

KASKY V. NIKE AND THE QUARRELSOME QUESTION OF CORPORATE FREE SPEECH

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Abstract: In the *Kasky* case, the Supreme Court of California determined that Nike, Inc., might be accountable in a civil action for misleading statements that it made to the press and to the public about its operations in Southeast Asia. The *Kasky* case is examined here in its legal and ethical aspects. The U.S. Supreme Court's First Amendment cases that distinguish between commercial speech and political speech are explained, and the arguments in favor of greater protection for Nike's statements about its overseas operations are evaluated in light of Donaldson and Dunfee's integrative social contracts theory. The hypernorm of "necessary social efficiency" is invoked to claim that the arguments made by Nike and various "friends of the court" in favor of greater protection for corporate speech are problematic. Reliable information is the lifeblood of both democracy and efficient free markets. Thus, the more ethical approach is for corporations to support systemic legal reforms that would predictably sanction false and misleading statements in accordance with clear guidelines.

Introduction

In 2001, the Supreme Court of California determined that Nike, Inc., might be accountable in a civil action for misleading statements that it made to the press and to the public about its operations in Southeast Asia. A San Francisco-based labor activist, Marc Kasky, filed the lawsuit in 1998, using California laws that prohibited unfair competition and false advertising. After the U.S. Supreme Court agreed to review the decision, numerous business interests aligned with Nike's appeal. Twenty-eight organizations and the U.S. government filed briefs as "friends of the court" to argue that Nike's statements should be fully protected by the First Amendment.

The stakes were high. From the business community's point of view, the California law was too broad, too vague, and improperly empowered individuals to police corporate speech for purportedly misleading statements. The overall effect would be to "chill" corporate speech on matters of fundamental policy concern, ending any voluntary corporate social reporting for fear of civil liability and the possibility of "show trials" brought by labor activists.¹ Many corporations and their attorneys

considered the California statute and the *Kasky* lawsuit to be calamitous for the corporate right of free speech.² In his oral argument to the Supreme Court, former Solicitor General Theodore Olson even hinted that such activist-initiated lawsuits were the litigation equivalent of terrorism.³

This article reviews the *Kasky v. Nike* case and explores its implications for both business and society. Nike had numerous choices regarding the way it conducted business beyond the reach of U.S. law, and also had choices in responding to critics of its overseas operations. Each set of choices was laden with ethical implications. This article examines the second set of choices, inquiring whether there are any ethical limits on what a company says about its own operations, whether overseas or at home. The ethical aspects are critically important, given that the legal limits are so confounding. In legal terms, much depends on whether Nike's corporate speech is motivated by a monetary purpose ("commercial speech," subject to some governmental regulation) or is characterized as "political speech," fully protected because it relates to important public policy concerns.

The commercial speech/political speech distinction is problematic. Justice Thomas finds it essentially incoherent,⁴ and many current Supreme Court Justices may reject it entirely.⁵ Still, the distinction persists, and the difficulties of interpreting the free speech clause of the First Amendment⁶ are legion. These difficulties are likely to persist; even after extensive briefing and oral argument, the Justices were unable to decide the *Kasky* case.⁷

Because the legal standards and distinctions have proven so difficult to apply, it makes sense to consider underlying values and ethical perspectives that may apply to Nike's actions and speech. In this article I will attempt to address this question by applying Donaldson and Dunfee's frequently discussed integrative social contracts theory (ISCT) to the issues raised by the *Kasky* case. But before doing that, it is essential to make a detailed journey through *Kasky*'s case against Nike, considering the values that underlie the First Amendment's "freedom of speech" clause. Along the way, I hope to lay the groundwork for a conclusion that reliable information is the lifeblood of both democracy and efficient free markets, and that reasonably accurate reporting of labor and environmental aspects of overseas operations should be a desired end, sought-after not only by consumers, investors, and workers, but by corporations themselves. Within any such reporting system, corporations should support sanctions and standards that reward relative accuracy and discourage seriously negligent and misleading speech. Such a system would be morally preferable to either position adopted by the litigants in *Kasky*. I begin with an explanation of how bipolar the litigants came to be, and why the Supreme Court of the United States found the legal issues so indecipherable.

I. The Kasky Indecision

Nike, Inc., is the world's leader in sales of athletic footwear, apparel, equipment, and accessories. Its manufacturing operations are subcontracted to more

than 700 factories in over fifty countries. Nike gained its position in the market through careful nurturing of its brand image, an image associated with its distinctive “swoosh” logo, the slogan “Just do it,” agreements with sports heroes such as Michael Jordan and Tiger Woods, and exclusive arrangements with major university athletic programs. Like Reebok, Adidas, and other makers of athletic shoes and sports apparel, Nike uses independent contractors in nations with low labor costs. After initially establishing overseas production in Japan, Nike moved operations to South Korea and Taiwan for cheaper labor. In 1995, a Korean subcontractor set up a major new facility in Vietnam; Nike subcontractors also used facilities in China, Thailand, and Indonesia. Over 500,000 workers are employed in Asian factories producing Nike products.⁸

In June 1996, critical commentary began to surface in the United States regarding Nike’s production facilities in Southeast Asia. New York Times columnist Bob Herbert accused Nike of building its wealth on the “slave labor” of young Asian women.⁹ Several non-government organizations (NGOs) came forward to allege human rights abuses, violence toward laborers, and deplorable working conditions. Nike began to answer accusations as early as July 1996, but other negative reports soon surfaced. A CBS program in October 1996 reported that workers in Nike’s factories in Asia were “poorly paid, exposed to toxic chemicals and subjected to physical abuse.”¹⁰ In September 1997, a report by the Hong Kong Christian Industrial Committee alleged that in three Chinese factories there were violations of minimum wage laws, employment of children below sixteen years of age, eleven to twelve hour work days, compulsory overtime, and exposure to dangerous levels of dust and toxic fumes.¹¹

Several other labor-watch organizations also reported abuses at Nike facilities in 1997. According to the Boycott Nike website, there were four major reports of abusive Nike labor practices in Asia between March and November 1997. In addition to the Hong Kong Christian Industrial Committee, reports were released by Vietnam Labor Watch (New York), Community Aid Abroad (Sydney), and Transnational Resource & Action Center (San Francisco). These generated a significant number of newspaper accounts and editorials that tarnished Nike’s brand image. Protests and boycotts began to spring up around the United States, including demonstrations at some Niketown retail shops; one Niketown grand opening was marred by the arrest of nineteen demonstrators.¹²

Nike engaged these criticisms as quickly as possible. By late February 1997, Nike had commissioned a report from GoodWorks International, LLC.¹³ Led by Andrew Young (formerly mayor of Atlanta, U.S. Ambassador to the United Nations, and civil-rights champion), the report was finished and released four months later based on surveys of twenty factories in six Asian countries.¹⁴ In general, the report gave assurances that all surveyed operations met all applicable health, safety, and labor standards. In particular, the report states that average pay rate in these factories is double the local minimum wage, and that the company “typically” grants “subsidies” for meals and medical treatment. Just prior to March 1997, however,

Nike also received a negative report by Ernst and Young on one of its Vietnamese facilities. The factory had no drinkable water, and toxic chemical concentrations up to 177 times the allowable safety limits. With respect to the laborers, forty-eight of the fifty worked longer than permitted hours, workers were punished for taking time off to attend funerals, and 80 percent had never read the code of conduct.¹⁵ It is not clear whether Mr. Young visited that facility, but it seems unlikely.

Nike may not have been diligent in studying the methodology of the report by Andrew Young's company.¹⁶ Several groups were openly critical of Young and his methods. Vietnam Labor Watch commented that Young did not explore issues of wages, working conditions, or health and safety practices. Australian researcher Anita Chan wrote to the *Washington Post* that Young's conclusions were sharply at odds with her own conclusions, which were reached after three years of research on the Chinese footwear industry. Bob Herbert wrote in a *New York Times* op-ed piece that "Mr. Young said he found no evidence of child or prison labor. He did not seem to realize that those are not the problems that critics of Nike operations in China, Vietnam and Indonesia have been complaining about. The issues in those countries are wretchedly low wages, enforced overtime, harsh and sometimes brutal discipline, and corporal punishment." Herbert wrote that Young spent "just three or four hours in each factory and even he acknowledges that 'we probably should have insisted that we bring our own translators.'"¹⁷

Whatever its deficiencies or merits, Nike chose to rely on the GoodWorks report, going forward with a public relations campaign that defended the benefits of its Asian factories to host countries and portrayed the company as being in the vanguard of corporations seeking to maintain adequate labor standards in overseas facilities.¹⁸ Nike press releases responded to allegations of poor working conditions and denied the use of underage workers. They emphasized the company's code of conduct, and some of the press releases provided "detailed information and footnoted sources."¹⁹ One Nike press release called attention to the Young report and invited readers to peruse it on Nike's website. Nike officials also wrote letters to non-profit organizations and various news sources. Full-page ads were taken in major newspapers to say that Nike factories were operating decently and paying a living wage.²⁰

Nike also addressed the concerns on college campuses over "sweatshop" labor in Asia. Nike managers wrote letters to presidents and athletic directors at colleges that sponsored Nike products;²¹ the letters reported fair conditions at Nike factories and gave assurances of Nike's corporate responsibility.²² Nike also created a web page for athletic departments that listed factory addresses in Vietnam and Taiwan so that coaches and athletes could see where their equipment was manufactured; further, Nike addressed student concerns in portions of its website. Nike CEO Phil Knight visited University of North Carolina—Chapel Hill to speak with students about the fairness of Nike's labor policies.

In opposition to Nike's press releases and letters, Kasky filed suit under a California consumer protection law that permits any citizen to formally accuse businesses of disseminating misleading or false statements to the public. He filed on behalf of

the general public of the State of California²³ as a private citizen, without alleging any particular economic harm to himself.²⁴ Kasky's complaint alleged four causes of action based on the California Business and Professions Code.²⁵ The first and second causes of action were based on negligent misrepresentation and intentional and/or reckless misrepresentation in order to maintain or increase its sales and profits.²⁶ The third cause of action alleged unfair business practices and the fourth alleged false advertising.²⁷ Kasky sought a court order to compel Nike to "disgorge all monies" that it acquired by the alleged practices, to undertake a court-approved public information campaign as a corrective to its false advertising, and to stop its misrepresentations about working conditions under which its products are made.

