Diluting the Commercial Speech Doctrine: “Noncommercial Use” and the Federal Trademark Dilution Act

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The debate over the appropriate level of First Amendment protection for commercial speech has raged for more than half a century. While much of this debate has focused on purely commercial forms of expression, a great deal of scholarship has examined the correct standard for evaluating speech with both commercial and expressive elements. These “mixed” forms of communication, including commercial parody and criticism, present difficult constitutional questions. Some commentators have argued that mixed communications should receive full protection under the First Amendment, and have even gone so far as to suggest that the distinction between commercial and non-commercial speech be abolished.

The debate has significant implications for trademark law. Trademarks are, essentially, purely commercial speech: they are words


1 Compare Valentine v Chrestensen, 316 US 52 (1942), with Kasky v Nike, Inc, 27 Cal 4th 939, 45 P3d 243 (2002) (holding a corporation’s statements regarding human rights to be commercial speech), cert granted, Nike, Inc v Kasky, 537 US 1099 (2003), cert dismissed as improvidently granted, 123 S Ct 2554 (2003). See also Kasky, 123 S Ct at 2559–60 (Breyer dissenting) (arguing that the issues at hand should not be left for another day, because “the questions presented directly concern the freedom of Americans to speak about public matters in public debate... and delay itself may inhibit the exercise of constitutionally protected rights of free speech”).

2 See, for example, Charles Gardner Geyh, The Regulation of Speech Incident to the Sale or Promotion of Goods and Services: A Multifactor Approach, 52 U Pitt L Rev 1, 12 (1990) (discussing truthful commercial advertising).


4 See, for example, Alex Kozinski and Stuart Banner, Who’s Afraid of Commercial Speech?, 76 Va L Rev 627 (1990) (arguing that commercial speech should enjoy the same First Amendment protection as noncommercial speech); Alex Kozinski and Stuart Banner, The Anti-history and Pre-history of Commercial Speech, 71 Tex L Rev 747 (1993) (examining the history and weaknesses of the legal distinction between commercial and noncommercial speech). These academic calls for abolition of the commercial speech doctrine may now be playing themselves out in the Ninth Circuit’s recent trademark and right of publicity decisions. See Part I.C.2 for a discussion of recent developments.

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or symbols used to identify, advertise, and sell products or services. Traditionally, trademark infringement law has had relatively few run-ins with the First Amendment because of its common-law roots in the law of fraud. However, recent laws combating trademark dilution raise the question of how "mixed" speech with both commercial and expressive elements should be regulated. Disputes have repeatedly arisen in the application of the Federal Trademark Dilution Act (FTDA), which exempts "noncommercial use" of a mark from actions for dilution.

Conflicts over the proper level of protection afforded by the FTDA to communications with "mixed" commercial and noncommercial purposes have been resolved in one of two ways. Several courts have ruled that an ounce of commercial intent or effect removes all First Amendment protection, creating an expansive definition of "commercial" speech for purposes of dilution liability. Perhaps in reaction to this extreme view, other courts have recently adopted the opposite perspective: an ounce of expressive content protects the entire message, regardless of commercial intent.

In this Comment, I argue that neither approach to the FTDA's "noncommercial use" exemption adequately reflects the Constitution's delicate balance between First Amendment freedoms and congressional power to regulate commerce. Rigorously applied, the "all is commercial" standard transforms the FTDA into a sledgehammer, creating serious constitutional questions and threatening to chill forms of protected commercial expression. At the same time, the "all is protected" standard guts the FTDA of any real meaning, creating a roadmap for evasion that would quickly enfeeble both federal dilution protection and the Supreme Court's commercial speech precedents. In order to preserve the constitutionality and viability of the FTDA, I

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5 See New Kids on the Block v News America Publishing, Inc, 971 F2d 302, 305 (9th Cir 1992) (discussing the purpose and function of trademarks). See also Thomas W. Merrill, Comment, First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 U Chi L Rev 205, 236 (1976) (emphasizing the parallels between trademark use and commercial speech, and proposing a definition of commercial speech requiring references "to a specific brand name product or service").
6 See Part I.A.
7 See Parts I.B and I.C.
9 15 USC § 1125(c)(4)(B).
10 See Part I.C.1.
12 Although I am concerned with the constitutionality of the FTDA as applied to potentially protected forms of noncommercial speech, I do not address the larger question of the FTDA's constitutionality as a regulation of purely commercial speech. As courts have noted, "the noncommercial use exemption does not eliminate all tension between the FTDA and the First Amendment because the exemption does not apply to commercial speech, which enjoys quali-
propose a new test for identifying "noncommercial use" of a mark based on basic principles of content-based speech regulation and the more developed law of fair use in copyright doctrine. By focusing on (1) a speaker's commercial intent and commercial content rather than the commercial effects of the speech and (2) the role played by a famous trademark in conveying the speaker's message, courts can improve consistency, increase fidelity to the Court's commercial speech precedents, and ultimately be more faithful to the intended meaning of the FTDA's "noncommercial use" exemption.

My argument proceeds in three parts. In Part I of this Comment, I provide a brief summary of federal trademark law, including an analysis of its interplay with the First Amendment in the contexts of trademark infringement and trademark dilution. As part of that analysis, I describe recent trademark dilution decisions that have taken divergent perspectives on the meaning of "noncommercial use." In Part II, I review the Supreme Court's commercial speech precedents, examining the forms of speech that the Court has classified as "commercial" and "noncommercial." In Part III, I compare these commercial speech precedents to divergent perspectives of "noncommercial use" under the FTDA, arguing that both the "all is commercial" and "all is protected" lines of analysis must be rejected. Finally, I propose a new test for identifying "noncommercial use" under the FTDA, shifting the focus of a court's attention away from commercial effects and toward a contextual analysis of the role played by a dilutive use in "mixed" speech with commercial and noncommercial elements.

I. TRADEMARK LAW: INFRINGEMENT, DILUTION, AND "NONCOMMERCIAL" USE

A. Federal Trademark Regulation

At present, federal law (primarily, the Lanham Act\textsuperscript{13}) protects trademarks against several conceptually distinct forms of harm. One harm is "infringement," which arises out of a confusing or misleading use of one's trademark on competing products. Another harm is "dilution," which arises out of a confusing or misleading use of one's trademark on competing products. Another harm is "dilut-
"confusion," which occurs when a famous trademark is used in a manner that blurs or tarnishes its distinctiveness. This Part explores trademark infringement and trademark dilution, as well as the interplay between the First Amendment and trademark law.

1. Trademark infringement.

Before 1996, trademark owners wishing to protect their marks in federal court were limited to actions for trademark infringement. Protection against trademark infringement is available only under a narrow set of circumstances: the infringing party must use a mark identical to, or confusingly similar to, the trademark owner's mark; the infringing party must be in competition with the trademark owner; and the trademark owner must demonstrate that the infringing party's use creates a "likelihood of confusion" among the relevant purchasing public.

Under this set of narrow constraints—particularly the "likelihood of confusion" requirement—trademark infringement presents relatively few First Amendment concerns. In the context of commercial expression, the Supreme Court has stated that "[t]he government may ban forms of communication more likely to deceive the public than to inform it." Generally, confusing, misleading, or outright false statements do not receive significant protection under the First Amendment. Accordingly, federal trademark infringement law contains built-in safeguards against liability for protected speech, since by

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16 See Visa International Service Association v Eastern Financial Federal Credit Union, 24 USPQ2d 1365, 1366 (9th Cir 1992) (describing the likelihood of confusion requirement as "the sine qua non of trademark infringement"). For a general discussion of trademark infringement and its requirements, as well as the historical development of trademark infringement as an outgrowth of common law fraud, see Beverly W. Pattishall, David C. Hilliard, and Joseph N. Welch II, Trademarks and Unfair Competition Deskbook §§ 5.01–04 (Lexis 2001).
17 Central Hudson Gas & Electric Corp v Public Service Commission, 447 US 557, 563 (1980). See also Bolger v Youngs Drug Products Corp, 463 US 60, 69 (1983) ("The State may deal effectively with false, deceptive, or misleading sales techniques."); Castrol, Inc v Pennzoil Co, 987 F2d 939, 949 (3d Cir 1993) (holding that "commercial speech that is false when uttered does not enjoy the protection of the First Amendment").
18 See Friedman v Rogers, 440 US 1, 12–13 (1979) (upholding state regulation of trade names based on the "significant possibility that trade names [could] be used to mislead the public"); Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc, 425 US 748, 771 (1976) ("Un truthful speech, commercial or otherwise, has never been protected for its own sake."). False statements of fact receive little to no constitutional protection because they are low-value expression. See Gertz v Robert Welch, Inc, 418 US 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact."); Garrison v Louisiana, 379 US 64, 75 (1964) ("[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.").
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its terms it applies only to speech likely to confuse and mislead consumers."

