A letter to the editor written by Nike CEO, Phillip Knight, explaining Nike’s overseas manufacturing processes. A billboard advertisement from Citigroup stating “[s]pending like it's out of style is out of style.” BP-Amoco’s website suggesting it is an environmentally responsible corporation. Philip Morris’s media campaign to stop teen-agers from smoking. These all have one thing in common: they are various forms of image-advertising. Image advertising allows a corporation to improve its public image (and possibly increase or maintain sales as a result) without directly urging a consumer to buy or use its products. While this form of advertising is commonly used, it is unclear whether it qualifies as fully protected self-expressive speech or commercial speech with limited First Amendment protections.

The United States Supreme Court has addressed the issue of whether commercial speech is protected under the First Amendment on many occasions. Primarily, the Court has stated that spending money on speech does not remove the speech from protection under the First Amendment. However, speech that “does no more than propose a commercial transaction,” has limited protection under the First Amendment. Because of these limitations, states may establish regulations including requirements that commercial speech be true and not misleading. However, even though these limitations exist, the Supreme Court has provided little guidance for determining what is and what is not commercial speech subject to these regulations. As a result, a variety of speech by corporations has been over-regulated and under-protected.

This Article will address the lack of a clear definition regarding what exactly is commercial speech and attempt to create a clearer meaning of the term. Part I of the article will
examine the current law regarding the definition of commercial speech and how to recognize
commercial speech as compared with non-commercial speech. It will posit that there is no clear
way to recognize commercial speech under the current United States Supreme Court
jurisprudence and examine different categories of commercial speech as identified by the
Court. Part II will examine the early history of the First Amendment in relation to commercial
speech. Specifically, it will explain why we, as a society, value free speech and why all speech,
even misleading speech and some aspects of commercial speech, is protected in the marketplace
of ideas. It will establish that the reasons behind protecting speech in general must be applied to
all categories of speech. Part III will propose a new test for determining what is and what is not
commercial speech. This test will allow corporations to contribute to the marketplace of ideas
for all political debates, including debates that affect their profit margin. This section will focus
on defining and explaining “inextricably intertwined” as it applies to commercial speech with
political value. Finally, Part III will examine the effect this test will have on False Advertising
Laws like California’s and provide a brief recommendation for what such regulations may and
may not include.

I. DEFINING COMMERCIAL SPEECH: THE CURRENT PARADIGM[12]

Because commercial speech is treated differently than non-commercial speech, and has
less protection under the First Amendment, states have the power to regulate commercial speech
in ways that would be unconstitutional if the speech were non-commercial. States may regulate
non-commercial speech in terms of time, place, or manner restrictions,[13] but States may not
choose one viewpoint over another or choose to regulate speech based on content. All regulation
of non-commercial speech must be viewpoint and content-neutral.[14] Any regulation of non-
commercial speech is subject to strict scrutiny by the courts.[15] On the other hand, States are
afforded more leeway with regards to regulation of commercial speech.[16] Many States have
False Advertising and/or Unfair Competition Laws which require commercial speech to be
truthful, accurate, and not misleading and non-commercial speech so as to avoid unconstitutional
restriction of non-commercial speech.
Commercial speech takes many forms. From attorney solicitation letters, newspaper advertisements from a store promoting a prescription good prices, to in person sales pitches that occur in a customer’s home, the federal and state governments have the power to regulate the content of commercial speech. The Supreme Court has addressed these types of commercial speech at different times since it first evaluated the protections afforded to commercial speech. Each time, the Supreme Court has addressed the specific fact situations involved and the specific state regulation at issue. Each time, the Supreme Court has used a vague test: whether the speech “does no more than propose a commercial transaction.” This test, does not address the middle ground—speech which may have the effect of increasing a seller’s profit, but doesn’t actually propose a commercial transaction, such as advertisements by Ford suggesting that it takes its responsibility to the environment seriously.

A. *The Commercial Speech Doctrine: What It Is, and What It Isn’t*

Because commercial speech does not have the same protections as political or self-expressive speech, the Supreme Court has attempted to define commercial speech so that only commercial speech (and not political speech) is limited. In doing so, the Court has defined commercial speech as that “which does ‘no more than propose a commercial transaction.’” In fact, the Court has merely stated that there is a “common-sense distinction between speech proposing a commercial transaction . . . and other varieties of speech,” never really providing a clear answer on what that common-sense distinction is.

The Court first addressed commercial speech as it applies to the First Amendment in 1942 in *Valentine v. Chrestensen*. In a very brief opinion, the Court unequivocally stated that States have every power to regulate the distribution of commercial advertising along public streets, even though States may only enact time, place, or manner restrictions upon the distribution of information purely in the public interest. Since *Chrestensen*, the Court’s opinions regarding the proper regulation of commercial speech have been lengthy and inexact.

In the 1970s the Supreme Court specifically limited the *Chrestensen* decision to speech which “did no more than propose a commercial transaction.” *Pittsburgh Press Co. v.*
*Pittsburgh Commission on Human Relations* found that help wanted advertisements in a newspaper were pure commercial speech and, therefore, the state had the power to regulate their listings.\(^{28}\) While *Pittsburgh Press* did very little to explain the definition of commercial speech, it was the first case to describe commercial speech as that which “does no more than propose a commercial transaction.” This description of commercial speech has since been used in most (if not all) commercial speech cases, suggesting at least some limitation on the commercial speech doctrine.

