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### What's "Controversial" About ESG? A Theory of Compelled Commercial Speech under the First Amendment

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Sean J. Griffith\*

## What’s “Controversial” About ESG? A Theory of Compelled Commercial Speech Under the First Amendment

### ABSTRACT

*This Article uses the Securities and Exchange Commission’s SEC’s recent foray into Environmental, Social, and Governance ESG to illuminate ambiguities in First Amendment doctrine. Situating mandatory disclosure regulations within the compelled commercial speech paradigm, it identifies the doctrinal hinge as “controversy.” Rules compelling commercial speech receive deferential judicial review, provided they are purely factual and uncontroversial. The Article argues that this requirement operates as a pretext check, preventing regulators from exceeding the plausible limits of the consumer protection rationale.*

*Applied to securities regulation, the compelled commercial speech paradigm requires the SEC to justify disclosure mandates as a form of investor protection. The Article argues that investor protection must be conceived on a class basis—the interests of investors qua investors, rather than focusing on the idiosyncratic preferences of individuals or groups of investors. Disclosure mandates that are uncontroversially motivated to protect investors are eligible for deferential judicial review. Disclosure mandates failing this test must survive a form of heightened scrutiny.*

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*The SEC's recently proposed climate disclosure rules fail to satisfy these requirements. Instead, the proposed climate rules create controversy by imposing a political viewpoint, by advancing an interest group agenda at the expense of investors generally, and by redefining concepts at the core of securities regulation. Having created controversy, the proposed rules are ineligible for deferential judicial review. Instead, a form of heightened scrutiny applies, under which they will likely be invalidated. Much of the ESG agenda would suffer the same fate. However, the vast majority of the SEC's disclosure mandates, which aim at eliciting only financially relevant information, would survive.*

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## I. INTRODUCTION

The Securities and Exchange Commission (SEC, the Commission) has embarked on an endeavor to compel companies to disclose information about environmental, social, and governance (ESG) matters. The first batch of rule-making proposals, released on March 21, 2022, focuses on climate-related disclosures.<sup>1</sup> But the Commission has indicated that there is more to come, promising a comprehensive ESG disclosure framework, eventually incorporating diversity, equity, inclusion and other issues.<sup>2</sup> This expansion of the Commission's agenda raises the question of the its authority.<sup>3</sup> Simply put, does the SEC have the authority to do ESG?

Congress has not enacted a law requiring the SEC to incorporate ESG. The Commission, instead, is pursuing this agenda on its own. In the absence of a legislative mandate, the SEC's regulatory authority derives from the securities laws' general delegation, empowering the Commission to make disclosure rules that protect investors.<sup>4</sup> The statutory validity of the new rules thus depends upon whether ESG can be derived from the investor protection rationale.<sup>5</sup> This, as we shall see,

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1. The Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act Release No. 33-11042, Exchange Act Release No. 34-94478, 87 Fed. Reg. 21334 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) [hereinafter Proposed Rule Release].
  2. See SEC, *SEC Announces Annual Regulatory Agenda* U.S. Securities and Exchange Commission, (June 11, 2021) <https://www.sec.gov/news/press-release/2021-99> (announcing that the SEC intends to make rules concerning “[d]isclosure relating to climate risk, human capital, including workforce diversity and corporate board diversity, and cybersecurity risk”). See also Allison Herren Lee, *A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC*, U.S. Securities and Exchange Commission (Mar. 15, 2021) <https://www.sec.gov/news/speech/lee-climate-change> [<https://perma.cc/KL9K-EK9N>] (detailing SEC progress in addressing investor concerns); Allison Herren Lee, *Climate, ESG, and the Board of Directors: “You Cannot Direct the Wind, But You Can Adjust Your Sails,”* U.S. Securities and Exchange Commission (June 28, 2021) <https://www.sec.gov/news/speech/lee-climate-esg-board-of-directors> [<https://perma.cc/S34W-WXA3>].
  3. See Matt Levine, *The SEC Will Regulate Climate*, BLOOMBERG (Mar. 22, 2022, 6:28 PM) (concluding from the climate-related disclosure rule that the SEC has become “the Securities and Everything Commission”).
  4. See, e.g., Securities Act of 1933, ch. 38, sec. 7(a)(1) (codified as 15 U.S.C. § 77g(a)(1)) (authorizing the SEC to regulate the content of registration statements insofar as its regulations are “necessary or appropriate in the public interest or for the protection of investors”); see also Securities Act of 1933, ch. 38, secs. 7, 10, 19(a) (2012) (codified as amended at 15 U.S.C. §§ 77g, 77j, 77s(a)) (detailing various disclosure rules in order to protect investors); Securities Exchange Act of 1934, ch. 404, secs. 3(b), 12, 13, 14, 15(d), 23(a) (2015) (codified as amended at 15 U.S.C. §§ 78c(b), 78l, 78m, 78n, 78o(d), 78w(a)) (same). For further discussion of the SEC's authority to promulgate disclosure regulations, see *infra* notes 243–265.
  5. See *infra* section V.A.

is a difficult question.<sup>6</sup> However, it is unlikely to trouble the SEC much since agency interpretations of statutory ambiguities control,<sup>7</sup> and an SEC that wants to do ESG can be expected to find an interpretation of investor protection that allows it to do so.<sup>8</sup>

But statutory authority is not the end of the story. The SEC is, above all, a regulator of speech. It polices the communicative relationship between buyers and sellers of securities, telling them what they may or must say to one another. Essentially all of securities regulation either restrains speech, as in the case of the "gun-jumping" rules,<sup>9</sup> or compels it, as in the case of the myriad disclosure mandates catalogued in Regulation S-K.<sup>10</sup> These actions clash with the First Amendment's prohibition against "abridging the freedom of speech."<sup>11</sup> But is not the agency's entire regulatory apparatus an abridgment of the freedom of speech? Is the SEC unconstitutional?

Amazingly, the Supreme Court of the United States has never answered this question.<sup>12</sup> Commentators, meanwhile, have generally divided into two groups: apologists who claim that the First Amendment is somehow inapplicable to securities regulation and abolitionists who see securities regulation as inherently unconstitutional.<sup>13</sup> While it may be easy to see that neither can be quite right, it is not easy to see why. It is true, of course, that fraud, like obscenity and incitement to violence, is a category of speech without constitutional protection.<sup>14</sup> Thus, to the extent that the SEC regulates speech that qualifies as fraud, its regulations are unaffected by the First Amendment. It is also true, however, that the SEC does much, especially in the realm of mandatory disclosures, that has no plausible connection to the anti-

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6. *See infra* section V.B.

7. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 468 U.S. 837 (1984). *But see West Virginia v. EPA*, 142 S.Ct. 2587 (2022) (indicating less deference to agency interpretations under the "major questions doctrine").

8. *See infra* note 267 and accompanying text.

9. Securities Act of 1933, sec. 5 (codified as amended at 15 U.S.C. § 77e) (1988).

10. 17 C.F.R. § 229.10 (2014).

11. U.S. CONST. amend. I.

12. *See, e.g., Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003) (per curiam) (dismissing First Amendment challenge to securities laws on basis that certiorari was improvidently granted); *Lowe v. SEC*, 472 U.S. 181, 211 (1985) (resolving First Amendment challenge to the Investment Advisers Act of 1940 on statutory basis).

13. For more on this debate, *see infra* section III.B.

14. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

*Id.* at 340 (internal citations omitted).

fraud principle. The constitutional validity of the SEC's disclosure mandates thus needs another justification. It needs the commercial speech paradigm.

According to Supreme Court precedent, commercial speech—speech involved in the buying and selling of some good or product—receives limited constitutional protection.<sup>15</sup> Commercial speech is protected because consumers in a market economy require the free flow of information about products.<sup>16</sup> But its protection is less extensive than other kinds of speech because the consumer protection rationale permits regulations aimed at protecting consumers. In the words of the Court: “the stream of commercial information [must] flow cleanly as well as freely.”<sup>17</sup> As a result, the government is entitled to greater constitutional leeway when it regulates purely commercial speech. As the doctrine has developed, a form of intermediate scrutiny has been applied to rules *restraining* commercial speech,<sup>18</sup> but a substantially lesser standard often applies to rules *compelling* commercial speech, provided that the required disclosures are “purely factual and uncontroversial.”<sup>19</sup>

The commercial speech doctrine applies to the basic substance of securities regulation, involving the buying and selling of investment products. Moreover, the essential rationale of the commercial speech doctrine—consumer protection—merges seamlessly with the basis of the SEC's statutory authority—investor protection. The commercial speech doctrine thus suggests that mandatory disclosures aimed at protecting investors should receive deferential treatment under the First Amendment, provided that the disclosures are purely factual and uncontroversial. The SEC's constitutional authority has, in this way, gone unchallenged as long as it has hewn to a traditional path, focusing on information relevant to investment value. In undertaking its ESG agenda, however, the SEC has strayed from this path. And it has poked the bear.

What does it mean to regulate on the basis of investor protection when, as in the case of ESG issues, investors have various and conflicting preferences? According to some, ESG disclosures amount to

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15. *See generally* Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411 (1992) (describing the commercial speech doctrine as a model of practical reason).

16. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976).

17. *Id.*

18. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

19. *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985); *Nat'l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361 (2018).

politics by other means.<sup>20</sup> According to others, especially institutional asset managers, investors want ESG.<sup>21</sup> Which investor's perspective controls? These questions lead back to the question whether ESG can be derived from an investor protection rationale. The difference, however, is that since we are asking the question under the First Amendment, deference to the regulator does not apply. The SEC no longer gets to answer the question.

The First Amendment analysis features a second critical ambiguity: controversy. What makes a disclosure "purely factual and uncontroversial?" Litigation, the essence of controversy, cannot be the answer since recognizing it as such would allow regulated entities to defeat disclosure merely by filing a lawsuit. Where then are we to look for evidence of controversy? Opposition from organized interest groups? Editorials and expert opinion? A count of the protestors on courthouse steps? What bearing ought such external indicia have on First Amendment analysis generally and on the validity of ESG mandates in particular?

This Article answers these questions. In doing so, it offers a theory of compelled commercial speech to reconcile the needs of securities regulation with the demands of the First Amendment. The key to this theory is the inner relationship between the concepts of investor protection, on the one hand, and controversy, on the other. Starting with investor protection, the Article argues that the concept must be understood to apply to investor interests as a class, not to the idiosyncratic wishes of any particular investor or group of investors who, like all human beings, have a multiplicity of conflicting preferences and interests. Instead, focusing on *investors qua investors* reveals a common core—specifically, concern for the financial return of an investment. Understanding financial return as the core concern of investors clarifies the limits of the SEC's authority to regulate for the purpose of investor protection.

In turn, the "uncontroversial" requirement of the commercial speech paradigm guides the First Amendment analysis of mandatory disclosures. The Article argues that this requirement operates as a pretext check to ensure that the regulator, here the SEC, has not exceeded the plausible bounds of the commercial speech doctrine. In this

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20. See, e.g., Benjamin Zycher, *Other People's Money: ESG Investing and the Conflicts of the Consultant Class*, Am. Enter. Inst. (Dec. 17, 2018), <https://www.aei.org/articles/other-peoples-money-esg-investing-and-the-conflicts-of-the-consultant-class/> [https://perma.cc/DJ4B-AP6N] ("ESG investment choices substitute an amorphous range of political goals in place of maximizing the funds' economic value . . .").

21. See, e.g., Larry Fink, *Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance*, BLACKROCK (Jan. 14, 2020), <https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter> [https://perma.cc/W8G3-KJEW].

way, the analysis of controversy does not look to any outside constituency but rather to the plausibility of the government's consumer protection rationale. A regulation that is plainly focused on consumer protection is uncontroversial and therefore entitled to First Amendment deference, but a regulation that can plausibly be shown to have some other justification is controversial. Under this standard, the SEC must once again articulate a version of investor protection from which ESG mandates could derive.

The SEC necessarily fails this test in the context of the proposed climate-related disclosures, many of which are irrelevant to investors concerned with corporate value, but useful to asset managers marketing ESG portfolios.<sup>22</sup> Having created controversy, the SEC must survive intermediate scrutiny, which involves asking whether the government's action is more restrictive than necessary to achieve its ends. At least in the context of the proposed climate-related disclosures, because companies are already required to disclose material environmental risks, it is highly likely that additional climate-related disclosures are more restrictive than necessary. Much of the ESG agenda to come is likely to suffer the same fate. Furthermore, having opened this door, it is also likely that some regulations the SEC has already passed could not survive a First Amendment challenge. In this way, by seeking to expand its agenda, the SEC has exposed it to the risk of shrinkage. As a result, the SEC's expansion into ESG can be shown to be neither valid nor, from the agency's perspective, wise.

From this Introduction, the Article proceeds in five parts. First, it summarizes the ESG disclosure mandates recently outlined by the SEC. Second, it reviews the applicable First Amendment jurisprudence and the prior academic literature. Third, it articulates a theoretical framework for reconciling disclosure regulation to the First Amendment. Fourth, it applies this framework to the securities laws, finding that, although the vast majority of the SEC's disclosure mandates pass constitutional muster, the ESG disclosures, at least in their current form, do not. Fifth and finally, the Article closes with a brief summary and conclusion.