The California trial court dismissed the case on First Amendment grounds even before the pre-trial discovery phase, and the state's appellate court affirmed the dismissal. The Supreme Court of California reversed, however, which meant that Kasky could proceed to discovery and put Nike on trial.²⁸ In rejecting the reasoning of the lower courts, Justice Joyce L. Kennard reasoned that Nike's statements were properly characterized as "commercial speech," entitled to a lesser degree of Constitutional protection. She considered Nike's publicity counter-offensive as more akin to commercial speech rather than protected commentary on a public policy issue; as a commercial entity, Nike directed its message at potential customers (especially in its letters to athletic directors, but also in statements reaching athletic-shoe buyers in general), and was making factual representations about its own business practices. Kennard was not convinced by the argument that Nike entered "the marketplace of ideas" to defend itself against accusations that had already been made public. Nor did she agree with dissenting Justice Ming W. Chin's argument that Nike's statements were entitled to maximum protection on the basis that their commercial elements were "inextricably entwined" with noncommercial public-policy opinions.²⁹

Nike then appealed to the Supreme Court, which granted review of the California Supreme Court opinion. In granting Nike's petition for a writ of certiorari, the Supreme Court of the United States certified the following questions for briefs and oral argument:

- (1) whether a corporation participating in a public debate may "be subjected to liability for factual inaccuracies on the theory that its statements are 'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions";
- and (2) assuming the California Supreme Court properly characterized such statements as commercial speech, whether the "First Amendment, as applied to the states through the Fourteenth Amendment, permits subjecting speakers to the legal regime approved by that court in the decision below."³⁰

The appeal attracted thirty-nine "friend of the court" (or "*amicus curiae*") briefs. Twenty-nine briefs were filed on behalf of Nike, and business interests were well-represented. Among many others, the Center for the Advancement of Capitalism, the Public Relations Society, Exxon Mobil, Monsanto, Pfizer, Microsoft, the Busi-

ness Roundtable and the U.S. Chamber of Commerce all made their views known to the Court, as did the U.S. government. First Amendment law made for “strange bedfellows” in this case; “amicus” briefs on behalf of Nike were also filed by the American Civil Liberties Union and a consortium of newspapers that included the *New York Times*.

In advancing Nike’s First Amendment rights, critics of the decision offered various arguments: that Kasky did not have “standing” to bring such an action, that the California law wrongly imposed “strict liability” on corporate public speech, and that the law as interpreted by the California Supreme Court had a “chilling effect” on corporate speech on matters of public policy. This “chilling effect” would inhibit “robust debate” on important issues of the day, and the public interest would be ill-served. Moreover, because Nike’s critics could assail its overseas practices yet Nike was limited in its speech by California’s law, there was not “a level playing field” for corporations and its critics. Thus, Nike and allied “friends of the court” urged the maximum “breathing room” for corporate speech on matters of public importance.

Two months after oral argument, however, the Court dismissed the writ of certiorari “as improvidently granted.”³¹ In so doing, the California Supreme Court’s ruling remained in effect; within three more months, the case was settled.³² To advocates of corporate free speech, this meant that in any public debate, corporations would need to balance the desire to speak freely against the risk of litigation and potential liability.

This article does not aim to assess whether the California Supreme Court “correctly” decided *Kasky v. Nike* under the law. Nor does it aim to say what the U.S. Supreme Court should have decided. It does look at the ethical aspects of a corporation’s speech about its own activities. Such speech raises an array of questions with implications for corporate ethics and societal values. Should corporations have the same free speech rights as natural persons? Should corporations seek to be insulated from any lawsuit regarding false or misleading speech? Should all corporations have the kind of First Amendment protection that Nike was seeking? How can the rules of the game be adjusted to create the “level playing field” that Nike says that it seeks?

As we shall see, First Amendment decisions have not devised helpful answers and clearly defined categories. Moreover, litigation is not a very efficient way to regulate the flow of information about a company’s activities to the general public. But lawsuits are part of the legal landscape, and this particular lawsuit has raised conceptual issues both legally and ethically which are better addressed than ignored. Part II therefore begins with an analysis of the free speech clause of the First Amendment law, and judicial decisions which distinguish between “commercial speech” and “political speech.” In part III I will examine the legal arguments of Nike and its friends in more detail, before evaluating the ethical merits of those arguments in parts IV and V.

II. Issues and Definitions: Free Speech and its "Core Values"

Political speech as a "core value" of the First Amendment emerged in the early part of the twentieth century in the opinions of Justices Oliver Wendell Holmes and Louis Brandeis. In *Abrams v. United States*, a pamphleteer was sentenced to twenty years in prison after criticizing the dispatch of U.S. Marines to Siberia as a "capitalist" invasion of Russia and an attempt to crush the Russian Revolution.³³ In 1919 the Supreme Court upheld the conviction and a twenty-year jail sentence under the federal Espionage Act despite a First Amendment challenge that the law as applied violated Abrams's right of free speech. In dissent, Justice Holmes noted that Abrams was convicted for expressing "opinion and exhortations," and advised that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe." It is in this dissent that the "marketplace of ideas" metaphor makes its appearance. Holmes notes that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."³⁴

Justice Brandeis concurred with Holmes's dissent. Eight years later, in *Whitney v. California*, Justice Brandeis emphasized the value of unrestricted debate for American democracy. He wrote that the founders of the U.S. Constitution believed

that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.³⁵

As Professor O. Lee Reed has noted, Holmes and Brandeis at this time were trying to shake the Supreme Court from its fairly complacent acceptance of a "majoritarian government view as setting the parameters for First Amendment protection."³⁶

They advocated independent constitutional standards that would protect unpopular minority opinions unless they threatened a clear and present danger. . . . Although Brandeis and Holmes were not successful in the 1920s in persuading the Supreme Court to their position, both their position and its values rhetoric soon became dominant in free speech analysis.³⁷

At the heart of the Holmes and Brandeis "values rhetoric" is the belief that the highest aim of the First Amendment is for citizens to discover what Reed calls "political truth." Whatever the First Amendment was originally meant to protect, or whatever Holmes and Brandeis posited as the highest aim, the First Amendment has come to protect all kinds of speech, including entertainment, commercial speech, and even some kinds of pornography. Although commercial speech now enjoys some protections, it was not always so. In the 1930s and 1940s the Court "embraced the value justifications offered by Holmes and Brandeis."³⁸ Most notably, the Court created a category of unprotected commercial speech in the 1942 case of *Valentine v. Chrestensen*.³⁹

The case arose under New York's Sanitary Code, which banned the distribution of commercial handbills on public streets. To encourage people to tour his submarine, Chrestensen made up handbills with two sides: one side invited would-be patrons, and the other protested against the City Dock Department's refusal to permit him to moor the submarine at his preferred pier. The Court held that the intent of the handbill was clearly commercial, and was therefore subject to the city's authority to regulate public streets. "We are," said the Court, "clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising."⁴⁰

There is evident hostility to the *Valentine v. Chrestensen* opinion in many of the *amicus* briefs submitted to the Court in Nike's appeal. The Center for the Advancement of Capitalism approvingly cites a law review article, claiming that in *Valentine*, the Court "plucked the commercial speech doctrine out of thin air."⁴¹ The Business Roundtable notes that *Valentine* has been over-ruled by a series of cases that afford greater protection to commercial speech, starting with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*⁴² Yet by the 1980s, when the Court had over-ruled *Valentine*, regulatory restrictions on commercial speech were still permitted. In *Zauderer v. Office of Disciplinary Counsel*, the Court said that "[s]ome forms of commercial speech regulation are surely permissible."⁴³ Moreover, the Court has never altered its position that "[t]he States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading."⁴⁴

Both sides in the *Kasky* case agreed that commercial speech, however defined, does not have the fullest measure of First Amendment protection. Full protection is given to noncommercial speech, even if it is misleading; for example, political advertisements may frequently distort an opponent's position and be deliberately misleading. Intermediate protection is given for nonmisleading commercial speech about a lawful activity, but no protection is given for commercial speech that either misleads or pertains to an unlawful activity. Thus, Nike wanted its comments about its own labor practices to be categorized as noncommercial (relating to a public issue); as noncommercial speech, even misleading statements could be constitutionally protected.

Judicial definitions of commercial speech have varied. A common definition is speech that "does no more than propose a commercial transaction."⁴⁵ But the Supreme Court has also referred to commercial speech as "expression solely related to the economic interests of the speaker and its audience."⁴⁶

The first definition of commercial speech seems to suggest that commercial speech could be confined to a category of cases where a seller proposes a specific transaction to a buyer. An advertisement that invites the reader to get 30 percent off certain best-selling books if the purchase is made within four days would fall into the "specific transaction" category. The second definition—based on the speaker's motivation rather than the content of the message or its relation to a particular transaction—is much broader. Still, neither definition prevents a company from commenting on matters of public importance (e.g., global warming, fuel efficiency

laws, "sweatshops," child labor, and related issues). But comments on public issues presumably have at least some commercial motivation or component; why would corporations spend money making public comments if doing so would not advance shareholder value? Friends of the court favoring the California Supreme Court's decision (including attorneys general of New York, California, Florida, Ohio, Minnesota, and sixteen other states) cited the Supreme Court's statement that "many, if not most, products may be tied to public concerns about the environment, energy, economic policy, or individual health and safety."⁴⁷ The argument the attorneys general make is that for many products, a "tie-in" to public policy issues is often possible, and should not transform the sale of private products into matters of public discussion and thereby automatically gain the full protections of "political speech."

