

ESSAY

GREENWASHING AND THE FIRST AMENDMENT

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Recent explosive growth in environmental and climate-related marketing claims by business firms has raised concerns about the truthfulness of these claims. Critics argue (or at least question whether) such claims constitute greenwashing, which refers to a set of deceptive marketing practices in which an entity publicly misrepresents or exaggerates the positive environmental impact of a product, a service, or the entity itself. The extent to which greenwashing can be regulated consistent with the First Amendment raises thorny doctrinal questions that have bedeviled both courts and scholars. The answers to these questions have implications far beyond environmental marketing claims. This Essay is the first to offer both doctrinal clarity and a normative approach to understanding how the First Amendment should tackle issues at the nexus of science, politics, and markets. It contends that the analysis should be driven by the normative values underlying the protection of speech under the First Amendment in the disparate doctrines that govern these three arenas. When listeners are epistemically dependent for information on commercial speakers, regulation of such speech for truthfulness is consistent with the First Amendment and subject to the laxer review of the commercial speech doctrine. This is because citizens must have accurate information not only to knowledgeable participate at the ballot box but also to have meaningful freedom in economic life itself.

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INTRODUCTION

Business firms and other private actors are confronting the reality that urgent action to address climate change is required, not only through public regulation but also through private environmental governance.¹ To date, more than 1,500 firms globally have announced their intention to reduce their greenhouse gas emissions to net zero by 2050 in accordance with the goals of the Paris Climate Agreement.² Many firms have publicly stated their intentions to reach “net zero” or “carbon neutral” goals with respect to their own operations and purchased electricity.³ Others have gone farther, promising to reach net zero with respect to the emissions arising out of their lending portfolios, upstream supply chains, or downstream consumption of their products.⁴ These climate pledges have come from a wide variety of firms, including the six largest banks in the United States;⁵ managers of more than \$9 trillion in assets;⁶ technology firms like

1. Private environmental governance defines the overarching category of environmental standard-setting and enforcement actions taken by private actors like firms, nongovernmental organizations (NGOs), and multistakeholder groups that operate in parallel with those undertaken by public law regulators. See Sarah E. Light, *The New Insider Trading: Environmental Markets Within the Firm*, 34 *Stan. Env't L.J.* 3, 4–5 (2015); Sarah E. Light & Eric W. Orts, *Parallels in Public and Private Environmental Governance*, 5 *Mich. J. Env't & Admin. L.* 1, 3 (2015); Michael P. Vandenbergh, *Private Environmental Governance*, 99 *Cornell L. Rev.* 129, 133 (2013). See generally Michael P. Vandenbergh & Jonathan M. Gilligan, *Beyond Politics: The Private Governance Response to Climate Change* (2017) (demonstrating that private environmental governance has resulted in a reduction in global emissions and arguing its benefits for addressing climate change).

2. Data-Driven EnviroLab & NewClimate Inst., *Accelerating Net Zero: Exploring Cities, Regions, and Companies' Pledges to Decarbonise 13* (2020), https://newclimate.org/sites/default/files/2020/09/NewClimate_Accelerating_Net_Zero_Sept2020.pdf [<https://perma.cc/8E2T-KFKW>]. The Paris Agreement establishes a global goal of limiting the global increase in temperature to “well below 2°C above pre-industrial levels and . . . pursu[ing] efforts to limit the temperature increase to 1.5°C above pre-industrial levels” to avoid the worst impacts of climate change. Paris Agreement to the United Nations Framework Convention on Climate Change, art. 2, Dec. 12, 2015, T.I.A.S. No. 16-1104 (entered into force Nov. 4, 2016).

3. Thomas Murray, *Net Zero Is the New Business Imperative*, *Env't Def. Fund+Bus.* (Sept. 24, 2020), <https://business.edf.org/insights/net-zero-emissions/> [<https://perma.cc/N7B9-QQ76>] (noting that the “number of net zero pledges has doubled in less than a year”).

4. Data-Driven EnviroLab & NewClimate Inst., *supra* note 2, at 4.

5. Sarah E. Light & Christina P. Skinner, *Banks and Climate Governance*, 121 *Colum. L. Rev.* 1895, 1896, app. at 1952 (2021); Avery Ellfeldt, *Citi Goes Net Zero. Who's Next?*, *ClimateWire* (Mar. 2, 2021), https://www.eenews.net/climatewire/2021/03/02/stories/1063726339?utm_campaign=edition&utm_medium=email&utm_source=eenews%3Aclima (on file with the *Columbia Law Review*).

6. Press Release, Ceres, *Leading Asset Managers Commit to Net Zero Emissions Goal With Launch of Global Initiative* (Dec. 11, 2020), <https://www.ceres.org/news-center/press-releases/leading-asset-managers-commit-net-zero-emissions-goal-launch-global> [<https://perma.cc/PG9W-N2PA>].

Google⁷ and Microsoft;⁸ consumer-facing firms like McDonald's;⁹ oil and gas majors like BP¹⁰ and Shell;¹¹ the largest producer of aluminum in the United States, Alcoa;¹² and even a NASCAR racing team.¹³ Firms have formed or joined coalitions, like the Glasgow Financial Alliance for Net Zero, pursuant to which "over \$130 trillion of private capital is committed to transforming the economy for net zero" comprising commitments by more than 450 firms in forty-five countries.¹⁴ One of the boldest claims in this regard is Occidental Petroleum's recent statement that it has delivered the "world's first shipment of 'carbon-neutral' oil."¹⁵ There has been an explosion in the growth of investment funds marketed as "green" or

7. Google Sustainability, <https://sustainability.google/commitments/#leading-at-google> [<https://perma.cc/729A-XAXE>] (last visited Aug. 5, 2022) (pledging to be carbon-free by 2030).

8. Brad Smith, Microsoft Will Be Carbon Negative by 2030, Microsoft: Off. Microsoft Blog (Jan. 16, 2020), <https://blogs.microsoft.com/blog/2020/01/16/microsoft-will-be-carbon-negative-by-2030/> [<https://perma.cc/G8FY-XUVD>].

9. McDonald's Accelerating Climate Action to Reach Net Zero Emissions by 2050, McDonald's (Oct. 4, 2021), <https://corporate.mcdonalds.com/corpmcd/en-us/our-stories/article/Featured.net-zero-by-2050.html> [<https://perma.cc/M7UM-U8ER>] (announcing that the company is joining the UN's "Race to Zero" campaign and the Science Based Targets Initiative's "Business Ambition for 1.5°C" campaign).

10. Press Release, BP, BP Sets Ambition for Net Zero by 2050, Fundamentally Changing Organisation to Deliver (Feb. 12, 2020), <https://www.bp.com/en/global/corporate/news-and-insights/press-releases/bernard-looney-announces-new-ambition-for-bp.html> [<https://perma.cc/J5RU-E8KS>].

11. Media Release, Shell, Shell Accelerates Drive for Net Zero Emissions With Customer-First Strategy (Feb. 11, 2021), <https://www.shell.com/media/news-and-media-releases/2021/shell-accelerates-drive-for-net-zero-emissions-with-customer-first-strategy.html> [<https://perma.cc/54YZ-V7PF>].

12. Press Release, Alcoa, Alcoa States Its Ambition to Reach Net Zero Greenhouse Gas Emissions by 2050 (Oct. 4, 2021), <https://news.alcoa.com/press-releases/press-release-details/2021/Alcoa-States-Its-Ambition-to-Reach-Net-Zero-Greenhouse-Gas-Emissions-by-2050/default.aspx> [<https://perma.cc/MV7R-U3XC>].

13. Jenna Fryer, Roush Fenway Becomes 1st Carbon Neutral NASCAR Team, ClimateWire (Feb. 19, 2021), https://www.eenews.net/climatewire/2021/02/19/stories/1063725431?utm_campaign=edition&utm_medium=email&utm_source=eenews%3Aclimewire (on file with the *Columbia Law Review*).

14. Press Release, Glasgow Financial Alliance for Net Zero, Amount of Finance Committed to Achieving 1.5°C Now at Scale Needed to Deliver the Transition (Nov. 3, 2021), <https://www.gfanzero.com/press/amount-of-finance-committed-to-achieving-1-5c-now-at-scale-needed-to-deliver-the-transition/> (on file with the *Columbia Law Review*).

15. Carlos Anchondo, Company Claims World's First CO₂-Neutral Oil. Is That True?, EnergyWire (Feb. 3, 2021), https://www.eenews.net/energywire/2021/02/03/stories/1063724089?utm_campaign=edition&utm_medium=email&utm_source=eenews%3Aenergywire (on file with the *Columbia Law Review*); News Release, Oxy, Oxy Low Carbon Ventures, Together With Macquarie, Deliver World's First Shipment of Carbon-Neutral Oil (Jan. 28, 2021), <https://www.oxy.com/news/news-releases/oxy-low-carbon-ventures-together-with-macquarie-deliver-worlds-first-shipment-of-carbon-neutral-oil/> [<https://perma.cc/AS8E-9LV5>] (noting that greenhouse gas emissions from the oil's lifecycle were being offset).

otherwise socially responsible.¹⁶ These public statements are not limited to climate pledges but include promises to improve environmental performance along other dimensions, such as with respect to water use; reducing waste, the use of toxic chemicals, and deforestation; and preserving biodiversity.

This exponential growth in environmental marketing claims has raised concerns about their truthfulness. Critics argue (or at least question whether) such claims constitute greenwashing.¹⁷ Greenwashing generally refers to a set of deceptive marketing practices in which an entity publicly misrepresents or exaggerates the positive environmental impact or attributes of a product or service to create a favorable impression that is not supported by evidence (product-level claims), or in which an entity misrepresents the entity's overall impact on the environment (firm-level claims).¹⁸ Importantly, the term "greenwashing" is a broad descriptor, not

16. Evie Liu, SEC's Gensler Is Targeting Greenwashing of ESG Funds, *Barron's* (Mar. 1, 2022), <https://www.barrons.com/articles/sec-gensler-greenwashing-esg-funds-51646166625> (on file with the *Columbia Law Review*).

17. See, e.g., Thomas Day, Silke Mooldijk, Sybrig Smit, Eduardo Posada, Frederic Hans, Harry Fearnough, Aki Kachi, Carsten Warnecke, Takeshi Kuramochi & Niklas Höhne, Corporate Climate Responsibility Monitor: Assessing the Transparency and Integrity of Companies' Emission Reduction and Net-Zero Targets 5 (2022), <https://newclimate.org/sites/default/files/2022-06/CorporateClimateResponsibilityMonitor2022.pdf> [<https://perma.cc/WV7S-M8GF>] (assessing the climate strategies and claims of twenty-five major global firms and finding that net-zero commitments reduce aggregate emissions on average by 40%, rather than 100%); Ashish Kothari, The 'Net-Zero' Greenwash, *Meer* (July 13, 2021), <https://www.meer.com/en/66356-the-net-zero-greenwash> [<https://perma.cc/B4VX-UPWG>] (suggesting that "net zero" is just hiding business-as-usual strategies); Joel Makower, Is 'Net-Zero' Greenwash?, *Greenbiz* (Nov. 17, 2020), <https://www.greenbiz.com/article/net-zero-greenwash> (on file with the *Columbia Law Review*) (questioning the integrity of net-zero commitments and identifying ways in which firms can hedge their pledges); Tim Quinson, Al Gore Warns Greenwashing May Stop the Climate Fight in Its Tracks, *Bloomberg* (July 13, 2021), <https://www.bloomberg.com/news/articles/2021-07-13/al-gore-warns-greenwashing-may-stop-climate-fight-in-its-tracks-green-insight> (on file with the *Columbia Law Review*) (noting former Vice President Al Gore's concern that greenwashing can undermine progress in addressing the climate emergency).

18. Miriam A. Cherry & Judd F. Sneirson, Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster, 85 *Tul. L. Rev.* 983, 985 (2011) (defining greenwashing as the use of environmental rhetoric without actual commitment); Magali A. Delmas & Vanessa Cuerel Burbano, The Drivers of Greenwashing, 54 *Cal. Mgmt. Rev.* 64, 65 (2011) (defining greenwashing as "the intersection of two firm behaviors: poor environmental performance and positive communication about environmental performance"); William S. Laufer, Social Accountability and Corporate Greenwashing, 43 *J. Bus. Ethics* 253, 253 (2003) (defining greenwashing as a "form[] of disinformation from organizations seeking to repair public reputations and further shape public images"). In litigation against ExxonMobil, the Commonwealth of Massachusetts focused on how companies employ greenwashing to induce consumers to purchase their products. *Massachusetts v. ExxonMobil Corp.*, 462 F. Supp. 3d 31, 37 (2020). Some have distinguished greenwashing from "environmental fraud." See Eric W. Orts & Paula C. Murray, Environmental Disclosure and Evidentiary Privilege, 1997 *U. Ill. L. Rev.* 1, 7, 49 (defining environmental fraud as "[f]ailure to disclose legal violations found through [environmental] auditing in public reports" and arguing that it should be subject to harsher penalties than other false or

a legal term of art like “fraud” or “negligence.” Whether different types of claims about environmental performance or intentions that might be described as greenwashing are “false” or “misleading” has significant First Amendment implications—implications that bear on whether such claims are protected speech or can be legally regulated for truthfulness.

Accusations of greenwashing have bedeviled firms with respect to their marketing of specific products, with some claims rising to the level of legal action.¹⁹ Procter & Gamble faced claims of greenwashing when it advertised a brand of paper towel as containing recycled material when in fact only the inner cardboard tube contained recycled fibers.²⁰ Firms have faced class action lawsuits under state consumer protection laws, such as one suit against a cookware company based on its claims that its pots and pans were “toxin free” and “good for the environment” when they allegedly contained “compounds that are known to be toxic.”²¹ Others have faced lawsuits alleging false and deceptive advertising based on advertisements that cleaning products were “non-toxic” and “earth friendly” when they allegedly contained ingredients that were harmful to people, animals, and the environment.²² And greenwashing claims surrounded the infamous Keurig coffee pods, based on Keurig’s claims that the pods were recyclable when a substantial number of nationwide recycling facilities would not actually accept them for recycling.²³ Despite greenwashing’s broad definition, which encompasses both product- and firm-level claims,

misleading statements made in environmental reports). While common law findings of liability for past misleading statements about firms’ own knowledge are outside of the direct scope of this Essay, such claims would be subject to the same First Amendment values and doctrines articulated here. See generally *N.Y. Times v. Sullivan*, 376 U.S. 254, 279–83 (1964) (applying First Amendment limits to defamation cases brought against public officials). For this Essay’s taxonomy of greenwashing, see *infra* Part I.

19. For a discussion of the legal enforcement mechanisms available to combat greenwashing, see *infra* Part II.

20. Jill Meredith Ginsberg & Paul N. Bloom, *Choosing the Right Green Marketing Strategy*, 46 *Mass. Inst. Tech. Sloan Mgmt. Rev.* 79, 79 (2004) (mentioning the Procter & Gamble case).

21. *Class Action Complaint & Demand for Jury Trial* paras. 4–5, *Saldivar v. Cookware Co.*, No. 19-cv-06014-JST (N.D. Cal. filed Sept. 25, 2019) (emphasis omitted).

22. See *Bush v. Rust-Oleum Corp.*, No. 20-cv-03268-LB, 2021 WL 24842, at *1, *6 (N.D. Cal. Jan. 4, 2021) (denying motion to dismiss claims that Rust-Oleum misrepresented Krud Kutter as “non-toxic” and “earth friendly” when the products were alleged to harm humans, animals, and the environment); *Companies Accused of Greenwashing* (Apr. 22, 2022), <https://www.truthinadvertising.org/six-companies-accused-greenwashing/> [<https://perma.cc/2ATT-ME35>] (last updated June 28, 2022) (listing other companies accused of falsely marketing their products).

23. See *Smith v. Keurig Green Mountain, Inc.*, No. 18-cv-06690-HSG, 2020 WL 5630051, at *1, *3 (N.D. Cal. Sept. 21, 2020) (granting motion for class certification under California law as to whether claim that Keurig’s K-Cups were “recyclable” was deceptive).

much of the focus to date—at least when it comes to litigation—has been on product-level claims.²⁴

The issue of greenwashing is taking a broader turn, however, with much higher stakes. In March 2021, three environmental organizations filed a complaint with the Federal Trade Commission (the FTC or the “Commission”), the federal agency charged with enforcing laws that prohibit false and deceptive claims in advertising.²⁵ The complaint contends that the fossil fuel firm Chevron has engaged in greenwashing by overstating and misrepresenting the *firm’s overall efforts* to reduce emissions of greenhouse gases and increase its investments in renewable energy.²⁶ This is the first complaint filed with the Commission invoking the Commission’s “Green Guides” to claim that a firm has misled consumers about how it markets *its overall climate strategy and the environmental impact of its operations*, rather than merely a complaint about the marketing of a specific product or service.²⁷

Why does this matter? At a basic level, whether the law can regulate firms’ green marketing claims for truthfulness has material implications for whether, collectively, humanity can keep global emissions below a threshold to avoid the worst impacts of climate change. Misleading and deceptive claims about emissions reductions and climate-friendly business strategies can muddy the waters of what firms are actually doing to address climate change. Consumers and investors, who are often information dependent upon firms to shed light on their practices and strategies, may be misled into taking actions within the marketplace that are inconsistent with achieving either personal or societal climate goals. And they may not demand the political action they might, were they to know more clearly what the private sector is (or is not) doing to mitigate climate change. The primary motivating question of this Essay is therefore the extent to which the First Amendment permits regulation of firms’ environmental claims for truthfulness.

24. Entities other than business firms can engage in greenwashing. Frances Bowen, *After Greenwashing: Symbolic Corporate Environmentalism and Society* 3 (2014) (arguing that greenwashing can occur at the firm or product level); Thomas P. Lyon & A. Wren Montgomery, *The Means and Ends of Greenwash*, 28 *Org. & Env’t* 223, 225 (2015) (noting that NGOs and governments can engage in greenwashing and in fact “may often serve as partners in corporate greenwashing”). The focus here, however, is on consumer-oriented claims in the marketplace, and thus this Essay focuses exclusively on business firms.

25. See *infra* Part II.

26. Myles McCormick, *Chevron Accused of ‘Greenwashing’ in Complaint Lodged With FTC*, *Fin. Times* (Mar. 16, 2021), <https://www.ft.com/content/2985e18a-fdcb-4cd2-ae3-d5a0fe4cdab2> (on file with the *Columbia Law Review*); Corey Paul, *Environmental Groups Accuse Chevron of ‘Greenwashing’ in FTC Complaint*, *S&P Glob. Mkt. Intel.* (Mar. 16, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/environmental-groups-accuse-chevron-of-greenwashing-in-ftc-complaint-63206914> [<https://perma.cc/VBP3-ZHB3>].

27. Paul, *supra* note 26.

Under this Essay's analysis, a broader set of green marketing claims can be constitutionally regulated for truthfulness and a broader set of statements by business firms should be treated with relaxed constitutional scrutiny than current doctrine arguably envisions. This is for two reasons. First, many forms of greenwashing—namely those that are false or misleading, or which provide information that informs consumers' political choices—are subject to either no First Amendment coverage or the reduced scrutiny of the commercial speech doctrine under current law. Since the 1990s, however, established law has been increasingly undermined and contested, as litigants have sought to—and some courts have agreed to—transform the First Amendment into an all-purpose deregulatory tool in what many have described as First Amendment *Lochnerism* or New *Lochnerism*.²⁸ This Essay pushes back against that deregulatory effort. Second, both pre-New *Lochnerism* commercial speech law and the deregulatory view that now challenges it fail to offer a coherent view of the freedom of speech or the forms of democracy it advances. This Essay thus breaks new ground in offering a new theory of the purposes of the freedom of speech in economic life.

In making this argument, this Essay begins by explaining that courts addressing speech rights in these contexts have, to date, produced notoriously confusing and inconsistent First Amendment case law. The root of that confusion is that speech at the juncture of politics, markets, and science also sits at the intersection of three quite disparate First Amendment doctrines: the First Amendment principles that apply to speech in public discourse (politics), the commercial speech doctrine and related doctrines that generally apply to expression in economic life (markets), and free speech doctrines around expertise and knowledge production (science).²⁹ These contrasting doctrines reflect distinct constitutional values, constitutionally relevant institutional differences, and varying approaches to the production of information, individual choice, and truth and falsity.

Ultimately, this Essay does not simply apply existing First Amendment speech doctrine to green marketing claims. Instead, it evaluates and reconceives the purposes of the First Amendment regarding expression at the juncture of politics and markets. It argues that the values underlying

28. There is a large literature describing First Amendment *Lochnerism*. Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. Rev. 318, 331 n.57 (2018) [hereinafter Shanor, *First Amendment Coverage*] (collecting citations); Amanda Shanor, *The New Lochner*, 2016 Wis. L. Rev. 133, 182–91 [hereinafter Shanor, *The New Lochner*] (analyzing the parallels and differences between modern commercial speech doctrine and *Lochner v. New York*, 198 U.S. 45 (1905), and concluding that the First Amendment has the potential to serve as an even more powerful deregulatory tool than did the liberty of contract announced in *Lochner*).

29. See Robert Post, *Compelled Commercial Speech*, 117 W. Va. L. Rev. 867, 871–72 (2015) [hereinafter Post, *Compelled Commercial Speech*] (“[T]he Constitution values different kinds of speech for different reasons. First Amendment doctrine protects each distinct kind of speech in a manner appropriate for safeguarding its particular kind of constitutional value.”).

the freedom of speech are to protect decisional and participatory liberty in both political and economic life. The purpose of the First Amendment in both settings, it contends, is to advance a deep form of participatory democracy. This theory provides needed explanatory support for First Amendment doctrine that predates the New Lochnerism and goes beyond it to advance a holistic understanding of the purposes of the freedom of speech at this intersection.

While seeds of this understanding of the First Amendment are present both in canonical commercial speech cases and in the broader pattern of First Amendment coverage,³⁰ the notion that the freedom of speech does and should advance democratic norms in economic life has been largely ignored. The principal self-government theories of the First Amendment understand democracy as voice in government. This Essay argues that this conception of governance unduly limits the scope of democracy and depends on a questionable division between the political and the commercial. Instead, it adopts a more capacious notion of democratic participation and recognizes that there is no clear *ex ante* philosophical boundary between speech that is “commercial” (and thus subject to regulation for truthfulness) or “political” (and thus presumptively not subject to such regulation). It argues that by looking at the normative values animating these different doctrines and the sorts of social relationships they seek to regulate and produce, we can ask more tractable questions.

This Essay delves into the case of greenwashing because it highlights the underlying core values that the First Amendment aims to protect, which is where any assessment of First Amendment doctrine should begin. This focus on underlying values—to protect decisional and participatory liberty in both political life and the marketplace, especially in cases of informational asymmetry—yields the conclusion that more green marketing claims ought to be subject to regulation for truthfulness than are under the current doctrinal morass. This new theoretical lens will not only clarify the First Amendment status of greenwashing (and the regulations that seek to address it) but also provide a conception of the First Amendment that advances democracy in a more thoroughgoing way.

The Essay proceeds in five parts. Part I provides the key features of greenwashing as a broad concept, and Part II elaborates the regulatory authority of government actors like the FTC and the states to address commercial speech that is false, deceptive, or misleading. Part III details the First Amendment terrain in which greenwashing is situated and provides a typology of the relevant constitutional considerations that should inform the application of differing First Amendment rules. Part IV then brings these frameworks together and offers a path forward. It advances a new theory of the First Amendment contexts, values, and considerations that should inform the application of differing constitutional rules. Part V merges these inquiries to offer implications of this analysis for the varying

30. See *infra* Part III.

forms of greenwashing the Essay identifies and provides some suggestions about solutions. In so doing, this Essay offers clarity for those addressing the increasingly important constitutional questions at the intersection of politics, science, and markets.

I. THE MANY FORMS OF GREENWASHING

To determine whether and to what extent green marketing claims are covered under the First Amendment and, if covered, the level of scrutiny that applies (and thus the extent to which regulation is permitted),³¹ it is first necessary to define the scope of what constitutes greenwashing. Scholarship in many fields, including management, marketing, law, and business ethics, has examined different aspects of greenwashing, although these literatures do not always interact.³² This lack of cross-disciplinary conversation is striking because greenwashing is a phenomenon that raises implications at the intersection of law, ethics, marketing, strategic management, consumer protection, and energy and environmental policy, among others.³³

Reading these literatures together yields several key insights with implications for this Essay's First Amendment analysis about the forms and causes of greenwashing, as well as the institutional and legal factors that can limit or deter this phenomenon. Indeed, management and marketing scholarship have contributed substantially to our understanding of greenwashing by focusing on three questions: (1) What is greenwashing?;³⁴ (2) Why do firms engage in greenwashing?;³⁵ and (3) What are the

31. For a discussion of the distinction between First Amendment "coverage" and "scrutiny," see *infra* notes 247–251 and accompanying text.

32. But see Lyon & Montgomery, *supra* note 24, at 228–29, surveying literature from several fields, including the law of deceptive marketing, management, and economics, among others.

33. Cf. *id.* at 224 (calling for a broader, cross-disciplinary approach to researching greenwashing).

34. Thomas P. Lyon & John W. Maxwell, Greenwash: Corporate Environmental Disclosure Under Threat of Audit, 20 *J. Econ. Mgmt. Strategy* 3, 7–10 (2011) (defining greenwashing as a phenomenon of selective disclosure).

35. See Delmas & Burbano, *supra* note 18, at 65–66 (examining the factors that lead firms to engage in greenwashing, both at the product and firm level); Eun-Hee Kim & Thomas P. Lyon, Greenwash v. Brownwash: Exaggeration and Undue Modesty in Corporate Sustainability Disclosure, 26 *Org. Sci.* 705, 707–08 (2015) (hypothesizing that growing firms are more likely to engage in greenwashing); Eun-Hee Kim & Thomas P. Lyon, Strategy Environmental Disclosure: Evidence From the DOE's Voluntary Greenhouse Gas Registry, 61 *J. Env't Econ. & Mgmt.* 311, 312 (2011) (analyzing the political and economic factors that motivate firms to make voluntary environmental disclosures); Erin M. Reid & Michael W. Toffel, Responding to Public and Private Politics: Corporate Disclosure of Climate Change Strategies, 30 *Strategic Mgmt. J.* 1157, 1158 (2009) (explaining why firms respond to pressure campaigns).

implications of greenwashing?³⁶ In contrast, legal scholarship has largely tended to focus on how to limit greenwashing through regulation, social pressure, certification programs, or greater mandatory disclosure rules, questions that become more salient in Part II and beyond.³⁷

This Part begins with an account of what constitutes greenwashing, why firms engage in greenwashing, and what limits greenwashing. It then develops and offers a deep dive into an analytical taxonomy of greenwashing informed by this theoretical understanding.

