the commercial speaker. In *Lorillard*, the Court was ultimately swayed by the argument that the Massachusetts ordinance would cripple the tobacco industry's ability to communicate its messages to adults in many urban areas of the state. In *Western States*, the Court was persuaded that if pharmacists were to be granted the right to engage in drug compounding, the government could not require them to forego advertising simply because some pharmacists might abuse the privilege: Nonspeech means would have to be used to address the objective of limiting the compounding activities of pharmacists. In both cases, the Court gave serious consideration to the speakers' rights of self-expression and found that they outweighed the consumer protection goals of the restraints. Had these cases been presented to the Court a decade earlier—when the *Central Hudson* test paid deference to governmental judgments and looked for a “reasonable,” not near-perfect, fit be-

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Because the unsuccessful plaintiffs in that earlier case were pharmacists, the court said, “theirs was a prima facie commercial approach.” . . . The present plaintiffs, on the other hand, were asserting an interest in their own health that was “fundamentally deeper than a trade consideration.”

*Va. State Bd.*, 425 U.S. at 754-55 (quoting *Va. Citizens Consumers Council, Inc. v. Va. State Bd. of Pharmacy*, 373 F. Supp. 683, 686 (E.D. Va. 1974) (three-judge court)).

<sup>95</sup> *Edenfield*, 507 U.S. at 766-69.

tween the government's objective and the measure imposed—the restraints would likely have been upheld.

This doctrinal shift may auger well for Nike and its corporate supporters, because Nike's core argument was based on its right of self-expression. Nike took every opportunity to drive home the point that it had an equal right to be heard in the debate over its treatment of foreign workers and that cases like *Kasky*'s chilled Nike's ability to participate fully in that debate.<sup>96</sup> Nike's argument seems to have persuaded Justice Breyer and Justice O'Connor—two critical votes on the Court—who made it clear in their *Nike* dissent that if a *Nike*-like case were to return to the Court, they would “apply a form of heightened scrutiny to the speech regulations in question” and strike them down.<sup>97</sup>

*B. Lesson Number Two: Applicability of New York Times v. Sullivan Protection May Be the Next Commercial Speech Battleground*

Although many of the arguments in *Nike v. Kasky* had been presented to the Court in earlier cases, Nike raised one argument that was entirely novel—that it was entitled to full *New York Times* protection for speech responding to charges that it mistreated its foreign workers. Never before had a commercial speaker argued to the Supreme Court that *New York Times* shielded it from a government-imposed sanction for making a false statement of fact.

On one level, Nike's argument has appeal. No speaker, commercial or otherwise, should be handcuffed in a public debate about a matter of undeniable social and political importance. Nor does it seem fair, as Nike hammered home, that opposing sides should be subject to different liability standards if they misstate

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<sup>96</sup> The word “debate” has many connotations. Nike's submissions framed the question before the Court in terms of statements made “[w]hen a corporation participates in a public debate . . . .” Brief for the Petitioners at (i), *Nike* (No. 02-575). The imagery used in Nike's briefs makes it appear that Nike's statements were uttered in the heat of battle, with little time for reflection or attention to detail. See, e.g., *id.* at 39-40 (arguing that companies will be “invariably hesitant to react when called on, as Nike has been here, to make on-the-spot responses to accusations” if they must first “verify all the facts” or risk being held liable). Were Nike's statements actually made in the heat of battle, Nike's defense might be on firmer footing, because a trier of fact would be hard pressed to find fault with a speaker who misspoke in the midst of a debate that demanded an immediate response. See generally Brief of Amicus Curiae Pfizer Inc. in Support of Petitioners at 18-24, *Nike* (No. 02-575) (arguing that the Court should constitutionalize a corporation's response to criticisms on matters of public importance under a “Right to Reply” theory). But the record in the case, although sparse, does not bear out Nike's characterization. At least according to the plaintiff's allegations, which were not controverted by Nike because the case did not proceed beyond the motion to dismiss stage, Nike's statements were not made in the spur of the moment without an opportunity for reflection and fact-checking. Rather, they were part of a carefully orchestrated media campaign designed to promote Nike as a labor-friendly, responsible company and to counter contrary arguments made by Nike's critics. Brief for Respondent at 5-6, 37, *Nike* (No. 02-575).

<sup>97</sup> *Nike*, 123 S. Ct. at 2560, 2565 (Breyer, J., dissenting).

facts during the course of a public debate. The way to level the playing field, Nike contended, was to give all combatants the full constitutional protection reflected in the *New York Times* actual malice standard. By following Nike's approach, the government would let the marketplace of ideas sort out truth and falsity.<sup>98</sup> Nike's argument on this score sparked enormous interest within the business community and was echoed throughout the amici briefs filed in support of Nike.<sup>99</sup> The argument is thus certain to soon be replayed in court.

There are many reasons to doubt that courts will accept Nike's argument and engraft libel law concepts as a limit on the commercial speech doctrine. Most problematic is that under Nike's approach, many false statements of fact made by sellers on matters that could even arguably touch on important social or political issues would generally be beyond the reach of regulators. According to Nike's theory, its statements that it pays its workers double the minimum wage and provides them free meals and health care could be the subject of litigation only if a plaintiff relied on Nike's misstatement in purchasing a Nike product and had sufficient knowledge of Nike's state of mind to allege that Nike knew or should have known that its statements were false when they were made.<sup>100</sup> But because Nike, not its critics, has superior access to the facts—a point repeatedly touted by Nike—it would be the rare case where a plaintiff could actually plead and prove a case against Nike. There is no doubt that this is why Nike argued for such a formidable standard.<sup>101</sup>

Unless the Court is willing to make a clean break from past precedent, it will not permit commercial speakers to escape accountability for false statements when they are made even in part

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<sup>98</sup> Brief for the Petitioners at 44-45, *Nike* (No. 02-575).