2. Trademark dilution.

In 1996, Congress radically altered the landscape of federal trademark protection with the passage of the Federal Trademark Dilution Act.20 The FTDA supplements the Lanham Act by prohibiting the "commercial use in commerce" of a "famous" mark, if that use causes "the lessening of the capacity" of the mark "to identify and distinguish goods or services," irrespective of confusion or competition.21 This "lessening of the capacity" comes in two forms: blurring and tarnishment. "Blurring" occurs when the noncompeting use of a mark associates that mark with two or more sources (for example, association of the KODAK mark with both "Kodak Film" and "Kodak Pianos").22 A subset of blurring is "tarnishment," which occurs when a noncompeting use of a famous mark associates that mark with an inferior or offensive product or service (usually pornography or illegal drugs).23 Plaintiffs alleging either blurring or tarnishment of a famous mark must demonstrate "actual dilution" of the mark, which requires significant proof of dilutive injury but not necessarily a showing of actual economic harm.24

Because the FTDA does not contain a "likelihood of confusion" test, dilution protection potentially extends to a significant amount of non-misleading speech protected by the First Amendment. Consequently, the FTDA's broad prohibition against dilutive speech is tempered by a statutory exemption for "noncommercial use."26 Courts have uniformly interpreted the FTDA's "noncommercial use" exemption as a general exemption for constitutionally protected forms of

19 See 15 USC § 1125(a)(1)(A) (limiting federal trademark infringement protection to trademark uses "likely to cause confusion, or to cause mistake" among consumers).
20 15 USC §§ 1125, 1127.
21 15 USC §§ 1125(c)(1), 1127.
23 See id (discussing tarnishment's economic effects); Playboy Enterprises, Inc v Welles, 279 F3d 796, 805 (9th Cir 2002) (discussing the differences between blurring and tarnishment).
24 See Moseley v V Secret Catalogue, Inc, 537 US 418, 433 (2003) (holding that the FTDA requires a showing of "actual dilution").
25 See id at 434 (noting that actual dilution under the FTDA does not necessarily require a showing of actual economic harm, since actual dilution might be proven through circumstantial evidence of dilution). By rejecting an "economic harm" requirement under the FTDA, the Supreme Court rejected the approach taken by several appellate courts. See, for example, Ringling Bros-Barnum & Bailey Combined Shows, Inc v Utah Division of Travel Development, 170 F3d 449, 460–61 (4th Cir 1999) (requiring plaintiffs to demonstrate dilutive injuries that have caused actual economic harm before recovering under the FTDA).
26 See 15 USC § 1125(c)(4)(B).
expression and criticism.\textsuperscript{7} This interpretation appears to effectuate the FTDA's intended meaning, as evinced by the statute's legislative history.\textsuperscript{8} However, the exact scope and application of that exemption for "noncommercial use" remains a matter of some controversy.

B. Identifying "Noncommercial Use": Competing Judicial Paradigms

In the abstract, courts agree that the FTDA's "noncommercial use" exemption is a catch-all for First Amendment concerns reflecting the Supreme Court's distinction between protected noncommercial speech and less-protected commercial speech. However, when faced with concrete factual disputes requiring the application of the "noncommercial use" exemption, courts are far less uniform in their interpretations of the FTDA. These divergent interpretations can be grouped into two categories: "all is commercial," a school of thought characterizing a mark's mixed use as a commercial use without constitutional protection; and "all is protected," which views all mixed uses of a mark as fully protected under the First Amendment.

1. "All is commercial."

To determine the "commercial" or "noncommercial" status of a trademark's use, some courts place tremendous emphasis on the commercial intent and effects of the defendant's speech, categorizing speech with an association to the commercial interests of third parties

\textsuperscript{7} See, for example, Panavision International LP v Toeppen, 945 F Supp 1296, 1303 (CD Cal 1996), affd, 141 F3d 1316 (9th Cir 1998) ("The exception for non-commercial use of a famous mark is intended to prevent courts from enjoining constitutionally-protected speech."). See also J. Thomas McCarthy, 4 McCarthy on Trademarks and Unfair Competition § 24:97.2 at 24-223 (West 4th ed 2003) (examining the FTDA's legislative history, and noting that "the intent of Congress appears to be that the federal anti-dilution law cannot be used [to block] negative product reviews in the media or negative opinions expressed about company policies").


The [FTDA] adequately addresses legitimate First Amendment concerns espoused by the broadcasting industry and the media. The bill will not prohibit or threaten "noncommercial" expression, as that term has been defined by the courts. Nothing in this bill is intended to alter existing case law on the subject of what constitutes "commercial" speech.

See also id at 8 (stating that the FTDA "expressly incorporates the concept of 'commercial' speech from the 'commercial speech' doctrine, and proscribes dilution actions that seek to enjoin use of famous marks in 'non-commercial' uses (such as consumer product reviews)"); Statement of Senator Orrin Hatch, 142 Cong Rec S 19310 (Dec 29, 1995):

The [FTDA] adequately addresses legitimate first amendment concerns espoused by the broadcasting industry and the media. The bill will not prohibit or threaten noncommercial expression, such as parody, satire, editorial and other forms of expression that are not a part of a commercial transaction. The bill includes specific language exempting from liability the "fair use" of a mark in the context of comparative commercial advertising or promotion.
or an impact on a trademark owner's commercial interests as unprotected "commercial" speech. Using this approach, every mixed use of a mark could be fully regulated, regardless of its expressive, critical, parodic, or satiric content. While the majority of this precedent has been applied in the trademark infringement context, its reasoning and application have important consequences for the FTDA, where the distinction between "commercial" and "noncommercial" use often determines the defendant's ultimate liability.

One early example of the "all is commercial" school of trademark use is Planned Parenthood Federation of America, Inc v Bucci, in which the defendant was enjoined from using the domain name "plannedparenthood.com" to host his website. Bucci was an anti-abortion activist operating an anti-abortion website at the "plannedparenthood.com" URL. His website included information about his activities as an anti-abortion activist, as well as sample sections from an anti-abortion book, The Cost of Abortion. Planned Parenthood, a pro-choice activist organization and a provider of abortion services, brought suit alleging several trademark claims, including trademark dilution. Bucci defended his use of the domain name as a "noncommercial use" permissible under the FTDA.

To determine the "commercial" or "noncommercial" character of Bucci's speech under the FTDA, the Planned Parenthood court focused on three activities it claimed were relevant to the "commercial" status of the trademark use: "(1) defendant is engaged in the promotion of a book, (2) defendant is, in essence, a non-profit political activist who solicits funds for his activities, and (3) defendant's actions are designed to, and do, harm plaintiff commercially." Because Bucci endorsed the ideas in an anti-abortion book, solicited contributions on his radio show, and mentioned his website on his radio show, the court held that "defendant's use of plaintiff's mark is sufficiently tied to defendant's fund-raising efforts for the use to be deemed 'commercial' within the meaning of [the FTDA]." The court then looked beyond Bucci's promotional and commercial activities to conclude that "defendant's use [of the mark] is commercial because of its effect on the plaintiff's activities." Because of these "commercial" activities (such as promotion without sale or intent to financially benefit, solicitation in forums outside the speech at issue, and commercial impact on the plaintiff), the court concluded that defendant's use of the PLANNED

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29 42 USPQ2d 1430 (SD NY 1997).
30 See id at 1432-33.
31 Id at 1435.
32 Id at 1436.
33 Id.
PARENTHOOD mark did not qualify as a “noncommercial use” under the FTDA.34

Based on the reasoning in Planned Parenthood, subsequent courts focused on similar activities in an effort to determine “noncommercial use” under the FTDA. In Jews for Jesus v Brodsky,35 the court held that defendant’s use of the “jewsforjesus.org” and “jews-for-jesus.com” domain names did not qualify as a “noncommercial use.”36 In evaluating plaintiff’s dilution challenge, the Jews for Jesus court placed great weight upon Planned Parenthood’s holding: intentionally harming another’s commercial activities could constitute commercial speech. The court emphasized that defendant’s use impacted plaintiff by “preventing the Plaintiff Organization from exploiting the Mark and the Name of the Plaintiff Organization.”37 In addition, the court relied on the fact that the defendant hyperlinked its websites to Outreach Judaism, another opponent of the Jews for Jesus movement. While the defendant’s website offered nothing for sale, the Outreach Judaism site sold audio tapes, books, and related items. The court reasoned that defendant was engaged in an indirect form of commercial solicitation, because

[Although the Defendant Internet site does not solicit funds directly like the defendant’s site did in Planned Parenthood,38 the Outreach Judaism Organization Internet site (available through the hyperlink) does do so through the sale of certain merchandise…. Considering the limited nature of the Defendant Internet site and its hyperlink to the Outreach Judaism Organization Internet site, it is apparent the Defendant Internet site is a conduit to the Outreach Judaism Organization Internet site.39

It is difficult to overstated the broad reach of this reasoning. The defendant’s website did not offer any items for sale and did not directly or indirectly profit from commercial transactions; it merely hyperlinked to another site engaging in commercial activities. But Jews for Jesus held that this indirect association with commercial activities was enough to eliminate protection under the FTDA’s “noncommer-

34 Id at 1437.
36 Id at 308.
37 Id.
38 It is worth noting that the Jews for Jesus court’s interpretation of Planned Parenthood is incorrect in this respect: The website at issue in Planned Parenthood did not directly solicit contributions. Rather, the defendant solicited contributions on his offline radio show. The defendant’s website was considered commercial solicitation because it was “part and parcel” of the offline solicitation activities, not because it directly advertised or contributed to those solicitations. See Planned Parenthood, 42 USPQ2d at 1436.
39 Jews for Jesus, 993 F Supp at 308.
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cial use” exemption.\(^{40}\) Although the defendant appealed the court’s analysis of his trademark use, the Third Circuit summarily affirmed the district court’s analysis, providing additional support for the lower court’s interpretation of the FTDA’s “noncommercial use” exemption.\(^{41}\)

Perhaps the strongest articulation of the “all is commercial” school is *Bihari v Gross*,\(^{42}\) where the court was faced with a metatag dispute over defendant’s use of the BIHARI INTERIORS mark. Defendant used the mark to describe a website containing critical reviews of the interior design services offered by the plaintiff and hyperlinks to other area design firms.\(^{43}\) Plaintiff sued for cybersquatting to enjoin the mark’s use in the site’s text and metatags. The *Bihari* court noted that “[t]he mere use of another’s name on the Internet...is not per se commercial use.”\(^{44}\) However, the court emphasized that the defendant’s “websites contain hyperlinks to other websites which promote the services of other interior designers,” and therefore concluded that the defendant’s websites “effectively act as a conduit, steering potential customers away from [the plaintiff] and toward its competitors.”\(^{45}\) Because defendant’s critical speech was likely to dissuade customers from using Bihari Interiors and encourage customers to visit other design firms, the court held that the defendant’s linking activities “transform[] his otherwise protected speech into a commercial use.”\(^{46}\) This statement marks the high-water mark of the “all is commercial” school: “otherwise protected” speech cannot be “noncommercial” under the FTDA if it is likely to harm the commercial interests of a trademark owner.

