

ANTI-WOKE CAPITALISM, THE FIRST AMENDMENT, AND THE DECLINE OF LIBERTARIANISM

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ABSTRACT—Firms across the globe, including financial institutions like banks, asset managers, and pension fund managers, are adopting strategies to account for the risks they face from climate change. These strategies include declining to invest in certain emissions-intensive projects or advising firms in their portfolios to report or reduce climate impacts and risks. These forms of private environmental governance can be characterized as one aspect of the “E” within a broader management strategy of “ESG,” or the management of environmental, social, and governance factors. Regulators in the United States and other countries are beginning to mandate that firms take some of these factors into account.

With the rise of firms’ consideration of ESG factors has come backlash, often under the umbrella of anti-wokeness. This backlash has come to a head in the form of state laws prohibiting state agencies and municipalities, including state pension funds, from doing business with financial institutions that are alleged to be “boycotting” the fossil fuel industry or that are broadly taking ESG factors into account. These laws are part of a larger trend of targeting firms’ decisions to address social and governance issues like declining to invest in gun manufacturing or taking positions on other social issues, including racial justice, abortion, and LGBTQ+ rights.

The last three decades of First Amendment law have been strongly influenced by laissez-faire constitutionalism, stemming in significant part from the adoption of libertarian ideas by the conservative legal movement. New so-called “anti-woke” capitalism laws represent a fundamental shift in the conservative legal movement away from libertarianism, First Amendment Lochnerism, and deregulatory constitutionalism and toward identitarianism and efforts to directly influence the substance of firm decision-making. This Article traces this important turn away from laissez-faire law and policy, which has significant constitutional implications, particularly for the First Amendment. These anti-woke laws, and the identitarian politics they reflect, may foreshadow a similar turn in First Amendment law.

At the same time, these laws raise important First Amendment issues. These include the difficult questions of when a governmental motive is sufficiently untoward to trigger heightened scrutiny or render a law unconstitutional, and when a social practice should be considered a medium of expression in public discourse for constitutional purposes. These issues have long vexed courts and scholars and are also crucial to the disposition of many of today's most contested First Amendment questions.

This Article offers the first in-depth constitutional analysis of these so-called “anti-woke capitalism” laws. Rather than declaring that some of these laws—which vary across doctrinally significant axes—are constitutional or unconstitutional, this Article focuses on articulating the questions and constitutional values that should guide analyses of these laws and others like them that regulate social practices at the intersection of political and economic life. By focusing on the First Amendment's underlying objectives—to protect decisional and participatory liberty in both political life and the marketplace—this Article uses these laws as a lens to clarify and rethink existing doctrinal categories in order to forward a conception of the First Amendment that advances democracy in a thoroughgoing way.

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INTRODUCTION

Climate change is arguably the most challenging global crisis facing humanity. Nations, states, and local governments are committing to reduce greenhouse gas emissions to minimize the most significant risks of climate change. On February 19, 2021, the United States formally rejoined the Paris Agreement on Climate Change, the goal of which is to limit global warming to “well below 2°C above pre-industrial levels and [to pursue] efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”¹ Climate experts have concluded that avoiding the most catastrophic impacts of

¹ Paris Agreement art. 2(1)(a), Dec. 12, 2015, T.I.A.S. No. 16-1104, https://unfccc.int/sites/default/files/english_paris_agreement.pdf [<https://perma.cc/QG96-R9DR>]. The agreement entered into force on November 4, 2016, and the United States reentered on February 19, 2021. *Paris Climate Agreement: Everything You Need to Know*, NRDC (Feb. 19, 2021), <https://www.nrdc.org/stories/paris-climate-agreement-everything-you-need-know> [<https://perma.cc/BV5T-VXR6>]; see also INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5°C 5–8 (Valérie Masson-Delmotte et al. eds., 2019), https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf [<https://perma.cc/63MA-BLN4>] (reporting the impacts of climate change expected at different levels of global warming).

climate change requires a global transition away from the burning of fossil fuels—in other words, the achievement of net-zero emissions—by the middle of this century.² This shift will require both reducing emissions from existing sources currently powered by fossil fuels and expanding the use of renewable and zero-emissions energy technologies.³ It will also require the widespread deployment of new technologies to remove carbon from the atmosphere.⁴ The International Energy Agency (IEA) has estimated that annual investment in everything from new transmission and distribution grids, to electric-vehicle charging stations, to carbon dioxide pipelines and infrastructure for deploying hydrogen fuels will need to increase from billions of dollars today to trillions of dollars by 2030 to achieve net-zero emissions.⁵

In light of the significant financial commitments required to achieve a net-zero economy by 2050, the Paris Agreement contemplates a significant role for private actors, particularly institutions within the financial sector. Article 2(1)(c) of the Agreement specifically links this net-zero goal to sustainable finance through the mechanism of “[m]aking finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.”⁶ Major financial institutions like banks, asset managers, and institutional investors, including pension fund managers, have publicly announced commitments to achieve net-zero emissions by 2050 in order to align with the goals set forth in the Paris Agreement.⁷ These financial institutions are taking steps to reduce the

² Paris Agreement, *supra* note 1, art. IV; INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 1, at 12–15 (offering different pathways to achieve net-zero emissions by 2050); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2023 SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS 10 (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf [<https://perma.cc/3KMT-YJ33>] (concluding with high confidence that it is likely that the world will exceed the 1.5-degree threshold during the twenty-first century, and that “finance flows fall short of the levels needed to meet climate goals across all sectors and regions”).

³ See INT’L ENERGY AGENCY, NET ZERO BY 2050: A ROADMAP FOR THE GLOBAL ENERGY SECTOR 14 (2021), https://iea.blob.core.windows.net/assets/405543d2-054d-4cbd-9b89-d174831643a4/NetZeroBy2050-ARoadmapfortheGlobalEnergySector_CORR.pdf [<https://perma.cc/GT42-J7FM>].

⁴ INT’L ENERGY AGENCY, FINANCING CLEAN ENERGY TRANSITIONS IN EMERGING AND DEVELOPING ECONOMIES 14 (2021), https://iea.blob.core.windows.net/assets/6756ccd2-0772-4ffd-85e4-b73428ff9c72/FinancingCleanEnergyTransitionsinEMDEs_WorldEnergyInvestment2021SpecialReport.pdf [<https://perma.cc/GZ6F-2YP5>].

⁵ INT’L ENERGY AGENCY, *supra* note 3, at 21–22.

⁶ Paris Agreement, *supra* note 1, art. 2(1)(c).

⁷ See *infra* Section I.C. See generally Sarah E. Light & Christina P. Skinner, *Banks and Climate Governance*, 121 COLUM. L. REV. 1895, 1931 n.177 (2021) (discussing private actions by banks to address climate change using levers available to debt rather than equity).

emissions associated with their own operations, and to invest in renewable and other “clean” technologies to advance the net-zero transition.⁸

Asset flows into funds that seek to manage environmental risks are substantial, making these decisions by financial firms significant.⁹ In addition, many of these financial institutions are using their leverage and relationships with debtors and portfolio companies to ensure that those companies are behaving more environmentally responsibly, whether by reporting or reducing greenhouse gas emissions or taking other needed steps.¹⁰ In some cases, the firms are making these commitments through participation in industry and other associations, such as the Glasgow Financial Alliance for Net Zero (GFANZ).¹¹ In other cases, the firms are acting independently.¹²

These actions, collectively considered forms of private environmental governance, are also part of a larger movement in which business firms consider Environmental, Social, and Governance (ESG) factors in strategic decision-making and risk management.¹³ Many of these private actions arise within a broader regulatory context that is increasingly mandating that firms take environmental and social issues into account. These regulatory mandates appear in disclosure rules, taxes, and subsidies seeking to promote investment in clean and renewable energy, as well as substantive mandates

⁸ Light & Skinner, *supra* note 7, at 1931–45 (offering a taxonomy of the ways in which banks are adopting private climate governance).

⁹ Press Release, PwC, ESG-Focused Institutional Investment Seen Soaring 84% to US\$33.9 Trillion in 2026, Making Up 21.5% of Assets Under Management: PwC Report (Oct. 10, 2022), <https://www.pwc.com/gx/en/news-room/press-releases/2022/awm-revolution-2022-report.html> [<https://perma.cc/F5RY-SGZB>] (projecting that assets under management in ESG-related investments globally will grow from \$18.4 trillion in 2021 to \$33.9 trillion by 2026, and within the United States to more than double to \$10.5 trillion by 2026).

¹⁰ Light & Skinner, *supra* note 7, at 1934–37.

¹¹ See *infra* text accompanying notes 82–88.

¹² See, e.g., Brook Masters & Patrick Temple-West, *Vanguard Quits Climate Alliance in Blow to Net Zero Project*, FIN. TIMES (Dec. 7, 2022), <https://www.ft.com/content/48c1793c-3e31-4ab4-ab02-fd5e94b64f6b> [<https://perma.cc/UFS8-LSFQ>] (reporting that despite Vanguard’s withdrawal from GFANZ, it will continue to offer products that account for ESG factors and ask companies about plans for addressing climate change risk).

¹³ For discussions of ESG, see generally Elizabeth Pollman, *The Making and Meaning of ESG* (Eur. Corp. Governance Inst., Working Paper No. 659/2022, 2022; Univ. of Pa. Inst. for L. & Econ., Working Paper No. 22-23, 2022), <https://ssrn.com/abstract=4219857> [<https://perma.cc/RA42-VF26>], which discusses the historical origins of ESG as well as critiques, and Alex Edmans, *The End of ESG*, FIN. MGMT. (Mar. 2023), <https://onlinelibrary.wiley.com/doi/10.1111/fima.12413> [<https://perma.cc/A38C-4QZK>], which argues that ESG is one driver of corporate and investment value and should be treated on par with other drivers.

to reduce emissions.¹⁴ In other cases, laws simply permit firms to consider such factors.¹⁵

Arising alongside these actions is a backlash. A significant number of state legislatures and executive officials within the United States have adopted laws or executive actions that limit their states' interactions with financial institutions that are taking ESG factors into account. These states have adopted statutes prohibiting state agencies from doing business with financial firms that the states have concluded are "boycotting" the fossil fuel industry. States have also passed statutes and policies requiring state treasurers to divest from financial firms that use ESG in their investment decisions.¹⁶

These state laws are not only targeting firms' decisions to address climate risks, however. Several states, including Texas and Wyoming, have focused on the "social" aspect of ESG, adopting laws that restrict state contracts with firms alleged to be boycotting gun manufacturers.¹⁷ Other state legislatures are considering similar bills addressing financial companies' alleged boycotts of either energy production by fossil fuel producers or firearms manufacturing.¹⁸ Some states have adopted statutes

¹⁴ See, e.g., The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (proposing a new SEC rule requiring firms to disclose climate-related information); New Source Performance Standards for Greenhouse Gas Emissions, 88 Fed. Reg. 33,240 (May 23, 2023) (to be codified at 40 C.F.R. pt. 60) (proposing new carbon-pollution standards for certain power plants); Public Hearing for Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 88 Fed. Reg. 24,743 (Apr. 24, 2023) (to be codified at 40 C.F.R. pts. 85–86, 600, 1036–37, 1066) (proposing new, more stringent EPA standards to reduce greenhouse gas emissions in light- and medium-duty vehicles).

¹⁵ See, e.g., Investment Duties, 29 C.F.R. § 2550.404a (permitting retirement plan sponsors to consider ESG factors in selecting investment options, as part of the Department of Labor's ERISA regulations).

¹⁶ See *infra* Part II.

¹⁷ See, e.g., TEX. GOV'T CODE ANN. § 2274 (West 2021) (prohibiting state agencies from contracting with companies that "discriminate" against the firearm and ammunition industry); WYO. STAT. ANN. §§ 13-10-301 to -303 (West 2021) (prohibiting state contracts with financial institutions that "discriminate" against firearms businesses).

¹⁸ See, e.g., H.B. 2473, 55th Leg., 2d Sess. (Ariz. 2022) (firearms); H.B. 737, 66th Leg., 2d Reg. Sess. (Idaho 2022) (energy, mining, timber, agriculture); H.B. 1409, S.B. 397, 122d Gen. Assemb., 2d Reg. Sess. (Ind. 2022) (firearms); H.B. 1224, 122d Gen. Assemb., 2d Reg. Sess. (Ind. 2022) (energy); KY. REV. STAT. ANN. §§ 41.470–480 (West 2022) (energy); H.B. 978, 2022 Reg. Sess. (La. 2022) (firearms); H.B. 25, 2022 Reg. Sess. (La. 2022) (energy); S.B. 1048, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022) (firearms); H.B. 3144, 58th Leg., 2d Sess. (Okla. 2022) (firearms); H.F. 4574, S.F. 4441, 92d Leg., Reg. Sess. (Minn. 2022) (energy, mining, agriculture, lumber); H.B. 297, 134th Gen. Assemb., Reg. Sess. (Ohio 2021–2022) (firearms); H.B. 2799, 2022 Gen. Assemb., Reg. Sess. (Pa. 2022) (ESG investment); H.B. 4996, 124th Gen. Assemb., Reg. Sess. (S.C. 2021–2022) (energy); S.B. 182, 97th Leg., Reg. Sess. (S.D. 2022) (firearms); H.B. 312, 64th Leg., Gen. Sess. (Utah 2022) (energy). For a helpful

that do not specifically target banks and financial institutions, but that appear to target other forms of integration of ESG factors.

To be sure, other states have rejected such proposed laws, often citing increased costs or loss of discretion for financial managers.¹⁹ Recent research makes clear that these anti-ESG laws have raised the cost of capital for the states enacting them. One study estimated that in the first eight months following enactment of Texas’s anti-ESG laws, which led the five largest municipal bond underwriters to leave the Texas market, the state’s borrowing costs would increase by between \$284 million and \$504 million in additional interest payments due to lower competition in the marketplace.²⁰ A follow-on study suggested that other states adopting similar laws would likewise face substantially increased borrowing costs.²¹

Notably, in February 2023, the North Dakota legislature rejected an anti-ESG bill by a vote of 90–3.²² Similarly, the Board of Trustees of Kentucky’s County Employees Retirement System declined to divest from BlackRock and other firms integrating ESG factors, reporting to the treasury Secretary that to do so would be “inconsistent with our fiduciary duty and responsibility.”²³ Indiana likewise initially rejected an anti-ESG bill after a study demonstrated that divesting its pension fund would lead to losses of more than \$6.7 billion over 10 years.²⁴ Similarly, the Kansas legislature was considering an anti-ESG bill when the state published an analysis concluding that the law would apply to 100% of investment managers, would require

chart of anti-ESG legislation, see MORGAN LEWIS, ANTI-ESG LEGISLATION (2022), <https://www.morganlewis.com/-/media/files/document/2022/anti-esg-legislation-standalone-state-chart.pdf> [<https://perma.cc/HT3A-R5SW>].

¹⁹ Karin Rives, *Some States Backtrack on Anti-ESG Efforts, Citing ‘Unintended Consequences,’* S&P GLOB. MKT. INTEL. (Feb. 22, 2023), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/some-states-backtrack-on-anti-esg-efforts-citing-unintended-consequences-74371958> [<https://perma.cc/8UEV-AW39>].

²⁰ Daniel G. Garrett & Ivan T. Ivanov, *Gas, Guns, and Governments: Financial Costs of Anti-ESG Policies 20–21, 24* (Jan. 2, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123366 [<https://perma.cc/T7PJ-4369>].

²¹ See Memorandum from Econsult Sols., Inc. on ESG Boycott Legislation in States: Municipal Bond Market Impact to the Sunrise Project (Jan. 12, 2023), https://econsultsolutions.com/wp-content/uploads/2023/01/Sunrise-ESG-boycott-Impact_FINAL.pdf [<https://perma.cc/9VH2-EWFJ>].

²² Rives, *supra* note 19.

²³ *Id.*

²⁴ *Id.*; Leslie Bonilla Muñoz, *Analysis: Anti-ESG Pension Bill Could Shrink State Pension Returns \$6.7B in Next Decade*, INDIANAPOLIS BUS. J. (Feb. 6, 2023), <https://www.ibj.com/articles/analysis-anti-esg-pension-bill-could-shrink-state-pension-returns-6-7b-in-next-decade> [<https://perma.cc/P3XT-JUHH>]. An amended version of the bill, which exempted private market funds and bank holding companies from its provisions, ultimately passed. Brenna Goth, *States Dilute Anti-ESG Investing Efforts to Avoid Pension Losses*, BLOOMBERG L. (May 1, 2023), <https://news.bloomberglaw.com/in-house-counsel/pension-concerns-dilute-anti-esg-measures-in-indiana-and-kansas> [<https://perma.cc/ZD4J-3TGV>]; IND. CODE ANN. §§ 5-10.2-14-1, 14-11, 14-13 (West 2023).

termination of contracts and restructuring of the entire investment portfolio, and would lead to lost earnings of \$3.6 billion over ten years as compared to if no law were passed.²⁵ In contrast, some states have adopted laws that *require* the consideration of ESG factors, or otherwise create preferences for environmental or socially minded firms or contracts, including in the financial sector.²⁶

At their core, these disputes are about what banking and investing *are* and what role investment markets—and business more generally—should play in our society, in shaping its contested values, and in addressing its largest challenges. How disputed those issues are can be seen not only in these state laws but also in the bitter nomination fights over bank regulators, which left several of the key financial regulatory positions empty or filled by “actings”²⁷ for most of the Biden Administration.²⁸

These anti-ESG laws represent an important shift in the conservative legal movement—and one with significant constitutional implications. As a deep literature has traced, over the last thirty years, the First Amendment has taken a sharp libertarian turn. Once the core of political liberty, the freedom of speech in particular has become a powerful deregulatory engine that protects a growing set of economic activities and expression from governmental regulation. This laissez-faire turn was influenced in significant part by the pivot of the conservative legal movement over the same period toward libertarianism.²⁹ This Article traces the recent rise of so-called “anti-

²⁵ See Ross Kerber, *Kansas Anti-ESG Bill Could Cut Pension Returns \$3.6 Bln -Analysis*, REUTERS (Mar. 8, 2023), <https://www.reuters.com/business/sustainable-business/kansas-anti-esg-bill-could-cut-pension-returns-36-bln-analysis-2023-03-08/> [<https://perma.cc/BXJ8-V68C>].

²⁶ ME. REV. STAT. ANN. tit. 5, §§ 135, 138, 1957 (2021) (requiring pension system to divest from fossil fuel investments by 2026); Taylor K. Brown, *Maine Takes On Fossil Fuel Divestment. How Will It Happen?*, GOVERNING (July 13, 2022), <https://www.governing.com/finance/maine-takes-on-fossil-fuel-divestment-how-will-it-happen> [<https://perma.cc/RCF2-2BYQ>]; Anne Barnard, *New York's \$226 Billion Pension Fund Is Dropping Fossil Fuel Stocks*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/2020/12/09/nyregion/new-york-pension-fossil-fuels.html> [<https://perma.cc/TW2E-KMXL>] (citing an announcement by New York's state comptroller that “investing for the low-carbon future is essential to protect the fund's long-term value”).

²⁷ This term refers to a temporary leader in a federal agency. See generally Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613 (2020).

²⁸ See, e.g., Kathryn Judge & Dan Awrey, *The Administrative State and Financial Regulation: The Case for Commissions 31–33* (unpublished manuscript) (on file with authors) (discussing the contentious and ultimately unsuccessful nominations of Sarah Bloom Raskin for Vice President for Supervision of the Federal Reserve and referencing the unsuccessful nomination of Saule Omarova for Comptroller of the Currency).

²⁹ See, e.g., Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 154–63 (tracing the role of the business community, as part of a larger conservative legal movement, in shifting First Amendment jurisprudence in a libertarian direction); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 167–68 (2015) (describing how conservatives on the Supreme Court began to see the commercial speech doctrine as a deregulatory tool).

woke” capitalism laws as an important evolution in the conservative legal movement, this time away from libertarianism. These laws, we argue, may foreshadow a similar turn in First Amendment law. Our contention is not that the curtain has fallen on libertarianism or First Amendment Lochnerism—though its prominence may wane in the face of other legal-change goals that are higher priority to the bench, including in the law of religion.³⁰ Rather, we chronicle a key change in one of the forces that has and likely will continue to shape the First Amendment. And we raise questions about what the adoption of anti-wokeism, and the identitarian politics it reflects, may portend for the law of free speech.

At the same time, state laws addressing different aspects of E, S, and G raise challenging and thorny First Amendment issues that have long bedeviled scholars and courts. These challenges home in on three, sometimes

³⁰ See, e.g., Amanda Shanor, “LGBTQ+ Need Not Apply,” *REGUL. REV.* (June 21, 2021), <https://www.theregreview.org/2021/06/21/shanor-lgbtq-need-not-apply/> [<https://perma.cc/PP6F-NQ9X>] (discussing the Supreme Court’s increasing turn towards an expansive view of the Free Exercise Clause and questioning whether this shift will prompt a turn away from free speech Lochnerism). For more on recent dramatic changes in religion law as well as the Supreme Court’s announcement of the major questions doctrine, see generally Stephen I. Vladeck, *The Most-Favored Right: COVID, The Supreme Court, and the (New) Free Exercise Clause*, 15 *N.Y.U. J.L. & LIBERTY* 699, 701, 738 (2022), which reviews the Court’s disproportionate activity for applications for relief made on freedom-of-religion grounds; Andrew Koppelman, *The Increasingly Dangerous Variants of the “Most-Favored-Nation” Theory of Religious Liberty*, 108 *IOWA L. REV.* 2237, 2241, 2253 (2023), which provides a taxonomy of such theories; Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under Smith and After Smith*, 2020–2021 *CATO SUP. CT. REV.* 33, 38 (2020), which argues for the overturning of *Smith*; Note, *Pandora’s Box of Religious Exemptions*, 136 *HARV. L. REV.* 1178 (2023), which traces changes in religious exemption law and their implications; Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 *COLUM. L. REV.* 2397 (2021), which analyzes the most-favored-nation theory, which the author calls “equal value,” in recent free exercise jurisprudence; Micah Schwartzman & Richard Schragger, *Slipping from Secularism* 10 (Univ. of Va. Pub. L. & Legal Theory Rsch. Paper Series, Paper No. 2022-75, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4266290 [<https://perma.cc/R3X7-GYUD>], which argues that some theories of religious freedom that permit exemptions threaten to undermine their own secular foundations; Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 *SUP. CT. REV.* 271, 271–72 (2020), which evaluates liberal justices’ strategy of attempting to appease conservatives in Establishment Clause cases; Elizabeth Sepper, *Free Exercise Lochnerism*, 115 *COLUM. L. REV.* 1453, 1455, 1459 (2015), which draws a parallel between the Lochner-era deregulatory constitutionalism and modern courts’ use of the Free Exercise Clause to weaken governmental regulations; *Biden v. Nebraska*, 143 S. Ct. 2355, 2374–75 (2023), which holds that under the major questions doctrine the Secretary of Education was not congressionally authorized to waive student loans; *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022), which holds that limitation of state tuition assistance programs to “nonsectarian” schools violates the Free Exercise Clause; *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2415 (2022), which upholds a First Amendment Free Exercise Clause claim against a school district brought by a football coach seeking to pray after games; *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2242–43 (2022), which overrules *Roe v. Wade*, 410 U.S. 113 (1973), and holds that the federal Constitution does not protect a right to abortion; and *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–16 (2022), which articulates the major questions doctrine and holds that the EPA’s method of limiting carbon dioxide emissions from power plants was congressionally unauthorized agency action on a major question.

related, questions. First, when is a governmental motive sufficiently improper to trigger heightened scrutiny or render a law unconstitutional? Second, what social practices constitute “mediums of expression”—meaning what social practices are covered by the speech clause? And third, of those covered mediums of expression, which ones are protected as core to the First Amendment and subject to the Constitution’s most searching scrutiny, which we call “mediums of expression in public discourse”?³¹ These questions are some of the most difficult in constitutional law and theory. They have long flummoxed courts and scholars and are also crucial to the disposition of many of the most contested First Amendment questions today.

Several recent Supreme Court cases, including *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* and *303 Creative LLC v. Elenis*, for example, revolve around these very issues.³² Perhaps because of the difficulty of these questions, the Supreme Court avoided ruling on the free speech claims in *Masterpiece Cakeshop* and then entirely dodged these difficult questions in *303 Creative*. The majority in *303 Creative* failed to craft any analysis, rule, or rubric for assessing when an activity is covered by the First Amendment’s most searching review. The Court instead relied exclusively on the parties’ stipulations.³³

There is thus significant need for useful guidance on how to assess these constitutional issues—particularly in light of the wave of litigation that the

³¹ While the terms “mediums of expression” and “mediums of expression in public discourse” are a bit unwieldy, they focus our attention on the key but often overlooked point that social practices, relationships, norms, institutions, and contexts—rather than words or actions in themselves—determine, respectively, whether an activity constitutes either covered “speech” for First Amendment purposes, as well as “speech” that is not only covered, but protected with the First Amendment’s most stringent scrutiny. Focusing on mediums allows us to disaggregate the differences between even what could be described as “the same” activity in different contexts, and why one might not be covered at all (a basketball game; racial epithets at work) while the other is robustly protected (a basketball movie; racial epithets on a street corner). The broader concept of mediums requires us to reject the notion that some activities are inherently expressive, and rather to focus on the social relationships and institutions that embody distinct constitutional values and so are governed by different constitutional rules. In so doing, we hope to be able to gain more traction on otherwise vexing questions. For in-depth discussion of coverage and protection under the First Amendment, as well as the concept of mediums of expression, including in public discourse, see *infra* Sections III.A, IV.D.

³² See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1738–41 (2018); *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2320 (2023).

³³ 143 S. Ct. at 2312–13, 2319. Justice Sotomayor’s dissent in *303 Creative*, by contrast, went further to assess the public accommodations law at issue under many aspects of the approach described in this Article. See *id.* at 2322–23 (Sotomayor, J., dissenting). One of us has had the honor of filing, collaborating on, and advising multiple Supreme Court briefs advocating for this analysis. See Brief for Respondents Charlie Craig & David Mullins at 58, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111); Brief of Floyd Abrams et al. as Amici Curiae in Support of Respondents, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111); Brief for First Amendment Scholars as Amici Curiae in Support of Respondents at iv, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111).

ambiguity of the *303 Creative* opinion is likely to prompt. By focusing on the First Amendment's underlying values—to protect decisional and participatory liberty in both political life and the marketplace—this Article aims to make those questions more tractable. We also lay out the broader constitutional concerns attendant to anti-woke capitalism laws to provide a more comprehensive guide to analyzing these laws.

This Article proceeds in four Parts. Part I introduces the concepts of private environmental governance and ESG, and discusses recent legal rules permitting, subsidizing, or mandating that firms take these factors into account. It offers a descriptive account of how banks and other financial institutions are employing these approaches to address climate and environmental risks. Part II turns to the anti-ESG backlash that targets not only how these institutions are addressing financial risk from climate change, but also lumps climate action together with a broader swath of private actions addressing social issues. It surveys actions at both the federal and state levels to limit financial institutions' ability to take climate change and other social issues into account in their investment and lending decisions.