<sup>99</sup> See *supra* note 74.

<sup>100</sup> Nike discounted the idea that consumers place stock in what Nike characterized as "moral judgments that only indirectly affect consumer behavior" or influence purchasing decisions only "secondarily, if at all," suggesting that reasonable consumers would not generally rely on Nike representations about its treatment of its workers in deciding to purchase a Nike product. Brief for the Petitioners at 19, 22, 36, *Nike* (No. 02-575).

<sup>101</sup> Any plaintiff, even one who had relied on Nike's statements in purchasing Nike products, would have a difficult time bringing a *Nike*-like case under an actual malice standard. Actual malice turns on the defendant's state of knowledge—what the defendant knew or should have known about a statement's accuracy. Only a plaintiff with access to the facts equal or superior to that of the defendant is typically in a position to make these allegations. A libel plaintiff is likely to be in that position because of her superior knowledge of the facts, but not a false advertising plaintiff like Marc Kasky, a point recognized by Nike's supporters. See Brief for the National Association of Manufacturers as Amicus Curiae in Support of Petitioners at 11, *Nike* (No. 02-575) ("[B]ecause of its special incentives and resources, the manufacturer or producer will possess knowledge about the qualities of its products that no other participant in the debate is in a position to provide.").

to influence consumer purchasing decisions. The Court has long recognized that “there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”<sup>102</sup>

This general point takes on special force where commercial speech is concerned. Commercial speech warrants protection only where it enables consumers to make “intelligent and well informed” decisions<sup>103</sup>—a value subverted by false information. For this reason, the one thread that ties together all of the Court’s commercial speech cases, from *Virginia State Board of Pharmacy* to the Court’s most recent decision in *Western States*, is the Court’s hostility to false commercial speech. As Justice Stewart put it in his concurring opinion, “the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking.”<sup>104</sup> “[L]eeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.”<sup>105</sup> Although the Court has expressed misgivings about the *Central Hudson* test with regard to restraints on *truthful* commercial speech, it has never expressed any interest in providing a greater shield to safeguard *false or misleading* commercial speech. Thus, to the extent that Nike’s *New York Times* argument is seen as a way for commercial speakers to avoid accountability for making false or misleading statements of fact, that argument is unlikely to fare well in the Court.

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<sup>102</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); see also *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (“[Falsehoods] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”).

<sup>103</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (“Purely factual matter of public interest may claim [First Amendment] protection.”).

<sup>104</sup> *Id.* at 781 (Stewart, J., concurring).

<sup>105</sup> *Bates v. State Bar*, 433 U.S. 350, 383 (1977). Similar statements abound in the Court’s cases. See, e.g., *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring) (“The evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explain why we tolerate more governmental regulation of this speech than of most other speech.”); see also *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) (false and misleading speech “is not protected by the First Amendment”); *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980) (“The First Amendment’s concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.” (citation omitted)).

Moreover, when examined closely, Nike's justifications for extending *New York Times* protection to its speech fall apart. Contrary to Nike's suggestion, the *New York Times* standard was not intended to level the playing field between powerful institutions and their critics, let alone to equalize the liability standards between the powerful and everyone else. Indeed, Nike's argument stands the rationale for *New York Times* on its head. The Court forged the *New York Times* standard to empower ordinary members of the public, who do not have ready access to the press or deep pockets to gain access to the media, to engage and criticize public officials, public figures, and powerful institutions, like the Nike Corporation. The Court assumed that the rich and powerful have ample means to make sure their voices are heard.<sup>106</sup> But the First Amendment was not intended to be the exclusive preserve of the rich and powerful. For ordinary individuals and small, thinly capitalized organizations, the Court thought, the threat of ruinous libel litigation and possibly a bankrupting judgment would silence all but the most resolute critics, since even a single misstatement of fact might bring disaster.<sup>107</sup> The *New York Times* standard was developed to protect the otherwise disenfranchised so that they could be full participants in the "uninhibited, robust, and wide-open" debate that lies at the heart of the First Amendment.<sup>108</sup> Nike's theory destabilizes the equilibrium brought about by *New York Times* and cuts *New York Times* loose from its moorings by transforming it from a shield for the "little guy" to enable him to criticize the powerful into a shield for the powerful, all in the name of equality.

Nor are the concerns that animated the Court in *New York Times* present in the commercial speech context. *New York Times* was prompted, at least in part, by the recognition that "erroneous statement[s] of fact" are "inevitable in free debate" over political and social matters.<sup>109</sup> But misstatements of fact are hardly inevitable when a corporation is making factual representations about its own products and the conditions under which they are made. Nike "knows more . . . than anyone else" about whether its products are

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<sup>106</sup> *Gertz*, 418 U.S. at 344 ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.").

<sup>107</sup> *N.Y. Times*, 376 U.S. at 279 ("[W]ould-be critics . . . may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.").

<sup>108</sup> *See id.* at 269-70 (noting that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))).

<sup>109</sup> *Gertz*, 418 U.S. at 340.

manufactured in compliance with wage and hour and health and safety laws; its statements on those matters should be “easily verifiable.”<sup>110</sup> The corollary to this point is that Nike is also in the best position to judge the *limits* of its speakers’ knowledge about Nike’s global operations and to act accordingly, either by refraining from speaking when Nike does not have possession of the relevant facts or by stating whatever qualifications are needed to ensure accuracy. It is hardly unreasonable to hold Nike to a high standard of accuracy when it is making statements about facts uniquely within its possession.