## II. CLIMATE MANDATES

The SEC launched its foray into ESG mandates on March 21, 2022, with a series of climate-related disclosure rules. Considering these alongside companies' pre-existing disclosure obligations reveals that the new rules are simultaneously broader and more specific than current disclosure requirements. The most important difference, however, between the old and new rules may be in the area of materiality. Companies' current disclosure obligations regarding climate are

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22. See *infra* notes 88–92 and accompanying text.



firmly grounded in the concept of financial materiality. Individual issuers are generally not required to disclose information that is not material to their current or future financial performance. By contrast, many of the proposed rules dispense with the concept of materiality or, where they do not disregard it altogether, significantly alter its meaning. The sections below review the old and the new rules affecting climate disclosures.

### A. The Old Rules

The pre-existing regulatory framework had several rules that triggered climate-related disclosures. These rules typically did not call for specific line-item disclosures relating to climate but rather required climate-related disclosures when issuers discussed their regulatory environment, legal proceedings, or business operations. However, all of these disclosure obligations were grounded in materiality, which, in turn, focused on the financial results of individual issuers.

Some of the pre-existing disclosure rules speak directly to environmental concerns and, therefore, climate. For example, item 101 of Regulation S-K requires companies to disclose the material effects on business of complying with federal, state, and local environmental regulations, including the effects on capital expenditures, earnings, and competitive position.<sup>23</sup> Insofar as environmental regulations focus on climate-related matters, item 101 requires issuers to disclose their effect on the business, provided it is material.<sup>24</sup>

Other disclosure regulations are more broadly worded but nevertheless may address climate. For example, the obligation to disclose material legal proceedings under item 103 of Regulation S-K includes an obligation to disclose all proceedings to which a government entity is a party.<sup>25</sup> As a result, any legal proceeding in which an environmental regulator has filed suit against the issuer must be described. More generally, all public companies are under an obligation pursuant to item 105 of Regulation S-K to disclose risks that significantly impact investors' valuation of the company.<sup>26</sup> Likewise, item 303 of Regulation S-K requires companies to include in management discussion and analysis any material events or uncertainties likely to cause financial or operating results to deteriorate in the future.<sup>27</sup>

Taking the existing rules together, it is clear that public companies faced substantial climate-related disclosure obligations prior to the newly proposed climate rules. Companies were required to disclose any environmental or climate regulation that had a material impact,

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23. 17 C.F.R. § 229.101(c)(2)(i) (2011).

24. *Id.* § 229.101(a)(1).

25. *Id.* § 229.103(a).

26. *Id.* § 229.105(a).

27. *Id.* § 229.303(a).

any environmental legal proceedings brought by the government, and any climate-related change that would have a material impact on the value or future results of the company. To ensure that regulated entities understood these obligations, the SEC issued guidance in 2010 emphasizing the applicability of existing disclosure rules to the context of climate change.<sup>28</sup>

However, the pre-existing rules required no climate-related disclosures that were not financially material. Materiality is a fundamental part of securities regulation.<sup>29</sup> As defined by Justice Marshall in *TSC Industries v. Northway*, a fact is material “if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.”<sup>30</sup> The “reasonable shareholder” standard ensures that materiality will be judged objectively, by what investors *need* to know, not by what any particular investor might *like* to know.<sup>31</sup> Furthermore, to be material, the information must have “assumed actual significance in the deliberations of the reasonable shareholder” or “significantly altered the ‘total mix’ of information . . . available.”<sup>32</sup> Later, in *Basic v. Levinson*, the Supreme Court extended the same definition of materiality to the context of purchasing or selling a security.<sup>33</sup> The SEC likewise followed *TSC Industries* in defining materiality for general regulatory purposes.<sup>34</sup>

This definition of materiality has a double aspect: looking to both relevance and weight. The “reasonable investor” aspect of materiality demands that information be *on topic*—that is, relevant to investment analysis. The “total mix” aspect of materiality demands that information be sufficiently weighty to affect that analysis. These two aspects of materiality point to analytically distinct reference points. The relevance aspect points to the perspective of the investor, asking what

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28. Commission Guidance Regarding Disclosure Related to Climate Change, Exchange Act Release No. 33-9106, 75 Fed. Reg. 6290 (Feb. 8, 2010).

29. See generally HOUSE COMM. ON INTERSTATE & FOREIGN COM., 95TH CONG., 1ST SESS., REP. OF THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SECURITIES AND EXCHANGE COMMISSION 320 (Comm. Print 95-29, 1977) (describing materiality as “the cornerstone” of the disclosure system established by the federal securities laws).

30. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

31. *Id.* at 445 (“The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor.”).

32. *Id.* at 449.

33. *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988) (“We now expressly adopt the *TSC Industries* standard of materiality for the § 10(b) and Rule 10b-5 context.”).

34. See Proposed Rule Release, *supra* note 1, 87 Fed. Reg. at 21351, n.209; see also 17 C.F.R. § 240.12b-2 (according to the regulatory definition, the term “material,” when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered).

kind of information is objectively relevant to them. But the weight of information points elsewhere. In asking whether a piece of information is sufficiently weighty to affect investment analysis, attention is directed to the issuer, not investors.

Usually, with facts relating to financial returns, distinguishing these aspects of materiality is not worth the candle. Information affecting the value of a security is plainly relevant to investors, and their analysis obviously focuses upon the impact of the fact on the issuer.<sup>35</sup> Ordinary considerations of materiality therefore elide the distinction between relevance and weight, on the one hand, and between investors and issuers on the other. Information about financial return is relevant to investors because it affects issuers.

But, as we shall see, the new rules are not grounded upon ordinary considerations of materiality. It is therefore worth remembering that materiality requires both relevance and weight. Relevance is determined by an objective investor's perspective. Weight is determined by the impact on an issuer. Moreover, although the old rules addressed climate, because the disclosures were rooted in traditional notions of materiality, no company would have been required to disclose climate-related information if it did not have a plausible impact on the financial results of the company.

## B. The New Rules

The proposed rules have three areas of focus. First, companies must make narrative disclosures of climate risks and describe how the company manages them.<sup>36</sup> Second, companies must disclose specific information concerning greenhouse gas (GHG) emissions.<sup>37</sup> Third, companies must disclose climate-related financial metrics as part of their audited financial statements.<sup>38</sup> These disclosures are required on an annual basis—climate risk and GHG disclosures on the annual report in a separately titled section, the financial statement metrics disclosures in the form of a note to the consolidated financial statements.<sup>39</sup> Some of the proposed rules are qualified by materiality, but others are not. Moreover, when the rules do include a materiality

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35. Elad L. Roisman, Commissioner, *Can the SEC Make ESG Rules That Are Sustainable?*, U.S. SECURITIES AND EXCHANGE COMMISSION (June 22, 2021) (analyzing materiality and noting that "it seems clear that a 'reasonable investor' is someone whose interest is in a financial return on an investment" and that determining materiality depends upon whether the disclosures are relevant "to a company's financial value").

36. See Proposed Rule Release, *supra* note 1, 87 Fed. Reg. at 21465 (to be codified at 17 C.F.R. § 229.1502(d)). The disclosures are to be part of the company's regular periodic reporting obligations—for example, the annual report on Form 10-K.

37. *Id.*, 87 Fed. Reg. at 21468 (to be codified at 17 C.F.R. § 229.1504(a)).

38. *Id.*, 87 Fed. Reg. at 21464 (to be codified at 17 C.F.R. § 210.14-01(a)).

39. *Id.*

qualifier, the term often departs from the traditional meaning of materiality.

### 1. *Climate-Related Risk Disclosure*

Under the proposed rules, companies are required to disclose any climate-related risks likely to have a material impact on the company's business or financial condition.<sup>40</sup> This requirement may seem redundant, given existing rules requiring companies to disclose the costs of environmental compliance,<sup>41</sup> however, the proposed rules are both broader and more specific than existing regulations. The breadth comes from the definition of "climate-related risks" as "the actual or potential negative impacts of climate-related conditions and events on a registrant's consolidated financial statements, business operations, or value chains, as a whole."<sup>42</sup> By including "value chains" in the definition, the SEC means to include the impact of climate risks not only on the issuer itself but also on its upstream suppliers and downstream users.<sup>43</sup> In this way, the proposed rule focuses as much on products as it does on producers, panning out from the individual corporation to the supply chain of which it is a part.

The SEC further separates climate risks into physical risks and transition risks.<sup>44</sup> Physical risks are those arising from extreme weather events as well as broader changes in weather patterns, draughts, or fires attributed to climate change.<sup>45</sup> Transition risks, by contrast, are those arising from regulators, customers, markets, and litigants pushing a climate agenda, the result of which might be decreased demand or increased costs for the company's products or services.<sup>46</sup> Companies disclosing climate-related risks must identify the

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40. *Id.*, 87 Fed. Reg. at 21467 (to be codified at 17 C.F.R. § 229.1502(a)).

41. *See supra* notes 23–28 and accompanying text.

42. Proposed Rule Release, *supra* note 1, 87 Fed. Reg. at 21465 (to be codified at 17 C.F.R. § 229.1500(c)).

43. *Id.*, 87 Fed. Reg. at 21466 (to be codified at 17 C.F.R. § 229.1500(t)) ("Value chain' would mean the upstream and downstream activities related to a registrant's operations. Under the proposed definition, upstream activities include activities by a party other than the registrant that relate to the initial stages of a registrant's production of a good or service (e.g., materials sourcing, materials processing, and supplier activities). Downstream activities would be defined to include activities by a party other than the registrant that relate to processing materials into a finished product and delivering it or providing a service to the end user (e.g., transportation and distribution, processing of sold products, use of sold products, end of life treatment of sold products, and investments).").

44. *Id.*, 87 Fed. Reg. at 21350.

45. *Id.*, 87 Fed. Reg. at 21468 (to be codified at 17 C.F.R. § 229.1503(c)(2)(i)).

46. *Id.*, 87 Fed. Reg. at 21468 (to be codified at 17 C.F.R. § 229.1500(c)(4)).

risk as physical or transitional and, in the case of physical risks, provide further detail on the nature and severity of the risks disclosed.<sup>47</sup>

A climate risk must be disclosed if it is "reasonably likely to have a material impact on a registrant, including its business or consolidated financial statements, which may manifest over the short, medium, and long term."<sup>48</sup> The SEC offers a gloss on the definition of materiality,<sup>49</sup> stating that "a matter is material if there is a substantial likelihood that a reasonable investor would consider it important when determining whether to buy or sell securities or how to vote."<sup>50</sup> Because climate risk requires an assessment of potential future events, the SEC proposes that issuers apply a version of the Hand formula to estimate materiality, incorporating "an assessment of both the probability of the event occurring and its potential magnitude, or significance to the registrant."<sup>51</sup> This implies, as the SEC suggests in a footnote, that "certain acute physical risks are material even if they are less likely to occur if the magnitude of their impact would be high."<sup>52</sup>

The disclosure of a material climate risk triggers more detailed climate disclosures. Companies disclosing material climate risks must further describe the actual and potential impacts of those risks on strategy, business model, and outlook.<sup>53</sup> Companies must describe analytical tools, such as scenario analyses, that they use to assess the impact of climate-related risks.<sup>54</sup> The rule does not require companies to use scenario analysis to project climate impact, but the rule re-

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47. *Id.*, 87 Fed. Reg. at 21467 (to be codified at 17 C.F.R. § 229.1502(a)(1)). The flip side of climate risk is "climate-related opportunity," the possibility that climate change or shifts in markets or public policies in response to concerns about climate change will lead to increased corporate revenues. Unlike climate risks, the disclosure of which is mandated, climate opportunities may be disclosed voluntarily. The basis for the distinction, according to the SEC is "anti-competitive concerns that might arise from a requirement to disclose a particular business opportunity." *Id.*, 87 Fed. Reg. at 21351.

48. *Id.*, 87 Fed. Reg. at 21467–68 (to be codified at 17 C.F.R. § 229.1502(a)).

49. *Id.*, 87 Fed. Reg. at 21351, n.209 (citing the materiality definition in Reg. S-K as well as the definitions in *TSC Industries* and *Basic*). See also *supra* notes 29–35 and accompanying text (discussing the traditional materiality standard).

50. *Id.*, 87 Fed. Reg. at 21351, n.209.

51. *Id.*, 87 Fed. Reg. at 21351.

52. *Id.*, 87 Fed. Reg. at 21350, n.211 (citing *Basic, Inc. v. Levinson*, 485 U.S. 238 (1998)).

53. *Id.*, 87 Fed. Reg. at 21467 (to be codified at 17 C.F.R. § 229.1502(b)).

54. *Id.*, 87 Fed. Reg. at 21468 (to be codified at 17 C.F.R. § 229.1502(f)). "Scenario analysis" is defined by the SEC to as "a tool used to consider how, under various possible future climate scenarios, climate-related risks may impact a registrant's operations, business strategy, and consolidated financial statements over time" as well as scenarios used to "test the resilience of [corporate] strategies under future climate scenarios, including scenarios that assume different global temperature increases, such as, for example, 3°C, 2°C, and 1.5°C above pre-industrial levels." *Id.*, 87 Fed. Reg. at 21356 (describing proposed 17 C.F.R. § 229.1500(o)).

quires that any such analytical tools that are used be disclosed and described.<sup>55</sup> These detail-oriented disclosures are not themselves qualified by materiality; however, they are only triggered by the company's having disclosed a material climate risk.