Part III then traces the origins of anti-woke capitalism as a broader phenomenon and demonstrates that these laws represent a fundamental shift in the conservative legal movement. This legal movement is moving away from libertarianism and toward identitarianism, by which we mean advocating that law should protect and advance a single cultural identity to the exclusion of other identities, other values, or pluralism³⁴—with significant constitutional implications. Importantly, these laws may mark the beginning of a turn away from First Amendment Lochnerism and deregulatory constitutionalism.³⁵

The remainder of the Article addresses the significant constitutional issues raised by anti-woke capitalism laws themselves. Rather than assess the constitutionality of the numerous laws—which vary across doctrinally significant axes—this Article's focus is on articulating the questions and constitutional values that should guide the analyses of these laws and others like them that regulate social practices at the intersection of political and economic life.

³⁴ We exclude from this definition movements for self-determination or sovereignty, such as that of Native peoples. See generally Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1796–98 (2019) (arguing that “[a]kin to *Brown*, recognition of inherent tribal sovereignty should serve as lodestar to evaluate constitutional theory,” and that “the national government has best protected Native peoples by bestowing power, not rights, through the recognition of inherent tribal sovereignty”).

³⁵ See *infra* note 201 (collecting literature on First Amendment Lochnerism and deregulatory constitutionalism).

Part IV lays out a normative and doctrinal framework through which to approach the broader constitutional questions that anti-woke capitalism laws raise—including the complex question of whether an activity such as ESG investing should be understood as a medium of expression in public discourse for First Amendment purposes. This framework clarifies that in many cases a governmental motive to stamp out assertedly woke ideas renders the resultant laws unconstitutional. But it also illuminates the gaps and open questions in existing doctrine—both as to governmental motive and what is, or is not, a medium of expression in public discourse for constitutional purposes. The most fundamental of those questions is how a First Amendment committed to advancing democracy in both economic and political life should be structured when economic decisions—both of powerful private actors and individual economic choices—will in large part determine the outcome of the most important contemporary social, economic, and political issues, including climate change.

I. THE RISE OF ESG, PRIVATE ENVIRONMENTAL GOVERNANCE,
AND GLOBAL LEGAL RULES ON THE ENVIRONMENT

Financial and other private institutions are taking climate change and other ESG factors into account in their decision-making for several reasons. First, many firms are undertaking these commitments as a form of private environmental governance, which can be categorized as an aspect of the broader rise of ESG. This Part discusses private environmental governance and ESG to offer some context into firms' motivations to take these steps. But these private influences are not the only motivation. Many major financial institutions—and the firms that they support through their financing—are global players, and thus are also responding to new legal rules adopted in jurisdictions in which they operate, including the European Union. This Part concludes with a brief discussion of some of these new legal rules that are likewise affecting firm decision-making.

A. *What Is Private Environmental Governance?*

Private environmental governance refers to a set of “traditionally ‘governmental’ functions of environmental standard setting and enforcement that private actors, including business firms and non-governmental organizations (NGOs), adopt to address environmental concerns” like climate change.³⁶ Many legal scholars have recognized that private

³⁶ 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*,

environmental governance can fill gaps in public environmental law, particularly in the context of global or transboundary challenges such as climate change or fishery management.³⁷

Private actors have access to and have employed the same kinds of tools as public actors in parallel ways.³⁸ For example, many firms have adopted private carbon fees—similar to carbon taxes—to force business units within the firm, or subunits within a private university to account for the cost of their energy use or emissions.³⁹ Other firms use supply chain management—like public procurement rules—to ensure that firms within their value chain reduce or report emissions.⁴⁰ One well-known example of the use of supply chain management is Walmart’s Project Gigaton, which encourages Walmart’s suppliers to report and reduce their emissions.⁴¹ Other firms act in concert with third-party certification organizations such as the Marine Stewardship Council (sustainable fisheries), the Forest Stewardship Council (sustainable forests), or the Science-Based Targets initiative (corporate net-zero targets), which monitor and certify firms’ environmental commitments.⁴²

99 CORNELL L. REV. 129, 133 (2013) (defining private environmental governance as “play[ing] the standard-setting, implementation, monitoring, enforcement, and adjudication roles traditionally played by public regulatory regimes”); see also MICHAEL P. VANDENBERGH & JONATHAN M. GILLIGAN, BEYOND POLITICS: THE PRIVATE GOVERNANCE RESPONSE TO CLIMATE CHANGE 119–62 (2017) (discussing private environmental governance in the climate context).

³⁷ Light & Orts, *supra* note 36, at 66; Sarah E. Light, *The Role of Universities in Private Environmental Governance Experimentalism*, 33 ORG. & ENV’T 57, 58 (2020) (discussing how private environmental governance can serve as a laboratory of experimentation for public policymakers).

³⁸ See generally Light & Orts, *supra* note 36, at 4 (discussing these “parallel forms of public and private governance,” including “private emissions trading systems, private carbon fees, private supply chain management, and private insurance”); Sarah E. Light & Michael P. Vandenberg, *Private Environmental Governance*, in 2 ENCYCLOPEDIA OF ENVIRONMENTAL LAW 253, 256 & tbl.II.19.1 (LeRoy C. Paddock, Robert L. Glicksman & Nicholas S. Bryner eds., 2016) (identifying a different parallel in which both public and private actors operate in the same contexts, including in forests, fisheries, toxic materials and pesticides, hydraulic fracturing, hazardous waste management, and climate change).

³⁹ Sarah E. Light, *The New Insider Trading: Environmental Markets Within the Firm*, 34 STAN. ENV’T L.J. 3, 41–50 (2015) (discussing Microsoft’s use of private carbon fees to shape behavior within the firm); Light, *supra* note 37, at 67–69 (discussing a private carbon fee at Yale University).

⁴⁰ Light & Orts, *supra* note 36, at 46–50 (discussing procurement and supply chain management).

⁴¹ See *Project Gigaton FAQs*, WALMART SUSTAINABILITY HUB, <https://www.walmartsustainabilityhub.com/climate/project-gigaton/faqs> [<https://perma.cc/565V-Y25J>].

⁴² *What Does the Blue MSC Label Mean?*, MARINE STEWARDSHIP COUNCIL, <https://www.msc.org/what-we-are-doing/our-approach/what-does-the-blue-msc-label-mean> [<https://perma.cc/D89Q-D45C>]; *Forest Managers*, FOREST STEWARDSHIP COUNCIL, <https://fsc.org/en/forest-managers> [<https://perma.cc/AV2V-3FBV>]; BENJAMIN CASHORE, GRAEME AULD & DEANNA NEWSOM, GOVERNING THROUGH MARKETS: FOREST CERTIFICATION AND THE EMERGENCE OF NON-STATE AUTHORITY 88 (2004) (generally discussing the rise of forest stewardship certification and the role of private firms like Home Depot in its development); *Companies Taking Action*, SCI. BASED TARGETS (May 5, 2023), <https://sciencebasedtargets.org/companies-taking-action> [<https://perma.cc/U5WZ-AUSP>].

Private climate governance, which is a specific form of private environmental governance, uses these tools both to mitigate greenhouse gas emissions, and to promote the transition to a net-zero economy, including efforts to promote resilience and adaptation. For example, private insurance firms have taken steps to promote climate resilience, including by insuring natural ecosystems like coral reefs that act as natural storm barriers.⁴³ And banks and financial firms are likewise engaging in private climate governance to facilitate the transition to a net-zero economy, including by using their monitoring and advising functions to promote a green transition within their portfolio companies or lending portfolios.⁴⁴

Firms may be motivated by different reasons to adopt private environmental governance. These reasons may include efforts to forestall regulation, a desire to take a leadership role and shape regulation that ultimately may come, or a concern about the real risks that environmental or climate-related issues pose to their business.⁴⁵ Some scholars have raised concerns that the existence of private environmental governance could diminish support for public environmental law and regulation of the same issue. Indeed, some studies provide support for this hypothesis when the private environmental governance is widely adopted within an industry.⁴⁶ On the flip side, however, there is also empirical support for the idea that when private actors adopt private environmental governance, support for public environmental legislation or regulation can increase. The reason is that private firms may serve as more “credible” sources to some segments of the population than government actors or environmental nongovernmental organizations for confirming that the problem the firms are addressing is a real issue.⁴⁷

⁴³ See Carolyn Kousky & Sarah E. Light, *Insuring Nature*, 69 DUKE L.J. 323, 353–54, 361–62, 371 (2019) (examining how the insurance industry can adopt private climate governance, including by insuring natural ecosystems).

⁴⁴ See generally Light & Skinner, *supra* note 7 (discussing the ways in which banks and other financial institutions have adopted private climate governance).

⁴⁵ Light, *supra* note 39, at 32–34, 41–43 (discussing rationales for why firms adopt private carbon fees or internal carbon trading schemes).

⁴⁶ See Neil Malhotra, Benoît Monin & Michael Tomz, *Does Private Regulation Preempt Public Regulation?*, 113 AM. POL. SCI. REV. 19, 31–32 (2019) (finding reduced public support for environmental law when all firms in an industry adopted modest private steps to increase recycling targets).

⁴⁷ See David A. Dana & Janice Nadler, *Regulation, Public Attitudes, and Private Governance*, 16 J. EMPIRICAL LEGAL STUD. 69, 76–77, 82–84 (2019) (finding increased support among conservatives for public policy on antibiotic-free products and cage-free eggs upon learning of corporate actions on these issues); 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*, ENERGY RSCH. & SOC. SCI., Mar. 2021, at 1, 2–4 (examining support for public policy across the ideological spectrum upon learning of private environmental initiatives). The existence of anti-woke

Climate change poses both physical and transition risks to the overall financial system as well as the financial institutions within it. Physical risks to property and infrastructure include both short-term abrupt events like wildfires, hurricanes, extreme precipitation events, and storm surges, which are becoming increasingly frequent and intense, and longer-term gradual changes such as those associated with sea-level rise.⁴⁸ For example, insurers facing high costs from wildfires or long-term costs from sea-level rise or frequent storms have either sought to leave markets entirely or raised rates, increasing the cost of home ownership.⁴⁹ Consumers may be more conservative about home purchases in areas exposed to sea-level rise, with financial knock-on effects.⁵⁰

capitalism laws discussed herein may raise questions about whether these empirical studies should be conducted again in the current political climate.

⁴⁸ On physical risks arising from climate change, see Katie K. Arkema et al., *Coastal Habitats Shield People and Property from Sea-Level Rise and Storms*, 3 NATURE CLIMATE CHANGE 913, 913 (2013), which discusses the anticipated increase in coastal flooding by mid-century; Scott A. Kulp & Benjamin H. Strauss, *New Elevation Data Triple Estimates of Global Vulnerability to Sea-Level Rise and Coastal Flooding*, NATURE COMMUN., Oct. 29, 2019, at 1, 2, which provides updated estimates of sea-level rise; Jesse D. Gourevitch, Carolyn Kousky, Yanjun (Penny) Liao, Christoph Nolte, Adam B. Pollack, Jeremy R. Porter & Joakim A. Weill, *Unpriced Climate Risk and the Potential Consequences of Overvaluation in US Housing Markets*, 13 NATURE CLIMATE CHANGE 250, 250 (2023), which finds that “residential properties exposed to flood risk are overvalued by US\$121–US\$237 billion” with implications for financial markets; Thomas R. Knutson, John L. McBriede, Johnny Chan, Kerry Emanuel, Greg Holland, Chris Landsea, Isaac Held, James P. Kossin, A.K. Srivastava & Masato Sugi, *Tropical Cyclones and Climate Change*, 3 NATURE GEOSCIENCE 157, 160–61 (2010), which projects the increasing intensity of cyclones; Iman Mallakpour & Gabriele Villarini, *The Changing Nature of Flooding Across the Central United States*, 5 NATURE CLIMATE CHANGE 250, 250 (2015), which observes an increase in flooding events in the United States; Seung-Ki Min Zuebin Zhang, Francis W. Zwiers & Gabriele C. Hegerl, *Human Contribution to More-Intense Precipitation Extremes*, 470 NATURE 378, 378–80 (2011), which discusses the increasing intensity of precipitation; and Andreas F. Prein, Changhai Liu, Kyoko Ikeda, Stanley B. Trier, Roy M. Rasmussen, Greg J. Holland & Martyn P. Clark, *Increased Rainfall Volume from Future Convective Storms in the US*, 7 NATURE CLIMATE CHANGE 880, 880–83 (2017), which observes increased precipitation within U.S. storms.

⁴⁹ Emily Flitter, *Insurer’s Retreat in Florida Signals Crisis with No Easy Fix*, N.Y. TIMES (July 14, 2023), <https://www.nytimes.com/2023/07/14/business/farmers-homeowners-insurance-florida.html> [<https://perma.cc/DC9R-PZFP>]; Christopher Flavelle, Jill Cowan & Ivan Penn, *Climate Shocks Are Making Parts of America Uninsurable. It Just Got Worse*, N.Y. TIMES (May 31, 2023), <https://www.nytimes.com/2023/05/31/climate/climate-change-insurance-wildfires-california.html> [<https://perma.cc/QB68-UXX7>]; U.S. GLOB. CHANGE RSCH. PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT: IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES 327–332 (D.R. Reidmiller, C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock & B.C. Stewart eds., 2018), https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf [<https://perma.cc/2YPT-PPYQ>]; FIRST ST. FOUND., THE FIRST NATIONAL FLOOD RISK ASSESSMENT: DEFINING AMERICA’S GROWING RISK 6–7 (2020).

⁵⁰ Benjamin J. Keys & Philip Mulder, *Neglected No More: Housing Markets, Mortgage Lending, and Sea Level Rise* 4 (Nat’l Bureau of Econ. Rsch., Working Paper No. 27930, 2020), <https://www.nber.org/papers/w27930> [<https://perma.cc/356H-4XYL>].

In addition to these physical risks, firms may be motivated to adopt private environmental or climate governance to reduce their transition risks. Transition risks are those associated with the transition away from fossil fuels and toward a net-zero economy, such as the risk that fossil fuel assets could be “stranded” if legal or regulatory changes mandate that such resources must be left in the ground.⁵¹ Other transition risks include the possibility of regulatory changes that will make certain business strategies less profitable or unprofitable.⁵² To the extent that these transition risks affect firms that seek credit from banks or that are part of the portfolio of asset managers or owners, the financial institutions will also face transition risks.

B. PEG as Part of Broader ESG

If private environmental governance is the constellation of activities by private actors to reduce environmental impact and facilitate the transition to a net-zero economy, then what is ESG and how does private environmental governance interact with it? ESG refers broadly to the “environmental, social, and governance” factors that business firms are integrating in their strategic or investment decisions.⁵³ Under this view, some aspects of private environmental or climate governance—particularly those efforts undertaken by financial firms—is the “E” within ESG.

The term ESG, however, has come to mean many things to many different audiences.⁵⁴ As corporate law scholar Elizabeth Pollman has explained:

ESG was coined to describe a set of issues to be integrated into enhanced financial or investment analysis, and has taken on meanings related to risk management, been treated as a synonym or subset of [Corporate Social Responsibility] or sustainability, and characterized as a preference or activity. It has taken on connotations both positive and negative, as value-laden notions

⁵¹ See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Strengthening and Implementing the Global Response*, in GLOBAL WARMING OF 1.5°C 313, 323 (2019), https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Chapter_4_LR.pdf [<https://perma.cc/U8L8-ZGEX>] (discussing the possibility that fossil fuel assets could be “stranded”); Emanuele Campiglio, Yannis Dafermos, Pierre Monnin, Josh Ryan-Collins, Guido Schotten & Misa Tanaka, *Climate Change Challenges for Central Banks and Financial Regulators*, 8 NATURE CLIMATE CHANGE 462, 462 (2018) (discussing transition risks and the potential for stranded assets).

⁵² See EPA CTR. FOR CORP. CLIMATE LEADERSHIP, CLIMATE RISKS AND OPPORTUNITIES DEFINED (Dec. 1, 2022), <https://www.epa.gov/climateleadership/climate-risks-and-opportunities-defined> [<https://perma.cc/39FH-Q7MG>].

⁵³ For an excellent explanation of the history of ESG as well as current understandings of the term, see generally Pollman, *supra* note 13, which discusses the origins of the term ESG in discussions under the auspices of the United Nations and its connections to the UN Global Compact.

⁵⁴ *Id.* at 4 n.14 and accompanying text.

of “conscious” versus “woke” capitalism give way to perceptions of ESG as ideological, political, and subject to backlash.⁵⁵

Importantly, ESG stands in contrast to the “Socially Responsible Investment (SRI) movement, which . . . was based on ethical and moral criteria” rather than financial materiality and other criteria for ordinary risk assessment by business firms.⁵⁶ Indeed, in *The End of ESG*, economist Alex Edmans argues that ESG does not require any kind of specialized terminology, because of the

recognition that ESG factors are critical to a company’s long-term (financial) value. But then all executives and investors should take them seriously, not just those with “sustainability” in their job title. Considering long-term factors when valuing a company isn’t ESG investing; it’s investing. Indeed, there’s not really such a thing as ESG investing, only ESG analysis.⁵⁷

As with private environmental governance, ESG has been critiqued on multiple fronts. One critique leveled at both ESG and private environmental governance is that they are all just “greenwashing.” In other words, both are simply public, exaggeratedly positive claims about the environmental (or social) performance of products, services, or the firms themselves that are not actually backed up by actions or deeds.⁵⁸ Several empirical studies have indeed raised questions about whether firms’ public commitments to achieve net-zero emissions by 2050 are realistic or possible, with at least one study suggesting that public claims overstate actual emissions reductions by a significant amount.⁵⁹ On the other hand are critiques that are unique to ESG—namely, that while the grouping of “environmental” and “social” factors together makes the concept broadly appealing, it can also lead to difficult tradeoffs.⁶⁰ In many cases, different ESG ratings can conflict,

⁵⁵ *Id.* at 5.

⁵⁶ *See id.* at 13.

⁵⁷ Alex Edmans, *supra* note 13, at 2 (emphasis omitted).

⁵⁸ Amanda Shanor & Sarah E. Light, *Greenwashing and the First Amendment*, 122 COLUM. L. REV. 2033, 2037 (2022) (discussing greenwashing as a critique of private environmental and climate governance); Shelley Welton, *Neutralizing the Atmosphere*, 132 YALE L.J. 171, 174–79, 195–98 (2022) (discussing the impossibility of private achievement of net-zero goals without collective government action); Pollman, *supra* note 13, at 39–40 nn.237–40 (citing critical sources on ESG).

⁵⁹ THOMAS DAY, SILKE MOOLDIJK, SYBRIG SMIT, EDUARDO POSADA, FREDERIC HANS, HARRY FEARNEHOUGH, 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/4RD8-59JK>] (concluding that the net-zero claims of twenty-five major global firms overstate actual emissions reductions by 60%).

⁶⁰ Pollman, *supra* note 13, at 5 (discussing the “promise and perils of putting E, S, and G together in one term”).

leading to a question of what they are measuring and how it is possible to value environmental and social impact or governance along a single set of metrics.⁶¹ Or, even within a single set of metrics, a firm could do well on one factor (social) but poorly on another factor (environmental), and still receive a good ESG rating or vice versa.⁶² One case that received significant attention occurred when, in May 2022, S&P Dow Jones removed Tesla from its S&P 500 ESG Index but retained several fossil fuel firms.⁶³

The adoption and integration of ESG factors by business firms raises questions within a larger debate over what purpose firms ought to serve in society, and what relationship they have not only to their shareholders but to a broader set of stakeholders.⁶⁴ At one end of this continuum lie the views of Milton Friedman, who argued that corporations owe a duty to their shareholders to maximize profits, within the general legal and ethical limits of society.⁶⁵ He argued that any corporate activity engaged in with a view toward promoting “general social interest[s]” would impose an unrepresentative and undemocratic tax on shareholders.⁶⁶ However, Friedman’s scholarship nowhere explicitly recognizes that environmental and social issues could have material financial implications for a firm; though we suspect that as long as ESG was part of a firm’s ordinary risk calculus and was demonstrated to affect firm profitability, it would be consistent with his shareholder-centric views. At the other end of this continuum, many scholars have put forward different approaches to firms’ duties as a matter of law, ethics, and economics. As a matter of ethics, numerous scholars have argued that corporations owe duties not only to the shareholders of the firm but to a broader set of stakeholders, including

⁶¹ Florian Berg, Julian F. Kölbl & Roberto Rigobon, *Aggregate Confusion: The Divergence of ESG Ratings*, 26 REV. FIN. 1315, 1323, 1341–43 (2022) (finding divergence among ESG ratings from six major ratings agencies including KLD, Sustainalytics, Moody’s ESG, S&P Global, Refinitiv, and MSCI).

⁶² See *id.* at 1321–22.

⁶³ Lauren Foster, *Tesla Got Dumped from an ESG Index. One Critic Calls the Move ‘A True Indictment’ of Sustainability Ratings*, BARRON’S (May 20, 2022), <https://www.barrons.com/articles/tesla-sp-esg-index-sustainability-ratings-51653011864> [<https://perma.cc/D8KM-NUYZ>].

⁶⁴ See, e.g., Pollman, *supra* note 13, at 6 (“Corporations and their role in society and purpose have been the subject of perpetual debate, going back to early corporations.”).

⁶⁵ See Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970 (§ 6), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> [<https://perma.cc/R4YF-7AB4>]. This is not to say that Friedman is or was the most radical or extreme libertarian. See Amanda Shanor, *The Tragedy of Democratic Constitutionalism*, 68 UCLA L. REV. 1302, 1355–64 (2022) (discussing diversity of libertarian perspectives and collecting citations).

⁶⁶ Friedman, *supra* note 65. On the division of labor between government and business firms to address environmental issues, see generally Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 140 (2019).

employees, customers, and the broader community.⁶⁷ As a matter of law, many legal scholars have long challenged the notion that corporations owe duties only to maximize profit for shareholders, pointing to flexibility and discretion within the business judgment rule, constituency statutes, and other legal rules that allow managers the flexibility to take a broader set of stakeholder interests into account.⁶⁸

Dorothy Lund and Elizabeth Pollman have argued that, notwithstanding any arguable flexibility in the law, a set of corporate governance institutions is oriented toward serving shareholders, and therefore, ESG will only succeed if framed as a way to maximize value (in the long run) for shareholders.⁶⁹ Much empirical economics scholarship in the ESG space demonstrates precisely this—that firms with good ESG policies have a lower cost of capital, are less risky investments, and have better long-term value.⁷⁰ Thus, according to Alex Edmans, ESG investing is merely “investing” and should be considered alongside any other drivers of long-term value for firms.⁷¹ On this view, the purpose of a firm is to maximize its own long-term value, not short-term profits.⁷² The rise of ESG demonstrates that many firm managers have concluded that integrating ESG factors is material to this financial goal.

⁶⁷ See, e.g., Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 *ACAD. MGMT. REV.* 65, 85–88 (1995) (exploring the interactions between different categories of stakeholders); R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation*, in *THE CORPORATION AND ITS STAKEHOLDERS: CLASSIC AND CONTEMPORARY READINGS* 125–26 (Max B.E. Clarkson ed., 1998) (arguing that managers have a duty to stakeholders rather than stockholders); Eric W. Orts & Alan Strudler, *The Ethical and Environmental Limits of Stakeholder Theory*, 12 *BUS. ETHICS Q.* 215, 220, 225 (2002) (arguing that broader stakeholder theories have significant conceptual limits).

⁶⁸ See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 *VA. L. REV.* 247, 299–305 (1999) (arguing that under corporate law rules firms owe duties to a broader class of stakeholders); Light, *supra* note 66, at 182–85 (discussing constituency statutes and the business judgment rule as safe harbors for managers to take multiple interests into account); Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 *GEO. WASH. L. REV.* 14, 32–35 (1992) (discussing constituency statutes).

⁶⁹ Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 *COLUM. L. REV.* 2563, 2630–34 (2021) (arguing that a set of institutions has evolved in corporate governance to support a shareholder-driven approach even if legal rules are more flexible and that ESG will only succeed if framed as a shareholder-driven approach to corporate governance).

⁷⁰ Witold J. Henisz & James McGlinch, *ESG, Material Credit Events, and Credit Risk*, 31 *J. APPLIED CORP. FIN.* 105, 105–06 (2019) (offering empirical evidence that links ESG performance to credit risk).

⁷¹ Edmans, *supra* note 13, at 2, 26–27.

⁷² See Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 *J.L., FIN. & ACCT.* 247, 251, 271 (2017).

C. *Engagement by Financial Firms (Banks, Investment Firms) in ESG*

Major banks, asset managers, and other financial institutions both in the United States and globally are adopting different forms of private environmental governance to address climate change.⁷³ These actions include not only steps to reduce emissions from their operations, but also from their portfolio companies.⁷⁴ Banks have a number of tools at their disposal to address the financial risks associated with climate change as financial intermediaries who enter into long-term contracts with borrowers.⁷⁵ These include unilateral tools that banks and financial institutions can adopt on their own, such as using their underwriting function and portfolio analysis to screen for risk; imposing terms and conditions on debtors and in contracts that mitigate such risk; and providing advice to borrowers and portfolio companies on how these parties can reduce emissions and risks associated with climate change.⁷⁶ In addition, banks and financial institutions frequently participate in voluntary associations to develop industry standards for measuring emissions, and set other goals or best practices.⁷⁷

Many major banks, including JP Morgan Chase & Co., TD Bank, HSBC, Morgan Stanley, Barclays, and Standard Chartered, have publicly committed to achieving net-zero emissions in their lending portfolios by 2050.⁷⁸ And many major banks in the United States and globally, including

⁷³ Light & Skinner, *supra* note 7, at 1895–96, 1936, 1952 app. (discussing banks' commitments to reduce emissions in operations and lending portfolios).

⁷⁴ *Id.* at 1896–97.

⁷⁵ *Id.* at 1901 n.16 (citing Douglas W. Diamond, *Financial Intermediation and Delegated Monitoring*, 51 REV. ECON. STUD. 393, 393, 395 (1984) (discussing the role of financial intermediaries like banks in monitoring loan contracts)); Carlo M. Gallimberti, Richard A. Lambert & Jason J. Xiao, *Bank Relations and Borrower Corporate Governance and Incentive Structures* 5 (Aug. 30, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3029930 [<https://perma.cc/JRT7-5WLL>] (discussing the monitoring role of banks); *see also* Douglas G. Baird & Robert K. Rasmussen, *Private Debt and the Missing Lever of Corporate Governance*, 154 U. PA. L. REV. 1209, 1242–51 (2006) (discussing the role of credit as a mechanism of firm governance); George G. Triantis & Ronald Daniels, *The Role of Debt in Interactive Corporate Governance*, 83 CALIF. L. REV. 1073, 1082–90 (1995) (examining the role of lenders in firm governance).

⁷⁶ Light & Skinner, *supra* note 7, at 1917–21.

⁷⁷ *Id.* at 1903, 1925–31.