For another thing, Nike is neither the defenseless victim it portrays itself to be, nor is the playing field as uneven as Nike suggests. Not only does Nike, a company worth \$20 billion,<sup>111</sup> have ample resources to ensure that its voice is heard, but Nike also has powerful weapons at its disposal should one of its critics make a false statement about Nike or its products that injures Nike. California, like every other state, permits corporations to bring actions for defamation and product disparagement.<sup>112</sup> Whether Nike or any other corporation needs to prove actual malice or simple negligence depends not on the status of its critics, but on whether the corporation is a “public figure” and whether the statements are of “public concern.”<sup>113</sup> But even if a corporation is held to the highest standards, the threat of protracted litigation by a giant like Nike strikes fear in the heart of every one of Nike’s potential crit-

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<sup>110</sup> Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 n.24 (1976). Justice Stewart made the same point in his concurrence:

The principles recognized in the libel decisions suggest that the government may take broader action to protect the public from injury produced by false or deceptive price or product advertising than from harm caused by defamation. In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser’s access to the truth about his product . . . substantially eliminates any danger that governmental regulation . . . will chill accurate and nondeceptive commercial expression. There is, therefore, little need to sanction some falsehood in order to protect speech that matters.

*Id.* at 777-78 (Stewart, J., concurring) (citation omitted).

<sup>111</sup> See Yahoo/Finance, Quotes & Info, Nike Inc. (NKE) <http://finance.yahoo.com/q?s=NKE&d=t> (last visited Apr. 2, 2004) (reporting that Nike has a market value of over \$20 billion).

<sup>112</sup> See, e.g., Suzuki Motors Corp. v. Consumers Union, 330 F.3d 1110 (9th Cir. 2003) (allowing Suzuki to file an action alleging that Consumers Union’s ongoing publication of a negative Samurai rating constituted product disparagement), *panel opinion reinstated*, 330 F.3d 1127 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 468 (2003).

<sup>113</sup> See *Gertz*, 418 U.S. at 346-48 (setting out test for the imposition of liability in private-figure defamation actions against the press for publishing matters of “public or general interest”); *New York Times*, 376 U.S. at 279-80 (setting out actual malice test).

ics/defendants.<sup>114</sup> Any misstep may well mean the death knell for the organization.<sup>115</sup> Corporate defamation and product disparagement cases carry the threat of protracted discovery<sup>116</sup> and often cannot be resolved on motions for summary judgment.<sup>117</sup> Public interest groups facing libel actions well understand that taking a case to trial can exhaust the organization's resources and that an adverse ruling can threaten its existence. The same obviously cannot be said of Nike.<sup>118</sup>

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<sup>114</sup> Even the most highly respected and powerful corporate critics are vulnerable to existence-threatening libel litigation. Consider *Suzuki Motors Corp.*, where the Ninth Circuit reversed a grant of summary judgment to Consumers Union and remanded the case for a full trial on Suzuki's claim that a *Consumers Report* article on the rollover propensity of the Suzuki Samurai was libelous. Judge Kozinski pointed out in his dissent from the denial of rehearing en banc that by September 1999, while the case was still pending in the district court:

Consumers Union . . . reportedly spent more than \$10 million defending its ratings, while its two adversaries had spent more than \$25 million. See John O'Dell, *Bruising Tests Await Consumer Reports in Court*, L.A. TIMES, Sept. 19, 1999, at A1. And these are just two of the many lawsuits CU has had to contend with—about a dozen published cases (and who knows how many unpublished ones) involving disgruntled CU reviewees seeking revenge through the courts. Good for lawyers, but not so good for free expression.

*Suzuki Motors Corp.*, 330 F.3d at 1115 (Kozinski, J., dissenting). This is not the first time that Consumers Union has been faced with potentially ruinous product disparagement litigation. See, e.g., *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (regarding Consumers Union's evaluation and disparaging review of the BOSE 901 sound system).

<sup>115</sup> See, e.g., *Avirgan v. Hull*, 125 F.R.D. 185 (S.D. Fla. 1989) (order forcing Christic Institute, a human rights organization, into bankruptcy because it was unable to pay \$1 million sanction for participating in lawsuit found to be factually unsupported under Rule 11 of the Federal Rules of Civil Procedure).

<sup>116</sup> See *Herbert v. Lando*, 441 U.S. 153, 160 (1979) (permitting discovery into the defendant's state of mind in libel action governed by *New York Times*).

<sup>117</sup> See, e.g., *Suzuki Motors Corp.*, 330 F.3d at 1132 (ruling that the evidence raised genuine issues of material fact); see also *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) (holding that the evidence presented a question for the jury).

<sup>118</sup> Given the depth of Nike's pockets, it is fair to ask whether Nike's principal concern was, as it claimed, the possibility of facing a speech-chilling, substantial money judgment—which was remote by the time the case reached the Supreme Court—or having the truth about its labor practices determined publicly in court. This point is important because many public interest organizations have faced survival-threatening libel litigation but have not engaged in the extensive self-censorship Nike claims flowed directly from the mere pendency of *Nike v. Kasky*. Certainly Consumers Union has not altered the editorial content of *Consumers Reports* because of the Suzuki litigation. Nor did the Natural Resources Defense Council close up shop after it faced a multi-million dollar libel and product disparagement action by the apple industry in the wake of its efforts to get the pesticide Alar off the market. *Auvil v. CBS "60 Minutes,"* 800 F. Supp. 941 (E.D. Wash. 1992) (granting NRDC summary judgment). In the wake of the defense victory in the Alar litigation, many states passed what are referred to as "Veggie" libel laws to make it easier for corporate plaintiffs in product disparagement cases to prevail. See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 749 n.230 (1999) (collecting state statutes). Oprah Winfrey, the talk show hostess, was sued by cattle producers relying in part on the Texas False Disparagement of Perishable Food Products Act after she hosted a show to discuss the risks of "Mad Cow" disease. *Engler v. Winfrey*, 201 F.3d 680 (5th Cir. 2000) (upholding jury verdict in favor of defendants). Environmentalists in West Virginia faced a massive libel action brought by coal companies unhappy with their efforts to restrict mining activities. *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981) (holding that alleging that petitioning activity is malicious will not always give rise to a cause of action). And libel