A. *What Is Greenwashing?*

Greenwashing is an “umbrella” category that includes a number of different forms of “misleading environmental communications.”³⁸ Firms can engage in greenwashing at both the level of products and services a firm offers for sale to consumers and at the level of the firm itself.³⁹ Professors Magali Delmas and Vanessa Burbano have defined the phenomenon broadly as “poor environmental performance and positive communication about environmental performance.”⁴⁰ Professors Tom Lyon and John Maxwell define greenwashing as “selective disclosure of positive information about a company’s environmental or social performance, without full disclosure of negative information on these dimensions, so as to create an overly positive corporate image.”⁴¹ Some scholars have defined it to encompass “communications that mislead receivers into adopting overly positive beliefs about an organization’s environmental performance.”⁴² Others have examined greenwashing in the context of the larger phenomenon of “selective disclosure,” which constitutes a “symbolic strategy whereby firms seek to gain or maintain legitimacy by disproportionately revealing beneficial or relatively benign performance indicators to obscure their less impressive overall performance.”⁴³ This focus on firm-level selective disclosures situates the phenomenon within a larger context as a “general corporate symbolic process that also applies

36. Christopher Marquis, Michael W. Toffel & Yanhua Zhou, *Scrutiny, Norms, and Selective Disclosure: A Global Study of Greenwashing*, 27 *Org. Sci.* 483, 484 (2016) (examining organizational attributes and institutional mechanisms that dissuade firms from engaging in greenwashing).

37. See Robin M. Rotman, Chloe J. Gossett & Hope D. Goldman, *Greenwashing No More: The Case for Stronger Regulation of Environmental Marketing*, 72 *Admin. L. Rev.* 417, 420 (2020) (arguing for more stringent regulation of claims that non-agricultural items are “organic”); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 *Harv. L. Rev.* 1197, 1293–306 (1999) (arguing that the SEC should require disclosure of environmental information to counteract misleading corporate advertising); *infra* notes 137–138.

38. Lyon & Montgomery, *supra* note 24, at 224.

39. *Id.* at 225.

40. Delmas & Burbano, *supra* note 18, at 65.

41. Lyon & Maxwell, *supra* note 34, at 9.

42. Lyon & Montgomery, *supra* note 24, at 224.

43. Marquis et al., *supra* note 36, at 483.

to many other corporate activities such as financial reporting.”⁴⁴ Taking these definitions together, greenwashing can include not only demonstrably false claims but also statements and disclosures that are technically true but nonetheless create a false or misleading impression. Running through this scholarship is the essential point that statements about a firm’s environmental performance or symbolic actions cannot always be categorized as clearly true or false in a binary manner; rather, there is more likely a continuum from truth to “slight exaggeration to full fabrication.”⁴⁵ For example, a firm might highlight its “significant investment” in renewable energy projects, when the investment either is miniscule or far in the future (some exaggeration) or does not in fact exist (full fabrication). To the extent greenwashing comes in the form of explicit “statements,” such statements can occur in mandatory disclosures such as a firm’s 10-Ks, in voluntary corporate sustainability reports, in reports to nongovernmental organizations (NGOs) like the CDP (formerly the Carbon Disclosure Project), and generally in advertising materials or on corporate websites.⁴⁶

Not all greenwashing comes in the form of statements or disclosures. Indeed, recognizing the importance of “image advertising,”⁴⁷ recent scholarship has expanded the definition of greenwashing to include symbolic speech, visual imagery, and actions. Thus, greenwashing may include misleading or deceptive use of symbols or images in product advertising or advertising about the firm’s environmental practices.⁴⁸ Others contend that it can include symbolic actions⁴⁹ such as “decoupling,” which represents a “[d]isconnect between the structures and the activities of an organization” or between the “actions and goals of an organization,”⁵⁰ for example by publicly announcing a new firm-wide initiative on climate but giving the initiative limited funding or authority. Greenwashing can also include “symbolic management,” in which a firm makes a promise to improve its environmental performance but fails to follow through on its promise.⁵¹ A final example of greenwashing of this more symbolic sort can involve “co-opted NGO endorsements/partnerships” that may give firms an air of legitimacy with respect to environmental performance that does

44. *Id.*

45. Lyon & Montgomery, *supra* note 24, at 225.

46. *Id.* at 236 (citing 10-Ks, corporate sustainability reports, and reports to the CDP).

47. *Id.* at 225.

48. See *infra* section I.C. Under First Amendment jurisprudence, images can be “communications” even if they are merely creating an impression, rather than disclosing information. Lyon & Montgomery, *supra* note 24, at 226.

49. See Bowen, *supra* note 24, at 63–68 (describing the distance between a firm’s “symbolic performance” and its “substantive environmental improvements” as a “symbolic gap”).

50. Lyon & Montgomery, *supra* note 24, at 227 tbl.1 (citing sources defining various misleading behaviors).

51. *Id.*

not hold up on closer scrutiny.⁵² These symbolic strategies and uses of imagery may be harder to categorize as either true or false, deceptive, or misleading but may serve as evidence of deception in a more traditional statement or disclosure.

Finally, while some scholars assume that greenwashing is always socially harmful, others have questioned whether in some cases, the “benefits of increased ‘green talk’ may outweigh the harms,”⁵³ for example, by simply increasing the sense of normalcy of discourse around business responsibility to the environment.

B. *Why Greenwashing: Drivers and Effects*

Understanding greenwashing’s effects on the public—including both consumers and investors—demonstrates not only the significance of the phenomenon but also why it should be characterized as commercial speech. As discussed below, empirical studies show that firm marketing of its corporate social or environmental responsibility can influence consumer perceptions about the quality of goods and influence consumer decisions about purchases within the marketplace.⁵⁴ In addition, when the public learns that private firms are engaged in different forms of environmental action—such as purchasing only cage-free eggs or adopting recycling targets—this can also affect (both positively and negatively) how the public thinks about regulating such activities through public law.

The primary factors driving firms to engage in greenwashing are external, internal/organizational, and individual forces.⁵⁵ Scholars have demonstrated that a primary external reason why firms engage in greenwashing is to gain legitimacy in the eyes of their stakeholders,⁵⁶ which can also be characterized as a reputational benefit. Other external influences include pressure from stakeholders like consumers, investors, and NGOs, while internal influences include lax ethical culture within firms and “inertia,” among others.⁵⁷ To put it bluntly, firms engage in greenwashing because it works. Delmas and Burbano helpfully categorize organizations as either “green” or “brown,” in terms of their environmental performance, and either “silent” or “vocal,” in terms of the extent to which they communicate about their environmental performance.⁵⁸ Thus, a “vocal green” organization both has good environmental performance and communicates about that performance accurately; while a “silent green” organization has good environmental performance but does not market its

52. *Id.* at 237.

53. *Id.* at 225 (citing Bowen, *supra* note 24, at 3).

54. See *infra* notes 62–63 and accompanying text.

55. Delmas & Burbano, *supra* note 18, at 65. This section focuses less on the individual forces, which may include (lack of) business ethics.

56. *Id.* at 71–72.

57. *Id.* at 66.

58. *Id.* at 67.

environmental performance.⁵⁹ A “silent brown” organization is a poor environmental performer but does not suggest in marketing that its environmental performance is good.⁶⁰ A “greenwashing” organization is the final category—a firm with poor environmental performance that nonetheless markets itself as having good environmental performance.⁶¹ Relying on this taxonomy, one study found that while “greenwashing organizations generate a less positive score on perceived environmental performance than do vocal green or silent green organizations,” nonetheless “greenwashing organizations generate a more positive score on perceived environmental performance than do silent brown organizations.”⁶² Thus, greenwashing can be effective—at least under some circumstances—in shifting consumer perceptions.

One way to categorize the sought-after legitimacy is as a “halo effect.”⁶³ In this context, a halo effect refers to the psychological effect by which consumer awareness of positive environmental attributes of a product (or firm) leads those consumers or investors to have a positive overall impression of the product’s (or firm’s) environmental performance that is not borne out by the evidence.⁶⁴ The halo effect has been defined as the “tendency of overall evaluations of a person/object to influence evaluations of the specific properties of that person/object in a way that is consistent with the overall evaluation.”⁶⁵ To put that definition into ordinary language, the idea is that when individuals learn about certain positive attributes of a product or firm, they come to believe that other attributes of the firm are similarly positive, even in the absence of evidence to that effect. For example, consumers and investors might perceive that a firm that derives all of its energy from solar power is likewise an environmental leader on water use or forestry management, even in the absence of evidence on its water use or forestry practices. More generally, a halo

59. *Id.*

60. *Id.* at 67–68.

61. *Id.* at 67.

62. Menno D.T. De Jong, Karen M. Harkink & Susanne Barth, Making Green Stuff? Effects of Corporate Greenwashing on Consumers, 32 *J. Bus. & Tech. Commc’n* 77, 79, 98 (2018).

63. Lyon & Montgomery, *supra* note 24, at 227 tbl.1 (citing sources on this effect). On the halo effect in the context of corporate social responsibility (CSR), see generally Alexander Chernev & Sean Blair, Doing Well by Doing Good: The Benevolent Halo of Corporate Social Responsibility, 41 *J. Consumer Rsch.* 1412, 1413 (2015) (demonstrating that “acts of corporate responsibility . . . can influence consumer perceptions of the functional performance of the company’s products” even when those acts are “unrelated to the company’s core business”); Steve Hoeffler & Kevin Lane Keller, Building Brand Equity Through Corporate Societal Marketing, 21 *J. Pub. Pol’y & Mktg.* 78, 80 (2002) (arguing that companies engaged in socially conscious marketing are more likely to be perceived as “doing the right things”); Lance Leuthesser, Chiranjeev S. Kohli & Katrin R. Harich, Brand Equity: The Halo Effect Measure, 29 *Eur. J. Mktg.* 57, 57 (1995) (designing a method for measuring brand loyalty based on existing empirical research on the halo effect).

64. Lyon & Montgomery, *supra* note 24, at 227.

65. Chernev & Blair, *supra* note 63, at 1414.

effect could lead the public to perceive that a firm's products are of generally higher quality when they learn that the firm engages in some form of corporate environmental or social responsibility. Ultimately, this halo effect can influence the decisions of consumers within the marketplace to purchase goods from Firm A rather than from Firm B if there is a perception that Firm A is doing more to protect the environment. A failure to achieve this reputational benefit can lead to lost sales.⁶⁶ In addition to advertising existing products as environmentally friendly, the introduction of new "green" products can have a significant positive effect on "brand attitude," which refers to an "overall evaluation of a brand."⁶⁷ Thus, when a major firm introduces a new product like "net-zero fuel," this can have a positive impact on the existing brand and the firm's other products.

Empirical studies have borne this out by demonstrating that a halo effect arises for a firm's products when that firm engages in charitable giving or a corporate social responsibility (CSR) program—even when the CSR program is unrelated to the product or its specific qualities.⁶⁸ For example, study participants who learned about a firm's CSR program concluded that a tooth-whitening product, a hair-loss treatment, the taste of wine, and the "sharpness" of text scanned by a fictitious software program all performed better than when those participants received no information about the firm's CSR.⁶⁹ The effect applies not only to a firm's specific products but can also apply to the firm's general reputation—as is relevant for firm-level greenwashing.⁷⁰ Co-opted NGO endorsements can likewise create a halo effect for the firms engaged in a partnership with an NGO with a good reputation,⁷¹ as can co-branding relationships between a firm and an environmental organization or entity with a positive environmental reputation like the national parks.⁷²

66. There is a substantial business ethics literature on the subject of ethical consumerism, which is "the practice of choosing to buy certain goods and services at least partly on the basis of ethical considerations." See, e.g., Waheed Hussain, *Is Ethical Consumerism an Impermissible Form of Vigilantism?*, 40 *Phil. & Pub. Affs.* 111, 112 (2012) (arguing that certain forms of ethical consumerism are consistent with democratic values); see also Brian Berkey, *Ethical Consumerism, Democratic Values, and Justice*, 49 *Phil. & Pub. Affs.* 237, 240 (2021) (responding to Waheed Hussain).

67. Mitchell C. Olsen, Rebecca J. Slotegraaf & Sandeep R. Chandukala, *Green Claims and Message Frames: How Green New Products Change Brand Attitude*, 78 *J. Mktg.* 119, 120, 129 (2014).

68. This effect is stronger when there is a greater nexus between the firm's business model and the cause or object of the CSR program. See Sankar Sen, Shuili Du & C.B. Bhattacharya, *Corporate Social Responsibility: A Consumer Psychology Perspective*, 10 *Current Op. Psych.* 70, 71 (2016).

69. Chernev & Blair, *supra* note 63, at 1413, 1415–18; see also Sarah E. Light, *National Parks, Incorporated*, 169 *U. Pa. L. Rev.* 33, 91–92 (2020) [hereinafter Light, *National Parks*] (discussing the halo effect in the context of co-branding with national and state parks).

70. Chernev & Blair, *supra* note 63, at 1413.

71. Lyon & Montgomery, *supra* note 24, at 237 (citing studies).

72. Light, *National Parks*, *supra* note 69, at 89–96.

Other drivers of greenwashing include consumer or investor self-identification. Consumers who care about the environment or otherwise self-associate with an identity that involves environmental protection will make choices in the marketplace that are consistent with that identity. Indeed, in marketing research, scholars have described it as “uncontroversial” to state that “consumers like products, brands, and consumption behaviors that are linked to category labels with which they self-associate.”⁷³ If firms misrepresent their products or themselves as environmentally friendly, then consumers who seek to make choices consistent with their identity in the marketplace are hindered from doing so.

There is an important limitation to the halo effect and some of these other drivers of greenwashing, however. Notably, when consumers view the firm’s actions—such as engaging in a CSR program—as the result of “self-interest rather than benevolence” toward the object of the CSR program, the halo effect does not necessarily arise.⁷⁴ In other words, if consumers see through the veneer of corporate sustainability programs and find them to be a sham, there is no resulting halo effect.⁷⁵ Professors Ike Silver, George Newman, and Deborah Small have referred to this as “inauthenticity aversion,” namely the “judgment process by which consumers perceive and condemn inauthenticity” when they detect a “mismatch between what an entity claims to be and what that entity really is upon closer scrutiny.”⁷⁶ Notably, consumers may feel such aversion not only when there is deception or a factual misrepresentation but also when there is a perception of ulterior motives (that the entity is acting merely to seek profit, for example, as in the case of “virtue signaling”), as well as “adulteration” (when an improper method was used to achieve an outcome or create a product).⁷⁷ Likewise, scholars have demonstrated that there can be

73. Americus Reed II, Mark R. Forehand, Stefano Puntoni & Luk Warlop, *Identity-Based Consumer Behavior*, 29 *Int’l J. Rsch. Mktg.* 310, 310 (2012) (offering a set of identity principles to unify scholarship in this area).

74. Sankar Sen & C.B. Bhattacharya, *Does Doing Good Always Lead to Doing Better? Consumer Reactions to Corporate Social Responsibility*, 38 *J. Mktg. Rsch.* 225, 238–39 (2001).

75. Although firms may engage in greenwashing to achieve legitimacy in the eyes of their customers, firm intent is not relevant to the legal inquiry of whether specific marketing claims are actionable greenwashing. See *infra* Part II. Empirical evidence on this subject suggests that “what people take from a communication is subjective and filtered through their own mental formations, so that greenwashing need not be deliberate.” Lyon & Montgomery, *supra* note 24, at 225, 228 (“If most consumers assume ‘all natural’ means that a product meets USDA Organic standards, then it would be misleading to make the claim that a product is all natural if it is not organic.”).

76. Ike Silver, George Newman & Deborah A. Small, *Inauthenticity Aversion: Moral Reactance Toward Tainted Actors, Actions, and Objects*, 4 *Consumer Psych. Rev.* 70, 71 (2021). While inauthenticity based on deception is somewhat straightforward, ulterior motive inauthenticity arises because “consumers think of cause-marketing, social responsibility, philanthropy, and volunteering as belonging to a class of actions which ought to be done out of a genuine desire to help others. When observed prosocial behavior seems motivated instead by profits or reputation, it seems insincere and inauthentic.” *Id.* at 75.

77. *Id.* at 73.

“backfiring” effects when a brand tries too hard by using not merely a reference to the identity but a suggestion that purchasing the product is “identity-defining,” because the consumer perceives such marketing as a “threat to free identity expression.”⁷⁸

One recent study demonstrated that “greenwashing has a detrimental effect on consumers’ views of the communicative integrity of an organization” and that consumers are less likely to be interested in purchasing its products.⁷⁹ This study provided participants not only with the marketing campaign of an invented firm but also with information in a “test report” that evaluated the truthfulness of the environmental claims in the firm’s advertisement (e.g., “Pretends to be environmentally friendly but has a low score on environmental friendliness. The [product] contains aggressive chemicals. Besides, the bottles are not environmentally friendly.”).⁸⁰ In the ordinary course of viewing marketing campaigns, consumers do not have access to such evaluations; thus, this study does not attempt to test whether consumers are able to perceive (or learn through independent research) whether “green” marketing claims are true.⁸¹ Although this perception led consumers to view the greenwashing organization less favorably than vocal and silent green organizations, it is important to note that the authors found that greenwashing organizations nonetheless generated a slightly more positive score on “perceived environmental performance” than silent brown organizations.⁸² They interpret this finding to mean that “even when consumers know that green information is not (entirely) true, organizations that explicitly communicate an interest in environmental issues create a more favorable image than do those that entirely neglect the environment as an issue of interest.”⁸³

Firms’ actions with respect to the environment can influence not only consumer purchases within the marketplace but also public attitudes toward regulation or legislation on the same subject matter. For example, one study found that when there was broad industry adoption of private environmental governance (all firms in an industry adopting recycling standards rather than only half of firms), members of the public were *less* inclined to support public legislation or regulation on the same subject matter.⁸⁴ They hypothesized that there was a perception that the private

78. Amit Bhattacharjee, Jonah Berger & Geeta Menon, When Identity Marketing Backfires: Consumer Agency in Identity Expression, 41 J. Consumer Rsch. 294, 294, 296 (2014) (noting that people seek to reassert their freedom and autonomy in response to perceived threats).

79. De Jong et al., *supra* note 62, at 99–100.

80. *Id.* at 90–91.

81. The authors acknowledge that their study did not address and their findings do not apply to “situations of undetected greenwashing.” *Id.* at 103.

82. *Id.* at 98.

83. *Id.* at 99.

84. Neil Malhotra, Benoît Monin & Michael Tomz, Does Private Regulation Preempt Public Regulation?, 113 Am. Pol. Sci. Rev. 19, 32 (2019).

sector was managing the issue. This study raises concerns that false green claims can paint an inaccurate picture of the marketplace and thus distort the public's views on whether public laws are required.

Professors David Dana and Janice Nadler raised the concern that prior empirical studies had overlooked the importance of political orientation as a mediating factor in public attitudes toward legislation and thus explored whether public support for new legislation either increases or decreases when members of the public perceive that the private sector is sufficiently engaged in private governance to address the problem.⁸⁵ They found that when business firms engage in private environmental governance, this can lead to increased support among members of the public for legislation on the same subject matter; however, the extent of the support varies depending upon the person's political orientation.⁸⁶ They exposed participants along the political spectrum to information that either McDonald's or California had announced that it would only purchase cage-free eggs going forward (or, in the control condition, that the issue of eggs from battery-cage hens was controversial and subject to debate). They found:

Conservatives who learned that McDonalds had announced that it would stop sourcing battery-cage produced eggs were notably more supportive of government regulation and favorable in their consumer attitudes toward cage-free eggs than their conservative counterparts in other governance conditions. Indeed, the conservatives who learned about McDonalds' private governance measures were about as supportive of government regulation regarding egg production and attitude toward cage-free eggs as were liberals.⁸⁷

Other scholars have explored similar questions about how attitudes toward public regulation or legislation are affected when members of the public learn about private environmental governance by firms.⁸⁸ Whether such support increases or decreases may (in the specific context of First Amendment analysis) be less important than the fact that there is a demonstrated relationship between public attitudes about how to regulate the market and what private firms say they are doing about an issue like the climate or the environment in their public-facing statements. If such statements are misleading or deceptive (or if members of the public cannot trust these statements because of the belief that they are simply

85. David A. Dana & Janice Nadler, *Regulation, Public Attitudes, and Private Governance*, 16 *J. Empirical Legal Stud.* 69, 84 (2019).

86. *Id.* at 82–83.

87. *Id.* at 76.

88. See, e.g., Ash Gillis, Michael Vandenberg, Kaitlin Raimi, Alex Maki & Ken Wallston, *Convincing Conservatives: Private Sector Action Can Bolster Support for Climate Change Mitigation in the United States*, 73 *Energy Rsch. & Soc. Sci.* 1, 1–4 (2021) (assessing the impact of private climate governance by firms upon support for public policy).

greenwashing), this raises the concern that public attitudes toward regulating the marketplace may be distorted or manipulated.

Finally, the drivers of greenwashing include not only these internal and external forces but also the lack of clear limits. Numerous scholars have pointed out that a primary reason for greenwashing's entrenchment as a marketing practice is legal uncertainty about enforcement and limits.⁸⁹ In other words, in the absence of clear legal rules prohibiting certain types of green marketing claims, firms engage in more greenwashing than they would if enforcement rules and limits were clear-cut.

C. *Defining Categories*

In light of this scholarship, this section offers a preliminary taxonomy of greenwashing, categorizing its forms along a continuum from false to misleading to true.⁹⁰ This taxonomy highlights the challenge of designating expression at what are at best fuzzy boundaries. A key element in this analysis is whether certain expression is, for example, false in fact—as well as whether it creates a false understanding in the minds of the consuming public.⁹¹ This consideration will become important in the First Amendment analysis in Parts III and IV.

Many scholarly discussions of greenwashing begin with the seven “Sins of Greenwashing” first articulated by TerraChoice in 2007.⁹² These “sins” have catchy names like the “Sin of Fibbing,” and the “Sin of No Proof.”⁹³ Others have sought to expand the list—often with equally catchy names. While these “sins” inform this Essay’s understanding of specific forms of greenwashing, they were not identified with First Amendment concerns in mind. Accordingly, this taxonomy eschews these catchy labels. The analysis is instead informed by those categories that will prove salient for the First Amendment discussion to follow.

1. *Category One: False Statements and Symbols.* — The first category includes both False Statements and False Symbols. This group includes statements in advertising that lack proof or that are demonstrably false about a product, service, or the firm’s overall environmental performance.

89. See, e.g., Delmas & Burbano, *supra* note 18, at 65–66 (arguing that the current regulatory environment, in which regulation of greenwashing is limited and its enforcement is uncertain, is the “key driver” of greenwashing).

90. The focus here is only on speech that can be categorized as “commercial” rather than “political,” leaving that fault line for discussion in Part III.

91. See Christine Jolls, *Debiasing Through Law and the First Amendment*, 67 *Stan. L. Rev.* 1411, 1413–14 (2015) (arguing that whether a company’s communications adequately informed consumers so as to correct a deceptive impression created by the company is an empirical inquiry).

92. TerraChoice was subsequently acquired by UL (formerly known as Underwriters Laboratories), and the Seven Sins became Six. See *Sins of Greenwashing*, UL Sols., <https://www.ul.com/insights/sins-greenwashing> [<https://perma.cc/A42Q-HRXC>] (last visited Aug. 3, 2022).

93. *Id.*

In other words, such claims must be sufficiently specific and factual in nature that they are verifiable as fact but are not verified. This category is arguably the core case of greenwashing and the easiest to police.

Category One embodies false assertions of fact by a firm.⁹⁴ For example, the FTC filed a complaint against the firm Truly Organic, Inc., which had advertised its products as vegan, when they contained non-vegan ingredients including honey and lactose.⁹⁵ Similarly, the FTC successfully recouped penalties from major retailers Bed Bath & Beyond, Nordstrom, Backcountry.com, and J.C. Penney for falsely labeling textiles as “made of bamboo” when in fact they were made of bamboo that had been synthetically and chemically processed into rayon.⁹⁶ J.C. Penney had additionally made false claims that the bamboo “gave the products antimicrobial properties.”⁹⁷

A second, related type of greenwashing fits within Category One. It encompasses the situation in which a firm markets a product without substantiating the claim with “easily accessible supporting information” or a verified third-party certification.⁹⁸ One example of such a lack of proof would include claims that a product is manufactured with a listed percentage of recycled materials, when the firm fails to provide data on its website or a genuine third-party certification as evidence of the truth of the assertion. A second example would be a claim that a firm has achieved net-zero emissions or is carbon neutral, when the firm fails to provide factual data on its emissions or a third-party certification from an organization like the Science Based Targets Initiative to back up the claim. In 2014, for example, the FTC took action against Engineered Plastics Systems for its failure to substantiate marketing claims regarding the recycled content of its products.⁹⁹ The firm had claimed—without any data—that some of its

94. The Seven Sins framework refers to this—in what appears to be a major understatement—as the Sin of Fibbing. *Id.* Importantly, within this Essay’s framework, the fact that the speaker is or could be characterized as a commercial entity is not sufficient to make the speech commercial speech for First Amendment purposes. As discussed in sections IV.B and IV.C, several types of speech by businesses are not commercial speech, including statements of opinion (rather than fact), puffery, and speech petitioning any level of government.

95. Press Release, FTC, Truly Organic? The FTC Says No, Alleges Retailer Misled Consumers About Its Products (Sept. 19, 2019), <https://www.ftc.gov/news-events/press-releases/2019/09/truly-organic-ftc-says-no-alleges-retailer-misled-consumers-about> [<https://perma.cc/UJ6Z-Z5QY>] [hereinafter Press Release, Truly Organic].

96. Press Release, FTC, Nordstrom, Bed Bath & Beyond, Backcountry.com, and J.C. Penney to Pay Penalties Totaling \$1.3 Million for Falsely Labeling Rayon Textiles as Made of “Bamboo” (Dec. 9, 2015), <https://www.ftc.gov/news-events/press-releases/2015/12/nordstrom-bed-bath-beyond-backcountrycom-jc-penney-pay-penalties> [<https://perma.cc/R7TL-KP27>].

