

JUST DO IT: *KASKY V. NIKE, INC.* ILLUSTRATES THAT IT IS TIME TO ABANDON THE COMMERCIAL SPEECH DOCTRINE

INTRODUCTION

Imagine a situation where a public interest group claims that one of its studies proves that McDonald's hamburgers are the primary cause of cancer. To combat this absurd claim, McDonald's embarks on a public relations campaign. The company enters the public debate concerning its product by publishing a number of advertisements in nationwide newspapers and writing several letters to newspaper editors. The advertisements and letters simply state that McDonald's hamburgers are not unhealthy because no scientific proof exists linking McDonald's hamburgers to cancer. The advertisements and letters do not encourage the readers to continue buying the product. After these advertisements and letters appear, another public interest group brings suit against McDonald's claiming that the company misrepresented its product. The second group claims that the hamburgers are in fact not healthy because they are linked to heart disease. Even though the advertisement did not explicitly encourage customers to purchase the good, the public interest group claims that McDonald's violated false advertising laws. The group asserts that McDonald's speech cannot receive full First Amendment protection because it is commercial speech. McDonald's responds by arguing that the speech was not intended to propose a commercial transaction. Instead, it was intended to rebut public attacks on the company that were taking place in the public forum.

This hypothetical situation may sound far-fetched, but it has happened in the United States and could happen again. The company currently facing this similar situation is Nike Incorporated. In *Kasky v. Nike, Inc.*, Nike was accused of making false representations concerning its labor practices in Asian factories.¹ The advertisements that gave rise to this suit were responses to public attacks concerning Nike's labor practices.² The California Supreme Court held that the statements rebutting the public attacks were commercial speech, and as a result the First Amendment did not prevent the filing of false advertising claims.³ In determining whether Nike's state-

¹ *Kasky v. Nike, Inc.*, 45 P.3d 243, 248 (Cal. 2002), cert. granted, 537 U.S. 1099, cert. dismissed, 539 U.S. 654 (2003) (per curiam). However, in June 2003, the United States Supreme Court dismissed *Nike*, holding that the writ of certiorari was improvidently granted. *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (per curiam).

² *Nike*, 45 P.3d at 248.

³ *Id.* at 262.

ments were commercial speech, the court formulated the “limited-purpose” test.⁴ This highly discretionary test examines the identity of the speaker, the intended audience, and the content of the message.⁵

With regard to commercial speech, the United States Supreme Court has held that “the [Federal] Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.”⁶ Broadly, the Court has described commercial speech as “speech which does ‘no more than propose a commercial transaction.’”⁷ However, problems begin to arise with the existence of a commercial speech distinction when entities that traditionally engage in commercial speech make statements that concern public issues. For example, in some cases, statements by commercial entities concerning a public issue might be seen as implicitly promoting a commercial transaction although, in reality, they are debating an issue in the public forum that does “more than propose a commercial transaction.”⁸ In addition, corporate speech that appears commercial may not retain its commercial character when it is “inextricably intertwined” with protected speech.⁹ American jurisprudence with regard to commercial speech has given courts wide discretion as to methods for deciphering whether particular speech is commercial or public speech.

This Note examines the *Nike* decision and demonstrates how the California Supreme Court’s “limited-purpose” test has the potential to broadly sweep into its purview speech that is noncommercial. In addition, this Note argues that the United States Supreme Court should abandon the commercial speech distinction because, as seen by the *Nike* court’s “limited-purpose” test, courts are afforded far too much discretion in determining what is and what is not commercial speech.

Part I of this Note examines the background case law with regard to what is commercial speech, what is not commercial speech, reasons for the distinction between commercial and noncommercial speech, and the way in which the government can regulate commercial speech. Part II then discusses the majority opinion and the two dissenting opinions in *Nike*. Part III analyzes the problems with the “limited-purpose” test, the possible effects of the *Nike* ruling, and why providing corporate speech full First Amendment protection will not harm consumers. In addition, Part III concludes by arguing that there should be a move to end the commercial speech distinc-

⁴ *Id.* at 256.

⁵ *Id.*

⁶ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-65 (1983).

⁷ *Id.* at 66 (citations omitted).

⁸ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)).

⁹ *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 (1988).

tion. Finally, the conclusion summarizes the Note, and makes a last pleading to the United States Supreme Court to abolish the commercial speech doctrine.

I. THE HISTORY OF THE COMMERCIAL SPEECH DOCTRINE

A. *What is Commercial Speech?*

It is difficult to succinctly define commercial speech. *Central Hudson Gas & Electric v. Public Service Commission* is the seminal case with respect to the commercial speech doctrine.¹⁰ The case concerned a challenge to a New York regulation that restricted electric companies from encouraging increased energy consumption through media advertisements.¹¹ The electric company, Central Hudson Gas & Electric Corporation, challenged the regulation, arguing that its restraint on commercial speech violated the First Amendment.¹² For reasons that will be discussed below, the U.S. Supreme Court held that the government's restrictions did violate the First Amendment.¹³ More importantly though, was that in order to reach its decision, the Court had to define commercial speech. The Court defined commercial speech as an expression that "relate[s] solely to the economic interests of the speaker and its audience."¹⁴ However, this broad definition has done little to solidify a determination by the Court of what is and what is not commercial speech. Numerous United States Supreme Court decisions demonstrate that there has been difficulty in forming a bright-line test as to what constitutes commercial speech.¹⁵

For example, before *Central Hudson*, the Court stated in *Ohralik v. Ohio State Bar Association* that the distinction between commercial speech and noncommercial speech was decided by whether the speech proposed a commercial transaction.¹⁶ *Ohralik* involved a suit against an attorney who

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

¹¹ *Id.* at 559-60.

¹² *Id.* at 560.

¹³ *Id.* at 570-72.

¹⁴ *Id.* at 561.

¹⁵ *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (stating that this case demonstrates the difficulty of forming bright-lines that clearly cabin commercial speech into a distinct category). The case involved a challenge to a city statute that classified a free magazine as a commercial handbill. The handbill contained mostly advertisements and some general information. *Id.* at 412-414. The city statute prohibited commercial handbills from being distributed on public property. *Id.* at 413-14.

¹⁶ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

engaged in face-to-face solicitations of potential clients.¹⁷ The attorney claimed that his speech could not be regulated because of First Amendment protection.¹⁸ However, the Court found that an in-person solicitation by a lawyer in order to obtain clients was “a business transaction in which speech is an essential but subordinate component.”¹⁹ In other words, since the attorney’s speech proposed a commercial transaction—soliciting a person in hopes that the individual will retain the attorney—it was commercial speech and therefore could be regulated.

After *Ohralik*, the Court, in *Central Hudson*, outlined a broader view of what constitutes commercial speech—speech that relates to the economic interests of the speaker and the audience.²⁰ However, the Court did not use the *Central Hudson* definition in two separate subsequent cases. In *Board of Trustees of the State University of New York v. Fox*, the Court followed *Ohralik* and held that commercial speech is speech that proposes a commercial transaction.²¹ The case concerned a challenge to a state university regulation that prohibited Tupperware parties in college dormitories.²² The case illustrates that the Court, in making its decision, did not cite the broader definition of commercial speech offered in *Central Hudson*. Both the *Ohralik* and *Fox* definitions of commercial speech are narrower than the *Central Hudson* definition, because, unlike *Ohralik* and *Fox*, the *Central Hudson* definition could apply to situations that do not solely involve a commercial transaction. For example, under *Central Hudson*, a statement that relates to the economic interest of the speaker might only be a positive statement concerning the company, and not a statement that explicitly promotes a commercial transaction.

In yet another case following *Central Hudson*, the Court further complicated commercial speech jurisprudence by outlining another definition of commercial speech. In *Bolger v. Young Drug Products Corporation*, the Court used the factors of advertising format, product references, and economic motivation to determine whether certain statements were commercial speech.²³ The Court concluded that the combination of all these characteristics provided “strong support” that the particular statements could be con-

¹⁷ *Id.* at 450-451.

¹⁸ *Id.* at 455.

¹⁹ *Id.* at 457.

²⁰ *Cent. Hudson*, 447 U.S. at 561.