⁷⁸ *JP Morgan Chase Adopts Paris-Aligned Financing Commitment*, JPMORGAN CHASE & CO. (Oct. 6, 2020), <https://www.jpmorganchase.com/ir/news/2020/adopts-paris-aligned-financing-commitment/> [<https://perma.cc/USF9-RCFW>]; Laura Alix, *TD Bank Pledges Net-Zero Carbon Emissions by 2050*, AM. BANKER (Nov. 9, 2020), <https://www.americanbanker.com/news/td-bank-pledges-net-zero-carbon-emissions-by-2050/> [<https://perma.cc/MG8R-JZM9>]; *HSBC Sets Out Net Zero Ambition*, HSBC (Oct. 9, 2020), <https://www.hsbc.com/who-we-are/hsbc-news/hsbc-sets-out-net-zero-ambition/> [<https://perma.cc/Z9PL-AWMR>]; *Morgan Stanley Announces Commitment to Reach Net-Zero Financed Emissions by 2050*, MORGAN STANLEY (Sept. 21, 2020), <https://www.morganstanley.com/press-releases/morgan-stanley-announces-commitment-to-reach-net-zero-financed-e> [<https://perma.cc/FT8N->

Bank of America, Citigroup, Goldman Sachs, JP Morgan Chase & Co., Morgan Stanley, and Wells Fargo, have publicly committed not to finance new oil and gas development in the Arctic.⁷⁹ Other banks have made even more specific commitments, such as JP Morgan’s commitment not to provide “lending, capital markets or advisory services to companies deriving the majority of their revenues from the extraction of coal, and by 2024, phasing out remaining credit exposure to such companies;” or not to provide “project financing . . . where the proceeds will be used to develop a new, or refinance an existing, coal-fired power plant, unless it is utilizing carbon capture and sequestration technology.”⁸⁰

In addition to these unilateral commitments, in some cases financial institutions participate in voluntary industry associations that seek to promote certain goals such as reducing portfolio emissions and driving the businesses they lend to or own shares in to achieve a transition to net-zero emissions by 2050.⁸¹ For example, banks and other financial institutions have signed on to participate in various voluntary multi-stakeholder organizations under the auspices of GFANZ.⁸² GFANZ actually comprises seven alliances for different subcategories within the financial sector.⁸³ Participation in these associations is voluntary. The goals and mission of GFANZ are twofold: (1) to increase adoption of meaningful and robust net-zero goals by financial institutions globally and (2) to “establish a forum” to address issues that arise with the transition for the financial sector broadly.⁸⁴

Another example of voluntary associations includes Climate Action 100+, an initiative launched in 2017 that now comprises 700 global investors with more than \$68 trillion in assets under management, including asset managers like BlackRock and Fidelity, as well as the asset management divisions of banks, asset owners such as insurance firms, pension fund

WV4V]; *Addressing Climate Change*, BARCLAYS, <https://home.barclays/sustainability/addressing-climate-change/> [https://perma.cc/JDB4-3R8S]; *Standard Chartered Signs Climate Commitment*, STANDARD CHARTERED (June 30, 2020), <https://www.sc.com/de-en/2020/06/30/standard-chartered-signs-climate-commitment/> [https://perma.cc/5BZ2-YYBJ].

⁷⁹ Light & Skinner, *supra* note 7, at 1935.

⁸⁰ *Id.* at 1935 n.191 (quoting *JPMorgan Chase Expands Commitment to Low-Carbon Economy and Clean Energy Transition to Advance Sustainable Development Goals*, JPMORGAN CHASE & CO. (Feb. 25, 2020), <https://www.jpmorganchase.com/news-stories/jpmorgan-chase-expands-commitment-to-low-carbon-economy-and-clean-energy> [https://perma.cc/M8JC-SK34]).

⁸¹ Light & Skinner, *supra* note 7, at 1934–40.

⁸² GFANZ was created in April 2021 to “coordinate efforts across all sectors of the financial system to accelerate the transition to a net zero global economy.” *About Us*, GLASGOW FIN. ALL. FOR NET ZERO, <https://www.gfanzero.com/about/> [https://perma.cc/5DVY-H257].

⁸³ *The Alliances and GFANZ*, GLASGOW FIN. ALL. FOR NET ZERO, <https://www.gfanzero.com/membership> [https://perma.cc/6JMD-DKE8].

⁸⁴ *Id.*

managers, cities, and universities, among others.⁸⁵ The organization has identified 166 “focus companies that are strategically important to the net-zero emissions transition,” and seeks investors who wish to engage with these focus companies to implement “a strong governance framework on climate change,” act to reduce value-chain (Scope 3) emissions, and enhance climate-related disclosures.⁸⁶ Of the 166 companies, 100 of them represent the 100 global firms with the “highest combined direct and indirect greenhouse gas emissions” based on reported data.⁸⁷ Notably, Climate Action 100+ makes clear that it “does not facilitate or require collective decision-making regarding an investment decision. The initiative will not provide recommendations to investors to divest, vote in a particular way or make any other investment decision.”⁸⁸

Why are banks and other financial institutions taking these steps now? There are several reasons. First, numerous nongovernmental organizations (NGOs) have pressed banks and financial institutions for years to align their operations and lending practices with environmental goals.⁸⁹ For example, NGOs like the Rainforest Action Network (RAN) that focus on environmental issues have been pressuring banks and other financial institutions to stop financing environmentally destructive projects, including oil sands exploration in Alberta and drilling in the Arctic.⁹⁰

In addition to environmentally oriented NGOs, coalitions of investors—both NGOs and private investment funds and firms—have likewise urged banks not to invest in environmentally destructive projects. For example, in 2018, a group of investors “representing \$2.52 trillion in assets under management,” and including major financial institutions like BNP Paribas and the New York State Common Retirement Fund, wrote a letter “oppos[ing] any efforts to develop oil and gas in the remote and pristine Arctic National Wildlife Refuge . . . and strongly urg[ing] oil and gas companies, and the banks that fund them, not to initiate any oil and gas

⁸⁵ *Investor Signatories*, CLIMATE ACTION 100+, <https://www.climateaction100.org/whos-involved/investors/> [<https://perma.cc/7AU3-LMC2>]; *How We Got Here*, CLIMATE ACTION 100+, <https://www.climateaction100.org/approach/how-we-got-here/>.

⁸⁶ *How We Work*, CLIMATE ACTION 100+, <https://www.climateaction100.org/approach/how-we-work> [<https://perma.cc/WD8Z-5KF7>].

⁸⁷ Climate Action 100+ relied on data from the MSCI All Country World Index and the CDP (formerly Carbon Disclosure Project). *Id.*

⁸⁸ *Id.*

⁸⁹ Light & Skinner, *supra* note 7, at 1898–99.

⁹⁰ Linda Capato Jr., *Arctic National Wildlife Refuge Under Threat*, RAINFOREST ACTION NETWORK (Mar. 19, 2019), <https://www.ran.org/the-understory/arctic-under-threat> [<https://perma.cc/9KVB-5GAF>].

development in the Arctic Refuge.”⁹¹ The letter identified financial risk, reputational risk, ecological impacts, and human rights impacts on the “subsistence lifestyle and culture of the Gwich’in, an Alaska Native tribe whose people have lived in the region for thousands of years.”⁹² Other NGOs, such as Ceres, an investor-oriented nonprofit organization, have broadly called for major banks and financial institutions to align their strategies with the goals of the Paris Agreement by setting targets to reduce emissions in their lending portfolios and to more deeply engage in climate-risk mitigation strategies.⁹³

Notably, despite these climate-related commitments, these major institutions still invest in fossil fuel projects. In 2022, a coalition of NGOs including the RAN published its annual fossil fuel finance report, concluding that, between 2015 when the Paris Agreement was adopted and 2021, fossil fuel financing by the “world’s 60 largest banks has reached USD \$4.5 trillion, with \$742 billion in fossil fuel financing in 2021 alone.”⁹⁴ Four U.S. banks—JP Morgan Chase, Citi, Wells Fargo, and Bank of America—“dominate” fossil fuel financing, together accounting for approximately one quarter of all financing during this six-year period.⁹⁵ There is some debate over whether divestment or continued engagement with fossil fuel companies is a preferable strategy to achieving net-zero emissions, with environmental groups and some scholars preferring divestment,⁹⁶ and some scholarship indicating that continued engagement may be preferable.⁹⁷ At the very least, these figures undermine the contention that these financial companies are “boycotting” fossil fuels.

⁹¹ Letter from Institutional Investors to Oil and Gas Companies and Banks (May 14, 2018), <https://www.sierraclub.org/sites/default/files/blog/Investor%20Arctic%20National%20Wildlife%20Refuge%20Letter%205.11.pdf> [https://perma.cc/8ND6-HS6T].

⁹² *Id.*

⁹³ *Financing a Net-Zero Economy: Measuring and Addressing Climate Risk for Banks*, CERES (Oct. 19, 2020), <https://www.ceres.org/resources/reports/measuring-and-addressing-climate-risk-banks> [https://perma.cc/6WSZ-J6S3].

⁹⁴ ALLISON KIRSCH ET AL., BANKING ON CLIMATE CHAOS: FOSSIL FUEL FINANCE REPORT 3 (2022), <https://www.ran.org/publications/banking-on-climate-chaos-2022/> [https://perma.cc/BSG3-Q8BZ].

⁹⁵ *Id.*

⁹⁶ *See, e.g.*, Daniel Green & Boris Vallée, Can Finance Save the World? Measurement and Effects of Bank Coal Exit Policies 24 (June 16, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4090974 [https://perma.cc/6G92-TUVD] (finding that coal-fired power plants “owned by firms more exposed to coal exit policies are more likely to face early retirement than plants owned by less exposed firms”).

⁹⁷ *See, e.g.*, Jonathan B. Berk & Jules van Binsbergen, *The Impact of Impact Investing 1* (Law & Econ. Ctr. at George Mason Univ. Scalia L. Sch. Rsch. Paper Series, Paper No. 22-008, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3909166 [https://perma.cc/CU8E-GNR8] (“[T]o have impact, instead of divesting, socially conscious investors should invest and exercise their rights of control to change corporate policy.”).

D. Global Legal Rules

Finally, it is essential to acknowledge that many financial firms are acting against a broader global backdrop of climate regulation. In 2022, the United States adopted the Inflation Reduction Act, which has substantially altered firms' economic incentives to invest in renewable energy generation and electric vehicle manufacture and infrastructure, as well as for financial institutions investing in the infrastructure needed for the transition to a net-zero economy.⁹⁸ The Environmental Protection Agency has recently proposed two environmental rules under the Clean Air Act with potentially far-reaching effects on firms in the climate space: one for power plants (stationary sources) and one for vehicle emissions (mobile sources).⁹⁹

In addition, many large, publicly traded firms are subject to legal rules in other jurisdictions, in particular in the European Union, that mandate consideration of certain environmental, social, or governance factors. Specifically, the European Union's Taxonomy Regulation provides definitions of sustainable activities to investment communities, and the European Commission issued a statement noting that directing investments to sustainable projects and activities is vital for reaching energy targets.¹⁰⁰ The European Union has also adopted the Sustainable Finance Disclosures Regulation (SFDR), which lays out affirmative disclosure obligations for certain financial advisors.¹⁰¹ Thus, it is not merely private environmental governance or ESG alone leading banks and other financial institutions to take these factors into account. It is also legal mandates in jurisdictions in which they legally operate.

Countries other than the United States and those in the European Union have likewise adopted laws and regulations that may affect business practices, and ultimately the decision-making and investments of financial institutions. Thus, it is important to recognize that these financial institutions are responding to a host of different demands, including those internal to firm decision-making, as well as external, such as compliance with

⁹⁸ Act of Aug. 16, 2022, Pub. L. No. 117-169, 136 Stat. 1818, 1906, 1931, 2003 (2022).

⁹⁹ See New Source Performance Standards for Greenhouse Gas Emissions from Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 33,240, 33,252 (proposed May 23, 2023) (to be codified at 40 C.F.R. pt. 60); Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 88 Fed. Reg. 29,184, 29,184 (proposed May 5, 2023) (to be codified at 40 C.F.R. pts. 85, 86, 600, 1036, 1037, 1066).

¹⁰⁰ *EU Taxonomy for Sustainable Activities*, EUR. COMM'N, https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities_en#why [<https://perma.cc/8ZLN-HMTM>].

¹⁰¹ *Sustainability-Related Disclosure in the Financial Services Sector*, EUR. COMM'N, https://finance.ec.europa.eu/sustainable-finance/disclosures/sustainability-related-disclosure-financial-services-sector_en [<https://perma.cc/9CRM-2L56>].

legal requirements. The interaction of all these factors has made the adoption of ESG integration favorable, and often mandatory, for many companies, which makes the backlash against these policies especially challenging.

II. ANTI-ESG BACKLASH

Against the backdrop of these environmental initiatives, various state government actors have begun to adopt anti-ESG laws, prohibiting state agencies and municipalities from entering into contracts with certain financial institutions, requiring state divestment from certain funds, or prohibiting state pension fund managers from considering factors and risks arising from climate change or other ESG issues.

As a preliminary matter, it is worth noting that anti-ESG actions have not been confined to state governments. While much of the focus on anti-ESG backlash has been on recent actions by the states, in fact, the federal government under the Trump Administration took steps to limit the ability of financial institutions to consider climate-related risks in investment decisions. These actions have since been walked back by the Biden Administration. However, they provide important context for the state actions that have followed. This Part therefore begins with a brief description of two actions by the Office of the Comptroller of the Currency and the Department of Labor. It then delves into the current state-level initiatives.

A. Federal Anti-ESG Backlash Under the Trump Administration

1. Proposed OCC Rule

In November 2020, the Office of the Comptroller of the Currency (OCC), an independent bureau within the Treasury Department responsible for supervising and regulating major national banks, issued the proposed “Fair Access to Financial Services” rule.¹⁰² On January 14, 2021, the OCC published a final rule to become effective on April 1, 2021.¹⁰³ The rule never came into effect as the Biden Administration announced on January 28, 2021 that it had “paused publication” of the rule.¹⁰⁴

The Fair Access Rule would have stated:

¹⁰² Fair Access to Financial Services, 85 Fed. Reg. 75,261, 75,261 (Nov. 25, 2020) (to be codified at 12 C.F.R. pt. 55).

¹⁰³ News Release, Off. of the Comptroller of the Currency, OCC Finalizes Rule Requiring Large Banks to Provide Fair Access to Bank Services, Capital, and Credit (Jan. 14, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-8.html> [<https://perma.cc/TEC8-7X48>].

¹⁰⁴ News Release, Off. of the Comptroller of the Currency, OCC Puts Hold on Fair Access Rule (Jan. 28, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-14.html> [<https://perma.cc/G374-H3JA>].

To provide fair access to financial services, . . . a covered bank shall (1) make each financial service it offers available to all persons in the geographic market served by the covered bank on proportionally equal terms; (2) not deny any person a financial service the bank offers unless the denial is justified by such person's quantified and documented failure to meet quantitative impartial risk-based standards established in advance by the covered bank; . . . and (4) not deny, in coordination with others, any person a financial service the covered bank offers.¹⁰⁵

The rule would have applied only to large banks with \$100 billion or more in assets or that met a threshold level of market share.¹⁰⁶

The OCC contended that it was acting pursuant to its authority in Title III of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act), by which the OCC is charged with “assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction.”¹⁰⁷ The OCC was motivated by concerns over public statements in 2019 and 2020 that major banks would not provide access to financial services for certain categories of projects, including fossil fuel development in the Alaskan Arctic.

The Federal Register notice in support of the OCC's proposed rule stated that the “Dodd-Frank Act's articulation of ‘fair access’ as a distinct concept implies a right of individual bank customers, whether natural persons or organizations, to have access to financial services based on their individual characteristics and not on their membership in a particular category of customers.”¹⁰⁸ Relying on a speech in 2014 by then-Comptroller Thomas J. Curry, the agency noted in its notice of proposed rulemaking that “the OCC has repeatedly stated that while banks are not obligated to offer any particular financial service to their customers, they must make the services they do offer available to all customers except to the extent that risk factors particular to an individual customer dictate otherwise.”¹⁰⁹ The agency referred to this as “customer risk evaluation” or case-by-case risk assessment rather than “category-based” risk evaluation.¹¹⁰

The OCC contended that the banks are “often reacting to pressure from advocates from across the political spectrum whose policy objectives are served when banks deny certain categories of customers access to financial

¹⁰⁵ Fair Access to Financial Services, 85 Fed. Reg. at 75,265.

¹⁰⁶ *Id.*

¹⁰⁷ Pub. L. No. 111-203, 124 Stat. 1376, 1523 (2010) (codified at 12 U.S.C. § 324(a)).

¹⁰⁸ Fair Access to Financial Services, 85 Fed. Reg. at 75,262.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 75,262–63.

services.”¹¹¹ The OCC listed certain categories of industries that had been “debanked,” in recent years, including contractors running correctional facilities for the federal government, as well as shotgun and rifle manufacturers.¹¹² The OCC stated:

It is our understanding that some banks have taken these actions based on criteria unrelated to safe and sound banking practices, including

(1) personal beliefs and opinions on matters of substantive policy that are more appropriately the purview of state and Federal legislatures; (2) assessments ungrounded in quantitative, risk-based analysis; and (3) assessments premised on assumptions about future legal or political changes. . . . [T]he OCC believes these criteria are not, and cannot serve as, a legitimate basis for refusing to grant a person or entity access to financial services.¹¹³

The reasoning behind the OCC’s initial proposal of this rule acknowledged climate risk but found that risk was outweighed by the need for energy security.¹¹⁴ The OCC further emphasized that Congress, not the banks, should balance these risks, and that lawful businesses, even if controversial, are entitled to fair access to financial services. The OCC finally restated that individual risk factors, rather than broad categorical exclusions, should guide the banks’ provisions of financial services.

The Trump Administration’s OCC rule was framed in a way that reflected a narrow reading of Milton Friedman’s view that business firms should essentially “stay in their lane” to focus solely on making profits, rather than wade into issues of interest to other stakeholders, such as environmental impact.¹¹⁵ The irony, of course, is that banks believe they are doing exactly that. For banks facing a complex regulatory transition between now and 2050 with the potential for stranded assets, as well as the physical effects of climate change and their impact on financial institutions’ operations, the banks would argue that they are simply considering long-term risks in the allocation of capital.

2. *Department of Labor Rule for ERISA*

On November 13, 2020, in the waning days of the Trump Administration, the Department of Labor published a final rule, “Financial Factors in Selecting Plan Investments,” to become effective on January 12, 2021, under the Employee Retirement Income Security Act of 1974

¹¹¹ *Id.* at 75,263.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 75,264.

¹¹⁵ See Friedman, *supra* note 65; Light, *supra* note 66, at 140.

(ERISA), which governs employee-sponsored retirement accounts.¹¹⁶ Notably, ERISA expressly does not apply to state-run or municipal employee benefit plans or pension plans.¹¹⁷ The rule broadly required retirement plan fiduciaries to base investment decisions on “pecuniary factors.”¹¹⁸

Under ERISA Section 404(a)(1)(A), fiduciaries of retirement plans must act “solely in the interest of the participants and beneficiaries” and “for the exclusive purpose of . . . providing benefits to participants and their beneficiaries.”¹¹⁹ In *Fifth Third Bancorp v. Dudenhoffer*, the Supreme Court stated that the term “benefits” refers to “the sort of *financial* benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust’s beneficiaries.” The term does not cover “nonpecuniary benefits” such as those at issue in the case that would allegedly have arisen from employee stock ownership.¹²⁰

Arguing that “ESG investing raises heightened concerns under ERISA” because of the broad nature of its scope and the potential that some ESG investment vehicles prioritize environmental or social impact over investment returns, the rule made “clear that ERISA plan fiduciaries may not subordinate return or increase risks to promote non-pecuniary objectives.”¹²¹ The Department acknowledged that “there are instances where one or more [ESG] factors will present an economic business risk or opportunity that corporate officers, directors, and qualified investment professionals would appropriately treat as material economic considerations under generally accepted investment theories.”¹²² However, the rule stated that only financial objectives could be paramount. In the final rule, the Department adopted a number of new provisions—for example, a provision that prohibited the addition or retention of an investment fund as a qualified default investment alternative if the fund “includes even one non-pecuniary objective in its investment objectives or principal investment strategies.”¹²³

¹¹⁶ Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846, 72,846 (Nov. 13, 2020) (to be codified at 29 C.F.R. pts. 2509, 2550). ERISA does not govern state-run pension plans.

¹¹⁷ 29 U.S.C. §§ 1002(32), 1003(b)(1).

¹¹⁸ News Release, U.S. Dep’t of Labor, U.S. Department of Labor Announces Final Rule to Protect Americans’ Retirement Investments (Oct. 30, 2020), <https://www.dol.gov/newsroom/releases/ebsa/ebsa20201030> [<https://perma.cc/DN5H-QQCD>] (discussing U.S. Department of Labor Final Rule, 85 Fed. Reg. 72,846 (Nov. 13, 2020)).

¹¹⁹ 29 U.S.C. § 1104(a) (prudent person standard of care).

¹²⁰ 573 U.S. 409, 420–21 (2014).

¹²¹ Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 72,848.

¹²² *Id.*

¹²³ Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,822, 73,823 (Dec. 1, 2022) (to be codified at 29 C.F.R. pt. 2550).

Relatedly, on December 16, 2020, the Department published a final rule, “Fiduciary Duties Regarding Proxy Voting and Shareholder Rights.”¹²⁴ This rule made clear that plan fiduciaries, in exercising any voting rights they hold as shareholders, must not “subordinate the economic interests of participants and beneficiaries to unrelated objectives.”¹²⁵

On November 22, 2022, however, the Biden Administration announced that it had finalized a new rule, called “Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights,” which “reverse[d] and modif[ied]” the regulations adopted in 2020.¹²⁶ Upon issuance of the final rule, Assistant Secretary for Employee Benefits Security Lisa M. Gomez stated that “[c]limate change and other environmental, social and governance factors can be useful for plan investors as they make decisions about how to best grow and protect the retirement savings of America’s workers.”¹²⁷ The Federal Register statement accompanying the final rule made clear that when ESG issues are considered “by a prudent fiduciary along with other relevant factors to evaluate the risk and return profiles of alternative investments” these ESG factors are not “tie-breakers” but are rather “‘risk-return’ factors affecting the economic merits of the investment” and therefore should be within the discretion of investment managers and plan fiduciaries to consider.¹²⁸

Thus, the new rule

retains the core principle that the duties of prudence and loyalty require ERISA plan fiduciaries to focus on relevant risk-return factors and not subordinate the interests of participants and beneficiaries (such as by sacrificing investment returns or taking on additional investment risk) to objectives unrelated to the provision of benefits under the plan.¹²⁹

However, the rule deletes the distinction between “pecuniary” and “non-pecuniary” terminology and explains that a fiduciary has the discretion to determine what factors may affect the risk and return analysis, and that “such factors may include the economic effects of climate change and other

¹²⁴ Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81,658, 81,658 (Dec. 16, 2020) (to be codified at 29 C.F.R. 2509, 2550).

¹²⁵ *Id.* at 81,658–59.

¹²⁶ News Release, U.S. Dep’t of Labor, US Department of Labor Announces Final Rule to Remove Barriers to Considering Environmental, Social, Governance Factors in Plan Investments (Nov. 22, 2022), <https://www.dol.gov/newsroom/releases/ebsa/ebsa20221122> [<https://perma.cc/RFH6-3F2R>]; Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. at 73,822.

¹²⁷ News Release, U.S. Dep’t of Labor, *supra* note 126.

¹²⁸ Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. at 73,824.

¹²⁹ *Id.* at 73,827.

environmental, social, or governance factors on the particular investment or investment course of action.”¹³⁰

In early 2023, the House and Senate sent a joint resolution under the Congressional Review Act to nullify the rule, but President Biden vetoed the resolution.¹³¹ However, multiple states have sued the Department of Labor to block the rule.¹³² In September 2023, the district court upheld the Biden Administration’s rule as consistent with ERISA,¹³³ though an appeal is likely to follow.

B. State Anti-ESG Laws

While some actions have occurred at the federal level, the anti-ESG backlash has arisen even more heatedly at the state level. This conflict has come to a head in the form of state laws (and some state executive actions) prohibiting state agencies or municipalities from doing business with financial institutions that are engaging with ESG issues. These state laws take many different forms. Some prohibit state agencies from doing business with financial firms that have adopted ESG integration. Others require divestment from funds sponsored by such financial institutions. Still others set limits on the ability of state pension fund managers to consider ESG factors. This section surveys the different types of anti-ESG laws.

It is important to note that while our focus is on decisions by financial institutions to take environmental and climate risks and opportunities into account, the states adopting these laws have often lumped these environmental- and climate-related analyses with other forms of ESG integration, such as issues related to guns, race, diversity, and other social issues of consequence, as well as concerns further afield, such as school curricula about race and American history.

¹³⁰ *Id.*

¹³¹ H.R.J. Res. 30, 118th Cong. (2023); see Karin Rives, *Biden Vetoes GOP-Led Effort to Overturn Labor Department ESG Rule*, S&P GLOB. MKT. INTEL. (Mar. 20, 2023), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/biden-vetoes-gop-led-effort-to-overturn-labor-department-esg-rule-74245723> [<https://perma.cc/CFA4-XC9N>].

¹³² See Complaint for Declaratory & Injunctive Relief at 1–2, *Utah v. Walsh*, No. 2:23-cv-00016-Z (N.D. Tex. filed Jan. 26, 2023), https://www.texasattorneygeneral.gov/sites/default/files/images/press/2023.01.26_1%20Complaint.pdf [<https://perma.cc/LP8J-GZJT>].

¹³³ Memorandum Opinion & Order, *Walsh*, No. 2:23-cv-00016-Z (N.D. Tex. Sept. 9, 21, 2023), https://www.napa-net.org/sites/napa-net.org/files/Utah%20v%20Walsh_092123.pdf [<https://perma.cc/Q95R-ZSDB>].

I. Texas S.B. 13

On September 1, 2021, Texas Senate Bill 13 came into force.¹³⁴ This law prohibits certain state agencies from doing business with financial institutions that “boycott energy companies.”¹³⁵ The statute defines “boycott[ing] energy companies” to mean:

without an ordinary business purpose, refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations with a company because the company:

- (1) engages in the exploration, production, utilization, transportation, sale, or manufacturing of fossil fuel-based energy and does not commit or pledge to meet environmental standards beyond applicable federal and state law; or
- (2) does business with a company described by Paragraph (A).¹³⁶

The law clarifies that a state governmental entity is not required to comply with S.B. 13 if it “determines that the requirement would be inconsistent with its fiduciary responsibility with respect to the investment of entity assets or other duties imposed by law relating to the investment of entity assets, including the duty of care” established under the Texas Constitution.¹³⁷

The law sets forth a process by which the comptroller prepares a list of “all financial companies that boycott energy companies” and makes it available to the relevant state agencies.¹³⁸ To prepare this list, the comptroller may rely on “publicly available information” regarding financial companies or request verifications from financial companies that they do not in fact boycott energy companies and rely on such verifications.¹³⁹

¹³⁴ S.B. 13, 87th Leg., Reg. Sess. (Tex. 2021); *see* News Release, Tex. Comptroller of Pub. Accts., Texas Comptroller Glenn Hegar Announces List of Financial Companies That Boycott Energy Companies (Aug. 24, 2022), <https://comptroller.texas.gov/about/media-center/news/20220824-texas-comptroller-glenn-hegar-announces-list-of-financial-companies-that-boycott-energy-companies-1661267815099> [<https://perma.cc/M25V-XWEA>].

¹³⁵ TEX. GOV. CODE ANN. §§ 809.001(1), 809.053 (West 2022) (defining “boycott energy company”). Note that the “financial company” is defined as “a publicly traded financial services, banking, or investment company.” *Id.* § 809.001(4). The state agencies subject to the prohibition include the Employees Retirement System of Texas, Teacher Retirement System of Texas, Texas Municipal Retirement System, Texas County and District Retirement System, Texas Emergency Services Retirement System, and the permanent school fund. *Id.* § 809.001(7).

¹³⁶ *Id.* § 809.001(1).

¹³⁷ *Id.* § 809.005 (citing TEX. CONST. art. XVI, § 67).

¹³⁸ *Id.* § 809.051.

¹³⁹ *Id.* § 809.051(1)–(2).