97. *Id.*

98. Sins of Greenwashing, *supra* note 92 (identifying this type as the Sin of No Proof).

99. Press Release, FTC, Too Good to Be Green: Company’s Plastic Lumber Claims Don’t Hold Up (July 17, 2014), <https://www.ftc.gov/news-events/press-releases/2014/07/>

products were “[m]ade entirely of recycled plastic lumber” and included “[a]ll recycled plastic design.”¹⁰⁰ The FTC’s investigation determined that the products were made with less than three-quarters recycled plastic content and thus that the claims lacked proof and were demonstrably false.¹⁰¹

A third type of greenwashing that falls into Category One is when a firm falsely claims that a product is certified by a third-party certification organization.¹⁰² For example, the FTC’s complaint against Truly Organic, Inc. included a claim that the firm falsely advertised its products as “100% organic,” when in fact they had not been certified as organic by the USDA.¹⁰³ In addition to the false claim that a firm’s product has been awarded an existing ecolabel, Category One would include cases of greenwashing in which a firm invents a fake ecolabel.¹⁰⁴

Not all green marketing claims include factual statements or words. In some cases, firms use symbols, imagery, and characters to convey the impression of positive environmental performance. Such symbols and images can actually be false as matters of fact and thus would also fall into Category One as *False Symbols*. Consider a recycling symbol on a product that cannot be recycled or a “heart healthy” symbol on a food that actually increases risk of cardiac disease. Each symbol conveys positive performance, when in fact the product does not actually meet the standard as advertised.

Both *False Statements* and *False Symbols*, by their nature, generally create a mistaken factual impression on the public. This is because the public relies on the firm’s false statement or symbol in forming their beliefs about the product or firm’s environmental performance. Each of these examples is arguably at the core of greenwashing.

2. *Category Two: Deceptive/Misleading Statements and Symbols.* — A second category of greenwashing—Deceptive/Misleading Statements and Symbols—is one level removed from directly false claims. This category includes statements and symbolic images that are not directly factual in nature and thus may not be as easily verifiable or unverifiable as the statements in Category One. It also includes statements that may be technically true but that create the mistaken impression among consumers or investors that a given product or service has positive environmental

too-good-be-green-companys-plastic-lumber-claims-dont-hold [https://perma.cc/ESV3-MVTB].

100. Id.

101. Id.

102. Sins of Greenwashing, *supra* note 92 (identifying this as a separate category known as the Sin of Worshipping False Labels).

103. Complaint for Permanent Injunction and Other Equitable Relief paras. 12–13, Fed. Trade Comm’n v. Truly Organic Inc., No. 1:19cv23832 (S.D. Fla. filed Sept. 13, 2019); Press Release, Truly Organic, *supra* note 95.

104. See Lyon & Montgomery, *supra* note 24, at 237, 241 (reviewing studies on the impact of fraudulent and misleading ecolabeling practices).

attributes. Some of the green marketing claims that fall into this category rely on a sort of sleight of hand or misdirection.

First among the forms of greenwashing in Category Two are product advertisements that state something that is technically true and convey a positive environmental impression; however, what is stated is irrelevant or unhelpful to consumers, or the advertisements gloss over the product's significant environmental harms.¹⁰⁵ The FTC has chosen to pursue some cases of this type.¹⁰⁶ Like the magician directing your attention away from his hands to a "talented assistant," Category Two often involves some misdirection or distraction. The Seven Sins taxonomy includes examples that highlight how such claims can mislead or deceive consumers. One such example is marketing that claims a product is "CFC-free," when in fact, ozone-depleting chlorofluorocarbons (CFCs) have been phased out in the United States since the 1980s under the Montreal Protocol.¹⁰⁷ Thus, even a true claim that a product is CFC-free can deceive consumers because it can suggest, misleadingly, that the product is environmentally superior to its competitors lacking CFC-free claims, when in fact the products are identical along this dimension as a matter of law.

A more recent example of a deceptive/misleading use of a symbol is highlighted by a new law in California.¹⁰⁸ The law prohibits the use of the recycling symbol (known as the "chasing arrows") on plastic packaging unless a firm can demonstrate that the material is actually accepted for recycling in most communities in California and that the resulting recycled plastic regularly becomes "feedstock" for new products.¹⁰⁹ New York is similarly considering a bill that would provide that it is "deceptive to misrepresent, directly or by implication, that a product or package is recyclable unless it can be collected, separated, or otherwise recovered from the waste stream through an established mechanical or manual recycling program for reuse or use in manufacturing or assembling another item."¹¹⁰ The bill would prohibit any "person" from offering for sale, selling, or distributing "any product or packaging for which a deceptive or misleading claim about the recyclability of the product or packaging is made."¹¹¹ Such claims can be either statements or made "through the use

105. The Seven Sins framework refers to these types of marketing claims separately as the Sin of Irrelevance and the Sin of Lesser of Two Evils, but this taxonomy highlights their similarities within Category Two. Sins of Greenwashing, *supra* note 92.

106. See *infra* section II.B.2.

107. Sins of Greenwashing, *supra* note 92; see also International Treaties & Cooperation About the Protection of the Stratospheric Ozone Layer, EPA, <https://www.epa.gov/ozone-layer-protection/international-treaties-and-cooperation-about-protection-stratospheric-ozone> [<https://perma.cc/Q24M-VJ4J>] (last updated Aug. 30, 2021) (describing the phaseout timeline for CFCs in developed countries under the Montreal Protocol).

108. S. 343, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

109. *Id.*

110. Assemb. 7668, 2021–2022 Leg., Reg. Sess. § 2 (N.Y. 2021).

111. *Id.*

of a universal recycling symbol or chasing arrows symbol.”¹¹² Arguably, if the plastic resin in the product is technologically capable of being recycled somewhere in the world, the use of the symbol is technically true. But, if the product cannot actually be recycled locally and the use of that symbol makes it more likely that consumers will purchase that item—thinking, mistakenly, that it can be recycled where they live and thus that it is preferable to a product that does not bear that symbol—then the use of the symbol is materially misleading.

Category Two likewise embodies those claims that highlight the positive environmental attributes of a product without mentioning the product’s other, environmentally harmful attributes.¹¹³ For example, the tobacco in a particular cigarette might have been grown using organic methods but to claim that cigarettes are organic misses the forest for the trees in light of cigarettes’ significant deleterious health effects—organic or not.¹¹⁴ A second example would be claims that a product is “recyclable” or “compostable,” when a lifecycle analysis might demonstrate significant environmental harms that arise during the manufacture of the product along other dimensions. For example, an advertisement could focus on the fact that paper is more easily recycled or composted than plastic, but a lifecycle analysis would reveal that the upstream use of chemicals or the greenhouse gases emitted during the process of making paper are nonetheless environmentally problematic.¹¹⁵ Such claims are frequently leveled against investment funds being marketed as “green” or otherwise socially responsible. Recently, the *Economist* published an exposé of sustainable finance, analyzing the world’s twenty largest funds focusing on “environmental, social, and governance” factors, also known as “ESG”

112. *Id.*

113. Under the Seven Sins taxonomy, these types of claims exemplify the Sin of Lesser of Two Evils, but under this taxonomy, these claims also encompass the Sin of the Hidden Trade-Off. Sins of Greenwashing, *supra* note 92.

114. See TerraChoice, *The Sins of Greenwashing: Home and Family Edition 10* (2010), <http://faculty.wvu.edu/dunnc3/rprnts.TheSinsofGreenwashing2010.pdf> [<https://perma.cc/Z4YN-GPBM>] (citing organic cigarettes and fuel-efficient SUVs as examples of the Sin of Lesser of Two Evils); *Eco-Friendly Product Claims Often Misleading*, NPR (Nov. 20, 2007), <https://www.npr.org/2007/11/30/16754919/eco-friendly-product-claims-often-misleading> [<https://perma.cc/8JFS-SJEP>] (citing example of organic cigarettes); *Greenwashing, Tobacco Tactics*, Univ. of Bath, <https://tobaccotactics.org/wiki/greenwashing/> [<https://perma.cc/F6YD-LR84>] (last updated July 12, 2022) (citing “eco-friendly” cigarette labelling as an example of industry greenwashing).

115. See TerraChoice Env’t Mktg. Inc., *The “Six Sins of Greenwashing™”: A Study of Environmental Claims in North American Consumer Markets 2–3* (2007), https://sustainability.usask.ca/documents/Six_Sins_of_Greenwashing_nov2007.pdf [<https://perma.cc/PF8M-UCVP>] (citing as an example of the Sin of the Hidden Trade-Off paper products that “promote their recycled content or sustainable harvesting practices without attention to manufacturing impacts such as air emissions, water emissions, and global warming impacts”).

funds.¹¹⁶ The analysis concluded that “[s]upposedly green and cuddly funds are stuffed full of polluters and sin stocks.”¹¹⁷ The analysis found that, on average, each of the studied funds—which are marketed as ESG products—“holds investments in 17 fossil-fuel producers.”¹¹⁸ Of the twenty funds, “[s]ix have invested in ExxonMobil,” “[t]wo own stakes in Saudi Aramco,” and “[o]ne fund holds a Chinese coal-mining company.”¹¹⁹ In addition to the selective disclosure of positive, but not negative, environmental information,¹²⁰ this category includes vague and incomplete statements of superior performance¹²¹—statements that are now likely subject to new legislation in the European Union that seeks to prevent false or misleading claims about financial products.¹²²

In contrast to these three forms of *Deceptive/Misleading Statements*, in which the outcome is to distract or mislead consumers into focusing on the positive rather than the negative attributes of a product, another form

116. Sustainable Finance Is Rife With Greenwash. Time for More Disclosure, *Economist* (May 22, 2021), <https://www.economist.com/leaders/2021/05/22/sustainable-finance-is-rife-with-greenwash-time-for-more-disclosure> (on file with the *Columbia Law Review*).

117. *Id.*

118. *Id.*

119. *Id.* Following the results of their analysis, the authors advocate adoption of a green taxonomy for sustainable finance, much like that of the European Union, or full disclosure of the carbon footprint of the firms held by investment portfolios. *Id.*

120. See Lyon & Montgomery, *supra* note 24, at 235–37 (reviewing literature on selective disclosure of environmental records).

121. See *id.* at 228, 237–38 (reviewing literature on empty claims and misleading narratives).

A third example could potentially be based on a disconnect between a firm’s public-facing statements about its environmental or climate-related practices and the firm’s lobbying efforts against specific environmental policies. See *id.* at 228 (noting that firms may covertly fund lobbying efforts against environmental protections). Evidence of such a disconnect may be relevant to the question of whether a firm is engaged in firm-level greenwashing by intentionally deceiving or misleading consumers or investors about the total of their environmentally related actions.

This is related to the concept of “astroturfing,” in which a firm claims to be pursuing or supportive of green policies and practices but is providing funds to third-party organizations that are explicitly seeking to defeat such public policies. Melissa J. Durkee, *Astroturf Activism*, 69 *Stan. L. Rev.* 201, 238 (2017) (noting the distinction between “astroturf” NGOs that are essentially “front” organizations for the business community and genuine “grass-roots” NGOs). See generally Thomas P. Lyon, Magali A. Delmas, John W. Maxwell, Pratima (Tima) Bansal, Mireille Chiroleu-Assouline, Patricia Crifo, Rodolphe Durand, Jean-Pascal Gond, Andrew King, Michael Lenox, Michael Toffel, David Vogel & Frank Wijen, *CSR Needs CPR: Corporate Sustainability and Politics*, 60 *Cal. Mgmt. Rev.* 5 (2018) (arguing that firms should be evaluated for environmental responsibility not only on the basis of their environmental performance but also on their political actions such as lobbying activity).

122. The European Union has adopted the E.U. Taxonomy and the Sustainable Finance Disclosure Regulation to address greenwashing in financial services. See Principles for Responsible Investing, *Implementing the E.U. Taxonomy: An Update to the PRI’s ‘Testing the Taxonomy’ Report 8–10* (2022), <https://www.unpri.org/download?ac=16143> [<https://perma.cc/BLY4-WA7K>] (discussing requirements for financial market participants under these new regulations).

of greenwashing in Category Two is simply about creating a favorable impression using flowery or meaningless language that can neither be demonstrably true nor false.¹²³ One example of such a vague claim is that a product or service is “all-natural”¹²⁴ or “green,” or even that the firm itself “cares about the environment.” These terms and vague statements have no specific legal definition and cannot easily be verified or demonstrated to be false. Such statements can still be misleading to consumers because many products that are all-natural are nonetheless harmful to human health or the environment, such as lead and asbestos. One of the clearest examples of such *Misleading Statements* involved the cleaning products company Rust-Oleum, which had claimed that its product, Krud Kutter, was “non-toxic” and “earth friendly” when in fact the product contained chemicals that could harm humans, animals, and the environment.¹²⁵ While toxicity claims may be verifiable, claims of “earth friendliness” are so general and vague in nature that it might be hard to demonstrate actual falsity. But such claims can nonetheless mislead consumers.

Not all statements or symbols that some might perceive as deceptive/misleading rise to the level of actionable misconduct. This may be because the statement or symbol is vague or fanciful, the statement could be characterized as opinion rather than fact, or the claim is so minor or irrelevant that it is unlikely to materially influence consumer purchasing decisions in the marketplace.

In some cases, for example, firms use symbols or associations with imagery and characters to convey the impression of positive environmental performance in a way that is misleading but is either not verifiable or very difficult to verify. One example of a misleading symbol in this category is BP’s green helios logo, which does not have a broadly accepted meaning.¹²⁶ It was arguably designed to create a positive environmental impression in consumers that is at odds with the business model of a firm in the fossil fuel industry.¹²⁷ These sorts of symbols may in fact materially

123. See Sins of Greenwashing, supra note 92 (referring to this as the Sin of Vagueness).

124. Id. (explaining that “all-natural” is vague because some chemicals, such as arsenic, uranium, mercury, and formaldehyde, are naturally occurring and nonetheless poisonous).

125. *Bush v. Rust-Oleum Corp.*, No. 20-cv-03268-LB, 2021 WL 24842, at *1, *6 (N.D. Cal. Jan. 4, 2021) (denying Rust-Oleum’s motion to dismiss the suit because the “plaintiff plausibly pleaded that the promise was a basis for the purchase and the products were in fact not ‘non-toxic’ or ‘earth friendly’”).

126. BP Logo, 1000Logos, <https://1000logos.net/bp-logo/> [<https://perma.cc/M8MS-VD3T>] (last updated July 22, 2022) (discussing the evolution of the BP logo).

127. See The BP Brand, BP, <https://www.bp.com/en/global/corporate/who-we-are/our-brands/the-bp-brand.html> [<https://perma.cc/N9WH-WPJ6>] (last visited Aug. 4, 2022) (“Our logo was launched in 2000 and was designed as a dramatic break with tradition. Two decades later, it is still unlike any other energy identity and symbolises a number of things—not least our greatest source of energy: the sun itself.”); Andy Stepanian, BP’s Greenwashing Can’t Clean Up Their Spill, *HuffPost: The Blog* (May 20, 2010), https://www.huffpost.com/entry/bps-greenwashing-cant-cle_b_581253 [<https://perma.cc/ZN4W-B4FY>] (last updated

change the public's factual beliefs about BP's environmental actions or the firm's overall environmental efforts. Conceptually such a symbol may be misleading, but because of the difficulty of identifying which actions the symbol may convey false facts about, symbols like this may be difficult or impossible to establish as misleading in a court of law.

Similarly, the environmental organization Friends of the Earth filed a complaint with the U.K. Advertising Standards Authority about an advertisement run by fossil fuel firm Shell that contained images of smokestacks emitting flowers and the slogan, "Don't throw anything away. There is no away."¹²⁸ The Advertising Standards Authority declined to declare the image alone as "misleading," concluding instead that it was "conceptual and fanciful."¹²⁹ The Authority concluded that "most readers were unlikely to interpret it as a depiction of reality."¹³⁰ It did, however, find that specific statements in the advertisement about Shell's use of carbon dioxide to grow flowers and its recycling of its emissions were misleading:

In the absence of qualification, most readers were likely to interpret the claim, 'We use our waste CO2 to grow flowers' . . . to mean that Shell used all, or at least the majority, of their waste CO2 to grow flowers, whereas the actual amount was a very small proportion, when compared to the global activities of Shell . . .¹³¹

Likewise, when the auto manufacturer Mazda engaged in a co-branded campaign with Universal Studios and Illumination Entertainment, which produced the movie *Dr. Seuss's The Lorax*, Mazda launched advertisements for its CX-5 showing the car driving through "Truffula Valley" and stating that the car received the Truffula Tree certified seal of approval.¹³² This advertising campaign notably provoked significant public backlash as greenwashing.¹³³ The mere association of Mazda with the Lorax does not make a specific claim that is verifiable or unverifiable. There is obviously no such thing as Truffula Tree

Dec. 6, 2017) (discussing the contrast between the green and yellow of BP's logo and the "dark, viscous, suffocating blanket" of oil spilled in the Deepwater Horizon explosion).

128. Chris Tryhorn, No Bouquets for Shell Press Ad, *Guardian* (Nov. 7, 2007), <https://www.theguardian.com/media/2007/nov/07/asa.advertising> [<https://perma.cc/4LQT-JTV9>] (discussing backlash to the advertisement).

129. *Id.* (internal quotation marks omitted) (quoting the Advertising Standards Authority).

130. *Id.* (internal quotation marks omitted) (quoting the Advertising Standards Authority).

131. *Id.* (first alteration in original) (quoting the Advertising Standards Authority) (noting that the Authority found Shell's claims about recycling sulfur emissions to be misleading).

132. Jason Siu, Mazda CX-5 Is Truffula Tree Certified in Dr. Seuss' The Lorax—Video, *Autoguide.com* (Feb. 21, 2012), <https://www.autoguide.com/auto-news/2012/02/mazda-cx-5-is-truffula-tree-certified-in-dr-seuss-the-lorax-video.html> (on file with the *Columbia Law Review*).

133. Jonathan Maus, Activists Revolted by Use of Lorax to Sell Cars, *BikePortland* (Feb. 29, 2012), <https://bikeportland.org/2012/02/29/activists-revolted-by-use-of-lorax-to-sell-cars-67970> [<https://perma.cc/7PFM-F9YF>] (discussing critical responses from activists, nonprofits, and the press to the advertising campaign).

Certification and few consumers are likely to think that there is. Rather, Mazda designed the advertising campaign to create an arguably misleading impression of environmental benefit.

3. *Category Three: True Statements and Symbols.* — In ideal type, Category Three includes expressions, statements, or symbols that are factual and accurate and also create an impression that is correct in the minds of the public. As this Essay discusses in Part III, under current doctrine, false or misleading commercial speech can be entirely banned. The fact that a statement is true, however, does not end the inquiry into whether it can be regulated consistent with the First Amendment as commercial speech. Restrictions on commercial speech that is factual and accurate are covered under the First Amendment and are subject to a form of intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.¹³⁴ Accordingly, including a category for statements or symbols that are factual and accurate is important.

Having offered this preliminary taxonomy of the forms of greenwashing, the next Part addresses the ways in which government actors can take action to prevent and address those forms of greenwashing that are legally problematic.

II. LEGAL REMEDIES AND THEIR CONTOURS

Greenwashing is not a legal term of art. And not all greenwashing is legally actionable. But some greenwashing does rise to the level of an actionable legal claim. Both the federal government and state governments have legal authority to protect consumers against false and deceptive marketing claims. There are also private legal remedies, such as private suits by competitors under the Lanham Act for false or deceptive claims in advertising,¹³⁵ as well as suits by shareholders pursuant to the securities

134. 447 U.S. 557 (1980). *Central Hudson* articulated the following four-part analysis:

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. at 566.

135. Section 43(a)(1)(B) of the Lanham Act provides a private cause of action to “any person who believes that he or she is or is likely to be damaged by” the action of

[a]ny person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which[] . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.

laws.¹³⁶ Layered on top of these legal mechanisms are private governance mechanisms like third-party certifications that aim to prevent greenwashing.¹³⁷ Finally, there are more informal private mechanisms to address greenwashing, including consumer boycotts and “Twitter-shaming.”¹³⁸ This Part surveys the legal landscape to explain existing enforcement authority at both the federal and state levels to address greenwashing. After briefly discussing the background history of caveat emptor, this Part delves into the rise of the FTC’s enforcement authority to police deceptive marketing claims. It examines the FTC’s Green Guides as the agency’s interpretation of how its authority applies to deceptive environmental claims. It concludes with a discussion of other legal methods to address deceptive environmental marketing, including state legal authorities and mandatory disclosures.

A. *Moving Away From Caveat Emptor*

Prior to the adoption of both the Federal Trade Commission Act (FTC Act) and various state statutes prohibiting false and deceptive advertising, the principle of “caveat emptor” (“let the buyer beware”) was generally accepted in America.¹³⁹ Legal remedies for disgruntled consumers were few. In a cause of action for “deceit,” an injured party was required to demonstrate “intentional falsification, reliance, and resultant harm” from a false claim about a product, but these standards were hard to meet.¹⁴⁰ As one early commenter pointed out, there was often a vast difference in technical knowledge about the quality of a product between the entity producing the product and the customer purchasing it.¹⁴¹ But the United States ultimately shifted away from this laissez faire approach.

At the turn of the twentieth century in the United States, statutory consumer protection laws began to take root. In 1911, a model statute known as the “Printer’s Ink Model Statute” was published and received

15 U.S.C. § 1125(a)(1)(B) (2018). For a thorough discussion of the Lanham Act’s provisions addressing trademark law and deceptive advertising, see Rebecca Tushnet, *Running the Gamut From A to B: Federal Trademark and False Advertising Law*, 159 U. Pa. L. Rev. 1305, 1309–13 (2011) [hereinafter Tushnet, *Running the Gamut*].

136. See *infra* section II.E.

137. Miriam A. Cherry & Judd F. Sneirson, *Chevron, Greenwashing, and the Myth of “Green Oil Companies”*, 3 Wash. & Lee J. Energy Climate & Env’t 133, 148–49 (2012) [hereinafter Cherry & Sneirson, *Chevron, Greenwashing, and the Myth of “Green Oil Companies”*] (discussing public and private certifications as a mechanism to address greenwashing).

138. Claire Fischer, Note, *Is Twitter the New FTC and EPA? Publicized Private Action as the Anti-Greenwashing Mechanism in Modern Society*, 33 Geo. Env’t L. Rev. 315, 328 (2021).

139. Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 Yale L.J. 1133, 1178–85 (1931).

140. Comment, *Untrue Advertising*, 36 Yale L.J. 1155, 1155–56 (1927).

141. Hamilton, *supra* note 139, at 1135 (noting that “the buyer’s inability to judge the quality of the ware is in striking contrast to the general legal presumption of his competence”).

support from a number of key constituencies, including within the advertising world.¹⁴² The Model Statute provided that an advertiser could be held criminally liable for false or misleading advertisements in print (excluding oral statements), without any requirement to show “knowledge or intent to deceive on the advertiser’s part, or reliance on his statement by, or damage to anyone.”¹⁴³ By 1913, fourteen states had adopted statutes prohibiting false advertising, with six of those fourteen states basing their statutes on the Model Statute; by 1927, twenty-two states had adopted false advertising statutes, with a substantial portion of those statutes (though not all) omitting a scienter requirement.¹⁴⁴ At the federal level, in 1914, Congress passed the FTC Act to prohibit “unfair methods of competition” that affect commerce.¹⁴⁵ And in 1915, a committee representing the Associated Advertising Clubs of the World argued at a hearing before the FTC that the FTC should act against false and deceptive advertising as a form of “unfair competition” within the meaning of the FTC Act.¹⁴⁶

B. *Federal Enforcement: The Federal Trade Commission Act*

In the United States, the FTC polices “unfair and deceptive” marketing claims under the FTC Act.¹⁴⁷ And since 1992, the Commission has published the Green Guides, most recently updated in 2012, which offer the Commission’s interpretations of how the Act applies with respect to firms’ environmental marketing claims.¹⁴⁸ Many states have general consumer protection laws that likewise protect consumers from unfair or deceptive business practices, as well as more specific laws prohibiting certain environmental marketing claims.¹⁴⁹ This section first addresses the FTC’s legal authority.

1. *The FTC’s Legal Authority.* — The FTC Act declares unlawful “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”¹⁵⁰ The Act empowers the FTC “to prevent persons, partnerships . . . from using unfair methods of competition in or affecting commerce and

142. Comment, *supra* note 140, at 1156–57.

143. *Id.* at 1156–59, 1559 n.16 (noting that the entity advertising to the public has better information about quality and more incentives to benefit from portraying goods favorably).

144. *Id.* at 1157.

145. Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. Rev. 227, 229–38 (1980) (describing the legislative history of the Act).

146. Comment, *supra* note 140, at 1160–61, 1161 n.25.

147. 15 U.S.C. § 45 (2018).

148. 16 C.F.R. pt. 260 (2012); *Environmentally Friendly Products: FTC’s Green Guides*, <https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides> [<https://perma.cc/R58G-ZFPZ>] (last visited Aug. 4, 2022).

149. See *infra* section II.D.

150. 15 U.S.C. § 45(a)(1).

unfair or deceptive acts or practices in or affecting commerce.”¹⁵¹ Importantly, “unfair methods of competition” include false and deceptive claims in advertising.¹⁵² While the initial language adopted by Congress in 1914 was premised on injury to competitors, rather than to the public, in the 1938 Wheeler-Lea Act, Congress amended section 5 of the FTC Act to state that the Act would prohibit “unfair or deceptive acts or practices in commerce” to ensure that the public and consumers, in addition to competitors, were protected against such practices.¹⁵³

The Act empowers the Commission to act when it “shall have reason to believe” that a person is engaged in such unfair methods of competition and that its enforcement action would be “to the interest of the public.”¹⁵⁴ The legal standard for “unfairness” in the statute requires the Commission to conclude that “the act or practice *causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.*”¹⁵⁵ Additionally, in determining whether a practice is “unfair,” the Commission “may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.”¹⁵⁶

2. *Establishing Liability: Claims and Defenses.* — As a practical matter, to establish that a defendant is liable for a violation of section 5 on the basis of false advertising, the Commission has interpreted the FTC Act to require it to show three things: first, that the defendant made a “representation, omission or practice that is likely to mislead the consumer;” second, that the representation, omission, or practice was likely to mislead a “consumer acting reasonably in the circumstances;” and third, that the representation was “material.”¹⁵⁷

With respect to the first factor, statements, images, labels, and testing demonstrations can all serve as a representation, omission, or practice that is misleading.¹⁵⁸ These include not only claims that are literally false that

151. Id. § 45(a)(2) (exempting certain listed entities, such as banks and common carriers, that are subject to other regulatory regimes).

152. Fed. Trade Comm’n v. Colgate-Palmolive Co., 380 U.S. 374, 384 (1965).

153. Id.

154. 15 U.S.C. § 45(b).

155. Id. § 45(n) (emphasis added).

156. Id.

157. Letter from James C. Miller III, Chairman, FTC, to John D. Dingell, Chairman, Comm. on Energy & Com., U.S. House of Reps. (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [<https://perma.cc/9E5X-YHB3>] [hereinafter FTC Policy Statement on Deception] (describing the FTC’s “enforcement policy against deceptive acts or practices”); see also POM Wonderful, LLC v. Fed. Trade Comm’n, 777 F.3d 478, 490 (D.C. Cir. 2015).