Nike's *New York Times* argument also drew heavy fire from Kasky and his amici on the ground that it would call into question the constitutionality of state and federal consumer deception laws, none of which embodies *New York Times*'s heightened standard of proof. For instance, the amici brief filed on behalf of California and seventeen other states pointed out that

California, along with 43 other states and the District of Columbia has adopted a . . . false advertising statute that prohibits any person from disseminating untrue or misleading statements which the person knows, or by the exercise of reasonable care should know, to be untrue or misleading, with the intent to dispose of property or services.<sup>119</sup>

These statutes would presumptively be unconstitutional at least when applied to speech like Nike's as they permit the imposition of fines and other sanctions on the basis of a showing that would fall well short of that required by *New York Times*. The same is true of federal laws proscribing false or deceptive commercial speech. As the Solicitor General acknowledged in his amicus brief supporting Nike,<sup>120</sup> "[n]either the FTC Act, nor the postal statute, nor the Lanham Act, requires, as a precondition to relief, a demonstration that the defendant had an intent to deceive."<sup>121</sup> Thus, a ruling in Nike's favor on this point would call into question the

actions by land developers against critics of development are legion. *See, e.g.*, *Westfield Partners v. Hogan*, 740 F. Supp. 523 (N.D. Ill. 1990) (dismissing action and collecting cases); *Protect Our Mountain Env't v. Dist. Court*, 677 P.2d 1361 (Colo. 1984) (upholding dismissal of \$40 million action by developer against local environmental group); *see also* *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972) (dismissing \$1 million counterclaim by logging company against the Sierra Club in an action to restrict timber cutting activities in Northern California). One of the earliest cases was *Martin Marietta Corp. v. Evening Star Newspaper, Co.*, 417 F. Supp. 947 (D.D.C. 1976) (dismissing a libel action brought against a newspaper, a small, progressive news service, and its reporter, for reporting that a defense contractor had held a "stag party," and paid for prostitutes, to entertain Defense Department officials).

<sup>119</sup> Brief of Amici Curiae State of California et al. in Support of Respondent at 22, *Nike* (No. 02-575) (*citing, inter alia*, CAL. BUS. & PROF. CODE § 17500 (West 2000)).

<sup>120</sup> Brief for the United States as Amicus Curiae Supporting Petitioners, *Nike* (No. 02-575). The Solicitor General supported reversal of the judgment below on the limited ground that Mr. Kasky had no standing to bring an action implicating First Amendment rights because he did not allege that he personally had been injured by Nike's false statements. *Id.* at 9-15. The Solicitor General did not support Nike on the substantive issues in the case, which he urged the Court to avoid. *Id.* at 24-30.

<sup>121</sup> *Id.* at 16 n.7 (citations omitted). The provisions the Solicitor General referred to are 15 U.S.C. §§ 45(a), 52 (2000) (empowering the FTC to take action against unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, including the dissemination of false advertising); 39 U.S.C. § 3005 (2000) (empowering the Postal Service to proceed against false and fraudulent schemes that use the mail); 15 U.S.C. § 1125(a)(1)(B) (2000) (providing for a civil action against any person who "in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services or commercial activities").

constitutionality of the federal government's comprehensive scheme for regulating and deterring false, deceptive, and misleading advertising.<sup>122</sup> There is no reason to believe that the Court would be willing to take such a far-reaching step that would jeopardize long-standing state and federal enforcement authority.<sup>123</sup>

*C. Lesson Number Three: The Court Will Not Redefine the  
Domain of Commercial Speech Along the Lines  
Proposed by Nike and Its Allies*

Nike's arguments about the breadth or domain of commercial speech will at some point have to be revisited by the Court, if only to clear up the confusion sown by the *Nike* litigation. After all, the heart of Nike's argument was that its statements about its treatment of its workforce fell outside of the boundaries of "commercial speech" and therefore deserved to be treated as core speech under the First Amendment. As is true in most cases as celebrated and contentious as *Nike v. Kasky*, Nike had a fair point—context

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<sup>122</sup> See also Brief of Domini Social Investments LLC et. al. as Amici Curiae in Support of Respondent at 27, *Nike* (No. 02-575) (contending that the Court's acceptance of Nike's *New York Times* argument "would . . . render unconstitutional various sections of the Securities Act, the Exchange Act and SEC rules").