The issue of commercially motivated corporate speech has come up in numerous cases where the commercial aspect of the corporation's speech was nonetheless strong enough to permit regulation. In *Bolger v. Youngs Drug Products Corp.*, a condom manufacturer's pamphlets not only discussed venereal disease but touted its condoms.⁴⁸ In *National Commission on Egg Nutrition v. FTC*, a trade association encouraged egg consumption while adding its own viewpoint to the public health debate by minimizing health concerns about cholesterol.⁴⁹ In *Board of Trustees of the State University of New York v. Fox*, the inclusion of a discussion on home economics did not make the promotion of Tupperware noncommercial; as commercial speech, it was subject to limited regulation consistent with standards the Court had announced in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.⁵⁰ The Court in *Fox* noted that "No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares."⁵¹ Likewise, Kasky argued that it was entirely possible for Nike to address public policy concerns without making factual misrepresentations about its Asian operations.

Kasky believed that Nike had made a series of false statements about its foreign labor practices in order to entice consumers who do not want to purchase products made in unsafe or inhumane conditions. Governments, both state and federal, have long prohibited false or misleading statements about a product's origins or methods of production. It is not legal in the United States, for example, to claim that a product is made by the blind or by union labor if it has not been so made.⁵²

Reliable information to consumers is the core value here. The Supreme Court granted some Constitutional protections to commercial speech starting in the 1970s, noting in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, that access to factual advertising about prescription drug prices could enable consumers and citizens to make better decisions. As the majority opinion noted,

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.⁵³

Moreover, as Bruce Ledewitz has observed, markets have so supplanted government in influencing private decisions and public policies that reliable information is indeed indispensable. He interprets *Virginia Pharmacy* and other decisions protecting commercial speech as predicated on the idea that citizens must be trusted to evaluate truthful information, commercial or otherwise, in a responsible way.⁵⁴

Moreover, the core value of reliable information in *Virginia Pharmacy* and subsequent commercial speech cases serves to remind us that jurists will often search for fundamental principles that underlie constitutional terms. If we link “reliable information” to Brandeis and Holmes’s “freedom to think as you will and to speak as you think,” we can sensibly argue that individual autonomy and civic participation are undermined by false and misleading information. The *Virginia Pharmacy* case distinctly recognizes states’ interest in limiting false and misleading information.⁵⁵ Corporate freedom of speech rights are balanced against societal needs for reliable market information; in *Virginia Pharmacy* and various commercial speech opinions that followed, the value of a “stream of commercial information” that flows “cleanly as well as freely” is frequently reaffirmed. A clean and free stream of commercial information is congruent with citizen/consumer autonomy and consent. As I will argue in part V, reliable information is also indispensable to honoring the moral norm of necessary social efficiency (a “hypernorm,” in Donaldson and Dunfee’s terminology).

Did Nike in fact fully respect and trust citizens and consumers in its public-relations counter-offensive? When it faced strong negative moral sentiments in 1996–1997, it had several choices to make. It could commission a thorough and impartial investigation and report. It could hire someone to do a less than thorough investigation. It could choose to publicize none of the results, some of the results, or all of the results, whether those results were good, bad, or indifferent. Ultimately, Nike chose to rely on the report of GoodWorks, LLC, which cast Nike in a favorable light. Was it ethical for Nike to go forward in its public relations campaign without having a better appraisal than Young’s in hand?

To address this and related questions raised by the *Kasky* case, I will first follow the Nike/*Kasky* arguments about commercial speech in the Supreme Court in part III, and look more closely at Nike’s appeals to the need for “robust debate” and “level playing fields” in part IV. In part V, I will come back to the central question raised earlier: to what extent is it ethical for corporations to demand full First Amendment protections for potentially misleading speech? From a societal perspective, the related question (with apologies to Oliver Wendell Holmes) is, “How can policy-makers best create and maintain market rules that encourage truth and discourage falsehood?”⁵⁶

III. Commercial Speech and the Kasky Case

The Court’s indecision and the subsequent settlement between *Kasky* and Nike let the California Supreme Court’s opinion stand, allowing *Kasky* and others to

bring claims against corporations for false or misleading speech. This was a cause of serious concern in boardrooms across America; it could also be a cause for concern among companies outside the United States whose advertisements or public relations efforts might be intended to influence California consumers.⁵⁷

Dire predictions followed in the wake of the Court's indecision. In addition to the previously noted warning that the Court's failure to overrule the modern commercial speech doctrine would "have a chilling effect on business and individual rights,"⁵⁸ The Business Roundtable predicted that the public "will be deprived of corporate perspectives on matters of social concern," and that "the people would lose an important counter-weight to the power of government."⁵⁹ The National Association of Manufacturers predicted that fear of "sanctions would cause prudent manufacturers to engage in self-censorship or simply to refrain from any controversial expression. . . . [I]t would constitute viewpoint discrimination of the worst sort. Under such a constitutional framework, Ralph Nader would receive full First Amendment protection when attacking the safety of General Motors' automobiles, yet General Motors' response would receive only commercial speech protection."⁶⁰

These warnings may be overly alarmist. In considering a motion to dismiss, the trial court will assume that the facts in the pleading are true. Thus, the fact that the trial court dismissed Kasky's complaint and the court of appeals affirmed that dismissal does not mean that Nike actually made false or misleading statements. Rather, each court presumed that Nike *did* make false or misleading statements, and pondered whether those statements were nonetheless protected under the First Amendment. The California Supreme Court's ruling meant that—unless the Supreme Court reversed it—Kasky could proceed to the discovery phase of litigation and then trial, assuming that he could get past a summary judgment motion during the discovery period before trial. If there were a trial, Kasky would have the burden of proof to show that Nike had indeed made false or misleading statements. If Kasky had merely been harassing Nike in bad faith, with little or no evidence to prove false or misleading statements, California law would allow Nike damages from Kasky for its attorney fees and other expenses.⁶¹

There are other barriers to labor-activist criticisms and lawsuits, as well. If Kasky, prior to filing any kind of lawsuit, had appeared on a television show to denounce Nike as giving false and misleading statements about its overseas operations, Nike could sue for defamation or some form of product disparagement. It should also be said that Kasky's chances of success at trial and appeal would be limited by recent commercial speech cases, which require the courts to invalidate state regulation of commercial speech unless the state (or Kasky as its proxy) could prove that a company's speech was commercial (not political), that the interests of the state in regulating the speech are substantial, that those interests were "directly advanced" by the state action, and that the state has chosen to advance those interests by choosing "least restrictive" means to serve that interest.⁶² In short, even with Nike's statements cast firmly as "commercial speech," the case for Kasky is not an easy one.

Nike, however, sought to characterize their statements as “noncommercial” or “political,” seeking even greater protection. Nike wanted “full” First Amendment protection for its public statements; it is important to understand what this means. To borrow the formulation from the Business Roundtable, it would mean that a government through its laws (legislative, judicial, or administrative) could not impose liability “for a commercial actor’s speech on a matter of public concern in the absence of proof of commercial harm caused by such speech and proof of actual malice.”⁶³ This position is certainly arguable within the context of defamation law where First Amendment rights are at issue. “Actual malice” means knowledge on the part of the speaker of the falsity of the statement made, or “reckless disregard” for the truth; it does not mean that the speaker has motives of spite or ill will, or has some intent to be malicious.

How would the test of “actual malice” be applied to Nike’s statements? In oral argument before the Court, Lawrence Tribe emphasized that Nike was not promoting a specific product in its statements and that Kasky was not critiquing a specific Nike product. Nike argued that unless a particular consumer could be shown to purchase a particular Nike product in reliance on specific misrepresentations by Nike, there could be no civil liability for false or misleading statements.⁶⁴ The United States joined the various friends of the court on Nike’s behalf, and Theodore Olson made oral arguments to the Court in a similar vein.⁶⁵

If the Court had adopted that position, any litigant under California’s laws on unfair trade practices and false or misleading advertising would be constitutionally required to make a showing of product purchases because of reliance on specific statements made by Nike. These requirements would effectively preclude filing a lawsuit, much less winning one. Nike made statements about its operations overseas, not specific products. In marketing terms, it was defending its “brand” rather than a specific shoe or item of apparel. In short, the test or standards argued for by Mr. Olson and Mr. Tribe would effectively end any threat of judicial civil liability, even for a corporation’s willful and deliberate lies to influence market share. Actual malice could not be shown under Nike’s proposed standard, unless specific consumers could allege specific reliance on the false or misleading statements as to specific products. The difficulty of plaintiffs or attorneys general showing such specificity would effectively assure almost complete protection for corporate speech, even deliberately misleading statements to protect the company’s brand.

I will venture an argument in part V that Nike and its *amici* have claimed more protection than sound corporate ethics would warrant. Of course, the crucible of litigation requires an aggressive articulation of opposing positions. Kasky may have had well-founded doubts about Nike’s good faith its counter-offensive, but by filing a lawsuit, Kasky forced Nike to argue aggressively. Nike’s legal advocates chose the route most often recommended by defense trial attorneys: if possible, get the case dismissed on legal grounds rather than go through a lengthy discovery process and trial. The dismissal of Kasky’s claim then set in motion the long odyssey of this case, culminating in the Supreme Court’s intellectual deadlock. It also narrowed

Nike's focus: having won a dismissal both in the trial court and the court of appeals, and losing in the California Supreme Court by only one vote, an appeal to the U.S. Supreme Court seemed justified both by law and by reason. Understandably, Nike's lawyers were not concerned about systemic ethical issues, but thought primarily in terms of winning through legal arguments.

But the Justices (and the rest of us) must ask whether Nike's position would likely yield positive outcomes for business and society. I will argue that if Nike and the Business Roundtable articulate a position that would encourage the emergence of reliable, useful information while discouraging false and misleading statements, their arguments should be taken seriously. But if the arguments merely advocate corporate free speech rights without regard to the free speech rights of others, or the desire to establish a better-functioning free market system, then their arguments have less ethical merit. In part IV, I will sketch an overview of corporate attitudes and actions toward free speech in the United States; in so doing, I make the claim that Nike's position before the Supreme Court represented ardent advocacy rather than a reasoned proposal based on fairness and the assurance of unrestricted debate on public policy issues. This will support part V, which provides an explanation of how integrative social contracts theory commends a kind of corporate advocacy that values information above obfuscation and honors the particular nature of our political economy.