²¹ *Bd. of Trs. v. Fox*, 492 U.S. 469, 473-74 (1989).

²² *Id.* at 471-72. The Court, in *Fox*, examined the principal issue of whether public speech that was intertwined with commercial speech is commercial speech. *Id.* at 474. In addition, the Court scrutinized the state university’s regulation in order to rule on whether it was a constitutional restriction on commercial speech. *Id.* at 475-77.

²³ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983).

sidered commercial speech.²⁴ The test appears to be as broad as *Central Hudson*, but it adds two additional factors that can be considered, (1) advertising format and (2) product references.²⁵ However, in a footnote, the Court stated that it does not suggest that each of the characteristics must be present for statements to be commercial speech.²⁶ In addition, in a subsequent case, the Court stated that it did not simply apply the broad *Central Hudson* test in *Bolger*, but examined the speech very carefully to ensure that speech deserving greater constitutional protection was not suppressed.²⁷

The Court clearly has not firmly established a definition of what constitutes commercial speech. Cases can reach very different results using the various tests outlined by the Court. For example, applying the factors of economic motivation and intended audience will lead to a different result than if a court examines the speech to establish if it solely proposes a commercial transaction.

In order to illustrate this point, one can consider an opinion piece placed in a major newspaper by the chairman of McDonald's that argues that the company's hamburgers do not cause cancer. If the factors of economic motivation and intended audience are applied to determine whether the particular speech is commercial speech, a strong argument can be made that the chairman's opinion piece is commercial speech. The test is satisfied because the statements intend to maintain sales by proving that the hamburgers do not cause cancer, and the intended audience of the statements is potential consumers of the hamburgers. However, if commercial speech is defined as speech that solely proposes a commercial transaction, the McDonald's example will have a different result. An opinion piece that claims that the hamburgers do not cause cancer is not meant to solely propose a commercial transaction. Therefore, the opinion piece would not be considered commercial speech under that definition. This hypothetical demonstrates the problems that exist because the Court has not articulated a clear definition of commercial speech.

B. *What Commercial Speech is Not*

While the United States Supreme Court has not established a bright-line test as to what is commercial speech, it has produced various guidelines as to what commercial speech is not. These guidelines become espe-

²⁴ *Id.* at 67.

²⁵ *Id.*

²⁶ *Id.* at 67-68 n.14.

²⁷ *Discovery Network*, 507 U.S. at 423.

cially important when examining corporations' statements. Often, statements by corporations are thought to be commercial speech purely because a corporation makes them. However, the Court has protected corporations from this false assumption.

One of the seminal cases addressing whether the First Amendment protects corporate speech is *First National Bank of Boston v. Bellotti*.²⁸ In *Bellotti*, national banking associations and business corporations challenged the constitutionality of a Massachusetts criminal statute that prohibited them from making contributions and expenditures to influence the outcome of a state election.²⁹ The Court held that the speaker's identity as a corporation is not a factor in evaluating whether the First Amendment protects its speech.³⁰ The Court reasoned that this type of speech was "indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."³¹ The value of the speech in informing the public should not depend on the source, whether the source is an individual, corporation, association, or union.³² To further justify its holding, the Court stated that the First Amendment is plainly offended when a legislative suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people.³³ In another case concerning corporate speech, the Court opined that the First Amendment was intended to not only protect individuals, but also corporations that contribute to the debate and dissemination of ideas in the public forum.³⁴ According to the Court's theory, since society has an interest in open and informed discussion, speech concerning a public

²⁸ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

²⁹ *Id.* at 768. The appellants desired to spend money in order to publicize their views regarding a proposed state constitutional amendment. *Id.* at 769. If passed, the amendment would have permitted the state legislature to impose a graduated income tax on individuals. *Id.*

³⁰ *Id.* at 784.

³¹ *Id.* at 777.

³² *Id.*

³³ *Id.* at 785-86.

³⁴ *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986). This case challenged a directive by the Utilities Commission that allowed the extra space in Pacific Gas's billing envelopes to be used by a group whose purpose was to disseminate information on how to normalize utility rates. *Id.* at 5-6. The group desired to use this space for a newsletter that would reach the utility ratepayers. *Id.* at 6. Pacific Gas and Electric had been using this extra space to distribute to the taxpayers editorials concerning political and regulatory issues. *Id.* at 5. The company argued that its First Amendment rights would be violated if they were forced to allow the group to use the extra space. *Id.* at 7. Pacific Gas and Electric disagreed with the messages the group desired to disseminate. *Id.* In its decision, the Court examined whether the distribution of the newsletter by Pacific Gas received full First Amendment protection. *Id.* at 8-9. The Court held that because the contents of the company's newsletter included stories about wildlife conservation, energy saving tips, and recipes, it went far "beyond speech that proposed a business transaction." *Id.* It included "matters of public concern," of which the First Amendment was meant to protect. *Id.* at 9 (citation omitted).

issue should not be restricted because it emanated from a corporation rather than an individual.

While *Bellotti* established that there are instances where corporate speech is protected, the opinion concerned only speech that was politically related rather than commercially related. In cases where corporate speech contains commercial components and noncommercial components, such as politics or science, the courts use another approach to determine if the speech is protected under the First Amendment. The United States Supreme Court has adopted the view that if commercial speech is “inextricably intertwined” with noncommercial speech, then it is given full First Amendment protection.³⁵ In *Riley v. National Federation of the Blind*, North Carolina argued that the Court, when considering whether or not professional fundraisers must disclose the percentage of donations actually given to charity over the past twelve months, should apply commercial speech principles because the law relates to the fundraiser’s profits from the solicitations.³⁶ However, the Court held that the speech did not retain its commercial character because it was “inextricably intertwined” with protected speech.³⁷ The Court reasoned that it “cannot parcel out the speech, applying one test to one phrase and another test to another phrase.”³⁸ The component parts could not be separated from the whole because there is a risk of ceasing the free flow of information and advocacy.³⁹ The Court further stated that the theory of protecting commercial speech that is “inextricably intertwined” with fully protected speech does not stray from the narrow test that traditional commercial speech does “no more than propose a commercial transaction.”⁴⁰

The Court has established limits to the argument that all commercial speech that is intertwined with noncommercial speech has full First Amendment protection. Not all advertising which “links a product to a current public debate” is granted full constitutional protection.⁴¹ An advertise-

³⁵ *Riley*, 487 U.S. at 796.

³⁶ *Id.* at 795.

³⁷ *Id.* at 796.

³⁸ *Id.*

³⁹ *Sec’y of State v. Munson*, 467 U.S. 947, 959-60 (1984) (quoting *Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980)). In *Munson*, the Court examined the *Schaumburg* case. *Munson*, 467 U.S. at 959-60. The Court discussed how, in *Schaumburg*, it ruled that charitable solicitations that are intertwined with speech are entitled to First Amendment protection. *Id.* According to the Court, the intertwined speech deserved protections because it was persuasive speech seeking support for a particular cause, and that without the solicitation the flow of such information and advocacy would likely end. *Id.* at 960. These two cases assisted in establishing the theory that just because one part of the speech might normally receive less protection than public speech, one cannot partition it out from the other fully protected speech. Instead, the statement or advertisement should receive protection as a whole.

⁴⁰ *Va. State Bd. of Pharmacy*, 425 U.S. at 762 (citation omitted).

⁴¹ *Cent. Hudson*, 447 U.S. at 563 n.5.

ment or statement will be fully protected under the First Amendment only if its comments are directed at a public issue.⁴² However, advertisements or statements that simply include references to a public issue in the context of a commercial transaction will not receive full First Amendment protection.⁴³ For example, a sales presentation that is begun with the Pledge of Allegiance does not convert all speech concerning the sales after that to political speech.⁴⁴ These limitations demonstrate that the “inextricably intertwined” theory cannot be interpreted so broad as to include advertisements or statements that propose a commercial transaction but contains a mere statement regarding a public issue.⁴⁵

A recent example of the application of the “inextricably intertwined” rule is found in a Maryland state court of special appeals case, *Keene v. Abate*.⁴⁶ In *Keene*, the issue on appeal concerned whether the circuit court could constitutionally restrict Keene Corporation from advertising its views regarding the societal impact of asbestos litigation before the jury returned a verdict in an ongoing asbestos case involving the corporation.⁴⁷ The court held that the advertisements could not be restricted because the statements were not commercial speech.⁴⁸ The advertisements addressed a matter of public concern and proposed a legislative solution.⁴⁹ Like *Riley*, the advertisement may promote an economic interest of Keene Corporation, but the statements are not commercial speech because the advertisement’s message is directed at a public issue.