Related to but separate from the proposed climate risk disclosures, companies must also describe how their board and management processes superintend climate risk. The proposed rules require companies to identify board members or committees charged with overseeing climate risk<sup>56</sup> and to describe the process and frequency with which climate risks are discussed at the board level.<sup>57</sup> Companies must describe their board's climate expertise, disclosing whether "any member of the [registrant's] board of directors has expertise in climate-related risks" in sufficient "detail as necessary to fully describe the nature of the expertise."<sup>58</sup> Not only must companies disclose how climate risk fits into the board's consideration of business strategy, risk management, and oversight,<sup>59</sup> but also how the board sets climate-related goals and how it measures progress towards reaching those goals.<sup>60</sup> The rule contains parallel disclosure requirements for management, including the identification of management positions or committees charged with climate risk and their level of expertise,<sup>61</sup> a description of how information concerning climate risk reaches responsible officers,<sup>62</sup> and whether these officers have available reporting lines to the board concerning climate-related matters.<sup>63</sup> None of the climate-related governance disclosures are tied to materiality.

Furthermore, the proposed rules require extensive disclosure of climate-related risk management processes. This includes granular disclosures concerning how the company determines the relative significance of climate risks relative to other risks, how it fits regulatory requirements and public policies into climate risk management, adapts to shifts in technology or market preferences regarding climate, and how it quantifies the materiality of climate-related risks.<sup>64</sup> If a company adopts a plan to mitigate climate-related risks or to reduce emissions, extensive additional disclosures concerning that plan

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55. *Id.*, 87 Fed. Reg. at 21468 (to be codified at 17 C.F.R. § 229.1502(f)).

56. *Id.*, 87 Fed. Reg. at 21467 (to be codified at 17 C.F.R. § 229.1501(a)(1)(i)).

57. *Id.*, 87 Fed. Reg. at 21467 (to be codified at 17 C.F.R. § 229.1501(a)(1)(iii)).

58. *Id.*, 87 Fed. Reg. at 21467 (to be codified at 17 C.F.R. § 229.1501(a)(1)(ii)).

59. *Id.*, 87 Fed. Reg. at 21467 (to be codified at 17 C.F.R. § 229.1501(a)(1)(iv)).

60. *Id.*, 87 Fed. Reg. at 21467 (to be codified at 17 C.F.R. § 229.1501(a)(1)(v)).

61. *Id.*, 87 Fed. Reg. at 21467 (to be codified at 17 C.F.R. § 229.1501(b)(1)(i)).

62. *Id.*, 87 Fed. Reg. at 21467 (to be codified at 17 C.F.R. § 229.1501(b)(1)(ii)).

63. *Id.*, 87 Fed. Reg. at 21467 (to be codified at 17 C.F.R. § 229.1501(b)(1)(iii)). *See also id.*, 87 Fed. Reg. at 21351. The SEC entertained but ultimately did not require disclosure on the question of whether management compensation is connected to climate-related goals.

64. *Id.*, 87 Fed. Reg. at 21468 (to be codified at 17 C.F.R. § 229.1503(a)(1)).

are required.<sup>65</sup> Finally, the company must also describe how it insures against climate risk as part of its risk management practices.<sup>66</sup> Like the governance disclosures, none of the risk management disclosures are in any way tied to materiality.

Finally, if the company has made public statements setting climate-related goals, the SEC's proposed rule requires companies to make further disclosures about the scope of the activities included in the goals, a description of how the company plans to meet the goals, data relevant to determining whether the goals are being met, and information about the use of carbon credits, if applicable.<sup>67</sup> While many companies set climate reduction goals with little detail on how they intend to achieve their commitments, the SEC asserts that additional disclosures "are intended to elicit enhanced information about climate-related targets and goals so that investors can better evaluate" them.<sup>68</sup> In fact, the proposed rule operates as a kind of lobster trap.<sup>69</sup> Once companies announce a climate goal, the disclosure regime kicks in, preventing any escape and requiring further detail on how the company intends to operationalize its plan.

## 2. Greenhouse Gas Emissions Disclosures

A second focus of the SEC's rule-making proposal is GHG emissions.<sup>70</sup> Under the proposed rule, every reporting company is required to make GHG disclosures at the end of each fiscal year.<sup>71</sup> These disclosures distinguish between direct and indirect GHG emissions and are qualified by materiality only with respect to downstream indirect disclosures.<sup>72</sup> Otherwise, reporting companies must make required GHG disclosures regardless of whether they are material to the company's business or financial performance.<sup>73</sup> The basis for this rule-making, the SEC acknowledges, is to benefit a vocal investor constituency—namely, large asset managers and financial institutions—that find corporate GHG disclosures useful in their business.<sup>74</sup>

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65. *Id.*, 87 Fed. Reg. at 21466, 21468 (to be codified at 17 C.F.R. §§ 229.1500(s), 229.1503(c)(1)).

66. *Id.*, 87 Fed. Reg. at 21468 (to be codified at 17 C.F.R. § 229.1503(a)(1)).

67. *Id.*, 87 Fed. Reg. at 21471 (to be codified at 17 C.F.R. § 229.1506(b)(1)–(6)).

68. *Id.*, 87 Fed. Reg. at 21406.

69. See Edward Rock, *Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure*, 23 CARDOZO L. REV. 675 (2002).

70. Proposed Rule Release, *supra* note 1, 87 Fed. Reg. at 21468, § 229.1504(a).

71. *Id.*

72. *Id.*, 87 Fed. Reg. at 21469 (to be codified at 17 C.F.R. § 229.1504(e)(1)).

73. *Id.*, 87 Fed. Reg. at 21469 (to be codified at 17 C.F.R. § 229.1504(e)(8)) ("[A] registrant must include GHG emissions from outsourced activities that it previously conducted as part of its own operations").

74. See *id.*, 87 Fed. Reg. at 21341.

The GHG disclosure rules are divided into three focus areas or “Scopes” used by the Environmental Protection Agency.<sup>75</sup> Scope 1 emissions are those that are under a company’s direct control, such as emissions caused by the company’s factories or transportation facilities.<sup>76</sup> Scope 2 emissions are indirect in the sense that they are not generated directly by the company but rather by upstream producers of energy purchased by the company.<sup>77</sup> Therefore, Scope 2 emissions include GHG emissions associated with the company’s purchase of electricity, steam, or heat.<sup>78</sup> Scope 3 emissions are also indirect but, rather than looking upstream at the company’s energy inputs, the focus is on how the company’s downstream products are used, including any further emissions thereby caused.<sup>79</sup> Therefore, Scope 3 emissions might include those caused by further processing or distribution of the product, energy consumed in the use of the product, or emissions caused by the recycling or final disposition of the spent product.<sup>80</sup>

The proposed rule calls for all registered companies to disclose Scope 1 and Scope 2 emissions on an annual basis.<sup>81</sup> Each is to be separately described, not including any offsets, both as aggregate emissions and in disaggregated form, describing each constituent gas.<sup>82</sup> Finally, emissions are described in terms of “intensity”—that is, expressed in a ratio per unit of economic production and total revenue.<sup>83</sup> Although subject to a scheduled phase-in period, neither Scope 1 nor Scope 2 disclosures are qualified by materiality. Scope 3 GHG emissions, by contrast, are required to be disclosed only if they are material or if the registrant has publicly committed to a GHG target that includes Scope 3 emissions.<sup>84</sup>

Generally, the SEC sees emissions data as a proxy for climate risk.<sup>85</sup> More specifically, the SEC insists that these disclosures are valuable because “GHG emissions could impact the company’s access to financing, as well as its ability to reduce its carbon footprint in the face of regulatory, policy, and market constraints.”<sup>86</sup> As previously

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75. *See id.*, 87 Fed. Reg. at 21344–45 (“We have based our proposed GHG emissions disclosure requirement primarily on the GHG Protocol’s concept of scopes and related methodology.”).

76. *Id.*, 87 Fed. Reg. at 21466 (to be codified at 17 C.F.R. § 229.1500(p)).

77. *Id.*, 87 Fed. Reg. at 21466 (to be codified at 17 C.F.R. § 229.1500(q)).

78. *Id.*

79. *Id.*, 87 Fed. Reg. at 21469 (to be codified at 17 C.F.R. § 229.1500(r)).

80. *Id.*

81. *Id.*, 87 Fed. Reg. at 21468 (to be codified at 17 C.F.R. § 229.1504(b)(1)).

82. *Id.*, 87 Fed. Reg. at 21468 (to be codified at 17 C.F.R. § 229.1504(a)(1)).

83. *Id.*, 87 Fed. Reg. at 21468 (to be codified at 17 C.F.R. § 229.1504(d)(1)).

84. *See id.*, 87 Fed. Reg. at 21469.

85. *Id.*, 87 Fed. Reg. at 21344 (“[E]missions data can enable investors to assess a registrant’s exposure to climate-related risks, including regulatory, technological, and market risks driven by a transition to a lower-GHG intensive economy.”).

86. *Id.*



discussed, all of these—capital market risk, regulatory risk, and product market risk—are examples of climate risk. Thus, to the extent material, GHG disclosures are duplicative of climate-risk disclosures. To the extent immaterial, they are of no use to investors. From this we see that the proposed GHG disclosures are not aimed at investors at all. Or, rather, not at investors generally but at a particular class of investor, for whom the value of GHG disclosures is their form more than their content.<sup>87</sup>

The value of GHG disclosures lies in the fact that they are *quantitative* and therefore easily compared across companies and industries.<sup>88</sup> This makes the information useful to institutional asset managers.<sup>89</sup> According to the proposed rule release: “[I]nstitutional investors and other commentators have indicated [that] GHG emissions information is important . . . because GHG emissions data is quantifiable and comparable across industries . . .”<sup>90</sup> GHG emissions numbers allow asset managers to automate ESG investing.<sup>91</sup> For example, quantitative GHG disclosure can be programmed into an algorithm that screens companies on climate without anyone having to wade through narrative risk disclosures. This in turn allows asset managers to advertise their sensitivity to clients’ ESG concerns while also minimizing the cost of designing and maintaining ESG portfolios.

Apparently unconcerned that catering to the interests of asset managers might be seen as an instance of regulatory capture, the SEC relied upon these interests to justify the disclosures:

[A]s several *institutional investor commenters* stated, investors need and many investors currently use this information to make investment or voting decisions. One of those commenters stated that GHG emissions information serves as the starting point for transition risk analysis because it is quantifiable and comparable across companies and industries. The commenter, an *institutional investor*, indicated that it uses GHG emissions data to rank companies within industries based on their GHG emissions intensity to better assess transition risk exposure of companies in its portfolio and make informed investment decisions.<sup>92</sup>

The SEC also notes that the rules are helpful in allowing asset managers make good on their own climate commitments:

As previously mentioned, several *large institutional investors* and *financial institutions*, which collectively have trillions of dollars in assets under management, have formed initiatives and made commitments to achieve a net-zero economy by 2050, with interim targets set for 2030. These initiatives further support the notion that investors *currently need and use GHG emissions data* to make informed investment decisions. These investors and financial institutions are working to reduce the GHG emissions of companies in their

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87. *See id.*, 87 Fed. Reg. at 21378

88. *Id.*, 87 Fed. Reg. at 21344.

89. *Id.*, 87 Fed. Reg. at 21376.

90. *Id.*, 87 Fed. Reg. at 21373.

91. *Id.*, 87 Fed. Reg. at 21410.

92. *Id.*, 87 Fed. Reg. at 21376 (emphasis added).

portfolios or of their counterparties and need GHG emissions data *to evaluate the progress made regarding their net-zero commitments . . .*<sup>93</sup>

These statements suggest the SEC was influenced by the interests of the asset management community in crafting disclosure rules for GHG emissions.

After a brief phase-in period, larger companies will be required to have an independent third party verify their Scope 1 and Scope 2 emissions disclosures.<sup>94</sup> The third party's attestation will begin with a "limited assurance" standard, meaning the attestant has not found the disclosures to be false but without any evaluation of the adequacy of the company's internal controls.<sup>95</sup> However, the attestation standard will later increase to require "reasonable assurance," including some evaluation of the adequacy of the company's internal controls regarding GHG reporting.<sup>96</sup> Although third parties performing the verification audit must meet minimum standards for expertise and independence, the proposed rules do not require the assurance provider to be a traditional auditing firm.<sup>97</sup>

### 3. *Financial Statement Disclosures*

In addition to the narrative disclosures outlined above, the proposed rules require registrants to make climate related disclosures in their annual financial statements.<sup>98</sup> Particularly, the proposed rules require registrants to disclose both direct and indirect costs associated with severe weather and efforts to mitigate emissions or other "transition activities."<sup>99</sup> The proposed rules also require registrants to detail in the notes to their audited financial statements how they arrived at these estimates and any assumptions underlying them.<sup>100</sup> Financial statement disclosures also include an implicit materiality threshold,<sup>101</sup> whereby disclosures are not required if the aggregate climate

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93. *Id.*, 87 Fed. Reg. at 21376 (emphasis added).

