Nike v. Kasky: An Invitation to Discard the Commercial Speech Doctrine

*By Deborah J. La Fetra**

Over the past 60 years, this Court's approach to speech uttered by business interests has ranged from zero protection (*Valentine v. Chrestensen*, 316 U.S. 52 (1942)), to very high protection (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)), to a four-part test (*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980)), which has itself undergone revision (*Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (upholding a regulation outlawing Tupperware parties on a university campus)). There have been conflicting analyses depending on the speaker (*Bates v. State Bar*, 433 U.S. 350, 384 (1977) and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978) (lesser protection accorded to attorney solicitations)) and the social worth of the activity promoted (*Compare Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 342, 348 (1986) (restrictions on advertisements for legal gambling facilities do not violate the first amendment) *with Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (restrictions on solicitations for charity struck down)).

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), the Supreme Court formulated a four-part test against which restrictions on commercial speech would be weighed:

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

This Court later expanded *Central Hudson*'s inherent flexibility. *See e.g.*, *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (requiring a "reasonable fit" rather than the least restrictive means to comply with the fourth prong). Unfortunately, this flexibility has "left both sides of the debate with their own well of precedent from which to draw," Floyd Abrams, *A Growing Marketplace of Ideas*, Legal Times, July 26, 1993, at S28.

The commercial speech doctrine has become nearly impossible to apply because "commercial speech" is often extremely difficult, if not impossible, to identify. This Court has long recognized that speech can serve dual functions.

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

Cohen v. California, 403 U.S. 15, 26 (1971). The duality of commercial and noncommercial speech becomes critically important when overlaid with the Supreme Court's treatment of false or misleading speech. Traditionally, in the realm of noncommercial speech, the government is restrained from acting as the arbiter of truth and falsity. *See, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."). Moreover, the state may not punish its citizens for disseminating false noncommercial information. *New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964) ("[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth. . . . [E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"); *See also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 783 (1978) (corporations enjoy the same degree of constitutional protection as individuals for direct comments on public issues; thus, corporate sponsored editorials which address the merits of a pending legislation should not be subject to government regulation of falsity).

The divergent lines of commercial speech jurisprudence have produced a well of confusion, the most extreme example of which is the California Supreme Court decision in *Kasky v. Nike*, 27 Cal. 4th 939 (2002), now pending before the United States Supreme Court on a petition for a writ of certiorari. In a groundbreaking decision, the Court held that "when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception, categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message." *Id.* at 960. The Court tries to downplay the nature of its holding, claiming that it merely means "that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully." *Id.* at 946. There is, of course, nothing to prevent other courts from

considering this reasoning persuasive enough to depart from the consumer fraud context to which the court tries to limit it.

Dissenting, Justice Janice Brown took issue with the current commercial speech doctrine that is dependent on speech being categorized as *either* commercial or noncommercial, with little quarter given to speech that contains elements of both. *Id.* at 979 (Brown, J., dissenting). Contemporary marketing, she argues, involves speech far more intermingled than segregated: "With the growth of commercialism, the politicization of commercial interests, and the increasing sophistication of commercial advertising over the past century, the gap between commercial and noncommercial speech is rapidly shrinking." *Id.* She further laments, "I believe the commercial speech doctrine, in its current form, fails to account for the realities of the modern world–a world in which personal, political, and commercial arenas no longer have sharply defined boundaries." *Id.* at 980.

The speech in this case involved press releases, letters to the editor, letters to university athletic directors and the like describing Nike's overseas labor practices. Far from the prototypical commercial speech of offering to sell X product for Y price, Nike's speech sought to rehabilitate a corporate image as well as provide information to the public on a matter of broad concern. Extending the lesser protection of the commercial speech doctrine to this type of speech threatens a wide variety of public relations communication. For example, companies frequently use websites with a combination of sales pitch and general information about their products, industry, or related concerns. Music videos provide entertainment while hoping to encourage consumers to purchase the musician's CDs. Some companies even engage in "stealth marketing," in which they hire actors to use the products in public and say nice things about the products (such as digital cameras or a brand of liquor) to onlookers, but never letting on that they are in the hire of the company or explicitly urging anyone to buy the products.

The current commercial speech doctrine leads to highly unpredictable results. Pulling a little of this and a little of that from a variety of this Court's opinions, a majority of the California Supreme Court developed a new doctrine unlike any the Supreme Court–or any other court–ever articulated. When the state of the law reaches this point, affected parties have no means by which to adapt their actions or their speech to prevent themselves from running afoul of the law. This uncertainty chills protected speech as those fearing liability shy away from expression that might be construed as "commercial."

The Supreme Court has thus far resisted "breaking new ground," finding *Central Hudson* to be "adequate," (*e.g., Thompson v. Western States Medical Center*, 122 S. Ct. 1497, 1504 (2002); *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 554-55 (2001)), but the ad hoc application of *Central Hudson* fails to provide the guidance necessary to a fair and even application of constitutional law. *See Lorillard*, 533 U.S. at 574 (Thomas, J., concurring in part and in the judgment) ("the Court has followed an uncertain course– much of the uncertainty being generated by the malleability of the four-part balancing test of *Central Hudson*."); *Rutan v. Republican Party*, 497 U.S. 62, 95-96 (1990) (Scalia, J., dissenting) (footnote omitted) ("When it appears that the latest 'rule,' or 'three-part test,' or 'balancing test' devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens.").

The Supreme Court's current commercial speech jurisprudence simply is not up to the task of analyzing corporate interests' innovative ways of informing the public of their positions on issues ranging from the companies themselves to raging public debates. The California Supreme Court's decision demonstrates how far afield a court can go while relying on Supreme Court precedents. The *Nike* decision cannot be reconciled with the First Amendment, but can serve only as authority for other courts to ratchet downward the protection due not only to commercial speech, but to any speech that has even the slightest element of commercial gain for the speaker.

* Deborah J. La Fetra is a Principal Attorney with Pacific Legal Foundation.