<sup>123</sup> Some participants in the Symposium stake out a middle-ground position, at least for private plaintiff cases like *Nike v. Kasky*. They recognize that "the 'malice' standard offers too much protection to false statements of fact for speech such as is at issue here, and thus threatens to shortchange the interest in consumer protection." James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 CASE W. RES. L. REV. 1091, 1138-40 (2004). In their view, "a more limited First Amendment immunity akin to that provided under *Gertz v. Welch* seems in order. Under this standard, a plaintiff cannot recover in a defamation action unless he can show that the defendant was at least negligent in making the untrue statements, and, in addition, can prove that he was actually damaged by these statements. . . ." *Id.* at 1139; see also Robert M. O'Neil, *Nike v. Kasky—What Might Have Been . . .*, 54 CASE W. RES. L. REV. 1259 (2004). Presumably, this approach would leave intact the government's ability to restrain and punish false or deceptive commercial speech without a showing of fault and to impose fines without a showing of actual damages. This attempt at an accommodation, perhaps laudable from a doctrinal standpoint, raises a set of practical problems. For one thing, it would construct a peculiar First Amendment rule—one that gives the government a greater right to suppress or punish false speech than an individual has in private litigation. For another, applying the *Gertz* standard might result in precisely the kind of shortchanging the interest in consumer protection the author fears. Consider a variant on *Nike v. Kasky*, where the plaintiff bought Nike sneakers because of Nike's progressive labor practices and threw the sneakers away as soon as she learned the "truth" about Nike's treatment of workers. Under *Gertz*, even if the plaintiff wins, she is unlikely to recover anything more than the \$75 or so she spent on the sneakers. *Gertz* not only rules out presumed and punitive damages, but limits recovery to injuries to "reputation and standing in the community, personal humiliation, and mental anguish and suffering"—injuries that may be compensable for a libel plaintiff, but are unlikely to be compensable for a false advertising plaintiff. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). And if proof of detrimental reliance is required, as one would suppose under *Gertz*, does that eliminate the possibility of class cases? If so, then, as a practical matter, there is little difference for prospective plaintiffs between *New York Times* and *Gertz*, because, in either event, the cases would be too hard to prove and the recoveries too modest to justify litigation.

*should* matter in assessing the application of the commercial speech doctrine. A letter to the editor should not necessarily be judged under the same standard as a direct-to-consumer advertisement on television, and matters of constitutional importance should not be resolved by resort to mere labels.

In response to these arguments, the Court is likely to reaffirm that context must be taken into account when determining whether speech is “commercial.” Lost in the firestorm over *Nike v. Kasky*, however, is the fact that the Court’s long-standing test for commercial speech is context-sensitive and sufficiently flexible to answer many of Nike’s context-dependent arguments.<sup>124</sup> An admonition by the Court will add clarity to this area of law.<sup>125</sup>

But it is highly unlikely that the Court will reformulate the definition of commercial speech along the lines proposed by Nike and its allies. Make no mistake, Nike asked the Court to overhaul substantially the line that it has historically applied to differentiate commercial speech from other forms of protected expression. Nike’s argument broadly contends that speech is not “commercial”

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<sup>124</sup> Although the Court’s test for commercial speech is generally summarized as speech which “propose[s] a commercial transaction,” *see, e.g., Edenfield v. Fane*, 507 U.S. 761, 767 (1993), the Court elaborated a more nuanced test in *Bolger*. There, the Court identified three characteristics that distinguish commercial from non-commercial speech: (1) whether the communication is aimed at the speaker’s customers; (2) whether the speech contains a promotional message about the speaker’s product; and (3) whether the speech is aimed at persuading consumers to buy the speaker’s product. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983). Under this test, context plainly matters. A letter to the editor that discussed Nike’s labor practices generally might not qualify as commercial speech while a direct-to-consumer advertisement about Nike’s newest sneaker plainly would. Applying these factors, the California Supreme Court found that the Nike statements at issue in this case constituted commercial speech, and thus, if false, could form the basis of Mr. Kasky’s claims under California’s false advertising and unfair competition laws. *Kasky v. Nike, Inc.*, 45 P.3d 243, 256-60 (Cal. 2002), *cert. dismissed*, *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003).

<sup>125</sup> The Court has long recognized that the line between commercial and noncommercial speech is not a bright one. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) (“precise bounds of the category of expression that may be termed commercial speech” often hard to discern); *In re Primus*, 436 U.S. 412, 438 n.32 (1978) (line “will not always be easy to draw”); Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 461 (1980) (“[I]t is not easy to define commercial speech or distinguish it from noncommercial speech for first amendment purposes. But the task does not seem impossible.”). The problem of line-drawing is not unique to commercial speech; indeed, it permeates First Amendment jurisprudence, which carves out domains based on categories—obscenity, fighting words, public forum, and so forth. In some instances, categorization determines whether speech receives First Amendment protection at all (political speech does, obscenity does not); in other instances, categorization defines the degree of First Amendment protection speech warrants (political speech deserves the most stringent protection, commercial speech something less). Once the Court undertakes categorization, line-drawing is inevitable. The line-drawing problems the Court has faced with commercial speech are no different from those encountered in other areas of the First Amendment. *See generally* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Kathleen M. Sullivan, *Post-liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992).

unless it is both aimed directly at potential purchasers and addresses the characteristics of Nike's products, including the product's price, quality, appearance, and safety, but nothing more.<sup>126</sup> Speech relating to moral and political matters, even if linked to a product or aimed at consumers, is not "commercial," Nike maintains, because it "affects purchasing choices only secondarily, if at all" and is "concerned with moral judgments that only indirectly affect consumer behavior," for "only a subset of listeners."<sup>127</sup> Under Nike's proposed test, Nike's letters to college athletic directors and newspaper advertisements defending its labor practices are not commercial speech because they focus not on Nike's products, but on Nike's corporate conduct.