In the Supreme Court’s 1976 *Virginia State Board of Pharmacy* decision, it found that “speech which does ‘no more than propose a commercial transaction’”\(^{29}\) does warrant at least some protection under the First Amendment, even though a “[s]tate may insur[e] that the stream of commercial information flow cleanly as well as freely.”\(^{30}\) *Virginia State Board of Pharmacy* dealt with pure commercial speech—whether a pharmacist had the right (under the First Amendment) to advertise that he would sell consumers a certain drug at a certain price.\(^{31}\) The Court clearly stated that speech which does not editorialize or offer opinions on public issues, or on newsworthy items is commercial speech.\(^{32}\) It emphasized that this speech “did no more than propose a commercial transaction.”\(^{33}\) In *Central Hudson Gas & Electric Corp. v. Public Service Comm’n*, the Supreme Court defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.”\(^{34}\) However, this definition did not really enhance the meaning of commercial speech for most.

The Court has also addressed speech which would appear commercial in nature but should be protected. Reasons for protecting this speech aim at furthering the goals of the First Amendment. In *New York Times Co. v. Sullivan*,\(^{35}\) the Court stated that merely placing an advertisement in a local newspaper does not make that advertisement commercial speech.\(^{36}\) The Court emphasized that although the New York Times received money for this speech and it was in fact an advertisement, it could not be classified as commercial speech because of its editorial content.\(^{37}\) Similarly, the Court found that commercial advertisements are not necessarily “stripped of First Amendment protection” in *Bigelow v. Virginia*.\(^{38}\) Finding
that a newspaper’s advertising regarding the legality and availability of abortions in New York State “did more than simply propose a commercial transaction” and “contained factual material of clear ‘public interest,’” the Court held that the advertising had full protection under the First Amendment, even though the advertising “reflected the advertiser’s commercial interests.”\[39\]

The mere fact that a corporation is speaking does not make the speech any less protected than it would be if the speech came from a private individual.\[40\] “A major purpose of the First Amendment was to protect the free discussion of governmental affairs”;\[41\] in order for free discussion to occur, all parties, including corporations, who have an interest in the public debate must be allowed full protection under the First Amendment when speaking to that public debate. Self-expression is the basic principle of self-governance; self-governance will fail if competing viewpoints from “diverse and antagonistic sources” are suppressed.\[42\] Even corporations have the right under the First Amendment to “express their opinions or viewpoints on controversial issues of public policy.”\[43\] Limiting a corporation’s right to speak about an issue is not a valid time, place, manner restriction, or a valid subject-matter restriction.\[44\]

As the Court pointed out in *Virginia Pharmacy*, the essence of commercial speech is that which does nothing more than propose a commercial transaction. Without a clear explanation of what that means, it must be taken at face value. A proposal for a commercial transaction consists of an offer or an opportunity for a consumer to make an offer to the advertiser. Commercial transactions, by their very nature, do not include responses to attacks regarding a company, political speech, or other self-expressive speech. However, often this statement is not merely taken at face value, but other factors are also considered.
**B. Hybrid Commercial / Non-Commercial Speech is not Easily Addressed by the Modern Definition**

The blending of commercial and non-commercial speech has created various types of “hybrid speech.” So-called image advertising, especially popular today with corporations often hit hard by environmental groups and other public interest organizations, is the pinnacle of hybrid speech. One such example to have found its way to the court system involves a letter to the editor written by Nike’s CEO Philip Knight regarding Nike’s overseas manufacturing processes. A letter to the editor such as this one could easily be classified as hybrid speech in that it is written by a corporate entity, includes mention of the corporation’s products, and is directed toward an audience that includes its consumers, yet the content relates entirely to a matter of public concern and one currently being addressed by the public media.

Without a clear definition of what commercial speech is, theories abound on whether this type of speech is protected. In *Nike v. Kasky*, a private citizen brought suit against Nike under California’s False Advertising Law and Unfair Competition Law. The false advertising law prohibits any corporation from publishing in any newspaper—and the regulation is not limited to paid advertising—any false or misleading statements. Despite Nike’s arguments to the contrary, the California Supreme Court found that the elements of commercial speech were all present in Nike’s letters to the editor of different newspapers, advertisements reporting the same information as the letter to the editor, and other communications with the same content. The court found that Nike’s statements were commercial in nature because they “were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker’s own business operations for the purpose of promoting sales of its products.” Two judges dissented from the majority, each in separate opinions. Each dissenter’s argument hinged on the fact that Nike’s products were the political debate and Nike could not speak to the public issue without mentioning its products. Although Nike’s speech clearly involved its own products, and could result in an increase in sales if consumers believed everything Mr. Knight stated in the various letters and
advertisements, the dissenting judges argue that the only way to acquire the full truth and to determine what values are important to society is to allow Nike to have the same freedom of speech as its opponents.\textsuperscript{[52]}

The Seventh Circuit also addressed image advertising, this time from the National Commission on Egg Nutrition (NCEN) in a 1977 case that addressed the NCEN’s advertisements suggesting that eating eggs was part of a healthy diet and would not affect heart health or blood cholesterol in otherwise healthy people (specifically arguing that there was no scientific evidence to prove otherwise).\textsuperscript{[53]} Despite the Supreme Court’s statements that economic motive is insufficient to make speech commercial, the Seventh Circuit focused almost entirely on the NCEN’s\textsuperscript{[54]} economic motive behind running the advertisements.\textsuperscript{[55]} Advertisements regarding the health of food are not limited to the one case decided by the Seventh Circuit. Amidst the wave of concern regarding eating red meat, pork began its own campaign of “pork, the other white meat,” referring to chicken, touted to be healthier than beef.\textsuperscript{[56]}