As discussed above, the Court has established situations where speech will not be considered commercial speech. When the speech pertains solely to a public issue or is intertwined with noncommercial speech, the Court will allow full First Amendment protection. In cases where the speech does not fit into one of these two categories, the courts must examine, in order to decide whether the speech deserves full protection, the United States Supreme Court’s murky definition of what is commercial speech.

⁴² *Bolger*, 463 U.S. at 68.

⁴³ *Id.*

⁴⁴ *Fox*, 492 U.S. at 474-75.

⁴⁵ The term “inextricably intertwined” was coined in *Riley*, 487 U.S. at 796. The Court used the term to assist in describing the situation where protected speech is intermingled with commercial speech. *Id.*

⁴⁶ *Keene v. Abate*, 608 A.2d 811 (Md. App. 1992).

⁴⁷ *Id.* at 812.

⁴⁸ *Id.* at 814.

⁴⁹ *Id.*

C. *Reasons for the Distinction Between Commercial and Noncommercial Speech*

Throughout its commercial speech jurisprudence, the United States Supreme Court has formulated reasons as to why commercial speech deserves less protection than noncommercial speech. One reason is verifiability. In *Virginia State Board of Pharmacy*, the Court, in a footnote, stated that commercial speech “may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary.”⁵⁰ In the normal course of business, an advertiser disseminates information pertaining to a certain product that he presumably knows more about than anyone else.⁵¹ It is generally assumed that a commercial advertiser is in a better position to verify the accuracy of his or her factual representations before he or she disseminates them.⁵² For example, a company that controls its product manufacturing is in the best position to give accurate information concerning the specifications of its products. Because the corporate advertiser has unfettered access to the truth regarding his or her product, it “substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and non-deceptive commercial expression.”⁵³

In addition, the Court reasons that commercial speech deserves less protection because it is “hardier” than noncommercial speech.⁵⁴ Since “advertising is the *sine qua non* of commercial profits, there is little likelihood of it being chilled by proper regulation and forgone entirely.”⁵⁵ It is due to the hardiness of commercial speech that courts do not tolerate inaccurate statements in fear of silencing a speaker.⁵⁶ The courts allow the states to impose regulations on commercial speech because the hardiness of commercial speech, inspired by the profit motive, reduces the chilling effect that may be caused by the state-imposed regulation.⁵⁷ It is for these reasons

⁵⁰ *Va. State Bd. of Pharmacy*, 425 U.S. at 774 n.24.

⁵¹ *Id.*

⁵² *See id.* at 777 (Stewart, J., concurring) (“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 . . .”).

⁵³ *Id.*

⁵⁴ *Id.* at 772 n.24.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996). Rhode Island enacted two statutes prohibiting the advertisement of the retail price of alcoholic beverages. *Id.* at 489. 44 *Liquormart* was a Rhode Island liquor store. *Id.* at 492. The store advertised, in a Massachusetts newspaper, the price of potato chips, peanuts, and Schweppes mixers. *Id.* In addition, the advertisement included the word “WOW” in large letters next to pictures of rum and vodka bottles. *Id.* The Rhode Island Liquor

that the United States Supreme Court justifies its view that commercial speech deserves less First Amendment protection, and, as a result, can be regulated by the government.

Lastly, one of the predominant reasons the courts, government, and some people believe commercial speech should be regulated is the idea that there is a governmental interest in preventing commercial harms.⁵⁸ Because of this governmental interest, commercial speech can be “subjected to greater governmental regulation than noncommercial speech.”⁵⁹ In an effort to prevent commercial harms, the government’s power to regulate commercial transactions is justified by its concurrent power to regulate the commercial speech that is linked to the commercial transaction.⁶⁰ There is a strong desire to protect consumers from commercial harm, therefore justifying the requirement that advertising be truthful.⁶¹ A law that protects consumers from suffering commercial harm would properly be evaluated as a regulation of commercial speech.⁶² American courts have adopted the consumer protection argument as a strong excuse to regulate commercial speech.

Verifiability, durability, and the protection of consumers have been the three predominant rationalizations for greater governmental control of commercial speech. Speech, such as political speech, is often hard to verify, is not durable, and does not pose a risk of consumer harm. It is for these reasons that political speech is given full First Amendment protections. However, as discussed above, speech concerning commercial transactions is verifiable by the speaker, is durable, and could present a commercial harm if the product or idea is not properly represented. It is for these reasons that the Court has found justification in providing commercial speech with less First Amendment protection.

D. *How the Government Can Regulate Commercial Speech*

The United States Supreme Court has established a test that must be followed in order to determine whether the specific regulation of some par-

Control found the store in violation of the statute that banned advertising by any Rhode Island liquor store. *Id.* They based their conclusion on the implied reference—WOW—to low liquor prices at the store. *Id.* The Court held that the prohibition against advertisements that provide the public with accurate information concerning the price for alcoholic beverages was invalid. *Id.* at 489.

⁵⁸ See *Discovery Network*, 507 U.S. at 426.

⁵⁹ *Id.*

⁶⁰ *44 Liquormart*, 517 U.S. at 499.

⁶¹ *Bolger*, 463 U.S. at 81 (Stevens, J., concurring in judgment).

⁶² *Id.*

ticular form of commercial speech is valid. The test, as outlined in *Central Hudson*, asks (1) whether the regulated speech concerns a lawful activity and is not misleading; (2) whether the asserted government interest is substantial; (3) whether the regulation directly advances the interest asserted; and (4) whether the regulation is not more extensive than is necessary to serve that interest.⁶³ This balancing test allows courts to examine the “prongs” and use their discretion to balance the government’s interest versus the public’s interest when determining whether a law or regulation restricting commercial speech is valid.

In order to observe the application of the *Central Hudson* test, a brief examination will be made of two cases in which this test was applied. First, in *Central Hudson* itself, the Court outlined the test and applied it to determine whether the Public Service Commission could ban promotional advertising by the electrical utility.⁶⁴ The Court easily disposed of the first question regarding whether the speech concerned a lawful activity and was not misleading because the Commission did not claim that the advertisements were inaccurate or related to an unlawful activity.⁶⁵ With regard to whether the government interest was substantial, the Commission asserted two justifications.⁶⁶ The Commission argued that in the interest of conservation it is justified in suppressing advertisements that increase consumption.⁶⁷ In addition, the Commission argued that the higher consumption encouraged by the advertisements would lead to higher marginal rates charged to all consumers.⁶⁸ The Court found that both of these arguments demonstrated that there was a substantial government interest in restricting the advertisements.⁶⁹

With regard to the third prong, the Court examined whether the regulation directly advanced the interests asserted.⁷⁰ The Court held that the argument concerning the higher marginal rates was too remote and could not justify silencing the electrical utility’s advertising.⁷¹ However, the Court did find that the restrictions on the advertising did directly promote the substantial government interest of conservation.⁷² Lastly, with regard to the

⁶³ *Cent. Hudson*, 447 U.S. at 566.

⁶⁴ *Id.* The advertising in question involved the promotion of the use of electricity. *Id.* at 559. The Commission desired to restrict promotional advertising because it was contrary to the national policy of energy conservation. *Id.*

⁶⁵ *Id.* at 566.

⁶⁶ *Id.* at 568.

⁶⁷ *Id.*

⁶⁸ *Id.* at 568-69.

⁶⁹ *Id.*

⁷⁰ *Cent. Hudson*, 447 U.S. at 569.