Once this list is made available, the relevant state governmental entities must notify the comptroller as to whether it holds, directly or indirectly, any assets in the financial company.¹⁴⁰ The state governmental entity must then notify the financial company that it may be subject to divestment, and offer the company an “opportunity to clarify its activities;” and the “financial company must cease boycotting energy companies in order to avoid qualifying for divestment by state governmental entities.”¹⁴¹ The law requires that, except as provided by the statute, “a state governmental entity may not acquire securities of a listed financial company.”¹⁴² And the law provides a schedule pursuant to which state governmental entities must “sell, redeem, divest, or withdraw all publicly traded securities of a listed financial company.”¹⁴³

There are several exceptions to these requirements, which appear to acknowledge possible financial losses from a full divestment strategy. One exception exists if there is “clear and convincing evidence” that:

- (1) the state governmental entity has suffered or will suffer a loss in the hypothetical value of all assets under management by the state governmental entity as a result of having to divest from listed financial companies under this chapter; or
- (2) an individual portfolio that uses a benchmark-aware strategy would be subject to an aggregate expected deviation from its benchmark as a result of having to divest from listed financial companies under this chapter.¹⁴⁴

Each of the exceptions appears to acknowledge the possibility that when financial institutions take climate risk or other ESG factors into account, they may be acting in a way that prioritizes financial returns. This echoes the definition that a financial institution is allegedly “boycotting” energy companies only when the financial institution is acting “without an ordinary business purpose.”¹⁴⁵

A second operative mandate in S.B. 13 provides that any state agency or political subdivision of the state “may not enter into a contract” with a value of \$100,000 or more, “with a company for goods or services unless the contract contains a written verification from the company that it: (1) does not boycott energy companies; and (2) will not boycott energy companies during

¹⁴⁰ *Id.* § 809.052.

¹⁴¹ *Id.* § 809.053.

¹⁴² *Id.* § 809.057.

¹⁴³ *Id.* § 809.054.

¹⁴⁴ *Id.* § 809.056(a)(1)–(2).

¹⁴⁵ *Id.* § 809.001(1).

the term of the contract.”¹⁴⁶ This prohibition on contracting likewise contains exceptions when the governmental entity determines that compliance with the prohibition would be “inconsistent with the governmental entity’s constitutional or statutory duties.”¹⁴⁷

According to the Texas Comptroller’s Office, the comptroller identified an initial list of companies based on the Global Industrial Classification System (GICS) and Bloomberg Industrial Classification System (BICS), MSCI ESG Ratings Service, and membership in Climate Action 100+ and Net Zero Banking Alliance/Net Zero Asset Managers Initiative.¹⁴⁸ After generating an initial list, the comptroller “narrow[ed] down the universe of financial companies for additional scrutiny” by reviewing the following scoring indicators:

- A score which measures a company’s management of and exposure to key environmental risks and opportunities;
- An oil and gas financing policy indicator;
- A score measuring a company’s oversight of ESG considerations in financing and investment activities;
- An indicator which describes the extent of engagement of the board of directors on perceived climate risk; and
- An indicator which evaluates the perceived environmental risks of the financial company’s lending and underwriting activities.¹⁴⁹

Then, the comptroller sent letters to those firms that met the initial criteria seeking a “verification request” to help in the final listing determination.¹⁵⁰ One question the verification request inquired about was whether the firm had committed to an “aggressive reduction in fossil fuel emissions with goals of aligning lending and investment portfolios with ‘net zero’ prior to 2050[.]”¹⁵¹ The Texas FAQ justified this question by stating that a number of financial firms have pledged to reduce carbon emissions to net zero by 2050, but such a pledge with an earlier time horizon was indicative of a lack of “ordinary business purpose,” and characterized such pledges as boycotting per the statute’s definition.¹⁵²

¹⁴⁶ *Id.* § 2274.002(a)–(b) (prohibition on contracting); *Id.* § 2274.001(3) (defining which governmental entities are bound by the prohibition on contracting by reference to § 2251.001).

¹⁴⁷ *Id.* § 2274.002(c).

¹⁴⁸ News Release, Tex. Comptroller of Pub. Accts., *supra* note 134; TEX. COMPTROLLER OF PUB. ACCTS., LIST OF FINANCIAL COMPANIES THAT BOYCOTT ENERGY COMPANIES FREQUENTLY ASKED QUESTIONS (Mar. 2023), <https://comptroller.texas.gov/purchasing/publications/divestment.php> [<https://perma.cc/M5NQ-TT4N>].

¹⁴⁹ TEX. COMPTROLLER OF PUB. ACCTS., *supra* note 148, at 3.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 4.

¹⁵² *Id.* at 5.

The FAQ make clear that there is no single step a financial company can take to be removed from the state’s list of financial firms that are alleged to “boycott” energy companies, but they do note that “[c]onsistent with the process described above, an entity that is no longer included on the Climate Action 100+ and Net Zero Banking Alliance/Net Zero Asset Managers Initiative, would no longer meet the initial criteria for listing.”¹⁵³

2. *Other States*

States other than Texas have adopted an assortment of anti-ESG legal rules. These include laws with language substantially similar to that of the Texas statutes, for example in Kentucky,¹⁵⁴ Oklahoma,¹⁵⁵ and West Virginia.¹⁵⁶ Notably, West Virginia defines the term “reasonable business purpose” to include “any purpose directly related to: (a) Promoting the financial success or stability of a financial institution; (b) Mitigating risk to a financial institution; (c) Complying with legal or regulatory requirements; or (d) Limiting liability of a financial institution.”¹⁵⁷

This language illustrates that the drafters recognize that an ordinary business purpose could include mitigation of climate or other ESG-related risks, and thus, provides an important qualification that is not so defined in Texas law.

Other states have taken different approaches. One approach is an absolute prohibition on considering ESG factors in investment decisions—with the legislative text stating conclusively that such factors can never be “pecuniary” in nature. For example, Arizona’s State Investment Policy Statement provides that the proper standard of care for all investments by the Arizona State Treasurer’s Office is the fiduciary standard of care, and that evaluating an investment ought to consider only pecuniary factors—meaning, the factors with a “material effect” on the financial risk or return of the investment.¹⁵⁸ Further, non-pecuniary factors that cannot be considered are any of the following:

¹⁵³ *Id.* at 6.

¹⁵⁴ See S.B. 205, 2022 Leg., Reg. Sess. (Ky. 2022).

¹⁵⁵ See H.B. 2034, 2022 Leg., 1st Reg. Sess. (Okla. 2022).

¹⁵⁶ See W. VA. CODE ANN. § 12-1-C (West 2022).

¹⁵⁷ *Id.* § 12-1C-1(5).

¹⁵⁸ ARIZ. STATE TREASURER’S OFF., INVESTMENT POLICY STATEMENT (2022), https://www.aztreasury.gov/_files/ugd/8bb536_415fda871e864b9ea1fb95fce704874e.pdf [https://perma.cc/XT84-HFFX]. For an updated list of state laws addressing ESG issues, see Elizabeth S. Goldberg & Rachel Mann, *The State of Anti-ESG State Legislation*, MORGAN LEWIS (Aug. 25, 2022), <https://www.morganlewis.com/blogs/mlbenebits/2022/08/the-state-of-anti-esg-state-legislation> [https://perma.cc/RJ52-9XNF], and Leah Malone, Emily Holland & Carolyn Houston, *ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S.*, HARV. L. SCH. F. ON

- (1) International, domestic, or industry agreements relating to environmental or social goals.
- (2) Corporate governance structures based on social characteristics.
- (3) Social or environmental goals.¹⁵⁹

In addition, Arizona’s Investment Policy Statement states that fiduciaries managing state treasury assets “may not vote shares based upon non-pecuniary factors.”¹⁶⁰

Florida has adopted similar language in a resolution by the State Board of Administration that it will initiate an update to the Board’s investment policy for the state retirement system’s defined benefit plan to make clear that evaluations by the Board of investment decisions and proxy votes “must be based only on pecuniary factors” and that “[p]ecuniary factors do not include the consideration of the furtherance of social, political, or ideological interests.”¹⁶¹ Florida has recently adopted a similar absolute prohibition on certain types of actions by state and local officials, to become effective on July 1, 2023.¹⁶² The law expressly prohibits the consideration of any “social, political, or ideological interests” by financial officials acting on behalf of the state in a number of capacities, including in pension and retirement investments, as well as in other types of organizations like citizen support organizations.¹⁶³ The law expressly defines the term “pecuniary factor” to exclude the “consideration of the furtherance of any social, political, or ideological interests.”¹⁶⁴ The new law then mandates that—*notwithstanding*

CORP. GOVERNANCE (Mar. 11, 2023), <https://corpgov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-the-regulatory-landscape-in-the-u-s> [<https://perma.cc/YYQ5-SEDY>].

¹⁵⁹ ARIZ. STATE TREASURER’S OFF., *supra* note 158, at 1.

¹⁶⁰ *Id.*

¹⁶¹ State Bd. of Admin. of Fla., A Resolution Directing an Update to the Investment Policy Statement and Proxy Voting Policies for the Florida Retirement System Defined Benefit Pension Plan, and an Execution of an Internal Review (Aug. 23, 2022).

¹⁶² See 2023 Fla. Sess. Law Serv. 2023–28.

¹⁶³ See FLA. STAT. §§ 215.47, 215.475–215.4755 (2023).

¹⁶⁴ *Id.* § 17.57(1)(a). It is notable that some state anti-woke laws such as Florida’s unselfconsciously treat the pursuit of profit as neutral and not implicating social, political, or ideological issues. For critiques of such neutrality assumptions, see, for example, David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 7 (2014), which observes that “[t]he very idea of a ‘market’ has no operational content without a series of prior political decisions that define and allocate economic rights, such as property and the power to contract”; Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 676–77 (1979), which explores the ideological underpinnings of classical law and economics and, building off of Hale, argues that all legal systems necessarily reflect political, nonneutral choices; and Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 491–93 (1923), which critiques the contention that market ordering is neutral or free from legal and political structuring. For analyses and critiques of contemporary capitalism and the history of settler colonialism as racialized,

any other law—state officials “must make decisions based solely on pecuniary factors and may not subordinate the interests of the people of this state to other objectives, including sacrificing investment return or undertaking additional investment risk to promote any nonpecuniary factor.”¹⁶⁵ Similar language applies to multiple types of state organizations, as well as to voting of proxies. The law further prohibits the issuance of “green” or ESG bonds,¹⁶⁶ and prohibits the payment of public funds to any third party that rates such bonds and the entry into contracts with any rating agency “whose ESG scores for such issuer will have a direct, negative impact on the issuer’s bond ratings.”¹⁶⁷

The law further imposes obligations on “qualified public depository” institutions—i.e., banks—not to “discriminate” in the provision or denial of services based on political affiliation, religious belief, or “[a]ny factor if it is not a quantitative, impartial, and risk-based standard, including any such factor related to the person’s business sector.”¹⁶⁸ The banks further ought not to use ratings based on a “social credit score,” that is in turn based on the firm’s engagement in different industries like gun manufacturing or exploration, production, or sale of fossil fuels, or the firm’s performance on environmental or social standards, benchmarks, or disclosures, so long as the firm is in compliance with applicable law.¹⁶⁹ Finally, the Florida statute prohibits the consideration of social, political, or ideological interests in government contracts and licensing, including within the public university system.¹⁷⁰ While some might argue that the term “social, political or

see, for example, Arun Kundnani, *The Racial Constitution of Neoliberalism*, 63 RACE & CLASS 51 (2021), which argues that “[p]revailing scholarship on neoliberalism fails to recognise that it generates its own distinctive forms of racial domination”; NATSU TAYLOR SAITO, SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS 6, 9 (2020), which traces the genealogy of race and racialization in the United States from their settler colonial origins, analyzing “structural racism as a function of ongoing colonization,” and argues that “eliminating racism will require us to move beyond nondiscrimination to decolonization”; NTINA TZOUVALA, CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW 4 (2020), which analyzes the “standard of civilization” in international law and arguing that it “was a historically contingent response to the need to make sense of and regulate a world shaped and reshaped by these dynamics of unequal, yet global, capitalist development”; Lars Cornelissen, *Neoliberalism and the Racialized Critique of Democracy*, 27 CONSTELLATIONS 348, 348 (2020), which analyzes the “intersection between the neoliberal critique of democracy and racial (or racialized) differentiation”; and CEDRIC ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 2 (1983), which develops the concept of “racial capitalism” by tracing the feudal origins of racialism in Europe and arguing that, from those origins, “it could be expected that racialism would inevitably permeate the social structures emergent from capitalism.”

¹⁶⁵ FLA. STAT. § 17.57(1)(c) (2023).

¹⁶⁶ *Id.* § 215.681(1)(c).

¹⁶⁷ *Id.* § 215.681(2)(c).

¹⁶⁸ *Id.* § 280.02(26)(f).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* §§ 560.1115(2)(a), 1010.04(5)(a).

ideological” includes social issues but not climate-related factors in decision-making, it appears likely that the state intends for this term to apply to consideration of environmental and climate-related factors as well. Conversely, some might argue that what the state considers permissible considerations, such as pecuniary interests, are themselves necessarily “social, political or ideological”, though the state might disagree.

Some states have adopted laws that disfavor, but do not prohibit entirely, state investments based on environmental, social and governance factors. For example, Idaho has adopted Senate Bill 1405, which provides that “public entities engaging in investment activities” must abide by the Idaho Uniform Prudent Investor Act, and that “[n]o public entity engaged in investment activities shall consider environmental, social, or governance characteristics in a manner that could override the prudent investor rule.”¹⁷¹ This language suggests that there is no blanket prohibition on considering ESG factors, so long as financial considerations remain paramount. The law further includes language stating that ESG alternatives are permissible so long as investors have other options.¹⁷²

In Indiana, state officials have issued advisory opinions regarding whether the state Public Retirement System’s Board may choose investments or vote proxies based on ESG factors.¹⁷³ The Attorney General of Indiana concluded that Indiana law prohibits the trustees of state pension funds from investing or voting proxies for purposes “such as to further general environmental, social, or governance goals” as to do so “violates” their fiduciary duties.¹⁷⁴

In Louisiana, on October 5, 2022, the state treasurer issued a letter addressed to Larry Fink, the CEO of BlackRock, that begins: “Your blatantly anti-fossil fuel policies would destroy Louisiana’s economy.”¹⁷⁵ The letter goes on to state that Louisiana’s treasury intends to “liquidate all [\$794 million of treasury funds invested in BlackRock] by the end of 2022.”¹⁷⁶ The letter explains that ESG investing is “contrary to Louisiana law on fiduciary duties,” and “a threat to our founding [democratic] principles.”¹⁷⁷

¹⁷¹ IDAHO CODE ANN. § 67-2345(1) (West 2022).

¹⁷² S.B. 1405, 66th Legis. 2s Reg. Sess. (Idaho 2022).

¹⁷³ Off. of the Att’y Gen., State of Ind., Off. Op. 2022-3 (2022).

¹⁷⁴ *Id.* at 1.

¹⁷⁵ Letter from John M. Schroder, La. State Treasurer, to Laurence D. Fink, CEO, BlackRock, Inc. (Oct. 5, 2022), https://a4de8bd9-8c02-4b69-8f48-7792cfcaf8fd.usrfiles.com/ugd/a4de8b_38fde8b7e3c04c9490bf332ce14f8d2f.pdf [<https://perma.cc/8BV8-ZEBN>].

¹⁷⁶ *Id.* at 1.

¹⁷⁷ *Id.* at 1–2.

In Missouri, on October 18, 2022, the state treasurer issued a press release stating that the Missouri State Employees' Retirement System (MOSERS) had "sold all public equities managed by BlackRock, Inc., pulling approximately \$500 million in pension funds from the investment manager."¹⁷⁸ The state treasurer noted that BlackRock rejected the state's request to abstain from voting the plan's proxies, stating, "We should not allow asset managers such as BlackRock, who have demonstrated that they will prioritize advancing a woke political agenda above the financial interests of their customers, to continue speaking on behalf of the state of Missouri," and calling BlackRock's investment strategies a "massive fiduciary breach."¹⁷⁹

North Dakota adopted Senate Bill 2291, which provides that the state investment board may not make "social investments" unless the board can demonstrate that such an investment "would provide an equivalent or superior rate of return" as a nonsocial investment with a "similar time horizon and risk."¹⁸⁰ The statute defines "social investment" as "the consideration of socially responsible criteria in the investment or commitment of public funds for the purpose of obtaining an effect other than a maximized return to the state."¹⁸¹ The statute further directs the North Dakota Department of Commerce to conduct a study on divestment from companies that "boycott" energy or production agriculture companies.¹⁸²

Other states, including Idaho, Indiana, Louisiana, Minnesota, Pennsylvania, South Carolina, and Utah, are also considering boycott bills targeting energy companies, while other states have adopted or are considering similar limits on interactions and investments in companies that target other social issues like firearms, mining, agriculture, and commercial timber production.¹⁸³ It is important to note that several states have rejected similar bills.¹⁸⁴

As noted above, recent studies have demonstrated that states adopting anti-ESG laws face increased borrowing costs such that they may not be in

¹⁷⁸ Press Release, Scott Fitzpatrick, Mo. State Treasurer, Treasurer Fitzpatrick Announces MOSERS Has Pulled \$500 Million in State Pension Funds from BlackRock (Oct. 18, 2022), <https://treasurer.mo.gov/newsroom/news-and-events-item?pr=80669a5f-5c6b-491f-a0f0-6abe4c012604> [<https://perma.cc/2YNG-CCSW>].

¹⁷⁹ *Id.*

¹⁸⁰ S.B. 2291 § 1(2), 67th Legis. Assemb., Reg. Sess. (N.D. 2021).

¹⁸¹ *Id.* § 1(1).

¹⁸² *Id.* § 2.

¹⁸³ See MORGAN LEWIS, *supra* note 18 (listing bills introduced by type).

¹⁸⁴ Steven Mufson, *The Conservative Battle Against "Woke" Banks Is Backfiring*, WASH. POST (Feb. 28, 2023, 5:54 PM), <https://www.washingtonpost.com/climate-environment/2023/02/28/climate-change-wall-street-investments/> [<https://perma.cc/A5FL-DP9W>].

the states' economic interests.¹⁸⁵ This demonstrates that anti-ESG laws are often not particularly economically prudent and may be driven by other political or social goals. Whatever the reason, the overall movement within states of passing anti-woke capitalism laws is troubling for businesses that consider ESG as part of a risk and return analysis. The movement also raises significant constitutional issues, which are discussed next.

III. LEGAL LANDSCAPE: THE CONSTITUTIONAL AND POLITICAL BACKDROP OF ANTI-WOKE CAPITALISM

The remainder of this Article addresses the origins and constitutional issues raised by the current wave of anti-woke capitalism laws detailed above. This Part lays out the doctrinal and political landscape in which these laws intervene. It clarifies that an illicit governmental motive—to quash woke ideas and woke social and political associations—triggers heightened scrutiny and would very likely render anti-woke capitalism laws unconstitutional. It also outlines the larger doctrinal structures in which constitutional questions about these laws sit. This discussion demonstrates that these laws raise doctrinally similar issues to a number of the most contested First Amendment cases today, including those involving refusals to serve or employ.

This Part also traces the historical and political context out of which anti-woke capitalism laws have arisen. We include that context for two reasons. First, anti-woke capitalism laws mark a sea change in the conservative legal movement that has significant implications, including for the future of First Amendment law. Second, governmental motivation is often critical to the constitutional analysis of anti-woke capitalism laws, and their historical and political context illuminates the governmental interests driving these laws, including anti-ESG investment laws.

A. First Amendment Principles

1. Coverage, Protection, and the Political–Economic Distinction

To understand the doctrinal landscape, it is important to recognize that the First Amendment has many rules, not just one. The scope of the First Amendment's application is often termed First Amendment *coverage*.¹⁸⁶ It

¹⁸⁵ See Memorandum from Econsult Sols., Inc., *supra* note 21, at 1–2.

¹⁸⁶ Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004); Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 319 (2018). There is a longer history identifying distinctions similar to the distinction between coverage and protection, the latter of which indicates the contours and level of scrutiny of doctrines protecting covered speech. See Harry Kalven Jr., *The Reasonable Man and the First*

encompasses the set of social practices that are deemed “speech” for First Amendment purposes. We refer to this covered set of social practices as “*mediums of expression*.”¹⁸⁷

Importantly, the First Amendment does not cover all activities that we might colloquially describe as speech, expression, or association. The First Amendment does not, for instance, generally apply to words used in contracts, SEC filings, tax returns, or many types of professional speech, such as that involved in malpractice or fiduciary duties. A doctor, for instance, does not have a free speech defense against a malpractice suit based on her provision of incorrect information to a patient. The examples are myriad, including broad swaths of antitrust, evidence, contract, and criminal law, among others.¹⁸⁸ Counterintuitively—and contrary to the popular myth of the First Amendment—more speech, association, and expression are likely *not* covered by the First Amendment than are covered by it.¹⁸⁹

Once speech, association, or expression is covered under the First Amendment, and so is a medium of expression, the next question is how the First Amendment protects that covered medium of expression. First Amendment *protection* refers to the doctrinal rules that apply to covered expression. This includes not only the level of scrutiny, such as strict, intermediate, or closer to rational basis, but also other crucial doctrinal contours, such as whether the right protects the interests of speakers or

Amendment: Hill, Butts, and Walker, 1967 SUP. CT. REV. 267, 278 (distinguishing between the “ambit” and “level” of First Amendment protection); Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1444 (1962) (distinguishing between the scope and strength of the First Amendment).

¹⁸⁷ See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (describing signs on residential property as “an important and distinct medium of expression”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (“It cannot be doubted that motion pictures are a significant medium for the communication of ideas.”); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (“The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression.”); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1253 n.16, 1257, 1264 (1995); Brief for First Amendment Scholar, *supra* note 33, at 1 (“The First Amendment protects the communication of ideas through recognized mediums of expression.”); Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. F. 346, 347–48 (2015) (explaining that coverage concerns “which forms of speech, in the ordinary language sense of that word, or which forms of communication or expression, will be understood as having nothing to do with the First Amendment,” such as contracts, while protection encompasses forms of expression, such as advocacy of acts of illegality, which are protected under context-specific First Amendment doctrines, such as that for incitement).

¹⁸⁸ Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Saliency*, 117 HARV. L. REV. 1765, 1773, 1783 (2004); see also Post, *supra* note 187, at 1271–72 (arguing that a “general free speech principle” cannot determine the scope of the First Amendment because speech has no “generic constitutional value”; instead, the First Amendment’s multiple “values represent virtues implicit in specific and discrete kinds of social practices”).

¹⁸⁹ Shanor, *supra* note 186, at 320–21; see Schauer, *supra* note 186, at 1768.

listeners.¹⁹⁰ The doctrinal features of First Amendment protection are shaped by the context-bound constitutional values they aim to advance.¹⁹¹

One of the central distinctions in First Amendment doctrine rose to ascendancy during the New Deal—namely, the political–economic distinction. Since the Supreme Court’s turn away from laissez-faire constitutionalism in *West Coast Hotel Co. v. Parrish*, it has been black letter law that, under the Fourteenth Amendment, what we might call “political” or “fundamental” rights receive more stringent judicial protection than the regulation of economic ordering, which is largely left to the political branches.¹⁹² Scholars have traced how the political–economic distinction in the Fourteenth Amendment emerged from efforts to ensure democratic control over trusts and other forms of consolidated economic power.¹⁹³ President Franklin D. Roosevelt described the New Deal’s democratic accomplishment in his second inaugural address: “[W]e have made the exercise of all power more democratic; for we have begun to bring private autocratic powers into their proper subordination to the public’s government.”¹⁹⁴ This conception was that “[a]gainst economic tyranny . . .

¹⁹⁰ See Shanor & Light, *supra* note 58, at 2099.

¹⁹¹ *Id.* at 2076; Shanor, *supra* note 186, at 355; Post, *supra* note 187, at 1255 (describing one view of the First Amendment as “a legal conclusion that organizes protection of the constitutional values that we perceive in particular kinds of social contexts”).

¹⁹² 300 U.S. 379, 398–400 (1937); Suzanna Sherry, *Property Is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1468–75 (2015) (reviewing RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* (2014)); Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1541–42 (2008); Shanor, *supra* note 65, at 1316–22.

¹⁹³ See WILLIAM J. NOVAK, *NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE* (2022) (prioritizing and interrogating “the broader and substantive democratic commitments at the very heart of the production of the modern American state” and its transformation between the Civil War and the New Deal); William J. Novak, *The Progressive Idea of Democratic Administration*, 167 U. PA. L. REV. 1823, 1840 (2019) (“[The creation of the modern administrative state was centered on] a vision of democratic administration built on the protection of public over and against private interest. Here, substantive issues of economic inequality, political unfairness, and systemic bias and discrimination moved to the very center of the American administrative project. Indeed, one of the leading motivations for the turn to modern administration was an acute awareness of the troubling ascendancy of private special economic interests in turn-of-the-century American politics.”); *id.* at 1842–43 (“[W]hat was new at the turn of the twentieth century was an acute awareness of the unprecedented threat to democratic politics posed by the arrival of large-scale business and corporate interests Corruption and the pursuit of selfish private and economic interests in the democratic public sphere was seen as the central problem confronting American democracy at the turn of the century [A]dministration was offered up as a distinctly democratic solution.”); Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017) (observing that the modern administrative state “yields important constitutional benefits” and arguing for “reorient[ing] constitutional analysis to consider[] not just constitutional constraints on government but also constitutional obligations to govern”).

¹⁹⁴ President Franklin D. Roosevelt, Second Inaugural Address (Jan. 20, 1937) (transcript available at the Avalon Project, https://avalon.law.yale.edu/20th_century/froos2.asp [<https://perma.cc/6RCZ-DPW9>]).

the American citizen could appeal only to the organized power of Government.”¹⁹⁵ Democracy, on that account, is understood as elected government.

The Supreme Court later imported the New Deal political-economic distinction into the First Amendment.¹⁹⁶ Accordingly, for decades, the doctrinal principles that apply to what we might call political speech—which we refer to as “*mediums of expression in public discourse*”¹⁹⁷—and those that apply in economic life, including the commercial speech doctrine, have been fundamentally distinct. Justice Sandra Day O’Connor aptly described these two contexts as receiving “radically different constitutional protections.”¹⁹⁸ The strict, speaker-autonomy-focused rules most often associated with the First Amendment apply to speech in public discourse—political speech. And rules organized to advance the knowledge and democratic participation of the public in markets structure those in economic life.¹⁹⁹ We can understand

¹⁹⁵ President Franklin D. Roosevelt, Acceptance Speech for the Renomination for the Presidency (June 27, 1936) (transcript available at The American Presidency Project, <https://www.presidency.ucsb.edu/documents/acceptance-speech-for-the-renomination-for-the-presidency-philadelphia-pa> [<https://perma.cc/7UUH-RDDU>]).

¹⁹⁶ See *Valentine v. Chrestensen*, 316 U.S. 52, 54–55 (1942) (treating commercial advertising as economic conduct subject to plenary regulation); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (extending First Amendment coverage to commercial speech but orienting the doctrine towards the rights of listeners, rather than speakers, so as to advance the listening public’s democratic and economic participation); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980) (laying out a more relaxed scrutiny test, relative to political speech, for restrictions on commercial speech); *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 650–51 (1985) (stating an even more relaxed standard, relative to restrictions, for compelled commercial speech).

¹⁹⁷ Robert Post coined this term. Post, *supra* note 187, at 1256–59, 1275–76.