The cases and scenarios raise the important issues left open due to the lack of a clear definition of commercial speech. To what extent should corporations be able to respond to public debate regarding their practices and policies? Non-commercial speech, by its nature, is fully protected regardless of its veracity; on the other hand, commercial speech can be regulated by the state and found illegal if it’s misleading or false. Any test of commercial speech must balance the corporation’s right to speak with its power to affect the market based on its sheer size and access to a large portion of the marketplace. Should corporations responding to public criticism of their policies have an opportunity to respond to the public debate without regard for the truth, given that the opposing side may speak its mind without regard for the truth? Or should corporations be held to a higher standard even in these apparent public policy debates because, by their mere position as purveyors of goods, they should have a greater responsibility to verify the truth of their statements before making them?
The Supreme Court’s tests in determining whether speech is commercial or not have ranged from applying a common sense distinction and using a three factor test to determining whether commercial speech is inextricably intertwined with non-commercial speech. Each of these have been applied in fact-based analyses with few similarities across the tests. These tests have not been clearly defined; even the three factor test was applied in a fact-specific manner without any indicator as to the weights given to each factor.

In applying a common sense distinction, the Supreme Court also used three factors to determine whether speech was commercial. The first factor requires courts to determine whether or not the speech constitutes an advertisement. Second, a court must examine the content of the speech, specifically focusing on whether the speech references a particular product. Finally, a court needs to determine whether the speaker has an economic motive. In Bolger, the only Supreme Court case to attempt to apply these factors, the Court stated that no one factor is dispositive, however the presence of all three of these factors strongly suggests that the speech is commercial in nature. The Court held that the defendant’s pamphlets regarding birth control were commercial in nature because of the explicit reference to the company’s products and because the company conceded that they were, in fact, advertisements. The Court reiterated, however, that when a company speaks on issues pertaining to the public interest, it has all of the same protections under the First Amendment as afforded to a private individual; however, merely linking a product to public debate, as done here, does not make the product non-commercial speech or remove it from state regulation.

While linking political speech with commercial speech will not protect the commercial speech, if the commercial speech is inextricably intertwined with protected speech, then the commercial speech is also protected. In Riley v. National Federation of the Blind, the Court stated that commercial speech does not retain its commercial nature “when it is inextricably intertwined with otherwise fully protected speech.” The Court did not expand on what this
meant, but it became the starting point for a wave of other cases. *Board of Trustees of the State University of New York v. Fox* clarified the *Riley* decision when it addressed a regulation by the State University of New York (SUNY) prohibiting private commercial entities from functioning on SUNY campuses other than for certain, enumerated functions. In questioning the Constitutionality of this regulation, a Tupperware sales group stated that as part of so-called Tupperware parties, it also taught home economics. Because teaching the attendees about home economics was fully protected under the First Amendment, the sales group argued that the commercial speech of selling Tupperware products was “inextricably intertwined” with the protected non-commercial speech.

The Court strongly disagreed with the sales group’s theory, stating that the premise behind “inextricably intertwined” requires that the necessary political or otherwise protected speech cannot occur in any way without the commercial speech. Under the facts at bar, the Court declared that teaching students about home economics does not require that the sales group also sell Tupperware (or other housewares). “Nothing in the nature of things requires [these noncommercial messages] to be combined with commercial messages.” The concept of inextricably intertwined forms the basis of determining when otherwise commercial speech would be fully protected due to its importance to public debate. While the mere inclusion of political or other social issues does not render speech protected, the speech should be protected if it significantly furthers a purpose of the First Amendment regarding an issue of public concern.

II. REASONS FOR PROTECTING COMMERCIAL SPEECH UNDER THE FIRST AMENDMENT

Courts have found self-expressive, non-commercial speech deserves protection for its contribution to a “market place of ideas” and function in bringing about a “discovery of political truth.” Protecting such speech affirms “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-
Commercial speech which links public issues in such a way that these important goals of the First Amendment are served should also be protected.
A. Reasons for Protection of Speech

Traditionally, speech has been protected in order to allow individuals to participate in the marketplace, without a fear of chilling speech. Courts and scholars have determined that allowing expression of all viewpoints helps the public to determine the truth regarding important issues. Additionally, the values and protections of the First Amendment have been hailed as allowing the maintenance of a “democratic legitimacy.” By allowing expression of all viewpoints on all matters of public concern, the public is able to determine the truth or to determine what values are important for society. The Supreme Court has stated that a key purpose of the First Amendment is to allow the public, and not the government, to determine the truth of political and self-expressive speech. For these reasons, it is important to avoid overly broad regulations regarding speech, including speech by corporations, in order to avoid “unacceptable applications” of such regulations that limit the ability of the public to determine the truth of important social or public issues.