94. *Id.*, 87 Fed. Reg. at 21470 (to be codified at 17 C.F.R. § 229.1505(b)(1)).

95. *Id.*, 87 Fed. Reg. at 21469–70 (to be codified at 17 C.F.R. § 229.1505(a)(1), (c)).

96. *Id.*; *see also id.*, 87 Fed. Reg. at 21450 ("[R]easonable assurance on whether material weaknesses exist regarding management's assessment of the effectiveness of controls over GHG emissions disclosures as of the measurement date.").

97. *Id.*, 87 Fed. Reg. at 21470 (to be codified at 17 C.F.R. § 229.1505(b)(1)).

98. *Id.*, 87 Fed. Reg. at 21464 (to be codified at 17 C.F.R. § 210.14-01(a)).

99. *Id.*, 87 Fed. Reg. at 21464–65 (to be codified at 17 C.F.R. §§ 210.14-02(c) (impact of weather events), -02(d) (impact of transition activities), -02(e) (expense of mitigating weather events), -02(f) (expense of transition activities)).

100. *Id.*, 87 Fed. Reg. at 21464 (to be codified at 17 C.F.R. § 210.14-02(a)).

101. *See id.*, 87 Fed. Reg. at 21464 (to be codified at 17 C.F.R. § 210.14-02(b)(1)) (financial disclosure statements "[are] not required if the sum of the absolute values of all the impacts on the line item is less than one percent of the total line item for the relevant fiscal year.").

cost is less than one percent of the total line item for the relevant fiscal year.<sup>102</sup>

In focusing on severe weather events, the proposed rules assume causation. Registrants are required to make financial disclosure of direct and indirect costs associated with "severe weather events and other natural conditions, such as flooding, drought, wildfires, extreme temperatures, and sea level rise."<sup>103</sup> However, the link between these events and climate change is nowhere stated in the rules.<sup>104</sup> Presumably, these disclosures are triggered because they are somehow related to climate change—the over-arching subject matter of the rule release—but the connection is nowhere explained. The proposed rules offer neither a general basis for connecting severe weather to climate nor any specific standard for attributing particular weather events to climate. Instead, the proposed rules simply assume that climate change causes severe weather events and impose the assumption on registrants.

Registrants may depart from the SEC's assumptions and viewpoint on climate, but when they do so, they must state their reasons and describe any assumptions or "policy decisions" underlying their position.<sup>105</sup>

### III. DISCLOSURE MANDATES AND THE FIRST AMENDMENT

The First Amendment to the United States Constitution prevents the government from, among other things, "abridging the freedom of speech."<sup>106</sup> When the government, through agents such as the SEC, forces a person to speak, it abridges that person's freedom in the same way as it would were the government to prevent that person from speaking. Supreme Court cases generally do not distinguish "compelled speech" from "restraints" on speech in applying the protections

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102. *Id.*, 87 Fed. Reg. at 21464 (to be codified at 17 C.F.R. § 210.14-02(b)(1)).

103. *Id.*, 87 Fed. Reg. at 21464–65 (to be codified at 17 C.F.R. §§ 210.14-02(c) (direct costs), -02(e) (indirect costs)). Likewise, proposed rule 17 C.F.R. 229 provides no theory or basis for connecting severe weather events to climate change. *See generally id.*, 87 Fed. Reg. at 21436 (discussing severe weather events as a manifestation of climate costs but failing to provide any basis for assuming a causal relationship between changes in the climate and weather).

104. The proposed rules do conceive of differences between issuer's exposure to weather events—hurricanes may not be a risk to REIT's operating in Wyoming, for example. *See id.*, 87 Fed. Reg. at 21338, n.35 (offering post-hurricane flooding as an example). Nevertheless, the proposed rules consistently assume that severe weather is caused by climate change.

105. *See id.*, 87 Fed. Reg. at 21464 (to be codified at 17 C.F.R. § 210.14-02(a)) (requiring disclosure of "contextual information . . . including a description of significant inputs and assumptions used, and, if applicable, policy decisions made by the registrant to calculate the specified metrics.").

106. U.S. CONST. amend. I.

of the First Amendment.<sup>107</sup> However, a distinction has grown when the speech involves purely “commercial” matters as opposed to other subjects of expression. This is the so called “commercial speech doctrine.” The sections that follow describe the development of the commercial speech doctrine and the applicability of that doctrine to securities regulation.

### A. The Compelled Commercial Speech Doctrine

The Supreme Court invented the commercial speech doctrine in the 1942 case of *Valentine v. Chrestensen*, which upheld a New York City law banning the distribution of advertising leaflets.<sup>108</sup> Prior to *Chrestensen*, the distinction between commercial and political speech did not exist, and regulations of commercial speech were subject to the same protections as any other kind of speech.<sup>109</sup> The *Chrestensen* court, however, announced that although the First Amendment generally protects “the freedom of communicating information and disseminating opinion . . . the Constitution imposes no such restraint on government as respects purely commercial advertising.”<sup>110</sup> Unmoved by the merchant’s clever attempt to evade the law by printing his advertisement on the obverse of a protest pamphlet, the Court noted that, were it to extend First Amendment protection on that basis, “every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law’s command.”<sup>111</sup>

In denying any First Amendment protection to “purely commercial advertising,” *Chrestensen* thus granted the state full authority to regulate or suppress it. However, this breadth of authority did not long endure. In 1964, the Court narrowed *Chrestensen* by holding that the phrase “purely commercial advertising” did not encompass paid newspaper advertisements that “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objec-

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107. *W. Virginia 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 . . .”); *see also* *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that states may not compel citizens to display state motto on license plates).

108. *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

109. Commercial speech, in other words, was not among the classes of so-called “unprotected” speech. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words”).

110. *Valentine v. Chrestensen*, 316 U.S. at 54.

111. *Id.* at 55.

tives are matters of the highest public interest and concern."<sup>112</sup> In 1973, the Court clarified that *Chrestensen* applied principally to speech that "did no more than propose a commercial transaction" and not to speech that "expresses a position on . . . a matter of social policy" or criticizes a law or its enforcement.<sup>113</sup> Soon thereafter, the Court invalidated a ban on abortion advertising on the basis that the speech in question communicated information of "clear 'public interest.'"<sup>114</sup> The gating distinction—whether there was a matter of social or political interest or whether, by contrast, the communication was "purely commercial"—determined whether the communication in question was within the scope of First Amendment protection.

*Chrestensen* was ultimately overruled in 1976 by the Court's decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*<sup>115</sup> There the Court squarely confronted "purely commercial" speech but nevertheless held that the state did not have unbounded authority to regulate it.<sup>116</sup> The case involved an occupational licensing board that had banned the advertisement of prescription drug prices as a form of "unprofessional conduct."<sup>117</sup> Hence, the only relevant speech content was the price of an everyday product, not an issue of social or political concern. Nevertheless, the Court struck down the regulation, emphasizing the value of the information to its intended audience—consumers. "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."<sup>118</sup> Although it acknowledged several examples where purely commercial advertising might implicate broader social or political concerns, the Court ultimately concluded that "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn" because the free-flow of information is vitally important to consumers operating in a market econ-

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112. *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964).

113. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 385 (1973).

114. *Bigelow v. Virginia*, 421 U.S. 809, 822, (1975) (specifying further that statements that "'Abortions are now legal in New York. There are no residency requirements,' involve the exercise of the freedom of communicating information and disseminating opinion.>").

115. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) ("Our question is whether speech which does no more than propose a commercial transaction, . . . is so removed from any exposition of ideas, . . . that it lacks all protection. Our answer is that it is not.") (citations and internal quotations omitted).

116. *Id.* at 769–70.

117. *Id.* at 752.

118. *Id.* at 763.

omy.<sup>119</sup> Thus, even though occupational licensing has been held constitutional on other grounds, the First Amendment does not permit otherwise permissible regulatory interests to suppress the flow of information to consumers.<sup>120</sup>

With *Virginia Board*, consumer protection becomes the central justification for attempts to regulate commercial speech. If, in a market economy, we are to look to the interests of consumers, the state may claim a right to regulate speech that in some way harms consumers, most obviously by deceiving or misleading them.<sup>121</sup> Because consumers have no interest in false or misleading information, states may freely regulate it.<sup>122</sup>

The Court clarified the commercial speech doctrine four years later in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>123</sup> In that case, the state prohibited public utilities from promoting the use of electricity in their advertising.<sup>124</sup> As in *Virginia Board*, there was no claim that advertising was false or misleading.<sup>125</sup>

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119. *Id.* at 764–65 (“So long as we preserve a predominantly free enterprise economy, the allocation of our resources . . . will be made through numerous private economic decisions. It is a matter of public interest that those decisions . . . be intelligent and well informed. To this end, the free flow of commercial information is indispensable.”).

120. *Id.* at 767–70. In reaching this conclusion, the Court expressly addressed several earlier decisions holding that the due process and equal protection clauses permitted the regulation of business. *See, e.g., Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory [sic] of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”). The Court implied that these cases might have been decided differently on First Amendment grounds.

121. *Id.* at 771–72 (“The First Amendment, as we construe it today does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”).

122. The reverse side of this rationale, however, is that the public’s interest in receiving accurate and truthful commercial information implies that such information is protected by the First Amendment. As the Court later articulated it: “*Virginia Bd. of Pharmacy* reflected the conclusion that the same interest that supports regulation of potentially misleading advertising, namely, the public’s interest in receiving accurate commercial information, also supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and non-misleading commercial messages.” *Liquormart, Inc., v. Rhode Island*, 517 U.S. 484, 496 (1996).

123. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557 (1980).

124. *Id.* at 558–60.

125. The Court treated false or misleading advertising as lying wholly outside of constitutional protection. “The First Amendment’s concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.” *Id.* at 563–64 (citations omitted).

Instead, the state justified its content-based regulation as an attempt to encourage conservation.<sup>126</sup> In evaluating the advertising ban, the Court affirmed "the 'commonsense' distinction" between commercial and other forms of speech, by which is meant "lesser protection to commercial speech."<sup>127</sup> Nevertheless, the Court in *Central Hudson* articulated a test providing considerable constitutional protection to commercial speech. In order to be upheld, restrictions on commercial speech must (1) advance a "substantial" government interest,<sup>128</sup> and (2) be no more restrictive than necessary, as measured by two criteria: (a) it must "directly advance" the state interest, providing more than "only ineffective or remote support,"<sup>129</sup> and (b) be "no more extensive than necessary" to achieve the state's ends.<sup>130</sup> This level of judicial scrutiny, which the Court later described as a form of "intermediate scrutiny," is substantially greater than that offered under the traditional rational basis test.<sup>131</sup>

The Supreme Court extended the commercial speech doctrine to compelled speech in 1985 in *Zauderer v. Office of Disciplinary Council*.<sup>132</sup> In *Zauderer*, Ohio had attempted to regulate attorney advertising in three ways: first, through a ban on the inclusion of legal advice or information in advertisements; second, through a ban on the use of illustrations in advertisements; and third, through a requirement that attorneys advertising "no fee" contingency services also include a statement that unsuccessful litigants might be liable for court costs, if not attorney fees.<sup>133</sup> All three of the regulations involved commercial speech,<sup>134</sup> and as the Court summarized the law in the area, "[c]ommercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that di-

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126. *Id.* at 559–60.

127. *Id.* at 562–63.

128. *Id.* at 564.

129. *Id.*

130. *Id.* at 570. This aspect of the *Central Hudson* test, the Court later explained, requires a fit "that is not necessarily perfect, but reasonable." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (citing *In Re R.M.J.*, 455 U.S. 191 (1982)).

131. *Milavetz, Gallop & Milavetz P.A. v. United States*, 559 U.S. 229, 249 (2010) (describing *Central Hudson* as holding that "restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny").

132. *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626 (1985).

133. *Id.* at 638. *Zauderer* was one of a spate of attorney advertising cases to reach the Supreme Court. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *In re RMJ*, 455 U.S. 191 (1982); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

134. *Id.* at 637 ("[A]dvertisements undeniably propose a commercial transaction. Whatever else the category of commercial speech may encompass, it must include appellant's advertisements.") (citation omitted).

rectly advance that interest.”<sup>135</sup> Finding that neither of the first two regulations involved false or misleading statements, the Court applied *Central Hudson* to strike both.<sup>136</sup> This left the third regulation—the disclosure concerning costs—as the sole surviving claim.

The *Zauderer* court rejected the argument that the same constitutional analysis should apply to the compelled speech mandate as applied to the two speech restrictions.<sup>137</sup> Although it acknowledged that compelled speech receives the same constitutional protections as prohibitions on speech in other contexts,<sup>138</sup> the Court distinguished ordinary speech cases from the commercial context.<sup>139</sup> Because, following *Virginia Board*, the commercial speech doctrine is grounded on providing information to consumers, the Court held that “the constitutionally protected interest in *not* providing any particular factual information . . . is minimal.”<sup>140</sup> In reaching this conclusion, the Court emphasized that the state was requiring the disclosure only of “purely factual and uncontroversial information.”<sup>141</sup> Under the circumstances, the Court held that the speaker’s interests were “adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”<sup>142</sup> Because the distinction between fees and costs could easily elude, and thereby mislead prospective clients, the Court upheld the disclosure in light of the state’s interest in preventing deceptive advertising.<sup>143</sup>

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135. *Id.* at 638 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n. of N.Y.*, 447 U.S. 557, 566).