IV. Corporations and Free Speech in America

At the heart of the argument over corporate free speech in the Kasky case is a set of themes and ideological frames that can obscure as well as enlighten. Nike and its *amici* offer an implicit utilitarian argument that removing constraints to speech will serve the greater societal and economic good. The argument that traded on "fairness" and "rights" (i.e., that Nike should be allowed freedom to counteract its critics by "leveling the playing field") also has an intuitive appeal. But, to offer some different (and decidedly mixed) metaphors, the "deck is already stacked" to give corporations not only more players on the field, but also a bigger influence over the referees and the rules of the game. What follows will address the ethical merits of what Nike and its friends have argued before considering in part V what policy positions it should be taking under integrative social contracts theory. It is also intended as a quick "reality check" to the facially appealing argument that Nike and other corporations "should" be able to speak freely in order to "level the playing field" and uphold the value of unrestricted debate that Oliver Wendell Holmes had championed.⁶⁶

To summarize what follows: a credible case can be made that corporations, following their primary mandate of maximizing shareholder wealth, have not generally advocated for free, untrammled discourse in order to create a "robust debate" on public issues in the United States media, in its courts, or in its other public institutions. Rather, a pattern emerges in the corporate use of economic and political

power to limit discussion, suppress alternative viewpoints, and skew public policy debates. This pattern is evident in U.S. media consolidation, corporate public relations, corporate lobbying, lawsuits against public participation, advertiser's pressure on media, and widespread practices of hiding (or shredding) information that would be useful to public officials or the public generally.

U.S. Media Consolidation and Public Affairs

Robert McChesney writes, "Our media system is increasingly the province of a very small number of large firms, with nary a trace of public-service marrow in the commercial bones."⁶⁷ William Safire notes that the five media conglomerates are merging their way to becoming three, with a predictable "chilling" of diverse facts and opinions. Safire concludes that "[y]ou don't have to be a populist to want to stop this rush by ever-fewer entities to dominate both the content and the conduit of what we see and hear and write and say."⁶⁸ Paul Starr notes that because of media concentration in a handful of corporations, dissent to prevailing policies tends to be muted and any political activism by media companies is designed primarily to further sales and profits.⁶⁹

Corporate Public Relations

Political speech and lobbying have been used by some corporate interests to undermine policy-making based on facts and probabilities. Franklin Foer notes that "[d]ocuments produced in recent litigation show that, in the early 1990s, cigarette companies wanted to cast grave doubts on government scientists' capacity to produce fair research."

But they didn't want to be too closely associated with this debunking. Instead, tobacco quietly formed a coalition of industries that would challenge every aspect of government science, from its studies of global warming to auto safety. They called their group, formed in 1993, The Advancement of Sound Science Coalition. As the University of California, San Francisco's Stanton Glantz and Elisa Ong have described, "The 'sound science' movement is not an indigenous effort from within the profession to improve the quality of scientific discourse, but reflects sophisticated public relations campaigns controlled by industry executives and lawyers whose aim is to manipulate the standards of scientific proof to serve the corporate interests of their clients." Despite its cynical motives, tobacco's sound science coalition acquired a broad following.⁷⁰

The companies were engaged in fully protected political speech under the First Amendment. Even if the Advancement of Sound Science Coalition was engaged in a blatantly self-interested disinformation campaign, it is not promoting a product or brand and is thus not "commercial speech" under existing standards. Thus, a Kasky-type activist could not "chill" such speech using the California law. Moreover, industry trade associations and other groups have considerable operating room because they are not attempting statements of fact that can be argued as "false" or

“misleading.” The method of much trade industry communication is not to claim the truth of specific facts so much as to question opinions, methodologies, and conclusions. They not only have “breathing room” but an open field of play. Moreover, if their advertising budgets and public relations efforts are large enough, media giants will be willing to give their messages full exposure.

Corporate Lobbying: Changing the Rules of the Game

Large corporations can not only own and leverage major media, but have First Amendment protections for political lobbying and campaign contributions as well. This came about in the early 1970s—after business interests were set back by a decade of social regulation on environmental, consumer, and worker rights—as more and more corporations sought a presence in Washington, D.C., and the Supreme Court extended First Amendment protection to corporate campaign contributions.⁷¹ As William Greider documented in the early 1990s, the rise of political action committees (PACs) in the 1980s resulted in substantial regulatory retrenchment during the Reagan and Bush I administrations. Both parties were beholden to large contributors in order to get sufficient money for media-intensive election campaigns, and most of the large contributions came from corporations.⁷²

Greider’s thesis is that while legislators sometimes pass laws that seemed to address public concerns, they are often “symbolic gestures” or “hollow laws” that leave ample room for business interests to get what they really want in the administrative process.⁷³ He has pointed out that in a society where many people are speaking, money and access are vital. Large corporations and trade associations have it. They also have that rare commodity, the power to resist and change laws that they do not like, and to replace them with laws that they do like. In the game of influencing public policy, they not only have more players, but also have the officials and broadcasters on their side.

Strategic Lawsuits against Public Participation

Large corporations have created what George Pring and Penelope Canan originally termed “SLAPP suits,” an acronym for strategic lawsuits against public participation. As Lawrence Soley notes, SLAPPs are civil suits filed primarily for purposes of intimidation, largely without merit, and expressly designed to suppress criticism of business activities.⁷⁴ Soley claims—with abundant documentation—that “many corporations have filed frivolous, vexatious lawsuits, alleging copyright violations, patent infringement, defamation, business torts, process violations, civil rights violations, and a laundry list of other alleged injuries, not expecting to win the suits but seeking simply to silence critics.”⁷⁵ This has the effect of making public debates into private legal disputes and shifting significant financial burdens onto the defendants. Soley contends that even the threat of a SLAPP suit is sometimes enough to silence critics; many times companies bring SLAPP suits “expecting to drop them before they go to trial.”⁷⁶ Corporations will often require that settlement

depend on the critic-defendant's signing of a non-disclosure agreement that prevents the critic from ever commenting on the case.⁷⁷

Advertiser and Conglomerate Pressures on the Media

The past ten years have offered numerous examples of commercial interests "chilling" free speech in the political arena. Political messages offered by MoveOn.org during the 2004 Super Bowl were rejected by CBS in favor of more "acceptable" advertisements for Viagra and Cialis.⁷⁸ Lawrence Soley cites numerous incidents where corporations have withdrawn advertising dollars because they did not like the critical content of a news story, and where media companies have refused to run stories out of concern for upsetting advertisers or corporate parents. Soley cites a number of examples, such as General Electric's ownership of NBC, that demonstrate the free speech chilling effect for news organizations that have conglomerate parents with conflicting commercial interests.⁷⁹

Discovery Abuses and the Secrecy of Judicial Records

Numerous sources have pointed out that many large corporations have been actively abusing the discovery process in civil litigation by secreting records or destroying them (spoliation). This abuse remains largely unchecked by judges.⁸⁰ In this way the truth is often hard to fathom, even for litigants with supposed access to documents and testimony through the discovery process. Because spoliation and secretion of records are undertaken in secret, it is difficult to know just how deep and wide these practices are; but the post-Enron corporate scandals have illustrated the apparent temptation to shred documents and delete incriminating e-mails when criminal or civil liability looms large. Arthur Andersen comes to mind, among many others.

Even after trial or settlement, corporate lawyers often seek to seal the records in order to do "damage control." If someone is harmed by a defective product, medical malpractice, an investment scam or a wrongful discharge, they can expect that their lawsuit will be opposed by highly skilled and well-paid attorneys, who will use every conceivable motion to dismiss the case, and use every means to resist discovery requests. When settlement is offered, the usual condition will be that the litigant and his or her lawyer will agree to secrecy. The company will "insist that it did nothing wrong . . . [and] evidence discovered in the case will be sealed against disclosure to other persons similarly injured, lawyers representing such injured parties, the media, and regulators—even if the secrecy serves no beneficial public purpose."⁸¹

In many ways, then, corporations have sought to limit the public's access to diverse and reliable information and opinion. Even if Nike, Inc., does not itself engage in the foregoing behaviors, the corporate community supported its position before the Court that fairness (to level the playing field) and positive societal outcomes (through unrestricted debate) could be secured by providing full First Amendment protections to Nike's speech. I have argued in this part of the article that the *Kasky*

case is more realistically framed in the context of corporate self-interest than the pursuit of the public good through a “level playing field” and “robust public debate.” From ethical and policy perspectives, it would be easier to embrace Nike’s arguments for a “level playing field” if large corporations consistently supported the airing of diverse opinions in the media, sought to limit undue influence of private money on questions of public import, worked to ensure that those without economic power had a public voice, and sought to keep judicial records open rather than closed. Robust public debate depends on a variety of voices, and a way for both consumers and citizens to have valid information as well as ideology or opinion on which to base consumer choices in the marketplace and political choices on Election Day.

The final section focuses on the ethical and public policy questions presented in the *Kasky* case. Pre-eminent among those questions is what kind of legal regime should be sought and argued for by corporations in order to create and maintain market rules that encourage truth and discourage falsehood?

V. Corporate Moral Choices on Free Speech

Large U.S.-based companies have every reason to contribute to a “robust public debate” about laws and regulations. They do so routinely, both as corporations and as members of trade associations. They contribute to political candidates, and offer their opinions and viewpoints through lobbyists at the state and federal level. Their views are well-represented at international trade and finance institutions as well. The temptation—some would say the profit-maximization mandate—is not always to safeguard the truth about their goods and services and their means of production. Sometimes corporations will choose to conceal realities they would prefer to remain hidden. Acts of concealment and obfuscation are varied, and can be entirely legal. A group that sounds pro-environment may in fact be a trade association that speaks to the public and to politicians against new limits on mercury emissions. An auto manufacturer facing lawsuits for rollovers of sport utility vehicles may settle cases singly, insuring silence by requiring confidentiality agreements and sealed records. If a whistleblower speaks the painful truth about a corporation’s actions, there are numerous legal ways to suppress that speech. The history of SLAPP suits may also remind us that some corporations have actively sought to suppress speech. As noted in the preceding part of this article, corporations often seek an unlevel playing field when it comes to matters of speech. Why does any of this matter?