158. See *Colgate-Palmolive Co.*, 380 U.S. at 375–76 (finding a testing demonstration for shaving cream in a television advertisement to be misleading); *P. Lorillard Co. v. Fed. Trade Comm’n*, 186 F.2d 52, 56 (4th Cir. 1950) (finding statements in advertisements about a cigarette’s nicotine content to be misleading). The FTC’s 1983 Policy Statement defines a

are made within the text of a document or advertisement¹⁵⁹ but also claims that are implied, or claims that may be literally true but nonetheless misleading. The many forms of implicitly “deceptive” and “misleading” claims are perhaps as numerous as the types of products sold in commerce. In *FTC v. Colgate-Palmolive Co.*, the Supreme Court considered a television advertisement containing a demonstration of a shaving cream in which the announcer appeared to be applying the cream to sandpaper and shaving it clean, but in fact the “sandpaper” was a “simulated prop.”¹⁶⁰ Although the underlying evidence demonstrated that after a period of soaking, sandpaper could in fact be shaved, the Commission concluded that the commercial misled viewers into “believing they had seen” the evidence “with their own eyes.”¹⁶¹ In upholding the Commission’s conclusion, the Court explained that a claim or representation in advertising can be misleading even if “the underlying product claim is true and . . . the seller actually conducted an experiment sufficient to prove to himself the truth of the claim.”¹⁶² The Court drew an analogy to a false endorsement or false certification: In each case, the Court reasoned, “the seller has told the public that it could rely on something other than his word concerning both the truth of the claim and the validity of his experiment.”¹⁶³ In this case, “when the commercial not only makes a claim, but also invites the viewer to rely on his own perception, for demonstrative proof of the claim, the respondents will be aware that the use of undisclosed props in strategic places might be a material deception.”¹⁶⁴ Other forms of deception include the failure to tell the whole truth through the misleading citation of only a portion of a research study, focusing on “the effect which it might reasonably be expected to have upon the general public.”¹⁶⁵

When it comes to scientific claims in advertising, this point is especially important: “The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the

misrepresentation as “an express or implied statement contrary to fact. A misleading omission occurs when qualifying information necessary to prevent a practice, claim, representation, or reasonable expectation or belief from being misleading is not disclosed.” FTC Policy Statement on Deception, *supra* note 157, at n.4.

159. Such claims, for example, include statements and labels that garments are made from a certain material when in fact they are made out of another. On this point, see *Fed. Trade Comm’n v. Winsted Hosiery Co.*, 258 U.S. 483, 491–93 (1922) (finding statements and labels that knit underwear was wool when the underwear was made primarily of cotton to be misleading); *Country Tweeds, Inc. v. Fed. Trade Comm’n*, 326 F.2d 144, 145–46 (2d Cir. 1964) (false claims regarding the strength and quality of cashmere); *De Gorter v. Fed. Trade Comm’n*, 244 F.2d 270, 281–84 (9th Cir. 1957) (material falsely marketed as fur); *Mary Muffet, Inc. v. Fed. Trade Comm’n*, 194 F.2d 504, 505 (2d Cir. 1952) (*per curiam*) (false claims that material was silk).

160. *Colgate-Palmolive Co.*, 380 U.S. at 376.

161. *Id.* at 377.

162. *Id.* at 389–90.

163. *Id.*

164. *Id.* at 393.

165. *P. Lorillard Co. v. Fed. Trade Comm’n*, 186 F.2d 52, 58 (4th Cir. 1950).

unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions.”¹⁶⁶ Notably, the issue is not whether any consumers were actually deceived but whether the marketing claim has the “capacity to deceive” or there is a “likelihood of deception.”¹⁶⁷ In *Montgomery Ward & Co. v. FTC*, for example, the Seventh Circuit upheld the Commission’s cease and desist order against Montgomery Ward’s representations that some of its merchandise was “guaranteed” when there was a discrepancy between the details of the guarantees listed in advertisements and the actual guarantee certificates.¹⁶⁸ The Commission’s action was upheld even over Montgomery Ward’s objection that there was no evidence of a single customer making a claim under the relevant guarantee or of Montgomery Ward’s failure to satisfy any claim under a guarantee.¹⁶⁹ The court further rejected the firm’s claims that it always upheld the advertised guarantees, and that it lacked any intention to deceive, concluding that the firm’s intentions “are not controlling in the determination of [an advertisement’s] deceptiveness.”¹⁷⁰

Visual images can likewise be misleading and deceptive. For example, in *American Home Products Corp. v. FTC*, the Third Circuit reviewed not only the text in certain advertisements about an over-the-counter pain reliever but also the “messages conveyed through the ‘aural-visual’ pattern.”¹⁷¹ The court observed that if the Commission were limited to scrutiny of words in an advertisement, it would have “limited recourse against crafty advertisers whose deceptive messages were conveyed by means other than, or in addition to, spoken words.”¹⁷² Likewise, in *Standard Oil Co. of California v. FTC*, the Ninth Circuit upheld the Commission’s finding that the “predominant visual message”—an image of a pollution meter in an advertisement—was misleading and that the text of the advertisement failed to correct the misleading message.¹⁷³

There are, of course, limitations to what can be deemed misleading. A few notable exceptions include “expressions of opinion” rather than fact, which cannot be the basis of an FTC action or cease and desist

166. *Id.* (internal quotation marks omitted) (quoting *Florence Mfg. Co. v. J.C. Dowd & Co.*, 178 F. 73, 75 (2d Cir. 1910)).

167. *Montgomery Ward & Co. v. Fed. Trade Comm’n*, 379 F.2d 666, 669–70 (7th Cir. 1967).

168. *Id.* at 669.

169. *Id.*

170. *Id.* at 670.

171. 695 F.2d 681, 688 (3d Cir. 1982).

172. *Id.*

173. 577 F.2d 653, 659 (9th Cir. 1978).

order.¹⁷⁴ Likewise, some claims in advertising are so outlandish that no reasonable consumer would rely upon them. Such claims are considered “puffery” and are not actionable under the statute.¹⁷⁵

In addition, to be actionable, a statement must be “material.” The Commission has defined “materiality” straightforwardly—the question is “whether the act or practice is likely to affect the consumer’s conduct or decision with regard to a product or service,” because absent the deception that consumer might have made a different choice.¹⁷⁶ In other words, when customers purchase a product under a “reasonable but mistaken belief” that the products can deliver the performance stated in a deceptive advertisement, such claims are material.¹⁷⁷ The D.C. Circuit has noted that the Commission generally presumes materiality for three types of claims: “(1) all express claims, (2) intentional implied claims and (3) claims that ‘significantly involve health, safety, or other areas with which the reasonable consumer would be concerned,’ including a claim that ‘concerns the purpose, safety, efficacy, or cost of the product or service,’ its ‘durability, performance, warranties or quality,’ or ‘a finding by another agency regarding the product.’”¹⁷⁸ Where materiality cannot be presumed, the Commission “may require evidence” of materiality of a particular claim’s import to consumers, including the fact of a higher price (i.e., that

174. *L. B. Silver Co. v. Fed. Trade Comm’n*, 289 F. 985, 990–91 (6th Cir. 1923) (finding a conflict of opinion among experts as to whether hogs were a new breed and thus no violation of the FTC Act).

175. See *Ostermoor & Co. v. Fed. Trade Comm’n*, 16 F.2d 962, 963–64 (2d Cir. 1927) (holding that an image of a mattress was “slight puffing” that “cannot deceive the average purchaser” and not the “clear misrepresentation of the character of goods” targeted by the FTC Act). Judge Learned Hand defined puffing in another context: “There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity Such statements . . . are rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth.” *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918). The Commission has defined “puffing” more narrowly, as a statement whose “truth or falsity cannot be precisely determined,” rather than an exaggeration that some might argue would not deceive the reasonable consumer, such as the “world’s lowest prices.” *In re Better Living, Inc.*, 54 F.T.C. 648, 653 (1957), *aff’d*, 259 F.2d 271 (3d Cir. 1958); see also *Steelco Stainless Steel, Inc. v. Fed. Trade Comm’n*, 187 F.2d 693, 697–98 (7th Cir. 1951) (“Statements made for the purpose of deceiving prospective purchasers and particularly those designed to consummate the sale of products by fright cannot be characterized as mere ‘puffing.’”); *Moretrench Corp. v. Fed. Trade Comm’n*, 127 F.2d 792, 795 (2d Cir. 1942) (reluctantly deferring to the FTC’s conclusion that a literally false statement in an advertisement was not puffery). Courts often reject defenses of puffery. See, e.g., *Fairyfoot Products Co. v. Fed. Trade Comm’n*, 80 F.2d 684, 686 (7th Cir. 1935) (rejecting a defense of puffery for unison plaster advertisement).

176. FTC Policy Statement on Deception, *supra* note 157.

177. *United States v. Sumpolec*, 811 F. Supp. 2d 1349, 1356 (M.D. Fla. 2011).

178. *Novartis Corp. v. Fed. Trade Comm’n*, 223 F.3d 783, 786 (D.C. Cir. 2000) (citing FTC Policy Statement on Deception, *supra* note 157) (upholding the Commission’s finding of materiality where substantial evidence supported the finding that “efficacy is a pivotal consideration for consumers”).

consumers will pay a premium for the feature), a consumer survey, or other “credible testimony.”¹⁷⁹

3. *Necessary Evidence.* — The heavily factual nature of these inquiries raises the question of what evidence must be in the record to support the Commission’s conclusion that a defendant violated the FTC Act. When a representation is made expressly in an advertisement, courts have held the Commission need not rely on consumer surveys to demonstrate that the representation, omission, or practice is misleading.¹⁸⁰ For example, in comparing advertised guarantees made by retailer Montgomery Ward in newspapers to its actual guarantee policy, the Commission concluded without further evidence that the guarantees were misleading as the two texts were in conflict.¹⁸¹

Even in cases where the deceptive claim is implied rather than express, the Commission may be able to determine meaning through “such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transaction.”¹⁸² Thus, in *American Home Products Corp. v. FTC*, regarding advertisements over an over-the-counter pain reliever, the Third Circuit held, “It is true that on some crucial points in the case at hand the Commission lacked direct evidence that consumers were in fact misled. But the Commission need not buttress its findings that an advertisement has the inherent capacity to deceive with evidence of actual deception.”¹⁸³ And in *Standard Oil of California*, the Ninth Circuit made clear that “[n]o specialized engineer was needed to put [an advertising agency] on notice that a gauge which drops from a reading of 100 (“dirty”) to 20 (“clean”) implies a sweeping representation with reference to the change in level of pollution discharge” in an advertisement about a gasoline additive.¹⁸⁴ In some cases of an implied nature, however, the Commission may need to rely on extrinsic evidence such as “expert opinion, consumer testimony[,] . . .

179. FTC Policy Statement on Deception, *supra* note 157.

180. See *Fed. Trade Comm’n v. Colgate-Palmolive Co.*, 380 U.S. 374, 391–92 (1965) (rejecting the argument that the Commission was required to survey consumers before determining that an advertisement was misleading).

181. *Montgomery Ward & Co. v. Fed. Trade Comm’n*, 379 F.2d 666, 669–70 (7th Cir. 1967) (comparing the text of an advertisement to the retailer’s guarantee policy).

182. FTC Policy Statement on Deception, *supra* note 157, at n.7 (discussing cases that address these factors). This stands in contrast to private actions by competitors for false advertising under the Lanham Act, in which courts require the competitor plaintiff to establish deception through consumer surveys when a claim is implicitly false or misleading. Tushnet, *Running the Gamut*, *supra* note 135, at 1337–39 & n.135 (drawing this distinction between the Lanham Act and the FTC Act). Findings of fact by the Commission are conclusive when supported by “substantial evidence.” *Am. Home Prods. Corp. v. Fed. Trade Comm’n*, 695 F.2d 681, 686 (3d Cir. 1982) (quoting *Beneficial Corp. v. Fed. Trade Comm’n*, 542 F.2d 611, 616 (3d Cir. 1976)).

183. 695 F.2d at 687.

184. *Standard Oil Co. of California v. Fed. Trade Comm’n*, 577 F.2d 653, 660 (9th Cir. 1978).

copy tests, surveys, or any other reliable evidence of consumer interpretation” to establish that the claim is likely to mislead.¹⁸⁵

In *POM Wonderful v. FTC*, the D.C. Circuit distinguished between two types of scientific claims that can be deceptive in different ways, and thus require different levels of proof: “efficacy” claims (a claim that a product “successfully performs the advertised function or yields the advertised benefit”) and “establishment” claims (a claim that “a product’s effectiveness or superiority has been scientifically established”).¹⁸⁶ This distinction is important in determining whether a claim is false or deceptive. An advertiser must have a “reasonable basis” for making an efficacy claim, to be evaluated under a set of factors (namely, the “type of product,” the “type of claim,” the “benefit of a truthful claim,” the “ease of developing substantiation for the claim,” the “consequences of a false claim,” and the “amount of substantiation experts in the field would consider reasonable”).¹⁸⁷ In contrast, for an establishment claim, the FTC considers different factors.¹⁸⁸ If the claim in the advertisement is specific, then the “advertiser must possess the specific substantiation claimed.”¹⁸⁹ If the claim is non-specific, such as “medically proven” or a misleading visual claim that suggests a “foundation of scientific evidence,” then the advertiser “must possess evidence sufficient to satisfy the relevant scientific community of the claim’s truth.”¹⁹⁰ Thus, in *POM Wonderful*, the court concluded that POM’s advertisements, which contained both efficacy and establishment claims, lacked the requisite proof and were misleading when they misrepresented the content of studies and when the studies were not randomized controlled trials, which would be expected in the relevant scientific community.¹⁹¹

185. FTC Policy Statement on Deception, *supra* note 157, at nn.8, 13 (explaining this policy and citing a case in which the Commission dismissed a complaint for lack of extrinsic evidence). In different contexts, the FTC has relied on different forms of evidence. See *Mary Muffet, Inc. v. Fed. Trade Comm’n*, 194 F.2d 504, 505 (2d Cir. 1952) (per curiam) (finding that the Commission was justified in ordering manufacturers of women’s clothing to label rayon properly, where expert testimony revealed that non-experts had a hard time distinguishing rayon from silk); *P. Lorillard Co. v. Fed. Trade Comm’n*, 186 F.2d 52, 56 (4th Cir. 1950) (upholding the Commission’s order prohibiting a cigarette manufacturer from making claims that its cigarettes were less harmful than other brands where the defendant introduced no expert testimony to dispute the government’s expert); *United States v. Sumpolec*, 811 F. Supp. 2d 1349, 1354 (M.D. Fla. 2011) (finding liability where the Commission relied on expert testimony that claims in advertisements were not supported by the evidence, where the defendant offered no expert testimony in response).

186. *POM Wonderful, LLC v. Fed. Trade Comm’n*, 777 F.3d 478, 490 (D.C. Cir. 2015).

187. *Id.* at 490–91 (citing *In re Pfizer*, 81 F.T.C. 23, 62 (1972)).

188. *Id.* at 491.

189. *Id.* at 491 (quoting *Removatron Int’l Corp. v. Fed Trade Comm’n*, 884 F.2d 1489, 1492 n.3 (1st Cir. 1989)).

190. *Id.* at 491 (citations omitted).

191. *Id.* at 497.

C. *The Green Guides*

For claims made in advertising about the environmental attributes of a product, service, or firm, the FTC has published the Green Guides, which set forth the Commission's "current views about environmental claims."¹⁹² The goal of the Guides is to "help marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. § 45."¹⁹³ The Guides themselves are careful to disclaim that they "do not confer any rights on any person and do not operate to bind the FTC or the public."¹⁹⁴ The Commission, however, "can take action under the FTC Act if a marketer makes an environmental claim inconsistent with the guides. In any such enforcement action, the Commission must prove that the challenged act or practice is unfair or deceptive in violation of Section 5 of the FTC Act."¹⁹⁵ In other words, the Guides are a way for firms to understand the FTC's views on "how reasonable consumers likely interpret certain claims."¹⁹⁶

The scope of the Guides' coverage is broad. The Guides: apply to claims about the environmental attributes of a product, package, or service in connection with the marketing, offering for sale, or sale of such item or service to individuals. These guides also apply to business-to-business transactions. The guides apply to environmental claims in labeling, advertising, promotional materials, and all other forms of marketing in any medium, whether asserted directly or by implication, through words, symbols, logos, depictions, product brand names, or any other means.¹⁹⁷

Notably, the Guides place the burden on the advertiser to ensure that any claims made in its advertisements have sufficient support:

To determine if an advertisement is deceptive, marketers must identify all express and implied claims that the advertisement reasonably conveys. Marketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims.¹⁹⁸

With respect to environmental marketing claims, the FTC has made clear that the scientific context may require scientific evidence to provide

192. 16 C.F.R. § 260.1(a) (2021). On the Green Guides generally, see 16 C.F.R. pt. 260 (2012); see also 15 U.S.C. § 57a(a) (2018) (providing that the Commission may issue "interpretive rules and general statements of policy" with respect to the practices prohibited under 15 U.S.C. § 45(a)).

193. 16 C.F.R. § 260.1(a).

194. *Id.*

195. *Id.*

196. *Id.* § 260.1(d).

197. *Id.* § 260.1(c).

198. *Id.* § 260.2 (citing FTC Policy Statement Regarding Advertising Substantiation (Nov. 23, 1984), <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-regarding-advertising-substantiation> [<https://perma.cc/M9BF-WNF3>]).

this “reasonable basis.” Specifically, the Guides make clear that “[i]n the context of environmental marketing claims, a reasonable basis often requires competent and reliable scientific evidence.”¹⁹⁹ Such scientific evidence includes:

tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results. Such evidence should be sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that each of the marketing claims is true.²⁰⁰

Thus, unlike a claim about the softness of a mattress, or the effectiveness of a drain pipe, claims about the environmental attributes of a product, service, or firm are likely to require more substantial scientific evidence.

To avoid a claim that an advertisement is false or deceptive, any qualification in marketing materials should be “clear, prominent, and understandable,” in proximity to the claim, and in sufficiently large type,²⁰¹ and the advertisement should clarify whether the claim applies to “the product, the product’s packaging, a service, or just to a portion of the product, package, or service” unless that information is already clear from the context.²⁰²

The Guides then address specific types of marketing claims that the FTC states should be avoided, such as claims of “general environmental benefit” because they are “difficult to interpret” and “likely convey that the product, package, or service has specific and far-reaching environmental benefits and may convey that the item or service has no negative environmental impact.”²⁰³ They further address potential sources of consumer confusion with respect to other specific types of environmental claims, including claims about the use of renewable energy²⁰⁴ or carbon offsets;²⁰⁵ claims about endorsements by third parties;²⁰⁶ claims that a product is “recyclable,”²⁰⁷ “biodegradable,”²⁰⁸ “free of” a specified substance,²⁰⁹ or

199. *Id.*

200. *Id.*

201. *Id.* § 260.3(a).

202. *Id.* § 260.3(b).

203. *Id.* § 260.4(b).

204. *Id.* § 260.15(a).

205. *Id.* § 260.5(a).

206. *Id.* § 260.6.

207. *Id.* § 260.12(a).

208. *Id.* § 260.8(a).

209. *Id.* § 260.9(a).

“non-toxic”;²¹⁰ and comparative claims such as “contains 20% more recycled content.”²¹¹

D. *State Authorities to Address False and Deceptive Advertising*

State law likewise provides redress for false and deceptive advertising claims, including green marketing claims. There are consumer protection laws that prohibit false and deceptive advertising, such as in states that have adopted the Uniform Deceptive Trade Practices Act.²¹² In addition, in 1970 the FTC drafted the Unfair Trade Practice and Consumer Protection Law, a model statute, to provide states with a “little FTC Act” for adoption, whereby decisions under federal law would serve as guidance for interpretation of any state law of this kind.²¹³ Some states have adopted other, more specific consumer protections laws, including California’s Unfair Competition Law,²¹⁴ False Advertising Law,²¹⁵ and Consumer Legal Remedies Act,²¹⁶ which broadly prohibit unfair and fraudulent trade practices,²¹⁷ false statements in advertising that are likely to mislead consumers about a product or service,²¹⁸ and other specific types of false advertising like misleading labels or false origin claims.²¹⁹

Finally, some states have recently adopted specific laws to prohibit greenwashing, such as California’s law prohibiting the use of the “chasing arrows” recycling symbol on plastic products when they are not in fact recyclable in most California communities.²²⁰

E. *Other Legal Authorities: Securities Laws and Mandatory Disclosures*

In addition to these general laws prohibiting false or misleading advertising claims at the federal and state levels, federal securities laws provide both a remedy for a material misstatement or omission by a firm and mandatory disclosure rules about environmental risk that may play an increasingly significant role in addressing concerns about greenwashing. This section briefly discusses these other legal mechanisms.

210. Id. § 260.10(a).

211. Id. § 260.3(d).

212. Unif. Deceptive Trade Pracs. Act (withdrawn 2000), 7A pt. 1 U.L.A. 351 (1966).

213. Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 *Antitrust L.J.* 911, 913–14 (2017).

214. Cal. Bus. & Prof. Code §§ 17200–17210 (2022).

215. Id. §§ 17500–17509.

216. Cal. Civ. Code §§ 1750–1784 (2022).

217. Cal. Bus. & Prof. Code § 17200.

218. Cal. Bus. & Prof. Code § 17500.

219. See, e.g., Cal. Civ. Code § 1770.

220. See *supra* notes 108–109 and accompanying text.

1. *Rule 10b-5*. — The Securities Exchange Act of 1934 provides that it is unlawful for any person to employ any “manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors” in connection with the purchase or sale of any security.²²¹ Pursuant to this statute, the SEC has issued Rule 10b-5, which prohibits the employment of “any device, scheme, or artifice to defraud.”²²² Rule 10b-5 prohibits anyone from making “any untrue statement of a material fact or . . . omit[ing] . . . a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.”²²³ Lastly, the Rule proscribes generally engaging in an act or practice of fraud or deceit in connection with the purchase or sale of a security.²²⁴ Thus, the SEC or a private shareholder can initiate an action for securities fraud when an issuer makes a material misstatement (or omission) of fact with the requisite scienter, the shareholder has relied on the statement (or bases their claim on a fraud-on-the-market theory), and the misstatement or omission has caused damage.²²⁵ The purpose behind this disclosure requirement is to ensure the integrity of the market: “There cannot be honest markets without honest publicity.”²²⁶

Many commentators have argued that Rule 10b-5 affords a remedy to address greenwashing claims; they have, however, noted challenges with this approach.²²⁷ In particular, several commenters have cited the securities class action decision *In re Ford Motor Co. Securities Litigation*, in which

221. 15 U.S.C. § 78j(b) (2018).

222. 17 C.F.R. § 140.10b-5(a) (2021).

223. *Id.* § 240.10b-5(b).

224. *Id.* § 240.10b-5(c).

225. *Id.*; see also *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (adopting the *TSC Industries* standard of materiality for Rule 10b-5 that “there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available” (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976))).

226. *Basic Inc.*, 485 U.S. at 230 (internal quotation marks omitted) (quoting H.R. Rep. No. 1383-73, at 11 (1934)).

227. See Cherry & Sneirson, *Chevron, Greenwashing, and the Myth of “Green Oil Companies”*, *supra* note 137, at 143, 146–48 (arguing that there are multiple ways to police greenwashing claims, including through state false advertising laws, the FTC Green Guides, as securities fraud, through private certifications, and private environmental governance, and that in the securities fraud context it may be difficult to demonstrate materiality); Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 *Temp. L. Rev.* 831, 834–42 (2008) (arguing that Section 10(b) of the Securities Exchange Act provides a legal remedy for greenwashing if misstatements are sufficiently specific to surmount the materiality threshold); Cadesby B. Cooper, Note, *Rule 10b-5 at the Intersection of Greenwash and Green Investment: The Problem of Economic Loss*, 42 *B.C. Env’t Affs. L. Rev.* 405, 408 (2015) (noting that victims of green misrepresentation do not have a 10b-5 claim “when the misrepresentation does not involve information bearing on the future expected cash flows of the company”).

plaintiffs argued that Ford's broad statements about its commitment to safety were materially misleading, false, or incomplete in the face of a subsequent recall of its ATX tires for safety after numerous crashes and deaths in vehicles using these tires.²²⁸ Plaintiffs pointed to numerous positive statements about Ford's commitment to safety, such as: "[A]t Ford quality comes first"; "Ford has its best quality ever"; Ford is "taking across-the-board actions to improve . . . [its] quality"; "Ford is a worldwide leader in automotive safety"; and Ford is "designing safety into . . . [its] cars and trucks" because it wants its "customers to feel safe and secure in their vehicles at all times," among others.²²⁹ The court concluded:

Such statements are either mere corporate puffery or hyperbole that a reasonable investor would not view as significantly changing the general gist of available information, and thus, are not material, even if they were misleading. All public companies praise their products and their objectives. Courts everywhere "have demonstrated a willingness to find immaterial as a matter of law a certain kind of rosy affirmation commonly heard from corporate managers and numbingly familiar to the marketplace—loosely optimistic statements that are so vague, so lacking in specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor could find them important to the total mix of information available."²³⁰

Notably, the court also found that a statement made by a public affairs manager at the company that several "accidents clearly resulted from driver error and had nothing to do with the design of the vehicle" was an "expression of Ford's opinion as to the safety record of the vehicle itself," which is "actionable only 'if the speaker does not believe the opinion and the opinion is not factually well grounded,'" and in this case the plaintiffs failed to meet this burden.²³¹ Thus, as with the FTC Act, threshold questions in such litigation include whether the statements are mere puffery or opinion, or whether they are sufficiently specific to meet the materiality threshold for investors in this context. In addition, because Rule 10b-5 requires plaintiffs to show economic loss as a result of the material misrepresentation (usually a drop in share price), this may likewise limit the use of securities regulations to address greenwashing in the ordinary case.²³² In addition, it is worth noting that the securities laws protect a different

228. 381 F.3d 563, 566 (6th Cir. 2004); Cherry & Sneirson, *Chevron, Greenwashing, and the Myth of "Green Oil Companies"*, *supra* note 137, at 146–48; Kerr, *supra* note 227, at 841–42.

229. 381 F.3d at 570.

230. *Id.* at 570–71 (quoting *Shaw v. Digit. Equip. Corp.*, 82 F.3d 1194, 1217 (1st Cir. 1996)).