¹⁹⁸ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 638 (1984) (O’Connor, J., concurring in part and concurring in the judgment).

¹⁹⁹ See Shanor & Light, *supra* note 58, at 2085–89; Shanor, *supra* note 29, at 154–63; Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 167–70 (2015). See generally Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867 (2015) [hereinafter Post, *Compelled Commercial Speech*] (discussing First Amendment jurisprudence on compelled commercial speech); ROBERT C. POST, *Democratic Legitimation and the First Amendment, in DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 1* (2012) (theorizing First Amendment doctrine as reflecting the value of both the free formation of public opinion and the need for expert knowledge); ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995) (exploring how constitutional law balances the concerns of democracy, community, and management); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990) [hereinafter Post, *Public Discourse*] (assessing the justification and structure of the concept of public discourse in First Amendment jurisprudence); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–23 (1971) (articulating a political-speech-based theory of the freedom of speech); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 263 (articulating the classic democratic governance theory of the freedom of speech, namely that the free flow of speech related to self-government is necessary for an electorate to freely govern itself).

this distinction as the First Amendment rules and values applicable to politics versus markets, respectively. The distinction applies not only to the right to free speech but also to rights of association and boycotts in politics versus markets as well. Many of the knottiest First Amendment issues arise at the intersection of these two doctrines, including those surrounding greenwashing, social media platform regulation, challenges to public accommodations and other antidiscrimination laws,²⁰⁰ and now, anti-woke capitalism laws.

2. *New Lochnerism and the Erosion of the Political–Economic Distinction*

In recent decades, litigants and courts have increasingly embraced a robustly deregulatory view of the First Amendment that applies the more stringent rules once confined to public discourse to economic regulation. Scholars have termed this First Amendment Lochnerism. As described in the large literature on First Amendment Lochnerism and broader deregulatory constitutionalism,²⁰¹ since at least the 1990s, litigants and courts have eroded the doctrinal distinction between the economic and the political within the First Amendment. The consequence of this erosion has been the application

²⁰⁰ See Shanor & Light, *supra* note 58, at 2098, 2116.

²⁰¹ For discussions of First Amendment Lochnerism and deregulatory constitutionalism, see Shanor, *supra* note 65, at 1310; Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 161–62 (2021); 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) [hereinafter Britton-Purdy et al., *LPE Framework*]; Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1700–10 (2019); Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2161 (2018); Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 179 (2018); Metzger, *supra* note 193, at 28–30; Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1206–09 (2015); John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 223–24 (2015); Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1140 (2015); Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 234–37; Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1917–22 (2016); Tamara R. Piety, *Citizens United and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16, 16–17 (2010); Post & Shanor, *supra* note 199, at 165–67; Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1454–59 (2015); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 196–203, 211–13 (2014); and Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, NEW REPUBLIC (June 3, 2013), <http://www.newrepublic.com/article/113294/how-corporations-hijacked-firstamendmentevade-regulation> [https://perma.cc/93MM-JDDX]. For early seminal work, see Thomas H. Jackson & John Calvin Jeffries Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 1–6, 30–33 (1979); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1386–88 (1984); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 376–87; and Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935, 935–42 (1993).

of heightened standards of review previously only applicable to laws targeting political speech to economic regulations as well. Heightened scrutiny means that fewer economic regulations survive—and that the final arbiter on how economic life should be ordered has shifted from the political branches to the courts. The practical implications of First Amendment *Lochnerism* are that the First Amendment has emerged as a powerful deregulatory tool. Recent cases, for example, have, often successfully, challenged the regulation of anything from ordinary business licensing, to the sale of personal behavioral data, to stock buybacks as violating the First Amendment.²⁰²

The boundary between the First Amendment doctrines applicable to politics, on the one hand, and markets, on the other, has come under pressure for many reasons.²⁰³ These reasons include how increasingly important private ordering within markets has become to addressing significant social issues, such as climate change; as well as other issues such as hyperpolarization, the stability of democracy, and conflict over the social status of various groups, such as that of members of the LGBTQ+ or Black communities. The political–economic distinction has also been roundly criticized from voices across the scholarly and political spectrum.²⁰⁴

Indeed, one of the most pressing contemporary constitutional questions is whether the political–economic distinction will be replaced by something else, or whether it will remain within First Amendment doctrine—if with altered boundaries. For a time, it appeared likely that the courts would adopt

²⁰² *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011); *Edwards v. District of Columbia*, 755 F.3d 996, 998 (D.C. Cir. 2014); *U.S. Chamber Sues the Securities and Exchange Commission over Stock Buyback Rule*, U.S. CHAMBER OF COM. (May 12, 2023), <https://www.uschamber.com/finance/u-s-chamber-sues-the-securities-and-exchange-commission-over-stock-buyback-rule> [https://perma.cc/NC5E-3N2Y].

²⁰³ See generally Shanor, *supra* note 199 (identifying a business-led social movement and the rise of behavioral law and economics and disclosure regulation as among the key causes).

²⁰⁴ See, e.g., Britton-Purdy et al., *LPE Framework*, *supra* note 201, at 1789 (critiquing the political–economic distinction and proposing a framework to move beyond it); Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2237 (2018) (pointing to the inherent contradiction of Supreme Court distinctions “between the protection of economic and political rights”); Richard A. Epstein, *An Unapologetic Defense of the Classical Liberal Constitution: A Reply to Professor Sherry*, 128 HARV. L. REV. F. 145, 146–47 (2015) (arguing that the political–economic distinction should be rejected in favor of a unified framework that promotes gains from voluntary trades); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 3 (2011) (arguing that *Lochner*’s approach, at least as much as jurisprudence built on the political–economic distinction, is well-grounded and important to modern jurisprudence); Seidman, *supra* note 192, at 1547 (“[I]t will not do to distinguish between economic and noneconomic liberties because noneconomic freedoms are parasitic on underlying economic entitlements.”); Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 762 (1993) (criticizing the weaker protections extended to commercial speech within the First Amendment’s internal political–economic distinction).

a one-size-fits-all rule applying the heightened levels of scrutiny usually reserved for political speech everywhere—including to “expressive” activities in the marketplace. But, as described below, the coalition supporting this deregulatory shift appears to be splintering, and the dominant thrust of the conservative legal movement appears to be moving away from its formerly laissez-faire stance. It is to this shift that we next turn.

B. A Shifting Conservative Legal Movement

An important shift that has significant First Amendment implications is occurring within the conservative legal movement. The libertarian, pro-business,²⁰⁵ and private-property-supporting strains of the conservative legal movement—which have been dominant since the Reagan Administration and flourished within First Amendment law over the last thirty years, particularly while Justice Anthony Kennedy anchored the center of the Supreme Court²⁰⁶—are increasingly being eclipsed by a new form of legalism. Far from libertarian, this approach within the conservative legal movement seeks to tie the hands of businesses and investors that express views associated with progressive politics, even if done for profit-seeking reasons. The anti-ESG laws highlighted above seek to expressly overrule private managers’ business judgments about whether a particular factor, such as climate risk, is financially material to an investment or lending decision. In some cases, this approach appears to reject categorically the idea that the integration of climate risk—or other ESG factors—may be motivated by a search for long-term profit or motivated by business-related risk management strategies and business opportunities. Instead, it lumps such decisions into a category of woke views associated with progressive politics. This shift in approach reflects the pressures of increasing political polarization and the altered landscape presented by the current conservative Supreme Court supermajority.

Because the investment-focused anti-ESG laws described in detail above sit in a broader context of other anti-woke laws, this section describes the landscape of anti-woke capitalism and anti-wokeism more broadly. This landscape illuminates many of the constitutionally significant differences between, and similarities among, these laws, which have constitutional import—an issue we take up in Part IV to provide a framework for assessing such laws. This discussion is also important because *governmental* motivation—not the motivation of the banks or other private firms that are

²⁰⁵ Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220 (2021) (questioning and problematizing the description of recent Supreme Court cases as “pro-business”).

²⁰⁶ Shanor, *supra* note 201, at 1308–09, 1380; Lakier, *supra* note 201.

taking climate-focused or socially focused actions—is a key factor in assessing the constitutionality of these laws.

1. *The History of Wokeness, Anti-Wokeness, and Anti-Woke Capitalism*

Woke is defined by the Oxford English Dictionary as originally meaning “well-informed, up-to-date” but now “chiefly [means] alert to racial or social discrimination and injustice.”²⁰⁷ The use of the term reaches back to Black American history in the early twentieth century.²⁰⁸ Long before #StayWoke went viral, exhortations to “stay woke” began as a call to be more politically and socially conscious. Early twentieth century folk singer Lead Belly explained in an afterword to his 1938 Blues song, *Scottsboro Boys*, about nine Black teenagers who were falsely accused of raping two white women, that he wrote the song to “advise everybody, be a little careful when they go long through there—best stay woke, keep their eyes open.”²⁰⁹ Be alert, the song cautions, to the dangers of racism around you.

The writer William Kelley is credited with first putting the concept into print in a 1962 *New York Times* op-ed entitled, *If You’re Woke You Dig It*.²¹⁰ A decade later, Barry Beckham’s play, *Garvey Lives!*, further popularized the term.²¹¹ The title references Marcus Garvey, a Black nationalist leader who founded the Universal Negro Improvement Association in 1914 and the newspaper *Negro World* in 1918, and whose message of Black pride and the

²⁰⁷ *Woke*, OXFORD ENG. DICTIONARY (2022), <https://www-oed-com.proxy.library.georgetown.edu/view/Entry/58068747?rskey=YdTB4&result=15&isAdvanced=true#eid1216715200> [<https://perma.cc/9MN5-VQH9>].

²⁰⁸ *Id.* (documenting use of the term “woke up” in reference to political awareness as far back as 1943). Others point to Marcus Garvey’s 1923 call, “Wake up Ethiopia! Wake up Africa!” See Aja Romano, *A History of “Wokeness,”* VOX (Oct. 9, 2020, 10:00 AM), <https://www.vox.com/culture/21437879/stay-woke-woke-ness-history-origin-evolution-controversy> [<https://perma.cc/R3QK-68VM>].

²⁰⁹ LEAD BELLY, *Scottsboro Boys*, on LEAD BELLY: THE SMITHSONIAN FOLKWAYS COLLECTION, at 04:27–:31 (Smithsonian Folkways 2015), <https://www.youtube.com/watch?v=VrXfkPViFIE&t=46s> [<https://perma.cc/27Y3-573M>].

²¹⁰ William Melvin Kelley, *If You’re Woke You Dig It*, N.Y. TIMES (May 20, 1962), <https://timesmachine.nytimes.com/timesmachine/1962/05/20/issue.html> [<https://perma.cc/M65F-9Q6D>]; see also Kathryn Schulz, *The Lost Giant of American Literature*, NEW YORKER (Jan. 22, 2018), <https://www.newyorker.com/magazine/2018/01/29/the-lost-giant-of-american-literature> [<https://perma.cc/H963-CBS2>] (discussing Kelley’s career and fascination with “the way one language can accommodate many different speakers”); Elijah C. Watson, *The Origin of Woke: William Melvin Kelley Is the ‘Woke’ Godfather We Never Acknowledged*, OKAYPLAYER (Dec. 2022), <https://www.okayplayer.com/culture/what-does-woke-mean-history-origins-william-melvin-kelley.html> [<https://perma.cc/V68D-RXKN>] (“[Kelley’s] essay doesn’t use the word ‘woke’ beyond its title, but it’s worthy of being described as such, [Kelley] offering a prophetic commentary that is just as sobering now as it was then, considering woke’s worldwide appropriation.”).

²¹¹ BARRY BECKHAM, *GARVEY LIVES!* 9 (1972); OXFORD ENG. DICTIONARY, *supra* note 207 (citing *Garvey Lives!* as an example of the use of woke).

necessity of economic success to Black liberation reached millions.²¹² In Beckham’s play, the protagonist, Strong, clad in a straightjacket, refuses to cooperate with an attendant chasing him with an injection and instructing him to go to sleep:

No. I won’t go to sleep. I won’t. I been sleeping all my life. And now that Mr. Garvey done woke me up, I’m gon stay woke. And I’m gon help him wake up other black folk. We got to organize so we can do all the things for ourselves that we ought to been doing long time ago.²¹³

The use of #StayWoke by activists, Black Twitter, and the Black Lives Matter movement following the 2014 Ferguson uprisings and, later, George Floyd’s death spurred national understanding of woke to mean awareness of structural racial injustice.²¹⁴

Since then, for many, the concept of wokeness has come to include progressive ideas more generally—and often derisively.²¹⁵ Merriam-Webster, for example, defines woke not only as “aware of and actively attentive to important social facts and issues (especially issues of racial and social justice),” but also “reflecting the attitudes of woke people” and “disapproving: politically liberal (as in matters of racial and social justice) especially in a way that is considered unreasonable or extreme.”²¹⁶ In this negative vein, Taryn Fenske, Florida Governor Ronald DeSantis’s communications director, has explained that “woke” is “a slang term for . . . progressive activism.”²¹⁷

Critiques of wokeness surged in tandem with those of critical race theory (CRT). CRT and efforts related to diversity, equity, and inclusion are often understood by their opponents as a subset of larger wokeism.²¹⁸

²¹² *Marcus Garvey*, NAT’L ARCHIVES, <https://www.archives.gov/research/african-americans/individuals/marcus-garvey> [<https://perma.cc/T957-HMX4>]; David Van Leeuwen, *Marcus Garvey and the Universal Negro Improvement Association*, NAT’L HUMANS. CTR. (Oct. 2000), <http://nationalhumanitiescenter.org/tserve/twenty/tkeyinfo/garvey.htm> [<https://perma.cc/LJ8J-8T4K>].

²¹³ BECKHAM, *supra* note 211.

²¹⁴ Romano, *supra* note 208.

²¹⁵ Sean Illing, “Wokeness Is a Problem and We All Know It,” VOX (Apr. 27, 2021, 8:30 AM), <https://www.vox.com/22338417/james-carville-democratic-party-biden-100-days> [<https://perma.cc/SHW6-HE87>] (quoting James Carville).

²¹⁶ *Woke*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/woke> [<https://perma.cc/N897-JLPV>].

²¹⁷ Philip Bump, *What Does ‘Woke’ Mean? Whatever Ron DeSantis Wants*, WASH. POST (Dec. 5, 2022, 4:17 PM), <https://www.washingtonpost.com/politics/2022/12/05/desantis-florida-woke-critical-race-theory/> [<https://perma.cc/CD5J-M2BB>].

²¹⁸ Some scholars argue that woke is a racial dog whistle—aimed to be understood as anti-multicultural to some but not all—because it is more ambiguous and less explicitly racial than CRT and therefore a more effective political organizing term. See Samuel L. Perry & Eric L. McDaniel, *Why*

Florida's Stop W.O.K.E. Act (Stop the Wrongs to Our Kids and Employees Act), for example, aims to "take on both corporate wokeness and Critical Race Theory," according to the press release announcing the Act.²¹⁹

Passed in 2022, in addition to overhauling Florida's education laws to take aim at CRT, the Stop W.O.K.E. Act made it an unlawful employment practice for private employers to require employees to attend a training or other activity that "espouses, promotes, advances, inculcates, or compels such individual to believe any of" eight forbidden concepts.²²⁰ Those concepts include that a person's "status as either privileged or oppressed is necessarily determined by his or her race, color, sex, or national origin," and that "[m]embers of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin."²²¹ It further prohibits promotion of the concept that an individual, because of their "race, color, sex, or national origin, bears personal responsibility for and must feel guilt" or other forms of distress for actions "committed in the past by other members of the same race, color, sex, or national origin."²²² Those provisions have been challenged by a group of Florida employers as violating the First Amendment.²²³

Similar legal and political targeting of allegedly woke private sector actions is a core feature of the larger anti-woke political movement. In tandem, public conflicts between conservative leaders and corporate America over the latter's asserted wokeness have become increasingly common. When Walt Disney's then-CEO, Bob Chapek, told shareholders that he opposed Florida's Parental Rights in Education law, known by its critics as the "Don't Say Gay" law, and the company issued a statement opposing the law, Governor DeSantis and the Florida legislature responded with a law attempting to "strip[] Disney (Central Florida's largest taxpayer) of special legislative benefits that it had enjoyed since its establishment, a

"Woke" Is a Convenient Republican Dog Whistle, TIME (Jan. 26, 2023, 8:00 AM), <https://time.com/6250153/woke-convenient-republican-dog-whistle/> [<https://perma.cc/NF76-CDVL>]. "[D]og-whistle politics" involves messages "that seem innocent to a general audience but resonate with a specific public attuned to receive them." WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 190 (2008).

²¹⁹ Press Release, Fla. Off. of the Governor, Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations (Dec. 15, 2021), <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/> [<https://perma.cc/2QYG-X4GR>].

²²⁰ FLA. STAT. § 760.10(8) (2022).

²²¹ *Id.*

²²² *Id.*

²²³ *Honeyfund.com, Inc. v. DeSantis*, 622 F. Supp. 3d 1159 (N.D. Fla. 2022).

half century ago.”²²⁴ Disney has since sued Governor DeSantis and other Florida officials, including on First Amendment grounds. The company argues that the state’s interference with its contracts and reconstruction of its governing body are unconstitutional retaliation for its statements about the Don’t Say Gay law.²²⁵

Florida’s elected officials are not the only ones that have pushed back against so-called woke capitalism; the tide against allegedly woke capitalism has become a crucial component of a larger conservative legal movement. The 2021 Conservative Political Action Conference, for example, included a panel on “The Awakening of Corporate America.”²²⁶ Following his wildly successful leadership of the Federalist Society, Leonard Leo has turned to devote his strategic acumen to a small set of projects aimed at shifting public opinion and has reportedly raised nearly \$2 billion to support those efforts—including challenging allegedly woke capitalism.²²⁷ A leading voice of the conservative legal movement, Leo has said that “the woke capitalism battle is a very high priority for me.”²²⁸ The two groups in his network leading those efforts are Consumers’ Research and the State Financial Officers

²²⁴ Benjamin Wallace-Wells, *The Political Strategy of Ron DeSantis’s “Don’t Say Gay” Bill*, NEW YORKER (June 28, 2022), <https://www.newyorker.com/news/the-political-scene/the-political-strategy-of-ron-desantiss-dont-say-gay-bill> [<https://perma.cc/AB7W-GQZA>]; Andrew Krietz, *Disney Releases Statement as DeSantis Prepares to Sign Bill Limiting Teachings About Sexual Orientation, Gender*, WTSP (Mar. 22, 2022), <https://www.wtsp.com/article/news/politics/disney-florida-desantis-statementbill/67-170f27d3-eee4-4fb1-ab70-01c73828834a> [<https://perma.cc/6N2Q-9KEE>]. The conflict between Disney and DeSantis appears to have started earlier when Disney’s then-former and now current CEO, Bob Iger, tweeted that the law, if passed “will put vulnerable, young LGBTQ people in jeopardy.” Todd C. Frankel & Lori Rozsa, *DeSantis Might Have Met His Match in Disney’s Iger as Both Sides Dig In*, WASH. POST (May 15, 2023 1:28 PM), <https://www.washingtonpost.com/business/2023/05/15/desantis-disney-iger-power/> [<https://perma.cc/YC3V-63WB>]. After the Florida law was passed, the company pledged to get it repealed or struck down. *Id.* With Iger back in charge, Disney also moved to stymie Florida’s plan; on the eve of Florida’s takeover of the company’s special district, the still-Disney-controlled district board entered a decades-long contract with the company giving it control over development in the district. *Id.*

²²⁵ Amended Complaint at 73–78, *Disney v. DeSantis*, No. 23-cv-163 (N.D. Fla. May 8, 2023).

²²⁶ Allan Smith, *Culture Wars Strain Once Unshakeable Bond Between Republicans, Corporate America*, NBC NEWS (Apr. 4, 2021), <https://www.nbcnews.com/politics/politics-news/culture-wars-strain-once-unshakeable-bond-between-republicans-corporate-america-n1262797> [<https://perma.cc/8TW5-WXQV>].

²²⁷ See Jonathan Swan & Alayna Treene, *Leonard Leo to Shape New Conservative Network*, AXIOS (Jan. 7, 2020), <https://www.axios.com/2020/01/07/leonard-leo-crc-advisors-federalist-society> [<https://perma.cc/36UU-WQMZ>]; Kenneth P. Vogel, *Leonard Leo Pushed the Courts Right. Now He’s Aiming at American Society*, N.Y. TIMES (Oct. 12, 2022), <https://www.nytimes.com/2022/10/12/us/politics/leonard-leo-courts-dark-money.html> [<https://perma.cc/GJG9-CVPW>].

²²⁸ Vogel, *supra* note 227; Steven Mufson, *This Group Is Sharpening the GOP Attack on ‘Woke’ Wall Street*, WASH. POST (Jan. 30, 2023, 6:10 AM), <https://www.washingtonpost.com/climate-environment/2023/01/30/climate-change-sustainable-investing/> [<https://perma.cc/B257-EE8>] (quoting Leo, who stated that “Consumers’ Research and its leader Will Hild are executing the most impactful pushback I know against ESG and other aspects of woke corporate culture”).

Foundation. Consumers' Research launched an anti-ESG campaign in 2021, and the State Financial Officers Foundation is coordinating the work of state treasurers, discussed above, to withdraw state pension funds from banks and funds that consider ESG in investment decisions.²²⁹

Following the Supreme Court's affirmative action ruling in *Students for Fair Admission, Inc. v. President & Fellows of Harvard College*,²³⁰ anti-wokeism has focused even more intensely on the private sector. Within weeks of the opinion's publication, more than a dozen Republican attorneys general sent a letter to Microsoft and other Fortune 100 companies urging them to reexamine their diversity practices and to "immediately cease any unlawful race-based quotas or preference" in employment or contracting or "be held accountable—sooner rather than later."²³¹ Senator Tom Cotton of Arkansas further sent letters to fifty-one top law firms, warning them that "[t]o the extent that your firm continues to advise clients regarding [Diversity, Equity, and Inclusion] programs or operate one of your own, both you and those clients should take care to preserve relevant documents in anticipation of investigations and litigation."²³² UCLA School of Law's Critical Race Studies Program, which tracks anti-CRT laws including those against private firms, reports that from September 2020 through the end of 2022, over 560 anti-CRT laws were introduced.²³³ That number has risen to 750 at the time of publication.²³⁴

The anti-ESG laws that target financial institutions for integrating climate change into their decision-making discussed in Part II are thus part of a larger movement targeting private sector actions branded by opponents as woke, including on issues of race and inclusion, abortion, and LGBTQ+

²²⁹ Vogel, *supra* note 227.

²³⁰ 143 S. Ct. 2141 (2023).

²³¹ Letter from Attorneys General of Thirteen States to Fortune 100 CEOs (July 13, 2023), https://ag.ks.gov/docs/default-source/documents/corporate-racial-discrimination-multistate-letter.pdf?sfvrsn=968abc1a_2 [<https://perma.cc/U65C-GT2H>]; see also Trisha Thadani & Jacob Bogage, *The Campaign Against Affirmative Action Shifts to Corporate America*, WASH. POST (July 19, 2023), <https://www.washingtonpost.com/technology/2023/07/15/affirmative-action-workplace-diversity-equity-inclusion> [<https://perma.cc/8U96-YAKA>] (covering the attorneys general campaign against company diversity programs and noting that a group run by former Trump aide Stephen Miller has begun filing EEOC claims accusing major companies of hiring based on race and sex).

²³² Press Release, Tom Cotton, Sen. for Ark., Cotton Warns Top Law Firms About Race-Based Hiring Practices (July 17, 2023), <https://www.cotton.senate.gov/news/press-releases/cotton-warns-top-law-firms-about-race-based-hiring-practices> [<https://perma.cc/CYA8-XAZL>].

²³³ TAIFHA ALEXANDER, LATOYA BALDWIN, CLARK KYLE REINHARD & NOAH ZATZ, CRT FORWARD, UCLA, TRACKING THE ATTACK ON CRITICAL RACE THEORY 4 (2023), https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law_CRT-Report_Final.pdf [<https://perma.cc/N27S-QB3R>].

²³⁴ *CRT Forward Tracking Project Map*, CRT FORWARD, UCLA, <https://crtforward.law.ucla.edu/map> [<https://perma.cc/M5VS-3E5X>].

rights. That larger context, the differences between these laws, and the motivations spurring them, are constitutionally significant. We turn to these issues in Part IV.

2. *Polarization and the Decline of Libertarianism*

Conservative thought leaders, including Nate Hochman of the *National Review*, have argued that the anti-woke, anti-CRT movement “reflects a broad shift in conservatism’s priorities and worldview.”²³⁵ Hochman observes that this “new coalition is focused on questions of national identity, social integrity and political alienation.”²³⁶ What is occurring on the right, he argues, is a partial realization of the contention of theorist Samuel T. Francis that the “principal lines of conflict” between progressive elites and middle Americans are around cultural, ethnic, and social identities.²³⁷ Columnist David Brooks has described Francis as a “prescient”²³⁸ early identifier of the rise of populism and the decline of “pro-corporate Republican economic policies.”²³⁹ The best way forward for conservatism, Francis argued, was not free-market orthodoxy, lower taxes, or democracy promotion abroad, but rather a war of identity politics tied to nationalism and race.²⁴⁰ Hochman argues that, as actualized, that distinction is between the “the woke and the unwoke.”²⁴¹

This self-described realignment reflects the pressures and political opportunities presented by polarization and identity sorting. A rich body of

²³⁵ Nate Hochman, *What Comes After the Religious Right?*, N.Y. TIMES (June 1, 2022), <https://www.nytimes.com/2022/06/01/opinion/republicans-religion-conservatism.html> [<https://perma.cc/MFF3-MNYK>].

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ David Brooks, *The Coming War on Business*, N.Y. TIMES (Sept. 22, 2017), <https://www.nytimes.com/2017/09/22/opinion/business-war-trump.html> [<https://perma.cc/3K7W-9Z4K>]; see also Matthew Rose, *The Outsider*, FIRST THINGS (Oct. 2019), <https://www.firstthings.com/article/2019/10/the-outsider> [<https://perma.cc/5KEA-37TC>] (arguing that conservative intellectuals have turned to Francis to “better understand our populist moment and its political logic”).

²³⁹ Rose, *supra* note 238.

²⁴⁰ See, e.g., SAMUEL T. FRANCIS, *LEVIATHAN AND ITS ENEMIES* (2016) (arguing that “a new social and political force,” the “post-bourgeois proletariat,” emerged in the United States at the end of the twentieth century); *id.* at 433 (describing that movement’s worldview as characterized by an “attachment to group identities, authoritarianism, with low tolerance of deviation and the subordination of the individual to the group, a disposition to use force as a means of responding to challenges and problems, and a tendency to resist innovation, and [to] seek to preserve old forms and traditions” (internal quotation marks omitted)); SAMUEL FRANCIS, *ESSENTIAL WRITINGS ON RACE* (Jared Taylor ed., 2007) (arguing in favor of an explicitly race-based approach to sustaining Western civilization); SAMUEL FRANCIS, *SHOTS FIRED: SAM FRANCIS ON AMERICA’S CULTURE WAR* (Peter B. Gemma ed., 2006) (arguing in favor of restoring a “Eurocentric” cultural order).