Commercial speech was first protected for its own sake in Virginia State Board of Pharmacy. The Court focused on two key issues when it determined that commercial advertising was, in fact, given limited protection under the First Amendment. First, the Court declared that if there is a right to speak, then there is a right for the general public to receive that information, including advertisements. Second, the Court reiterated that speech does not lose its protection simply because the speaker spends money to present it. In making its decision, the Court referenced prior cases dealing with fighting words and obscenity. Specifically, the Court found that commercial speech is not “so removed from any exposition of ideas and from truth, science, morality, and arts in general . . . that it lacks all protection.” In furthering the protection of commercial speech, the Court stated a few years later that advertising is protected even if it only gives a partial picture of the whole because “the First Amendment presumes that some accurate information is better than no information at all.” Commercial speech also serves the role of insuring the “free flow of information . . . in a democratic society.”
Securities law is also specifically governed as commercial speech. Securities, however, fall into a special category of commercial speech in that consumers are much more likely to be harmed by false speech from a corporation. Unlike products such as cars, shoes, or electronics, there is “no intrinsic value” in securities; the value of securities relies solely on statements made by the corporation. Because the value is based on corporate statements, the courts have found that it is acceptable to regulate speech regarding securities sales in order to protect consumers, prevent market manipulation, and “provide full disclosure” regarding a corporation’s status. Although commercial speech does have some protection under the First Amendment, it does not have full protection under the First Amendment.

B. Reasons for Affording Commercial Speech Less Protection than Non-Commercial Speech and What That Means to Commercial Speakers

Commercial speech, pure commercial speech, is valuable for the information it conveys and for no other reason. Because of this unavoidable fact, pure commercial speech must be true. Unlike non-commercial speech where false or misleading speech can be valued because it widens the political discourse and brings to the discussion with the hope that the truth will eventually emerge, false or misleading commercial speech does nothing more than harm consumers who wish to purchase a product only to find out that it does not do what it’s manufacturer advertised it did or that it costs more than advertised. Commercial speech has less protection than non-commercial speech for one main reason: consumer protection. Many sub-reasons stem from this main reason for protection. Governments regulate commercial transactions in order to avoid harm to consumers; therefore, the logic follows that governments should also have the power to regulate speech that is “linked inextricably to those transactions.” It is this reason, preventing harm to consumers, that forms the basis of all other justifications for limiting the protections afforded commercial speech. In fact, in many instances where commercial speech regulations are upheld, it is based on the fact that these regulations go to the public good; therefore, they withstand first amendment scrutiny because of paternalistic motives.
While false non-commercial speech is given full protection, courts have justified this paternalistic view regarding commercial speech for many reasons. Most courts believe that commercial speech is “more easily verifiable by its disseminator than . . . news reporting or political commentary.” This specifically applies because at its core, commercial speech is nothing more than product advertising coupled with a suggested or sale price for the product. Because the advertiser has unlimited access to this information (and in many cases, ultimate control over this information), any regulation by the government of price or product information would be incredibly unlikely to lead to the chilling of speech, the main concern in regulating non-commercial speech based on the veracity of the speech. Additionally, because corporations should be able to verify their speech, it is important that they do so for the protection of the consumer when this speech directly proposes a commercial transaction.

Scholars and courts also argue that commercial speech is “hardier” than non-commercial speech because commercial speakers act from an economic motive—profit. Because they act to make money, it is highly unlikely that this speech will be chilled by proper regulation. The purpose of commercial speech, unlike non-commercial speech, is to effect a commercial transaction, not to contribute to an on-going debate or other public issue. This factor has two elements. First, because of the motivation to make a sale, commercial speakers will choose to speak so that they can make a sale. Second, also because of this motivation to make a profit, commercial speakers may attempt to skew the speech in their favor in order to win over consumers; it is for that reason that financial motive becomes a factor in limiting the protections afforded commercial speech. While these values for protection are important, it is necessary to note that not all of the rationales for why commercial speech is treated differently hold up when looked at thoroughly.

Two of three factors used to explain why commercial speech can be treated differently from non-commercial speech do not apply solely to commercial speech. Both commercial and non-commercial speakers may have a better opportunity than their listeners to verify the information before they speak. Additionally, both commercial and non-commercial speakers
may have economic interests backing their reasons for speaking. The hardiness of speech goes
to the ease with which a speaker can verify the truth of the information before publishing
it. Generally, courts have used this as a distinguishing factor between commercial and non-
commercial speech, and to explain why the two forms of speech are treated
differently.[106] However, this ignores the crucial fact that commercial speech is not the only
speech that can be readily verified by its speaker.[107] For example, political candidates are often
in better positions to verify their statements before making them, yet their speech is protected
fully, including misstatements. By relying on this distinction, courts have essentially created a
false reason to differentiate commercial from non-commercial speech.

Similarly, reliance on the fact that a commercial speaker may have an economic motive
behind its speech ignores the fact that many people speaking out on political issues also have an
economic motive.[108] Rather, in both of these cases, the “essential difference” is the “presence
or absence of speaker interests.”[109] Political speech carries a degree of self-expression which
commercial speech does not; rather, in commercial speech, the content of the speech is purely
economic, it only provides an opportunity to participate in a business or other commercial
transaction.[110] Having established the reasons for protection of non-commercial speech and
contrasting that with only allowing limited protection of commercial speech, this Article will
now address how these values should affect the determination of commercial speech.[111]