231. *Id.* at 571–72 (quoting *Helwig v. Vencor, Inc.*, 251 F.3d 540, 562 (6th Cir. 2001)).

232. Cooper, *supra* note 227, at 407 ("[W]hether brought by the SEC or a private plaintiff, Rule 10b-5 is inherently ill suited for application in the [socially responsible investing] market, where largely intangible and non-economic values drive investment decisions and where the social and environmental costs of misrepresentations do not necessarily translate into immediate market losses.").

set of “consumers”—those holding, purchasing, or selling shares in the company, rather than those consumers seeking to purchase the firm’s products or services.

Importantly, however, Donald Langevoort has argued that “courts [in 10b-5 cases] play a backup role to SEC regulation, imposing disclosure duties only to the extent that nondisclosure constitutes fraud.”²³³ Thus, the discussion now turns to mandatory disclosures.

2. *Disclosures.* — In order to “protect investors against manipulation of stock prices” and to promote market integrity, securities laws do not merely rely on ex post litigation but rather require mandatory disclosures in periodic reports of information that is material to investors.²³⁴ Regulation S-K provides for mandatory disclosures in periodic annual and quarterly reports, as well as in connection with certain specified events like mergers.²³⁵ Regulation S-K requires not only the disclosure of general financial information that is material to investors but also designates specific information that must be disclosed, including certain environmental information, such as the cost of compliance with environmental laws,²³⁶ material capital expenditures, material pending legal proceedings,²³⁷ material impacts of risk events,²³⁸ and a general management discussion and analysis of financial condition.²³⁹ In 2010, the

233. Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, 107 *Geo. L.J.* 967, 976 (2019).

234. *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988) (citing S. Rep. No. 73-792, at 1–5 (1934)); see also Securities Act of 1933, 15 U.S.C. §§ 77a–77mm (2018); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78qq.

235. 17 C.F.R. §§ 229.10–229.1406 (2021). See SEC Adoption of Integrated Disclosure System, Securities Act Release No. 6383, Exchange Act Release No. 18,524, Investment Company Act Release No. 12,264, 47 Fed. Reg. 11,380, 11,380 (Mar. 16, 1982) (codified at 17 C.F.R. pts. 200, 201, 229, 230, 239, 240, 249, 250, 260, 274) (announcing the adoption of a comprehensive disclosure system, including expansion and reorganization of Regulation S-K).

236. 17 C.F.R. § 229.101(c)(2)(i).

237. *Id.* § 229.103.

238. *Id.* § 229.105.

239. *Id.* § 229.303; see also SEC Adoption of Integrated Disclosure System, 47 Fed. Reg. at 11,387–93 (describing the disclosure requirements); Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6293–95 (Feb. 8, 2010) (to be codified at 17 C.F.R. pts. 221, 231, 241) (providing an overview of the disclosure rules related to climate change issues). For a history of the environmental disclosure provisions as well as an argument for expansion of social and environmental disclosures, see Williams, *supra* note 37, at 1293–306 (arguing that more “social disclosure . . . provide[s] greater information to shareholders concerning [corporate] actions so that shareholders can determine the extent to which they approve of the trade-offs management has made between economic returns and social and environmental effects”); see also Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 *Geo. L.J.* 923, 952 (2019) (arguing for improved sustainability disclosures in mandatory reports in the form of a “sustainability discussion and analysis”); Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 *Am. Bus. L.J.* 407, 443–56 (2018) (arguing that mandatory public disclosures are superior to private and voluntary regimes); Sarah E. Light, *The Law of the Corporation as*

SEC issued guidance to public firms on how these general rules apply to climate-related risks, explaining that firms should disclose the impact of actual or potential legislation, regulations, and international accords relating to climate change, as well as indirect risks including changes in demand for goods and services or ways in which the physical impacts of climate change could affect performance and operations.²⁴⁰ While the 2010 Guidance was an interpretation of existing law, actual enforcement of its terms was spotty, and climate-related disclosures in 10-Ks tended to include mere boilerplate language.

In 2022, the SEC issued a new proposed regulation on Enhancement and Standardization of Climate-Related Disclosures, which proposes to mandate the inclusion of certain climate-related quantitative and non-quantitative information in periodic reports, such as Form 10-K.²⁴¹ The proposed rule would require the disclosure of certain information including climate-related risks, the actual or likely impact on the registrant's business of such risks, and the business's governance of these climate-related risks.²⁴² More importantly for addressing concerns about greenwashing, however, are the proposed provisions that would require registrants to disclose greenhouse gas emissions from their onsite activities (Scope 1 emissions) and purchased electricity (Scope 2 emissions), as well as upstream and downstream (Scope 3 emissions) for certain larger firms.²⁴³ The provisions would also require a firm that has set climate-related targets to show how it intends to meet those targets, including the amount of carbon offsets or renewable energy certificates it intends to use to achieve those goals.²⁴⁴ These mandatory disclosures, if made final, would go a substantial part of the way to ensuring that the statements of firms making net-zero commitments or other public statements about their carbon emissions targets can actually be verified. It remains to be seen, however, what the final rule will look like.

No matter what transpires with the SEC's proposed Climate-Related Disclosures, however, the larger doctrinal and theoretical questions raised in this context are certain to continue. Substantial questions are now coming to the fore about the legality and, in some cases, constitutionality of climate-related regulation, including securities regulations and mandated

Environmental Law, 71 *Stan. L. Rev.* 137, 165–71 (2019) (discussing the SEC disclosure rules and 2010 climate guidance as a form of environmental governance); Perry E. Wallace, *Disclosure of Environmental Liabilities Under the Securities Laws: The Potential of Securities-Market-Based Incentives for Pollution Control*, 50 *Wash. & Lee L. Rev.* 1093, 1105–14 (1993) (discussing the environmental disclosure provisions of Regulation S-K).

240. Commission Guidance Regarding Disclosure Related to Climate Change, 75 *Fed. Reg.* at 6295–97.

241. Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 *Fed. Reg.* 21,334, 21,334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

242. *Id.*

243. *Id.* at 21,344–46.

244. *Id.*

disclosures, and how to understand and apply First Amendment principles at the intersection of markets, politics, and science.

III. THE FIRST AMENDMENT TERRAIN

The remainder of the Essay takes on the First Amendment issues raised by greenwashing. This Part lays out the current doctrinal landscape into which greenwashing intervenes and traces the doctrinal fault lines that have led to the current morass.

Courts addressing speech rights at the nexus of science, politics, and markets—on issues from climate change to public health and large-scale financial risk to the use of consumer data—have, to date, produced notoriously confusing First Amendment case law. The root of that confusion is that speech at that nexus also sits at the intersection of three distinct First Amendment doctrines—namely, the First Amendment principles that apply to speech in public discourse (applicable in politics), the commercial speech doctrine and related doctrines that generally apply to expression in economic life (markets), and free speech doctrines around expertise and knowledge production (science). What is more, litigants and courts have increasingly advanced a robustly deregulatory view of the First Amendment that undermines established law particularly at the crossroads of politics and markets, in a trend some have described as First Amendment *Lochnerism*.²⁴⁵ This Part therefore explains the differences among those three First Amendment doctrines. In so doing, it illuminates the distinct constitutional values, constitutionally relevant institutional differences, and varying approaches to the production of information, individual choice, and truth and falsity reflected in these doctrines.

As a preliminary matter, to understand the importance of the First Amendment's rules at this intersection, it is critical to distinguish between First Amendment coverage and First Amendment protection. Coverage means whether the First Amendment applies to a given activity or whether the activity is beyond the boundaries of the protections of the “freedom of speech” altogether.²⁴⁶ As Professor Frederick Schauer has described, this threshold question is “often far more consequential than are the issues surrounding the strength of protection,” but “the answer is too often simply assumed.”²⁴⁷ Many activities that are colloquially considered “speech” are not covered by the First Amendment at all. Contracts,

245. See *supra* note 28 and accompanying text.

246. Shanor, *First Amendment Coverage*, *supra* note 28, at 324–25.

247. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 *Harv. L. Rev.* 1765, 1767 (2004); see also Robert Post, *Recuperating First Amendment Doctrine*, 47 *Stan. L. Rev.* 1249, 1271–73 (1995) (arguing that a “general principle of speech” cannot determine First Amendment coverage because speech has no “generic constitutional value,” rather, the First Amendment’s multiple “values represent virtues implicit in specific and discrete kinds of social practices”); Shanor, *First Amendment Coverage*, *supra* note 28, at 343–56 (exploring the sociological dynamics of First Amendment coverage).

perjury, conspiracy, workplace harassment, the compelled speech of tax returns, antitrust and securities regulation, criminal solicitation, and most of evidence law, just to name a few, have all historically fallen outside of the ambit of First Amendment coverage, even though all consist of speech in a normal sense.

Protection, by contrast, is essentially how much scrutiny applies in various contexts to activities that fall within the First Amendment's coverage. In this respect, the First Amendment uses different tiers of scrutiny not unlike those applied under the Fourteenth Amendment. As a general matter, speech in public discourse (politics) receives strict scrutiny, which requires that a law that either restricts or compels speech be narrowly tailored to achieve a compelling interest.²⁴⁸ Commercial speech, by contrast, is generally analyzed under either the intermediate scrutiny of *Central Hudson*, which applies to laws that restrict commercial speech,²⁴⁹ or a test close to rational basis review for laws that compel the disclosure of factual commercial information, under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*.²⁵⁰ The level of protection largely "depends on the constitutional value of the speech in question, meaning the reason the Constitution protects that activity in the first instance."²⁵¹ This Essay focuses on these underlying values.

To add coverage and protection to the mix of science, politics, and markets reveals that there is thus not one First Amendment question in greenwashing cases but five. Analytically, therefore, this Essay contributes to the literature by clarifying what questions should apply to a given green marketing claim and, ultimately, more broadly to other questions at the intersection of science, politics, and markets.

The first three questions lie at the fault line between speech in politics and speech in markets, that is, between commercial and political speech. False or misleading *commercial* speech falls completely outside the First Amendment's coverage and thus can be constitutionally regulated or even prohibited outright.²⁵² Conversely, false or misleading *political* speech is generally not only covered by the First Amendment but also protected by its most stringent level of review, making it largely unregulable.²⁵³ At the

248. See *infra* note 287 and accompanying text.

249. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563–64 (1980).

250. 471 U.S. 626, 651 (1985).

251. Shanor, *First Amendment Coverage*, *supra* note 28, at 327.

252. See *Central Hudson*, 447 U.S. at 563–64 (“[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”). This Essay brackets other potential constitutional concerns, such as whether the law has a rational basis under the Fourteenth Amendment.

253. See *United States v. Alvarez*, 567 U.S. 709, 714–15 (2012) (protecting a lie about a military honor).

same time, commercial expressions of opinion²⁵⁴ are protected with more stringent review than commercial assertions of fact.²⁵⁵ From this nexus, three questions arise: whether the activity should be characterized as commercial or political; if the speech is commercial, whether it is an assertion of fact or opinion; and if a statement is one of fact, whether it is false, misleading, or fraudulent.²⁵⁶

The remaining two key questions—namely, whether the commercial entity or the regulator bears the burden of demonstrating truth or falsity and what evidence must be shown to meet this burden—lie at the intersection of the doctrines surrounding expertise and knowledge production with those doctrines applicable to politics, on one hand, and markets, on the other. These issues are especially thorny in contexts like climate change and the COVID-19 pandemic, where the evidence in many cases points to risks, rather than certainties.²⁵⁷ In the context of greenwashing claims, the central question is whether the perspective of the public audience of commercial speech or of a given expert community should be used to evaluate claims of truth or falsity.

How courts elaborate the constitutional evidentiary standard may be extraordinarily consequential. Consider the Supreme Court's landmark decision in *New York Times v. Sullivan*.²⁵⁸ In establishing the actual malice standard for criticism of government officials, the Supreme Court wrote an opinion recognizing that “defamation of the government is an impossible notion for a democracy.”²⁵⁹ It did so by changing what a public official

254. See *United States v. United Foods, Inc.*, 533 U.S. 405, 410–11 (2001) (holding that “First Amendment scrutiny” applies to regulations that require commercial actors to subsidize opinions with which they disagree).

255. See *Zauderer*, 471 U.S. at 651 (holding that a commercial actor’s “constitutionally protected interest in *not* providing any particular factual information . . . is minimal” and its rights are therefore “adequately protected as long as disclosure requirements are reasonably related to the State’s interest”).

256. This analysis brackets whether an activity is not covered by the First Amendment for any reason other than being false or misleading commercial speech.

257. On the distinction between risk and uncertainty, see Frank Knight, *Risk, Uncertainty, and Profit* 46–47, 231–32 (1921) (explaining that under conditions of risk, one can assess the probability of an outcome even if one cannot conclusively determine that it will occur, while under conditions of true uncertainty, one cannot even assess the probability of an outcome occurring); Daniel A. Farber, *Uncertainty*, 99 *Geo. L.J.* 901, 909 (2011) (noting that economic analysis underestimates the likelihood of catastrophic outcomes under conditions of uncertainty); Sarah E. Light, *Precautionary Federalism and the Sharing Economy*, 66 *Emory L.J.* 333, 337–38 & nn.11–12 (2017) (discussing risk and uncertainty in the climate context); Cass Sunstein, *Irreversible and Catastrophic*, 91 *Cornell L. Rev.* 841, 875–77 (2006) (examining the distinction between risk and uncertainty in the climate context).

258. 376 U.S. 254 (1964).

259. Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment”*, 1964 *Sup. Ct. Rev.* 191, 205; see also Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 8–28 (1st ed. 1948) [hereinafter Meiklejohn, *Political Freedom*] (arguing that freedom of speech is necessary for “self-government” because people should be able to hear and evaluate all ideas in order to decide

must prove to succeed on a libel claim against their critics, now requiring “clear and convincing proof”²⁶⁰ that the statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”²⁶¹ That is to say, the Court implemented what it described as “the central meaning of the First Amendment” by way of evidentiary standards.²⁶² What may appear at first glance to be dry, technical doctrinal questions are, in other words, of tremendous importance.

The goal of this Essay is not to argue that any of these categories are clear or even truly distinguishable at an epistemic level. Each of the tensions addressed below has been subject to sharp, thoughtful critique. As legal realists and law and political economy scholars have argued, the political and the commercial are inextricably intertwined.²⁶³ Similarly, as Professor Rebecca Tushnet has observed, “falsity, misleadingness, and meaning itself are often debatable.”²⁶⁴ Professor Steven Shiffrin likewise cautions: “[T]he line between true and false speech is not bright. . . . All language misleads some people to some extent. How many are too many and how much is too much are questions of policy and degree. The distinction between the true and the misleading is normative.”²⁶⁵ In other words, to answer these questions and to apply them to a given case, it is essential to articulate the normative reasons that these doctrinal fault lines exist to begin with.

Ultimately, these categories enact and reflect constitutional values. In other words, they implement the *reasons* why the First Amendment covers and protects (or does not protect) an activity in the first instance. The key is to know *why* an activity should be characterized as commercial or political, fact or opinion, or true or false. The aim of this Essay is to offer reasons

how they would like to be governed); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 26–29 (1971) (describing democracy as a “form of government that is meaningless without open and vigorous debate about officials and their policies”).

260. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342–43 (1974).

261. *Sullivan*, 376 U.S. at 280.

262. *Id.* at 273.

263. See, e.g., Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 *Yale L.J.* 1784, 1786–94 (2020) (calling for a “renewed commitment to questions of political economy” that understands the economy as “always already political in both its origins and its consequences”); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Pol. Sci. Q.* 470, 470–79 (1923) (arguing that “the systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restrictions of individual freedom”).

264. Rebecca Tushnet, *It Depends on What the Meaning of “False” Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 *Loy. L.A. L. Rev.* 227, 228 (2007) [hereinafter Tushnet, *Falsity and Misleadingness*].

265. Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 *Nw. U. L. Rev.* 1212, 1218–19 (1983). Tushnet thoughtfully uses a longer quote of Shiffrin’s discussion of this point. Tushnet, *Falsity and Misleadingness*, *supra* note 264, at 227.

why doctrinal lines should be drawn in certain ways that will bring practically useful clarity. By explicating the central tensions and animating normative considerations in both the doctrine around greenwashing and the regulation of expression at the nexus of politics, markets, and science, this Essay aims to provide a map out of the current doctrinal thicket.

In so doing, this Essay cuts new theoretical ground. For example, it leads to the conclusion that the gravamen of the commercial speech doctrine is consumer reliance and information asymmetries—much like in the contexts of fiduciary duties, perjury, malpractice, and other forms of fraud—more than whether a commercial speaker “propos[es] a commercial transaction”²⁶⁶ or the expression is “related solely to the economic interests of the speaker and its audience,”²⁶⁷ as the Court has occasionally suggested. By reaching this conclusion, this Essay parts ways with prominent scholars of commercial speech, including Professor Tamara Piety, who has argued that all corporate speech should be treated as commercial speech because corporations are, by definition, motivated by profit,²⁶⁸ as well as Professor Kent Greenfield, who has argued that the boundaries of the commercial speech doctrine should trace the corporation’s central purpose, namely “to create and build wealth.”²⁶⁹ This Essay’s approach similarly departs from the many scholars and advocates who have decried *Citizens United v. FEC*²⁷⁰ on the grounds that it wrongly treats corporations as humans (or groups of humans) when they engage in political speech.²⁷¹ The principal difference is that these scholars’ analyses focus on if and why corporations are unique as speakers (in law or fact), rather than (as this

266. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562 (1980).

267. *Id.* at 561.

268. Tamara R. Piety, *Brandishing the First Amendment: Commercial Expression in America* 224 (2012).

269. Kent Greenfield, *Corporations Are People Too (and They Should Act Like It)* 140 (2018). Greenfield agrees that corporate lies should be regulable even in the political context, principally because they, like corporate lies in commercial contexts, skew markets. See *id.* at 134–70.

270. 558 U.S. 310 (2010).

271. See Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 *Wis. L. Rev.* 451, 454–55 (“The *Citizens United* view of the corporation as an association of individuals is inconsistent with the established conception of the corporation as a judicial entity with limited liability.”); Tamara R. Piety, *Citizens United and the Threat to the Regulatory State*, 109 *Mich. L. Rev. First Impressions* 16, 16–17 (2010) (arguing that by identifying corporations as “citizens,” the decision “bolsters arguments for treating commercial speech like fully protected speech” and, by extension, hampers the government’s ability to regulate commerce); Tamara R. Piety, *Why Personhood Matters*, 30 *Const. Comment.* 361, 362–63 (2015) (arguing that *Citizens United*’s personhood metaphor “cast the corporation into the role of a ‘disfavored’ speaker” which made subsequent controversial decisions seem “correct and neutral” by “exploit[ing] our tendency to condemn discrimination”); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 *Case W. Rsv. L. Rev.* 497, 499 (2011) (“A conceptualization of corporate political speech that is grounded in traditional corporate law principles challenges the assumptions underlying the Court’s conclusion that corporate political speech cannot be distinguished from individual speech . . .”).

Essay emphasizes) on the constitutional value that the commercial speech doctrine was created to advance. On the other extreme, this approach diverges from those scholars who contend that commercial speech has little if anything to do with First Amendment values.²⁷²

The argument here instead connects the *reasons* for the commercial speech doctrine with how the First Amendment treats other socially similar contexts. One must know *why* the public needs commercial information to understand what the scope of the doctrine should be, and that is not found in the nature of corporations but instead by asking whether the public listener is informationally dependent on the commercial speaker and whether the information in question could materially inform the public's political or economic choices. And while this argument is consistent with pre-New *Lochner* commercial speech case law and Professor Robert Post's view that commercial speech is constitutionally valuable for its "informational function," it rejects Post's view that that function only extends to "information necessary for the education of those who participate in public discourse,"²⁷³ or as Post describes it, to increase "[d]emocratic competence."²⁷⁴ First Amendment *Lochnerism* has also questioned, if not undermined, this theory of commercial speech while failing to offer a coherent alternative.²⁷⁵

Instead, this Essay argues that the commercial speech doctrine should be defined by the public's need for commercial information to both knowledgeably participate at the ballot box and in political speech, and to have the information necessary for meaningful freedom in economic life itself. This approach takes the First Amendment's commitment to democratic participation to be more thoroughgoing than to protect only

272. See C. Edwin Baker, Commercial Speech: A Problem in the Theory of Freedom, 62 Iowa L. Rev. 1, 25 (1976) [hereinafter Baker, Commercial Speech] (arguing that commercial speech is justifiably excluded from constitutional protection because it is not about the expression of individual choice or value commitments); C. Edwin Baker, The Process of Change and the Liberty Theory of the First Amendment, 55 S. Cal. L. Rev. 293, 341 n.129 (1982) (arguing that the First Amendment should only protect speech with some "intrinsic connection with individual value choices"); C. Edwin Baker, Realizing Self-Realization: Corporate Political Expenditures and Redish's *The Value of Free Speech*, 130 U. Pa. L. Rev. 646, 671 (1982) (claiming that because market forces require commercial speech to orient toward profit maximization, commercial speech is "not a manifestation of individual freedom"); C. Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964, 996 (1978) (reiterating that commercial speech should not be constitutionally protected because it does not reflect "anyone's voluntary or personal choice"); Bork, *supra* note 259, at 26–28 (arguing that only political speech should be protected by the First Amendment because of its relationship to democratic government); Meiklejohn, Political Freedom, *supra* note 259, at 87 (arguing against the use of the First Amendment "for the protection of private, possessive interests with which it has no concern").

273. Post, Compelled Commercial Speech, *supra* note 29, at 874–75.

274. *Id.* at 915.

275. See Shanor, The New *Lochner*, *supra* note 28, at 140–54 (describing the evolution of the Court's rationale for protecting commercial speech and its increasing reluctance to justify it based on the speech's informational function).

those “communication[s] that are deemed necessary to ensure that a democratic state remains responsive to the views of its citizens.”²⁷⁶ While the Court’s canonical commercial speech cases and the broader pattern of First Amendment coverage²⁷⁷ suggest and support the theory this Essay advances, scholars and courts have left largely unexplored the idea that the First Amendment protects a broad notion of participatory democracy in economic life. This theory thus explains pre-New *Lochner* doctrine and goes beyond it to advance a new theory of the purposes of the freedom of speech in economic life.

This analysis allows for a greater understanding of why certain activities should be doctrinally characterized as commercial versus political speech with regard not only to whether the law can regulate false or misleading speech but also whether it should be evaluated under the unique, less stringent doctrines applicable to restrictions and compelled disclosures in commercial speech. Ultimately, this Essay concludes that those cases in which firms make public-facing statements about the environmental qualities of their products, services, or the firm itself should more often be understood as commercial than they are under current, contested doctrine. This is because the public, as voters, consumers, and investors, depend on truthful commercial speech to knowledgeably participate—and have meaningful freedom—in economic life. By concluding that these types of claims are regulable under the First Amendment, this Essay does not argue that all such expression *should* be regulated or could be under the FTC’s current rules and authorizing legislation. The aim is instead to outline the boundaries of the First Amendment in these contexts.

This Part first addresses First Amendment doctrine in the realm of politics and public discourse. It then turns to the constitutional rules surrounding commercial speech, that is, speech in markets. It concludes by outlining the First Amendment doctrine and values in the context of science and knowledge creation.

A. *The First Amendment Doctrine on Public Discourse (Politics)*

Despite its cultural prominence, the First Amendment’s robust protection of the freedom of speech is surprisingly young. The Supreme Court did not protect political expression until the early twentieth century and completely excluded commercial speech from the “speech” protected by the Constitution until 1976.²⁷⁸

276. Robert Post, *The Constitutional Status of Commercial Speech*, 48 *UCLA L. Rev.* 1, 4 (2000) [hereinafter Post, *Constitutional Status*].

277. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763–65 (1976).

278. See Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 *Tex. L. Rev.* 747, 759–61 (1993) (explaining that First Amendment cases were rarely heard prior to World War I because the Amendment’s guarantees were thought of as enforceable only against the federal government and most regulation affecting

Today, it is well established that political speech is entitled to the most forceful First Amendment protection. From the Court's earliest free speech opinions, it has observed this fundamental point: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."²⁷⁹ The Supreme Court has repeatedly observed that political speech "is at the heart of the First Amendment's protection[s]"²⁸⁰ and "at the core of what the First Amendment is designed to protect."²⁸¹ It has stressed "that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'"²⁸² The reason why goes to the premise of our democracy: "The constitutional safeguard . . . 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"²⁸³ At the core of the First Amendment, then, is the people's right to engage in the formation

freedom of speech was enacted at the state or local level); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 629 (1990) (noting that commercial speech was excluded from constitutional protection until the Court's decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. Forum 165, 167–68 (2015) (tracing the history of the commercial speech doctrine); Shanor, *The New Lochner*, *supra* note 28, at 142 (identifying *Virginia Board* as "creating the modern commercial speech doctrine").

279. *Stromberg v. California*, 283 U.S. 359, 369 (1931); see also, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.").

280. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978); see also *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) ("Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."); Zechariah Chafee, Jr., *Free Speech in the United States* 559–66 (1941) (arguing that robust protection of political speech leads to more truth in public discourse, a better-informed citizenry, and a happier country); Thomas M. Cooley, *Constitutional Limitations* 528–30 (5th ed. 1883) ("Repression of full and free discussion is dangerous in any government resting upon the will of the people."); Cass R. Sunstein, *Free Speech Now*, in *The Bill of Rights in the Modern State* 255, 304–07 (Geoffrey R. Stone, Richard A. Epstein & Cass R. Sunstein eds., 1992) (justifying heightened protection of political speech based on the Framers' theories of free expression and the government's incentive to act in a self-interested manner, among other factors).

281. *Virginia v. Black*, 538 U.S. 343, 365 (2003); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) (noting that "[c]ore political speech occupies the highest, most protected position" in our constitutional order).

282. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)); see also *Fed. Commc'ns Comm'n v. League of Women Voters*, 468 U.S. 364, 381 (1984) (quoting *Claiborne Hardware*, 458 U.S. at 913).

283. *N.Y. Times v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

of “that public opinion which is the final source of government in a democratic state.”²⁸⁴

The First Amendment’s robust protection for speech in public discourse reflects the idea that the Constitution entrusts the people—through each of us as free, individual speakers—with the power to decide the direction of our social order and political system.²⁸⁵ Political speech protections orient around the autonomy of the speaker to ensure the wide-open public discourse necessary for democratic self-determination and legitimacy.²⁸⁶

These constitutional values and institutional considerations manifest in important doctrinal ways. First, speech in public discourse is protected by strict scrutiny, the most demanding level of constitutional review. Courts

284. *Masses Publ’g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.), rev’d, 246 F. 24 (2d Cir. 1917).

285. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.”); *Cohen v. California*, 403 U.S. 15, 24 (1971) (“[F]ree expression . . . in a society as diverse and populous as ours . . . is designed . . . [to] put[] the decision [about] what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise . . . upon which our political system rests.”); *Sullivan*, 376 U.S. at 270 (“The First Amendment, said Judge Learned Hand, ‘presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many, this is, and always will be, folly, but we have staked upon it our all.’” (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion”); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system.”); see also Robert C. Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State* 1–25 (2012) (conceiving of the First Amendment as a vehicle for democratic legitimation); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 *N.Y.U. L. Rev.* 1, 3–4 (2004) (contending that the First Amendment aims “to promote a democratic culture”); Bork, *supra* note 259, at 22–23 (arguing that the freedom of speech is meant to aid the process of representative government); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 *Sup. Ct. Rev.* 245, 263 (arguing that free speech is needed because the people “have decided . . . to govern themselves”); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 *Harv. L. Rev.* 601, 633–44 (1990) (articulating a theory of the First Amendment grounded in democratic participation and public discourse).

286. See, e.g., *Sullivan*, 376 U.S. at 270 (acknowledging the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”); *Barnette*, 319 U.S. at 642 (“[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”).

“uphold . . . restriction[s]” that “burden[] core political speech” only if they are “narrowly tailored to serve an overriding state interest.”²⁸⁷

Second, laws and policies that compel speech receive the same level of scrutiny as those that restrict political speech.²⁸⁸ Because speech in public discourse is protected due to the *speaker’s* right to contribute to the formation of public opinion, speech compulsions and prohibitions equally conflict with the reason speech in public discourse is constitutionally valuable.²⁸⁹

Third, the First Amendment robustly protects false statements of fact in public discourse. Why? “[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”²⁹⁰ In the context of heated disagreements over political, moral, religious, or other matters of opinion, humans are prone to exaggeration or even falsehood.²⁹¹ For this reason, the First Amendment requires that criticism of government officials and other public persons not only be false statements of fact but also meet the exacting actual malice standard to be actionable as libel.²⁹²

The Court has gone further to protect even knowing, outright lies in public discourse. “Lying was his habit” are the words that open the Court’s opinion in *United States v. Alvarez*, a case about a man who lied about receiving the Congressional Medal of Honor.²⁹³ For his lie, Xavier Alvarez was charged with and pled guilty to a violation of the Stolen Valor Act of 2005, which the Supreme Court found violated the First Amendment.²⁹⁴

287. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995); see also *Sable Commc’ns of Cal., Inc. v. Fed. Commc’ns Comm’n*, 492 U.S. 115, 126 (1989) (“The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”).

288. For an example of a restriction on political speech receiving strict scrutiny, see *McIntyre*, 514 U.S. at 336 (concerning “an Ohio statute that prohibits the distribution of anonymous campaign literature”). For an example of compelled speech in public discourse receiving the same treatment as a speech restriction, see *Barnette*, 319 U.S. at 626–29 (concerning a resolution mandating a daily recitation of the Pledge of Allegiance).

289. See *Barnette*, 319 U.S. at 642.

290. *Sullivan*, 376 U.S. at 271–72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)); *id.* at 279 (“A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . leads to a comparable ‘self-censorship.’ Allowance of . . . [defending] truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.”).

291. See *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (“In [the realms of religious faith and political belief] the tenets of one man may seem the rankest error to his neighbor. . . . But . . . in spite of the probability of [exaggeration or false statements], these liberties are . . . essential to enlightened opinion and right conduct on the part of the citizens . . .”).

292. See *Sullivan*, 376 U.S. at 283 (holding that when public officials bring libel actions “against critics of their official conduct,” they must prove “actual malice”).

293. 567 U.S. 709, 713 (2012).

294. *Id.* at 714–15.

While the Court acknowledged that the government may regulate false statements in certain contexts such as “to effect a fraud or secure moneys or other valuable considerations, say, offers of employment,”²⁹⁵ it rejected the government’s argument that “false statements, as a general rule, are beyond constitutional protection.”²⁹⁶ In other words, the First Amendment offers a sweeping commitment to protecting a speaker’s right to say what they want in public discourse.

B. *The First Amendment’s Protection of Commercial Speech (Markets)*

The Supreme Court first seriously considered the constitutional status of commercial speech in 1942 in *Valentine v. Chrestensen*.²⁹⁷ The case involved a provision of New York City code that prohibited the distribution of business advertising materials. F.J. Chrestensen was found in violation of that restriction because he had distributed advertisements for a submarine exhibition.²⁹⁸ The Court brusquely rejected his claim that the city’s restriction on advertising was unconstitutional, saying that it is “clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.”²⁹⁹ Instead, “[w]hether, and to what extent,” it can be regulated “are matters for legislative judgment.”³⁰⁰ *Chrestensen’s* holding thus placed commercial speech completely outside the First Amendment as wholly uncovered, like contracts or fighting words.³⁰¹

The Supreme Court overturned *Chrestensen* and created the modern commercial speech doctrine in the 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, which involved Virginia’s ban on pharmaceutical advertising.³⁰² In that case, the Court articulated the unique value of commercial speech:

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

295. *Id.* at 723.

296. *Id.* at 718.

297. 316 U.S. 52 (1942).

298. *Id.* at 53.

299. *Id.* at 54.

300. *Id.*

301. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (noting that regulation of “fighting words” raises no constitutional issue).

302. 425 U.S. 748, 761–73 (1976). *Bigelow*, which involved the advertisement in Virginia of the availability of legal and low-cost abortions in New York, foreshadowed the Court’s explicit protection of commercial speech in *Virginia Board*. See *Bigelow v. Virginia*, 421 U.S. 809, 818–21 (1975).

also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.³⁰³

In this explanation, the Court expressed the constitutional value of commercial speech as unrelated to a commercial speaker's rights or autonomy. Instead, the "First Amendment's concern for commercial speech is based on [its] informational function."³⁰⁴ Critically, the Court framed the architecture of commercial speech doctrine around the informational needs of the public as decisionmakers in *both* economic and political life.

This distinctive reason that commercial speech is constitutionally valuable explains several of the defining features of commercial speech doctrine. First, commercial speech is treated with intermediate or even more relaxed constitutional review, rather than the strict scrutiny extended to political speech. Specifically, government restrictions on commercial speech (for example, a ban on cigarette advertising) receive intermediate scrutiny under *Central Hudson*,³⁰⁵ while mandated factual disclosures (for example, a required nutrition or drug interaction label) are analyzed under the standard established in *Zauderer*, which is only slightly more stringent than rational basis review.³⁰⁶ Under *Zauderer*, a mandated disclosure of factual commercial speech is constitutional as long as it is "reasonably related" to a permissible governmental interest and is not so "[u]njustified or unduly burdensome" as to "chill[] protected speech."³⁰⁷

Second and relatedly, the Constitution extends asymmetrical protection to government *restrictions* on commercial speech versus mandated *disclosures* of commercial speech. Why? Because the First Amendment favors more, rather than less, factual-information flow to the public for its decisionmaking in economic and political life. Restrictions

303. *Virginia Board*, 425 U.S. at 765 (citations omitted).

304. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980); see also *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) (noting that "First Amendment coverage of commercial speech is designed to safeguard" society's "interest[] in broad access to complete and accurate commercial information").

305. *Central Hudson*, 447 U.S. at 566; *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (holding that affirmative limitations on commercial speech are subject to intermediate scrutiny under *Central Hudson*).

306. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985).

307. *Milavetz*, 559 U.S. at 250 (quoting *Zauderer*, 471 U.S. at 651). *Zauderer* has been sharply criticized by a range of Justices. Shanor, *The New Lochner*, *supra* note 28, at 153 ("[T]wo Justices, Ginsburg and Thomas, have indicated a desire to revisit the continuing validity of *Zauderer*, which created that distinction."). But it was also recently reaffirmed and broadened in scope by *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018). See *infra* notes 313–314 and accompanying text. Professor Elizabeth Pollman has argued that the Supreme Court's "willingness to strike down the regulation and raise the bar on the 'exacting scrutiny' standard" in *Americans for Prosperity Foundation v. Bonta* "suggests that campaign finance regulations and other compelled disclosure regimes—even for business corporations—may be dismantled or threatened in the future." Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 *Harv. L. Rev.* 220, 224 (2021).

on commercial speech interrupt the flow of accurate information to the public and therefore are subject to intermediate scrutiny. By contrast, compelled commercial speech amplifies the flow of information to the public and so is subject to more relaxed review. For this reason, the Supreme Court has stressed that a commercial actor's "constitutionally protected interest in *not* providing any particular factual information . . . is minimal."³⁰⁸

Third, commercial speech that is false or misleading falls entirely outside the First Amendment's coverage. Why? Because false or misleading commercial information does not facilitate the public's economic or political decisions.³⁰⁹ Commercial speech is valuable for its informational function—its provision of information to the public so that people can make more informed choices in political and economic life—which means its underlying doctrines value truthful information.

Two related doctrinal principles follow. First, speech is deemed true, false, or misleading from the perspective of its audience, not the commercial speaker.³¹⁰ This principle makes sense given that commercial speech is protected because of its value to its public audience, which includes consumers and investors, among others. Second, opinion, including the articulation of opinion by commercial actors, is protected by the rules of public discourse, not the rules applicable to commercial speech. The Supreme Court reached this issue in *United States v. United Foods, Inc.*, which invalidated a mandated subsidy that funded opinion advertising about mushrooms.³¹¹ It held the compelled subsidy program unconstitutional because competitors were required to subsidize generic opinion advertising conveying that "mushrooms are worth consuming whether or not they are branded," which suggested that there was no difference in quality between competitors.³¹² This conclusion makes sense, again because commercial speech is constitutionally valuable because of the factual information it provides to the public.

This distinction raises an important question about how to distinguish fact from opinion. The Supreme Court recently addressed a related issue

308. *Zauderer*, 471 U.S. at 651; see also *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001) ("[Mandated] disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas.'").

309. See *Central Hudson*, 447 U.S. at 563–64 ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.").

310. Cf. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 186–87 (2015) (noting that whether statement is "misleading" in the securities context depends on the perspective of a reasonable investor).

311. 533 U.S. 405, 408–09 (2001); see also *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 4, 20–21 (1986) (invalidating an order requiring a privately owned utility company to include speech generated by a third party in the monthly newsletter printed on the company's billing envelopes).

312. *United Foods*, 533 U.S. at 411.

in *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*), a case involving California regulation of pregnancy crisis centers, which arguably required factual disclosures as part of the state's regulation of the medical profession.³¹³ *NIFLA* made clear that a relaxed standard of review for compelled commercial speech applies both to "health and safety warnings" and "purely factual and uncontroversial disclosures about commercial products."³¹⁴ The Court also reaffirmed that the commercial speech doctrine does not apply to statements of opinion when it declined to apply commercial speech case law to the compelled disclosures of information about pregnancy-related services offered by the state.³¹⁵ Because the clinic viewed the compelled speech (that is, providing information about where a pregnant person could obtain an abortion) to be religiously abhorrent, the Court treated the mandated disclosures as statements of opinion—and indeed opinion messaging on abortion, a topic of the most contentious and deepest moment.³¹⁶

Despite the principles outlined in the last two sections, questions at the intersection of the doctrines that apply to political and commercial speech raise difficult questions and have caused tremendous confusion. A good example of this arose in *Nike, Inc. v. Kasky*.³¹⁷ In the late 1990s, the athletic fashion company Nike was accused of abusive labor practices in its factories abroad—or, put more sharply, of producing its shoes in sweatshops.³¹⁸ Nike responded in myriad ways, including by making statements about its labor practices—to customers, newspaper editors, university officials, and athletic directors—that the plaintiff, Marc Kasky, alleged included false statements of fact and/or material omissions that violated California's unfair competition and false advertising laws.³¹⁹

Nike contended that the statements were protected by the First Amendment's stringent protections for political speech—such that even if the statements were false, they were constitutionally shielded from suit.³²⁰ As Professor David Vladeck observed, "Rather than arguing for constitutional protection for *false* commercial speech, Nike took the high road and argued that its speech was not 'commercial' speech at all, but core speech about an urgent political and social matter."³²¹ Specifically, Nike urged that its statements were about and were made within a larger public debate

313. 138 S. Ct. 2361, 2369–70 (2018).

314. *Id.* at 2376.

315. See *id.* at 2372 (rejecting the applicability of the *Zauderer* standard because the regulation at issue required disclosure of controversial information).

316. *Id.*

317. 539 U.S. 654 (2003) (per curiam).

318. *Id.* at 656 (Stevens, J., concurring).

319. *Id.*

320. *Id.* at 656–57.

321. David C. Vladeck, Lessons From a Story Untold: *Nike v. Kasky* Reconsidered, 54 Case W. Rsrv. L. Rev. 1049, 1061 (2004).

about the labor practices of multinational companies abroad.³²² “The marketplace of ideas, Nike contended, would sort out truth and falsity but only if spirited debate could proceed uninhibited by the threat of government intervention.”³²³ The company acknowledged that even if the statements it made were false, the company could only be liable if the demanding “actual malice” standard of *New York Times v. Sullivan* was met—namely that the statements were made with knowledge they were false or with reckless disregard of their truth or falsity.³²⁴ Unsurprisingly, Kasky countered that Nike was engaged in commercial speech, and because false or misleading commercial speech is not protected, nothing barred his suit against Nike.³²⁵

The state trial and appellate courts ruled in Nike’s favor, but the California Supreme Court reversed on the grounds that Nike’s speech was commercial speech and thus lacked protection.³²⁶ The U.S. Supreme Court granted Nike’s petition for certiorari—only to dismiss the writ six months later as improvidently granted.³²⁷ As Justice John Paul Stevens noted when the Court dismissed the case, it presented “difficult First Amendment questions.”³²⁸ It appears those questions—this doctrinal thicket—were difficult enough that the Justices decided to avoid them altogether.

* * *

By outlining the disparate doctrines around speech in politics and markets, their doctrinal differences, and the line-drawing questions they raise, these sections have aimed to shed light on why First Amendment questions at this intersection are not only often difficult but have also created doctrinal confusion. Cases at the nexus of these overlapping doctrines require us to answer three questions in the first instance: whether the activity should be characterized as commercial or political; if the speech is commercial, whether it is an assertion of fact or opinion; and if a statement is one of fact, whether it is false or misleading. But further questions arise surrounding the production of knowledge—namely, the ability to discern whether a statement is true, false, or misleading, and the process by which we arrive at a determination. This Essay now turns to these questions.

322. *Id.* at 1062.

323. *Id.*

324. *Id.* at 1063–64.

325. See *id.* at 1065–67 (“Kasky and his supporters saw *Nike v. Kasky* as a garden-variety commercial speech case.”).

326. *Nike, Inc. v. Kasky*, 539 U.S. 654, 656–57 (2003) (Stevens, J., concurring).

327. *Id.* at 655 (2003) (per curiam).

328. *Id.* at 663 (Stevens, J., concurring).

C. *The First Amendment and Knowledge Creation (Science)*

First Amendment analysis of greenwashing is further complicated because questions of scientific knowledge and risk assessment are involved. One often needs the input of expert communities to decide if a given statement is true, misleading, or false, and to inform the important line-drawing questions outlined above.

The First Amendment applies a distinct set of considerations to the institutions and norms involved in the production of knowledge. Those institutions and norms stand in stark contrast to both the strong, speaker-centered autonomy principles of public discourse and the listener-based information function of the commercial speech doctrine. The scientific method does not allow everyone to say whatever they would like out of respect for their equal autonomy. The processes around knowledge creation are instead defined by structured, discipline-specific methodologies surrounding what qualifies as sufficient proof of a claim of fact.

There is a range not only of disciplinary methods but also theories of what science is. The most prominent of those theories agree on the importance of accepted disciplinary methods and frameworks for seeking truth: Philosopher Karl Popper's theory that falsifiability is the defining feature of science,³²⁹ philosopher Thomas Kuhn's theory of scientific revolutions through paradigm shifts,³³⁰ and the "development-by-accumulation" views of science that Kuhn critiques³³¹ are all grounded in the existence of these sort of norms and frameworks. Kuhn, for example, recognizes that paradigms "provide models from which spring particular coherent traditions of scientific research," and that those whose research is "based on shared paradigms are committed to the same rules and standards for scientific practice."³³² Prominent theorists diverge about whether establishing truth (or falsification or verification) is possible and whether the structures of knowledge creation evolve understanding toward truth.³³³ But most recognize the centrality of the discipline of accepted methods, standards, and fundamental commitments for seeking truth and building knowledge.

Luckily, neither the First Amendment nor the issue of greenwashing requires an answer to this question of how to establish truth or to create

329. Karl Popper, *The Logic of Scientific Discovery* 6–7 (2d ed. 2002) ("[This theory] might be described as the theory of the *deductive method of testing*, or as the view that a hypothesis can only be empirically *tested*—and only *after* it has been advanced. . . . [T]he work of the scientist consists in putting forward and testing theories."); *id.* at 18 (arguing that what distinguishes science and non-science is that "*it must be possible for an empirical scientific system to be refuted by experience*").

330. See Thomas S. Kuhn, *The Structure of Scientific Revolutions* (4th ed. 2012) (elaborating theory of normal science and scientific revolutions).

331. See *id.* at 2–3.

332. *Id.* at 11.

333. Kuhn, for example, argued that because science is based in contingent paradigms, there is no way to establish absolute truth. See *id.* at 144–52.

knowledge. What is important for present purposes is that regardless of what the accepted model of knowledge creation is in any given discipline, claims can be tested within that paradigm. For that reason, one can understand the First Amendment's relationship to knowledge creation as not necessarily inquiring into actual truth, but instead pursuing verification within currently accepted approaches to how facts can be found and substantiated. It may be wrong, for example, that light is both a particle and a wave, but there are contemporary methods, rules, and standards to evaluate claims that it is in fact both of those things. One might think about the issue more simply as the set of processes by which different sorts of claims are currently verified.

At the same time, because knowledge about key issues from climate change to public health often takes the form of possibilities, risks, and uncertainties, issues of science can further complicate how to evaluate whether a specific statement is true. It is accepted under standard statistical methods, for example, that the statement "cigarettes cause cancer" can be factually accurate even if a person who smokes will not get cancer 100% of the time. But new examples are constantly emerging that are being questioned: Do masks or vaccines protect against COVID-19? Are paper bags better for the environment than plastic ones? Whether these statements can be characterized as factual and accurate critically depends upon accepted forms of inquiry about health risks in the context of evolving knowledge. As discussed in the next Part, because prevailing scientific methods do not expect or require certainties, it is inappropriate to require 100% certainty on many issues of scientific fact for a related statement to be considered a true (or false) statement for First Amendment purposes.

IV. A TYPOLOGY OF FIRST AMENDMENT CONSIDERATIONS AT THE INTERSECTION OF SCIENCE, POLITICS, AND MARKETS

This Part offers the primary theoretical contribution of the Essay: It articulates a new theory of commercial speech grounded in a thick view of participatory democracy. It aims to be a helpful lens through which the problems of speech rights about greenwashing can be better and more clearly understood than through the thicket of conflicting doctrines highlighted above. To do so, this Part argues that the scope of what should be understood as "commercial speech" must be based upon the *reasons why* commercial speech is treated distinctly under First Amendment doctrine and the *normative values* that truthful commercial speech enables and supports. Namely, truthful information in the marketplace is protected because such information is necessary for the people to participate meaningfully in both political and economic life.

After offering this normative assessment, this Part then provides a taxonomy of the constitutionally relevant contexts, values, and considerations that should be taken into account when approaching issues of greenwashing. In so doing, the Essay aims to offer clarity for those addressing—

not only in litigation but also public policy and private action—the increasingly important constitutional questions at the intersection of science, politics, and markets.

A. *A Social Relationships Approach to the Commercial Speech Doctrine*

The term “commercial speech doctrine” is misleading and has encouraged both judges and scholars to pursue the wrong sorts of questions. Framing the doctrine as about a preexisting quality of “commercialness” leads to attempts to cleanly differentiate the “commercial” from the “political” to identify what the boundaries and characteristics of the doctrine should be. Many brilliant scholars have attempted that undertaking.³³⁴ That, however, is not the key question to be asked.

334. See, e.g., C. Edwin Baker, *Human Liberty and Freedom of Speech* 194–224 (1989) (arguing that “first amendment theory requires a complete denial of first amendment protection for commercial speech”); Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 39 (1948) (“The constitutional status of a merchant advertising his wares . . . is utterly different from that of a citizen who is planning for the general welfare. And from this it follows that the Constitution provides differently for two different kinds of ‘freedom of speech.’”); Baker, *Commercial Speech*, *supra* note 272, at 3 (“[C]ommercial speech lacks the crucial connections with individual liberty and self-realization[,] . . . which are central to justifications for the constitutional protection of speech.”); cf. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *Yale L.J.* 877, 948 n.93 (1963) (“Up to the present, the problem of differentiating between commercial and other communication has not in practice proved to be a serious one.”).

Aspects of these arguments tie to broader questions of the relationship between public and private (in law and beyond), the boundaries of state action, and the purpose(s) of firms and economic activity. See generally Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Guenther Roth & Claus Wittich eds., 1968) (describing the division between the instrumental rationality of economic life, as distinct from other social values, as central to modernity); Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 *Harv. L. Rev.* 1049 (1931) (arguing that “all powers granted to a corporation . . . are necessarily and at all times exercisable only for the ratable benefit of all the shareholders”); Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 *Harv. L. Rev.* 1365 (1932) (arguing that if they have no obligation to shareholders, corporate managers are accountable to no one); Nikolas Bowie, *Why the Constitution Was Written Down*, 71 *Stan. L. Rev.* 1397 (2019) (tracing the corporate charter origins of the U.S. Constitution); Paul Brest, *State Action and Liberal Theory: A Casenote on *Flagg Brothers v. Brooks**, 130 *U. Pa. L. Rev.* 1296 (1982) (tracing the origins of differing approaches to state action to the divide between Lockean natural rights theory and Hobbesian positivism and arguing that the public/private distinction collapses under constitutional positivism); Britton-Purdy et al., *supra* note 263 (describing the intellectual history of the relationship between public/private and economic/political in U.S. legal thought); Morris R. Cohen, *Property and Sovereignty*, 13 *Cornell L.Q.* 8, 21–26 (1927) (arguing that so-called private rights are in fact delegated public powers); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 *Harv. L. Rev.* 1145 (1932) (arguing that corporations have a “social service,” as well as profit-making, function); Hale, *supra* note 263 (articulating classic legal realist argument on the inseparability of public and private); Morton J. Horwitz, *History of the Public/Private Distinction*, 130 *U. Pa. L. Rev.* 1423 (1982) (tracing the intellectual history of the public/private distinction); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 *U. Pa. L. Rev.* 1349 (1982) (arguing that the public/private distinction, like others that constitute liberal thought, is on the decline by way of six stages

Instead of asking whether certain speech is “commercial” or “political,” a better question requires identifying the normative reasons for and constitutional values of having this distinctive First Amendment doctrine in the first place. What is the doctrine aiming to do? This approach has several benefits. It encourages a focus on more tractable questions such as who has more information in the speaker–listener relationship, and whether that information is useful for a given purpose. This focus on social relationships and the context in which they occur is critical to the First Amendment analysis because it allows clearer identification of the sorts of relationships that the commercial speech doctrine has regulated and seeks to support and the constitutional values that have animated those decisions.

1. *Informational Reliance*. — What sorts of relationships, then, has the commercial speech doctrine regulated? Despite the recent dynamism of the doctrine, the case law from the 1970s to the present provides a startlingly consistent answer: The doctrine extends to relationships of informational reliance.³³⁵ This is strikingly consistent with other similar contexts of epistemic reliance where the First Amendment consistently permits regulation for truth and falsity by extending either no coverage or reduced protection to speech. These contexts include fiduciary duties, fraud of any variety (common law, securities, criminal), malpractice,

from “robust health to utter decrepitude”); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. Pa. L. Rev. 1358 (1982) (analyzing the incoherence and ideological function of the public/private distinction in labor law); Sophia Z. Lee, *Job Security and the Public–Private Law Distinction*, 24 *Theoretical Inquiries L.* (forthcoming 2023) (on file with the *Columbia Law Review*) (engaging the recent resurgence of the public/private distinction in the context of the New Private Law movement and the history of the legal recognition of termination only for good reason); Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration and the Internet: Directing Law to Serve Human Needs*, 52 *Harv. C.R.-C.L. L. Rev.* 145 (2017) (analyzing the conceptual mess of the state action doctrine and theorizing alternatives to meet the challenges of the twenty-first century); Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 *Tex. L. Rev.* 1423 (2021) (examining corporate purpose through the evolution of corporate charters). Compare *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy that Serves All Americans’*, *Bus. Roundtable* (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [https://perma.cc/2Q86-6W33] (articulating commitment to all stakeholders), with *Bus. Roundtable, Statement on Corporate Governance 1* (1997), <http://www.ralphgomory.com/wp-content/uploads/2018/05/Business-Roundtable-1997.pdf> [https://perma.cc/Z4SD-UYN6] (“The Business Roundtable wishes to emphasize that the principal objective of a business enterprise is to generate economic returns to its owners.”).

335. See Shanor, *First Amendment Coverage*, *supra* note 28, at 327 n.39 (“[S]ince the Supreme Court first drew commercial speech within the First Amendment’s scope, the reason it has been protected is because of the information it provides to listening consumers.”); Shanor, *The New Lochner*, *supra* note 28, at 203 (noting that commercial speech has been protected for its informational value to the public since the doctrine’s inception).

contracts, and perjury.³³⁶ Relationships in these contexts are defined not by the sort of normative and factual contestation of the public sphere but instead by relationships of trust.³³⁷ Consider malpractice or commercial fraud: If you relied on a doctor who knowingly informed you that you needed a dangerous surgery that you did not, it would be clear that they violated the norms attendant to the doctor–patient relationship.³³⁸ These underlying social relationships have shaped constitutional doctrine. Your doctor cannot claim in defense to a medical malpractice lawsuit that their advice was protected speech under the First Amendment. Each of these examples—fiduciary duties, fraud, malpractice, contracts, and perjury—involve relationships of reliance and informational dependence. And the First Amendment has long permitted each to be regulated for truth and face liability for falsehood.

Consider *Alvarez*. While the Court aggressively protected his lie about the Medal of Honor, it repeatedly emphasized what the decision did not reach, including prohibitions on false statements to a government official, perjury, and false representation that one is speaking as a government official.³³⁹ “Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.”³⁴⁰ Why was Alvarez’s lie different? “For all the record shows, respondent’s statements were but a pathetic attempt to gain respect that eluded him.”³⁴¹ Critically, they did “not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal.”³⁴² That is, there was no informational dependence in *Alvarez*.