Of course, the FTDA was not directly at issue in *Bihari*, as the plaintiffs were not alleging trademark dilution. But the case still has important implications for trademark dilution law. *Bihari* stated that the Lanham Act’s “commercial use” requirement “tracks the commercial speech doctrine as developed by the United States Supreme

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\(^{40}\) See id (“The Plaintiff Organization has demonstrated a likelihood of success on its claim of dilution under [the FTDA].”).

\(^{41}\) See *Jews for Jesus*, 159 F3d at 1351.

\(^{42}\) 119 F Supp 2d 309 (SD NY 2000).

\(^{43}\) “Metatags” are fields in hypertext markup language used to describe the contents of a website. These descriptive fields are visible to search engines, but not to end users. For a summary of metatag technology and its uses, see *Brookfield Communications, Inc v West Coast Entertainment Corp*, 174 F3d 1036, 1045 (9th Cir 1999).

\(^{44}\) *Bihari*, 119 F Supp 2d at 314 (noting defendant’s “Who's Who in Interior Design” section with numerous hyperlinks to design firms).

\(^{45}\) Id at 318, citing *Bally Total Fitness Holding Corp v Faber*, 29 F Supp 2d 1161, 1166 (CD Cal 1998).

\(^{46}\) *Bihari*, 119 F Supp 2d at 318.

\(^{47}\) Id, citing *Jews for Jesus*, 993 F Supp at 308 (emphasis added).
and further cited Planned Parenthood for the proposition that the FTDA "states that '[n]oncommercial use of a mark' is not actionable under the Lanham Act." Therefore, the court's statement that passing references to another's commercial activities and speech, which are likely causes of harm to a trademark owner's commercial activities, could "transform[] [ ] otherwise protected speech into a commercial use" is of critical importance in the larger debate over "commercial" and "noncommercial" use. Indeed, courts have relied on this statement in Bihari, as well as similar statements in Planned Parenthood and Jews for Jesus, in holding that similar trademark uses constitute unprotected commercial speech. As a group, these holdings continue to influence not only courts, but also arbitration panels using the Uniform Dispute Resolution Policy (UDRP) to adjudicate domain name disputes and differentiate "commercial" and "noncommercial" uses of a mark.

Most recently, Nissan Motor Co, Ltd v Nissan Computer Corp adopted a conception of "commercial use" emphasizing the speaker's potential for harming the commercial interests of a trademark owner. In Nissan, the plaintiff sued the defendant for diluting its famous NISSAN mark by registering the "www.nissan.com" and "www.nissan.net" domain names. The court found dilution of the plaintiff's mark and enjoined the defendant from using the domain names to sell products or otherwise engage in commerce, but did not enjoin the defendant from engaging in uses outside the scope of the FTDA. For instance, the court noted that "using nissan.com to post ... family photographs" would not constitute "commercial use," and would not run afoul of the

48 Bihari, 119 F Supp 2d at 318, citing Central Hudson, 447 US at 561.
49 Bihari, 119 F Supp 2d at 318, citing Planned Parenthood, 42 USPQ2d at 1437.
50 Bihari, 119 F Supp 2d at 318 (citation omitted and emphasis added).
51 See, for example, PGC Property v Wainscott/Sagaponack Property Owners, Inc, 250 F Supp 2d 136, 141 (ED NY 2003) (citing Bihari and Planned Parenthood for the definition of commercial use in determining that plaintiff did have standing to bring a Lanham Act claim, despite no direct competition); Christian Science Board of Directors v Robinson, 123 F Supp 2d 965, 969-71 (WD NC 2000) (citing Planned Parenthood and Jews for Jesus for the proposition that defendant's criticism of plaintiff's activities amounted to commercial use through its commercial impact on plaintiffs).
52 See, for example, Council of American Survey Research Organizations v Consumer Information Organization, LLC, WIPO No D2002-0377 (July 19, 2002), online at http://arbiter.wipo.int/domains/decisions/html/2002/d2002-0377.html (visited May 20, 2004) (citing Planned Parenthood for an analysis of commercial use); United States Postal Service v Consumer Information Organization, NAF No 95757 (Nov 27, 2000), online at http://www.arb-forum.com/domains/decisions/95757.htm (visited May 20, 2004) ("The web site created by respondent, if it were limited solely to non-commercial information might qualify as use in good faith, but the site contains links to respondent's commercial email, domain name registration and other goods and services.").
53 231 F Supp 2d 977 (CD Cal 2002).
54 See id at 978.
court's injunction.\textsuperscript{55} However, the court concluded that posting "disparaging remarks or negative commentary" about the trademark owner would be "sufficiently commercial to bring the defendants' use of the domain names within the scope of the FTDA," because "critical speech becomes commercial and is subject to the proscriptions of the FTDA" when it causes commercial harm.\textsuperscript{56} In reaching this conclusion, \textit{Nissan} rejected the possibility that critical commentary injuring plaintiff's commercial interests and reputation would fall within the FTDA's "noncommercial use" exemption,\textsuperscript{57} demonstrating the continued appeal of the "all is commercial" school of interpretation for courts and arbitration panels.

2. "All is protected."

As noted above, a number of courts characterize speech with elements of commercial association and effect as "commercial" speech outside the scope of the FTDA's "noncommercial use" exemption. However, other courts take a decidedly different approach. A growing body of law suggests that all speech with an element of expressive, parodic, or satiric content is entirely "noncommercial use" outside the scope of the FTDA.

In \textit{Hoffman v Capital Cities/ABC, Inc},\textsuperscript{58} actor Dustin Hoffman sued the publishers of Los Angeles Magazine for violating his rights under the Lanham Act and his right of publicity, and for unfair competition. The defendants published an article featuring images of actors from famous films, including Dustin Hoffman from the film "Tootsie," digitally altered to appear in designer fashions.\textsuperscript{59} The Ninth Circuit held that because the images were intended to inspire "humor," the article was protected noncommercial speech, despite what the court identified as the article's clear commercial purpose: "to draw attention to the for-profit magazine in which [the article] appears," thereby selling additional copies of the magazine.\textsuperscript{60}

\begin{footnotes}
\item[55] Id at 980.
\item[56] Id.
\item[57] \textit{Nissan} used the FTDA's "noncommercial use" exemption to support its conclusion that "not all uses of domain names constitute unlawful dilution under the FTDA," because "noncommercial speech is exempted." Id at 979. Accordingly, in determining that criticism of the plaintiff would lead to commercial harm and therefore constitute a commercial use of the plaintiff's trademark, the \textit{Nissan} court clearly concluded that the scope of the FTDA's "noncommercial use" exemption did not reach critical commentary that causes commercial harm. See id at 980.
\item[58] 255 F3d 1180 (9th Cir 2001).
\item[59] Id at 1183.
\item[60] Id at 1186. But see id at 1185 (emphasizing that the defendant "did not receive any consideration from the designers for featuring their clothing in the fashion article," and that the article did not "simply advance a commercial message").
\end{footnotes}
While *Hoffman* was not a trademark dilution case, its clear rejection of the “all is commercial” principle quickly was adopted in FTDA cases. A notable example is the Ninth Circuit’s recent decision in *Mattel, Inc v MCA Records, Inc,* which makes a subtle but important change in the relationship between protected speech and commercial use. Mattel sued a Danish band for trademark dilution after the band used Mattel’s BARBIE mark (or more accurately, Mattel’s famous Barbie doll) as the object of ridicule in a popular song, “Barbie Girl.” Mattel claimed that the song had both blurred (by associating an unrelated music product) and tarnished (by associating the mark with the song’s risqué lyrics) the BARBIE mark.

Judge Kozinski, writing for the court, began with an analysis that closely resembled decisions from the “all is commercial” school. The court noted that “the song amounts to a ‘commercial use in commerce’” of the trademark because the song was sold and marketed bearing the BARBIE mark. Moreover, the court unambiguously stated that “MCA’s use of the mark is dilutive.... This is a classic blurring injury and is in no way diminished by the fact that the song itself refers back to Barbie the doll.” The court then stated that the FTDA’s “noncommercial use” exemption “refers to a use that consists entirely of noncommercial, or fully constitutionally protected, speech.” Reading the opinion literally, one would expect the court to reach the same conclusion as the “all is commercial” school and treat any communication with both commercial and noncommercial elements as outside the FTDA’s “noncommercial use” exemption.