Beyond any legal distinctions between commercial and political speech in First Amendment jurisprudence, the aim for those who care about law, business, and society should be to visualize, construct, and maintain a political-legal system in which there is both efficiency and fairness. In arguing to the Supreme Court that the law requires corporate freedom of speech to insure robust public debate, Nike and the various business interests that submitted briefs could either be looking to achieve the upper hand in the playing field we call “the market,” or could be genuinely concerned with the quality of the public debate about outsourcing and overseas

factory workers. If the arena for this discussion went beyond the courtroom, what should the “corporate community” say? Should it say, as Nike and its friends did, that corporations should only be criminally or civilly liable for deliberately false or misleading statements that caused particular plaintiffs some specified economic harm.⁸²

Such a recommendation for system-wide change goes too far. I propose to use (or abuse) Holmes’s “marketplace of ideas” metaphor to discuss what kind of policies corporations should support in order to generate not only a wider selection of ideas and facts in that marketplace, but also to generate more validity and reliability rather than less. The goal is to create and maintain a system in which people can more easily distinguish among products in terms not only of price and quality, but also in terms of their origins and processes. It is to design policies that more likely assure that consumers and investors can distinguish what is true from what is false, and where economic power does not suppress the emergence of better products and the expression of moral preferences by consumers and investors.

Nike’s Decisions in a Marketplace of Morality

In essence, Nike had a series of ethical decisions: (1) how to conduct operations in Vietnam and other states where subcontractors operated, (2) how to advertise and/or publicize its activities, and (3) how to argue for a change in the law that would allow for meaningful participation in matters of public debate. This part of the article will review all three, but primarily focus on (2) and (3).

In his article on the “marketplace of morality,” Thomas Dunfee demonstrates why legal compliance, in itself, is an inadequate guide to corporate ethics. For example, suppose that Nike is a market leader, and that Global Exchange wants to shame Nike into paying higher wages in Vietnam, even though Nike is complying with all applicable labor laws of Vietnam. Because people do express preferences in the market, careful attention to maximizing shareholder wealth may require a more nuanced response than “what we did was both legal and profitable.” Potential boycotts, or the tarnishing of brand image, can easily be triggered by legal activities that some customers and activists regard as unethical.⁸³ Sensitivity to investors as well as consumers is now advisable; a growing group of “socially responsible” funds will not invest in companies involved in sales of tobacco or alcohol, the use of child labor or forced labor, or environmentally suspect activities.

Moral concerns from consumers, activists, or investors can be readily addressed by using Donaldson and Dunfee’s integrative social contracts theory (ISCT). ISCT will also be useful in considering what kind of legal positions on corporate free speech are most ethical. ISCT specifically addresses the structural integrity of the legal and cultural norms of a market system in a representative democracy. The reader’s basic familiarity with ISCT is assumed here.⁸⁴ The dual-level structure of ISCT is particularly helpful in a context where there are multiple communities that have a voice and an interest in Nike’s actions and speech. In its attempt to balance universal rules with more local ethical norms, ISCT gives moral weight to

the “microsocial norms” of specific societies and communities, while yet rejecting some of those norms by the invocation of “hypernorms.” Thus, if the practice of nepotism in hiring is deeply embedded in a society (or, “embodied in ethical custom”), it is presumptively ethical unless it violates one or more hypernorms. These hypernorms can be substantive, procedural, or derived from “necessary social efficiency.”⁸⁵ As explained by Donaldson and Dunfee, the hypernorm of necessary social efficiency imposes certain systemic duties. “At its broadest,” they explain, “this hypernorm requires observance of duties generated by the multitude of institutions and organizations that taken together provide the basic fabric of a given political economy.”⁸⁶

Deference to local norms is given particular significance by those doing business globally who must come to terms with varying cultural standards; indeed ISCT accords moral weight to authentic local norms. For example, in ISCT, autonomy is specifically recognized as fundamental to a person’s participation in a moral community; without the ability to “consent” and have “voice,” authentic moral norms cannot emerge.⁸⁷ Without reliable information, one loses the information necessary to exercise the moral autonomy to voluntarily accept contractual duties. Thus, in legal contracts as well as social contracts, “consent” seems to require relatively accurate information.

Using Integrative Social Contract Theory (ISCT)

In brief, ISCT would recommend that Nike look at its various subcontractors’ overseas operations and consider whether they were acting in compliance with “authentic” local norms (including laws and customs). If so, then a presumption of moral acceptability would attach. The presumption would be tested against “hypernorms,” including substantive hypernorms, procedural hypernorms, and the hypernorm of necessary social efficiency. If Nike’s subcontractors were acting in compliance with local norms, then Nike should (by ISCT’s lights) only intervene to change those subcontractor practices that violated hypernorms. Again, however, the first step would be to ascertain that its operations were in accord with local law and custom, or what Donaldson and Dunfee call “authentic micro-social norms.”

Adhering to Authentic Micro-Social Norms

In balancing the universal and the particular, ISCT starts with the notion that “authentic” ethical norms regarding what is right behavior can be found in “communities” that have “moral free space” to contract as they wish, subject to the “right of voice and exit” and bounded by hypernorms.⁸⁸ Such norms would include both written and unwritten rules, and both formal and informal norms. In “moral free space,” idiosyncratic norms can emerge, allowing for considerable moral diversity in what is regarded as right behavior; Japanese and Chinese organizations, they note, “can be expected to differ significantly from their Western counterparts in the manner in which they utilize their moral free space.”⁸⁹

Given that there were various Asian nations where Nike's subcontractors were operating, it is entirely possible that varied local norms would apply. If some nations encouraged child labor, or forced labor, or discrimination against women, then Nike's subcontractors could be complying with authentic moral norms while still offending sensibilities of NGOs, labor activists, and certain customers in the United States. Under ISCT, ascertaining that local contractors were at least in compliance with local norms would be a first step; Andrew Young's GoodWorks investigation did make claims that Nike's subcontractors were largely in compliance with local laws and norms. Notably, though, the Young report also sought to portray Nike as taking a leadership position.⁹⁰ The link to ISCT seems clear enough: compliance with local laws and customs may not be ethically enlightened where enough people worldwide are convinced that substantive hypernorms are being violated.

Applying Substantive Hypernorms

Typically, the hypernorms that might be violated would be from the "vitaly important category" of "substantive hypernorms, which specify fundamental conceptions of the right and the good."⁹¹ Noting "threads of convergence" around "fundamental ethical principles,"⁹² Donaldson and Dunfee suggest that both rational and empirical approaches may be needed to discover substantive hypernorms. Evidence for substantive hypernorms could be found in widespread consensus that a norm is universal, in global industry standards, in the support of NGOs internationally, through consistency with major religious precepts and/or major philosophies, or in laws upholding the norm in many different countries.⁹³ Some trans-cultural norms may include human rights, such as the right to freedom from torture or the right to subsistence, or the right to minimal education.⁹⁴ It is possible for a U.S.-based corporation to use forced labor in its profit-making activities abroad,⁹⁵ in which case ISCT would probably hold that, regardless of the law and culture in a host country that would allow or approve such labor, the U.S. company should not engage in it, for doing so would violate a substantive hypernorm.

Supposing Nike was to thoroughly investigate its subcontractors and find that it was observing all authentic local norms in various Asian nations, ISCT would also commend a further evaluation of those norms by measuring them against hypernorms. Hypernorms, as Dunfee notes,

are defined as "principles so fundamental to human existence that . . . we would expect them to be reflected in a convergence of religious, philosophical, and cultural beliefs." As expressed by Michael Walzer, they would be a thin "set of standards to which all societies can be held—negative injunctions, most likely, rules against murder, deceit, torture, oppression, and tyranny."⁹⁶

Thus, while Vietnam or Indonesia (or some smaller community within those territories) might have specific norms, and those norms were adequately complied with by Nike and its subcontractors, the moral maneuvering room would nonetheless be limited by hypernorms. For example, if the citizens and government of Myanmar were to actually agree that forced labor was their best path to economic and

social development, that agreement would nonetheless be evaluated with reference to hypernorms; a U.S. company seeking collaborative relationship with the government of Myanmar would also want to consider whether forced labor violated hypernorms.

There is room for vigorous disagreement about the existence of substantive hypernorms, their epistemology, and their utility.⁹⁷ In the context of Nike's decisions in a marketplace of morality, however, it makes sense for Nike to look for applicable substantive hypernorms that could be clues to whether investors and customers would react negatively to any news that Nike's operations were paying less than a living wage, physically or sexually abusing workers, employing underage workers, or lying about its benefits and working conditions.

Donaldson and Dunfee suggest that clues to the existence of substantive hypernorms can be found both rationally (in philosophical thought) and empirically (in various collective agreements).⁹⁸ For example, one could look from Confucius to Kant to Rawls, on the philosophical side, and to the Universal Declaration of Human Rights or the Caux Round Table on the empirical side.

The Caux Round Table offers a number of guidelines for multinational corporations that might apply to de-legitimize adherence to authentic local norms. The Round Table agreed that its member companies have a responsibility to provide jobs and compensation that "improve workers' living conditions," that "respect each employee's health and dignity," avoid "discriminatory practices" and guarantee equal treatment and opportunity "in areas such as gender, age, race, and religion," and "protect employees from avoidable injury and illness in the workplace."⁹⁹

In comparing authentic local norms to hypernorms, Nike might well conclude that although local laws and customs may allow unsafe or unhealthy working conditions or wages below subsistence level, hypernorms might suggest a more worker-friendly set of corporate policies. They would be mandated not in a legal sense, but only in the sense that the marketplace of morality commends that corporations pay attention to generally held notions of what is right. To do otherwise is to risk alienation of some consumers and investors through adverse publicity. Nike CEO Philip Knight and the Andrew Young GoodWorks report took pains to paint Nike as a moral leader that would go beyond legal compliance to enforce its own code of conduct. In so doing, Nike may have raised the ire of Kasky, but the corporate intent precisely fits ISCT's recommended moral path: ascertain compliance with local norms, and look to broader norms where local norms seem morally insufficient.