136. *Id.* at 639–49 (holding in each case the state had failed in its burden to establish a sufficiently strong government interest to justify regulation). The Court relied on *Central Hudson* to reach each conclusion. For example, the Court cited *Central Hudson* as the basis for its “insistence that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the State’s purposes.” *Id.* at 644 (citing *Central Hudson*, 447 U.S. at 565, 569–571). Likewise, with regard to the latter holding, the Court stated its premise that “restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test.” *Id.* at 647.

137. *Id.* at 650 (stating that applying the same analysis “overlooks material differences between disclosure requirements and outright prohibitions on speech”).

138. *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705, (1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943)).

139. *Id.* at 651 (stating that “the interests at stake in this case are not of the same order” because the state has not “attempted to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion’” but has “attempted only to prescribe what shall be orthodox in commercial advertising”) (citations omitted).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 652–53.



Although *Zauderer* introduced ambiguities into First Amendment doctrine, the decision does make some things clear.<sup>144</sup> First, *Zauderer* is clear in distinguishing between commercial and other forms of speech. Speech is less protected in a commercial context than in other speech contexts. When regulations *prohibit* speech in a commercial context, *Zauderer* is clear in applying *Central Hudson* to require a close fit between the prohibition and the state's regulatory interest. When regulations *compel* speech in a commercial context, *Zauderer* allows for a lesser standard of scrutiny, provided that the government only seeks disclosure of "purely factual and uncontroversial information."<sup>145</sup> In subsequent cases, the Supreme Court has emphasized that *Zauderer* triggers a standard of judicial review that is "less exacting" than the applicable standard under *Central Hudson*.<sup>146</sup>

But when does *Zauderer* apply? The *Zauderer* court specifically addressed its analysis to regulations aimed at preventing deception, not at advancing some other state interest.<sup>147</sup> This is consistent with the commercial speech doctrine's greater tolerance for regulations aimed at preventing consumers from being deceived or misled.<sup>148</sup> However,

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144. The most notable ambiguity is the meaning of "uncontroversial." See Berman, *infra* notes 151–158 and accompanying text. However, commentators also debate the relationship between *Zauderer* and *Central Hudson*. Compare, e.g., Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 882 (2015) ("*Zauderer* consciously repudiated the *Central Hudson* test in the context of compelled commercial speech"), with Jonathan H. Adler, *Compelled Commercial Speech and The Consumer "Right To Know"*, 58 ARIZ. L. REV. 421, 434 (2016) ("*Zauderer*, properly understood, is but an application of the underlying *Central Hudson* framework . . .").
145. Under *Zauderer*, only a "reasonable" relationship between the regulation and the state's interest in preventing deception is necessary. The Court understands "reasonable" as a (lesser) alternative to "least restrictive means" analysis. *Id.* at 651 ("Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized.").
146. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249–53 (2010) (referring to "the less exacting scrutiny described in *Zauderer*").
147. *Zauderer*, 471 U.S. at 638 (summarizing the law to allow government to "prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction. Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.") (citations omitted).
148. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Some Circuits, including the Third, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh follow this logic to limit application of *Zauderer* to regulations targeting consumer deception. See *Nat'l Ass'n of Mfrs. v. S.E.C.*, 800 F.3d 518, 528–29 (D.C. Cir. 2015); *Dwyer v. Cappell*, 762 F.3d 275, 283 (3d Cir. 2014); *Handsome Brook Farm v. Humane Farm Animal Care*, 700 Fed.App'x 251, 258 (4th Cir. 2017); *Pub. Citizen Inc. v. Louisiana Att'y Disciplinary Bd.*, 632 F.3d

not every court applying *Zauderer* has limited its scope to the context of consumer deception.<sup>149</sup> The Supreme Court has not yet settled the question whether deference under *Zauderer* is available only for regulations aimed at preventing consumer deception, although some Justices have addressed the issue, suggesting that it is ripe for decision.<sup>150</sup>

The critical ambiguity, however, is in the meaning of “uncontroversial.” In the wake of *Zauderer*, some commentators argued that “uncontroversial” did not present an independent element, but rather a qualification of “factual” to mean something like uncontested or indisputably true.<sup>151</sup> Some circuit courts adopted this approach, holding that *Zauderer* was satisfied as long as the disclosure mandate was, in this sense, factual.<sup>152</sup> However, the Supreme Court revived the independent significance of “uncontroversial” in its 2018 opinion in *NIFLA*

212, 227 (5th Cir. 2011); *Ent. Software Ass’n v. Blagojevich*, 469 F.3d 641, 652–53 (7th Cir. 2006); *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 541 F.3d 785, 795–96 (8th Cir. 2008); *U.S. v. Wegner*, 427 F.3d 840, 850 (10th Cir. 2005); *Tillman v. Miller*, No. 1:95-CV-1594-CC, 1996 WL 767477 at \*2–3 (N.D. Ga. Sept. 30, 1996), *aff’d*, 133 F.3d 1402 (11th Cir. 1998).

149. Circuits that apply *Zauderer* to a broader set of regulatory purposes beyond preventing consumer deception include the First, Second, Sixth, Ninth, and D.C. Circuits. *See* *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005); *National Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001); *Discount Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, 530 (6th Cir. 2012); *CTIA—The Wireless Ass’n v. City of Berkeley*, 854 F.3d 1105, 1117, (9th Cir. 2017); *Am. Beverage Ass’n v. City and Cnty. of San Francisco*, 871 F.3d 884, 892 (9th Cir. 2017).

150. For example, Justice Thomas has written:

I have never been persuaded that there is any basis in the First Amendment for the relaxed scrutiny this Court applies to laws that suppress nonmisleading commercial speech. . . . I am skeptical of the premise on which *Zauderer* rests—that, in the commercial-speech context, “the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed.” . . . Accordingly, I would be willing to reexamine *Zauderer* and its progeny in an appropriate case to determine whether these precedents provide sufficient First Amendment protection against government-mandated disclosures.

*Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 255–56 (2010) (Thomas concurring) (citations and internal quotations omitted).

151. Micah L. Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U. J.L. & POLY 53, 65 (2016) (“[T]he ‘factual and uncontroversial’ limitation is best read as a check to ensure that any mandated statement is factually accurate (or factually uncontroversial).”); Seana Valentine Shiffrin, *Compelled Speech and the Irrelevance of Controversy*, 47 PEPP. L. REV. 731, 738 (2020) (arguing for the treatment of “uncontroversial” as “a useful redundancy, not an independent factor”).
152. *See, e.g., Disc. Tobacco Cty. & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (focusing the test on whether disclosures are “factual or accurate”); *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc) (focusing on the meaning of controversial as a “dispute about simple factual accuracy”).

*v. Becerra*.<sup>153</sup> In that case, the Court reviewed a California regulation requiring religiously affiliated pregnancy counseling centers to advise clients that abortions could be obtained at no financial cost through state clinics and to provide clients with the telephone number of a nearby clinic. Whatever else it may be, this information is factual. It is plainly non-normative, non-speculative, objectively true, uncontested, and indisputably relevant to at least some pregnant women. Yet the Supreme Court refused to apply *Zauderer* because the regulation "concerned abortion, hardly an "uncontroversial" topic."<sup>154</sup> In doing so, the Court rejected any interpretation of "purely factual and uncontroversial" in which uncontroversial merely clarifies some aspect of factual.<sup>155</sup> *NIFLA* plainly requires that "uncontroversial" be given independent significance from "factual." However, *NIFLA* offered no further guidance on what the meaning of "uncontroversial" might be or how a judge might find it.

There is a great deal—namely, governmental authority to engage in vast swaths of consumer protection regulation—riding on this determination.<sup>156</sup> In spite of this, courts are no closer to articulating exactly what the "uncontroversial" element requires. Few circuit courts have wrestled with the issue since *NIFLA*.<sup>157</sup> Commentators likewise have been unable to provide a coherent theory of "uncontroversial" that gives it independent significance from factual. This lacuna in the doctrine invites judges to define controversy much as Justice Stewart once defined obscenity,<sup>158</sup> thus leaving the future of consumer protection to turn on what might ultimately become a series of unprincipled and therefore unpredictable decisions.

## B. SEC Exceptionalism

Where does the development of First Amendment doctrine leave securities regulation? The securities laws, after all, consist primarily

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153. Nat'l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361 (2018).

154. *Id.* at 2372 ("[*Zauderer*] is limited to 'purely factual and uncontroversial information about the terms under which . . . services will be available.' . . . Accordingly, *Zauderer* has no application here.") (citations omitted).

155. See Shiffrin, *supra* note 151; Berman, *supra* note 151.

156. Writing in dissent, Justice Breyer expressed the worry that the wrong interpretation of "uncontroversial" could put much settled law at risk. Nat'l Inst. of Fam. & Life Advocates v. Becerra, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting) ("the majority's view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted.")

157. See, e.g., CTIA—The Wireless Ass'n v. City of Berkeley, 854 F.3d 1105 (9th Cir. 2017) (applying *Zauderer* to regulation requiring retailers to inform consumers that carrying cell phones could expose them to highly levels of radio-frequency radiation).

158. *Jacobellis v. Ohio*, 84 S. Ct. 1676, 1683 (1964) ("I know it when I see it.") (Stewart, J., concurring).

of rules either prohibiting or compelling speech. Securities laws regulate when, how, and to whom public companies can release information. And they compel a vast amount of disclosures in the offering process, in financial statements, in annual reports, in the solicitation of proxies, and in connection with significant corporate events such as material contracts, acquisitions, and changes in listing status. It is sometimes said that the whole of securities law can be summarized in one word: disclosure.<sup>159</sup> But really it is two words: compelled speech.

It is an understatement to say that such laws fit uneasily within a constitutional system that prevents the government from abridging the freedom of speech. Of course, most professors of securities law do not consider their specialty to be unconstitutional.<sup>160</sup> But their reasons for rejecting the argument amount largely to a shrug: It has always been this way, at least since 1933, and no court has yet invalidated the securities laws as a violation of the First Amendment.<sup>161</sup> Hence, it must be the case that the securities laws are constitutionally valid because, for some reason, doctrines that suggest they are invalid do not apply.

There is, in other words, a claim for a kind of constitutional exceptionalism for securities law. The best version of this argument, articulated by Professor Schauer, offers a theory of the limits of the First Amendment and argues that securities regulation somehow lies out of bounds. Against this claim is the argument that the First Amendment, along with every other clause of the Constitution, does indeed apply to securities regulation with the likely result that securities regulation is constitutionally invalid.<sup>162</sup>

To understand this debate, it is best to separate two distinct questions. First, we must consider whether the First Amendment applies to the corporate disclosures that are the subject of securities regulation. Only after answering this threshold question do we reach the second question of whether the securities laws could survive serious First Amendment scrutiny. As we shall see, the answers scholars have given to these questions amount, essentially, to an all-or-nothing proposition. Either the securities laws lie outside the bounds of the First Amendment, in which case nothing the SEC can do would raise First Amendment concerns. Alternatively, First Amendment protections invalidate everything the SEC has ever done. Neither of these alterna-

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159. See LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION 33 (Little, Brown, & Co. 2d ed. 1988).

160. See *infra* note 167.

161. See *infra* subsection III.B.1 (discussing the “absence of evidence/evidence of absence” problem found in the professors’ amicus brief).

162. See *infra* subsection III.B.2 (discussing Wolfson, Drury, and others in this tradition.)

tives can be right. The Hobson's choice must send us forth in search of an alternative interpretive rubric.

1. *Is the First Amendment Applicable to Securities Law?*

Securities regulation plainly affects "speech" in any common sense understanding of the term.<sup>163</sup> Moreover, there is no doubt that corporations possess sufficient constitutional rights to assert First Amendment claims. There is, however, a tradition of treating the corporate disclosures that are the subject of the securities regulatory regime as outside of the scope of First Amendment protection, along with defamation and obscenity.<sup>164</sup> This is the threshold question of coverage. Even granting that securities regulation inevitably affects speech, does that speech come within the ambit of First Amendment protections?

Two Supreme Court cases from the 1970s suggest, in dicta, that securities regulation might lie outside of the coverage of the First Amendment. In *Paris Adult Theatre I*, a 1973 obscenity case, the Court noted that securities laws have validly "regulated public expression by issuers and dealers in securities . . . commanding what they must and must not publish and announce."<sup>165</sup> In *Ohralik*, a 1978 attorney advertising case, the Court observed that "[n]umerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities [and] corporate proxy statements."<sup>166</sup> The Court's observations in each of these cases suggest that it viewed securities regulation as presumptively valid notwithstanding the First Amendment.

Thirty years later, a collection of preeminent securities law professors used these cases in an amicus brief to argue that the securities laws "lie outside the boundaries of the First Amendment."<sup>167</sup> But the

163. Roberta S. Karmel, *Introduction: The First Amendment and Government Regulation of Financial Markets*, 55 *BROOK. L. REV.* 1, 1 (1989) ("Securities regulation is essentially the regulation of speech."); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 *HARV. L. REV.* 1765, 1778 (2004) (referring to the SEC as the "Content Regulation Commission").

164. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

165. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61–62 (1973).

166. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). On the spate of pre-*Zauderer* attorney advertising cases, see *supra* note 133.

167. Brief for Law Professors as Amicus Curiae in Opposition to Motion to Dismiss at 20, *SEC v. Siebel Sys., Inc.*, 384 F. Supp. 2d 694 (S.D.N.Y. 2005) (No. 04 CV 5130) (signed by John C. Coffee, Jr., Alan R. Bromberg, James D. Cox, Melvin A. Eisenberg, Jill E. Fisch, Theresa A. Gabaldon, Thomas Lee Hazen, Howell Jackson, Donald C. Langevoort, Ronald M. Levin, Henry Monaghan, Donna M. Nagy, Neil M. Richards, Margaret V. Sachs, Hillary A. Sale, Joel Seligman, Larry D. Soderquist, Marc I. Steinberg, Lynn Stout, Steven Thel, Robert B. Thompson, and William K.S. Wang).

statements made in these cases constitute dicta, and dicta, because it is not part of the holding, lacks precedential authority.<sup>168</sup> Worse, the law professors' argument uses absence of evidence (of cases invalidating securities regulations under the First Amendment) as evidence of absence (of First Amendment inapplicability to securities regulation). Worse still, the statements the professors would like to invoke were made by the Supreme Court *before* it had fully developed the commercial speech paradigm. *Paris Adult Theatre I* was decided three years prior to *Virginia Board*, at a time when *Crestensen* was still good law, and commercial speech remained largely unprotected. Likewise, *Ohralik*, a case involving compelled commercial speech, was decided seven years before *Zauderer*, the case in which the doctrine matured to its present form. In the older cases, the Court is speaking from a time when the relevant doctrinal paradigm did not yet exist.<sup>169</sup> More broadly, the general perception that securities regulation lies somehow outside of the scope of the First Amendment may reflect the fact that these laws came into being at a time when commercial speech was largely unprotected. The securities regulatory regime had reached full maturity by the time the commercial speech paradigm finally emerged in the 1970s and 1980s. As a result, entire generations of securities law scholars and practitioners grew up taking its constitutionality for granted.

More recent cases express doubt that First Amendment principles are inapplicable to securities regulation. For example, in *Lowe v. SEC*, the Court relied on a statutory exemption to avoid deciding the constitutional question but noted that "it is difficult to see why the expression of an opinion about a marketable security should not . . . be protected" under the First Amendment.<sup>170</sup> Lower courts have been even less willing to give the SEC a constitutional free pass. For example, in *SEC v. Wall Street Publishing Institute*, the D.C. Circuit noted that although the First Amendment may provide only limited protection in the context of securities regulation, "it would be an overstatement to assert that the First Amendment does not limit regulation in

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168. 20 AM. JUR. 2D *Courts* § 33 (1998).

169. A third case cited by the professors is from 1985, the same year as *Zauderer*. See Professors' Amicus Brief, *supra* note 167, at 18 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758, n.5 (1985)). However, the Court's statement in *Dun & Bradstreet* is dicta on dicta or, if you like, dicta squared. The *Dun & Bradstreet* court makes no statement of its own concerning the relationship between securities regulation and the First Amendment. Instead, it merely cites *Ohralik* as one in a string of cases in which First Amendment principles were applied deferentially. The citation is not central to the holding of the case, the subject of which is defamation, not securities regulation. Moreover, it appears in a single footnote of a three-judge plurality opinion. In no way does the case stand for the principle of securities law exceptionalism that the professors would like to take from it.

170. *Lowe v. SEC*, 472 U.S. 181, 210 n.58 (1985).

the securities field.”<sup>171</sup> Most recently, the D.C. Circuit demonstrated its willingness to apply First Amendment principles to securities laws in the “conflict minerals” cases.<sup>172</sup>

The conflict minerals cases involved a First Amendment challenge to regulations that required public companies to disclose whether they used or traded in certain raw materials originating from the Democratic Republic of the Congo.<sup>173</sup> After the district court upheld the regulations,<sup>174</sup> the D.C. Circuit reversed, invalidating the regulations under *Central Hudson*<sup>175</sup> and observing that the disclosures likely did not qualify as “uncontroversial” under *Zauderer*.<sup>176</sup> After an *en banc* decision in the D.C. Circuit extended *Zauderer* beyond the context of misleading or deceptive speech,<sup>177</sup> the D.C. Circuit revisited the case,<sup>178</sup> reaffirming the result, this time basing its conclusion exclusively on the ground that the requisite disclosure was not “uncontroversial” under *Zauderer*.<sup>179</sup>

The conflict minerals cases are especially instructive. Unlike the proposed climate rules, which the SEC has sought to promulgate under its own authority, the SEC issued the conflict mineral rules pursuant to an express Congressional mandate. The SEC had unambiguous statutory authority to adopt the rules. Nevertheless, the statutory authority did not insulate the rules from constitutional

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171. *SEC v. Wall Street Publishing Institute*, 851 F.2d 365, 373 (D.C. Cir. 1988); see also *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1109 (D.C. Cir. 2011) (concluding that while securities law “involves a different balance of concerns and calls for different applications of First Amendment principles” those principles nevertheless apply) (internal citations omitted).

172. *Nat’l Ass’n of Mfrs. v. SEC*, 956 F. Supp. 2d 43 (D.D.C. 2013) [*hereinafter NAM I*]; *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014) [*hereinafter NAM II*]; *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015) [*hereinafter NAM III*].

173. *Conflict Minerals*, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249b) (the “Conflict Minerals Rule”). The regulations were promulgated by the SEC under the authority of the Dodd-Frank Act of 2010. 15 U.S.C. § 78(m).

174. *NAM I*, *supra* note 172 (holding that *Zauderer* did not apply because the regulations were not merely aimed at preventing misleading or deceptive speech).

175. *NAM II*, *supra* note 172. Interestingly, both courts found the application of First Amendment principles to SEC rulemaking unproblematic, and both held that *Zauderer* did not apply because the regulations in question went beyond preventing misleading or deceptive speech, differing only on their application of *Central Hudson*.

176. *Id.* at 371 (“By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment.”).

177. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014).

178. *NAM III*, *supra* note 172.

179. *Id.* at 527 (“However persuasive we might find the intervenors’ argument, we see no way to read *AMI* except as holding that—to quote *AMI—Zauderer* requires the disclosure to be of ‘purely factual and uncontroversial information’ about the good or service being offered. We are therefore bound to follow that holding.”) (internal citations omitted).

challenge. Moreover, once the First Amendment was raised, the court did not treat the securities laws as somehow immune from First Amendment scrutiny. The “out of bounds” argument is discussed nowhere in the opinions and was apparently never raised in court. Instead, the court focused on the question whether the rules were “uncontroversial” under *Zauderer* and, finding controversy, applied *Central Hudson*’s intermediate scrutiny standard, which the rules failed to satisfy.

Still, putting all the inconsistencies with actual juridical practice aside, what coherent theoretical justification could there be for treating securities regulation as outside of the scope of the First Amendment? Here, the strongest case is made by Professor Schauer who argued in a series of articles that the securities laws lay largely outside the coverage of the First Amendment.<sup>180</sup> Schauer’s basic claim, cited by the law professor *amici*, is that when a legal rule targets a form of conduct of which speech is an integral part—such as rules against price fixing, fraud, or conspiracy—the First Amendment does not apply in spite of the fact that the rule regulates speech.<sup>181</sup> The target of the law is not speech but an act of which speech may be an integral part. In Schauer’s words:

It is not that the speech is not protected. Rather, the entire event—an event that often involves “speech” in the ordinary language sense of the word—does not present a First Amendment issue at all, and the government’s action is consequently measured against no First Amendment standard whatsoever. The First Amendment just does not show up.<sup>182</sup>

In such cases, that is, courts refrain from even applying the First Amendment at all. Securities regulation is a prime example of Schauer’s theory.<sup>183</sup>

One problem with this theory is that it is borderline tautology. Although speech is an integral part of securities transactions, we define the event we are regulating as the securities transaction, not speech. Once speech is defined out of the picture, we can say that the First Amendment does not apply because the regulation is about something other than the definition. All the work is in the definition of the regulation’s subject matter. It must be this way, Schauer says, else we could never regulate fraud (contracting necessarily involves speech) or

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180. See Frederick Schauer, *The Aim and the Target in Free Speech Methodology*, 83 Nw. U. L. REV. 562, 563 (1989). (“Perhaps the law *should* examine the securities, antitrust, fraud, perjury, labor, and criminal laws through a First Amendment lens. But it doesn’t. . . . [T]here are uses of language for communicative purposes that lie . . . far outside the coverage of the First Amendment . . .”).

181. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004).

182. *Id.*

183. *Id.* at 1778 (“A prime example of speech residing almost imperceptibly outside the First Amendment’s boundaries is the speech that is the primary target of federal securities regulation.”).



conspiracy (at least when the parties verbally assent) or any number of other examples. So, we define the rule as being somehow not about speech. But are not the same kind of definitional subtleties available in those areas where the First Amendment does apply? For example, burning the flag could be defined not as speech but as, well, burning the flag.<sup>184</sup> Black armbands could be defined as a dress code violation, not speech.<sup>185</sup> Political contributions could be defined as expenditures of money, not speech.<sup>186</sup> The whole game is in defining the activity as speech or as something else. Once speech is not recognized as the central aspect of an activity, it becomes fair game for regulation. Define it the other way, however, and the First Amendment applies. All we are doing is defining an act to be within or without the scope of the First Amendment. And the definitional work is largely arbitrary.

Schauer, in other work, provides some basis for arguing that such distinctions are not entirely arbitrary. Most relevant here is his "Institutional Theory" of the First Amendment. This theory would have us look to the "institutional environment in which the speech occurs."<sup>187</sup> Does the speech emerge from a college classroom or the institutional press?<sup>188</sup> Alternatively, does it involve a private communication between individuals engaged in some joint activity, like trading securities or conspiring to rob a bank?<sup>189</sup> Schauer's claim is that consideration of the institutional environment can be used to distinguish areas of special First Amendment concern from areas of wider regulatory latitude.<sup>190</sup> The First Amendment is particularly solicitous of institutions such as universities and the press.<sup>191</sup> It is not typically concerned with communications between individuals designed to achieve private ends.

Following Schauer, commentators have applied the "Institutional Theory" to securities regulation. Notably, Professor Siebecker used

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184. See *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that Johnson's burning of the American flag was protected speech under the First Amendment).

185. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that public school students wearing black armbands to protest the Vietnam War is a form of pure speech protected by the First Amendment).

186. See, e.g., *Randall v. Sorrell*, 548 U.S. 230 (2006) (overturning a state law limiting campaign contributions as a violation of the First Amendment). The examples go on: banning obscenity is not about speech, it is about obscenity (appealing to prurient interests). Sure, speech is used to appeal to prurient interests, but it's the appeal to prurient interests we're interested in, not the speech.

187. Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1256 (2005).

188. *Id.*

189. Schauer, *supra* note 181, at 1801–02.

190. Schauer, *supra* note 187, at 1274 ("I want to suggest that a certain number of existing social institutions . . . serve functions that the First Amendment deems especially important, or may carry risks that the First Amendment recognizes as especially dangerous.").

191. *Id.* at 1274–75.

the framework as “a theoretical hook for maintaining a robust securities regulation regime,”<sup>192</sup> arguing that the “social importance” of the institution of securities regulation supports “carving [it] out. . . from the First Amendment’s reach.”<sup>193</sup> Because, in his view, the securities regulatory regime is “among the most important institutions in the United States,”<sup>194</sup> and subjecting it to First Amendment scrutiny would destroy it,<sup>195</sup> Siebecker argues that the institutional theory provides a principled basis for excluding the securities laws from application of the First Amendment.<sup>196</sup>

But what is the operative principle here? Is it not merely the decision that the underlying area of law is important. Very, very important, perhaps. Once we are so decided, Siebecker’s analysis allows us to shield that area of law from application of the constitution. But this is precisely backwards. The constitution trumps statutes, not vice versa. As important as the securities laws may be, they do not trump the Constitution of the United States. Nor is it clear that Siebecker’s argument is a faithful application of Schauer’s framework. Schauer claimed only to use institutional analysis to identify areas where courts should be especially attentive to First Amendment concerns, not areas where courts can disregard the First Amendment altogether.<sup>197</sup>

Regardless of whether it faithfully applies Schauer’s institutional framework, Siebecker’s result—carving an area entirely out of First Amendment application—is consistent with Schauer’s earlier claim that there are in fact boundaries beyond which First Amendment protections cannot (or, at least, do not) proceed.<sup>198</sup> Schauer regularly used securities law as an example of an area on the other side of the boundary, thus effectively carving it off from First Amendment protection.<sup>199</sup> Siebecker and Schauer thus arrive at the same place. The se-

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192. Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 619–20 (2006).

193. *Id.* at 619–20.

194. *Id.* at 651.

195. *Id.* at 656–70.