⁷¹ *Id.*

⁷² *Id.*

fourth prong, the Court held that “in the absence of a showing that more limited speech regulation would be ineffective,” the Court could not condone a complete suppression of *Central Hudson*’s speech.⁷³ Therefore, the Court ruled that the suppression of *Central Hudson*’s speech was unconstitutional because it failed the fourth prong of the test.⁷⁴

A more recent case in which the *Central Hudson* test was applied is *Thompson v. Western States Medical Center*.⁷⁵ This case involved a challenge to the provision of the Food and Drug Administration Modernization Act (“FDAMA”) that prohibited advertising and promoting compound drugs.⁷⁶ The Court held that the ban on advertising imposed by the FDAMA passed the first three prongs of the *Central Hudson* test, but failed the fourth.⁷⁷ The provision failed the fourth prong because “the government failed to demonstrate that the speech restrictions are no more extensive than is necessary to serve the government’s interest.”⁷⁸ The Court found that the government could have achieved its interests in a manner that either did not restrict speech or restricted less speech.⁷⁹

As the past two cases illustrate, the government can regulate commercial speech. However, the regulation must pass the test formulated by the Court in *Central Hudson*.

II. THE *KASKY V. NIKE, INC.* DECISION

A. *The Facts of Nike*

Beginning in 1996, several television news programs aired stories about Nike’s labor practices in its Asian country factories.⁸⁰ These pro-

⁷³ *Id.* at 570-71. The Court stated that the Commission’s ban reached all advertising, “regardless of the impact of the touted service on overall energy use.” *Id.* at 570. While the energy conservation rationale was found to be important, the Court found that it could not be used to suppress information regarding electric devices or services that would not increase energy use. *Id.*

⁷⁴ *Id.* at 571.

⁷⁵ *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002).

⁷⁶ *Id.* at 360.

⁷⁷ *Id.* at 367-77.

⁷⁸ *Id.* at 370 (citing *Cent. Hudson*, 477 U.S. at 566) (internal quotations omitted).

⁷⁹ *Id.* The Court outlined various methods of regulating compound drugs that would not affect free speech. *Id.* For example, the government could have prohibited pharmacists from compounding drugs in anticipation of receiving prescriptions. *Id.* Also, the government could limit the amount of compound drugs that a given pharmacist or pharmacy may sell out of state. *Id.*

⁸⁰ *See Nike*, 45 P.3d at 248.

grams alleged that Nike treated the laborers in these factories unfairly.⁸¹ Nike was accused of paying less than the minimum wage, requiring mandatory overtime, and not having adequate safety equipment on the premises.⁸² These were just a few of the allegations that the news programs made against Nike.

Due to these accusations, Nike responded with a public relations campaign.⁸³ Nike made defensive statements in press releases, letters to newspapers, letters to university athletic coaches, and in various other documents.⁸⁴ In these statements, Nike stated that their workers were protected from physical and sexual abuse, were paid the applicable minimum wage laws of the locality, and received free meals and health care.⁸⁵ In addition, Nike claimed that the working conditions in the factories were in compliance with local law.⁸⁶ Also, as part of its public relations campaign, Nike bought full-page advertisements in numerous newspapers in order to promote a report conducted by a former United States Ambassador.⁸⁷ The report stated that there was no evidence of illegal or unsafe working conditions in Nike's factories.⁸⁸

The plaintiff, Marc Kasky, brought suit against Nike, alleging that the company made false statements during their public relations campaign regarding their labor practices.⁸⁹ Kasky brought this action under California's Unfair Competition Law ("UCL") and False Advertising Law ("FAL").⁹⁰ Kasky sought monetary and injunctive relief under both the UCL and FAL.⁹¹

B. *Procedural History*

This case began in California Superior Court. Kasky brought suit as a California resident under the California Business and Professions Code,

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Nike*, 45 P.3d at 249-50. The Unfair Competition Law protects consumers and competitors from unfair business acts, which include untrue or misleading advertising. *Id.* at 249 (citing CAL. BUS. & PROF. CODE § 17200 (West 1997)). The False Advertising Law prohibits a corporation from disseminating statements that are false and misleading in order to induce the public to purchase its goods or services. *Id.* at 250 (citing CAL. BUS. & PROF. CODE § 17500 (West 1997)).

⁹¹ *Id.* at 247.

which allowed him to sue on behalf of the general public of the State of California.⁹² Nike demurred to the complaint on the grounds that Kasky could not state a cause of action.⁹³ According to Nike, there was no cause of action under the UCL or FAL because the First Amendment to the United States Constitution protected Nike's speech.⁹⁴ Before the case could continue, the court stated that it was important to first determine whether Nike's allegedly false and misleading statements constituted commercial or noncommercial speech.⁹⁵ The court reasoned that the answer to this question would determine the level of protection granted to the statements under the United States and California Constitutions.⁹⁶ After the court considered the arguments and authorities, it sustained the demurrers by Nike and dismissed the complaint.⁹⁷

Kasky then appealed the Superior Court's decision to the California Court of Appeal. The Court of Appeal upheld the judgment of the lower court.⁹⁸ Similar to the lower court, the Court of Appeal reasoned that the crucial issue was whether Nike's statements were commercial or noncommercial speech.⁹⁹ The Court of Appeal also determined that Nike's statements were noncommercial speech and as a result deserved full First Amendment protection.¹⁰⁰ The court stated that since Nike's speech was protected, the trial court's ruling must be sustained and the complaint be dismissed.¹⁰¹ Kasky appealed the case to the California Supreme Court.

C. *Majority Opinion*

In a four to three decision, the California Supreme Court overturned the lower courts' rulings and held that the matter should be remanded for further proceedings consistent with the court's opinion.¹⁰² The majority opinion begins by describing California's Unfair Competition Law and its False Advertising Law. The court stated that the UCL's goal is to protect consumers by promoting fair competition.¹⁰³ Under the law, unfair competi-

⁹² *Id.*

⁹³ *Nike*, 45 P.3d at 248.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 248-49.

⁹⁸ *Nike*, 45 P.3d at 249

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 262-63.

¹⁰³ *Nike*, 45 P.3d at 249.

tion includes any “unfair or fraudulent business act or practice.”¹⁰⁴ In addition, the FAL prohibits the dissemination of misleading information regarding an item or property that might be involved in a commercial transaction.¹⁰⁵ The court stated that the common feature of the UCL and FAL is that a violation of the FAL will necessarily violate the UCL.¹⁰⁶ To state a claim under either the UCL or FAL, the court held that the advertisement may either be false or have the tendency to deceive or mislead the public.¹⁰⁷

Next, in order to determine whether Nike’s statements could be governed by the UCL and FAL, the court examined the development and definitions of commercial speech. As a result of the court’s examination of the United States Supreme Court’s jurisprudence regarding commercial speech, the court established a test of three factors to determine whether particular statements or advertisements were commercial or noncommercial speech. According to the court, the three factors that must be considered are (1) the speaker, (2) the intended audience, and (3) the content of the message.¹⁰⁸ The court called this test the “limited-purpose” test.¹⁰⁹ The element considering the “speaker” is important, according to the court, because in most commercial speech cases the speaker is someone engaged in commerce.¹¹⁰ Also, with regard to the second factor, the court reasoned that speech that can be considered commercial speech is generally directed to an audience that may engage in a commercial transaction with the speaker.¹¹¹ For example, advertisements generally contain statements concerning a product that are directed at a person who may want to purchase the product or service.¹¹² Lastly, the court stated that for speech to be considered commercial, the content of a statement or advertisement must be commercial in nature.¹¹³

Within the “limited-purpose” test, the content element is critical to determine whether particular speech is commercial. The court stated that the content of the speech is commercial in nature when it “consists of representations of fact about the business operations, products, or services of the speaker . . . made for the purpose of promoting sales of, or other commercial transactions in, the speaker’s products or services.”¹¹⁴ The court in-

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 250.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 255-56.