It is hard to imagine the Court accepting Nike's redefinition of commercial speech. To begin with, the Court has repeatedly rejected similar arguments in the past. Anticipating precisely this kind of attack, the Court in *Virginia State Board of Pharmacy*<sup>128</sup> acknowledged that, at times, there might be a convergence of commercial speech and core speech on important social matters, giving as examples advertising for legal abortions, promotion of artificial furs as an alternative to the extinction of fur-bearing animals, and advertisements by domestic producers urging that consumers buy their products as an alternative to imports that deprive U.S. residents of their jobs.<sup>129</sup> These communications, the Court made clear, were nonetheless to be judged under the commercial speech test even though they also addressed important political and social matters.<sup>130</sup> The Court repeated this point in *Central Hudson*, recognizing that "many, if not most, products may be tied to public concerns about the environment, energy, economic policy, or individual health and safety" and that a linkage between a product and a matter of public debate does not transform commercial speech into core speech.<sup>131</sup> The Court reiterated this view in *Bolger*, where it addressed the constitutional status of pamphlets distributed by a condom manufacturer which, along with promoting the product, contained a discussion about the value of condoms in halting the spread of venereal disease. Finding that the pamphlets were commercial rather than core speech, the Court emphasized

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<sup>126</sup> Brief for the Petitioners Nike, Inc., et. al. at 16, *Nike* (No. 02-575); see also *id.* at 26-28.

<sup>127</sup> *Id.* at 19, 36, 46.

<sup>128</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

<sup>129</sup> *Id.* at 764-65.

<sup>130</sup> *Id.* at 765.

<sup>131</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562-63 n.5 (1980).

that the pamphlets were advertisements, that they referred to a particular product, and that they were economically motivated, thus subjecting them to review under the commercial speech standard.<sup>132</sup>

While the line drawn by *Bolger* is hardly seamless, it has worked tolerably well for two decades. Indeed, in the twenty years between *Bolger* and *Nike*, no case before the Court turned on the definitional question. The line-drawing test proposed by Nike, apart from being novel, would dramatically reshape the landscape of commercial speech law on the basis of highly indeterminate and subjective judgments. Under Nike's definition, a wide array of statements *could* be characterized as "moral" or "political," even though they plainly drive consumer choice. Statements about whether food is kosher, whether produce is organic, whether tuna is dolphin-safe, and whether cosmetics have been produced without animal testing, could all, under Nike's theory, fall outside the definition of commercial speech, even though the government regulates such claims for accuracy.<sup>133</sup> So too might statements by corporations about matters relating to executive compensation, the likelihood that a drug company's product will be approved by the FDA, or predictions about the fate of a new product.<sup>134</sup> Statements of this sort, of course, have long been regulated by the SEC and the FDA.<sup>135</sup> The briefs by Nike's opponents are replete with other, equally compelling, examples of claims that could, applying Nike's definition, fall outside of the line, notwithstanding the fact that they are at the forefront of consumer concerns and are presently the subject of government regulation.<sup>136</sup> For all of these reasons, it is likely that the Court would see Nike's definitional argument for what it is—an effort to promote the substantial deregulation of corporate speech.

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<sup>132</sup> *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-68 (1983).

<sup>133</sup> See Amicus Curiae Brief in Support of Respondent by Members of the United States Congress at 2, 10-14, *Nike* (No. 02-575).

<sup>134</sup> See Press Release, FDA, FDA and SEC Work to Enhance Public's Protection from False and Misleading Statements (Feb. 5, 2004) (announcing cooperative program between the FDA and SEC to enable SEC to investigate claims that FDA-regulated firms have made statements material to the firm's financial condition that may be false or misleading), available at <http://www.fda.gov/bbs/topics/NEWS/2004/NEW01019.html>.

<sup>135</sup> *Id.*

<sup>136</sup> See, e.g., Amicus Curiae Brief in Support of Respondent by Members of the United States Congress at 2-3, 10-14, *Nike* (No. 02-575) (discussing consumer concerns relating to kosher food, unionized labor, and product testing practices); Brief of Amicus Curiae Public Citizen at 22-25, *Nike* (No. 02-575) (noting consumers' concern for environmentally conscious products and "Made in the USA" labeling); Brief of Domini Social Investments LLC et. al. as Amici Curiae in Support of Respondent at 4-5, *Nike* (No. 02-575) (noting airline maintenance and safety as an example).

The final, albeit related, problem with Nike's definitional argument is that it begs the question of the constitutional status of "image" advertising. As students of modern advertising point out, today's mass media advertising has little to do with "information" and almost everything to do with "image."<sup>137</sup> Image advertising focuses not on a corporation's product, but the corporation's identity, or, more precisely, the identity the corporation wants to project to the public.<sup>138</sup> We are told that young people comprise "the Pepsi generation," having a Mastercard is "priceless," that "At Ford, Quality is Job #1," and that Nike wants us to "Just Do It." Nike's advertisements do not communicate information about the price, durability, or availability of its products. Rather, they "convey[] the idea that Nike sneakers [a]re worn by people of all ages, genders, and disabilities, and that the buyers of Nike shoes ha[ve] the grit and determination to take on the type of challenges included in the advertisement[] . . . 'the roads are always open. Just do it.' Wearing Nikes offer[s] a route to spiritual if not political salvation. . . ."<sup>139</sup> As one expert put it, Nike's advertising suggests that buying Nike products is "part of expressing who you are, what you stand for and what you believe in."<sup>140</sup> Nike itself said that the statements at issue were intended to demonstrate that Nike is "a good corporate citizen."<sup>141</sup> Having carefully cultivated Nike's image as a fair-minded, "good corporate citizen," Nike nonetheless argued that statements that go to the heart of that image—whether Nike treats its workers humanely—should be immune from challenge because they concern moral and not commercial matters.

Nike's problem here is one of its own making. Having chosen image advertising as its preferred way of communicating with consumers, Nike cannot seriously contend that matters that define Nike's image are not "commercial" in the most basic sense.<sup>142</sup> On this point, Nike's arguments about context undercut its line-drawing argument as well. If context is important to properly

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<sup>137</sup> See Ronald K. L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 708 (1993) (noting advertisers' concern with image and illusion more than product).