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61 Using the tests put forth by the “all is commercial” school discussed above, the form of (1) commercial promotion (that is, listing the contact and purchasing information for the designs featured in the article) and (2) commercially motivated solicitation (that is, attempting to attract readers and increase sales) seen in *Hoffman* would clearly qualify the magazine’s speech as commercial use without protection under the FTDA. Compare *Bihari*, 119 F Supp 2d at 318 (finding that while no commercial transactions were offered at defendant’s website, the website nevertheless constituted a commercial use because it acted “as a conduit, steering potential customers away from [the plaintiff] and toward its competitors”). However, *Hoffman* rejected the “all is commercial” rationale by holding that the commercial elements of the speech could not transform “otherwise protected” speech into commercial use if the speech’s commercial elements were “inextricably entwined with its expressive elements” *Hoffman*, 255 F3d at 1185–86. Importantly, *Hoffman* included “humor” and “visual and verbal editorial comment on classic films and famous actors” as protected expressive elements of the speech. Id. For a discussion of the validity of this approach, see Part III.B.

62 296 F3d 894 (9th Cir 2002).

63 See id at 899 (describing factual background of the dispute). See also id at 909 (reprinting song’s lyrics, including “Come on Barbie, let’s go party,” “You can brush my hair, undress me everywhere,” and “Kiss me here, touch me there, hanky-panky”). The song sold millions of copies, making it into the American Top 40 Music charts. Id at 899.

64 Id at 903.

65 Id at 903–04.

66 Id at 905 (emphasis added).
However, having set this familiar stage, *Mattel* then defined “commercial speech” as expression that “*does no more than propose a commercial transaction.*” The court approvingly cited *Hoffman* for the proposition that “mixed” communications should be treated as entirely protected if elements of the speech (including “humor”) receive full First Amendment protection. Specifically, the court stated that “[i]f speech is not ‘purely commercial’—that is, if it does more than propose a commercial transaction—then it is entitled to full First Amendment protection.” Using that definition, as well as the observation that “humor” was protected under *Hoffman*, the court concluded that the song at issue “is not *purely* commercial speech, and is therefore fully protected [as a noncommercial use]... [The song] lamponos the Barbie image and comments humorously on the cultural values [defendant] claims she represents.”

This cursory analysis of the song’s status as entirely “noncommercial use” marks a subtle but important change in dilution law. By narrowly defining “commercial speech” as communication “that does no more than propose a commercial transaction,” *Mattel*’s literal language requires that the broad spectrum of mixed communications—that contain both commercial and noncommercial elements—be deemed entirely noncommercial, and therefore entirely protected, under the FTDA. Thus, no amount of commercial content or intent could ever transform mixed speech into commercial speech, because the “otherwise protected” elements of the speech would still render it “not *purely* commercial.” This broad understanding of “noncommercial use” as “not purely commercial speech” stands in sharp conflict with the “all is commercial” school described above, which held that an element of promotion, solicitation, commercial effect, or commercial intent could “transform[]” otherwise protected speech into a...
Moreover, the case creates an interesting tension with earlier cases that found dilution by tarnishment of the BARBIE mark, despite some minor elements of parody.

Mattel’s expanded reading of the FTDA’s “noncommercial use” exemption has already been embraced and extended by other courts. In *American Family Life Insurance Co v Hagan* (AFLAC) the court concluded that the defendant’s TAFTQUACK campaign commercials and www.taftquack.com website, which used plaintiff’s famous AFLAC duck to mock Ohio Governor Robert Taft, were a “noncommercial use” under the FTDA. In reaching its conclusion, the court explicitly rejected the argument that “mixed” communications with commercial and noncommercial elements could fall outside the FTDA’s “noncommercial use” exemption. Instead, the court approvingly cited Mattel’s interpretation of the FTDA’s “noncommercial use” exemption as a protection for speech that “does more than propose a commercial transaction.” The court therefore stated that “[i]f the Court were to apply the reasoning of Mattel, [defendant’s] speech clearly would be ‘noncommercial,’ because it does ‘more than propose a commercial transaction’—it discusses public issues and challenges the qualifications of a political candidate.”

72 *Bihari*, 119 F Supp 2d at 318.

73 Historically, the Barbie doll has carried sexual connotations. See *Mattel*, 296 F3d at 898 (noting that the original Barbie resembled a “German street walker,” and that “Barbie has been labeled ... a bimbo”). However, in recent years, several cases have enjoined pornographic uses of the BARBIE mark despite some element of parody regarding Barbie’s cultural and historical status as a symbol of sexuality. See *Mattel, Inc v Internet Dimensions*, 55 USPQ2d 1620, 1627 (SD NY 2000) (holding that defendant’s Barbie’s Playpen website diluted the BARBIE mark by offering sexually explicit photographs of live models imitating Barbie); *Mattel, Inc v Jcom, Inc*, 48 USPQ2d 1467, 1468–70 (SD NY 1998) (holding that defendant’s Barbie’s Playhouse website diluted the BARBIE mark by offering sexually explicit video-conferences with a model that portrayed Barbie). It appears that, under Mattel, the minor element of parody present in these uses of the BARBIE mark would transform commercial pornographic ventures into entirely protected “noncommercial use” under the FTDA, so long as the use of the BARBIE mark contained some element of parody or satire as to Barbie’s image as a “bimbo” or sex symbol.

74 266 F Supp 2d 682 (ND Ohio 2002).

75 Id at 698.

76 See id at 696 (rejecting plaintiff’s contention that “when a defendant engages in speech which has both commercial and noncommercial elements to it ... the [“noncommercial use”] exemption should not apply”) (emphasis added). In *AFLAC*, the plaintiff’s argument regarding mixed communications with commercial and noncommercial elements relied heavily on the “all is commercial” school. See id at 696 n 17 (noting that plaintiff advocated an adoption of the reasoning in *Planned Parenthood and Jews for Jesus*, and concluding that “the Court is inclined to believe that the anti-dilution aspects of those decisions reads the noncommercial exemption in the [FTDA] too narrowly”).

77 See id at 696 (“This court is inclined to conclude that AFLAC’s argument that the [noncommercial use] exemption should be read narrowly is unavailing, and the Mattel court’s reading of the noncommercial use exemption is better reasoned.”).

78 Id at 697. Importantly, and as before in Mattel, the court’s analysis included no detailed examination of whether the noncommercial elements of the defendant’s speech—“discuss[ing] public issues and challeng[ing] the qualifications of a political candidate”—were “inextricably in-
reading of the "noncommercial use" exemption, the court's reasoning suggests that speech with noncommercial elements is fully protected as a "noncommercial use" under the FTDA, regardless of the relative dominance of the commercial and noncommercial elements of the speech.

C. Implications of the Split

The "all is commercial" and "all is protected" interpretations of the FTDA have serious implications for trademark dilution suits, since the court's choice of an interpretive school can result in disparate outcomes for identical forms of expression. For example, the commercial components of the defendant's speech in Mattel would not have been protected "noncommercial uses" under the "all is commercial" approach in Planned Parenthood, Jews for Jesus, and Bihari, in which elements of promotion or commercial impact transform otherwise protected speech into a commercial use without First Amendment protection. Similarly, Mattel's approach to granting full protection to speech that does anything more than "propose a commercial transaction," including commercial speech with an element of "humor" or "commentary," would have resulted in a different result in many "all is commercial" cases (especially Jews for Jesus and Planned Parenthood, where the defendant's speech was a direct and critical commentary on the plaintiff's religious or political activities). Litigants therefore face tremendous uncertainty in dilution suits and UDRP proceedings, since the outcome of the dispute will turn on the line of conflicting precedents selected by the court or arbitration panel. Outside litigation, the consequences of the split are even greater; potential speakers are surely chilled from engaging in forms of expression that fall on the margins of the FTDA's "noncommercial use" exemption, since those speakers cannot be certain that their expression will not run afoul of federal dilution law.

II. REVISITING THE COMMERCIAL/NONCOMMERCIAL DISTINCTION

As discussed in Part I, courts have failed to settle on a single definition of "noncommercial use" under the FTDA. This problem may be related to the Supreme Court's difficulties in establishing uniform standards for distinguishing between commercial and noncommercial speech. The Court's commercial speech jurisprudence has taken many twists and turns during its development, at times veering close to the "all is commercial" school, and at others close to the "all is intertwined" with the plaintiff's trademark. Id.
protected" standard. However, as this Part makes clear, the Court’s modern commercial speech jurisprudence falls into neither category.

A. Early Doctrinal Swings

The commercial speech doctrine was born in 1942, when the Supreme Court ruled in *Valentine v Chrestensen* that commercial advertisements could be regulated without regard to their expressive components. F.J. Chrestensen attempted to evade a New York regulation prohibiting distribution of commercial handbills in public areas by printing two-sided handbills: one side contained a commercial advertisement and the other contained a protest of a political decision. He was restrained by the government and sued to enjoin interference with his distribution of the handbill. In a brief opinion for the Court, Justice Roberts stated that “[w]e are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising.”