III. MOVING TOWARD A NEW DEFINITION OF COMMERCIAL SPEECH

This section posits that corporate entities should have the full protection of the first
amendment for all speech addressing issues of public concerns, following the Supreme Court’s
holding in *Bellotti*. It suggests that the key to distinguishing commercial speech from fully
protected speech will be whether the commercial speech is “inextricably intertwined” with issues
in the public debate. While the Court in *Bolger* attempted to establish a test for determining
whether speech is commercial or non-commercial in nature, the Court failed in that it did not
provide a specific test and merely stated that some or all of these factors may signify that the
speech is commercial in nature. There was no definiteness to this test. Secondly, the factors
used to justify treating commercial speech differently from non-commercial speech are insufficient to validate limiting non-commercial speech from corporations—even non-commercial speech inextricably linked with commercial speech.
A. Faults in Current Jurisprudence Defining Commercial Speech

The values protected by the First Amendment and the tests used by the courts to determine whether speech is non-commercial or commercial do not always mesh. In particular, while the Supreme Court and commentators declare that speech should be protected because it leads to an exposition of ideas, ultimately leading to the truth while at the same time, preventing the chilling of speech, courts (including the Supreme Court) dance around the issue of what it means when speech by a corporation also addresses an issue of public concern. In some cases, this issue has been easily answered in that it is clear that spending money on speech does not render it unprotected. However, in others, many courts have decided that speech which affects a corporation’s profit should be declared commercial in nature and, therefore, it only receives limited protection under the First Amendment.

Using the facts from Kasky as an example, Philip Knight was not the only individual to write a letter to the editor in response to claims within an opinion piece criticizing Nike’s business practices. There were at least two other letters to the editor, both published before Knight’s letter to the editor, which addressed the same issues as Knight’s letter and from the perspective. However, under the California Supreme Court’s interpretation of First Amendment jurisprudence, only Nike’s letter would be governed by the regulation. By restricting Nike’s speech while allowing the speech of all private citizens, the court effectively limited the public debate regarding an important issue. Significantly, the court restricted speech based on who was speaking. Restricting speech simply because a certain person is speaking is, in effect, a form of viewpoint-based regulation on speech.

The result of such a restriction allows critics of a corporation to print or speak anything they would like to regarding that corporation’s business practices. If all speech by a corporation that mentions its products is treated as commercial, then the corporation does not have the same freedom to speak as its critics. A corporation has the extra burden of verifying every minute fact, statement, and possibly even opinion to ensure that they are 100% true. While a
corporation may have better access to that than others, placing this added burden on a corporation in effect limits Nike’s side of the debate. If it later turns out that something was false or misleading, under California’s laws, in particular, a private citizen may sue the corporation. There is no such limitation on the other side of the debate. This goes against every fundamental principle behind the First Amendment. Government should not interfere and determine which side is true in any debate in the public sphere.\footnote{118} By limiting one side of the debate, government effectively decides which side of the debate is correct and determines the truth of the speakers’ statements.

At their most basic form, letters to the editor are not advertisements as they do not propose a commercial transaction, they do not offer items for sale, they do not tell people where the products can be found, they do not list prices for the products. Similarly, advertisements promoting responsible spending, or corporate websites suggesting environmental stewardship promote certain activities of a corporation, but they do not specifically promote a sale of a particular brand or product. Additionally, as evidenced by The New York Times v. Sullivan even though some aspect of these forms of speech may be paid advertisements, that by itself does not make speech commercial. However, the Supreme Court has also made clear that a speaker cannot simply include political speech and expect the commercial aspect of the speech to be protected.\footnote{119} Therefore, the question becomes, at what point does speech that would otherwise be commercial speech, become non-commercial, fully protected, self-expressive speech?

\textbf{B. Establishing Inextricably Intertwined as the Test to Distinguish Commercial & Non-Commercial Speech}

The “common sense” approach suggested by the Court in \textit{Ohrlik} is too simplistic and non-descript. An ambiguity in the definition of commercial speech exists seeing as different judges on the same court, listening to the same issues found completely differently, relying on different aspects of the speech and different cases to find support for their arguments. However, Supreme Court jurisprudence does not deny a corporation full protection of the First Amendment when its speech is clearly not proposing a commercial transaction. Because the \textit{Bolger} decision
is so ambiguous, this Article proposes a two part test for determining whether speech is commercial or non-commercial when a commercial entity’s speech does more than propose a commercial transaction.

First, a court should determine whether the speech specifically references a commercial entity’s products either generically by brand name (e.g. Nike), or specifically by particular product (e.g. Air Jordan sneakers). If not, then the speech should be considered non-commercial speech and should be considered fully protected speech. Second, if the speech does specifically reference a commercial entity’s product either generically or specifically, then a court should determine whether the speech is “inextricably intertwined” with political or public speech. If the speech regarding the entity’s products is inextricably intertwined with political speech (as explained below) then the speech should receive full protection under the First Amendment; however, if the speech is not inextricably intertwined, then it should be treated as commercial speech.

i. Non-Commercial Speech that does not Specifically Reference a Commercial Entity’s Products

This aspect of the test accounts for speech by a corporation which addresses a matter currently in the public sphere—i.e. an on-going public debate or social concern, whether or not it is currently being debated in the marketplace—but does not mention the corporation’s products either by brand name (other than something to the effect of “this message was brought to you by View Askew”).

For example, under the first part of this test, if a state legislature considered passing a law requiring that individuals under the age of sixteen be accompanied by an adult if attending a movie after 6:00 pm, Loews movie theaters would be able to run commercials or other announcements opposing this legislation, so long as the legislation only referred to the effects of the legislation generally and did not specifically reference its own products. Clearly, Loews Theaters would have an economic interest in seeing that the legislation didn’t pass, given the large number of young teenagers and that attend the movies after 6:00 pm. In fact, Loews
Theaters’ primary reason for speaking out would be to ensure it maintained its current profit levels. However, under current Supreme Court jurisprudence, having an economic motive for speech does not remove the speech from protection under the First Amendment.\textsuperscript{121} Effectively, anyone who speaks could have an economic motive behind the speech. For example, a politician who campaigns in the hopes of receiving money to fund his or her campaign has an economic motive to speak.