<sup>138</sup> *Id.*

<sup>139</sup> RANDY SHAW, RECLAIMING AMERICA: NIKE, CLEAN AIR, AND THE NEW NATIONAL ACTIVISM 17 (1999).

<sup>140</sup> Steve Swo, *Nike Takes Own Advice in Changing Its Slogan*, PORTLAND OREGONIAN, Jan. 4, 1998, at A1, available at 1998 WL 4171086 (quoting Lynn Khale, head of the marketing program at the University of Oregon).

<sup>141</sup> Brief for the Petitioners at (i), *Nike* (No. 02-575).

<sup>142</sup> Nike's own CEO, Phil Knight, admitted as much in 1998, when he acknowledged that "I truly believe the American consumer doesn't want to buy products made under abusive conditions." Bill Richards, *Nike to Increase Minimum Age in Asia for New Hirings, Improve Air Quality*, WALL ST. J., May 13, 1998, at B10.

categorizing speech, then it must be understood that Nike's statements at issue in *Nike v. Kasky* were not made in the course of a debating society discussion over labor practices in Asia. They were made because a consumer boycott of Nike products in the late 1990s delivered a body blow to Nike's bottom line. Nike lost money in 1998 for the first time in thirteen years and had to lay off 2,000 workers.<sup>143</sup> Nike's statements were made to stop the flood of consumer defections by demonstrating that Nike is, in fact, the "good corporate citizen" it claims to be. No speech was more central to Nike's economic well-being than the statements at issue in *Nike v. Kasky*.

For these reasons, it is unlikely that the Court will adopt Nike's view that only communications directed to consumers that make representations about specific products qualify as commercial speech. The consequences of such an approach would be far-reaching. If one accepts Nike's basic proposition that the commercial speech doctrine applies only to direct-to-consumer ads and little else, then one must accept the necessary corollary to Nike's argument—that commercial speakers may not be compelled to account for the accuracy of much of their speech in court or by government regulators, absent the most extraordinary circumstances. The Court is unlikely to accept such a significant reformulation of the definition of commercial speech.

#### CONCLUSION

Extracting lessons from a case not decided is undoubtedly an exercise fraught with uncertainty. There is no way to know whether the concerns that drove the Court to accept review in *Nike* will animate the Court in future cases. Nor is it assured that, having carefully considered *Nike*, the Court will be anxious to review the next case that presents the same questions.

But one thing *is* certain: The commercial speech doctrine remains a controversial doctrine in considerable flux. As one First Amendment authority recently remarked, commercial speech is "a notoriously unstable and contentious domain of First Amendment

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<sup>143</sup> As one report put it:

Some of the most admired and powerful brand advertising was tainted when . . . [Nike] became embroiled in the Asian sweatshop scandal. The brand that could seemingly do no wrong was suddenly the target of a violent backlash, particularly on the internet, where a Boycott Nike website became the focus of activity. The effects of the PR disaster on Nike were dramatic. In 1998 it made losses for the first time in 13 years and was forced to cut almost 2,000 jobs.

James Curtis, *Public Relations: PR Takes Center Stage*, CAMPAIGN, Mar. 10, 2000, available at 2000 WL 9853049.

jurisprudence. No other realm of First Amendment law has proved as divisive.”<sup>144</sup> For that reason, courts will continue to be presented with inventive arguments, like those raised by Nike, seeking to broaden First Amendment protection to speech the government labels “commercial,” and the courts will have to address those arguments.

Without guidance from the Court in *Nike*, we are left to predict the direction the evolution of the commercial speech doctrine will take. *Nike* presents the dilemma of a story untold. Like an audience permitted to see only the first three acts of a four-act play, the audience in *Nike* was left to imagine its own ending. Perhaps it is best that the Court chose not to write *Nike*'s final act. After all, the case presented “difficult First Amendment questions,”<sup>145</sup> the record before the Court was threadbare, the Court had little time to deliberate,<sup>146</sup> and the Court's dismissal led to the quick resolution of the case on terms both parties found acceptable.<sup>147</sup>

This Article imagines one conclusion to *Nike*—that the Court would have been hesitant to engage in the sort of wholesale revision of the doctrine Nike urged. The basic truth about the commercial speech doctrine is that it was crafted as a pragmatic solution to the complicated problem of how to open the door to truthful communications between sellers and prospective purchasers while continuing to shield prospective purchasers from falsehoods and half-truths that distort the market. The test that has evolved to evaluate restraints on commercial speech, the modern *Central Hudson* test, has not served that goal perfectly, but has served it reasonably well—so much so that the doctrine is criticized far more for its theoretical failings than for the results it produces. While the doctrine may be “notoriously unstable and contentious,” the results it produces are generally predictable and broadly ap-

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<sup>144</sup> Post, *supra* note 89, at 2.

<sup>145</sup> *Nike, Inc. v. Kasky*, 123 S. Ct. at 2558 (Stevens, J., concurring); *id.* at 2560 (Breyer, J., dissenting).

<sup>146</sup> The timing of *Nike* might have been a problem for the Court. The Court granted Nike's petition for a writ of certiorari on January 10, 2003. *Nike, Inc. v. Kasky*, 123 S. Ct. 817 (2003). Nike was argued just three months later on April 23, 2003, the final argument day of the 2002 Term, and was dismissed on June 26, 2003, the final day the Court issued opinions from the 2002 Term. Thus, had the Court reached the merits, it would have had just two months from the date of argument to consider and decide the case, leaving little time for the circulation of draft opinions and deliberation within the Court.