¹⁰⁹ *Nike*, 45 P.3d at 256.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

sisted that the United States Supreme Court's commercial speech decisions support its justifications as to when speech is commercial.¹¹⁵ It reasoned that because the speech was easily verifiable by its disseminator and, due to the profit motive, it was less likely to be chilled by proper regulations prohibiting false and misleading advertising.¹¹⁶ Therefore, the court believed that its interpretation of the content element did not violate past United States Supreme Court precedent.¹¹⁷

The court next applied the "limited-purpose" test to the facts in the *Nike* case. The first factor of the test examines the identity of the speaker. The court held that the factors point to a finding that the speech was commercial because Nike engages in commerce.¹¹⁸ For example, they manufacture, distribute, and sell consumer goods in the form of shoes.¹¹⁹ The court also found that the second factor, requiring an intended commercial audience, also directed a finding that the speech was commercial.¹²⁰ It reasoned that the statements and advertisements by Nike were addressed to actual and potential consumers who might engage in commercial activities with the company.¹²¹ According to the court, the purpose of disseminating these statements to the public was to maintain the company's profits and sales by disseminating positive information about the company to potential consumers.¹²²

Lastly, the court applied the third factor of the "limited-purpose" test, the content of the statements, to Nike's speech. The court held that the content of Nike's statements were commercial in nature.¹²³ Nike, in describing its labor practices, was making factual representations concerning its business operations.¹²⁴ The wages, conditions of the factories, hours of work, and the environment of the workplace were all easily verifiable by Nike because it was in the best position to verify the truth of its statements.¹²⁵ In addition, the court reasoned that the content of Nike's speech was commercial because the speech was "durable."¹²⁶ According to the court, the speech was "durable" because Nike's goal in making these statements was to pre-

¹¹⁵ *Nike*, 45 P.3d at 256-57.

¹¹⁶ *Id.* at 257.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 258.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* Nike had addressed letters to athletic directors and university presidents explaining their labor policies. *Id.* The company also made statements regarding their labor practices to the general public. *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

vent profit losses.¹²⁷ The court stated that due to this goal, the regulations preventing false and misleading statements were “unlikely to deter Nike from speaking truthfully or at all about the conditions in its factories.”¹²⁸

Despite two vigorous dissents, discussed below, the majority concluded that Nike’s statements were commercial speech because Nike was acting as a commercial actor, its intended audience was consumers of its product, and the statements were of commercial character because they consisted of factual representations of its business operations.¹²⁹ To justify its conclusions, the majority rebutted some of the arguments made by Nike and the dissenters as to why the company’s statements were noncommercial speech. Nike first defended itself by arguing that its statements were not commercial speech because its labor practices became a matter of public concern.¹³⁰ However, the court said, “[c]ommercial speech commonly concerns matters of intense public and private interest.”¹³¹ The court further stated that “it does not matter that Nike was responding to charges publicly raised by others and was thereby participating in the public debate.”¹³² The court rationalized that it was not necessary to tolerate false statements in fear of silencing the speaker because the alleged commercial speech was both verifiable and durable.¹³³

The majority also rebutted the dissenters’ arguments that Nike’s speech was intertwined with commercial and noncommercial speech, therefore categorizing the speech as noncommercial speech.¹³⁴ The court stated that prior United States Supreme Court rulings have only decided that intertwined commercial and noncommercial speech can only be considered noncommercial when “there is some legal or practical compulsion to combine them.”¹³⁵ Since no law forced Nike to combine its representations of its labor practices with the debate of economic globalization, the statements did not qualify as noncommercial speech.¹³⁶

The court also struck down the argument by Nike that, in regulating its speech, Nike’s point of view would be restricted while the company’s critics would have broad leeway to state what they wanted to about the com-

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Nike*, 45 P.3d at 259.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 260.

¹³³ *Nike*, 45 P.3d at 259. The content of the commercial statements are easily verifiable by its disseminator, and they are less likely to be chilled by proper regulation. *Id.*

¹³⁴ *Nike*, 45 P.3d at 260.

¹³⁵ *Id.* at 260-61.

¹³⁶ *Id.* at 261.

pany.¹³⁷ The court stated that Nike's view on general policy questions regarding the globalization debate could be noncommercial speech. However, even though the noncommercial speech might be intertwined with commercial speech, Nike's speech loses full First Amendment protection when it concerns facts regarding commercial transactions.¹³⁸

To conclude its opinion, the court ruled that Nike's statements were commercial speech; therefore, the statements deserved less First Amendment protection than noncommercial speech.¹³⁹ The court rejected the arguments that Nike's speech was intertwined with noncommercial speech, that the speech concerned a matter of public concern, and that one side's point of view would be restricted.¹⁴⁰ Instead, the court ruled that Nike's speech was commercial speech because, according to the "limited-purpose" test, Nike was acting as a commercial actor, the audience was actual or potential consumers, and the context of the speech was commercial in nature.¹⁴¹

D. Dissents

Two separate dissents were filed in this case. Justice Chin, in his dissent, stated that Nike's labor practices became relevant in a public context.¹⁴² Since the debate concerning Nike's labor practices was in the public sphere, the public therefore had a right to hear information from both sides regarding the debate.¹⁴³ He stated that Nike's responses were not promoting its athletic gear; instead, the company was defending itself from adverse statements by parties attacking the company's labor practices.¹⁴⁴ Justice Chin pointed out that characterizing Nike's speech as commercial is inconsistent with United States Supreme Court rulings because commercial speech does "no more than propose a commercial transaction."¹⁴⁵ According to Justice Chin, Nike's speech went beyond proposing a commercial transaction.¹⁴⁶ Justice Chin also stated that Nike's speech should be pro-

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 *Nike*, 45 P.3d at 264 (Chin, J., dissenting).

143 *Id.*

144 *Id.* at 265.

145 *Id.* (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 762).

146 *Id.*

tected because it is at least inextricably intertwined with noncommercial speech.¹⁴⁷

Justice Brown was the author of the second dissent. In her dissent, she stated that Nike's statements were more like noncommercial speech than commercial speech.¹⁴⁸ Justice Brown attacked the majority's enumeration of the "limited-purpose" test. She stated that United States Supreme Court rulings have held that commercial speech must be distinguished only by its content.¹⁴⁹ However, the "limited-purpose" test includes two elements unrelated to content—the identity of the speaker and the intended audience.¹⁵⁰ She explained that the test does not follow United States Supreme Court precedent because it considers the identity of the speaker and inhibits corporations from engaging in public debates.¹⁵¹ According to Justice Brown, the majority's test unfairly sets the level of speech protection dependent on the speaker rather than just the speech's content.¹⁵² This result unconstitutionally favors certain speakers over others.¹⁵³ She also argues, in the alternative, that Nike's public relations campaign was not commercial speech because noncommercial elements addressing a pertinent public issue were "inextricably intertwined" throughout the speech.¹⁵⁴

The two vigorous dissents show that the court was deeply divided. The dissenters wrote that Nike's speech could not properly be characterized as commercial speech. They believed that the "limited-purpose" test unfairly broadened what could be considered commercial speech. In addition, the court reasoned that since Nike's speech was "inextricably intertwined" with noncommercial speech it could not be considered commercial speech.

III. ANALYSIS

The California Supreme Court's ruling in *Nike* demonstrates that the commercial speech doctrine is fraught with uncertainties and lacks bright-line tests. The *Nike* court declared that after a close reading of United States Supreme Court jurisprudence it could formulate the "limited-purpose" test in order to decide what is and what is not commercial speech.¹⁵⁵ It has been a common struggle by both state and federal courts to determine the proper

¹⁴⁷ *Id.* at 266.

¹⁴⁸ *Nike*, 45 P.3d at 269 (Brown, J., dissenting).

¹⁴⁹ *Id.* at 269-70.

¹⁵⁰ *Id.* at 270.

¹⁵¹ *Id.* at 270-71.

¹⁵² *Id.* at 268.

¹⁵³ *Id.*

¹⁵⁴ *Nike*, 45 P.3d at 276.

¹⁵⁵ *Nike*, 45 P.3d at 256.

definition of commercial speech.¹⁵⁶ A solution to this struggle is for the United States Supreme Court to abolish the commercial and noncommercial speech distinction. As seen by *Nike*, the courts are allowed too much discretion in determining if particular speech is commercial speech. As a result, courts might establish a test, like the “limited-purpose” test, that potentially encompasses protected speech. This analysis section will discuss the inherent problems with the test outlined in *Nike*, the possible effects that the *Nike* decision will have on anyone engaging in commercial transactions, and offer arguments as to why consumers will still be protected if the commercial speech distinction is eliminated.