336. See, e.g., *United States v. Grayson*, 438 U.S. 41, 54 (1978) (noting the “unquestioned constitutionality of perjury statutes”); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 n.10 (1961) (“[Freedom of Speech as an absolute right] cannot be reconciled with the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like . . .”). Professor Jack Balkin’s argument that some information companies should be treated as information fiduciaries leverages this insight. See Jack M. Balkin, *Free Speech Is a Triangle*, 118 *Colum. L. Rev.* 2011, 2040–54 (2018) (describing the social and legal obligations of information fiduciaries); Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 *U.C. Davis L. Rev.* 1183, 1186 (2016) (“Because of their special power over others and their special relationship to others, . . . the First Amendment permits somewhat greater regulation of information fiduciaries than it does for other people and entities.”).

337. Shanor, *First Amendment Coverage*, *supra* note 28, at 350.

338. *Id.*

339. *United States v. Alvarez*, 567 U.S. 709, 719–21 (2012).

340. *Id.* at 723 (noting that fraudulent speech generally falls outside the protections of the First Amendment (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976))).

341. *Id.* at 714.

342. *Id.*

By contrast, perjury can be criminalized “because it can cause a court to render a ‘judgment not resting on truth.’”³⁴³ The Court emphasized this concern about epistemic reliance: “Unlike speech in other contexts, testimony under oath . . . will be the basis for official governmental action, action that often affects the rights and liberties of others.”³⁴⁴ Even casual consideration indicates that if Alvarez had made the same false statement, say, to a prospective employer or in the context of a court proceeding, the First Amendment would not have shielded him from liability.

Against this broader context, the relational concern at the heart of the commercial speech doctrine becomes clear: It is epistemic dependence. In a complex economy, consumers, investors, markets, and the public are often in an informationally dependent relationship with commercial speakers about the speaker’s behavior or the qualities of their products and services—including in the context of environmental claims.

While this foundational point is clear, there is not one First Amendment rule about the requisite type of informational reliance that must be present. Courts have taken a range of approaches. In some contexts that are outside of First Amendment coverage but which are the same social relationship form, courts have required plaintiffs to establish reliance as a matter of the underlying doctrine (say, contracts or malpractice law).³⁴⁵ In the securities fraud context, however, the court applies a rebuttable presumption that “[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor’s reliance on any public material misrepresentations, therefore, may be presumed” even if the investor did not directly rely on the misstatements.³⁴⁶ In cases within First Amendment coverage, courts have treated reliance more abstractly, either assuming reliance or its absence, without elaborating burdens, standards of evidence, or whose reliance matters for constitutional purposes—as in *Alvarez* and the canonical commercial speech case, *Virginia Board*.³⁴⁷

2. *Democratic Participation*. — But the commercial speech doctrine is characterized by more than epistemic dependence. Why is the “informational function” of commercial speech important? What is the

343. *Id.* at 720 (quoting *In re Michael*, 326 U.S. 224, 227 (1945)).

344. *Id.* at 721.

345. See, e.g., *Archdiocese of Milwaukee v. Doe*, 743 F.3d 1101, 1106 (7th Cir. 2014) (“To rescind a contract based on a fraudulent or material misrepresentation made during contract formation, the recipient must have justifiably relied on the misrepresentation in deciding to enter into the contract.”).

346. *Basic Inc. v. Levinson*, 485 U.S. 224, 241–49 (1988).

347. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763–64 (1976) (“Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. . . . [I]nformation as to who is charging what . . . could mean the alleviation of physical pain or the enjoyment of basic necessities.”).

normative end of encouraging the free flow of commercial information? The Court in *Virginia Board* identified two goals: (1) The importance of information to “the formation of intelligent opinions as to how that system ought to be regulated or altered,” that is, to “enlighten public decisionmaking in a democracy”; and (2) the “intelligent and well informed” “allocation of our resources . . . made through numerous private economic decisions.”³⁴⁸

The first of these may be clear enough. One might think of it as the goal of political participation. A predicate to meaningful participation in a democracy and in public discourse, including about wildly important economic and environmental questions, depends on truthful information. I may vote differently or support different environmental policies depending on the extent of the voluntary actions fossil fuel companies take to address climate change, for example. I similarly need information to take part in informed debate over how to allocate social and economic resources.

The second goal of the commercial speech doctrine has been largely ignored. Indeed, it has been misinterpreted to date. *Post*, for example, has described the second goal as one of “economic efficiency” and argued that efficiency is not and should not be a goal of the First Amendment.³⁴⁹ But *Virginia Board* did not speak of efficiency—it spoke of material freedom and what this Essay terms “economic democracy.”³⁵⁰

The Court explained, for example, that a consumer’s interest in commercial information may be “keener by far[] than his interest in the

348. *Id.* at 765.

349. *Post*, Constitutional Status, *supra* note 276, at 8–9.

350. See generally Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don’t Talk About It)* (2017) [hereinafter Anderson, *Private Government*] (arguing that American workplaces are unaccountable private governments with authoritarian powers that should be reorganized to provide space for real freedom for workers, including greater voice and greater associational and exit rights); Brandeis on Democracy (Philippa Strum ed., 1995) (elucidating Justice Louis Brandeis’s vision of both political and economic democracy); Cynthia Estlund, *Working Together: How Workplace Bonds Strengthen a Diverse Democracy* (2003) (arguing that the workplace is a key institution for building networks of shared norms, trust, and social connections, including across divisions including race and gender, in ways that strengthen democracy); Nikolas Bowie, Antidemocracy, 135 *Harv. L. Rev.* 160 (2021) (presenting a broad view of democracy beyond the ballot box); Cynthia L. Estlund, Free Speech and Due Process in the Workplace, 71 *Ind. L.J.* 101 (1995) (arguing that workplaces are self-governing, intermediate institutions); Cynthia Estlund, Workplace Democracy for the Twenty-First Century? Rethinking a Norm of Worker Voice in the Wake of the Corporate Diversity Juggernaut, 14 *Nev. L.J.* 309 (2014) (exploring possibilities for workplace democracy in the context of managerialism, market thinking, and the decline of the U.S. labor movement); Elizabeth Anderson, Liberty, Equality, and Private Government (Mar. 5, 2015) (Tanner Lectures on Human Values, Princeton University), https://tannerlectures.utah.edu/_resources/documents/a-to-z/a/Anderson%20manuscript.pdf [<https://perma.cc/ZU93-2RRR>] (original lectures that were later published with critiques and responses in Anderson, *Private Government*, *supra*).

day's most urgent political debate."³⁵¹ Why? The example the Court provides is telling: It is "the poor, the sick, and particularly the aged" for whom commercial information "could mean the alleviation of physical pain or the enjoyment of basic necessities."³⁵² That concern is not one of efficiency. It is one of *material freedom*—in other words, freedom in economic life, including not only the ability to obtain life's basic necessities but also to participate in economic life in ways that affect oneself—made possible by commercial information. Individuals need commercial information so they can get goods and services and make decisions about what to do with their labor, investments, and consumer choices—decisions that can make one's life profoundly, materially different, and one's experience of their life as one full (or not) of dignity, joy, opportunity, desperation, despair, or hope.

The Court additionally discussed the importance of truthful information to the individual decisions that will allocate resources so as to decide what society's material freedoms will be—and to affect important policies through individual action.³⁵³ These include policies, the Court notes, about the sales of products that may lead to the extinction of species and purchases that may deprive people of their jobs.³⁵⁴ Individuals need commercial information so that they can, say, buy green, buy American, or buy (or not buy) cigarettes or masks. Due to the wide adoption of light-touch regulation, such as mandated disclosures,³⁵⁵ and the pervasiveness of markets in so much of life, key policy outcomes are decided by what might be understood as a form of disaggregated economic democracy—that is, democracy fueled through individual action in economic life. Public health outcomes about cancer and COVID-19, for example, will in large measure be affected by individual choices about cigarettes and masks; wages will be influenced by labor market participation and unionization rates; and climate change will be affected by the actions of investors, consumers, and workers as individual decisions move social and economic resources between firms, products, and types of energy. The choices of consuming and investing listeners also crucially affect the distribution and formation of capital, which bears on issues ranging from economic inequality to whether society will be prepared to transition to a clean-energy economy.

These two goals of economic democracy—to enable listeners to participate in markets so as to (a) advance their material freedom and (b) make economic choices to affect important policies in the ways they wish—

351. *Virginia Board*, 425 U.S. at 763.

352. *Id.* at 763–64.

353. *Id.* at 764.

354. *Id.*

355. See generally Shanor, *The New Lochner*, *supra* note 28 (discussing the role of light-touch informational regulation, spurred in significant part by the rise of behavioral law and economics, in the conflict between the First Amendment and the modern administrative state).

are the purpose of the distinctive First Amendment rules in economic life. The normative goal of the commercial doctrine's informational function, then, should be understood as to provide the information needed to ensure that the public can participate meaningfully both in their political and economic lives.³⁵⁶

This understanding of the commercial speech doctrine is consistent with the broader architecture of the First Amendment and a range of cases that have articulated a vision of democratic participation beyond the ballot box. First Amendment doctrine following the New Deal, for example, supported not only freedom in public discourse, but also democracy at work through the pattern of both First Amendment protection and acquiescence around labor laws.³⁵⁷ Similarly, during the Civil Rights era the Court reshaped constitutional doctrine to promote the ability of racial minorities and women to participate more fully in social life, including through the integration of schools and economic institutions. This was reflected in the pattern of First Amendment protection and constitutional acquiescence to antidiscrimination laws in education, employment, and public accommodations.³⁵⁸ Protection of speech was likewise expanded to ideas and

356. See *Fed. Commc'ns Comm'n v. League of Women Voters*, 468 U.S. 364, 381–82 (1984) (“Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940))).

357. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223–35 (1977) (holding that a state law compelling local government employees to pay union agency fees was valid but that such fees could not be used to fund ideological causes that government employees opposed). In this context, “acquiescence” refers to a situation in which courts conclude that the First Amendment allows, often through no coverage or low levels of protection, laws to regulate things that are arguably speech or association.

358. Amanda Shanor, *The Tragedy of Democratic Constitutionalism*, 68 *UCLA L. Rev.* 1302, 1321 (2022) (“The Civil Rights era’s refashioned compromise included, for example, the ability of racial minorities and women to participate more fully in social life, including through the integration of schools and public accommodations through a combination of constitutional protection and constitutional acquiescence to antidiscrimination laws.”); see also *Roberts v. United States Jaycees*, 468 U.S. 609, 612 (1984) (upholding a state law that prohibited gender-based discrimination as applied to private organization); *Hishon v. King & Spalding*, 467 U.S. 69, 72–73 (1984) (rejecting male law firm partners’ claim to a First Amendment right to refuse to associate with female partners in violation of Title VII of the Civil Rights Act); *Craig v. Boren*, 429 U.S. 190, 191–92 (1976) (finding a state law that differentiated who could buy alcohol on the basis of sex to violate the Equal Protection Clause of the Fourteenth Amendment); *Norwood v. Harrison*, 413 U.S. 455, 471 (1973) (holding that Mississippi could not provide free textbooks to schools that discriminated on the basis of race in their admissions policies without violating the Fourteenth Amendment); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (invalidating a state statute that gave preference to men when appointing estate administrators); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (upholding a federal statute that prohibited racial discrimination in the sale or rental of property); *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (invalidating a Virginia statute that prohibited interracial marriage); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 242–43 (1964) (upholding the constitutionality of Title II of the Civil Rights Act of 1964);

associations beyond the explicitly political—such as controversial art and associations related to social and economic power, including Civil Rights era litigation and boycotts.³⁵⁹ More broadly, this case law advanced a broad vision of democratic participation and material freedom that far exceeded political participation alone.³⁶⁰

Crucially, the goals of the commercial speech doctrine revolve around listeners, not speakers. It is not an autonomy right of commercial speakers either to speak or remain silent. Understood in this way, the commercial speech doctrine does not, for example, empower commercial speakers to lie or to refuse to disclose factual information related to their commercial activities. Instead, it supports both speech protections and speech regulations that advance the ability of listening consumers to make decisions in their political and economic lives.

To summarize the argument to this point, there are two threshold questions to establish whether expression may be regulated as “commercial speech”:

1. Is the listening public of consumers and investors epistemically dependent on the information conveyed by the commercial speaker? And is there an informational asymmetry between the speaker and the audience, such that the speaker possesses information material to its audience?

2. Does that information further one or both of the two central goals of the commercial speech doctrine, namely (a) to enlighten the public’s political decisionmaking in a democracy, including about how the economy ought to be regulated or altered; or (b) facilitate the material ability of the public to participate in and make informed decisions about how economic life and resources should be governed through market choices?

These ideas have shaped both the political and commercial speech doctrines, but the critical importance of economic democracy has largely been undervalued or ignored. The failure to recognize the First Amendment’s commitment to economic democracy has led courts to make mistakes. Consider *Sorrell v. IMS Health Inc.*, which struck down a law that forbade pharmacies from selling or disclosing information about a doctor’s prescribing practices for the pharmacies’ own marketing purposes or for marketing by pharmaceutical manufacturers without a patient’s consent.³⁶¹ The Court concluded that since the information could

Katzenbach v. McClung, 379 U.S. 294, 304–05 (1964) (same); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that school segregation violated the Fourteenth Amendment).

359. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 934 (1982) (holding that the First Amendment robustly protects consumer boycotts); *NAACP v. Button*, 371 U.S. 415, 428–29 (1963) (holding that the First Amendment protects public interest litigation); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (holding that the First Amendment protects films).

360. See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (referring to antidiscrimination protections as “protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society”).

361. 564 U.S. 552, 557 (2011).

be sold for other (non-marketing) purposes, the law was an unconstitutional content- and viewpoint-based regulation of speech.³⁶² That is not the correct way to approach the issue. The inquiry should have instead focused on how the Vermont law affected information flows in ways that helped or harmed the consuming and investing public's ability to control their economic and political choices and destinies. That analysis would have reached the opposite result. Consumer choice, including consent about their data and knowledge of marketing practices that may increase the costs of needed medications, is at the crux of economic democracy. From this perspective, the Vermont law should have been upheld for advancing First Amendment values.

The approach advanced here would bring clarity to a range of cases. In *Nike, Inc. v. Kasky*, for example, courts would not need to consider whether Nike's representations about its labor practices were or were not part of an important public debate.³⁶³ As *Virginia Board* makes clear, that is likely to be the case about many, perhaps most, economic issues.³⁶⁴ Instead, Nike's statements about its labor practices should be regulable as commercial speech for two reasons. First, the public is epistemically dependent on Nike to understand precisely what its labor practices are in Asia—how am I as an individual consumer or investor (or a university athletic director or president) to know what Nike's labor practices are in Asia without information from the company?³⁶⁵ And second, information about Nike's labor practices would certainly inform consumer, investor, university, and public choices about both (1) how multinational labor practices should be regulated domestically and internationally and (2) how consumers, individually or collectively, make economic choices that affect the issues and the distribution of resources that matter to the consumer (such as between the price of shoes and the wages of factory workers abroad) and whether the consumer should continue to purchase from Nike or choose another supplier. This means that Nike's factual statements about its labor practices can be regulated for truthfulness, not only without violating the First Amendment but also while advancing its goal to “insur[e] that the stream of commercial information flow[s] cleanly as well as freely.”³⁶⁶

362. *Id.* at 564–66.

363. See *supra* notes 317–328 and accompanying text.

364. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) (“[T]he particular consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”).

365. The standard proposed here is a practical one: Should the public be reasonably understood, as an objective matter, to be dependent on the commercial speaker in order to gain the information? While a consumer might, for example, in theory be able to hire a private investigator to fly to Asia and identify and investigate Nike’s manufacturing plants and labor practices, that is not a reasonable or realistic expectation for individual consumers in our current economy and information ecosystem.

366. *Virginia Board*, 425 U.S. at 771–72.

Finally, the theory elaborated in this Essay is likely to expand the space of the commercial speech doctrine both with regard to greenwashing and more broadly. Specifically, it will entail that nearly all public statements made by companies about the environmental impacts of their products, services, or the firm's overall environmental impact and strategy should be treated as within the realm of the commercial speech doctrine because of likely consumer, investor, and broader public informational dependence about the firm's practices, at least as long as the information contributes to one of the two democratic objectives of the doctrine. The next sections address key limitations to this general principle.

B. *When Commercial Actors Engage in Political Speech*

If the expression in *Nike* was commercial speech, what speech that businesses engage in is *not* commercial speech? This section discusses the forms of expression by businesses that should be governed by the First Amendment rules that apply to public discourse—rules that make it exceedingly difficult to regulate speech for truth or falsity.

Because the commercial speech doctrine applies to contexts of listener reliance on factual commercial information when that information could advance the listener's freedom or decisionmaking in political or economic life, a sizeable amount of business speech will fall outside the commercial speech doctrine—including into the space of political speech. Two primary categories that will not be considered commercial speech are when businesses petition any level of government and when businesses express opinions. This section addresses the first of these, when commercial speakers petition the government. The next section then turns to the fact/opinion distinction.

First, the doctrines for political speech should apply when businesses speak to or petition governmental actors. A similar exception exists in the antitrust context. Antitrust law, despite often regulating “speech” in a colloquial sense—such as agreements to fix prices—generally falls outside the ambit of the First Amendment.³⁶⁷ Under the *Noerr-Pennington* doctrine,³⁶⁸ however, the First Amendment protects businesses that engage in good faith lobbying of the government (e.g., to urge the adoption or jettisoning of a regulation)—even lobbying that would have anti-competitive effects or that would be considered anti-competitive if the firms directly fixed prices themselves without petitioning the

367. See *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (“Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.”).

368. The *Noerr-Pennington* doctrine is named for two foundational cases that outlined the doctrine: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

government.³⁶⁹ *Noerr-Pennington* reflects the correct principle that even speech that is generally understood to fall outside First Amendment coverage—and so be fully regulable—should receive stringent First Amendment protection in the context of good-faith petitioning of the government.

While *Noerr-Pennington* began as a defense to antitrust enforcement actions, it has since been expanded to include a First Amendment-based defense to a range of lawsuits. The Court has explained that “the right to petition extends to all departments of the Government” and that “[t]he right of access to the courts is indeed but one aspect of the right of petition.”³⁷⁰ This is because:

In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity³⁷¹

For the same reason, when businesses petition any level of government in good faith to change or adopt policies, their speech should not be considered commercial speech but instead political speech robustly protected by the speech clause (bracketing whether this current system of lobbying is consistent with the petition clause, as Professor Maggie Blackhawk has questioned³⁷²). This means that attempts to limit such expression should be subject to exacting scrutiny.³⁷³

The Court has recognized, however, that there may be some petitioning activity “ostensibly directed toward influencing governmental action, [that] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a

369. See *Pennington*, 381 U.S. at 670 (“Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.”); *Noerr*, 365 U.S. at 144–45 (finding no violation of the Sherman Act by two competing industries that each sought to use their political power to pass legislation that would help themselves and hurt the other); see also *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972) (refusing to extend *Noerr-Pennington* doctrine to immunize from antitrust law alleged attempts to block competitors from petitioning state and federal agencies and courts).

370. *Cal. Motor Transp.*, 404 U.S. at 510.

371. *Noerr*, 365 U.S. at 137.

372. See Maggie Blackhawk, *Lobbying and the Petition Clause*, 68 *Stan. L. Rev.* 1131, 1141 (2016).

373. Of course, certain forms of truth enforcement that apply generally to government-directed political speech (e.g., perjury laws) will continue to apply, often with no First Amendment coverage at all, but not due to the commercial speech doctrine.

competitor.”³⁷⁴ The First Amendment does not shield such behavior from antitrust laws.³⁷⁵ A similar exception should apply to business speech directed toward governmental bodies. It, too, must not be a “sham” or an attempt to engage in arbitrage in the gaps between the commercial and political speech doctrines with the aim of immunizing from liability fraud or false or misleading statements of fact. In cases where there is a mix or blend of statements about the firm’s opinion of legal or regulatory policies alongside factual statements about the firm’s own behavior or operations, the presence of policy discussion should not immunize the factual statements from scrutiny as commercial speech.

Second, to the extent that corporations are protected as individuals in the context of money in politics, for similar reasons that speech petitioning the government should be afforded stringent review, firms should be protected by political speech principles when they contribute money to political candidates and causes.³⁷⁶

One coda: An astute reader might question why different, more forgiving rules should apply to the lies and misstatements of political speakers. Listeners may have relied to their detriment on politicians who made statements about how best to address COVID-19, or whether an election was tainted by fraud, for example. Many of those statements were false or misleading statements of fact. For example, many of the rioters that stormed the U.S. Capitol on January 6, 2021, believed former President Trump’s lie that the election had been stolen from him.³⁷⁷ And many of those statements could easily be understood to bear on the public’s political choices and lived freedoms. The answer is largely institutional rather than normative: The First Amendment has long been skeptical of the

374. *Noerr*, 365 U.S. at 144; FTC Staff, Enforcement Perspective on the *Noerr-Pennington* Doctrine 7 (2006), <https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf> [<https://perma.cc/W3CC-85PJ>]. The Court has articulated a two-part test that triggers the sham exception in the litigation context: The lawsuit must (1) objectively have no merit and (2) subjectively seek to use the governmental process, not the outcome, as an anticompetitive tool. *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60–61 (1993).

375. *Cal. Motor Transp.*, 404 U.S. at 515 (“First Amendment rights may not be used as the means or the pretext for achieving ‘substantive evils’ . . .” (quoting *NAACP v. Button*, 371 U.S. 415, 444 (1963))).

376. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010). The question of whether *Citizens United* was correctly or incorrectly decided is beyond the scope of this Essay, which recognizes it to be the law for purposes of the arguments herein. But see, e.g., Robert C. Post, Second Lecture: Campaign Finance Reform and the First Amendment, in *Citizens Divided: Campaign Finance Reform and the Constitution* 44, 86–87 (2014) (arguing that campaign finance laws that enhance democratic legitimacy and enable the public to be informed in their public decisionmaking are consistent with the First Amendment).

377. Ryan J. Reilly, For Jan. 6 Rioters Who Believed Trump, Storming the Capitol Made Sense, NBC News (June 20, 2022), <https://www.nbcnews.com/politics/donald-trump/jan-6-rioters-believed-trump-storming-capitol-made-sense-rcna33125> [<https://perma.cc/9TEY-KQEM>].

regulation of truth and orthodoxy in political speech because of the threat of foxes guarding the henhouse.³⁷⁸ First Amendment doctrine reflects a deep fear of the abuse of a governmental ministry of truth by interested political actors.³⁷⁹

C. *The Expression of Fact Versus Opinion*

A second category of speech by commercial speakers that is protected under the principles applicable to public discourse, and should not be considered commercial speech, is the expression of opinion. Why? The value of the commercial speech doctrine lies in its informational function—that is, its ability to convey truthful facts to the public so that citizens can make informed choices. Opinions do not fall within the norms and values protected by rule and therefore cannot be compelled or restricted without meeting exacting standards of scrutiny. Moreover, opinions are protected by the First Amendment for a different reason than commercial speech—out of equal regard for citizens to express opinions in the public sphere that can contribute to the future direction of our democracy. In other words, speech that is considered “opinion” is protected for the same reasons as political speech. This distinction, between fact and opinion, is often a difficult one. This section therefore addresses how to distinguish statements of fact from statements of opinion.

What should be considered fact versus opinion for First Amendment purposes depends on whether listeners generally converge on a meaning that most listeners agree can be verified by evidence. This is a rule based in social groups and their beliefs and impressions. It does not hinge on philosophically determining any definition of truth or fact (or if such definition is possible) but instead on the sociology of epistemology. The key question is whether there is social convergence into what Professor Robert Cover termed a “nomos” with regard to a given statement.³⁸⁰ Cover’s path-breaking article centers on insular faith communities, but his analysis reaches far beyond them to “collective attempts to increase revenue from market transactions, to transform society through violent revolution, to make converts for Jesus, and to change the law or the understanding of

378. See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.”).

379. See, e.g., *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (“Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.” (citing George Orwell, *Nineteen Eighty-Four* (Centennial ed. 2003) (1949))). But see *Rucho v. Common Cause*, 139 S. Ct. 2484, 2504–06 (2019) (rejecting for lack of a “basis . . . to guide the exercise of judicial discretion” the argument that partisan gerrymandering might violate the First Amendment by chilling political speech).

380. Robert Cover described a nomos as the normative universe through which we “create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.” See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 4 (1983).

the law.”³⁸¹ Cover’s analysis focuses on the “problem of intelligibility among communities” with divergent interpretive commitments that structure their nomos.³⁸² Here, the focus is on the reverse question: whether there is social coherence around the meaning and verifiability of a statement. This is similar, in some sense, to asking if there is a broadly held “paradigm” for such issues, as in Kuhn’s understanding of “normal science.”³⁸³ Thus, while we may all be wrong that the earth is round (or flat), in given periods there has been broad agreement that its shape is capable of verification as a fact.

To understand this distinction closer to the context of commercial speech, consider two statements of opinion:

1. The U.S. team should have won the Olympic gymnastics all-around medal.

2. In a recent commercial, Matthew McConaughey and the Lincoln he is driving look cool.

And two forms of fact:

1. An ad stating “50% of our products are recyclable.”

2. An ad showing a healthy, fit runner enjoying a cigarette as fuel before going on a long run.

The former statements or messages are verifiable either not at all, or in a way in which observers (1) will diverge on a judgment (are McConaughey or Lincolns actually cool?)³⁸⁴ or (2) will only agree within a small or insular community, such as gymnastics experts or McConaughey fans. By contrast, the latter two statements of fact are forms of messages that are generally accepted to be susceptible of verification with sufficient evidence within currently prevailing epistemic norms. Using prevailing accepted scientific and medical methods we can verify if a product is actually recyclable and whether cigarettes in fact make you a more fit, better runner.

This principle distinguishing fact from opinion makes clear that expressions of hyperbole, “puffery,” and other “imaginative expression” fall on the opinion side of the line. Consider *Greenbelt Cooperative Publishing Ass’n, Inc. v. Bresler*, in which an article described the negotiating tactics of a prominent real estate developer with city officials over the price of land for a public school as “blackmail.”³⁸⁵ The developer sued for libel, arguing that he had not literally been charged with criminal blackmail and so the

381. *Id.* at 32–34.

382. *Id.* at 17 n.45.

383. See *supra* notes 330–333 and accompanying text.

384. As Shanor has observed, speech that has a divergent effect on an audience (if I tell you to vote for Trump, will you?) prompts First Amendment coverage, while broad-based agreement about how a form of expression works (say, contracts or other contexts of reliance) generally militates against First Amendment coverage. See Shanor, *First Amendment Coverage*, *supra* note 28, at 349–51.