<sup>147</sup> David F. Pike, *Activist Lawyer Questions Nike Pact on Labor: Letters by Attorney Demand Whole Story, Details of Settlement*, L.A. DAILY J., Nov. 26, 2003, at 1 (quoting Kasky's lawyer as saying that “Mr. Kasky is satisfied that this settlement reflects Nike's commitment to positive change where factory workers are concerned,” and Nike's director for global issues management as saying that the settlement “benefits a wide array of people”).



proved. Aside from the Court's acknowledged mistake in *Posadas*, few of the Court's commercial speech decisions have drawn fire because of their results. For this reason, although the Court will continue to tinker with the commercial speech doctrine at the margins, it is not likely to abandon the doctrine's central value of encouraging the free flow of truthful—and only truthful—commercial information to consumers to enable informed decision-making.

*Postscript—A Brief Response to Collins and Skover*

In an effort to sort out the authors' positions on the key questions raised by *Nike v. Kasky*, Collins and Skover present four hypothetical cases and then speculate how each author might resolve them.<sup>148</sup> Because Collins and Skover's speculation about how I would analyze the cases is only partly correct, I want to set the record straight.

As Collins and Skover predict, for me, the final two of the case illustrations are easy because they build on the facts of *Nike v. Kasky* but add important context that further undermines Nike's First Amendment defense. In one case, Nike makes specific representations about the working conditions in foreign factories at a shareholders' meeting; in the other, Nike makes the same representations to an assembly of college athletic coaches who have "informed Nike that they would no longer purchase its products absent clear assurances that the workers were neither underpaid nor physically abused." In my view, a First Amendment defense by Nike would fail. Nike recognized that, even if the Court reshaped the commercial speech doctrine along the lines it urged, the First Amendment would not shield a company from liability for making false claims about a company's product directly to consumers. After all, Nike's plea to the U.S. Supreme Court was that the Court should fashion a commercial speech test that was affirmatively context-specific.<sup>149</sup> In one hypothetical, Nike is making inaccurate claims to appease angry customers; in the other, it is making inaccurate claims to influence investors. And in both cases, Nike's concessions about context would be its undoing.<sup>150</sup>

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<sup>148</sup> Ronald L.K. Collins & David M. Skover, Foreword, *The Landmark Free-Speech Case that Wasn't: The Nike v. Kasky Story*, 54 CASE W. RES. L. REV. 965, 1031-39 & nn.299-301 (2004).

<sup>149</sup> Brief of the Petitioners at 22-26, *Nike* (No. 02-575).

<sup>150</sup> *Id.* at 34 n.9 (conceding that under the securities laws, and other "special regulatory regime[s]," strict regulation of corporate speech would not run afoul of the First Amendment).

As to the other two examples, Collins and Skover are only half right about my views. In one hypothetical, Nike joins a violence-against-women campaign and some unspecified time thereafter is charged by an “anti-corporate activist group” of “knowingly tolerat[ing] abuses against women in its foreign factories.” In the second case, Phil Knight, Nike’s CEO, goes on a popular television show and says that Nike “is committed to being Green.” Some time later (again unspecified), an investigative reporter reveals that a Nike plant in Taiwan has polluted the local water supply. Collins and Skover speculate that I would find the “being Green” scenario a candidate for free speech protection, if only because Phil Knight’s statement is arguably not specific enough to trigger any real consumer reliance.”<sup>151</sup> I agree that the “being Green” scenario would not present Nike opponents with a viable lawsuit. But I base that conclusion not just on the lack of specificity in Phil Knight’s comments, but also because this hypothetical, like the violence-against-women hypothetical, lacks the rich context that made *Nike v. Kasky*, and the two hypothetical cases building on *Nike v. Kasky*, not just viable, but winnable, cases.

The problem with these two hypothetical cases is that there is no clear connection between the company’s statements and the misdeeds the company is accused of committing. In this respect, these hypothetical cases depart markedly from the real *Nike v. Kasky*, which arose because activists threw down the gauntlet to Nike on the company’s foreign labor practices and Nike picked it up. There was no question in *Nike* that the company’s statements about its labor practices were made in direct response to the charges that had been laid against the company.<sup>152</sup> Had Collins and Skover wanted their examples to parallel *Nike v. Kasky*, the company’s statements in support of environmental protection and safeguarding the rights of female workers would have been made in *response* to, not *before*, allegations of misconduct. Here is where I draw the line. As a litigator, I would take neither the “being Green” nor the “violence-against-women” case, based on the skeletal facts we have been given, because proving that the statements were not accurate when made would be too hard, if not impossible. Thus, in both cases, I think that the company might have a solid First Amendment defense based on truth. The “violence-against-women” case is problematic for another reason: Nike’s statement is *not* clearly a statement of its own practices, in stark

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<sup>151</sup> Collins & Skover, *supra* note 148, at 1037.

<sup>152</sup> See, e.g., Brief of the Petitioners at 40-42, *Nike* (No. 02-575); Brief for the National Association of Manufacturers as Amicus Curiae in Support of Petitioners at 2, *Nike* (No. 02-575).

contrast to Nike's actual statements about how it treated its foreign workers. And the "being Green" scenario is a difficult one to litigate because saying that a company is "committed to being Green" (not that the company *is* Green) may be more a statement of aspiration than one of fact, and may not be actionable for that reason as well. Thus, I think that the First Amendment is stronger medicine than perhaps Collins and Skover recognize, not because it protects falsehoods, but because these hypothetical cases do not involve the kind of clear-cut misstatements of fact at issue in *Nike v. Kasky*.