A. *Problems with the “Limited-Purpose” Test*

The “limited-purpose” test encompasses more speech than just commercial speech. According to *Nike*, the “limited-purpose” test considers the speaker, the intended audience, and the content of the message when determining whether particular speech is commercial.¹⁵⁷ However, these elements have the potential to be interpreted broadly to include speech that would normally be protected.

The first element, considering the speaker, should not even be a factor when determining whether particular statements are commercial speech. Entities that engage in commercial transactions, typically corporations, engage in both commercial and noncommercial speech. For example, if the government attempts to pass anti-trade legislation, many corporations that engage in international trade might produce advertisements or write editorials proclaiming the benefits of international trade. Corporations take these steps in order to encourage congressional representatives to vote down the act. These activities by a corporation are not commercial speech because they do “more than propose a commercial transaction.”¹⁵⁸ However, the “limited-purpose” test potentially makes the identity of the speaker a strong factor in determining whether certain statements are commercial speech. The United States Supreme Court has said that speech that would be protected under the First Amendment does not lose that protection because it emanates from a corporation.¹⁵⁹ In addition, the Court has stated that “the identity of the speaker is not decisive in determining whether speech is protected.”¹⁶⁰ Corporate speakers need their identity protected in commercial

¹⁵⁶ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) (commenting that “the precise bounds of the category of . . . commercial speech” are “subject to doubt”).

¹⁵⁷ *Nike*, 45 P.3d at 255-56.

¹⁵⁸ *Va. State Bd. of Pharmacy*, 425 U.S. at 762 (emphasis added).

¹⁵⁹ *Bellotti*, 435 U.S. at 784.

¹⁶⁰ *Pacific Gas & Elec. Co.*, 475 U.S. at 8.

speech determinations. Corporations must be allowed to engage freely in public discussions without the fear of their identity being used in a formula to determine whether their statements are commercial speech. Commercial speech must not depend on the identity of the speaker but, according to the United States Supreme Court, if distinguished at all, it “must be distinguished by its content.”¹⁶¹

The second factor concerns the intended audience of the statements. The consideration of this factor could also potentially lead to conclusions that particular corporate speech is considered commercial, when, in reality, it is noncommercial. For example, a corporation like Nike may try to rebut attacks on its labor policies with advertisements or editorials. While the statements are aimed at potential consumers, they contain no speech specifically proposing a commercial transaction. Rather, they concern a debate on an issue in the public forum. A court using the intended audience factor may, however, hold that because the advertisement is aimed at potential consumers it is more likely that the statements are commercial speech. This strays again from the United States Supreme Court’s holding that it is the content of the statements that determine whether speech is commercial.¹⁶² The statement’s intended audience should not matter because, in most cases, regardless if the speech concerns a public issue or is wholly commercial, the intended audience will be potential consumers.

The last factor of the “limited-purpose” test is the consideration of the content of the message. While this does not deviate from past holdings by the United States Supreme Court, this factor, combined with the other two factors, results in broad discretion as to what constitutes commercial speech. It must only be the content of the message that is examined to determine whether the statements propose a commercial transaction.¹⁶³

While the California Supreme Court in *Nike* was correct in examining the speech’s content, it made two mistakes when determining whether Nike had engaged in commercial speech. Its first mistake was to look at content in addition to the other two factors. As discussed earlier, content should be the only factor, if any, that a court scrutinizes. However, the court used two criteria unrelated to the speech’s content—identity of the speaker and intended audience—to determine whether Nike’s statements were commercial or noncommercial.¹⁶⁴ When these two unrelated factors are considered in conjunction with content, a court might be more likely to determine that particular speech is commercial. For example, if the speaker is a corporation and its audience is potential consumers, it is rational to assume that a

¹⁶¹ *Va. State Bd. of Pharmacy*, 425 U.S. at 761.

¹⁶² *Id.*

¹⁶³ *Ohralik*, 436 U.S. at 456.

¹⁶⁴ *Nike*, 45 P.3d at 270 (Brown, J., dissenting).

court could find that the content is also commercially related. The application of the two other factors along with content provides broad judicial discretion and can produce inconsistent rulings.

The second mistake that the *Nike* court made was determining that the content of Nike's statements was commercial. In *Nike*, the court dismissed the contention that Nike's speech was intertwined with noncommercial speech.¹⁶⁵ However, the court's conclusion is incorrect. Nike's speech does not exceed the limitations established by the United States Supreme Court with regard to commercial and noncommercial speech being "inextricably intertwined." The Court has stated that by adding a particular protected statement to statements that are not directed at a public issue will not give the speech full First Amendment protection.¹⁶⁶ However, the statements by Nike were solely directed at a public issue. Some could argue that an aspect of economic motivation was involved in the statements. Nonetheless, the statements are properly intertwined with noncommercial speech because they pertain to an issue that was debated in the public forum. It is not the duty or the prerogative of the California Supreme Court to parcel out the speech, in order to "apply[] one test to one phrase and another test to another phrase."¹⁶⁷

The United States Supreme Court has attempted to establish tests to assist in determining if a speech's content is commercial. However, by allowing commercial speech less protection and not establishing a bright-line standard, the result has been the use of expansive judicial discretion and inconsistent results in determining whether particular speech is commercial. *Nike* is a prime example of how a court used its own discretion to formulate a test in order to determine if certain statements are commercial speech. Allowing too much discretion eliminates certainty and predictability in an area where corporations need a reliable rule. Ending the commercial speech distinction would alleviate this problem and bring this form of speech under the same standards allowed to fully protected First Amendment speech.

The "limited-purpose" test is laden with problems. It considers two factors—the speaker and the intended audience—that should not be evaluated when deciding if particular statements are commercial speech. By using these factors, a court may unfairly determine that the content of the

¹⁶⁵ *Id.* at 260. The court stated that Nike cannot immunize its speech from being considered commercial speech simply by including references to a public issue. *Id.* at 260. In addition, the court stated that Nike's speech could not be considered inextricably intertwined with noncommercial speech because no law required Nike to combine factual representations of its labor practices with its opinions of the globalization debate. *Nike*, 45 P.3d at 260-61. The court attempted to draw a distinction between *Riley* because that decision did not involve speech that contained factual representations about a product or service. *Id.* at 260.

¹⁶⁶ See *Cent. Hudson*, 447 U.S. at 563 n.5; *Fox*, 492 U.S. at 475; *Bolger*, 463 U.S. at 68.

¹⁶⁷ *Riley*, 487 U.S. at 796.

speech is commercial because the factors point to a strong presumption that the statements are commercial speech. In addition, the various tests used in consideration of content have led to broad discretion by the courts as to what constitutes speech relating to a commercial transaction. The “limited-purpose” test illustrates how courts have struggled with identifying commercial speech and the broad and inconsistent rulings that have resulted from this struggle.

B. *Possible Effects of the Nike Ruling*

The *Nike* ruling furthers the confusion produced by the distinction between commercial and noncommercial speech therefore hindering a corporation’s ability to participate in a public debate. In wrestling with whether Nike’s speech was commercial and could thus be regulated under the California competition statutes, the court established its own test to determine what commercial speech is. However, this test only furthers the uncertainty corporations face when evaluating whether their speech is commercial or noncommercial. As a result, corporations will be more hesitant to speak in the public forum concerning public issues that may affect their businesses. For example, after the decision against it, Nike has restricted its communications on social issues in the national media.¹⁶⁸ Although an individual can speak about a particular public issue and be fully protected under the First Amendment, corporate speech is chilled. The United States Supreme Court has stated that the First Amendment is offended when a suppression of speech gives one side of a debatable public question an advantage over the other in expressing its views to the public.¹⁶⁹ The ruling in *Nike*, in effect, gives one side of a public issue more protection than the other side.