196. *Id.* at 674 (“Applied to the realm of securities regulation, then, the institutional approach provides a sufficiently strong intellectual anchor to keep the system of mandatory reporting and disclosure embedded in the U.S. securities laws outside the First Amendment’s reach.”). Professor Siebecker even doubled down on this argument in another paper of his: Michael R. Siebecker, *Securities Regulation, Social Responsibility, and a New Institutional First Amendment*, 29 J.L. & POL. 535 (2014).

197. See Schauer, *supra* note 187, at 1274.

198. Schauer, *supra* note 181, at 1765–66.

199. See, e.g., Schauer, *supra* note 180 (“Perhaps the law should examine the securities . . . laws through a First Amendment lens. But it doesn’t.”); Schauer, *supra* note 181, at 1771 (“Securities violations, antitrust violations, criminal sollicita-

curities regulatory regime is either in or out of the First Amendment. If it is in, the government is restricted in the regulations it can promulgate, perhaps to such a degree that the field itself becomes unstable. If it is out, then no such restrictions exist. Siebecker, Schauer, and the law professor *amici* have concluded that it is out. The result is, to borrow a phrase, that all is permitted.<sup>200</sup>

## 2. *Is Securities Regulation Constitutionally Valid?*

The flip side of the argument for insulating securities regulation from First Amendment scrutiny is the claim that application of the First Amendment necessarily invalidates the securities laws. Professor Nicholas Wolfson is among those to have pressed this claim.<sup>201</sup> Wolfson's central argument was that the distinction made in First Amendment jurisprudence between commercial speech and ordinarily protected speech is untenable when applied to securities regulation.<sup>202</sup> He argued that the corporate speech that is the subject of mandatory disclosures often cannot be distinguished from political or artistic expression.<sup>203</sup> As a result, such speech deserves full First Amendment protection which, he claimed, would invalidate essentially all SEC regulation.

Professor Michael P. Dooley critiqued Wolfson's thesis as soon as it appeared. Dooley argued first that the vast majority of securities regulation does not involve political speech but rather mundane capital

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tion, and many other categories of 'speech' remain uncovered by the First Amendment . . .").

200. See FYODOR DOSTOEVSKY, *THE BROTHERS KARAMOZOV* (Farrar, Straus and Giroux, 12th ed. 2002) (1879–1880) (character reporting that "I asked him, 'without God and immortal life? All things are permitted then . . . ?"). The phrase was first borrowed from Dostoevsky by Sartre. JEAN-PAUL SARTRE, *EXISTENTIALISM IS A HUMANISM* (Walter Kaufman, Meridian Publishing Company, 1989 ed. 1946) ("Dostoevsky had written: 'If God did not exist, all would be permitted.'").

201. See Nicholas Wolfson, *The First Amendment and the SEC*, 20 CONN. L. REV. 265, 275 (1988). See also NICHOLAS WOLFSON, *CORPORATE FIRST AMENDMENT RIGHTS AND THE SEC* (1990) (elaborating the argument in extended form).

202. See Wolfson, *supra* note 201, at 266 ("[T]here should not, and does not, exist a meaningful distinction between commercial speech and political-artistic speech"). See also Henry N. Butler & Larry E. Ribstein, *Corporate Governance Speech and the First Amendment*, 43 U. KAN. L. REV. 163, 163–65 (1994) (comparing corporate speech with political speech).

203. In his words:

Virtually all of political speech is a dialogue involving economic self-interest. Farmers demand relief against supposedly oppressive bank credit. Their speech is political and protected. Their economic self-interest is obviously not to be denied. Bankers demand more or less regulation depending upon which kinds of banks they represent. Their speech is political. Their interest is selfish and economic. Ministers demand tax breaks for their dwellings. Their vocation is divine; their speech is political; their interest in this regard is economic.

Wolfson, *supra* note 201, at 300.

raising activities.<sup>204</sup> Because the typical subject matter of securities regulation is not political speech,<sup>205</sup> it is, if anything, commercial speech, which Dooley argues, ought to pass muster under *Central Hudson*.<sup>206</sup> However, Dooley does not complete the *Central Hudson* analysis. Although he argues persuasively that the government has a valid interest in regulating capital markets, he ultimately concedes that the final step in the analysis—“whether [the regulation] is not more extensive than is necessary to serve that interest”—involves “embarrassing questions,” the answer to which might be negative.<sup>207</sup> Dooley treats the “more extensive than necessary” requirement as triggering a cost-benefit analysis of the disclosure regime, which he avoids (and argues that courts must also avoid) because this inquiry would “resurrect the *Lochner*-like ‘substantive due process’ review that [the Court] buried so many years ago.”<sup>208</sup> Because the question of

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204. See Michael P. Dooley, *The First Amendment and the SEC: A Comment*, 20 CONN. L. REV. 335, 337 (1988). Much of the Wolfson-Dooley debate revolves around a different set of examples: Wolfson having chosen examples (Dooley calls them “exotica”) that can be characterized as political while Dooley focuses on the normal (“homely”) fare of disclosure regulation—companies raising capital to expand plant capacity. *Id.* at 337–38.

205. *Id.* at 341. Dooley does acknowledge that the SEC can overstep constitutional bounds in regulating speech. See *id.* at 346–51 (analyzing the Long Island Lighting case and concluding that the SEC had stepped “over the line protected by the First Amendment into the arena of public debate where it clearly has no place”). Dooley adds: “If Wolfson means to argue that the SEC is not exempt from the First Amendment, he will find no one to argue with him.” *Id.* at 338. As we have seen, however, plenty of law professors are willing to argue this point. See *supra* note 167 and accompanying text.

206. *Id.* at 341.

207. *Id.* at 351–52.

208. *Id.* at 352. Of course, *Lochner* and the cases overturning it focus entirely on the due process clauses of the Fourteenth and, in some cases, the Fifth Amendments. See generally *Lochner v. New York*, 198 U.S. 45 (1905); *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”). None has any applicability to the First Amendment. The Supreme Court affirmed this proposition unambiguously in *Virginia Board*, acknowledging that although similar regulations had been upheld on due process and equal protection grounds, challenging them under the First Amendment “casts the [state’s] justifications in a different light . . .” *Virginia State Bd. of Pharmacy v. Citizens Consumer Council, Inc.*, 425 U.S. 748, 767 (1976). Regulations permissible under the Fourteenth Amendment, in other words, are not automatically permissible under the First Amendment. See also William French, *This Isn’t Lochner, It’s The First Amendment: Reorienting the Right to Contract and Commercial Speech*, 114 Nw. U. L. REV. 469 (2019) (emphasizing differences freedom of contract and freedom of speech).

costs, according to Dooley, lies outside the scope of judicial review, securities regulation is constitutional.<sup>209</sup>

If this is a win, it is a win by technicality. Dooley may have succeeded in countering Wolfson by showing that securities regulation is not necessarily an unconstitutional suppression of speech, but when he attempts to establish the constitutionality of the field, the claim is not that judges will find it to be consistent with the First Amendment, but only that they will perennially avoid the question. The conclusion evades the core question. It also rests upon two contestable assumptions: first, that judges are foreclosed from engaging in cost-benefit inquiries in all cases involving economic regulation, and second, that the final prong of *Central Hudson* necessarily requires cost benefit analysis and cannot therefore be applied to securities regulation.<sup>210</sup> Ultimately, then, Dooley arrives at another all or none position. Yes, he concedes, the SEC may act unconstitutionally when it regulates overtly political speech, but securities regulation is otherwise protected from constitutional invalidation because judges are foreclosed from scrutinizing it too closely.

Not every scholarly application of First Amendment principles to securities regulation results in invalidation of the field. For example, Professor Lloyd Drury has written that, were securities regulation to be analyzed under the court's commercial speech paradigm, the mandatory disclosure regime would survive largely intact.<sup>211</sup> Moreover, others have advocated a limited application of First Amendment principles that would leave the field generally undisturbed.<sup>212</sup> What is

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209. Dooley, *supra* note 204, at 352. ("The reason I did not discuss the costs of securities regulation is that, constitutionally, costs are irrelevant. Congress has determined that this regulation is in the public interest and, from the standpoint of judicial review, that is the end of the matter.")

210. *Id.* at 352, n.59. This assumption is rooted not in First Amendment doctrine but in the reaction to *Lochner*. It is therefore out of place in First Amendment analysis. See *supra* note 209.

211. See Lloyd L. Drury, III, *Disclosure Is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority*, 58 S.C. L. REV. 757, 788 (2007) ("If federal securities regulation is considered to be commercial speech, courts will strike down the regulations' prohibitions on the dissemination of truthful information, will heavily scrutinize the more burdensome regulations, and the bulk of the regulations will remain in place, providing ample protection for investors."). Accord Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. REV. 789, 829 (2007) (finding claims of a First Amendment exemption for securities regulation to be unpersuasive, but arguing that much of securities regulation is consistent with the commercial speech paradigm).

212. See Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 226 (1990) (applying First Amendment principles to securities advertising); Donald E. Lively, *Securities Regulation and Freedom of the Press: Toward a Marketplace of Ideas in the Marketplace of Investment*, 60 WASH. L. REV. 843, 847 (1985) (applying First Amendment protections to securities promotions).

missing from this literature, however, is a coherent principle that would allow courts to separate constitutional and unconstitutional securities regulations. In the absence of such a principle, many scholars assume that application of the First Amendment would result in wholesale invalidation of the securities laws. Schauer, for example, suggests as much in referring to the SEC as the “Content Regulation Commission.”<sup>213</sup> Likewise, Siebecker worries that “[w]ere corporations to find broad political protection under the First Amendment for factual disclosures, the detailed system of mandatory reporting and disclosure provided by the U.S. securities laws could be undone.”<sup>214</sup> Similarly, Erwin Chemerinsky and Michele Goodwin have warned that securities regulation, like consumer protection laws generally, stands to be swept away by the First Amendment.<sup>215</sup>

If these concerns seem overwrought, it is because both sides in this debate have backed into all or nothing positions. Either the securities laws are invalidated by the First Amendment or they are presumptively valid and beyond constitutional reach. What all of the commentary to this point has failed to find is a theoretically coherent balancing point. A line of demarcation beyond which efforts to regulate speech under the securities laws cannot go. The next Part offers such a theory by connecting the concepts of controversy and purpose.

#### IV. CONTROVERSY AND PURPOSE

Two issues remain open from the prior discussion. First, the word “uncontroversial,” the hinge on which much of the commercial speech doctrine turns, has been left undefined. Second, a coherent line demarcating the boundary between speech protection and market regulation has not been located. The two issues, I shall show, are inextricably bound.

The shared core linking these two issues is the concept of purpose and, more specifically, the problem of pretext. Purpose is the basis for an action, including of course, government action. Pretext involves citing as a basis some purpose other than the one that in fact motivates the action. Consideration of purpose and pretext points the way to a definition of “controversy” that is internal to the regulatory context and not based upon some external social or cultural referent. Likewise, consideration of purpose and pretext is the key to drawing a coherent boundary line between protecting consumers, on the one hand, and protecting speech, on the other.

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213. See Schauer, *supra* note 181, at 1778.

214. See Siebecker, *supra* note 192, at 618.

215. See Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61 (2019).

### A. Understanding Controversy

If we were writing on a blank slate, we could ascribe many different meanings to the phrase "purely factual and uncontroversial."<sup>216</sup> The Supreme Court, however, has not left us a blank slate. *NIFLA* requires that "uncontroversial" be given independent significance from "factual." But if "uncontroversial" points away from factual, where does it point?

"Uncontroversial" could be understood to point outward to some exogenous source of controversy in politics or society. Applying such a standard in the context of compelled speech would require judges to evaluate the evidence of controversy surrounding a subject in the world at large. But what counts as evidence of controversy? And how much controversy is needed in order for an item to lose its status as "uncontroversial" under *Zauderer*?

Litigation necessarily implies controversy—disputed facts and law—but disclosures cannot be deemed "controversial" merely because they attract litigation. Otherwise, a disclosure would be controversial anytime someone filed a lawsuit to avoid it. Where, then, should judges look? Opposition from trade associations? Newspaper editorials and comment letters? Protestors on the courthouse steps? All of these indicia of controversy are easily manipulated. Well-funded groups or wealthy individuals can organize coalitions around an issue, fund editorials and advertisements, and deliver protestors to public spaces.<sup>217</sup> Defining controversy in light of such external indicia means making the speech paradigm turn on funding and organization and making judges subject to lobbying in much the same way as the political branches of government.

More fundamentally, allowing *public* controversy to control the scope of fundamental speech rights is anathema to the First Amendment. Even a passing familiarity with First Amendment jurisprudence reveals its central aim of protecting individual conscience against majoritarian imposition.<sup>218</sup> If a fundamental purpose of the

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216. For example, Shiffrin argues that "uncontroversial" could be read to emphasize factual information that is alternatively "non-normative," "non-speculative," "objectively verifiable," "uncontested," indisputably relevant, or alternatively, not the subject of public controversy. Shiffrin, *supra* note 151, at 737–38.