²⁴¹ Hochman, *supra* note 235 (quoting Matthew Schmitz, *The Woke and the Un-Woke*, TABLET (Sept. 24, 2020), <https://www.tabletmag.com/sections/news/articles/woke-religion-america> [<https://perma.cc/3LBM-C3S4>]).

social science research has demonstrated that, since the beginning of the twenty-first century, Americans have grown more socially polarized along partisan lines.²⁴² That literature has found that “a new type of division has emerged in the mass public in recent years: Ordinary Americans increasingly dislike and distrust those from the other party.”²⁴³ They say that “other party’s members are hypocritical, selfish, and closed-minded,” they are “unwilling to socialize across party lines,” and are more likely to oppose their children marrying partisan out-group members.²⁴⁴ This shift has been a sea change: “While social identity has always played a role in politics, this literature suggests we have entered a new regime where partisan identity comes to engulf and align other social identities. Rather than contest over policies, elections turn into struggles between competing groups separated by a fundamental sense of difference.”²⁴⁵ This identity realignment has included beliefs on climate change. While conservatives, particularly highly educated conservatives, believed there was scientific consensus about anthropogenic climate change through the 1990s, once the media began representing climate change as a partisan issue embraced by progressives, that position reversed dramatically.²⁴⁶

As described above, a key focus of reconfigured conservative priorities is a criticism of so-called wokeness in the private sector. This new focus stands in sharp contrast to the form of economic libertarianism that has for several decades been the dominant strand of the conservative legal

²⁴² Christopher Weber & Samara Klar, *Exploring the Psychological Foundations of Ideological and Social Sorting*, 40 POL. PSYCH. 215, 215–16 (2019).

²⁴³ Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129, 130 (2019).

²⁴⁴ *Id.* at 130, 132.

²⁴⁵ Peter Törnberg, Claes Andersson, Kristian Lindgren & Sven Banisch, *Modeling the Emergence of Affective Polarization in the Social Media Society*, PLOS ONE, Oct. 2021, at 1, 2.

²⁴⁶ Matthew J. Hornsey & Stephan Lewandowsky, *A Toolkit for Understanding and Addressing Climate Scepticism*, 6 NATURE HUM. BEHAV. 1454, 1455–57 (2022); see also Daniel A. Farber, *The Conservative as Environmentalist: From Goldwater and the Early Reagan to the 21st Century*, 59 ARIZ. L. REV. 1005, 1007, 1024–41 (2017) (tracing the turn of the Republican Party from early pro-environmentalism towards current anti-environmentalism). This is not to say that all conservatives view climate issues in the same way. Many within the business community view anthropogenic climate change as real and carrying real financial risks and opportunities, as we discuss in Part II. See, e.g., The Power of Capitalism, Letter from Larry Fink, CEO, BlackRock, Inc., to CEOs (2022), <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> [<https://perma.cc/4YT3-YV5P>] (“We focus on sustainability not because we’re environmentalists, but because we are capitalists and fiduciaries to our clients. That requires understanding how companies are adjusting their businesses for the massive changes the economy is undergoing.”).

movement, sometimes linked with variants of originalism.²⁴⁷ It has also meant an unraveling of the close relationship between business interests and many conservative politicians.

The president of the Club for Growth, David McIntosh, has explained that the “old Reagan coalition—which included the Chamber of Commerce representing big and small businesses” has “frayed.”²⁴⁸ Senator Tom Cotton, a prominent critic of ESG, has likewise observed that “[t]o the extent the Republican Party ever was more closely aligned with big business, those days are long since past.”²⁴⁹ As one policy researcher has described: “You’re seeing a divorce between the GOP and Wall Street. . . . It’s a Trumpian shift from big business to a populist focus.”²⁵⁰ Jeffrey Sonnenfeld, a professor and associate dean of the Yale School of Management, has argued that this shift clashes with the business community because

business leaders believe that it’s in the interest of society to have social harmony. . . . Divisiveness in society is not in their interest—short term or long term. They don’t want angry communities; they don’t want fractious, finger-pointing workforces; they don’t want hostile customers; they don’t want confused and angry shareholders. The political desire to use wedge issues to

²⁴⁷ See, e.g., AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015) (tracing the role of the Federalist Society in the modern conservative legal movement, including in forwarding libertarianism); WHAT’S GOOD FOR BUSINESS: BUSINESS AND AMERICAN POLITICS SINCE WORLD WAR II 234–35 (Kim Phillips-Fein & Julian E. Zelizer eds., 2012) (elaborating on the role of the business community in shaping politics and law in a largely libertarian direction since the middle of the twentieth century); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008) (tracing the rise of the modern conservative legal movement from the mid-twentieth century through the present, including its libertarian orientation); Nancy Scherer & Banks Miller, *The Federalist Society’s Influence on the Federal Judiciary*, 62 POL. RSCH. Q. 366 (2009) (observing the role of the Federalist Society in influencing the makeup of the federal judiciary, including by espousing libertarian jurists); KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE BUSINESSMEN’S CRUSADE AGAINST THE NEW DEAL* (2009) (documenting the role of business in opposing the New Deal and later regulation from a libertarian direction); JEROME L. HIMMELSTEIN, *TO THE RIGHT: THE TRANSFORMATION OF AMERICAN CONSERVATISM* (1990) (analyzing the rise of the modern conservative movement and arguing that it viewed collectivization as a central problem facing America); THOMAS BYRNE EDSALL, *THE NEW POLITICS OF INEQUALITY* (1984) (tracing the rise in political power of economic elites, including the business community, and concomitant shift in policies towards those that advance affluent interests).

²⁴⁸ Smith, *supra* note 226.

²⁴⁹ Vogel, *supra* note 227.

²⁵⁰ Lydia Moynihan, *The Great Divorce: GOP to Launch Investigations into Big Business*, N.Y. POST (Dec. 11, 2022, 1:17 PM), <https://nypost.com/2022/12/11/gop-to-launch-investigations-into-big-business/> [<https://perma.cc/C6SF-LYTP>].

divide—which used to be fringe in the GOP—has become mainstream. . . . That is 100 percent at variance with what the business community wants.²⁵¹

While these developments portend a shift, it is perhaps too early to say what vision of economic life and markets this new strain of conservatism promotes, or how long-lasting it will be. But it is certainly clear that business firms have become a locus of cultural conflict. And this shift—whatever form it ultimately takes—will undoubtedly affect society’s response to climate change.

The anti-ESG state laws targeting financial institutions and their efforts to address climate risks thus fit into a larger story. It is a narrative of a changing conservative legal movement, one that is shifting away from libertarian beliefs about business and markets to one that is more focused on policing private firms for activities that diverge from certain identitarian commitments.

This development will likely have implications for First Amendment law—potentially significant ones. These laws, and the larger move away from libertarianism they represent, may signal a turn away from the ideas that animated the rise of the First Amendment as a powerful deregulatory tool. We emphatically do not mean to suggest that we have seen the end of First Amendment Lochnerism or libertarian law and policy more broadly. Nonetheless, the prominence of deregulation under the Speech Clause has arguably already begun to wane in the Supreme Court in the face of other legal-change goals of higher priority to the majority, including in the law of religion and the major questions doctrine.²⁵² The shift we document here may further that decline.

At the same time, the adoption of “anti-wokeism” and the polarized, identitarian politics it reflects may presage a similar identitarian turn in free speech law. A deep literature has traced the way in which the libertarian ideas of the modern conservative legal movement transformed speech law over several decades.²⁵³ This is in many ways unsurprising. Scholarship on democratic constitutionalism has long demonstrated that the forces that

²⁵¹ Zack Stanton, *The GOP-Big Business Divorce Goes Deeper Than You Think*, POLITICO (Apr. 15, 2021, 5:54 PM), <https://www.politico.com/news/magazine/2021/04/15/republican-party-big-business-georgia-voting-rights-conservative-481978> [<https://perma.cc/9MRS-59DQ>].

²⁵² See, e.g., *supra* note 30 (collecting citations regarding other Court priorities); *Biden v. Nebraska*, 143 S. Ct. 2355, 2374–75 (2023) (using the major questions doctrine to strike down the Biden Administration’s student debt forgiveness program); *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (using the major questions doctrine to invalidate the EPA’s Clean Power Plan rule).

²⁵³ See *supra* note 201.

shape U.S. constitutional law include the ideas and demands of important social and intellectual movements.²⁵⁴

Finally, it is worth noting that the shift in conservative ideas from libertarianism toward identitarianism that we document here overlaps with the conservative Christian legal movement’s efforts to reimagine the right to free speech and U.S. constitutional law more broadly. Conservative Christian legal activists, particularly the Alliance Defending Freedom (ADF), have shown marked success at shifting constitutional law, including First Amendment law, in prominent ways towards doctrine that reflects their substantive religious commitments.²⁵⁵ In that sense, the conservative

²⁵⁴ See, e.g., DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016) (documenting the role of civil society organizations in shaping constitutional law in areas including LGBTQ+ rights and gun rights); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516 (2015) (describing the way in which social movements of faith have shifted between political and court-focused constitutional claims); WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 1–28* (2010) (tracing how social movements use “small ‘c’” constitutional principles to shape positive rights under statutory and administrative law on issues from equality to social security and alter “large ‘C’” constitutional law in the process); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 *HARV. L. REV.* 191 (2008) (describing the role of democratic constitutionalism in shaping Second Amendment law); Reva Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 *CAL. L. REV.* 1323, 1323 (2006) (“Social movement conflict, enabled and constrained by constitutional culture, can create new forms of constitutional understanding—a dynamic that guides officials interpreting the open-textured language of the Constitution’s rights guarantees.”); Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 *SUFFOLK U. L. REV.* 27, 52 (2005) (“Social movements and political parties shape the contours of political and legal reason—they help produce what is plausible and implausible constitutionally.”); William Eskridge, *Some Effects of Identity-Based Movements on Constitutional Law in the Twentieth Century*, 100 *MICH. L. REV.* 2062, 2064 (2002) (“My thesis is that most twentieth century changes in the constitutional protection of individual rights were driven by or in response to the great identity-based social movements (‘IBSMs’) of the twentieth century.”).

²⁵⁵ *About Us*, ALL. DEFENDING FREEDOM, <https://adflegal.org/about> [<https://perma.cc/B6KP-VH45>] (“We have played various roles in 74 Supreme Court victories. Since 2011, ADF has represented parties in 15 victories at the Supreme Court.”); Jessica Contrera, *Inside the Christian Legal Powerhouse That Keeps Winning at the Supreme Court*, *WASH. POST* (July 4, 2018), https://www.washingtonpost.com/lifestyle/style/inside-the-christian-legal-powerhouse-that-keeps-winning-at-the-supreme-court/2018/07/04/ffa6aa0-7adb-11e8-93cc-6d3becdd7a3_story.html# [<https://perma.cc/TBT2-37TJ>]. ADF’s court victories include *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023); *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022); *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2022); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); and *Town of Greece v. Galloway*, 572 U.S. 565 (2014), among others. See *ADF at the Supreme Court*, ALL. DEFENDING FREEDOM, <https://adflegal.org/us-supreme-court-wins> [<https://perma.cc/KHB5-EQES>] (compiling cases). In tax filings, ADF has described one of the organization’s goals as elaborating “the framer’s original intent for the US Constitution and Bill of Rights as it reflects God’s natural law and God’s higher law.” All. Defending Freedom, Form 990: Return of Organization Exempt from Income Tax at 3 (2007), <https://projects.propublica.org/nonprofits/>

Christian legal movement can be understood as a faith-based variant of identitarian legal advocacy. ADF's successes include the Supreme Court's recent validation of a First Amendment right to refuse web design services for same-sex weddings in *303 Creative LLC v. Elenis* as well as *Dobbs v. Jackson Women's Health Organization*, the decision that overruled *Roe v. Wade*, which established a constitutional right to abortion. The growing influence of the conservative Christian legal movement in shaping constitutional law, as libertarianism wanes, reflects a longer-running fissure between the faith-based and business-led wings of the coalition that has supported First Amendment Lochnerism. One of us has previously observed that a "wedge between" "free-market libertarians and religious conservatives" exists "because many conservatives of faith, like most groups founded in shared values, do not hold single-note anti-state beliefs" but instead "aim for a value-rich restructuring of social arrangements that in fact depend on certain forms of state action and legal choices."²⁵⁶ Thus, there now is a confluence of two movements with overlapping, but in no sense coextensive, goals and values that are of growing importance in shaping First Amendment law towards their worldviews.²⁵⁷ These two groups—the anti-

display_990/541660459/2009_03_EO%2F54-1660459_990_200806 [https://perma.cc/SMG3-A97P]; All. Defending Freedom, Form 990: Return of Organization Exempt from Income Tax at 2 (2020), <https://adflegal.org/sites/default/files/2022-02/2020-ADF-Public.PDF> [https://perma.cc/Q7BL-MWBX] (similar).

One of us has noted that the Christian legal movement has pursued speech claims because speech doctrine, following First Amendment Lochnerism, has been more favorable to their arguments than religion doctrine, at least while *Employment Division v. Smith*, 494 U.S. 872 (1991), remains good law. Amanda Shanor, *LGBTQ+ Need Not Apply*, REGUL. REV. (June 21, 2021), <https://www.theregreview.org/2021/06/21/shanor-lgbtq-need-not-apply/> [https://perma.cc/H8LV-85JQ].

²⁵⁶ Shanor, *supra* note 65, at 1314. Elizabeth Sepper has astutely noted that the conservative Christian legal movement seeks to create a "moralized marketplace" reflected in law in ways that would erode LGBTQ+ rights not only with respect to public accommodations but also "the workplace, housing markets, and beyond." Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129, 130 (2015).

²⁵⁷ There is significant ideological overlap and coordination between the Christian and anti-woke prongs of the conservative legal movement. ADF, for example, engages in public advocacy against ESG investing and corporate DEI programs; it has also launched an annual Viewpoint Diversity Score Business Index, which the Heritage Foundation awarded its Innovative Prize for "hold[ing] CEOs accountable for pursuing woke agendas." See Caroline Reeves, *What Are ESG Policies, and Why Are They Harmful?*, ALL. DEFENDING FREEDOM (Oct. 28, 2022), <https://adflegal.org/article/what-are-esg-policies-and-why-are-they-harmful> [https://perma.cc/5DWA-PTPY]; *About Us*, VIEWPOINT DIVERSITY SCORE, <https://www.viewpointdiversityscore.org/about> [https://perma.cc/M2K6-QTRH]; Press Release, Heritage Found., Heritage VP Praises ADF's Business Index: Hold CEOs Accountable for Pursuing Woke Agendas (May 17, 2023), <https://www.heritage.org/press/heritage-vp-praises-adfs-business-index-hold-ceos-accountable-pursuing-woke-agendas> [https://perma.cc/3V2Q-BDW7]. ADF has additionally launched a program of advocacy, litigation, legislation, and public education fighting critical race theory in schools, which it describes as a "toxic ideology." See, e.g., *Parental Rights*,

woke and Christian conservative legal movements—might aptly be described as the new coalition that is likely to influence the future direction of the First Amendment.

There is cause for concern if they do. One, if not the, central animating idea of modern First Amendment law is the notion that government cannot target unpopular views or associations for disfavor or put its hand on the scale toward another.²⁵⁸ A polarized, identitarian turn in free speech law—resulting in doctrine built upon the idea that some identities, cultural or religious ideas, or ideologies are legitimate while others are not—would threaten that basic core.²⁵⁹ It might mean, for example, a libertarian First Amendment for some, but not others. An identitarian First Amendment might likewise raise rule of law issues or further undermine the legitimacy of the judiciary. Even for critics of the First Amendment’s

ALL. DEFENDING FREEDOM, <https://adflegal.org/issues/parental-rights> [<https://perma.cc/AW4S-Q2QE>]; ALL. DEFENDING FREEDOM, PARENTS’ TOOLKIT ON CRITICAL THEORY IN EDUCATION AND HEALTH CARE (2022), <https://wpsmc.adflegal.org/wp-content/uploads/2022/06/parental-rights-toolkit-final.pdf> [<https://perma.cc/5LLV-8TD3>]; Neal Hardin, *What Is Critical Race Theory?*, ALL. DEFENDING FREEDOM (April 25, 2023), <https://adflegal.org/article/what-critical-race-theory> [<https://perma.cc/SCJR-G7JR>]. Heritage Action for America operates its own anti-ESG program, ESG Hurts, which describes ESG as a strategy to “advance progressive ideology” from solar subsidies and climate change disclosures to critical race theory. ESG HURTS, <https://esghurts.com/> [<https://perma.cc/7YVY-3SRM>].

²⁵⁸ 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.”); *Texas v. Johnson*, 491 U.S. 397, 414–16 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. . . . [The First Amendment’s] enduring lesson, [is] that the government may not prohibit expression simply because it disagrees with its message.”).

²⁵⁹ Scholars have raised similar concerns about the Supreme Court’s recent religion law jurisprudence and whether it will protect some faith-based commitments but not others. See Elizabeth Sepper, *Free Exercise of Abortion*, 49 *BYU L. REV.* (forthcoming 2023) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4553079 [<https://perma.cc/9VPE-SP8Y>] (“[W]ere the courts to reject pro-abortion religious claims . . . [t]he result would be to exile some categories of religious people from religious liberty protections, while Christian conservatives gain systematic favor.”); David Schraub, *Liberal Jews and Religious Liberty*, 98 *N.Y.U. L. REV.* (forthcoming 2023) (manuscript at 1, 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4269319 [<https://perma.cc/5Z9G-FLUZ>] (arguing that conservative legal elites “will reconcile the Court’s broad religious liberty doctrine with the ambition to specifically promote conservative Christian ideology” by defining “liberal Jews (which is to say, most Jews) as not . . . actual Jews” and only recognizing forms of Judaism that are “compatible with conservative Christian commitments” as “authentic Judaism” worthy of constitutional protection); Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 *IOWA L. REV.* 2299, 2302 (2023) (“[T]he reality of this ‘selective’ application of religious liberty jurisprudence vindicates a long-standing critique of judicially mandated free exercise exemptions, namely, that such exemptions too easily permit judges to pick and choose among religious liberty claimants.”); Caroline Mala Corbin, *Religious Liberty for All? A Religious Right to Abortion*, 2023 *WIS. L. REV.* 475, 511 (“[T]he Supreme Court has not expanded religious liberty but facilitated conservative Christianity.”).

libertarian turn, an identitarian First Amendment may not be a normatively appealing alternative.

IV. THE CONSTITUTIONAL QUESTIONS RAISED AND CONSTITUTIONAL VALUES IMPLICATED BY ANTI-WOKE CAPITALISM LAWS

This Part provides a framework through which to analyze the constitutionality of anti-woke capitalism laws. It traces current doctrine and its gaps, and frames the questions, facts, and constitutional values that, we argue, should be considered when analyzing the broader constitutional questions these laws raise. We do not draw conclusions as to the constitutionality of each and every anti-woke capitalism law currently on the books, as these laws vary across doctrinally significant axes. Rather, the goal of this Part is to articulate the questions and constitutional values that should guide courts' analyses of these laws and others like them that regulate social practices at the intersection of political and economic life.

In other work, we have put forward a theory of the First Amendment that looks beyond the political-economic distinction to the values and social relationships that various First Amendment doctrines seek to promote.²⁶⁰ In this Part, we aim to clarify and rethink currently muddy doctrinal categories relevant to anti-woke capitalism laws to advance the conception that the First Amendment's deep commitment to democratic participation should animate not only the doctrines applicable in politics, but in economic life as well.

A. *Assessing Governmental Interests*

Governmental interest is a threshold inquiry in analyzing the constitutionality of anti-ESG laws. Under First Amendment doctrines applicable to public discourse, commercial speech, and symbolic expression, it is nearly always unconstitutional for a government to target an activity because of the viewpoint the activity expresses. For this reason, then-Professor Elena Kagan argued that "First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives."²⁶¹ Regardless of whether the activity is categorized as a medium of expression in public discourse or not for constitutional purposes, the threshold question

²⁶⁰ Shanor & Light, *supra* note 58, at 2092–95.

²⁶¹ Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHIC. L. REV. 413, 414 (1996).

is: does the law target an activity *because of* the message the activity communicates or *regardless of it*?²⁶²

Free Exercise law has long embraced a version of the same distinction. Government may not target an activity *because of* its religious nature.²⁶³ Under almost any standard, a similar principle applies to the law of speech, symbolic expression, and association: a governmental goal of silencing certain viewpoints is generally constitutionally suspect.²⁶⁴

The seminal case establishing this principle is *United States v. O'Brien*, in which the Supreme Court addressed a war protester's public burning of his draft card to protest the Vietnam War, in violation of a federal law prohibiting the destruction and mutilation of draft cards.²⁶⁵ *O'Brien* articulated a relatively lenient four-part test for regulations of conduct that incidentally burden expression:

[A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.²⁶⁶

If a generally applicable law regulates conduct *regardless of* what it communicates, even if the law incidentally restricts or compels expression, the Court typically extends only a relaxed form of scrutiny or even no First Amendment coverage at all. For example, the Court has applied relaxed

²⁶² Although *O'Brien* analyses of governmental purpose, discussed in this section, often reference the message a viewpoint "expresses," in this context "expression" refers to the government's perception of expression, not a constitutional analysis of whether the conduct at issue is a medium of expression for First Amendment purposes.

²⁶³ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). This will presumably remain the case, even if the Court strikes down *Employment Division v. Smith* or alters its holding that regulation that burdens religious expression is constitutional so long as it is generally applicable, that is, not crafted or motivated by a desire to target a religious viewpoint.

²⁶⁴ However, a generally applicable law that incidentally burdens religious activity is currently permissible. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1993).

²⁶⁵ 391 U.S. 367, 369 (1968).

²⁶⁶ *Id.* at 377. The majority's opinion in *Sorrell v. IMS Health Inc.*, which involved a First Amendment challenge to a health data privacy law, provides a helpful explanation of how *O'Brien* works in practice:

The State argues that heightened judicial scrutiny is unwarranted because its law is a mere commercial regulation. It is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.

564 U.S. 552, 566–67 (2011) (citations omitted).

scrutiny or no coverage and upheld regulations in cases involving regulations of newspaper companies, law firms, and private school admissions. As the Supreme Court has explained, the principle articulated earlier “is why a ban on race-based hiring may require employers to remove ‘White Applicants Only’ signs; why ‘an ordinance against outdoor fires’ might forbid ‘burning a flag’; and why antitrust laws can prohibit ‘agreements in restraint of trade.’”²⁶⁷ These are examples of incidental burdens on expression made by laws that regulate conduct regardless of what it communicates.²⁶⁸

In contrast, a law regulating conduct *because* of the viewpoint the regulated conduct expresses—or its perceived viewpoint—is constitutionally suspect and subject to heightened scrutiny. Regulations motivated by a governmental aim of silencing certain ideas or quashing social or intellectual movements, including consumer boycotts, are generally unconstitutional. The Court has repeatedly found that the *O’Brien* standard does not apply to laws that intentionally target a viewpoint because the government’s interest in such cases is not “unrelated to the suppression of free expression.”²⁶⁹ In other words, the regulation fails prong three of *O’Brien*’s test.²⁷⁰

The flag burning cases illustrate this rule.²⁷¹ In *United States v. Eichman*, for example, the Court struck down the federal Flag Protection Act, observing that while the Act

[c]ontains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government’s asserted interest is “related ‘to the suppression of free expression’” and concerned with the content of such expression [T]he Government’s desire to preserve the flag as a symbol for certain national ideals is implicated “only when a person’s treatment of the flag communicates [a] message” to others that is inconsistent with those ideals.²⁷²

²⁶⁷ *Sorrell*, 564 U.S. at 566–67.

²⁶⁸ See *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Runyon v. McCrary*, 427 U.S. 160, 175–76 (1976); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rels.*, 413 U.S. 376, 388 (1973); *O’Brien*, 391 U.S. at 377.

²⁶⁹ *O’Brien*, 391 U.S. at 368.

²⁷⁰ By contrast, *Lorillard Tobacco Co. v. Reilly* upheld the Massachusetts sales practices regulations under *O’Brien*. 533 U.S. 525, 569 (2001). We are not aware of any case in which the Supreme Court found that a challenged regulation failed the laxer level of scrutiny articulated by *O’Brien*’s prongs two and four. See *O’Brien*, 391 U.S. at 377.

²⁷¹ *Texas v. Johnson*, 491 U.S. 397, 410–12 (1989).

²⁷² *United States v. Eichman*, 496 U.S. 310, 315–16 (1990) (citations omitted). Similarly, the Court found the state law banning flag burning in *Texas v. Johnson*, to be “outside of *O’Brien*’s test altogether” because the government’s asserted interest was “related ‘to the suppression of free expression’” because

Other examples include *Lorillard Tobacco Co. v. Reilly*, in which the Court held that it did “not believe” Massachusetts’s placement requirement for tobacco advertisements could “be construed as a mere regulation of conduct under *United States v. O’Brien*.” Instead, it found that the law was “an attempt to regulate directly the communicative impact of indoor advertising.”²⁷³ Similarly, in *Buckley v. Valeo*, a case regarding money in politics, the Court declined to apply *O’Brien* but nonetheless explained that the challenged regulation could not have satisfied *O’Brien* because the government’s “interest in regulating the alleged ‘conduct’ of giving or spending money ‘arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful.’”²⁷⁴

This discussion highlights deep questions over what sorts of governmental interests are illicit and what sorts of evidence can be used to demonstrate those motives. Scholars, including now-Justice Elena Kagan, John Hart Ely, Robert Post, and others, have described the case law on this inquiry as “incoherent,” “haphazard,” and “conceptually puzzling,” and have debated what factors the inquiry should turn on.²⁷⁵ Some considerations include the listener’s reaction or the secondary effects of the speech—e.g., increased crime near nude dancing clubs.²⁷⁶ There is also a question about whether governmental interest should matter, and if so, how much, if the expression is protected by weak doctrinal rules.²⁷⁷ This would include contexts such as commercial speech, the doctrine around which generally

the State’s concern with protecting the flag’s symbolic meaning is implicated “only when a person’s treatment of the flag communicates some message.” 491 U.S. at 410; *see also Eichman*, 496 U.S. at 313–14.

²⁷³ *Lorillard Tobacco*, 533 U.S. at 567; *see also Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974) (“[B]ecause no other governmental interest unrelated to expression has been advanced or can be supported on this record, the four-step analysis of *United States v. O’Brien* is inapplicable.” (citations omitted)). The Court in *O’Brien* noted in *Stromberg v. California*, 283 U.S. 359, 369 (1931), which struck down a statute prohibiting the display of red flag, that “[s]ince the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct.” *O’Brien*, 391 U.S. at 382.

²⁷⁴ *Buckley v. Valeo*, 424 U.S. 1, 17 (1976) (per curiam) (quoting *O’Brien*, 391 U.S. at 382); *see also Elrod v. Burns*, 427 U.S. 347, 363 n.17 (1976).

²⁷⁵ Post, *supra* note 187; Kagan, *supra* note 261, at 428; John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484 (1975).

²⁷⁶ Post, *supra* note 187, at 1265–67. *See, e.g., City of Erie v. Pap’s A.M.*, 529 U.S. 277, 296 (2000) (finding that an ordinance targeting harmful secondary effects associated with public nude dancing satisfies the *O’Brien* test); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986) (designating an ordinance regulating adult theaters as content-neutral because it targeted theaters’ secondary effects on the surrounding community rather than the content of adult films); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70–71 (1976) (upholding location restrictions on adult theaters enacted for the purpose of preserving neighborhood character).

²⁷⁷ *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1991).

permits content discrimination, or speech that is not covered by the First Amendment at all, such as contracts or fraud.