Another effect of *Nike* will be that corporations will not be able to effectively rebut attacks by public interest groups or individuals without fear of being taken to court. Activists groups could use California’s statutes to bring any corporation who does business in California, as thousands in America do, to court, claiming that the company’s rebuttals to their attacks were false and misleading. As one commentator suggests, “Unless reversed, this decision [*Nike*] will place American businesses at a startling disadvantage in coping with attacks on their business ethics, integrity, or the worth or quality of their products or services.”¹⁷⁰

¹⁶⁸ Petition for Writ of Certiorari, *Nike, Inc. v. Kasky*, 537 U.S. 1099 (2003) (No. 02-575), available at 2002 WL 32101098. In addition, “Nike had determined that the risk of suits in California asserting the Kasky theory is too great to release publicly anywhere in the world its next annual Corporate Responsibility Report.” *Id.* at *28.

¹⁶⁹ *Bellotti*, 435 U.S. at 785.

¹⁷⁰ John Walsh, *State High Court Silences Business’ Free Speech*, LEGAL OPINION LETTER, Wash-

For example, corporations that specialize in genetically modified foods have been thrust into the national spotlight through the public debate concerning the safety of their products. Under *Nike*, a response by a corporation with regard to the debate concerning the exportation of genetically modified produce could be deemed commercial speech. This finding would be justified, under the test, because the identity of the speaker is a corporation, the intended audience—as in most cases with any statement by any corporation—is potential customers, and the content, even though intertwined with noncommercial speech concerning a public issue, is commercial. Due to the broad discretion implied in the “limited-purpose” test, corporate response to public attacks will be chilled. The corporation will not want to risk the possibility that a corporate adverse court might find some way to construe that corporation’s speech as being commercial and therefore unprotected.

The *Nike* case is a good example of how the commercial speech distinction lends itself to broad judicial discretion in determining what is commercial speech, and, as a result, leads to the suppression of protected speech. The risk of lawsuits will prevent corporations from engaging in important public policy discussions and defending themselves from attacks. In addition, just because speech comes from a corporation instead of an individual does not mean it is not valuable to the democratic process.¹⁷¹ The negative effect of the *Nike* ruling illustrates that a bright-line test must be adopted to give corporations certainty and predictability as to whether their statements will constitute protected speech. This test should be to allow all corporate speech, commercial and noncommercial, full First Amendment protection.

C. *Allowing All Corporate Speech Full First Amendment Protection Will Not Harm Consumers*

Proponents of the commercial speech doctrine argue that it is needed to protect consumers.¹⁷² Allowing commercial speech less protection may on its face seem like an effective way to protect consumers. However, this protection comes at an unnecessary cost to corporations. While individuals can speak freely, without restrictions, about a business, the corporation’s rebuttal will be chilled because of the fear of litigation. The “limited-purpose” test only exacerbates the problem. The broad application and wide

ington Legal Foundation, Vol. 12, No. 17 (2002).

¹⁷¹ *Bellotti*, 435 U.S. at 777.

¹⁷² *Discovery Network*, 507 U.S. at 426 n.21.

discretion a court could use in applying this test will only further restrict legitimate corporate speech.

A solution to this problem is to eliminate the commercial speech doctrine, which will end the need to decipher the proper definition of what is commercial speech. Even if the consumer speech distinction is eliminated, consumers will remain protected from corporate misrepresentation. The United States Supreme Court has not protected false speech. In addition, business regulations can be enacted to protect consumers as long as the regulations pass strict scrutiny. The California Supreme Court's ruling in *Nike*, and its formulation of the "limited-purpose" test, should be a wake-up call to the American judiciary that the commercial speech doctrine has become a dangerous doctrine.

1. The Court Has Not Protected False Speech

The United States Supreme Court has never protected false speech, whether commercial or noncommercial. The Court has stated that "untruthful speech, commercial or otherwise, has never been protected for its own sake."¹⁷³ These statements by the Court are derived from a string of cases that demonstrate that false statements can be regulated under the First Amendment. In *Gertz v. Robert Welch, Inc.*, a magazine publisher was accused of falsely describing the plaintiff as a "Communist," "Leninist," and "Marxist."¹⁷⁴ The Court reasoned that false statements of fact have no constitutional value.¹⁷⁵ It opined, "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."¹⁷⁶ It was established that states, as long as they did not impose liability without fault, would allow compensation for those harmed by a defamatory falsehood.¹⁷⁷ For example, in a case involving libel, decided before *Gertz*, the Court allowed for a public official to recover for defamation when it was made with "actual malice"—that is, knowledge that the statements are false or were made with reckless disregard of whether they were false.¹⁷⁸ *Gertz* followed the theory that in considering defamation cases involving a public issue or person, breathing space—the requirement of having to show actual malice—is required to insure that freedom of speech and the press is protected.¹⁷⁹ Even with a

¹⁷³ *Va. State Bd. of Pharmacy*, 425 U.S. at 771.

¹⁷⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

¹⁷⁵ *Id.* at 340.

¹⁷⁶ *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

¹⁷⁷ *Id.* at 347.

¹⁷⁸ *Sullivan*, 376 U.S. at 279-80.

¹⁷⁹ *Gertz*, 418 U.S. at 342.

high bar for recovery in defamation or libel cases concerning a public person, it appears that the Court will not protect false speech.

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. is another defamation case involving the First Amendment.¹⁸⁰ This case differed from *Gertz* because it involved a private matter.¹⁸¹ The Court draws a general distinction between “matters of public concern” and “matters of private concern.”¹⁸² For example, the defamation in *Gertz* concerned a “matter of public concern.”¹⁸³ The Court stated that speech that is of a public concern is the main purpose for stringent First Amendment protection.¹⁸⁴ However, speech which concerns matters that are purely private are less of a First Amendment concern.¹⁸⁵ The Court held in *Dun & Bradstreet* that false speech that is of a private concern does not deserve special protection—no actual malice must be shown.¹⁸⁶

Two observations can be made regarding the Court’s ruling in *Dun & Bradstreet*. First, it can be properly assumed that the special protection the Court is referring to concerns the need to prove actual malice in defamation and libel suits involving a public concern. However, in defamation and libel cases concerning private matters, the Court will not be as lenient in applying First Amendment protection. Second, and probably most importantly, the Court stated that it would not protect false speech regarding a private concern.¹⁸⁷ However, the Court does not make any reference that truthful speech concerning a private issue will have any less protection than speech concerning a public issue. This differs from the idea of a commercial speech distinction because commercial speech, even if truthful, receives less First Amendment protection because the government can regulate it.

These cases should calm the fears of those who believe that eliminating the commercial speech distinction will harm consumers. The Court, in both matters of public and private concern, has not protected false speech. Likewise, current commercial speech jurisprudence does not tolerate false speech. This can be seen through the first prong of the *Central Hudson* test, which asks the courts to initially consider whether the commercial speech

¹⁸⁰ *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985).

¹⁸¹ *Id.* at 762. *Dun & Bradstreet* had sent a credit report to five subscribers stating that Greenmoss Builders had filed for bankruptcy. *Id.* at 751. The report contained false statements concerning Greenmoss Builders and their financial position. *Id.* Greenmoss Builders brought this defamation suit against *Dun & Bradstreet* because it alleged that the false report injured its reputation in the business community. *Id.* at 752.

¹⁸² *Id.* at 759.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 759.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 762 (emphasis added).

¹⁸⁷ *Id.*

was false and misleading.¹⁸⁸ There is no reason to believe that if commercial speech were given full First Amendment protection, the result would be any different than defamation and libel cases. The Court could use *Dun & Bradstreet* as a justification to give false statements concerning commercial transactions—which can be considered private matters—no First Amendment protection. As a result, consumers will have no need to fear false statements from corporations concerning their products because the consumers will still be protected from false speech.

2. Consumer Protection Regulations Will Still Protect Consumers

In addition to the judiciary protecting consumers from false speech, many consumer protection regulations with or without minor revisions will remain constitutional. To restrict content-based speech, the government “must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that goal.”¹⁸⁹ For the regulation to be narrowly tailored, the government must use the least restrictive alternative to serve its purpose.¹⁹⁰ As long as these requirements are met, a regulation will be deemed to have not infringed upon an individual’s First Amendment rights. For example, as one commentator has stated, a securities regulation compelling disclosure of financial information will probably satisfy the strict scrutiny requirements because, as long as it is narrowly tailored, providing accurate information to market participants is a compelling government interest.¹⁹¹ While the current scheme of securities regulations might need to be fine-tuned to meet the “narrowly tailored” requirement, there “is no reason to fear that abandoning the commercial speech distinction will have any significant effect on the regulation of the securi-

¹⁸⁸ *Cent. Hudson*, 447 U.S. at 566.