Justice Roberts concluded that the opposite holding would create a clear roadmap for evasion and would effectively rob the legislature of its power to regulate commerce:

> [T]he affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance. *If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law’s command.*

Motivated by this concern regarding simple loopholes that might permit all commercial speech to evade regulation, the Court concluded that the handbill with both commercial and political expression was “commercial speech” outside the protection of the First Amendment.

Although subsequent decisions reaffirmed this holding, the Court eventually reconsidered its extreme deference to legislative regulation of commercial speech. In *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc* the Court struck down

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79 316 US 52 (1942).
80 Id at 54.
81 Id at 55 (emphasis added).
82 See *Breed v City of Alexandria, La, 341 US 622, 641–45 (1951)* (denying First Amendment protection to door-to-door solicitations of magazine subscriptions); *Martin v City of Struthers, 319 US 141, 142 n 1, 149 (1943)* (invalidating a ban on door-to-door solicitation as applied to a Jehovah’s Witness, noting that the ban was “not directed solely at commercial advertising”); *Murdock v Pennsylvania, 319 US 105, 110–11 (1943)* (“The states can prohibit the use of the streets for the distribution of purely commercial leaflets.”), quoting *Jamison v Texas, 318 US 413, 417 (1942).*
Virginia’s ban on advertising the prices of prescription drugs as a violation of the First Amendment. To justify constitutional protection for commercial speech, the Court stressed that commercial information helps consumers make reasoned judgments, commercial information contributes to public decisionmaking and debate on commercial and regulatory issues, and “the dangers of suppressing information” outweigh “the dangers of its misuse if it is freely available.” Following Virginia Board of Pharmacy, the Court repeatedly demonstrated its willingness to invalidate government regulations suppressing the free flow of commercial information to consumers.

B. Modern Doctrine: Balancing Congressional Power and Individual Liberty

The era of strong protection for commercial speech was short-lived. In Central Hudson Gas & Electric Corp v Public Service Commission, the Supreme Court reached a midpoint between the more extreme positions in Valentine and Virginia Board of Pharmacy by setting out a pliable test that provided greater deference to the legislature than Virginia Board of Pharmacy. In holding that legislatures could regulate the dissemination of truthful information otherwise protected by the First Amendment, so long as that regulation advanced the government’s interests and was not overbroad, Central Hudson opened the door for more stringent regulation of truthful commercial advertising, including specific words and phrases.

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84 Id at 753–54.
85 Id at 765 (noting that dissemination of information is “indispensable to the formation of intelligent opinions as to how [the] system ought to be regulated or altered”). For an in-depth defense of this principle, see Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (Harper & Brothers 1948).
86 Virginia Board of Pharmacy, 425 US at 770.
87 See, for example, Bates v State Bar of Arizona, 433 US 350, 384 (1977) (overturning a local bar rule prohibiting attorneys from advertising the price of routine legal services); Linmark Associates, Inc v Township of Willingboro, 431 US 85, 96–97 (1977) (invalidating a local ordinance prohibiting the display of “For Sale” or “Sold” signs as an attempt at stemming the tide of “white flight” from the community).
88 See, for example, Friedman v Rogers, 440 US 1 (1979) (upholding a ban on practicing optometry under a trade name); Ohralik v Ohio State Bar Association, 436 US 447 (1978) (upholding a ban on certain types of client solicitation by attorneys).
90 Id at 571–72 (holding that regulations on commercial speech must be no more restrictive than is necessary “to serve the state interest”).
91 See, for example, San Francisco Arts & Athletics, Inc v United States Olympic Committee, 483 US 522, 541 (1987) (upholding a commercial speech regulation intended to protect the value of the OLYMPIC mark, since “[t]he mere fact that [defendant] claims an expressive, as opposed to a purely commercial, purpose does not give it a First Amendment right to ‘appropriat[e] to itself the harvest of those who have sown’”).
Bolger v Youngs Drug Products Corp is particularly illustrative of the Court's modern approach to commercial speech cases. In Bolger, a drug company challenged the constitutionality of a federal statute banning the mailing of unsolicited advertisements for contraceptives. As in Valentine years before, the drug company attempted to evade the statute by transforming its advertisements into "informational pamphlets" promoting the use of contraceptives to prevent pregnancy and disease. Unlike the Court's opinion in Valentine, the opinion in Bolger did not immediately classify the mailings as an impermissible attempt to evade regulation. Rather, the court recognized that the informational value of the mailings distinguished them from speech that "does no more than propose a commercial transaction." In so doing, the Court distinguished its modern test for commercial speech from Valentine by recognizing the value of mixed expression, while still recognizing a distinction between the protection afforded to commercial and noncommercial expression.

Nevertheless, the value of the speech in Bolger was not enough to prevent regulation of the speech. The Court held that the "informational pamphlets" constituted commercial speech capable of regulation because of the union of three factors: (1) the pamphlets were acknowledged to be advertisements, (2) they referred to a specific product of the advertiser, and (3) the defendant had an economic motivation for mailing the pamphlets. The Court's conclusion in Bolger echoed Valentine's concerns regarding a roadmap for evading commercial regulations: "Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." Thus, Bolger opted for a more nuanced, multi-factored analysis of the speech at issue, balancing its commercial motivation against its public value and the government's interests in regulation.

Subsequent cases have placed additional restrictions on attempts to evade regulation. In Board of Trustees of the State University of New York v Fox, the Court upheld a university's ban on "Tupperware" parties in student dorms. The parties consisted not only of product advertising, but also discussions of public issues, including financial and

93 Id at 62-63 n 4.
94 Id at 66 (internal quotation marks and citations omitted).
95 Id at 65 (stating that "the degree of protection afforded by the First Amendment depends upon whether the activity sought to be regulated constitutes commercial or non-commercial speech").
96 Id at 66-67 (noting that, although insufficient when considered separately, the combination of all three factors established that the pamphlets were commercial speech).
97 Id at 68.
domestic responsibility. Upholding the ban, the court emphasized that Tupperware spokespersons voluntarily added commercial content to their otherwise-protected expression as a matter of choice, and not necessity.” The Court emphasized the lack of necessity binding the commercial expression and the noncommercial expression: “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.” As Fox demonstrates, commercial expression must be “inextricably intertwined with otherwise fully protected speech” to enjoy full constitutional protection. As such, the First Amendment protection afforded “mixed” speech turns on the necessity of the non-commercial element in the speaker’s message, and not the mere proximity of fully protected and relatively unprotected forms of speech.

III. TOWARD A SENSIBLE STANDARD FOR “NONCOMMERCIAL USE” UNDER THE FTDA

In light of the Court’s modern tests for distinguishing “commercial” and “noncommercial” forms of expression, both the “all is commercial” and “all is protected” schools outlined in Part I are untenable interpretations of the FTDA’s “noncommercial use” exemption. Each approach ignores important aspects of the Court’s precedents on commercial speech. In so doing, each approach undermines the Court’s attempt to harmonize the Constitution’s conflicting interests of protecting individual expression while maintaining effective congressional powers not subject to simple evasion.

In this Part, I set out the problems with existing interpretations of the FTDA’s “noncommercial use” exemption and then propose a new interpretation of that exemption based on the Court’s commercial speech cases. Using that jurisprudence as a guide, courts can employ simple tests to determine whether a particular dilutive use qualifies as “noncommercial use” under the FTDA. By ignoring a defendant’s intent to commercially harm a trademark owner’s economic interests and adopting standards that reflect the Court’s concern with the “necessity” of noncommercial elements in mixed speech, courts can more easily separate the wheat from the chaff when approaching dilutive uses with commercial and expressive components.

99 See id at 474 (distinguishing other cases where the state required that commercial speech be added to noncommercial speech).
100 Id.
A. The "All Is Commercial" School Is Unconstitutionally Underprotective

By emphasizing the commercial association or economic impact of a particular trademark use, the "all is commercial" line of cases incorrectly applies the Supreme Court's commercial speech jurisprudence. The commercial effect of speech is not an important element of its constitutional protection; it is the content of commercial speech, and the value of that content in public discourse, that justifies regulating commercial speech. As such, courts must focus on the commercial content of speech, and not its incidental or intended commercial effects, when classifying speech as "commercial" or "noncommercial."

In light of the importance of commercial content, the reasoning in the "all is commercial" cases is decidedly unsatisfactory. In those cases, three separate errors require rejection of the courts' interpretation of the FTDA. First, courts placed tremendous emphasis on promotional and solicitation activities that occurred outside the context of the speech at issue. But commercial activities outside the speech at issue cannot transform all expression by a speaker into commercial speech, as they do nothing to alter the content of the speech itself.

Second, the courts emphasized the speaker's association with commercial speech by other parties through hyperlinks or book promotion. But the Court has clearly held that affiliation with commercial
interests is not the test for defining "commercial" speech, and has also noted that certain forms of speech, though associated with commerce, cannot be considered "commercial." Third, and most troubling, the "all is commercial" cases imply that commercial harm to a trademark owner is an important element in determining the scope of the FTDA's "noncommercial use" exemption. But the Court has never taken such an approach in its commercial speech decisions. To the contrary, the Court's precedents focus on the commercial benefits accruing to the speaker, and not the commercial detriment befalling other parties, when classifying speech as "commercial" or "noncommercial." Focusing on the commercial detriment caused by speech would not adequately reflect the Court's concern with the "durability" of profitable commercial expression. Moreover, a focus on the commercial harm caused by speech threatens to underprotect speech with serious social value. Outside the context of trademark dilution, such an approach to classifying speech as "commercial" or "noncommercial speech protected by the First Amendment.