385. 398 U.S. 6, 7 (1970).

article made a false statement of fact.³⁸⁶ The Court rejected that view, explaining that:

It is simply impossible to believe that a reader who reached the word “blackmail” in either article would not have understood exactly what was meant: it was [the developer’s] public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging [the developer] with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer’s] negotiating position extremely unreasonable.³⁸⁷

This is not to say, however, that describing a statement as opinion makes it so. As the Supreme Court has recognized in the context of defamation, when an opinion implies an assertion of objective fact, it is treated as such for First Amendment purposes.³⁸⁸ This, too, is evaluated from the perspective of the listening public. For that reason, there is no First Amendment distinction between “Jones is a liar” and “In my opinion, Jones is a liar.”³⁸⁹ Both are treated as statements of fact, notwithstanding any effort to make it not so.

D. *Distinguishing Truthful Statements From False or Misleading Ones*

This section addresses the challenges involved in distinguishing statements that are true from those that are false or misleading. These questions sit at the intersection of the considerations of commercial speech and knowledge production. There are accordingly important and often difficult questions of whose perspective should be used to evaluate claims of truth or falsity: the listening public (as in commercial speech) or an expert community (as in knowledge creation).

Often, claims of truth and falsity are clear cut. When evaluating a product that states it does not contain peanuts when it does, for example, or another that states it is made of recycled material when it is not. The public and expert community perspectives are likely to converge. The difficult questions arise when they do not, or when a statement or symbol does not carry a broadly-established meaning but suggests one (such as a leaf symbol suggesting environmental attributes).

This section deals with these issues in reverse. In the context of a term or symbol that is not broadly established, generally, the listening public’s view should prevail. The listening public includes not only those who may purchase a product or service or invest in a business but also those who

386. *Id.* at 13.

387. *Id.* at 14.

388. *Milkovich v. Lorain J.*, 497 U.S. 1, 11–21 (1990).

389. *Id.* at 18–19.

may alter their political behavior (in politics or in economic choices) because of the term or symbol. If, in fact, the public believes that BP's adoption of a helios symbol as its logo means that it has significantly changed its business to renewable energy, when it has not, the use of the symbol is misleading.³⁹⁰ But what about a claim that a bottle is recyclable when it is technically capable of being recycled, but there are no facilities in the state where an advertisement appears that in fact recycle that material? Or, more sharply, what if there are facilities that do recycle the bottle in California but not Texas? Both of these cases should be resolved relative to the given public to whom the bottle is marketed. If in fact that bottle cannot be recycled anywhere plausibly near the community in which it is sold with the moniker "recyclable," then it is a false statement of fact to advertise it as "recyclable."

These issues can be thornier where the evidence in many cases points to risks, rather than certainties, as is often the case in contexts like climate and public health. In such contexts, accepted norms within expert communities are the best guides to evaluating truth or falsehood. Consider climate change. It is now the overwhelmingly accepted view in the scientific community that climate change is both occurring and caused by human forces—and that the probability of catastrophic events and long-term changes to the climate are extremely high if global average temperature increases exceed 1.5 degrees Celsius.³⁹¹ But how to address climate change is a political issue, over which ordinary people disagree.³⁹² Individuals also are subject to numerous biases, including myopia and optimism, that lead them to overestimate how lucky they will be in the face of bad outcomes and to prioritize today over the future.³⁹³ In such a context, public understanding of fact and assessments of risk are likely to lag behind expert assessments, and expert communities can offer assessments of fact that rely on prevailing scientific norms.

The threat of COVID-19 provides a similar case, where scientific evidence both leads public opinion and points to risks, rather than certainties, in the context of rapidly evolving evidence. In contexts such as

390. See *supra* notes 126–127 and accompanying text.

391. See, e.g., Intergovernmental Panel on Climate Change (IPCC), *Global Warming of 1.5°C*, at 5–8 (2019), https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Full_Report_LR.pdf [<https://perma.cc/W4VC-AXAC>].

392. See Brian Kennedy & Courtney Johnson, *More Americans See Climate Change as a Priority, but Democrats Are Much More Concerned Than Republicans*, Pew Rsch. Ctr. (Feb. 28, 2020), <https://www.pewresearch.org/fact-tank/2020/02/28/more-americans-see-climate-change-as-a-priority-but-democrats-are-much-more-concerned-than-republicans/> [<https://perma.cc/S2DP-K655>] (demonstrating disagreement across the political spectrum on the potential efficacy of different policies).

393. See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *Stan. L. Rev.* 1471, 1473–508 (1998) (identifying various cognitive biases and using them to develop a framework for “a behavioral approach to economic analysis of law”).

these, as with fact and opinion, the question should be whether the relevant expert community converges on an issue. General consensus of climate scientists or public health experts should be the touchstone of truth and falsity, rather than public (or commercial speaker) belief.³⁹⁴ That assessment of fact may be contingent, but it is still the best evidence available at the time.

If an assessment of truth or falsity is required, then two questions arise: first, whether the speaker (the commercial entity) or the regulator bears the burden of demonstrating truth or falsity and second, what evidence must be shown to meet this burden? Generally, the burden of proof falls on the law enforcer (the government) if—and this is a significant if—there is First Amendment coverage.³⁹⁵

But what if the very question is whether coverage should (or should not) extend to the speech at issue? In the context of disclosures, the case law is clear: The business opposing a mandated disclosure bears the burden of establishing (a) falsity or misleadingness of the mandated disclosure and (b) that the substantive First Amendment standard under *Zauderer* is not met, namely that the disclosure is not “reasonably related” to a legitimate governmental interest, or is so “[u]njustified or unduly burdensome” as to “chill[] protected speech.”³⁹⁶ This aligns with the principle that a business’s “constitutionally protected interest in *not* providing any particular factual information . . . is minimal.”³⁹⁷

In the context of speech restrictions, the government bears the burden as to whether the substantive factors of *Central Hudson*’s intermediate scrutiny are met if the speech is truthful.³⁹⁸ The commercial speaker, however, bears the initial burden of challenging a restriction of speech

394. See generally Shannon M. Roesler, Evaluating Corporate Speech About Science, 106 *Geo. L.J.* 447 (2018) (analyzing how courts should approach the truth or falsity of corporate speech about science, including climate change).

395. Compare *United States v. Alvarez*, 567 U.S. 709, 716–17 (2012) (“[T]he Constitution ‘demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality.’” (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004))), with *Fed. Trade Comm’n v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 426–28 (1990) (concluding that economic boycott was a price-fixing agreement not subject to First Amendment review or heightened scrutiny).

396. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (quoting *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985)). And to be so “[u]njustified or unduly burdensome” as to “chill[] protected speech” has a narrow meaning: for example, a required disclosure on business cards that is so long that it makes business cards infeasible and so “effectively rules out” the commercial speaker’s ability to speak at all. *Ibanez v. Fla. Dep’t of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136, 146 (1994); see also *Am. Meat Inst. v. Dep’t of Agric.*, 760 F.3d 18, 23 (D.C. Cir. 2014) (en banc) (“*Zauderer* cannot justify a disclosure so burdensome that it essentially operates as a restriction on constitutionally protected speech . . .”).

397. *Zauderer*, 471 U.S. at 628.

398. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563–64 (1980).

that the government regulates as false or misleading.³⁹⁹ A commercial challenger must therefore prove the truthfulness of a claim. For this reason, the FTC states a constitutional standard in the Green Guides when it requires that “[m]arketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims.”⁴⁰⁰ A commercial speaker’s public-facing assertions of fact must rest on reasonable evidence of truth or can be regulated as false or misleading.

Critically, because prevailing scientific methods do not expect or require certainties, it is inappropriate to require certainty on many issues of scientific fact for a related statement to be considered true (or false) for First Amendment purposes. It need not be the case, for example, that a person who smokes necessarily (100% of the time) will get cancer for a statement that “cigarettes cause cancer” to be true for constitutional purposes. The statement that “cigarettes cause cancer” should be assessed as truthful if it is deemed so from the perspective of the consensus of medical and public health experts. The existence of studies that disagree or question that fact should not in and of themselves undermine a general expert consensus—just like the fact that a subset of McConaughey fans believe that his Lincoln advertisement is cool as a matter of fact does not make the advertisement a statement of fact for First Amendment purposes. This point is important because requiring absolute certainty has the potential to amount to a “back door” form of First Amendment Lochnerism.⁴⁰¹ More importantly for this theory’s purposes, the nature of scientific inquiry and risk evaluation should not be used as a tool to undermine the reliability of the flow of truthful commercial information to an informationally dependent public.⁴⁰²

V. IMPLICATIONS

To this point, this Essay has aimed to clarify the ways in which speech at the nexus of three First Amendment doctrines—including environmental claims about products, services, and firms themselves—should be assessed and the relevant questions to ask to determine whether such speech can be regulated consistent with the First Amendment.

399. This aligns with the burdens in the context of defamation and securities fraud. See, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254, 279–83 (1964) (holding that plaintiffs in defamation cases against public officials bear the burden of proving the allegedly defamatory statements were made with actual malice).

400. 16 C.F.R. § 260.2 (2021).

401. We are grateful to Professor Amy Kapczynski for this point. Were the First Amendment to impose an exceedingly difficult evidentiary standard to establish truth or falsity, this would make it a more potent deregulatory tool.

402. Cf. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763–65 (1976) (emphasizing the importance of commercial information to the general public).

What are the practical consequences of this assessment? This Part explores the implications for both greenwashing and beyond. In short, under this Essay's theory, public-facing statements of fact by business firms about their own operations or products that are not made directly to lobby government, are not so fanciful as to be puffery, and are not opinion, ought to be considered commercial speech.

Most fundamentally, because commercial speech is constitutionally valuable for its ability to inform the listening public's participation in economic and political life, this Essay's approach will favor the expression of more commercial speech that is more truthful, accurate, and accessible to the public, rather than less. Because of the *reasons* why commercial speech is protected, regulations that require, incentivize, or encourage dissemination of commercial information or otherwise encourage economic or political participation will not only be constitutionally permissible in the main but will also affirmatively advance First Amendment values. This approach will therefore favor policies that ensure that members of the public who are epistemically dependent upon firms for information about their products, services, and environmental impacts have sufficient information to exercise participatory and decisional liberty in the economic and political spheres.

A. *Implications for Greenwashing and Climate Policy*

How will this theory affect the regulation of greenwashing? First, this approach makes clear that the First Amendment does not and should not immunize corporate actors who make false or misleading statements about the impacts of their business on climate change, the risks of climate change to their operations, or their climate-related pledges and plans. The First Amendment does not authorize companies to engage in the sorts of deception that the cigarette industry engaged in with regard to the health risks of cigarettes.⁴⁰³ Most of the important issues surrounding greenwashing do not involve blatant falsehoods, however.

This Essay's approach has significant implications for the FTC's Green Guides and enforcement policies. Most obviously, it is crucial that the FTC update its Green Guides, which were last revised a decade ago.⁴⁰⁴ This analysis suggests that those revisions should focus on two goals: (1) bringing clarity to the meaning of current contested or vague claims (what does

403. See David Michaels, *Doubt Is Their Product: How Industry's Assault on Science Threatens Your Health* 3 (2008) ("For decades, cigarette manufacturers have known that their product is hazardous to our health, did not care, and took whatever measures were necessary to protect their profits."); Naomi Oreskes & Erik M. Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues From Tobacco Smoke to Global Warming* 9–10 (2010) (describing how prominent scientists wielded money and influence to deliberately sow disinformation and confusion about important scientific issues).

404. *Environmentally Friendly Products: FTC's Green Guides*, *supra* note 148.

“net zero” mean, for example) and (2) detailing the sort of evidence that a firm must have in order to substantiate certain claims.

This second goal is crucial. For example, if a firm claims that it will reach net zero by 2050, can it calculate its plan to do so in a vacuum, following any strategy it prefers, or must it bear collective achievement or other probable risks in mind? May a firm claim it will reach net zero, for example, by continuing a business-as-usual strategy but planting trees? What if it is highly unlikely that it will be possible for that firm, or firms generally, to reach net zero solely by relying on such strategies, given increasing wildfires or concerns that multiple parties may be double-counting the same trees?⁴⁰⁵ Similarly, what sort of substantiation must a firm have to make a claim that one product is better for the environment, or greener, than another? For example, what sorts of information must a paper bag company possess in order to claim that using paper bags is better for the environment than plastic? May it base this claim solely on how quickly the products biodegrade? If so, paper is likely to best plastic. Or must the company do a full life-cycle assessment that calculates the environmental effects of the product both upstream—from raw material extraction, to processing and manufacturing, and through packaging and distribution—and downstream—in consumer use and ultimate disposal? If that is the case, given all that goes into making paper, the choice might be different.

It also would be useful for the Green Guides to address and standardize the sorts of studies and methodologies permissible to support given claims. Must the paper company have independent scientists conduct a lifecycle assessment, or may it be conducted by firm employees or commissioned by industry groups? Which, if any, claims must be backed up by studies that meet certain standards, for example, being randomized controlled trials or double blind? What, if any, of this information must be filed with the FTC and what if any should be accessible to researchers, policymakers, or the public? These are some of the key questions that a revision of the Green Guides should address.

A key advantage of this second goal—providing further clarity on what evidence is required for a company to make certain public-facing claims—is that it is information forcing. It would require firms to investigate and study environmental effects, risks, and impacts *before* they can legitimately make such a claim. Other regulators also have a host of tools at their disposal to force the production of information. The SEC could, as it is proposing to do, require companies to disclose climate risks and impacts in public filings, as well as how firms intend to meet their stated “net zero”

405. See Shelley Welton, *Neutralizing the Atmosphere*, 132 *Yale L.J.* 171, 171 (2022) (arguing that “if the world continues to pursue an atomized approach to net zero, it is likely that entities will overrely on certain cost-effective strategies—like tree planting—at scales that cannot be collectively achieved, at least not without substantial collateral social consequences”).

goals.⁴⁰⁶ States may use false advertising or investor fraud claims, ideally relying on the FTC's updated Guides, to gain more information about firm actions on climate, and shareholders may make investor fraud claims with similar goals.

Not surprisingly, another area in which this analysis is likely to have significant impact is within the grey area: claims that might be literally true but nonetheless misleading. By focusing on the values underlying the limited First Amendment protection for commercial speech, this analysis is likely to expand the set of cases in which speech is considered commercial, and therefore for which regulation—requiring truthfulness or factual disclosures—would be consistent with the First Amendment. Thus, statements by firms that tout their environmental performance using methods that are described in Category Two, above,⁴⁰⁷ may be subject to greater scrutiny for truthfulness.⁴⁰⁸

It is important to recognize, however, that because greenwashing can in many contexts be regulated for truth, this does not mean that potentially misleading statements like “earth friendly” ought to be banned. Compelled factual disclosures about the environmental performance of firms, products, and services may better advance First Amendment values by allowing the listening public to better evaluate the accuracy of environmental marketing claims. As noted above, when consumers learn that environmental marketing claims are false, or question the motivations behind such statements, consumers tend to react accordingly. Mandated disclosures and other information-forcing policies may likewise discourage firms from making misleading claims in the first place because they will lack the requisite “reasonable basis” to do so.

Finally, this First Amendment theory would not only permit but positively value regulations that encourage businesses to provide true, factual information to the consuming and investing public. Consider the SEC's proposed climate change disclosure rule, which would require publicly listed firms to provide investors with information about their climate-related impacts and risks.⁴⁰⁹ Mandated disclosures have been a mainstay of securities regulation since the 1930s.⁴¹⁰ The central aim of

406. See *infra* note 409 and accompanying text.

407. See *supra* section I.C.2.

408. This approach does not seek to undermine the current legal rules that protect statements of opinion as political speech. In addition, even if the FTC updates the Green Guides, there will still be puffery—claims so outrageous that they are not believable or conveyed through words or symbols that do not have a widely accepted meaning—that cannot be assessed as false or misleading and so are unlikely to be constitutionally regulable as commercial speech.

409. Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

410. See Securities Act of 1933, 15 U.S.C. § 77b(b) (2018) (requiring the SEC to consider the protection of investors and promotion of market efficiency and capital formation when rulemaking); Securities Exchange Act of 1934, 15 U.S.C. § 78c(f) (same); see

these laws is to protect investors and the capital markets by addressing informational asymmetries.⁴¹¹ Perhaps for this reason, securities disclosures have historically fallen entirely outside of First Amendment coverage⁴¹²—in other words, by definition, they advance the First Amendment goals articulated in the commercial speech cases. The speech law of securities disclosures is paradigmatic of the First Amendment’s support for listeners’ interests in market contexts involving informational dependence.

This theory leads to the same outcome in the SEC’s proposed climate disclosure rule: Those disclosures should either fall outside of the First Amendment’s coverage entirely, or should, if within its purview, be evaluated under the more lenient *Zauderer* review.⁴¹³ Under *Zauderer* and its progeny, mandated factual and uncontroversial disclosures are constitutional as long as they are “reasonably related” to a legitimate governmental interest and are not so “[u]njustified or unduly burdensome” as to “chill[] protected speech.”⁴¹⁴ The “uncontroversial” requirement asks if the

also Our Goals, SEC, <https://www.sec.gov/our-goals> [<https://perma.cc/P96Q-XLTC>] (last updated Oct. 16, 2018) (noting the SEC’s “longstanding tripartite mission—to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation”).

411. Our Goals, *supra* note 410.

412. See Schauer, *supra* note 247, at 1778 (“A prime example of speech residing almost imperceptibly outside the First Amendment’s boundaries is the speech that is the primary target of federal securities regulation.”); Helen Norton, Securities Law and the First Amendment 4 (2022) (unpublished manuscript) (on file with the *Columbia Law Review*) (noting that the “securities law framework has endured for the better part of a century with little (if any) First Amendment controversy”). The Supreme Court has observed, for example, that “[n]umerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities . . . [and] . . . corporate proxy statements.” *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978); see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985) (quoting *Ohralik*, 436 U.S. at 456); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64 (1973) (“[N]either the First Amendment nor ‘free will’ precludes States from having ‘blue sky’ laws to regulate what sellers of securities may write or publish about their wares. Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition.”).

413. Each author contributed to and joined comment letters of First Amendment and securities disclosure law experts regarding the constitutionality of the SEC’s proposed rule. Press Release, Democracy Forward, Legal Scholars File Letter Supporting SEC Climate Disclosure Rule (June 27, 2022), <https://democracyforward.org/press/legal-scholars-file-letter-supporting-sec-climate-disclosure-rule/> [<https://perma.cc/8CGG-WXY3>]; Knight Institute, Scholars Advise SEC that Proposed Climate Rules Do Not Raise First Amendment Concerns, Knight First Amend. Inst. at Columbia Univ., <https://knightcolumbia.org/cases/knight-institute-scholars-advise-sec-that-proposed-climate-rules-do-not-raise-first-amendment-concerns> [<https://perma.cc/97CD-WKEN>] (last visited Aug. 5, 2022).

414. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (quoting *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985)). The Ninth Circuit requires a “substantial” interest, which they imported from the *Central Hudson* standard for restrictions on commercial speech. *CTIA—The Wireless Ass’n v. Berkeley*, 854 F.3d 1105, 1115 (9th Cir. 2017); see also *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 23 (D.C.

regulation requires disclosures of fact, not opinion.⁴¹⁵ To determine whether proposed environmental or climate-related disclosures should be treated as commercial speech under the theory advanced here, a court should ask two questions: (1) whether investors are informationally dependent on firms about the financial risks they face from climate change and (2) whether disclosing that information would enlighten the investors' informed decisions about not only their market choices—whether to purchase, hold, or sell a security—but also how economic life should be governed.

The proposed disclosures easily meet this standard. They aim to “provide consistent, comparable, and reliable—and therefore decision-useful—information to investors to enable them to make informed judgments about the impact of climate-related risks on current and potential investments”⁴¹⁶ and to promote the efficiency of capital markets by facilitating the incorporation of that information into asset prices.⁴¹⁷ The SEC's proposed rule thus should either be considered outside of the scope of the First Amendment or, at most, subject to *Zauderer* review, the standard that applies to compelled disclosures of factual and uncontroversial information in commercial contexts.⁴¹⁸

By contrast, opponents of the proposed disclosure rule argue that “[c]limate change is a politically charged issue,” and so political speech rules—which center around speaker autonomy and apply strict scrutiny to speech restrictions and mandated disclosures alike—should apply.⁴¹⁹ That approach is mistaken. As the Supreme Court has observed, commercial speech does not become political if it is related to a “current public debate”; “many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety.”⁴²⁰ To center the inquiry on whether an issue is divisive would,

Cir. 2014) (en banc) (declining to decide whether a less than “substantial” interest could suffice under *Zauderer*).

415. See *supra* section III.B.

416. Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,335 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

417. *Id.* at 21,337.

418. See *Zauderer*, 471 U.S. at 651 (“[A]n advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”); Sarah C. Haan, *The First Amendment and the SEC’s Proposed Climate Risk Disclosure Rule 4* (June 16, 2022) (unpublished working paper), <https://ssrn.com/abstract=4138712> [<https://perma.cc/J7L3-EXGS>] (arguing that “the proposed climate risk disclosure mandate is *bona fide* securities disclosure, and thus should be subject, at most, to rational basis review”); Norton, *supra* note 412, at 36–37 (arguing that ESG disclosure requirements advance “securities law’s functional tradition”).

419. See Lawrence A. Cunningham, *Comment Letter on Proposal on Climate-Related Disclosures for Investors 15* (Apr. 25, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20126528-287180.pdf> [<https://perma.cc/C6Y9-KZ9R>].

420. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 n.5 (1980).

moreover, draw courts into impossible line-drawing exercises about the level of controversy. Uncontroversiality in *Zauderer* instead asks if the regulation requires disclosure of opinion.⁴²¹ That there is significant disagreement about how climate change should be regulated by governments and markets alike does not transform a factual disclosure about a firm's climate risks or emissions into one that is controversial. To the contrary, it instead demonstrates the importance of providing information about climate risks to the public.

B. *Implications Beyond Climate*

Greenwashing is fertile ground to explore more broadly applicable constitutional questions and articulate a new theory of commercial speech grounded in the First Amendment's commitment to democratic participation. But it is not the only case in which these issues arise. This subsection outlines some of the broader implications of this theory.

First, the approach advanced in this Essay reorients the narrative to questions of reliance and participation, rather than the Sisyphean task of attempting to distinguish epistemically between the political and the commercial. This reorientation indicates that the commercial speech doctrine should apply broadly to most expressions of fact by firms about their own operations and business strategies. This is because the consuming and investing public often is epistemically dependent on businesses for information that will contribute to the public's ability both to decide how to regulate markets and to seek meaningful freedom and voice within them. In a world in which the public were not so informationally dependent or significant freedoms and policy choices were not decided in markets and by economic ordering, this might not be the case.⁴²² As economic and institutional facts now stand, however, the purposes of the First Amendment direct that a broad swath of expression about commercial actions should be treated as commercial speech.

Second, this broader scope of the commercial speech doctrine would mean that regulations that touch upon commercial speech would receive intermediate or more lax scrutiny rather than strict scrutiny. This is not to say that such expression *should* be regulated—only that the First Amendment would not generally stand in the way. This approach would also clarify the Court's assertion in *Central Hudson* that the fact that commercial information is related to a contested political issue does not entitle it to greater scrutiny (that is, render it subject to the rules of public discourse rather than commercial speech).⁴²³ Rather, in many cases, the existence of a broader political debate would signal that truthful commercial speech is vital to the public to inform their political and economic decisions.

421. See *Zauderer*, 471 U.S. at 651.

422. We thank Professor Shelley Welton for prompting this insight.

423. *Central Hudson*, 447 U.S. at 563 n.5.

Third, the broad scope of the commercial speech doctrine would likewise permit, consistent with the First Amendment, more regulation for truth and more information-forcing policies, such as compelled disclosures and requirements that firms possess certain evidence to substantiate a claim before it is made. For example, this theory helps to explain the constitutional value of information-forcing regimes such as the Food and Drug Administration's pre-market review requirement that drug companies perform certain studies, which meet particular methodological standards, and submit those studies to the FDA for approval before a drug can be marketed for a particular purpose.⁴²⁴

Finally, just as the proposed SEC climate disclosure rule is not only consistent with the First Amendment but advances First Amendment values, most disclosures of basic financial information required by the SEC should generally lie outside of the coverage of the First Amendment. At most, they should receive *Zauderer* review—the form of scrutiny applied to mandated commercial disclosures. Likewise, policies that require the disclosure of information about corporate business practices, their effects, and their risks—such as the health effects of products, supply chain labor conditions, or social media content moderation practices—might advance First Amendment values and may therefore be constitutionally permissible. Similarly, mandated disclosures of corporate political activity would likely be constitutionally sound. The public is often dependent on firms for that information, and certainly, knowledge of corporate political activity could inform the public's approach to corporate and campaign finance regulation or to making more informed consumer and investment choices.⁴²⁵

CONCLUSION

Climate change is arguably the most pressing global challenge of our time. How citizens behave in the marketplace, and how the public chooses to address climate change both through public policy and private action, is ultimately guided by the public's knowledge not only about the science of climate change but also about how other participants in the economy

424. See Amy Kapczynski, *Dangerous Times: The FDA's Role in Information Production, Past and Future*, 102 *Minn. L. Rev.* 2357, 2358 (2018) (arguing that “[t]he core function of the FDA as a drug regulator . . . [is] . . . to generate and validate information about medicines”).

425. See generally Lucian A. Bebchuk, Robert J. Jackson Jr., James D. Nelson & Roberto Tallarita, *The Untenable Case for Keeping Investors in the Dark*, 10 *Harv. Bus. L. Rev.* 1 (2020) (noting that “[p]ublic companies are currently not required to, and most do not, report their political spending to shareholders” and arguing that objections against SEC-required disclosures of corporate political spending are untenable); Amanda Shanor, Mary-Hunter McDonnell & Timothy Werner, *Corporate Political Power: The Politics of Reputation & Traceability*, 71 *Emory L.J.* 153 (2021) (empirically analyzing why firms shift from transparent forms of political action to ones that cannot be traced by the public).

are acting. When citizens are informationally dependent upon firms to understand how they are responding to this challenge, the First Amendment calls for more factual commercial information, more accuracy, and more forthright commercial speech. Because information about the climate impacts, risks, and performance of firms are crucial to the public's ability to make informed choices about its political and economic future, the First Amendment allows society to demand that such statements be accurate and not misleading. At the heart of the First Amendment is a democratic commitment to the public's ability not only to knowledgeably vote and engage in public discourse but also to have the information needed to affect its future through market mechanisms and for meaningful freedom in economic life itself.