¹⁸⁹ *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). This case concerned a regulation, adopted by the Board of Curators for the University of Missouri at Kansas City, which did not allow university grounds or buildings to be used for religious meetings. *Id.* at 265. The Court stated that a regulation restricting content-based speech must be “necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Id.* at 270. It held, in this case, that there was no compelling state interest to justify the restrictions on the students’ religious speech. *Id.* at 278. In its reasoning, the Court stated that the Establishment Clause is limited by freedom of speech. *Id.* at 277.

¹⁹⁰ *United States v. Playboy*, 529 U.S. 803, 813 (2000). The case involved a statute that required cable operators to scramble a sexually explicit channel or limit the hours of programming on that channel. *Id.* at 808. This statute was passed to prevent the possibility that children will see the sexually explicit material due to the bleed problem. *Id.* at 806. The Court held that this statute was an unconstitutional restriction of content-based speech because there were less restrictive alternatives available. *Id.* at 827.

¹⁹¹ Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 652 (1990).

ties market.”¹⁹² Allowing commercial speech full First Amendment protection will not hinder effective consumer protection. It will only prevent the government from enacting legislation that might encompass speech that should be fully protected because it contributes to public or political debate.

In order to see how the strict scrutiny test would work with regard to a statute or regulation, the portion of the California Code at issue in *Nike* serves as a nice analytical example. The Code states that “it is unlawful for any person, firm . . . with the intent directly or indirectly to dispose of real or personal property . . . to make or disseminate . . . in any newspaper or other publication . . . *any statement*, concerning that real or personal property or those services . . . which is untrue or misleading.”¹⁹³ Using the strict scrutiny requirements, this Code section can be analyzed see if it is a constitutional restriction of speech. The first question to ask is whether the regulation serves a compelling government interest. There is a strong argument that the California Code does serve a compelling government interest because the government should ensure the integrity of the marketplace, and protect consumers from false advertisements that could create a danger in the use of a particular product. With regard to the second element, the California Code does not appear to be narrowly tailored. The phrase “*any statement*, concerning that real or personal property or those services” is overly broad.¹⁹⁴ The phrase is broad because “any statement” about a product could infer that any allegedly misleading statements made in a public debate concerning a political or public issue, if made by a producer of consumer goods, could be interpreted as a violation of the regulation. However, courts have routinely recognized that some leniency should be afforded to statements concerning public or political issues in order to promote “uninhibited, robust and wide-open” debate.¹⁹⁵

There are less restrictive alternatives that can be used in the California Code to accomplish the government’s goal of protecting consumers and the marketplace. Instead of allowing “any statement” that is false and misleading to be a violation, the legislature could insert language to narrow the regulation. For example, “any statement” could be substituted for “statements regarding the integrity, make, and description of the product.” The proposed phrase would narrow the language of the regulation, and still accomplish the government’s interest in protecting consumers and the marketplace. With minor adjustments to current regulations and statutes, and the use of more precise language in the future, consumers will still be protected even if the commercial speech doctrine is abolished.

¹⁹² *Id.*

¹⁹³ CAL. BUS. & PROF. CODE § 17500 (West 1997) (emphasis added).

¹⁹⁴ *Id.* (emphasis added).

¹⁹⁵ *Sullivan*, 376 U.S. at 270.

D. *Move to End the Commercial Speech Distinction*

Commercial speech should be given full First Amendment protection. Because commercial speech is given less protection, overly broad statutes risk restricting speech that is not necessarily commercial. If the commercial speech doctrine was abolished, consumers would still be protected because the courts have never protected false speech, and regulations would still be enforced that would give adequate protection to consumers. Justice Thomas has stated that he sees no basis for holding that commercial speech has a lesser value than noncommercial speech.¹⁹⁶ He reasoned that the *Central Hudson* test, due to its difficult application and wide discretion allowed to judges in rendering decisions, is dangerous because it infringes upon protected speech.¹⁹⁷ This discretion leads to inconsistent rulings, many times based on a judge's beliefs concerning what he considers to be commercial speech.

The United States Supreme Court has not been helpful in giving the American judiciary direction when deciding commercial speech cases. The Court's definition of what is commercial speech has differed in various cases. In one instance, the Court has stated that it is speech that proposes a commercial transaction.¹⁹⁸ In yet another, the Court has held that commercial speech "relates solely to the economic interests of the speaker and the audience."¹⁹⁹ Applying these two definitions of commercial speech to an entity's statements can lead to two very different results. For instance, speech that only proposes a commercial transaction might resemble a statement that says, "Buy Nike, because our shoes are made of top quality material and last a lifetime." However, speech that relates to the economic interest of the speaker could include everything from the statement mentioned above to statements discussing trade issue in the public forum. For example, one could argue that speech in the public forum relates to the economic interest of the speaker because it implicitly assists the entity in the sale of its products. These differing definitions of commercial speech do not aid the nation's courts in correctly adhering to the commercial speech doctrine. Justice Brown, in her dissent in *Nike*, lamented that the commercial speech doctrine needs to be reconsidered, and that the United States Supreme Court should begin this reconsideration with *Nike*.²⁰⁰

The commercial speech doctrine should be abolished because it does not lend itself to predictability and certainty. As one commentator ob-

¹⁹⁶ *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring).

¹⁹⁷ *Id.* at 527.

¹⁹⁸ *Fox*, 492 U.S. at 473.

¹⁹⁹ *Cent. Hudson*, 447 U.S. at 561.

²⁰⁰ *Nike*, 45 P.3d at 280 (Brown, J., dissenting).

served, the results that the United States Supreme Court have reached in commercial speech cases have been unpredictable and almost random.²⁰¹ The commentator further explained that “the strict scrutiny test is quite protective of speech, and therefore fairly predictable in result.”²⁰² Corporations have a great interest in predictability and certainty because a more efficient market exists when corporations know that their actions will produce a certain and definite result. The commercial speech distinction inhibits certainty and predictability in the marketplace. Corporations should be assured that when they enter into a public debate, as Nike did, their statements will not be considered commercial speech. If corporations cannot be certain that their speech will be protected, then their speech will be chilled, and the “robust exchange of ideas” will be restricted.²⁰³

Commercial speech should be held to the same level of protection as noncommercial speech. This would eliminate the discretionary application by the courts as to what constitutes commercial speech. As seen by the analysis above, affording commercial speech less protection lends itself to the possibility that legislation, passed in the name of consumer protection, will restrict lawful public or political speech. The courts must not allow this to happen.

CONCLUSION

The rationale of the California Supreme Court in *Kasky v. Nike, Inc.* and its creation of the “limited-purpose” test illustrates the difficulty courts have had defining commercial speech. This difficulty has arisen because the United States Supreme Court has not assisted the lower courts in establishing a bright-line test. Instead, due to the different definitions of commercial speech the Court has proffered, the result has been inconsistent rulings in the lower courts concerning commercial speech. This inconsistency burdens corporations because there is no predictability or certainty in this area of law. Corporations thus enter the public debate at their own peril. For example, in some jurisdictions a corporation’s speech concerning a public issue will be protected, while in other jurisdictions it may not. This problem has the effect of chilling corporate speech. Corporations must be allowed to debate in the public sphere and be assured that their speech will receive full First Amendment protection. It is for these reasons that the commercial speech doctrine must be abolished. As the Nike slogan says,

²⁰¹ Katherine Yanes, Glickman v. Wileman Bros. & Elliot, Inc.: *Has the Supreme Court Lost its Way?*, 27 STETSON L. REV. 1461, 1488 (1998).

²⁰² *Id.*

²⁰³ *Sullivan*, 376 U.S. at 270.

the United States Supreme Court should “just do it” and end the commercial speech doctrine.

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