See, for example, Bigelow v Virginia, 421 US 809, 822 (1975) (overturning the conviction of a newspaper editor for publishing a paid advertisement for an abortion referral agency). The editor in Bigelow was clearly affiliated with the newspaper's commercial interests in receiving money for the advertisement, but the speech (and the editor's actions) were ultimately deemed to be noncommercial speech protected by the First Amendment.

See, for example, Buckley v Valeo, 424 US 1, 48 (1976) (noting that commercial contributions and solicitations related to political activity are "no less entitled to protection under the First Amendment than the discussion of political policy generally"); Murdock v Pennsylvania, 319 US 105 (1943) (holding that advertisements for religious materials cannot be regulated as commercial speech because of the increased protections afforded the book's underlying subject matter). These precedents are especially damning for the reasoning of Planned Parenthood and Jews for Jesus, where defendants addressed highly political issues like abortion and religion, and associated themselves with the commercial activities of others addressing the same issues. See Planned Parenthood, 42 USPQ2d at 1435–36 (emphasizing the promotion of an anti-abortion book written by a third party, as well as the solicitation of funds for anti-abortion activities); Jews for Jesus, 993 F Supp at 307–08 (emphasizing defendant's hyperlinks to religious organizations with some commercial activities).

See Nissan, 231 F Supp 2d at 980 ("[D]isparaging remarks or negative commentary" regarding the trademark owner "[a]re sufficiently commercial to bring the defendants' [speech] ... within the scope of the FTDA," because that speech "would exploit [the famous trademark's] goodwill in order to injure Nissan Motor. Under these circumstances, the critical speech becomes commercial and is subject to the proscriptions of the [FTDA]."); Jews for Jesus, 993 F Supp at 308 (including harm to plaintiff's commercial interests among the factors counseling against application of the FTDA's "noncommercial use" exemption); Planned Parenthood, 42 USPQ2d at 1436 (same).

See, for example, Virginia Board of Pharmacy, 425 US at 772 n 24 (discussing the commercial benefits created by commercial speech, given that "advertising is the sine qua non of commercial profits").

See id (discussing the "durable" nature of commercial speech, since its profitability and "hardiness" reduces the likelihood of a chilling effect). The role of commercial benefit in maintaining the "durability" of commercial speech is a central motivating factor for subjecting that speech to greater regulation. See, for example, Merrill, Comment, 44 U Chi L Rev at 223 (cited in note 5) ("The importance of advertising in generating profits makes it less susceptible to the chilling effect of governmental regulation than news reporting and editorializing.").
cial” could subject all criticism of corporations and corporate activity to increased government regulation, and might permit wholesale suppression of critical speech with serious political value. Given the lack of support in commercial speech precedents, and the potential for suppressing speech with serious social and political value, a focus on commercial harm is especially inappropriate when distinguishing low-value “commercial” speech from fully protected “noncommercial” speech. An accurate definition of “noncommercial use” under the FTDA should reject these decisions as unsound.

B. The “All Is Protected” School Is Dangerously Overprotective

While the problems associated with the reasoning of the “all is commercial” school are considerable, the flaws in the “all is protected” school are nearly as great. By narrowly defining commercial speech as that which “does no more than propose a commercial transaction,” the “all is protected” line of cases completely ignores the standards set forth in the Court’s commercial speech jurisprudence. Despite Congress’s intent to incorporate the commercial speech doctrine into the FTDA without alteration, these cases threaten to enlarge the scope of protection afforded to all speech with commercial and noncommercial elements.

Applying the “all is protected” precedents literally, any protected element of an otherwise-dilutive trademark use, including “humor,” appears to immunize an entire trademark use. Accordingly, a dilutive trademark use that tangentially comments on an issue or merely

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111 For examples of politically valuable forms of expression that would likely be classified as “commercial speech” using such an approach, see Eric Schlosser, Fast Food Nation: The Dark Side of the All-American Meal (Gale 2001) (criticizing the fast-food industry); Ralph Nader, Unsafe at Any Speed: The Designed-In Dangers of the American Automobile (Grossman 1972) (criticizing the automotive industry).

112 See Mattel, 296 F3d at 906 (internal citations omitted); Hoffman, 255 F3d at 1185 (internal citation omitted).

113 See Statement of Senator Orrin Hatch, 142 Cong Rec S 19310 (Dec 29, 1995) (“The [FTDA] adequately addresses legitimate First Amendment concerns espoused by the broadcasting industry and the media. The bill will not prohibit or threaten 'noncommercial' expression, as that term has been defined by the courts. Nothing in this bill is intended to alter existing case law on the subject of what constitutes 'commercial' speech.”) (emphasis added).

114 The broad implications of this line of reasoning may not be accidental. Judge Kozinski’s own articles criticizing the commercial speech doctrine are particularly illustrative of the subtle change in dilution law (and indeed, constitutional law) affected by Mattel and other “all is protected” line of cases. See Kozinski and Banner, 76 Va L Rev 627 (cited in note 4) (arguing that commercial speech should enjoy the same First Amendment protection as noncommercial speech); Kozinski and Banner, 71 Tex L Rev 747 (cited in note 4) (examining the history and weaknesses of the legal distinction between commercial and noncommercial speech).

115 See Mattel, 296 F3d at 906 (listing humor among the forms of expression protected by the First Amendment).
amuses the consumer could be fully protected under the FTDA.\textsuperscript{116} Without limiting principles,\textsuperscript{117} this approach to “noncommercial use” seems to run afoul of Supreme Court precedent. The Court has repeatedly stated that the mere presence of protected elements in “mixed” speech does not immunize the entire communication.\textsuperscript{118} For example, \textit{Bolger} used multiple factors to determine that the defendant’s informational mailings were commercial speech, despite the presence of protected information that made the pamphlets a mixed form of communication doing more than simply proposing a commercial transaction.\textsuperscript{119} But if a single noncommercial element of mixed speech were sufficient to classify speech as noncommercial, no multifactored analysis of the informational mailings would have been required.

In this sense, the “all is protected” school’s expansive definition of “noncommercial use” as speech that “is not purely commercial speech, and is therefore fully protected,”\textsuperscript{120} is at odds with the very cases it purports to follow. \textit{Bolger} recognized that messages may “constitute commercial speech notwithstanding the fact that they contain discussions of important public issues.”\textsuperscript{121} \textit{Bolger} thus reaffirmed the notion that “[a]dvertisers should not be permitted to immunize [commercial speech] from government regulation simply by including references to public issues.”\textsuperscript{122} This important element in the classification of speech as “commercial” and “noncommercial” is not adequately reflected in the tests of the “all is protected” school.\textsuperscript{123} In order to avoid gutting federal dilution law of any real meaning, courts must be cau-
tious when applying the tests established by the "all is protected" school.

C. A New Test for "Noncommercial Use"

Both the "all is protected" and "all is commercial" schools of thought pose serious constitutional and practical problems: the "all is commercial" school impermissibly regulates speech protected by the First Amendment, and the "all is protected" school creates unwarranted loopholes for evading the FTDA's reach. However, a new test for applying the "noncommercial use" exception of the FTDA can easily be crafted by focusing on different elements of potentially dilutive speech. Using the following factors, courts and speakers can uniformly and easily determine whether mixed communications constitute "commercial" or "noncommercial" use.

1. Commercial benefits, not commercial harms.

When classifying dilutive speech as "commercial" or "noncommercial," courts should focus on the commercial benefits that the dilutive speech creates for the speaker. The Supreme Court's commercial speech precedents suggest that some degree of commercial benefit or some intent to commercially benefit is a necessary (though not sufficient) condition for classifying speech as commercial. Moreover, such an emphasis on commercial benefit would reflect the Court's longstanding concern with the "durability" of commercial speech, and would ensure that the FTDA applies only to speech and speakers unlikely to be deterred by the mere presence of regulation. Therefore, if a dilutive use satisfies the FTDA's jurisdictional predicate by evincing some "commercial use in commerce," but does not provide any direct commercial benefit to the speaker, that dilutive use should be categorized as "noncommercial use." Using such a test, it seems

124 See Bolger, 463 US at 67–68 (discussing "an economic motivation for mailing the pamphlets" at issue as one of several factors not sufficient, taken on its own, to classify the mailings as commercial speech, but concluding that the union of those factors is sufficient to classify the mixed speech as commercial speech). Importantly, the Supreme Court has never classified speech as commercial unless it involved product advertising or other indicia of clear intent to reap commercial benefit.

125 See, for example, Virginia Board of Pharmacy, 425 US at 772 n 24 (stating that "advertising is the sine qua non of commercial profits," and therefore arguing that commercial speech is more "durable" than other forms of expression due to the "hardiness" created by profits).

126 See, for example, United We Stand America, Inc v United We Stand, America New York, Inc, 128 F3d 86, 92–93 (2d Cir 1997) (noting that the "use in commerce" requirement of the Lanham Act is a jurisdictional predicate that "denotes Congress's authority under the Commerce Clause," and that the requirement does not evince "an intent to limit the Act's application to profit-making activity") (citations omitted).
likely that a number of the "all is protected" cases did not involve actionable dilution under the FTDA.  