This confusion notwithstanding, the case law is clear that a governmental attempt to enforce an orthodoxy of ideas constitutes an illicit interest.²⁷⁸ As Justice Antonin Scalia explained, “[t]he government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed.”²⁷⁹ This concept comes close to an accurate descriptive account of the jurisprudence, but it is overbroad. Not surprisingly, in the context of antitrust, tax, or contract regulation, like commercial speech, hostility toward fraud or favoritism toward laws that inform consumer action or economic participation are both ubiquitous and constitutionally unremarkable. The question, then, is about *what sorts* of messages and in what institutional and constitutionally salient contexts orthodoxy or hostility is enforced.

Even a cursory review of the case law makes the answer apparent: it is a motivation to impose orthodoxy in the context of what we might call political ideas, or expression in public discourse. The sociological and inescapably normative question of how to identify what is, and is not, expression in public discourse may therefore overlap with the illicit governmental motive analysis, but they are distinct inquiries.

Having laid out the doctrine on illicit governmental motive, it is worth examining what evidence should be considered to establish the relevant governmental motive. This question, while a morass in the speech case law, is clearer—albeit in flux—under the analogous doctrine in free exercise law. Free exercise law has a precise analogue to *O’Brien* in *Employment Division*

²⁷⁸ *Texas v. Johnson*, 491 U.S. 397, 416–17 (1989) (“[I]f we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag’s symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be . . . permitting a State to ‘prescribe what shall be orthodox’ by saying that one may burn the flag to convey one’s attitude toward it and its referents only if one does not endanger the flag’s representation of nationhood and national unity.” (emphasis added)); see also *United States v. Eichman*, 496 U.S. 310, 317 (1990) (quoting the same passage from *Texas v. Johnson*).

²⁷⁹ *R.A.V.*, 505 U.S. at 386. Kagan has expressed this idea as: “[T]he government may not restrict expressive activities because it disagrees with or disapproves of the ideas espoused by the speaker; it may not act on the basis of a view of what is a true (or false) belief or a right (or wrong) opinion. Or, to say this in a slightly different way, the government cannot count as a harm, which it has a legitimate interest in preventing, that ideas it considers faulty or abhorrent enter the public dialogue and challenge the official understanding of acceptability or correctness.” Kagan, *supra* note 261, at 428; see also *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (observing that illicit motive is apparent when a law is applied because of a “disagreement with the message presented”); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995) (“[The state] is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.”).

v. Smith.²⁸⁰ Under *Smith*, a law with the illicit purpose of targeting religion or a practice motivated by religious belief will face the most stringent constitutional review and likely be held unconstitutional.²⁸¹ To identify the government's motive, the Court looks to the text of the statute, its operation, implementation, exceptions or special context signaling targeting, and legislative or administrative history.²⁸² The Supreme Court has also considered statements of the enforcing governmental decisionmakers for evidence of targeting, though it is an open question whether free exercise analysis should consider the personal views of individual legislators as is proper under Equal Protection jurisprudence.²⁸³

B. Applying These Principles to Anti-Woke Capitalism Laws

Under the above standards, many anti-woke capitalism laws appear explicitly or implicitly aimed at curtailing purportedly woke ideas, including those favoring climate consciousness and racial inclusion. While the context of each law is different, it is readily apparent from the text, context, discretion provided for exceptions, disparate treatment of non-ESG-considering funds, and legislative history of many such laws that they are motivated by an intent to quash allegedly woke ideas and to malign social

²⁸⁰ *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877–79 (1990).

²⁸¹ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993) (establishing that illicit governmental motive to target religion falls outside of *Smith*'s rule and is unconstitutional).

²⁸² *Id.* at 533–38; *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878–79 (2021); Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, *Unrules*, 73 STAN. L. REV. 885, 892–93, 934 (2021) (showing how pervasive exceptions or “unrules” are in the U.S. Code, Federal Register, and Code of Federal Regulations).

²⁸³ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1729 (2018) (relying on statements of commissioners). Compare *Church of Lukumi Babalu Aye*, 508 U.S. at 540–42 (opinion of Kennedy, J.) (relying on legislator statements), with *Masterpiece Cakeshop*, 138 S. Ct. at 558–59 (Scalia, J., concurring in part and concurring in judgment) (rejecting such evidence); *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2437 n.3 (Alito, J., dissenting from the denial of certiorari) (noting open question). *O'Brien* itself makes clear that it is the law's operation and targeting of ideas, not the motive of individual legislatures, that matters in its analysis. It flatly states, “It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.” 391 U.S. 367, 383 (1968). It elaborates:

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

Id. at 383–84.

and political movements that advocate those ideas. Indeed, these laws are commonly heralded by their authors as anti-woke laws.

At the same time, the laws may vary greatly by state in the degree to which they target ideas or activities because of what those activities express. Most constitutionally vulnerable are those laws that facially suppress or retaliate against certain messages. Florida's legal actions against Walt Disney for its then-CEO's opposition to the Parental Rights in Education law (aka Don't Say Gay law), for example, run afoul of this principle.²⁸⁴

Florida's Stop W.O.K.E. Act, too, appears to be a "naked viewpoint-based regulation" of speech, as the District Court hearing a First Amendment challenge to the law found.²⁸⁵ Under the Stop W.O.K.E. Act, an employer may require employees to attend trainings lambasting woke concepts like "structural racism" or "White privilege," for example, but not the reverse.²⁸⁶

The governmental interest made clear by the text (and sometimes title) of many laws against private sector diversity and inclusion efforts, by their authors and proponents, and by their political history indicate that such laws are frequently aimed at suppressing ideas that the laws' Framers identify with progressive values and movements. The statements of the conservative activist Christopher Rufo, whom Governor DeSantis invited to speak at the unveiling of the Stop W.O.K.E. Act, provide meaningful context.²⁸⁷ The stated goal of the anti-CRT movement, he says, is to "driv[e] up negative perceptions" of the term and "eventually turn [the term] toxic, as we put all of the various cultural insanities under that brand category."²⁸⁸ After the

²⁸⁴ See Frankel & Rozsa, *supra* note 224. This would likely be the case even if Disney's speech is understood as commercial speech and subject to its laxer standard. On the different rules and lower standard for commercial speech, see Post, *Compelled Commercial Speech*, *supra* note 199, at 874–79, and Shanor, *supra* note 199, at 140–54. See also Shanor & Light, *supra* note 58, at 2085–90. In a similar vein, Senator Marco Rubio has encouraged lawmakers to pass laws that punish firms that take stands on "cultural issues" or "dump[] woke, toxic nonsense into our culture." Marco Rubio, *Corporations That Undermine American Values Don't Deserve GOP Support*, N.Y. POST (Apr. 25, 2021, 8:27 PM), <https://nypost.com/2021/04/25/corporations-that-undermine-american-values-dont-deserve-gop-support/> [<https://perma.cc/8U5V-UMGL>].

²⁸⁵ *Honeyfund.com, Inc. v. DeSantis*, 622 F. Supp. 3d 1159, 1168 (N.D. Fla. 2022).

²⁸⁶ The law bans and imposes liability for "espous[ing], promot[ing], advanc[ing], inculcat[ing], or compel[ling belief in]" eight prohibited "concepts." FLA. STAT. § 760.10(8)(a) (2022). Even if employer diversity trainings were treated as commercial speech, it is difficult to imagine a governmental interest that is unrelated to the suppression of ideas, including particular viewpoints.

²⁸⁷ Kevin Roberts, the president of the Heritage Foundation, has called Rufo "the icon of [the anti-CRT] movement." Wallace-Wells, *supra* note 224; see also Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, NEW YORKER (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory> [<https://perma.cc/5BUG-4Y33>]; Hochman, *supra* note 235 (describing Rufo, with Ron DeSantis and Tucker Carlson, as the "elites" of the new face of the conservative movement).

²⁸⁸ Christopher F. Rufo (@realchrisrufo), TWITTER (Mar. 15, 2021, 2:14 PM), <https://twitter.com/realchrisrufo/status/1371540368714428416> [<https://perma.cc/SRZ3-5UY6>].

unveiling of the Stop W.O.K.E Act, Rufo argued that “[c]onservatives need to wake up” and act immediately “to stamp out this . . . ideology.”²⁸⁹ Governor DeSantis, who announced in his inaugural address that “Florida is where woke goes to die!”, has taken similar positions in public statements.²⁹⁰

Anti-ESG laws seeking to silence or retaliate against allegedly woke ideas, including concern for climate change and its risks, may run afoul of *O’Brien*. Lawmakers advancing such laws focusing on fossil fuels have expressed a range of interests, some more and some less constitutionally suspect.

Louisiana’s state treasurer, for instance, seemed to assert potentially impermissible governmental interests in announcing that the state would liquidate all investments in BlackRock²⁹¹:

I fully realize . . . that BlackRock currently invests in oil and gas companies. Nonetheless, [BlackRock’s] consistent public messaging has made very clear what BlackRock is demanding from fossil fuel company CEOs and every other company they invest in. BlackRock has been a champion for ESG investing . . . BlackRock’s goal is an economy “that emits no more carbon dioxide than it removes from the atmosphere by 2050,” which [BlackRock] acknowledge[s] will require “a transformation of the entire economy.” . . . I’m convinced that ESG investing is more than bad business; it’s a threat to our founding principles: democracy, economic freedom, and individual liberty.²⁹²

Louisiana’s withdrawal from BlackRock appears to be at least in part motivated by BlackRock’s championing of ESG investing, described as a “threat” to the state’s founding principles. Under *O’Brien*, a governmental interest that appears to target what the state perceives to be BlackRock’s message is likely unconstitutional.

These same principles apply to governmental infringements on association and petitioning.²⁹³ Many of the investment firms targeted by state

²⁸⁹ Wallace-Wells, *supra* note 287.

²⁹⁰ Press Release, Fla. Off. of the Governor, Governor DeSantis Delivers Inaugural Address, Sets Priorities for Second Term (Jan. 3, 2023), <https://flgov.com/2023/01/03/governor-desantis-delivers-inaugural-address-sets-priorities-for-second-term/> [<https://perma.cc/YMQ2-9DSW>].

²⁹¹ Letter from John M. Schroder, La. State Treasurer, to Laurence D. Fink, CEO of BlackRock, Inc. (Oct. 5, 2022), https://www.treasury.la.gov/_files/ugd/aed85d_b9d074136d9c4377a8bb469d311faa4c.pdf [<https://perma.cc/LU44-PNCU>].

²⁹² *Id.*

²⁹³ The Supreme Court has extended robust protections to the right of association, including not only membership in organizations but also a range of their activities and the anonymity of their members. *Cf.* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (protecting boycotting with social change objectives under the right of association); United States v. Robel, 389 U.S. 258, 258 (1967) (holding unconstitutional a federal law that prohibited employment of Communist Party members at defense facilities as violating the right of association); NAACP v. Button, 371 U.S. 415, 429–30 (1963)

laws have joined associations like the GFANZ or Climate Action 100+ in connection with achieving their pledged climate goals and to otherwise reduce financial risk. The state of Texas has explicitly stated that it places firms on its prohibited list initially based on whether those firms have joined these associations.²⁹⁴ It is telling that BlackRock, whose Chairman Larry Fink has repeatedly announced the firm’s commitments to addressing climate change, has appeared on Texas’s list of firms that are “boycotting” the fossil fuel industry, notwithstanding the fact that it continues to invest in fossil fuel projects globally.²⁹⁵ To the degree that states retaliate against firms for their public statements of opinion—much as Florida’s actions against Disney following Disney’s opposition to the Don’t Say Gay law—or membership in expressive associations with respect to climate issues, those actions are likely unconstitutional.²⁹⁶

Other evidence may also suggest impermissible targeting. The text and operation of many anti-woke capitalism laws makes clear that they are targeting perceived wokeness, the idea of ESG, statements made by firms about ESG goals, or firm membership in associations that advance those goals. Texas, for example, explicitly uses “public commitments and pledges” regarding ESG or participation in Climate Action 100+ or subgroups of GFANZ to place firms on its excluded list in the first instance.²⁹⁷ Many, if not all, anti-ESG investing laws also treat the same activity (for example, investing or not investing in the fossil fuel industry) differently based upon whether a firm states that it is doing so to advance ESG goals or not, which

(protecting NAACP’s impact litigation as a protected medium of association and expression); *Scales v. United States*, 367 U.S. 203, 205 (1961) (protecting membership in the Communist Party absent specific intent to further its unlawful objectives); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461, 463, 466 (1958) (finding state law requiring disclosure of association’s membership lists violates the freedom of association).

²⁹⁴ TEX. COMPTROLLER OF PUB. ACCTS., *supra* note 148, at 2, 4.

²⁹⁵ *Financial Companies That Boycott Energy Companies*, TEX. COMPTROLLER OF PUB. ACCTS. (2023), <https://comptroller.texas.gov/purchasing/publications/divestment.php> [<https://perma.cc/3TER-Z742>].

²⁹⁶ This is not to say that public statements made by business associations, such as trade groups, are not regulable for truthfulness as commercial speech; they generally may be. *See generally* Shanor & Light, *supra* note 58 (explaining the applicability of the commercial versus political speech doctrines in the context of business and trade association advocacy, and that factual expression in this context can be regulated for truthfulness, while statements of opinion are generally protected as political speech); *cf.* Memorandum in Support of Defendant American Petroleum Institute’s Individual Merits Motion to Dismiss at 2, 8, *Delaware ex rel. Kathleen Jennings v. BP P.L.C.*, No. 20C-09-097 (Del. Super. Ct. May 18, 2023) (arguing that alleged “disinformation campaign” run by the American Petroleum Institute, a nonprofit trade association, involved fully protected political speech).

²⁹⁷ TEX. COMPTROLLER OF PUB. ACCTS., *supra* note 148.

may also provide evidence of targeting viewpoints.²⁹⁸ A firm that simply is not public about its ESG practices may not be listed, while one that has been outspoken, such as BlackRock, may be—even if they make the same investment decisions.

One important point bears emphasis here. This analysis applies regardless of whether the financial firms intend to express any message at all (woke or otherwise) through their investing decisions. Likewise, it is irrelevant whether firms are in fact, or merely characterize themselves as, considering ESG factors for political, reputational, or ordinary economic and business reasons.²⁹⁹ Why? Because *O'Brien's* test is concerned with impermissible *governmental* interests, *not* speaker intentions. Thus, for constitutional purposes, what matters is whether the *laws* are *anti-woke*—that is, seek to quash certain ideas and their expression—not whether the *firms* are in fact woke or even intend to express anything with their investment or lending decisions. If the government seeks to silence or regulate an activity because of what the government perceives to be a woke or pro-ESG message, the law will generally be unconstitutional and that will be the end of the analysis.

Proponents of anti-ESG and anti-woke capitalism may therefore find themselves in a bind regarding their strategic use of these laws to score political points. As a matter of *realpolitik*, the purpose of some anti-woke capitalism laws may actually be their identitarian or partisan signaling. Especially in the context of hyperpolarization, the signaling function of such laws (and proponents' sweeping descriptions of them) may itself be politically advantageous. But because governmental interest is fundamental to the assessment of these laws' constitutionality, government actors who write and tout anti-woke capitalism laws in the most identitarian and partisan-oriented fashion may simultaneously be putting these laws at the greatest constitutional risk.

²⁹⁸ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535–36 (1993). Many of these laws also allow exceptions and significant discretion to state treasurers in such a way that a court might not find the laws generally applicable and so not within *O'Brien's* ambit to begin with. Cf. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1873 (2021). For example, Texas's law permits exceptions if the governmental entity will suffer a loss in value. TEX. GOV. CODE ANN. § 809.056 (West 2022).

²⁹⁹ Serious critiques have questioned the viability of a distinction between the “economic” and the “political.” See, e.g., Britton-Purdy et al., *LPE Framework*, *supra* note 201, at 1789–90.

C. Are Anti-Woke Capitalism Laws Rational?

State anti-woke capitalism laws might also be challenged on Fourteenth Amendment grounds as violating due process or equal protection.³⁰⁰ In cases that do not involve fundamental rights, but rather the sort of property interests that anti-ESG investing rules may implicate, the Due Process and Equal Protection Clauses forbid governmental actors from imposing laws that lack a rational basis.³⁰¹ Under that standard, laws are upheld as constitutional if “there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”³⁰² One of the rationales for that lenient standard is that “[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”³⁰³ Antipathy or animus alone, however, does not constitute a rational basis.³⁰⁴

The constitutionality of a given anti-woke capitalism law will depend on its specific facts, and the rational basis standard is quite lax. Because many anti-ESG laws raise investing costs for the states that enact them—often dramatically—and harm state employee pension funds and others in the process,³⁰⁵ however, a due process or equal protection challenge to some of these laws might be viable. The lack of any rational basis may also suggest—for *O’Brien* purposes—that the real governmental interest is in quashing woke ideas or harming associations of businesses that espouse those ideas.

*D. When Is an Activity a Medium of Expression in Public Discourse?*³⁰⁶

If a law instead regulates an activity *regardless* of what it expresses, further inquiry is required. Such laws may trigger more stringent scrutiny

³⁰⁰ The Due Process and Equal Protection Clauses provide: “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.” U.S. CONST. amend. XIV, § 1.

³⁰¹ See, e.g., *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993).

³⁰² *Id.*

³⁰³ *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

³⁰⁴ *Romer v. Evans*, 517 U.S. 620, 632–35 (1996).

³⁰⁵ *Garrett & Ivanov*, *supra* note 20 (estimating that because of its anti-ESG investing law that Texas would face \$284–\$504 million in additional interest payments); Memorandum from Econsult Sols., Inc., *supra* note 21.

³⁰⁶ One of us had the pleasure of collaborating with Meaghan VerGow, Michael Dreeben, and their team at O’Melveny & Meyers on a First Amendment Scholars amicus brief filed in *303 Creative*. That brief reflects many of the ideas captured in this section. See Brief for First Amendment Scholars, *supra* note 33.

when applied to mediums of expression in public discourse, or what we might understand as core political, religious, or cultural expression.³⁰⁷ The key question is: Are ESG investing, marketing, or advocacy, or climate-related association of firms mediums of expression in public discourse, such that even generally applicable laws regulating them should be analyzed under heightened standards of review?³⁰⁸

In First Amendment doctrine, “medium of expression,” “recognized medium of expression,” or “medium for the communication of ideas” can denote two concepts: (1) activities to which the First Amendment applies, in other words what the First Amendment covers, and (2) activities that receive more stringent First Amendment protection because of their role in public discourse (what we might understand as core political expression). Courts and scholars often collapse these inquiries—particularly in cases at the intersection of the doctrines for politics and markets that are analyzed in this Article. This is likely because the most obvious doctrinal options in these cases appear to be no coverage (for economic conduct) or heightened protection (for political speech).

However, collapsing the two is an error—they require two separate analytical steps. Recognizing a regulated activity as a medium of expression (that is “speech” covered under the First Amendment) in the first sense is necessary but not sufficient to warrant stringent First Amendment protection. If an activity is a recognized medium of expression, meaning that there is First Amendment coverage, then there is a separate inquiry into what level of First Amendment protection—i.e., scrutiny—should apply. For this reason, we use two distinct terms to address each of these concepts: *mediums of expression* for activities that are covered under the First Amendment, and *mediums of expression in public discourse* for those mediums of expression that receive the highest level of scrutiny.

The Supreme Court recently decided a case that presents this very issue of how to identify mediums of expression and specifically mediums of expression in public discourse that assertedly violate a generally applicable

³⁰⁷ See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); Post, *Public Discourse*, *supra* note 199; Schauer, *supra* note 188; Shanor, *supra* note 189.

³⁰⁸ Before delving into the doctrinal questions, it may be useful to offer an example in which the context of an anti-ESG statute appears more neutral, and the regulation necessitates this next stage of inquiry. Indiana’s state treasurer cautioned against investing in ESG funds because of enhanced risks to the state’s pension funds and cited an expert view that pension funds would face “enhanced exposure to the negative effects of ESG ratings.” *ESG Funds Are Risky*, DANIEL ELLIOTT, <https://www.danielelliott.org/esg-funds-are-risky/#page-content> [https://perma.cc/5FNH-AG9D]. Whether this is a correct view of ESG funds based on economic principles, the motivations expressed do not facially appear aimed at silencing a particular viewpoint, including on climate change or the best future for the U.S. economy.

law. That case is *303 Creative LLC v. Elenis*, which involved a wedding website designer who asserted a free speech right to refuse service to gay couples in violation of a state antidiscrimination law. One of the reasons *303 Creative* (like *Masterpiece Cakeshop* before it) was litigated to the Supreme Court is that there are unfortunately few, if any, helpful resources in the case law to guide analyses of whether there is First Amendment coverage, let alone how to discern whether something is a medium of expression in public discourse in the fraught space of the political–economic distinction. The latter question, in particular, presents one of the most vexing questions of First Amendment theory.

Often, courts frame the medium of expression analysis—that is the first issue of First Amendment coverage—as whether the regulated activity is “pure speech” or “pure expression,” or they rely on the factors articulated in *Spence v. Washington*. *Spence* involved a college student who was charged with “improper use” of an American flag.³⁰⁹ To protest the U.S. invasion of Cambodia and the Kent State shootings, the student had hung a flag upside down and attached a peace symbol made out of black tape to the flag. The Court began its analysis by asking if the student’s “activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.”³¹⁰ Acknowledging the difficulty of such an analysis, the Court further explained that the First Amendment applies whenever “[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”³¹¹

Scholars and courts alike have noted the difficulty—and limitations—of applying the *Spence* factors. As Robert Post and Frederick Schauer have persuasively demonstrated, the *Spence* factors are neither necessary nor sufficient for First Amendment coverage (let alone for determining whether an activity is a medium of expression in public discourse).³¹² In *Spence* itself, the Court noted that it refused to “accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”³¹³ One can come up with numerous examples that highlight the fraught nature of a First Amendment inquiry into whether an activity is expressive. One such example is a political assassination. Even if the assassin intends to express a strong political

³⁰⁹ *Spence v. Washington*, 418 U.S. 405, 406–07 (1974).

³¹⁰ *Id.* at 409.

³¹¹ *Id.* at 410–11.

³¹² Post, *supra* note 187, at 1250–60.

³¹³ *Spence*, 418 U.S. at 409 (quoting *United States v. O’Brien*, 391 U.S. 367, 376 (1968)).

message and others may very clearly understand that message, we do not extend First Amendment protection to political assassination.

The second question of how to identify whether covered expression is a medium of expression in public discourse—especially in the context of the political–economic distinction—is even more vexing. It is perhaps for that reason that the Supreme Court has not once but twice in the last five years granted certiorari in a case that raised that question and then declined to answer it.³¹⁴

So how can we identify whether an activity like ESG investing or banks’ statements that they seek to promote a transition to a net-zero economy qualifies as a medium of expression in public discourse? Inquiring abstractly into whether an activity is expressive or “communicative” is rarely helpful because almost anything humans do can be considered expressive.³¹⁵

The remainder of this section addresses the complex issues of how to determine if the ESG-related activities of financial institutions are mediums of expression, and if so, whether they are mediums of expression in public discourse for First Amendment purposes, such that generally applicable laws regulating them should be analyzed under heightened review.³¹⁶

3. *Theoretical Framework*

To understand when heightened scrutiny might apply to a law not targeting speech requires a theory of the purposes of First Amendment doctrine. In other work, we have put forward a theory of the First Amendment that looks beyond the political–economic distinction to the values and social relationships that various First Amendment doctrines seek to promote. Below we advance an analytical approach that applies these principles to how to identify mediums of expression in public discourse to

³¹⁴ See 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (relying on the parties’ stipulations and avoiding the creation of any rule to decide what businesses or economic activities constitute mediums of public discourse); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n, 138 S. Ct. 1719 (2018) (deciding the case on narrow religion law grounds and so avoiding the free speech question).

³¹⁵ *O’Brien*, 391 U.S. at 376–77; *Wayte v. United States*, 470 U.S. 598, 613–14 (1985) (“We think it important to note as a final matter how far the implications of petitioner’s First Amendment argument would extend. . . . On principle, such a view would allow any criminal to obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to ‘protest’ the law. The First Amendment confers no such immunity from prosecution.”).

³¹⁶ We bracket the question of whether corporations should be considered covered speakers for First Amendment purposes and when corporate speech should be considered political speech and protected by its stringent rules—apart from whether ESG investing and related activities should be covered or considered political speech. We articulate a broader framework for discerning commercial and political speech in Shanor & Light, *supra* note 58, at 2079–81.

activities that sit at the intersection of the First Amendment doctrines for public discourse (politics) and economic life (markets).³¹⁷

We identify the purpose of the First Amendment rules in economic life to be economic democracy.³¹⁸ By this we mean that the distinctive First Amendment doctrines applicable in economic life should be structured to “enable listeners to participate both at the ballot box and in markets so as to (a) advance their material freedom and (b) make economic choices to affect policies in the ways they wish.”³¹⁹ In a market economy, individual decisions will allocate resources in ways that can affect what society’s material freedoms will be—including whether society stays within a 1.5 degree Celsius warming threshold or not.

Applying these ideas to anti-woke capitalism laws therefore requires both a sociological and normative component.³²⁰ It requires two inquiries:

First: Whether the activity in its social and institutional context is broadly viewed as a medium through which individuals or groups commonly express ideas core to their political, religious, moral, or cultural values or identities. For example, Americans are likely to view parades, membership in religious groups, and newspapers as such mediums, but unlikely to view woodchopping, taking a spelling test, or signing a contract the same way. Importantly, this is not an inquiry into whether the activity is expressive in some sense (either specifically or generally), but rather about the social role of the activity: how it shapes relationships and operates in institutions.

This analysis may include an inquiry into whether a message is likely to be viewed as that of the regulated party, rather than someone else. Why? A medium of expression in public discourse (political speech) is protected as an autonomy right of the *speaker*. It therefore may matter *who* observers understand is speaking. For example, a governmental regulation requiring an employer to read a statement promoting Christian values to her workforce

³¹⁷ Post has mapped a table that succinctly captures existing doctrine regarding the interplay between government motive and whether the activity is a “medium for communication of ideas.” Post, *supra* note 187, at 1256.

³¹⁸ Shanor & Light, *supra* note 57, at 2096.

³¹⁹ *Id.* at 2097–98. 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 decision making in a democracy”; and (2) the “intelligent and well informed” “allocation of our resources . . . made through numerous private economic decisions.” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

³²⁰ Post has argued, “Instead of aspiring to articulate abstract characteristics of speech, doctrine ought to identify discrete forms of social order that are imbued with constitutional value, and it ought to clarify and safeguard the ways in which speech facilitates that constitutional value.” Post, *supra* note 187, at 1276–77. This Article elaborates on and problematizes Post’s suggestion in the context of the intersection of political and commercial expression and institutions, and the First Amendment doctrines applicable to them.

may appear sociologically different than one requiring all photocopy shops to print whatever material a customer chooses to print, including the same statement, in part because of who is likely to be viewed as the speaker of the message.

Second: Whether including an activity as core speech subject to heightened scrutiny would either (a) enlighten the public’s political decision-making 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.³²¹

We will use denial of service cases—in which an organization, group, or individual refuses to deal with or provide service to another organization, group, or individual in an economic context—to illustrate our framework. The framework identifies if an activity at the intersection of political and economic life—including ESG investing and marketing, promoting a transition to a net-zero economy, or associating with organizations promoting these goals—should be understood as a medium of expression and specifically one in public discourse for First Amendment purposes.

4. *Refusals to Serve*

Perhaps the leading contemporary cases that put the two foregoing puzzles—whether an activity constitutes a medium of expression and how to apply the political-economic distinction that governs the level of protection—together are those surrounding the constitutionality of denials of service. This context illuminates questions in the doctrine that analysis of anti-woke capitalism laws may encounter.

