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Section on Mass Communications Law

I should like to devote my few minutes this morning to several thoughts on what the Supreme Court could – and should – have done in the Nike case to clarify commercial speech issues. Two brief disclaimers should precede: Since I grew up in an advertising family – my maternal grandfather and two uncles were advertising managers of Boston dailies -- I have always had a soft spot for commercial speech – and unlike most colleagues in the First Amendment field, I actually enjoy teaching this subject. Second, our Center filed an amicus brief in the Nike case, joined by the Media Institute, in which we argued for substantial protection for Nike’s statements. But that’s not the approach I’m proposing for my portion of this panel.

Nor is this the time to remark upon the strange turn of events that occurred late last spring. Optimism about the outcome seemed not unwarranted. The morning after oral argument, Linda Greenhouse reported that “Nike found a sympathetic audience at the Supreme Court for its argument that its defense of its overseas labor practices was the kind of speech that the First Amendment protects to the fullest extent.” Larry Tribe seemed to have the Justices fully convinced. But when it came to Paul Hober, arguing for Kasky, Greenhouse reported that “the

Justices were attentive, but appeared unpersuaded.” We will never know just what happened during the ensuing eight weeks. The eventual lineup reflected little that is familiar in constitutional adjudication. My law school and constitutional law classmate Justice Kennedy uncharacteristically dissented from the dismissal without explanation. Justice Thomas, clearly the current champion of commercial speech, was silent for the first time I can recall in such a case. Those who supported the per curiam disposition seemed to be reaching for procedural barriers and obstacles that had received no prior consideration. Even Justices Breyer and O’Connor seem tentative in their disagreement with the dismissal. But I’ll resist the temptation to comment further on the strange posture of this case. Instead, let me note five things I fervently wish the Justices had said with regard to the merits.

First, the Court should have declared that the purpose of the commercial speech doctrine was to provide partial protection for messages that lay outside the First Amendment until the mid 1970s. It seems clear to me that most of Nike’s statements involved in this case would not have been classified as advertisements before that time, and thus would have been fully protected. Using the commercial speech doctrine to reduce protection for messages in the gray zone - as the California Supreme Court did -- seems to me a perversion of a principle that was meant to enhance rather than diminish protection for expression.

Second, I wish the Justices had taken this occasion to define commercial speech once and for all. Such a definition would enable us to differentiate with some precision between commercial and non-commercial messages. What the Court has done, I would say, is only to describe but not to define the material that deserves partial protection despite its promotional character. All we know for certain is that not all paid advertising is commercial speech, especially the sponsored civil rights message that led to the *New York Times* libel case. At the other end of the scale we know that messages which do no more than propose the sale of a product or service are commercial. We may also infer from the *Pittsburgh Press* cases that the line falls somewhere between an employer's "help-wanted-female" ad and a prospective employee's paid announcement that "mature female seeks situation in home." Yet even here, the Supreme Court addressed only half the equation, and did so just before *Bigelow* and *Virginia Pharmacy*. So we urgently needed a definition, had hoped to get one, but in the end still have none.

Third, this case offered a marvelous opportunity to revisit the consequences of classifying certain statements as commercial speech. We tend to focus unduly on the lack of protection for advertising claims that are actually or inherently deceptive. That is indeed a major distinction between commercial and political or

artistic expression. But for me the greater risk in mistaken judgments about borderline material is the one Justice Blackmun stressed in *Central Hudson* – that even non-deceptive statements about a lawful product or service may be banned if government can show a close nexus with a substantial regulatory interest. If, for example, the New York Public Service Commission had been more effective in disproving the adequacy of less restrictive measures designed to conserve energy, the electric utility’s promotional enclosures could presumably have been banned. That prospect seemed truly frightening to Justices Blackmun and Brennan -- and remains for me, to this day, the most serious downside risk of a generally laudable doctrine. So few of the recent cases have taken the analysis far enough to tell us much about just how good a “fit” between end and means will suffice, or how substantial a regulatory interest will avail. To these questions, among others, we need answers and had hoped the Nike case might provide them.

Fourth, I wish the Justices had made clear that a corporate speaker is not inherently denied First Amendment protection, even when its messages pertain to its products and might affect the market for those products. We do know, because the Supreme Court has made it abundantly clear, that a profit motive in no way undermines free speech and press claims -- else newspapers, magazines, broadcasters and most recently Internet Service Providers or commercial websites

would be out of the First Amendment business. Conversely, we do not know whether a proprietary interest or motive is essential to a finding that statements are commercial speech; that issue is involved in a fascinating Ninth Circuit tobacco taxation case in which we filed a amicus brief just before the holidays. Meanwhile, the disparagement of corporate communications remains one of the most troubling features of the California Supreme Court's Nike ruling. The issue had remarkably little scholarly attention – although I would commend to those who have not seen it an article precisely on this point that Marty Redish and a former student wrote some five years ago, and which contains ample support for a less demeaning view of corporate expression that is not hard-core selling of products and services.

Finally, the Nike case offered an ideal opportunity to re-emphasize that the central value of protecting commercial speech is to ensure a better informed consumer population. Allowing private actions like those the California statute seems to permit effectively enables courts to shut down one side of an important public debate in precisely the way that the major commercial speech precedents insist legislative and executive authority may not do. California consumers end up in the dark on a major footwear maker's overseas labor policies. They are effectively denied information the accuracy of which is best tested and judged by making it – and its inevitable refutation – freely available to Nike consumers as

well as to those who are committed to Adidas or Reebok, or just don't buy sneakers. That, it seems to me, is what the evolution of commercial speech is all about. It would be comforting if we could conclude that the Court simply missed an opportunity to clarify important First Amendment issues and enhance the commercial speech doctrine. That outcome would be essentially a wash. But the actual disposition, including the subsequent settlement, left this area of free speech law worse than it was before. If they decide not to treat the patient, judges – like doctors -- should at the very least “do no harm.”