One of the primary values protected by the First Amendment, as enunciated by the Supreme Court and various scholars, is “the free discussion of governmental affairs.”\textsuperscript{122} This free discussion can only occur if all ideas are expressed and published in the marketplace.\textsuperscript{123} Because the purpose behind free discussion is to allow the public, not the government, to determine the truth and/or what is best for society,\textsuperscript{124} even corporations should be allowed to contribute to the debate. Allowing corporations to contribute to debate gives the public more information about what the issues are. As stated by both Justices Brandeis and Holmes, even misleading or false information will bring about the truth. Stifling a corporation’s speech because it is a corporation would violate this key idea that the public must determine the truth and not the government.\textsuperscript{125}

When a corporation is not referring to any of its products, processes by which its products are manufactured, or any other aspect of its business, other than commenting on some aspect of a debate or issue of public concern, a corporation must be treated as any other private individual with regards to its First Amendment rights. However, additional concerns arise when it becomes clearer that a corporation’s speech will directly affect how consumers view its products which may affect sales, and therefore, affect a corporation’s profit. Because a corporation knows more about its products than anyone else, because there is greater potential for consumer harm if it believes a corporation’s statements, and because a corporation has the resources to influence media coverage that a private individual most likely does not have, special considerations must be made when a corporation specifically mentions its products or services in any way.
ii. Defining Inextricably Intertwined: When a Corporation References its Particular Products, its Statements Must be Inextricably Intertwined with Current Public Debate

Because a corporation’s profit can be directly affected by the effects of its wide range of influence and resources to publish advertisements, write letters, and otherwise send messages into the marketplace, it is important to verify that a corporation’s speech, when its products are mentioned, is truly affecting a public debate and not just trying to create debate where there is none. By using an inextricably intertwined requirement, first used by the Supreme Court in Riley, a court would be able to ensure that the speech truly affects a public debate while still being able to protect the public from commercial speech that could be misleading or false and therefore harm the public. While the Supreme Court introduced the concept of inextricably intertwined in 1988, and has used it in a few cases since, it has not explicitly set out a definition regarding what it means. Without a clear definition, non-commercial as compared with commercial speech cases continue to be decided on an ad hoc basis.

In order to effectively ensure that a corporation’s speech regarding its products, manufacturing processes, or labor practices is truly inextricably intertwined with self-expressive or political speech, there are three things that must be considered. These factors help to ensure that the commercial speech is truly inextricably intertwined with political speech and not just merely linking the two. First, self-expressive speech that also lends itself to determining the truth of an important issue (one of the key values protected by the First Amendment as discussed earlier), must be published in a public forum of sorts. This serves two purposes: first, it gives the public more information about the issue and, second, it gives an individual or group an opportunity to respond in the same forum. Public forum is loosely defined in this context—it’s not as exacting as public forum in First Amendment jurisprudence, but rather refers to newspapers, television and radio media, and other avenues that reach the public on the whole. If a corporation were to only send targeted mailings (such as letters written by Nike to the Athletic Directors of various universities), it suggests that the corporation is more focused on ensuring that it maintains or increases its segment of the market share, and not that the corporation is
trying to increase the public dialogue about the issue. Because the First Amendment does not protect a corporation’s right to sell products, but only its right to speak on an issue in an effort to bring out the truth, if the speech is not a public forum, then it should be considered commercial speech as it is not inextricably intertwined with the values and goals behind the First Amendment.

Second, the products or brand name mentioned in the speech must be the political debate or public issue.\[131\] “Inextricably intertwined” when used by the Supreme Court suggests that it only refers to situations where it would be absolutely impossible to contribute to the debate or social issue without specific mention of some aspect of the products. When a Tupperware sales group argued that sales of Tupperware were inextricably intertwined with the freedom to speak about home economics, the Supreme Court pointed out that it was possible to educate individuals about home economics (and even food storage) without trying to sell Tupperware.\[132\] Comparatively, when a public issue or debate is focused on a specific product or brand, it is impossible to speak about the public issue without specific mention of the product. In particular, with reference to Nike’s situation, 48 Hours aired a news story focusing entirely on Nike and its overseas practices.\[133\] Other groups such as Sierra Club, Public Citizen, and various student organizations,\[134\] also focused heavily on Nike’s labor usages overseas. Because Nike’s products were the specific issue and the specific debate, Nike’s references to its products were inexplicably intertwined with its self-expression on an issue of public concern.

Alternatively, using the example set out above with regards to a hypothetical restriction on teen attendance at night movies, the public debate concerned whether or not individuals sixteen years old and younger should be able to attend the movies after 6:00 p.m. While Loews Theaters was able to comment on that specific issue, it would not have been able to state that its theaters were particularly suited to allowing younger individuals to attend the movies after 6:00 p.m. Loews would be able to comment on the issue at hand without specifically mentioning its own products; therefore, its products would not be inextricably intertwined with the
debate. Effectively, if Loews were to state that its theaters were ideal for younger individuals to attend the movies at night then its speech could be viewed as that aimed at improving its bottom line, and not necessarily speech directed at improving the public discourse on an important matter.