Yet Nike's ethical choices do not end by complying with authentic norms that are consistent with substantive hypernorms. Where its activities are called into question by the media or by NGOs, there are both better and worse ethical choices to be made. So, if the company wants to change the law, what kinds of changes can be ethically proposed? Law schools teach the tradition of "zealous advocacy" of a client's position, but citizens and judges must question whether the advocates would shape the legal environment in ways that create the best possible "marketplace of ideas." I argue in what follows that in responding to its critics, Nike should no

longer be looking at authentic local norms and substantive hypernorms, but rather to ISCT's hypernorm of necessary social efficiency.

The Hypernorm of Necessary Social Efficiency

Let us suppose for the sake of argument that company X, based in the United States, was not in compliance with authentic local norms overseas, or, if in compliance, the local norms were in conflict with various substantive hypernorms. ISCT and the *Kasky* case pose a second-level ethical choice. Should Nike do all in its power to make the situation sound better than it really is? Should their public relations division seek to "spin" whatever "news" comes out? Should Nike choose to make it more difficult for NGOs and governments to monitor workplace safety, wages, and other conditions? While any or all of these tactics may work well enough in the short-term, they do not build a sound system of choices for workers, customers, or investors. They do not, in short, support the "basic fabric" of the political economy in the United States today.¹⁰⁰

In *Ties that Bind*, Donaldson and Dunfee devote a chapter to the hypernorm of necessary social efficiency. A brief explanation begins with the understanding that economic systems vary, and these systems impose certain obligations if the system is to work efficiently. If a society "chooses" a system to promote aggregate welfare, members of that society should play "their part" in maintaining the "underlying efficiency" of that system.¹⁰¹ Most people tend to regard "efficiency" as morally neutral, depending on the end to which the efficient means are applied. Yet Donaldson and Dunfee contend that if necessary social and public goods exist—such as justice and aggregate welfare—then efficiency in pursuing those goods is necessarily "good" in a moral sense. For example, a judicial system that costs twice as much as an alternative system but delivers only the same amount of justice is "ripe for reform."¹⁰²

There are clear policy implications in this. Historically, human societies have generally sought cooperation in various forms (agriculture, hunting, industrial production). Different systems have existed throughout history, but in each, the goal "is to achieve a form of social organization that maximizes or increases returns from economic endeavor."¹⁰³ Cooperative behavior is critical; favorable business conditions depend on cooperative behavior among individuals, firms, and nations. Trust is efficient; fraud, opportunism, and misinformation are not. Negotiations are known for bluffing and for some degree of misdirection or nondisclosure, but there are still some basic unwritten ground-rules (i.e., rules that are not "law" or formal in nature) that reduce uncertainty and enhance efficiency.

Donaldson and Dunfee invoke Rawls's related notions of "the citizen," "social cooperation for reciprocal benefit," "the well-ordered society and its basic institutional structure," and "the norms for discussion and decision-making to which fellow citizens can be expected to adhere in arriving at principles of social justice."¹⁰⁴ Taken together, these exhibit what they call "necessary goods" of fairness (or justice) and

“aggregate welfare or ‘benefit,’ as well as the necessity of designing strategies and institutions to fulfill them.”¹⁰⁵

If we accept that efficiency and aggregate welfare are “good things,” we presumably do so (following Rawls) whether we are consumers, investors, employees, or corporate managers. If we make a moral choice to manifest efficiency and aggregate welfare, we do so by following the “necessary social efficiency” hypernorm. Donaldson and Dunfee have a formal iteration of this, which I find somewhat abstract: “Discharge role duties stemming from the economizing parameters of Efficiency Strategies in which you participate.”¹⁰⁶ We might translate this into saying that in a system of democratic capitalism, act consistently with the fundamental principles of that system [i.e., do nothing to undermine it]. If the system requires laws, institutions, and other public goods to maintain it, do not undermine it by seeking special exemptions, subsidies, imposing externalities, hiding information, or subverting reasonable laws and regulations that will enhance the overall public good.

I believe that Nike (and many of Nike’s friends of the court) argued for a standard of corporate free speech that did not seek the best overall level of efficiency and aggregate welfare. It is understandable that corporations would seek to maximize both freedom and profit; but serious attention to the necessary social efficiency hypernorm would require that certain standards be honored.

Donaldson and Dunfee take John Rawls’s duty of civility and translate it to mean a consistent honoring of the standards of cooperation.

The duty, then, is to go beyond self-interest and in doing so to refuse to exploit the regrettable but inevitable ways in which institutions fail automatically to align self-interests with broader interests.¹⁰⁷

To accept this proposition, we have to first reject the idea that “pursuing self-interest” at all times—both individually, corporately, and nationally—will actually result in overall justice and aggregate social welfare. Adam Smith’s *Wealth of Nations* and his ‘invisible hand’ have often been misread to mean that all we need to do is to pursue self-interest and “the market” will take care of optimizing resources and, ultimately, general welfare.¹⁰⁸ Donaldson and Dunfee, by contrast, note that “economic systems require the ethical cooperation of their participants. The efficiency hypernorm serves as a moral pathfinder, guiding business transactions where micro-social norms are obscure or inconsistent.”¹⁰⁹

Economics texts routinely note that well-functioning markets have a number of features.¹¹⁰ Prominent among them is the presence of buyers and sellers with fairly abundant and reliable information. Facts are the basis on which people can express their moral sentiments in the marketplace. Concealment, misdirection, lying, deception, and fraud undermine both trust and efficiency in the market. It is therefore appropriate for governments as rule-makers in the market to encourage truth and discourage falsehood. Accurate accounting, rules against fraud, disclosure of conflicts of interest, enforcement of promises, are all of a piece with the need to provide reasonably good (even if not perfect) information to market participants.

The autonomy of individual choices in the market can be rendered meaningless where no one and nothing can be relied upon for the truth.

Conclusion: Corporations and "Free Speech" in U.S. Society

The Constitutional command that Congress can make "no law" infringing freedom of speech or the press has been particularly difficult for the Supreme Court to apply. In the crucible of First Amendment litigation, judicial distinctions between political speech and commercial speech are coming under increasing strain, even as commercial speech has come to enjoy greater legal protection. In Nike's appeal to the U.S. Supreme Court, business interests joined with Nike in urging the Court to allow even greater freedom for corporate speech. Whether a majority of Justices were tempted to overturn the California Supreme Court opinion and grant the full measure of First Amendment protection that Nike wanted may never be known. But this article concludes that such a ruling, even though avidly sought, could undermine the political economy that has worked so well for Nike and others; advocating such change and making such a change is not consistent with the hypernorm of necessary social efficiency.

The facts seem to suggest that Phil Knight and Nike probably did not exercise due diligence in their acceptance of GoodWorks report. The report contradicted other reliable evidence that Nike had, and the process used was open to criticism. Yet Nike's attempt to ascertain whether local norms and laws were being complied with confirms the utility of ISCT's "authentic norm" inquiry. Moreover, Nike's public stance that it was going "beyond" compliance with local laws confirms that in a marketplace where moral sensibilities must be reckoned with, attention to some set of substantive hypernorms will also be desirable.

Nike could have worked diligently to go beyond compliance with local law and custom, even without publicizing such efforts. But given the marketplace of morality, it would be profitable to make clear to the public its status as a first mover in working for higher standards. Clearly, once Nike was publicly criticized, it felt obliged to speak. This article has sought to explore the question of what kinds of corporate speech—to the public and to lawmakers—are ethically sound. Kasky's legal position was that a corporation should not lie or mislead, and should be forced to pay damages and correct itself if it does, even if there was no intent to mislead. Nike's legal position was that if a corporation unintentionally misleads people in its public relations efforts, only those who have direct economic interests should be able to sue, and only then if they can show that the false or misleading statement was made with "malice" (meaning that the company knew that it was false and was likely to be relied upon). Both of these legal positions are less than satisfactory ethically, where our aim should be to encourage more reliable reporting about social and environmental aspects of corporate activities. Understandably, litigation breeds excessive rhetorical advocacy, but presumably Nike and other corporations would have been pleased had their position been upheld.

Appeals to the Court to “level the playing field” seem to ignore the outstanding advantages that corporations have in communicating their messages to the public and in keeping hidden what they do not wish to disclose.¹¹¹ Dedication to the values of more diverse and reliable information would have corporations adopting a very different kind of agenda for public relations, lobbying and litigating at both state and federal levels.

During the time between the California Supreme Court’s decision and the Supreme Court’s indecision, Nike CEO Phil Knight was reported to have endorsed a proposal calling for corporations to issue audited corporate social responsibility statements. False statements “would be punishable, but in a predictable manner and in accordance with guidelines that everyone would understand beforehand.”¹¹² Such audited statements are in keeping with the necessary social efficiency hypernorm, and it is to Nike’s credit that it would support such a system. Conscientious corporations should take the lead in lobbying not for full First Amendment protections, but for meaningful reporting systems. There are problems with such reporting, just as there are with current financial reporting standards. But given the vagaries of litigation and the conceptual minefield that is First Amendment law, some such system is bound to better encourage disclosure of reliable information than the confusing standards that currently govern corporate speech in the United States.

Notes

1. See Oral Argument before Supreme Court, April 23, 2003 (Argument of Professor Laurence Tribe), at 7 (“the kind of show trial that would be involved in this case is a lot more expensive than [the *Alta-Dena Dairy* case]), and at 14 (“What we hold is impermissible is making the courts pawns in a public debate and having what amounts to—they didn’t use the phrase show trial, but essentially they were saying that a trial in which you, in effect, put on trial such a large and massive question and hopeless mix of fact and opinion as the impact on the Third World of this large company.”)).

2. See, e.g., Reed B. Byrum, *Nike’s speech fight is our own*, 74 ADVERTISING AGE (3), Jan. 20, 2003, at 22 (noting that a victory for Kasky in the Supreme Court would spell the end of corporate public relations); Robert J. Samuelson, *The Tax on Free Speech*, 142 NEWSWEEK (2) July 14, 2003, at 41 (Supreme Court’s failure to rule on Nike’s petition is “a disaster.”); Carole Gorney, *One “Strike Suit” and You’re Out*, 48 PUBLIC RELATIONS QUARTERLY (3), Fall 2003, at 36–38.