Importantly, although commercial harm may be a relevant factor for determining jurisdiction under the FTDA, and may play an important role in identifying actual dilution that satisfies the FTDA's causal requirement, it is not a relevant factor when evaluating the protection afforded to the speaker by the "noncommercial use" exemption. Only direct commercial benefits should be considered when applying the FTDA's exemptions. Moreover, achieving intended commercial harm should not be considered a benefit. A political or social activist may intend to harm the commercial interests of a trademark owner, and may obtain some personal satisfaction when those intended goals are achieved through dilutive uses. But if a dilutive use generates no commercial benefit (or is not intended to generate any direct commercial benefit), it should not be lumped together with the types of profitable and durable speech that the Court has identified in its commercial speech cases, and should not be considered low-value commercial speech simply because it is politically and commercially effective. Instead, it should be exempted from the FTDA as "noncommercial use."

Equally important in this calculus is an examination of the desire to directly benefit from the dilutive speech at issue. It may be the case that parodists, artists, political and religious activists, and critics making noncommercial use of a mark will reap some indirect benefit through dilutive use of a mark. An artist's parodies may become an important element of the portfolio that makes her marketable to galleries, a political or religious activist's use of another's mark might

127 See, for example, Jews for Jesus, 993 F Supp at 308 (noting that the defendant received no direct commercial benefit from the dilutive use of the plaintiff's mark).

128 Because speech causing commercial harm might substantially affect interstate commerce (for example, by substantially reducing the products sold by a famous trademark owner), statements causing commercial harm could certainly fall within the modern scope of the Commerce Clause. See United States v Lopez, 514 US 549, 559 (1995). As such, statements might satisfy the FTDA's jurisdictional predicate without any evidence of commercial benefit; evidence of commercial harm could be enough. See United We Stand, 128 F3d at 92–93 (discussing the breadth of the Lanham Act's "use in commerce" requirement).

129 See Moseley v V Secret Catalogue, Inc, 537 US 418, 432–34 (2003) (interpreting the FTDA to require proof of "actual dilution" to the plaintiff's mark, and holding that proof of "actual economic harm" is a sufficient, but not necessary, condition for establishing actual dilution).

130 This was likely the situation in cases like Planned Parenthood and Jews for Jesus, where political and religious activists sought to frustrate the activities of their opponents. However, those attempts to frustrate another's commercial activities did not result in any direct financial benefits through use of another party's famous trademark.

131 See note 125 for a discussion of "durable" speech.

132 See, for example, Mattel, Inc v Walking Mountain Productions, 353 F3d 792, 796–812 (9th Cir 2003) (discussing a portfolio containing photographic parodies of Barbie dolls bearing the BARBIE mark).
increase the profile of that activist, eventually increasing political donations;\textsuperscript{133} critical discussions of political issues might further a corporation's commercial interests in the future. But the indirect and remote commercial benefits flowing from speech are not enough to classify that speech as "commercial" under the Court's precedents.\textsuperscript{134} In the same vein, these indirect commercial benefits should be considered too remote to constitute commercial benefit under the FTDA.

2. Trademarks as "targets" and trademarks as "weapons."

In Fox, the Supreme Court provided its clearest statement on the treatment of mixed communications with commercial and noncommercial elements: when the commercial elements of a mixed communication are not "inextricably intertwined" with its fully protected noncommercial elements, the entire communication may be regulated as commercial speech.\textsuperscript{135} Under this approach to mixed communications, commercial speech does not become protected when unrelated noncommercial elements are added. Rather, the "inextricably intertwined" inquiry provides full First Amendment protection to high-value speech (like parody or criticism) when low-value elements (like commercial advertising) are an integral element of the overall message.

To determine whether the dilutive use is "inextricably intertwined" with the noncommercial elements of the speech, courts should use the Fox test for mixed speech: does the dilutive use target the famous mark for parody or criticism, or simply use the famous

\textsuperscript{133} See, for example, Planned Parenthood, 42 USPQ2d at 1436 (noting that the defendant solicited contributions through radio broadcasts in which he also touted ownership of plaintiff's mark). Although financial donations supporting political or religious activities are certainly commercial gains, it is not clear that they should be considered the types of "commercial benefits" supporting classification of speech as "commercial speech." For an argument that political and religious contributions should not be considered commercial "benefits" affecting the classification of speech as commercial or noncommercial, see note 151.

\textsuperscript{134} See, for example, Virginia Board of Pharmacy, 425 US at 761–62 ("No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden."). Surely, a pharmacist stands to reap some commercial benefit by influencing the manner in which pharmaceutical prices should be regulated by the government. But as Virginia Board of Pharmacy demonstrates, commenting on political and social issues that influence one's pocketbook should not convert otherwise-protected speech into commercial speech simply because of a financial interest in the issue's outcome. The same rule should apply when determining commercial benefit under the FTDA.

\textsuperscript{135} See Fox, 492 US at 469, 474, citing Riley v National Federation of the Blind of North Carolina, Inc, 487 US 781, 796 (1988) (noting that "pure speech" that is "inextricably intertwined" with commercial speech results in a noncommercial communication, and holding that a mix of product advertising and unrelated discussions of social and political issues constituted commercial speech).
mark as a weapon to attract attention?\textsuperscript{136} This simple inquiry captures the essence of the Court’s “inextricably intertwined” inquiry by examining the trademark’s relation to the speaker’s message. If a dilutive use targets a famous mark for parody or criticism, its high-value expressive content is inextricable from its dilutive use of the mark; it would be impossible to discuss the trademark without using the mark. In that sense, dilutive uses are a necessary element of parody or criticism targeting a famous trademark. Because the dilutive elements of these types of speech cannot be separated from the noncommercial elements, the entire communication should fall within the FTDA’s “noncommercial use” exemption. However, if a dilutive use merely employs a famous mark as a weapon to draw attention to some message with no relation to the trademark, the noncommercial elements of the speech could have been expressed without subjecting the famous mark to dilutive harm. Because the commercial and dilutive use of a trademark as a “weapon” cannot be justified as a necessary consequence of some high-value expression, courts should not treat the entire mixed message as noncommercial, and therefore should not exempt the speaker’s dilutive use from the FTDA as “noncommercial use.”\textsuperscript{137}

The application of the “target”/“weapon” distinction to trademark dilution law requires a special emphasis on three limiting factors. First, courts should be sensitive to the dual informational role played by many famous marks. All trademarks are, by definition, source-identifying words or symbols for specific products.\textsuperscript{138} However, some famous trademarks have attained a special cultural symbolism in modern society, “transcend[ing] their identifying purpose and enter[ing] public discourse” because of their “cultural significance.”\textsuperscript{139}

\textsuperscript{136} This is a question drawn from seminal research on the definition of parody and its relationship to the First Amendment in intellectual property cases. See Richard A. Posner, \textit{When Is Parody Fair Use?}, 21 J Legal Stud 67, 71 (1992).

\textsuperscript{137} See \textit{Fox}, 492 US at 474 (treating mixed communication with commercial elements and unrelated noncommercial elements as commercial speech). The proposed approach to identifying fair use of a famous trademark would mirror the analysis of fair use in copyright law, where the Supreme Court has implicitly endorsed the “target”/“weapon” distinction:

\begin{quote}
For the purposes of copyright law, the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, \textit{comments on that author’s works}. … If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which \textit{the alleged infringer merely uses to get attention} or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and \textit{other factors, like the extent of its commerciality, loom larger}.
\end{quote}


\textsuperscript{138} See note 5 and accompanying text.

\textsuperscript{139} \textit{Walking Mountain}, 353 F3d at 807 (internal quotation marks and citations omitted).
When marks attain this social and cultural symbolism, "the trademark owner does not have the right to control public discourse" using the mark. Therefore, a dilutive use commenting on the social or cultural elements represented by a mark should be treated as "targeting" that mark for parody or criticism. Although a speaker may be able to comment on the social and cultural issues represented by a mark without using that mark at all, the presence of less restrictive forms of communication does not alter the fact that the speaker "targets" the mark itself when targeting its social meaning. Accordingly, a broad analysis of uses that "target" a mark is necessary when a famous mark has attained cultural symbolism.

Second, courts should take note of the role played by humor when identifying "inextricably intertwined" parody and criticism. Although several "all is commercial" cases list "humor" as a noncommercial expressive element deserving full constitutional protection, a dilutive but humorous use of another's trademark should not be protected unless the humor is created by targeting the mark.

For example, direct parodies of a trademark's social meaning, like some of the lyrics at issue in Mattel, will often be humorous. See Mattel, 296 F3d at 909 (reprinting song's lyrics); Walking Mountain, 353 F3d at 796-97 (discussing photographs of "a nude Barbie in danger of being attacked by vintage household appliances"). But these uses are not protected simply because they may (or may not) be humorous; they are protected because they target the social and cultural significance of the famous mark, and criticize the marks in decidedly non-humorous ways. See Walking Mountain, 353 F3d at 797 (discussing Barbie's cultural status as a symbol of the objectification of women, and noting the artist's intent to comment on female objectification by photographing Barbie products). When evaluating a dilutive use under the FTDA, it should not matter if the average listener is moved to tears, to deep contemplation, or to laughter. Rather, courts should focus on the relationship between the trademark and the expression, using
deal of commercial speech attempts to generate humor; if all forms of humor involving famous trademarks were considered fully protected, the FTDA would quickly become a hollow and easily evaded shell. Moreover, classic forms of dilutive harm would suddenly stand beyond the reach of the statute, despite the lack of connection between the trademark and the humor (and the potential for significant harm through blurring and tarnishment). In order to prevent a loophole allowing all trademark users “to achieve immunity from the law’s command,” courts should be especially wary when evaluating humor as an “inextricably intertwined” element of communication. A simple play on words involving a famous mark should not be considered “noncommercial use” under the FTDA if it does not target the mark’s cultural, social, or product-identifying meaning.