Finally, in order for a corporation’s speech to be inextricably intertwined with public debate, the speech must be in response to a debate that already exists. Requiring that the corporation’s speech be a response to an already existing debate ensures that the corporation’s speech is probably necessary to bring out the truth of the issue. Additionally, this requirement puts limitations on a corporation’s speech about its products. While these limitations are generally not acceptable for other forms of fully protected speech, a corporation’s speech most frequently is commercial in nature, and therefore not fully protected. Requiring a corporation’s speech to be a response to an on-going debate ensures that a corporation cannot create an unnecessary debate. If a corporation were allowed to create an unnecessary debate, it is possible that its influence and financial power would flood the market with its own ideas before others had a chance to speak.

In order to turn speech that would otherwise be considered commercial into fully protected speech, it should be necessary to protect the speech in order to secure the values guarded by the First Amendment. If it is not necessary to protect the speech to further the goals of the First Amendment, then allowing that speech the full protection would not be advantageous to society or the public. This is especially so given that a corporation may have a large influence on news media, or, at a minimum, will have access to resources that allow it to broadcast its message into every nook and cranny without batting an eye. These three elements of inextricably intertwined help to ensure that a corporation doesn’t end up flooding a market with its own ideas.

C. Effects on False Advertising Laws

Based on this interpretation of inextricably intertwined, state false advertising laws must not blanketly prohibit all misleading or false statements by corporations regarding their products
or manufacturing processes. Because this type speech may be inextricably intertwined with non-commercial speech and, therefore, have full protection under the First Amendment, a regulation may not prohibit such speech unless the regulation passes strict scrutiny with regards to speech that is inextricably intertwined with political speech. A permissible regulation would prohibit misleading or false statements that “do nothing more than propose a commercial transaction” while still allowing corporations to fully contribute to political debate, even if that political debate concerned the corporation’s products.

As written, the California False Advertising Law would not meet the standards set out above. In particular, the California False Advertising Law includes any publication “in any newspaper” which includes both paid advertising and letters to the editor. This inclusion is overly broad because letters to the editor which meet the above guidelines for inextricably intertwined speech would be fully protected under the First Amendment. As such, a state cannot regulate the speech based merely on its falsity or propensity to mislead. While the statute does make some allowances by stating that it is only unlawful if the corporation knew or should have known that the information was “untrue or misleading,” even knowledge of falsity is insufficient to render the speech unprotected under the First Amendment. Because of the fear of chilling otherwise protected speech, the Supreme Court has found that even false speech should be protected for the goals of achieving the political truth. For this main reason, false advertising laws must be narrowly tailored so as to only encompass true commercial speech and not expand to also include speech inextricably intertwined with fully protected speech.

CONCLUSION

As it currently stands, the law regarding commercial speech remains vague and unclear with respect to speech that does more than just propose a commercial transaction. The First Amendment protections apply to corporations with regard to political speech; however, under many court interpretations, a corporation’s political speech with regards to its own products has not been protected. Using an inextricably intertwined analysis, where commercial speech is inextricably intertwined with political speech allows corporation’s to contribute to the political
debate when their company or products (or some aspect thereof) is the political debate without fear of suit. This especially applies in states such as California where any private citizen may sue a corporation under California’s False Advertising law.\[^{14}\] If any citizen may sue a corporation for such speech, then there is a greater chance of being sued than if only the state’s attorney general could sue the corporation.\[^{14}\] By allowing corporation’s a limited range of fully protected speech, we ensure that the goals and values of the First Amendment are upheld.

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\[^2\] J.D. Candidate, Chicago-Kent College of Law, May 2003; B.S. Cornell University, 1998. The author would like to reiterate that while she, too, like the plaintiff in *Kasky v. Nike* is opposed to Nike’s alleged overseas labor practices, she believes that even Nike should have an opportunity to speak out against its critics.


\[^{2}\] See http://www.thisiscitigroup.org/citispoof/ for other examples of Citigroup’s advertisements.

\[^{3}\] http://www.bp.com/environ_social/index.asp

\[^{4}\] http://www.philipmorrisinternational.com/pages/eng/ysp/Media.asp


\[^{6}\] Although the term corporation has a legal meaning, for the purposes of this Article, it will be used to mean a commercial entity, or a seller of goods or services.


\[^{9}\] *Virginia State Board of Pharmacy*, 425 U.S. at 762.


\[^{12}\] Because the focus of this article is determining what commercial speech is, it is unnecessary to address the core test developed in *Central Hudson* regarding whether a State’s regulation of commercial speech is valid.


\[^{16}\] See *Central Hudson*, 447 U.S. at 566. The Court established the following test for state regulation of commercial speech: “In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.” *Id.*


\[^{18}\] See *Virginia State Board of Pharmacy*, 425 U.S. 748.

\[^{19}\] See Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989).

\[^{20}\] *Virginia St. Bd. of Pharmacy*, 425 U.S. at 772 (while the commercial speech cannot be banned in its entirety, the “State may insur[e] that the stream of commercial information flows cleanly as well as freely”).
The National Egg Association had commercials regarding how eggs are a healthy part of your diet. See Nat’l Comm’n on Egg Nutrition v. Federal Trade Comm’n., 570 F.2d 157 (7th Cir. 1977). Pork is advertised as “the other white meat.” See http://www.otherwhitmeat.com/default.asp. For a thorough discussion of the different categories of commercial speech, see Lurie, supra note 5.