3. See Oral Argument before Supreme Court, April 23, 2003 (Argument of Mr. Theodore Olson, at 22.) (“California has transferred its governmental authority to regulate marketplace communications to anyone and everyone who possesses the price of the filing fee. Unelected, unaccountable private enforcers, uninhibited by established notions of concrete harm or public duty, have the power to advance their own agendas or personal ideological battles by launching complex, burdensome, and expensive litigation. The *in terrorem* effect and potential for abuse is difficult to overstate.”) *Id.*

4. See Thomas, J., concurring in 44 *Liquormart Inc. v. Rhode Island*, 517 U.S. 484 (1996) at 522. (“I do not see a philosophical or historical basis for asserting that “commercial” speech is of “lower value” than “noncommercial” speech. Indeed, some historical materials suggest to the contrary.”) *Id.*

5. See Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at the Greater Includes the Lesser*, 55 VAND. L. REV. 693, 794–95 (2002) (suggesting that Justices Thomas, Scalia, Kennedy, and Stevens are so inclined, with Justice Ginsburg leaning in that direction.).

6. The First Amendment says, in full, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST., AMEND. I (1791).

7. *Nike, Inc., v. Kasky*, 539 U.S. 654 (2003) (per curiam) (dismissing writ of certiorari as improvidently granted).

8. Nike, Inc., Corporate Responsibility Report, FY04, at 4. This report is available at <http://www.nike.com/nikebiz/nikebiz.jhtml;bsessionid=KGY432GNWCIPGCQCGJDSF4YKAIIZEQIZB?page=29&item=fy04> (accessed March 20, 2006).

9. Bob Herbert, *Nike’s Boot Camps*, N.Y. TIMES, Mar. 31, 1997, at A15. (“The women often are treated little better than slaves. Mr. Nguyen said the factories are like ‘military boot camps’ in which workers are subjected to various forms of humiliation and corporal punishment.”) *Id.*

10. David G. Savage, *Nike Takes Ad Liability Case to High Court*, L.A. TIMES, Oct. 15, 2002, at B6.

11. *Kasky v. Nike*, 93 Cal. Rptr. 2d 854 (2000) at 856. This report is available at <http://www.saigon.com/~nike/NikeChina.html> (accessed March 20, 2006).

12. Tony Emerson, “Swoosh Wars: In an Operation Modeled on the Clinton Campaign Machine, Nike Takes on its Enemies,” NEWSWEEK, Mar. 12, 2001, at 35–40.

13. Matthew C. Quinn, *Young to study Nike policies on sweatshops*, THE ATLANTA JOURNAL-CONSTITUTION, Feb. 25, 1997, at 1C.

14. Maria Saporta, *Young insisted Nike give him full access to plants*, THE ATLANTA JOURNAL-CONSTITUTION, June 24, 1997 at 03E. Young spent 15 days in Asia and “six months” doing research for Nike. *Id.*

15. Roger Parloff, *Can we talk?* FORTUNE Aug. 11, 2002, at 102–112. The Ernst and Young study is also noted in the California Court of Appeals’ opinion; see *Kasky v. Nike*, 93 Cal. Rptr. 2d 854 (2000) at 856.

16. The study is still available on the internet. See <http://www.calbaptist.edu/dskubik/young.htm> (accessed March 20, 2006).

17. Bob Herbert, *Mr. Young Gets It Wrong*, N.Y. TIMES, June 27, 1997, at A29.

18. *Kasky v. Nike*, 93 Cal. Rptr. 2d 854 (2000) at 857.

19. *Id.*

20. Parloff, *supra* note 15.

21. Parloff, *supra* note 15.

22. David Graulich, *Press Release: Write in Haste . . . Repent*, NATIONAL LAW JOURNAL, 25(6), at D.12.

23. *Kasky v. Nike, Inc.*, Complaint for Statutory, Equitable and Injunctive Relief (Apr. 20, 1998), available at <http://www.corpwatch.org/article.php?id=3448> (accessed March 20, 2006)

24. See Cal. Bus. & Prof. Code 17204 (2003).

25. The California Business and Professions Code defines “unfair competition” to include any “unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by the Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.” Cal. Bus. Prof. Code 17200 (2003).

26. *Kasky*, 93 Cal. Rptr. 2d at 857. The first and second causes of action, based on negligent misrepresentation and intentional or reckless misrepresentation, alleged that Nike engaged in an unlawful business practice in violation of the California Business and Professions Code 17200 by making the above misrepresentations "In order to maintain and/or increase its sales and profits . . . through its, advertising, promotional campaigns, public statements and marketing." *Id.* (referring to Cal. Bus. Prof. Code 17200 (2003)).

According to the complaint, Nike made a series of six misrepresentations regarding its labor practices: (1) "that workers who make NIKE products are . . . not subjected to corporal punishment and/or sexual abuse;" (2) "that NIKE products are made in accordance with applicable governmental laws and regulations governing wages and hours;" (3) "that NIKE products are made in accordance with applicable laws and regulations governing health and safety conditions;" (4) "that NIKE pays average line-workers double-the-minimum wage in Southeast Asia;" (5) "that workers who produce NIKE products receive free meals and health care;" and (6) "that NIKE guarantees a 'living wage' for all workers who make NIKE products." In addition, the complaint alleges that NIKE made the false claim that the Young report proves that it "is doing a good job and 'operating morally.'" See *Kasky v. Nike, Inc.*, *supra* note 23.

27. The third cause of action alleged unfair business practices within meaning of 17200, and the fourth cause of action alleged false advertising in violation of Business and Professions Code section 17500. Section 17500 states that "it is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars (\$2,500), or by both that imprisonment and fine." Cal. Bus. Prof. Code 17500 (2003).

28. *Kasky v. Nike, Inc.*, 45 P.3d 243 (2002). Going to trial would require Kasky to survive a summary judgment motion either during or after discovery; it is not clear that he could. See *infra*, note 62 and accompanying text.

29. Kennard wrote: "No law required Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization, nor was it impossible for Nike to address those subjects separately." In contrast, Justice Brown's dissent noted that Nike could not meaningfully comment on the public issue of its labor practices by making general statements about overseas labor exploitation and economic globalization. "The majority, however, forgets that Nike's overseas labor practices *are* the public issue." *Kasky v. Nike, Inc.*, 45 P.3d at 276 (dissenting opinion by Justice Brown).

30. *Nike, Inc., v. Kasky*, 537 U.S. 1099 (2003) (granting certiorari).

31. *Nike, Inc., v. Kasky*, 539 U.S. 654 (2003) (per curiam) (dismissing writ of certiorari as improvidently granted).

32. Press Release, Nike, Inc., and Kasky Announce Settlement of Kasky v. Nike First Amendment Case (Sept. 12, 2003), at <http://www.nike.com/nikebiz/news/pressrelease.jhtml?year=2003&month=09&letter=f> (last visited July 9, 2005).

33. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (dissenting opinion of Justice Holmes).

34. *Id.* at 630. Holmes is often quoted for the following language:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. *Id.*

35. *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J. concurring). Justice Holmes joined in the concurrence.

36. O. Lee Reed, *Is Commercial Speech Really Less Valuable than Political Speech?: On Replacing Values and Categories in First Amendment Jurisprudence* 34 AM. BUS. L.J. 1, at 10 (1996).

37. *Id.*

38. *Id.* at 10–11.

39. *Valentine v. Chrestensen*, 316 U.S. 52 (1942). “Unprotected” speech means words that can be regulated by government without any protection from the First Amendment.

40. 316 U.S. at 54.

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

42. 425 U.S. 748 (1976).

43. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770. (1976).

44. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985).

45. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983)

46. *Central Hudson Gas & Electric Corp. v. Public Service Com.*, 447 U.S. 557, 563 (1980).

47. Brief of *Amici Curiae*, The States of California, Alaska, Arizona, Connecticut, Florida, Illinois, Louisiana, Maine, Maryland, Minnesota, New Mexico, New York, North Dakota, Ohio, Oklahoma, South Dakota, Vermont, and West Virginia and the Commonwealth of Puerto Rico, at 10, citing *Central Hudson*, 447 U.S. at 562 n.5.

48. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983). In this case, a proposed mailing of materials by the distributor of Trojan brand condoms that discussed (*inter alia*) public issues of venereal disease and family planning was nonetheless “commercial speech.” As the Court noted, “advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech.” *Id.* at 68. Still, Youngs Drug Products proposed mailer was given the “qualified but nonetheless substantial protection accorded to commercial speech.” *Id.* at 68. The Court held that the government’s restrictions were more sweeping than necessary and invalidated the restrictions.

49. National Commission on Egg Nutrition v. FTC, 570 F.2d 157 (1977), *cert. denied*, 439 U.S. 821 (1978).

50. Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 474–75. The *Central Hudson* case is discussed *infra*, note 62.

51. *Board of Trustees v. Fox*, 492 U.S. at 474.

52. See *Kasky*, 119 Cal. Rptr. 2d 296, at 314. Federal trademark law has several such prohibitions, and federal law requires food packages to include the place of business of the manufacturer, packer, or distributor. 21 U.S.C. § 343(e). For a thoughtful discussion of the distinction between production information and process information, see Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L.REV. 525 (2004). By in large, Kysar's analysis upholds the benefits of having consumers fully informed not only as to product quality and price, but also to the ways in which the product was made.

53. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), at 765.

54. See Bruce Ledewitz, *Corporate Advertising's Democracy*, 12 B.U. PUB. INT. L.J. 389 (Spring/Summer 2003), at 394

55. *Virginia State Board of Pharmacy*, 425 U.S. at 771 ("Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a state's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the state from insuring that the stream of commercial information flow cleanly as well as freely." *Id.*

56. See *supra* note 34 (Holmes, J., dissenting in *Abrams v. United States*).

57. The California economy is the fifth-largest in the world, and most companies cannot do business without potentially reaching a California consumer. See Vicki McIntyre, *Note: Kasky v. Nike: Leaving Corporate America Speechless*, 30 WM. MITCHELL L. REV. 1531 (2004) at 1536.