Finally, the FTDA’s allocation of the burden of proof places an important limitation on classifying a dilutive trademark use as a “weapon” and not a “target.” Close cases in which the social significance of a trademark cannot easily be determined, or the outcome of the “target”/“weapon” examination is unclear, should be resolved in favor of the defendant. The FTDA’s exemptions are not affirmative defenses requiring the defendant to carry the burden of proof; they are limiting provisions that delineate the boundaries of the plaintiff’s case. As such, the absence of a “noncommercial use” should be understood as part of the plaintiff’s burden. Such an interpretation would prevent plaintiffs from playing fast and loose with evidence of their mark’s cultural or social significance, and would further reduce predictable tests to determine whether the dilutive use is “inextricably intertwined” with the expressive elements of the speech.


For classic examples of damaging dilutive uses that use famous marks as “weapons” for forms of burlesque unrelated to the mark’s products or social and cultural significance, see Anheuser-Busch Inc v Andy’s Sportswear Inc, 40 USPQ2d 1542 (ND Cal 1996) (finding dilution by tarnishment of the BUDWEISER mark through sale of “Buttweiser” T-shirts); Coca-Cola Co v Gemini Rising, Inc, 346 F Supp 1183 (ED NY 1972) (finding dilution by tarnishment of plaintiff’s famous ENJOY COKE and ENJOY COCA-COLA marks through sale of “Enjoy Cocaine” posters).

Valentine, 316 US at 55.

For an example of wordplay that uses a famous trademark as a weapon for humor rather than a target for criticism, see American Dairy Queen Corp v New Line Productions, Inc, 35 F Supp 2d 727, 735 (D Minn 1998) (enjoining film producers from entitling the beauty-pageant film ultimately marketed as “Drop Dead Gorgeous” as “Dairy Queens”). See also note 144 and accompanying text.

See 15 USC § 1125(c)(4)(B).

See, for example, Walking Mountain, 353 F3d at 801 (discussing plaintiff’s questionable survey evidence regarding the cultural meaning of the BARBIE mark).
the chilling effect of uncertainty regarding a speaker’s liability under the FTDA.\textsuperscript{109} If courts adhere faithfully to these three limitations, the “target”/“weapon” test can be used to strike the ideal balance between preventing dilutive harms and protecting First Amendment freedoms. The proposed test provides much-needed certainty in an uncertain area of law. Identifying commercial speech is no easy task for courts, much less speakers; shifting the inquiry’s emphasis to the famous mark’s necessity to the noncommercial elements of mixed speech provides a more intuitive test for courts and speakers alike. By adopting a clearer test for identifying “noncommercial use” under the FTDA, courts also reduce the chilling effect of uncertainty, thereby encouraging speakers to come forward with new forms of parody and criticism. At the same time, such strong First Amendment protections are not achieved at the cost of an effective FTDA. Dilutive harms would be permitted only when a famous mark has been targeted for parody or criticism; those same harms would not be permitted when advertisers append unrelated forms of noncommercial expression to otherwise commercial speech. Thus, this balance between expressive freedoms and dilutive harms would increase valuable parody and criticism while decreasing dilutive harms unrelated to noncommercial expression.

Applying the proposed test to purported fair uses of a famous trademark would alter the reasoning of courts in the “all is protected” school. AFLAC is one clear example. In AFLAC, the court stated that the defendant’s speech constituted “noncommercial use” because “it discusses public issues and challenges the qualifications of a political candidate.”\textsuperscript{100} While those elements of the defendant’s message were certainly protected by the First Amendment, the court did not determine whether those messages were “inextricably intertwined” with the plaintiff’s trademark. Because the political commentary in the defendant’s advertisements was entirely unrelated to the plaintiff’s famous AFLAC mark and AFLAC “talking duck” advertisements, the political advertisements did not “target” the mark for criticism or parody. Rather, the advertisements used the well-known AFLAC mark as a “weapon” for drawing attention to messages with no connection to the mark, causing dilutive harm to the AFLAC mark in the process.

\textsuperscript{149} This approach to close cases will likely result in a permissive attitude toward many tarnishing uses. For example, several cases enjoining use of the BARBIE mark in the sale of pornography might come out differently under the proposed test. See note 73 and accompanying text for a description of these cases. When faced with classically tarnishing uses of a mark, courts still must determine if the dilutive use “targets” the famous mark for parody or criticism, or simply uses the mark as a “weapon” to attract attention and increase sales. Depending on the nature of the pornographic speech at issue in prior BARBIE litigation, it is conceivable that classic forms of tarnishment would be exempted from the FTDA.

\textsuperscript{150} See AFLAC, 266 F Supp 2d at 696–97.
Using this "target"/"weapon" distinction, the mixed speech at issue in AFLAC should not have been classified as entirely noncommercial based on the mere presence of noncommercial elements, because those noncommercial elements were not "inextricably intertwined" with its commercial and dilutive elements.\textsuperscript{151}

\section*{Conclusion}

The prevailing interpretations of the FTDA's "noncommercial use" exemption are unacceptable in light of the Court's commercial speech jurisprudence. The "all is commercial" interpretation of the FTDA systematically underprotects speech; the "all is protected" interpretation threatens to destroy the FTDA by creating simple roadmaps for evasion. Both schools of interpretation have altered the FTDA's intended meaning and the Supreme Court's interpretation of the Constitution. This split in statutory interpretation has undoubtedly increased uncertainty and chilled speakers engaging in criticism or parody of famous trademarks.

That increased uncertainty is especially unfortunate in the context of "commercial" and "noncommercial" speech. The Court's test for classifying speech as commercial or noncommercial is hardly a model of legal clarity.\textsuperscript{152} At times, the Court has described the test as nothing more than a "common sense" inquiry into the motivations and effects of the speech at issue.\textsuperscript{153} But when appeals to "common

\textsuperscript{151} This is not to say that the political advertisement in AFLAC should have been enjoined under the FTDA. One could certainly argue that the political advertisement failed to generate any "commercial benefit," as that term has been understood in commercial speech cases. Because political donations are speech, and not mere commerce, it seems reasonable to exclude political contributions from the realm of financial benefits that make commercial speech "durable." Virginia Board of Pharmacy, 425 US at 772 n 24. Such an interpretation would serve to exclude politically motivated solicitations from the scope of the FTDA, in accord with commercial speech precedents. See Buckley, 424 US at 14-23 (noting that campaign contributions, though undeniably commercial in nature, are protected speech); Murdock, 319 US at 106-17 (invalidating a regulation restricting the commercial advertisement of religious materials). See also Federal Election Commission v Colorado Republican Federal Campaign Committee, 533 US 431, 440 (2001) ("Spending for political ends and contributing to political candidates both fall within the First Amendment's protection of speech and political association."). In order to avoid conflicts with fully protected forms of speech that may also involve some commercial benefit or exchange, courts should read political and religious solicitations and contributions out of the realm of commercial benefits relevant to the FTDA's "noncommercial use" exemption.

\textsuperscript{152} See City of Cincinnati v Discovery Network, Inc, 507 US 410, 419 (1993) (recognizing "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category"); Zauderer v Office of Disciplinary Counsel of Supreme Court of Ohio, 471 US 626, 637 (1985) (noting that the "precise bounds" of the category of commercial speech may be "subject to doubt").

\textsuperscript{153} See Rubin v Coors Brewing Co, 514 US 476, 482-83 (1995) (utilizing the "commonsense" distinction to hold unconstitutional a federal ban prohibiting beer labels from displaying alcohol content); Zauderer, 471 US at 637 (holding that under the "common-sense" approach, the "pure and simple" advertising at issue clearly fell within the commercial speech category); Ohralik v
sense” are of little help, speakers have received no additional guidance from courts split on the scope of the FTDA.

The approach proposed in this Comment would avoid the negative consequences of accepting either the “all is commercial” or “all is protected” school of interpretation, giving speakers much-needed certainty regarding federal liability for trademark dilution. Courts can more accurately balance the competing interests reflected in the Court’s commercial speech precedents, and more uniformly resolve the outcome of dilution disputes, by emphasizing the importance of commercial benefit and “inextricably intertwined” speech in the analysis of “noncommercial use” of a trademark. In so doing, courts can give the FTDA its intended meaning while respecting the Constitution’s competing interests in strong regulatory powers and individual liberty.

Ohio State Bar Association, 436 US 447, 455–56 (1978) (noting that Virginia Board of Pharmacy maintained the “common-sense” distinction between commercial and noncommercial speech even while extending First Amendment protection to the former); Linmark Associates, Inc v Township of Willingboro, 431 US 85, 98 (1977) (reaffirming the “commonsense” differences between commercial and noncommercial speech).