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

The California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 (2003), provides that unfair competition amounts to “any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising and any act prohibited by Chapter 1 [§ 17500].”

These laws, particularly § 17500, include anything and everything that a company could publish about its actions. Additionally, they are treated separately. If a corporation violates § 17500, then it has also violated § 17200 and can be found liable under both statutes and punished under both.

At the time Kasky brought his suit, Nike was receiving a large amount of criticism from non-profit groups, socially responsible organizations, and the press in general regarding its alleged sweatshop activities in third world nations. 27 Cal. 4th at 947. Therefore, Nike argued that its speech was self-expressive and fully protected under the First Amendment. In effect, “Nike’s labor practices and policies, and in turn, its products, were the public issue.” Kasky, 27 Cal. 4th at 975 (Chin, J., dissenting).

The Court distinguished Riley, pointing out that in Riley, the fully protected speech (fundraising for a charitable organization) necessarily required the commercial speech (a statement by professional fundraisers specifying the “percentage of charitable contributions collected during the past 12 months that were actually turned over to charities.”).

See Danny Banister, When it Comes to Meat, I’m Color Blind, Missouri Farm Bureau Federation, available at: http://www.mofb.org/mofborg.nsf/44b7854220be851386256aa4700731f7e7e1222ebde7a57f586256bb40068c69d?OpenDocument, last visited 05/13/03.


Id. at 471-72. For example, a corporation was hired to run dining services.


Additionally, if false speech is not allowed, then people will be less likely to speak, hence there will be a chilling effect on their speech. While false speech may have an economic motive, it is not always the case that economic motives lead to false statements. The reason behind this goes towards Justice Holmes’s concept of a marketplace of ideas and Justice Brandeis’s concept of a marketplace of information. Whether or not false statements will bring about more debate and eventually the truth will come out. Additionally, if false speech is not allowed, then people will be less likely to speak, hence there will be a chilling effect on their speech.

The reason behind this goes towards Justice Holmes’s concept of a marketplace of ideas and Justice Brandeis’s concept of the political truth: even false statements will bring about more debate and eventually the truth will come out. Additionally, if false speech is not allowed, then people will be less likely to speak, hence there will be a chilling effect on their speech.
protected speech by the inclusion of content regarding a public debate.

Fall 1997 corporation was focused on as much as Nike in these campaigns. The Supreme has held that viewpoint regulation is not a compelling reason and states may not choose to suppress one side of an argument.

For a good discussion of why limiting commercial speech based on who’s talking does not work under First Amendment jurisprudence, see Estreicher, supra note 11, at 237-38. Ms. Estreicher rightly notes that to treat the speakers based on the fact that the corporate speaker may have an economic motive to speak, “requires disparate constitutional treatment for the same message.” Id. The unequal treatment is based solely on the “subjective motive of the speaker.” Id.

Which, as pointed out by the United States Supreme Court, and explained earlier, see notes 12-16 and accompanying text, supra, is unconstitutional.

See David Hoch and Robert Franz, Legal Developments: Eco-Porn vs. the Constitution Commercial Speech and the Regulation of Environmental Advertising, 58 ALB. L. REV. 441, 448-50 (1994) (pointing out that under Bellotti, the “public has the right to hear corporate opinions” which the state cannot abridge without a “compelling state interest.”). The Supreme has held that viewpoint regulation is a not a compelling reason and states may not choose to suppress one side of an argument.

See Fox, 492 U.S. at 475. Of course, this speech should be considered fully protected only to the extent that it is fully protected based on other categories of speech, or other laws or regulations that govern a substance or product. For example, the Surgeon General, as part of the U.S. Department of Health and Human Services, places different requirements and regulations on cigarette manufacturers regarding how they may advertise their product and what must be stated.

See Bolger, 463 U.S. at 67, Bigelow, 421 U.S. at 822, New York Times, 376 U.S. at 266.

Bellotti, 435 U.S. at 777-78.

Id. at 777 n. 12.

Edenfield, 507 U.S. at 767.

See Bellotti, 435 U.S. at 784-785.

487 U.S. at 796.

See notes 72-106 and accompanying text, supra, regarding the factors and considerations regarding why commercial speech is afforded less protection than other speech, particularly the paternalism argument suggesting that consumers need to be protected.

See Schneider, supra n. 40 at 1244-45.

note that this list is not exclusive

See Kasky 27 Cal. 4th at 948.

Public issue here has broad meaning, including proposed regulations or statutes, media campaigns by other groups, letters to the editor, etc.

See Fox, 492 U.S. at 474.

Kasky, 27 Cal. 4th at 948.

For example, the Cornell Organization for Labor Action (COLA) and the Cornell Greens (an environmental group not affiliated with the Green Party) worked in conjunction with student groups from other Ivy League institutions to try to prevent the school bookstores from buying Nike products due to its labor practices. No other corporation was focused on as much as Nike in these campaigns. COLA and Cornell Greens divestment campaign, Fall 1997-Spring 1998.

In effect, the concept of “inextricably intertwined” turns commercial speech into non-commercial, fully protected speech by the inclusion of content regarding a public debate.


See generally Kasky, 27 Cal 4th 939.
See note 98, supra, and accompanying text.


This is simply true because a state attorney general office may pick and choose which violations truly violate the law given time constraints, whereas a private individual may only have the one case to worry about.