Over many years, under the Fifth and Fourteenth Amendments and in First Amendment cases litigated as speech, association, and religion cases, prior to *303 Creative*, the Supreme Court had consistently declined to recognize a constitutional right to refuse to serve customers or to employ someone in violation of an antidiscrimination mandate.³²² The Court addressed this issue on a number of occasions, including in the context of whether a law firm or junior chamber of commerce has an associational

³²¹ See *Virginia Board*, 425 U.S. at 770–73; Shanor & Light, *supra* note 58, at 2085–86.

³²² See *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2318 (2023) (Sotomayor, J., dissenting); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1732 (2018); *Bd. of Dir. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 548–49 (1987); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Newman v. Piggie Park Enters. Inc.*, 390 U.S. 400, 402 n.5 (1968); *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 258–59 (1964); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). Compare *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993), with Brief for Respondent at 31–33, *Forklift*, 510 U.S. 17 (No. 92-1168) (briefing a First Amendment challenge the Court chose not to address). *Runyon v. McCrary*, 427 U.S. 160, 176 (1976), and *Bob Jones University v. United States*, 461 U.S. 574, 593 (1983), apply a similar principle to access to private educational institutions.

right to select partners³²³ or members³²⁴ respectively; whether employers have a speech right to engage in sexual harassment;³²⁵ whether the Boy Scouts have an associational right to exclude gay leaders;³²⁶ and whether parade organizers have a speech right to exclude messages on the banners flown by parade participants, among others—all in alleged violation of antidiscrimination laws.³²⁷ In each prior case, the issue was whether the regulated activity is covered under the First Amendment and, if so, what level of scrutiny should apply to the antidiscrimination law prohibiting that activity.

In many of those cases, the Court did not even inquire whether the challenged law prohibiting discrimination of this kind even incidentally affected expression or association, but simply said there is no right to discriminate. Alternatively, the Court did not even address the constitutional question raised. Why? It is not because the choice to serve—or not serve—a customer cannot be expressive. Certainly, a white-owned business' decision to serve Black customers in the 1930s South could have been understood to convey a message of racial inclusion, indeed a message so clearly understood that it could elicit violence. Instead, the answer is two-fold. First, as a general matter, the activity of choosing one's customers was not viewed as a common medium used to express core beliefs. This may be because, in a market economy, most businesses serve all comers or because political and intellectual movements have for decades espoused markets as normatively neutral.³²⁸ For whatever reason, most observers would not view the choice of customers as akin to the choice of political party, religion, romantic partner, or friend.

Second, public accommodations and antidiscrimination laws generally *further* rather than hinder the First Amendment's commitment to economic democracy. In a market society, access to consumer and employment markets is a predicate to meaningful democratic participation—both at the ballot box and through individual economic actions that can affect both large scale social issues and the liberty and dignity of individuals within them. This is why the Court has repeatedly and consistently stressed that Title VII and other antidiscrimination laws generally raise no constitutional

³²³ *Hishon*, 467 U.S. at 69.

³²⁴ *Jaycees*, 468 U.S. at 609.

³²⁵ *Forklift*, 510 U.S. at 23; Brief for Respondent at 31, *Forklift*, 510 U.S. 17 (No. 92-1168); see Richard H. Fallon Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1 (analyzing the Court's decision not to address the First Amendment issue in *Forklift*).

³²⁶ *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

³²⁷ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 580–81 (1995).

³²⁸ Britton-Purdy et al., *LPE Framework*, *supra* note 201, at 1813.

concern.³²⁹ Similarly, the Court has long described public accommodations laws as stemming from a “venerable history” and repeatedly noted their general constitutionality.³³⁰

By contrast, when an activity that is widely viewed as a medium of expression in public discourse, like a parade, is involved, the analysis changes. In *Hurley*, for example, the Court found the application of a public accommodations law to a parade unconstitutional. A parade, of course, is anything but an ordinary market context. Instead, parades, the Court observed, are “mediums of expression,” and not simply “group[s] of people . . . march[ing] from here to there”: “we use the word ‘parade’ to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way,” and indeed “depend[] on watchers.”³³¹ Similarly, the Court rejected the application of a public accommodations law to the Boy Scouts’ process for selecting their leaders, viewing it as more similar to a political organization than a consumer context.³³²

These cases illustrate the sort of fact-intensive inquiry required to determine if a market activity constitutes a medium of expression in public discourse for First Amendment purposes. That analysis, we have argued, involves consideration of both whether objective observers understand the activity to be such a medium as well as the constitutional values First Amendment doctrine aims to advance in that social and institutional context.

5. *ESG-Related Investment Decisions, Marketing, Advocacy, and Association*

With these principles in mind, we now turn to the First Amendment status of firms’ ESG-related investment decisions and marketing; advocacy of opinions around climate issues; and association in groups such as GFANZ. Some may argue that ESG investing could be considered a medium of expression in public discourse—and thus covered under the First Amendment from state laws seeking to prohibit it as “discriminatory.” Both from the perspective of an objective observer and due to the values underlying the First Amendment to promote decisional and participatory liberty in the marketplace, however, ESG investment decisions ought not be

³²⁹ See *supra* note 322 (collecting cases); *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993).

³³⁰ *Hurley*, 515 U.S. at 571; see also *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1727 (2018) (“Provisions like these are well within the State’s usual power to enact . . . and they do not, as a general matter, violate the First or Fourteenth Amendments.” (quoting *Hurley*, 515 U.S. at 572)).

³³¹ 515 U.S. at 568–69.

³³² *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000).

considered a medium of expression in public discourse or likely even expression for purposes of First Amendment coverage.

Why? Investment decisions are not generally considered a medium of expression, just as choice of customer is not.³³³ For this reason, securities regulation is generally treated as regulation of economic conduct.³³⁴ And just as the government can compel or limit the sale of certain products by law—say, health care, insurance, or cigarettes—it can do so in the context of investment decisions. Accordingly, mandatory securities disclosures, including the SEC’s proposed climate change disclosures, should either receive no First Amendment coverage or at most be treated as compelled commercial speech.³³⁵ This is for good reason: consumers and investors need truthful information to facilitate their participation in both markets and political life.³³⁶

As a sociological matter, investing is not, at least currently, understood by objective observers as a medium for expression, let alone one in public discourse. Were it otherwise, many, if not most, economic activities would be constitutionalized under the First Amendment. This would also likely hinder, not advance, the First Amendment’s purpose of promoting the ability of the public to meaningfully participate in both markets and political life.

Some investment firms that consider one or more of the ESG factors in their underwriting or investment decisions might argue that they are expressing a political viewpoint by their choice of investment product. The firms might contend that ESG investing is a special kind of product, such that the choice to offer funds that consider ESG factors is more like an artisan’s decision to sell, or not sell, wedding rings or Star of David necklaces. Financial institutions could argue that laws forbidding or punishing ESG investment dictate what products they can and cannot provide—tantamount to a state banning Christmas stores or requiring a Christmas store to sell menorahs. On this view, while the choice of investments generally does not constitute a medium of expression, including

³³³ See *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (finding that “religious and philosophical objections to gay marriage are . . . in some instances protected forms of expression,” but that “it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law”).

³³⁴ See Helen Norton, *What 21st-Century Free Speech Law Means for Securities Regulation*, 99 NOTRE DAME L. REV. (forthcoming 2023); Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 223 (1990); Letter from Ramya Krishnan, Stephanie Krent & Alyssa Morones, Knight First Amend. Inst., to Gary Gensler, Chair, SEC (June 17, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20131800-302235.pdf> [<https://perma.cc/Y55E-3GCF>].

³³⁵ Shanor & Light, *supra* note 58, at 2116.

³³⁶ *Id.* at 2039, 2116.

in public discourse, investment decisions that consider, or are advertised as, climate-conscious or promoting racial justice may be constitutionally distinct as expressing a political viewpoint.

That argument, however, cannot be correct. It is tantamount to the notion that the *reason* I engage in an activity makes it a protected medium of expression in public discourse, subject to the most stringent review. This argument would equally apply to investing to accrue capital or to express a certain conception of what the best form of economy is. Taken to its logical conclusion, this sort of argument would extend strict scrutiny to, for example, graffiti or even forms of violence aimed at expressing ideas, as acts of terrorism or assassinations often are. For these reasons, investment decisions themselves, whether they consider ESG factors or not, should not be understood as mediums of expression in public discourse.

Alternatively, could ESG investing be considered a protected boycott—a specific medium of expression in public discourse—if financial institutions refuse to invest in certain types of projects or industries? This question is worth asking for two reasons. First, opponents of ESG investing have accused firms of “boycotting” fossil fuel companies.³³⁷ We therefore address the First Amendment case law that would come into play if a court were asked to analyze if ESG investing (or a refusal to fund certain projects or industries) is a constitutionally protected boycott. Second, we discuss the law governing boycotts because it highlights an important normative point that we have stated elsewhere and reinforce here: A primary purpose underlying the First Amendment is to further the goals of economic democracy. Accordingly, existing law on boycotts also elaborates the way in which the political–economic distinction and theories of democracy in economic life have structured courts’ willingness to categorize activities as warranting stringent First Amendment protection since the New Deal.

Boycotts have long been a vital form of social and political protest that have spurred some of the greatest transformations in American history. The Boston Tea Party and the Montgomery bus boycott are two of the most well-known and most effective of those protests. Since the 1980s, the First

³³⁷ We note, however, that many if not all of the financial institutions targeted by these laws would likely object to their ESG-related actions being characterized as “boycotts,” especially in light of their continuing investment in fossil fuels. *See* Capato, *supra* note 90 (observing that banks continue to provide financing to fossil fuel projects). As we have aimed to demonstrate, there is a wide spectrum of ESG activity focusing on different aspects of “E” or “S” or “G,” and for different reasons. Some of the proponents of these activities might consider their actions as an effort to influence political debate, rather than decisions based purely on economic calculations. And of course, economic calculations often influence political debate and can be understood themselves as normative or political. As a preliminary matter, however, neither the characterization by opponents nor firms is determinative; whether an activity is treated as a protected boycott reflects an objective inquiry.

Amendment has protected consumer boycotts aimed at social, economic, or political change (what we will call “consumer change boycotts”) as expression protected by the most stringent form of constitutional scrutiny, while subjecting the regulation of economic boycotts to lax review.³³⁸ This framework essentially treats consumer change boycotts as a medium of expression in public discourse while concluding that economic boycotts are simply economic conduct and not a medium of expression at all.

Forty years ago, in *NAACP v. Claiborne Hardware Co.*, the Supreme Court addressed whether the First Amendment protected a boycott of white merchants organized by the NAACP in Claiborne County, Mississippi.³³⁹ The boycott aimed to promote racial and economic justice in part by causing “the [boycotted] merchants [to] sustain economic injury.”³⁴⁰ In response, white merchants filed tort actions against the NAACP and boycott’s participants to recover business losses.³⁴¹ The NAACP and boycotters asserted a First Amendment right to boycott.³⁴²

The Supreme Court upheld the boycotters’ argument.³⁴³ Assessing the many forms that the boycott took, the Court explained that “the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.”³⁴⁴ The Court drew a distinction between the boycott’s “social, political, and economic change” goals, on the one hand, and economic activity, such as that prohibited by

³³⁸ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907, 915 (1982).

³³⁹ *Id.* at 889–92.

³⁴⁰ *Id.* at 914.

³⁴¹ *Id.* at 889.

³⁴² *Id.* at 892.

³⁴³ *Id.* at 915.

³⁴⁴ *Id.* at 907 (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981)).

antitrust laws,³⁴⁵ designed to “destroy legitimate competition,”³⁴⁶ on the other. The *Claiborne* Court held that, although “States have broad power to regulate economic activity,” they “do not [have] a comparable right to prohibit peaceful political activity such as that found in the boycott in this case.”³⁴⁷

Should ESG investing similarly be understood as a constitutionally protected boycott? Firms’ investment decisions are generally not understood as, or as similar to, a consumer change boycott. Similarly, decisions about where to source goods in business-to-business transactions are generally not viewed as a medium of expression, let alone one in public discourse. But were those decisions to be taken as part of a larger social movement-led boycott with social, economic, or political aims, the result might be different. Divestment decisions taken in conjunction with a larger social movement—say, boycotting firearms, fossil fuels, or Russia in the context of the war in Ukraine—might be understood as more similar to the boycott in *Claiborne* than ordinary sourcing or capital allocation decisions. As of yet, firms have not generally argued that their actions are part of a larger consumer or environmental boycott rather than made for economic-risk reasons—and

³⁴⁵ Just months before the *Claiborne* decision, the Court addressed a similar issue in *International Longshoremen’s Ass’n v. Allied International, Inc.*, 456 U.S. 212 (1982). It involved a union’s refusal to handle cargo arriving from or destined for the Soviet Union, in protest of the Russian invasion of Afghanistan. Despite the union’s purpose, the Court viewed the union’s secondary boycott as part of the larger economic context of labor law. Regulating such boycotts was within Congress’s power to strike “the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.” *Claiborne*, 458 U.S. at 912 (internal quotation marks omitted) (citing *Longshoremen’s*, 456 U.S. at 222, 223 n.20). This conclusion is emblematic of the New Deal political–economic distinction and the related conception of how best to advance democracy and economic liberty. Under this view, democracy is understood as elected government, and both democracy and economic liberty are best advanced by committing the regulation of economic life to the political branches.

In another seminal case, *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990), the Court found that the Trial Lawyers Association’s refusal to take on representation of indigent defendants until they received a pay increase for such assignments was an economically motivated boycott, and, therefore, constitutionally regulable. The Trial Lawyers’ action “differ[ed] in a decisive respect” from the NAACP’s boycott in *Claiborne*, the Court explained, because the “clear objective” of the trial lawyers’ boycott was “to economically advantage the participants” by securing a pay increase. *Id.* at 414–20, 426, 428. *Trial Lawyers* is in some ways an odd decision. Generally, seeking economic advantage does not rob an activity of constitutional protection. The trial lawyers’ boycott could also have been construed as seeking economic justice or affecting indigent defense. Instead, as in *Longshoreman*, the Court saw it as a labor law case and so a field best left to the political branches. Cynthia Estlund early and incisively criticized this distinction as applied to labor versus public issue picketing. See, e.g., Cynthia L. Estlund, Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 938–39 (1982) (“[C]onsumer picketing that does not coerce the listener is expression entitled to First Amendment protection.”).

³⁴⁶ *Claiborne*, 458 U.S. at 914.

³⁴⁷ *Id.* at 913.

they may never do so, for the profit-driven reasons that often constrain and structure business decisions.³⁴⁸

Finally, might we understand some of the investment firms' activities as protected forms of association or political speech warranting heightened scrutiny? While, as shown above, investment decisions alone should not generally be considered mediums of expression, objective observers of modern advertising would conclude that the *marketing* of funds as ESG (or not) likely qualifies as a medium. More specifically, due to consumer or investor reliance on such statements for information to inform their decisions, such marketing is treated as commercial speech.³⁴⁹ Likewise, public statements by firms that they are committed to achieving net-zero emissions by 2050 or are considering specific ESG factors in their investment portfolios, are likely also commercial speech.

This leads to several doctrinal conclusions. First, it is fully consistent with the First Amendment for factual claims in such communications to be subject to regulation to ensure they are not false or misleading.³⁵⁰ Laws restricting the marketing of funds as ESG and public statements that a fund considers ESG factors would be subject to the intermediate scrutiny standard set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* for restrictions on commercial speech, while laws placing obligations to disclose additional factual information about such funds would be subject to a laxer standard closer to rational basis review.³⁵¹

³⁴⁸ What if a company refused to source products from firms located in a certain country on the basis of political concerns with that nation—as many companies did to protest apartheid in South Africa or have to protest the war in Ukraine? See generally *Jordahl v. Brnovich*, 789 F. App'x 589, 590–91 (9th Cir. 2020) (addressing the constitutionality of Arizona's law prohibiting government contracts with companies that boycott Israel); *Ark. Times LP v. Waldrip*, 988 F.3d 453, 458–59 (8th Cir. 2021), *reh'g en banc granted, opinion vacated* (June 10, 2021) (addressing the constitutionality of Arkansas's prohibition on government contracts with companies that boycott Israel).

³⁴⁹ See *Shanor & Light*, *supra* note 58, at 2091–2109 (detailing considerations in discerning commercial versus political speech).

³⁵⁰ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563–66 (1980) (holding that false or misleading commercial speech is not covered by the First Amendment and thus fully regulable as commercial conduct).

³⁵¹ See *id.* at 566. *Central Hudson* laid out the following four-part test:

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.

Arizona’s anti-ESG law is an excellent example of a law that restricts commercial speech. It prohibits state investment in a fund that “is branded, advertised or otherwise publicly described . . . as furthering: 1. International, domestic, or industry agreements relating to environmental or social goals. 2. Corporate governance structures based on social characteristics. 3. Social or environmental goals.”³⁵² Under *Central Hudson*, the question is whether the state’s interest in regulating this speech is substantial, if the regulation directly advances that interest, and if the regulation is more extensive than necessary.³⁵³

Some speech captured by Arizona’s law, however, may qualify as political speech. Statements of opinion made by companies—say, about the Paris Agreement or the decarbonization of the economy—likely constitute a medium of expression in public discourse subject to the most stringent review.³⁵⁴ Thus, a generally applicable anti-woke capitalism law that applied regardless of the message expressed by the regulated conduct likely could not prohibit a company’s expression of opinions about climate-related policies or goals.³⁵⁵

In addition, as discussed in Part IV, certain forms of association, such as civic, religious, and political groups are protected as mediums of expression in public discourse. Other forms of association, such as those between consumers and retailers or businesses that come together to price fix, are not. Based upon these principles, under what is termed the *Noerr–Pennington* doctrine, when businesses collaborate with each other to petition any branch of government—even for a law or regulation that would operate to restrain trade—the First Amendment protects that collaborative

Mandated disclosures made in these contexts are subject to review under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (“Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant’s constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. . . . [W]e hold that an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest” (citation omitted)).

³⁵² ARIZ. STATE TREASURER’S OFF., *supra* note 158, at 1.

³⁵³ 447 U.S. at 566. One might conceivably argue that anti-woke investment laws prohibit fund employees from discussing—or even considering—ESG factors. The analysis would then ask whether that speech—of fund employees and officers about ESG issues—is a medium of expression and what doctrinal rules would best advance democratic participation. The rules around the constitutional status of employee speech are underdeveloped and, like boycott law discussed below, in need of reconsideration.

³⁵⁴ For a thorough analysis of when speech at the intersection of markets and politics should be considered political versus commercial speech, see Shanor & Light, *supra* note 58, at 2091–2109.

³⁵⁵ However, companies’ statements of fact or statements of opinion that an objective consumer or investor would understand as a statement of fact could be regulated for truthfulness. *Id.* at 2108–09.

petitioning activity under its most stringent review.³⁵⁶ That is the case, even though the antitrust laws are laws of general applicability. Why? Because such associating to petition the government is understood as a key medium of expression in public discourse.

Noerr–Pennington has been expanded beyond the antitrust context. 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.”³⁵⁷ That is because, in the Court’s telling, a representative democracy depends on the ability of people to communicate their requests to their representatives.³⁵⁸ In other words, the Sherman Act can regulate economic, but not political, coordination and collaboration.³⁵⁹

Does this principle extend to the petitioning of foreign governments or international bodies such as the United Nations? Many of the investment firms targeted by state anti-woke capitalism laws have joined GFANZ, which was created by the United Nations Special Envoy on Climate Action and Finance “in partnership with” the United Nations Framework Convention on Climate Change Race to Zero campaign. Its stated goal is to “coordinate efforts across all sectors of the financial system to accelerate the transition to a net zero economy” and “achiev[e] the objective of the Paris Agreement to limit global temperature increases to 1.5°C from pre-industrial levels.”³⁶⁰ Might *Noerr–Pennington* and related principles protect this sort of association? There is reason to think it might. The Department of Justice and the Federal Trade Commission have issued guidance that it will apply *Noerr–Pennington* equally to domestic and foreign petitioning, and several courts have held, and the Supreme Court has arguably suggested, that *Noerr* applies to the petitioning of foreign governments, at last on statutory grounds.³⁶¹

³⁵⁶ The *Noerr–Pennington* doctrine is named for the two cases that established 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).

³⁵⁷ *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

³⁵⁸ *Noerr*, 365 U.S. at 137.

³⁵⁹ *Id.*

³⁶⁰ GLASGOW FIN. ALL. FOR NET ZERO, *supra* note 82; *Accelerating the Transition to a Net Zero Economy*, GLASGOW FIN. ALL. FOR NET ZERO, <https://www.gfanzero.com/> [<https://perma.cc/2ELQ-VXP2>].

³⁶¹ DOJ & FTC, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION § 4.2.4 (Jan. 13, 2017), <https://www.justice.gov/atr/internationalguidelines/download> [<https://perma.cc/5HPD-GJST>]; *cf.* *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1365–66 (5th Cir. 1983) (“The Sherman Act, as interpreted by *Noerr*, simply does not penalize as an antitrust violation the petitioning of a government agency. We see no reasons why acts that are legal and protected if done in the United States should in a United States court become evidence of illegal conduct because performed abroad.”);

GFANZ appears to serve more as a coordinating, rather than a petitioning, body. That said, as an association with the aim of meeting the goals of the Paris Agreement, membership in GFANZ should likely be protected as political association under related First Amendment principles.³⁶² Whether companies would have a constitutional right to engage in *activities* espoused by GFANZ, however, would require a context-dependent analysis of those activities, which may vary across constitutionally important dimensions.³⁶³ In each context, we would also ask if such an activity advances economic democracy. With respect to GFANZ membership, the alliance appears to facilitate the decisional liberty of the public by making investment decisions and their relationship to climate-change goals and policies more transparent. So doing may inform consumers and investors not only about investment decisions—which may determine their material liberty, particularly in the context of state pension funds—but also political decisions about how to regulate with regard to climate change.

More broadly, we might ask what is the relationship of investment firms and their forms of capital allocation to participatory democracy? Does private environmental governance or ESG investing advance the ability of consumers and investors to have decisional or material liberty? Might broader stakeholderism do so? Certainly, investment decisions made by large capital holders do not appear to advance democratic goals such as political or economic participation directly.³⁶⁴ But private environmental governance or ESG investing, like information-forcing public regulation, may nonetheless spur knowledge production and public dissemination of

Carpet Grp. Int'l v. Oriental Rug Imps. Ass'n, 256 F. Supp. 2d 249, 266 (D.N.J. 2003) (“This Court agrees with the rationale articulated by the Fifth Circuit and implied by the U.S. Supreme Court: lobbying of foreign governments, whether performed at home or abroad, is protected from antitrust liability under *Noerr-Pennington*.”); Luxpro Corp. v. Apple, Inc., 658 F. Supp. 2d. 921, 928 (W.D. Ark. 2009) (extending *Noerr* immunity to litigation in Germany and Taiwan); Luxpro Corp. v. Apple, Inc., No. C 10-03058, 2011 WL 1086027 (N.D. Cal. Mar. 24, 2011) (“[T]he *Noerr-Pennington* doctrine also protects parties’ efforts to petition foreign governments.”). Cf. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962) (while not specifically addressing whether *Noerr* applies to petitioning foreign governments, the Court distinguished *Noerr* factually rather than holding the doctrine inapplicable to foreign petitioning). But see Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 108 (C.D. Cal. 1971) (“[T]he constitutional freedom to petition the government carries limited if any applicability to the petitioning of foreign governments.”).

³⁶² See *supra* note 293.

³⁶³ It is important to note, as discussed in note 296, that the public-facing statements of such groups may nonetheless be subject to regulation to ensure they are not false or misleading.

³⁶⁴ Several scholars are exploring creative ways to make the financial system more democratic. See, e.g., Saule T. Omarova, *Why We Need a Public Interest Council*, AM. PROSPECT (Apr. 4, 2023), <https://prospect.org/economy/2023-04-04-public-interest-council-banking/> [<https://perma.cc/9QP4-Y9W7>]; Saule T. Omarova, *The People’s Ledger: How to Democratize Money and Finance the Economy*, 74 VAND. L. REV. 1231, 1231–32 (2021); Judge & Awrey, *supra* note 28; Mehrsa Baradaran, *It’s Time for Postal Banking*, 127 HARV. L. REV. F. 165, 166 (2014).

information that could aid consumers and investors indirectly in making decisions at the ballot box and in markets. And laws that seek to filter the public into different financial institutions arguably harm public discourse by creating echo chambers in which people need not confront ideas with which they might disagree.

* * *

The question of what constitutes a medium of expression, including in public discourse, against a backdrop of technological and social change is a perennial one. Movies were once not considered covered mediums of expression.³⁶⁵ Now deep questions are being raised about Artificial Intelligence and the sorts of art, music, and poetry it can create—and whether these are, in fact, authored by human beings.³⁶⁶ Will ESG investing at some point be viewed both as a vital medium of expression, and beyond that, one in public discourse? Like AI, that will necessarily be a context-bound and historically contingent inquiry, as we have outlined above.

A central aspect of the future of First Amendment law will be elaborating on questions like these raised at the intersection of the doctrines regulating public discourse, on the one hand, and economic life, on the other. These questions will require courts and scholars to look beyond whether an activity can colloquially be described as expressive. It will require looking beyond whether an activity can somehow be characterized as “political” or “economic.” These issues will instead demand that we face the critical question of what First Amendment rules will best advance the constitutional value of political and economic participation in a newly ordered economy.

CONCLUSION

Anti-woke capitalism laws mark an important turn away from libertarianism. They also raise critical First Amendment questions about what doctrinal rules best advance economic and political participation in the

³⁶⁵ See *Mut. Film Corp. v. Indus. Comm’n*, 236 U.S. 230, 244 (1915) (explicitly excluding motion pictures from First Amendment coverage). *But see* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (holding movies to be covered speech).

³⁶⁶ Justice Gorsuch observed in oral argument for *Gonzalez v. Google* that “[i]n a post-algorithm world, artificial intelligence can generate some forms of content, even according to neutral rules. I mean, artificial intelligence generates poetry, it generates polemics today.” Transcript of Oral Argument at 49, *Gonzalez v. Google*, 143 S. Ct. 762 (2023) (No. 21-1333). The U.S. Copyright Office recently canceled a copyright because the images produced were not sufficiently authored by a human being. Letter from Robert J. Kasunic, U.S. Copyright Off., to Van Lindberg (Feb. 21, 2023), <https://fingfx.thomsonreuters.com/gfx/legaldocs/klpygnkyrpg/AI%20COPYRIGHT%20decision.pdf> [<https://perma.cc/6GXL-EEUY>].

context of modern markets. These goals, we argue, should drive constitutional analysis within a broad range of contexts.

Emerging practices like ESG investing challenge the New Deal view that to democratize economic life means to subject it to plenary governmental regulation. Such a view may no longer make sense in a world in which private firms and mass individual economic decisions jointly exert a high degree of control over important social and policy outcomes. Pivotal decisions about climate change, democratic stability, global health, and the spread of information on social media platforms, to name a few, are now being made not only by governments, but by firms and through individual economic decisions. In this context, market settings become critically important sites for participatory and decisional democracy.

What doctrinal rules will best advance democratic participation in new spaces and with regard to new challenges? This question not only clarifies the constitutional status of anti-woke capitalism laws, but also the fundamental organizing principles that must ground the First Amendment's future.