58. Brief for Amicus Curiae, The Center for Advancement of Capitalism, Nike, Inc., et al. v. Marc Kasky, at 3.

59. Brief for Amicus Curiae, The Business Roundtable, Nike, Inc., et al. v. Marc Kasky, at 3.

60. Brief for Amicus Curiae, National Association of Manufacturers, Nike, Inc., et al. v. Marc Kasky, at 3. The claim here is that Ralph Nader would receive full protection of the First Amendment while General Motors would be provided a lesser standard of protection. Citing *Bose Corp. v. Consumers Union*, 806 F.2d 304 (1987), what Nike and its amici are arguing is that a specific product can be falsely criticized by a consumer advocate, and that because of First Amendment concerns the manufacturer can succeed in a product disparagement lawsuit only if it can prove that the critic spoke with "malice" or "reckless disregard." To "level the playing field" therefore, the Court was urged to find the California statute and decision to have provided less than the "full" First Amendment protection of requiring that a plaintiff prove malice or reckless disregard.

This argument, however, may overlook a number of important distinctions between product disparagement and business defamation. See, e.g., Lisa Magee Arent, *Note: A Matter of "Governance" Importance: Providing Business Defamation and Product Disparagement Defendants Full First Amendment Protection*, 67 IND. L.J. 441 (1992). Moreover, the "level playing field" argument does not account for the many other advantages currently enjoyed by corporations to suppress unfavorable ideas and facts. See *infra*, notes 67-81 and accompanying text. One example is the economic might of the meat industry, which has given large processors the resources to defend their practices vigorously to the public, while consumers often have little or no information on how animals are raised or processed for the market. Oprah Winfrey was accused of product disparagement by Texas cattlemen for hosting a 1996 television segment on the risks of mad cow disease breaking out in the United States. While the lawsuit failed, it "may have chilled media criticism of the meat industry, and it has spurred a significant number of states to enact new or

stricter food libel laws." See *Note: Challenging Concentration of Control in the American Meat Industry*, 117 HARV. L. REV. 2643, 2651 (June, 2004).

61. The California Code of Civil Procedure allows expenses for frivolous actions, bad faith, or delay. See Cal Code Civ Proc § 128.5 (2004).

62. This follows the contours of the Central Hudson Gas & Electric case, which is now followed in all cases where commercial speech is regulated. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980). In *Central Hudson*, the state utilities commission had prohibited promotional advertising by electric utilities, except for encouraging shifts of consumption away from peak demand times. The Supreme Court, invalidating the commission's ban, articulated a four-part test that has been widely followed in commercial speech cases. The first inquiry is whether the expression is protected by the First Amendment; to be protected at all, commercial speech must concern lawful activity and not be misleading. The second inquiry is whether the governmental interest being asserted is "substantial." If not, then First Amendment protections will trump the government's attempted restrictions. If the courts find both protected speech and government interests that are substantial, then the third and fourth "prongs" of *Central Hudson* will be reached: whether the regulation or restriction "directly advances the governmental interest asserted" and whether it is not "more extensive than necessary to serve that interest." *Central Hudson*, 447 U.S. at 566.

In many cases, the courts have rejected government regulations as not based on substantial government interests or as "not narrowly tailored" to effectuate that interest. See, e.g., *Bad Frog Brewery v. New York State Liquor Authority*, 134 F.3d 87 (1998) (finding that New York's interest in keeping a beer label with a frog extending its middle "finger" off New York grocery shelves may have been significant but that its regulations did not "directly advance" that interest and were not the least restrictive means of effectuating that interest).

63. Brief for Amicus Curiae, The Business Roundtable, Nike, Inc., et al. v. Marc Kasky, at 3.

64. Oral Argument to the Supreme Court, April 23, 2003 (Lawrence Tribe, at pages 5, 11–12, 16, 17).

65. Oral Argument to the Supreme Court, April 23, 2003 (Theodore Olson, at page 24, 26–27).

66. See *infra* notes 34–37 and accompanying text.

67. Robert W. McChesney, *Waging the Media Battle*, 15 AMERICAN PROSPECT, no. 7 (July 2004), at 24.

68. William Safire, *The Five Sisters*, N.Y. TIMES, op-ed page, Feb. 16, 2004.

69. Paul Starr, *Check and Balance*, 15 AMERICAN PROSPECT, no. 7 (July 2004), at 30. As Starr notes, "The FCC no longer uses its authority to promote public-affairs programming in the broadcast media, which have cut back the money and airtime they devote to news and public issues. The big question facing the media, as Harold Evans has said, is not whether they will stay in business but whether they will stay in journalism." *Id.*

70. Franklin Foer, *Closing of the Presidential Mind*, THE NEW REPUBLIC, July 5 & 12, 2004, 17–21, at 21.

71. *Buckley v. Valeo*, 424 U.S. 1 (1976). See also JOEL BAKAN, *THE CORPORATION* (2004), at 103 (n.33).

72. WILLIAM GREIDER, *WHO WILL TELL THE PEOPLE? THE BETRAYAL OF AMERICAN DEMOCRACY* (1992).

73. *Id.* at 123–140. (Chapter Five, "Hollow Laws.").

74. See LAWRENCE SOLEY, *FREE SPEECH AND PRIVATE ENTERPRISE CENSORSHIP INC.: THE CORPORATE THREAT TO FREE SPEECH IN THE UNITED STATES* (2002) at 88.

75. *Id.*

76. *Id.* at 90.

77. *Id.* at 90–91.

78. This may be an example of a commercially motivated choice that fights erectile dysfunction yet promotes electile dysfunction. See MoveOn.org, “CBS Guilty of Political Favoritism in Rejecting MoveOn.org Voter Fund Ad: Network Allows White House Anti-Drug Ad As it Lobbies for Favors from Bush and Congress, available at <http://www.moveon.org/press/pr/release12204.pdf> (accessed March 21, 2006).

79. Soley, *supra* note 74, at 229–30. Soley documents the conflict of interest in General Electric’s ownership of NBC. General Electric is a “major defense contractor, nuclear power plant builder, and consumer electronics manufacturer.” *Id.* Among other things, NBC has extolled the virtues and safety of nuclear power, has cancelled scheduled appearances by anti-nuclear activists, has failed to cover breaking stories on nuclear power safety issues and plant closings, and boycotts of General Electric. *Id.* at 230–31.

80. See Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991) (“[Spoliation] is a form of cheating which blatantly compromises the idea of the trial as a search for the truth.”); see also Dale A. Oesterle, *A Private Litigant’s Remedies for an Opponent’s Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1186 (1983) (“The naked truth is that many corporations purposefully operate programs to destroy evidence.”); in accord, RALPH NADER AND WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* (1996), at 134–157.

81. NADER AND SMITH, *supra* note 80, at 76.

82. See *supra* notes 64–65 and accompanying text.

83. THOMAS DONALDSON AND THOMAS DUNFEE, *TIES THAT BIND* (1999), at 7. [hereafter, *TIES*] (“As social contracts change, so too do the challenges for business. . . . The view has shifted from attitudes half a century ago that limited the responsibilities of companies largely to that of producing goods and services at reasonable prices, to a view today where corporations are held responsible for a variety of fairness and quality of life issues.”) *Id.*

84. See *TIES*, *supra* note 83. See also Thomas W. Dunfee, *Challenges to Corporate Governance: Corporate Governance in a Market with Morality*, 62 LAW & CONTEMP. PROB. 129 (1999). See also Thomas Donaldson and Thomas W. Dunfee 1995, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, ACADEMY OF MANAGEMENT REVIEW 19 (1994) at 252.

85. See *TIES*, *supra* note 83, at 49–81 (Chapter 3, Hypernorms: Universal Limits on Community Consent). See *infra* notes 101–111 regarding the hypernorm of necessary social efficiency.

86. *Id.* at 118.

87. *TIES*, *supra* note 83 at 25. (“Our primary task,” write Donaldson and Dunfee, “is to unravel the potential of social contracts as a foundation for an adequate ethical framework for economic activity. We begin by noting that at the core of all contractarian approaches is the acceptance of and respect for human autonomy. As Aristotle notes, all ethical behavior begins with choice.”)

88. See *TIES*, *supra* note 83, at 83.

89. See *TIES*, *supra* note 83, at 86.

90. See *supra* notes 14–15 and accompanying text.

91. *TIES*, *supra* note 83, at 52.

92. *TIES*, *supra* note 83, at 58.

93. TIES, *supra* note 83, at 60.
94. TIES, *supra* note 83, at 68.
95. See, e.g., Doe v. Unocal, 395 F.3d 932 (2002), in which Unocal's cooperation with the military government of Myanmar brought complaints of forced labor and other alleged violations of human rights.
96. Dunfee, *supra* note 84, at notes 86 and 87.
97. See, e.g., William C. Frederick, *Pragmatism, Nature and Norms*, 105 BUSINESS AND SOCIETY REVIEW (4), (Winter 2000), 467–79; Bill Shaw, *Review: Ties that Bind*, 37 AM. BUS. L.J. (Spring 2000), 563–78.
98. TIES, *supra* note 83, at 68–69.
99. The Caux Round Table Principles for Business can be found on the Caux Round Table website, See <http://www.cauxroundtable.org/principles.html> (accessed March 21, 2006).
100. TIES, *supra* note 83, at 118.
101. *Id.* at 119.
102. *Id.* at 119–121.
103. *Id.* at 122–23.
104. *Id.* at 125.
105. *Id.* at 125.
106. *Id.* at 130.
107. *Id.* at 134.
108. For a corrective view, see PATRICIA WERHANE, *ADAM SMITH AND HIS LEGACY FOR MODERN CAPITALISM* (1999).
109. TIES, *supra* note 83, at 138.
110. In TIES THAT BIND, Donaldson and Dunfee explicitly rely on the assumptions of a perfectly competitive market to buttress the notion of a necessary social efficiency hypernorm *Id.* at 135.
111. See *infra*, notes 66–81 and accompanying text.
112. Parloff, *supra* note 15.

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