217. See generally Richard Lardner, et al., *How American Right-Wing Funding for Canadian Trucker Protests Could Sway U.S. Politics*, PBS (Feb. 17, 2022), <https://www.pbs.org/newshour/world/how-american-right-wing-funding-for-canadian-trucker-protests-could-sway-u-s-politics> [<https://perma.cc/D6PM-GCQ4>] (focusing on protest funding); Charles Creitz, *Trump Suggests 'Some Very Stupid Rich People' Are Funding Protest Groups, Rioters at RNC and Across US*, FOX NEWS (Aug. 31, 2020), <https://www.foxnews.com/politics/trump-very-stupid-rich-people-funding-riots> [<https://perma.cc/88UM-T9EL>].

218. *W. Virginia. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes

First Amendment is to protect individuals from the imposition of group consensus, it makes no sense to look to group opinion in deciding whether to protect individual rights. Furthermore, the Court has been clear, most recently in *NIFLA*, that it remains committed to protecting speakers' rights even when the speech involved is commercial.<sup>219</sup>

If we cannot look outward to determine the presence of controversy, is there a way of looking inward? Can we define controversy in such a way that its meaning is internal to the dispute and its referents are endogenous, within a closed system of meaning, not subject to external manipulation? If so, what would it be?

### B. Pretext as Controversy

A clue to answering these questions emerges from the context of the major commercial speech cases, all of which involved the problem of pretext. Recall, for example, the recto-verso pamphlets used by the merchant in *Chrestensen* to portray his advertisements as political speech, a stratagem the Court expressly rejected, thereby denying the use of pretext to *limit* state power.<sup>220</sup> Later, when the Court began to protect commercial speech, it became attentive to uses of pretext that *expanded* state power. In *Virginia Board*, for example, the Court struck down a trade association's attempt to use state regulatory authority over health and safety to protect member pharmacists from price competition. In so holding, the Court emphasized that the states' generally wide latitude to regulate business does not extend to regulations affecting speech.<sup>221</sup> Only bona fide health and safety regulations

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of political controversy, to place them beyond the reach of majorities . . . ."); *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 226 (1963) (stating that a majority cannot "[U]se the machinery of the State to practice its beliefs."); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995) ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression."); *Citizens United v. FEC*, 558 U.S. 310, 372 (2010) ("The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech.") (quoting *McCConnell v. FEC*, 540 U.S. 93, 341 (Kennedy, J., concurring)).

219. *Nat'l Inst. Of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2378 (2018) ("Speaker-based laws run the risk that 'the State has left unburdened those speakers whose messages are in accord with its own views.'") (emphasis added, quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011)).

220. *Chrestensen v. Valentine*, 316 U.S. 52, 55 (1942) (rejecting the idea that "every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command").

221. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (stating that while "Virginia is free to require whatever professional standards it wishes of its pharmacists," it could not do so by restricting



empower the state to proscribe speech. If the speech regulation in fact rests upon some other foundation and health and safety is merely cited as a pretext, the regulation will be struck.

Seen in this light, *Zauderer*, like *Virginia Board*, emerges as a trade association case in which the professional association (the Bar) sought to misuse state regulatory authority. Recall that the State lost on two of the three questions presented in *Zauderer*, and the Court upheld the disclosure requirement distinguishing between fees and costs only because it viewed the rule as a good faith exercise of consumer protection. The same story can be told of *Central Hudson*, where the State lost when it used its regulatory authority to impose a viewpoint on conservation,<sup>222</sup> and *NIFLA*, where the state stretched a consumer protection rationale to impose a viewpoint on abortion.<sup>223</sup>

In all of these cases, the Court searched for pretext and rejected it when found. Pretext involves asserting the purpose of an action to be something other than the reason for which it was in fact taken. This asserted purpose, in the context of regulatory actions, will be one under which the regulator can claim valid statutory authority. The pretext inquiry thus turns on the question of whether a given regulatory action plausibly fits within the statutorily authorized purpose. When there is a plausible fit between the action and the authorized purpose, there is no pretext and, therefore, no controversy. However, when the fit is strained or implausible—when the action does not clearly fit with the authorized purpose—there is evidence of pretext and, thus, controversy.

Connecting controversy and pretext implies an inquiry into the relationship between a regulatory act and the regulator's authority for acting. Although this may be understood as an inquiry into regulatory purpose, it is not a subjective inquiry into the regulator's state of mind. Rather, it is an objective inquiry into whether the action plausibly fits within the limits of the regulator's authority. Actions that do not fit—that is, actions suggesting pretext—are controversial according to the statutory scope of the regulatory regime. Controversy, so

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First Amendment speech, such as prohibiting disclosure of consumer drug prices.) In other words, the First Amendment may prevent what the Fourteenth Amendment permits.

222. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 570 (1980) ("But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests.")

223. *NIFLA*, 138 S. Ct. at 2369 ("The stated purpose of the FACT Act, including its licensed notice requirement, is to 'ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them.'") (citing 2015 Cal. Legis. Serv. Ch. 700, § 2 (A.B. 775) (West) (Cal. Legis. Serv.)).

understood, is entirely endogenous to the closed system of regulation and justification. Indicia of public controversy—protests and advocacy groups—are irrelevant. So too is the subjective intent of the regulator. Judges need only look at the statutory purpose under which the regulatory action has allegedly been taken and ask, on the basis of objective evidence, whether the action can be said to fit within it. When the action and the authority agree, there is no pretext and no controversy. By contrast, actions that plausibly exceed their regulatory purpose imply pretext and therefore imply controversy.

For example, recalling that *Zauderer* rests upon a foundation of consumer protection,<sup>224</sup> the meaning of controversy in that case depends upon the consistency between the regulatory action and the consumer protection rationale under which it was taken. Because it found that prospective clients might in fact have been misled by the failure to distinguish costs from fees, the Court upheld the disclosure mandate. Controversy thus operates as a pretext check for claims to regulate speech in service of consumer protection.

The pretext check conducted under “controversy” is not the same analysis as the stringent “least restrictive means” analysis required by *Central Hudson*, nor is it the same as the weaker “reasonably related” analysis required by *Zauderer*. Each of those analyses evaluate how well-suited the regulation is to achieving its ends. Do the regulatory means fit the ends? Is it underinclusive or overinclusive? Is it cost justified relative to various alternatives? These questions do not probe pretext. Instead, they analyze the tradeoff, asking whether the give (the loss of full speech rights) is worth the get (the social value promised by the regulation). By contrast, the analysis of pretext as “controversy” looks at the plausibility of the state’s claim to serve the interest of consumer protection. The question is not how well the action achieves its end. Rather, the question is whether the action is taken towards that end at all or whether, in fact, something else is going on. If the state takes action for some reason other than the authorized end, the result is controversy and *Zauderer* does not apply.<sup>225</sup> The contours of this analytic framework become more apparent upon application, as in the case of the SEC’s proposed climate disclosure rules, discussed in Part IV, below.

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224. See *supra* notes 148–150 and accompanying text.

225. If the question is how tightly the state’s claimed justification must match its regulatory authority, it is worth recalling that *Zauderer* only applies when a disclosure mandate is “uncontroversial.” If controversy is plausibly invoked, even if not definitively proven, a mandate is not uncontroversial. When the state exceeds its regulatory authority and seeks to use authority in one area as a basis for action in another, it creates controversy, thereby losing deferential review under *Zauderer* and inviting greater judicial scrutiny.

## V. MANDATING DISCLOSURE TO PROTECT INVESTORS

This Article has so far argued that First Amendment analysis of disclosure mandates depends upon whether the government pursues its regulatory purpose in good faith or as mere pretext. In the context of securities regulation, this turns on how the government pursues the end of investor protection. However, the precise meaning of investor protection and, thus the limits of the investor protection rationale, has yet to be defined. This Part defines investor protection and evaluates mandatory disclosures under the analytic paradigm developed in this Article. It finds that the vast majority of the securities law disclosure mandates would survive a constitutional challenge. The SEC's proposed climate-related disclosures, however, would not. Furthermore, consistent application of this paradigm reveals the First Amendment boundaries of securities regulation.

### A. What is Investor Protection?

Investor protection is the basis of the SEC's statutory authority to regulate disclosure. Congress has granted the SEC authority to require disclosures that are "necessary or appropriate in the public interest or for the protection of investors."<sup>226</sup> The Supreme Court has repeatedly observed that the purpose of the SEC is "to protect investors through the requirement of full disclosure."<sup>227</sup> It has become hornbook law.<sup>228</sup>

But how do disclosure mandates protect investors? Protecting investors involves preventing fraud and deception. Nevertheless, fraud and deception are typically prevented by restraining speech, not compelling it. Perhaps in some instances, speech may be compelled to prevent deception based on a prior statement that, although not false

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226. 15 U.S.C. § 77g(a)(1) (delegating authority to regulate disclosures in registration statements). The phrase recurs in Congress's delegation to the SEC to regulate proxy statements, annual reports, and other periodic disclosures. *See* 15 U.S.C. § 78n(a)(1) (granting the SEC authority to regulate proxies "as necessary or appropriate in the public interest or for the protection of investors"); § 78m(a) (requiring registered companies to file annual reports "in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security"); §§ 78l(b), 78o(d).

227. *See Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). *Accord* *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) ("[A]mong [the Exchange Act's] chief purposes is 'the protection of investors.'").

228. *See generally* LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, *FUNDAMENTALS OF SECURITIES REGULATIONS* (7th ed. 2018); THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* (7th ed. 2016); HARVEY E. BINES & STEVE THEL, *INVESTMENT MANAGEMENT LAW AND REGULATION* (3d ed. 2015).

when made, has since become misleading.<sup>229</sup> An investor protection rationale easily justifies mandatory disclosures of a corrective nature.

However, even a cursory glance at Regulation S-K reveals that SEC disclosure mandates go far beyond corrective disclosures. For example, SEC rules require companies to disclose their financial statements quarterly and to disclose audited financial statements annually.<sup>230</sup> In addition, they require extensive management discussion and analysis (MD&A) of the issuer's financial performance,<sup>231</sup> "plain English" disclosure of risk factors,<sup>232</sup> and substantial detail about the company's governance and operational structure.<sup>233</sup> These disclosures go far beyond the principle of correcting misstatements or misperceptions. How can these disclosures be seen to derive from the investor protection rationale?

Perhaps a more robust disclosure regime can be justified by investor demand. Investors might want more than corrective disclosure. They might want the disclosure of affirmative information to assist them in evaluating whether to invest.<sup>234</sup> What disclosures are these? Since publicly traded companies have a vast number of investors, each with their own preferences, the answer might be literally anything. Some investors will want more detail about the company's operations—board minutes, for example, or details from financial advisors' presentations to the board.<sup>235</sup> Other investors will want the disclosure of non-financial information that they consider important.<sup>236</sup> For example, pro-life investors might want granular details about whether a company's products are used in manufacturing or distributing abor-

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229. Such corrective disclosures are contemplated, for example, under Rule 10b-5, which compels disclosures necessary to make prior statements "in light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5.

230. *Id.* §§ 301(a), 302(a)(1).

231. *Id.* § 229.303.

232. *Id.* § 229.15. See also *The Plain English Handbook: How to create clear SEC disclosure documents*, SEC INVESTOR PUBLICATIONS (1999), <https://www.sec.gov/pdf/handbook.pdf> [<https://perma.cc/6Z4L-XQV8>].

233. 17 C.F.R. § 229.101 (description of business), § 229.407 (corporate governance).

234. Whether private ordering would result in corporations voluntarily disclosing sufficient information to protect investors is a separate question beyond the scope of this Article. There are convincing arguments that it would. See generally Sanford Grossman, *The Informational Role of Warranties and Private Disclosure About Product Quality*, 24 J.L. & ECON. 461, 465–66 (1981) (arguing that sellers will offer accurate disclosure to avoid buyers' discounts). See also FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991) (applying this insight to securities law).

235. Details of financial analyst presentations were a frequent investor demand in the rash of merger objection cases filed in state and later federal courts after 2009. See Sean J. Griffith, *Innovation in Disclosure-Based Shareholder Suits*, 69 CASE W. RES. L. REV. 927 (2019).

236. See Belinda Hoff & David Wood, *The Use of Non-Financial Information: What Do Investors Want*, B.C. CTR. FOR CORP. CITIZENSHIP (March 1, 2008).

tificients or, more broadly, corporate health insurance plans' coverage of women's health.<sup>237</sup> Other investors may want to know whether a corporation engages in offshoring or the extent to which it imports materials from countries known to abuse human rights. Others will want to know about the company's diversity policies. A mandatory disclosure regime that took investor demand as its guiding principle would be without limit.

There is, however, a limit on the supply side. Disclosures are not free. Instead, disclosure imposes costs on companies through legal and accounting fees and, more fundamentally, through the opportunity costs associated with producing the information to be disclosed. In the absence of a mandate, companies may not compile certain kinds of information. But once disclosure of that information is legally mandatory, companies must produce this information and continually update it. This is not a trivial cost. Managers routinely complain about "boiling the ocean" in order to produce a line item of disclosure. Each employee minute spent on the exercise is an employee minute not spent on some more productive use. Information production is costly regardless of the subject of the disclosure, but some forms of disclosure may produce additional costs. Non-financial disclosures, for example, may divert a company from its core mission or lead to an increase in managerial agency costs.<sup>238</sup>

Once we consider the marginal cost of information, it becomes clear that some investors likely prefer *less* disclosure. Many investors possess sufficient information to act without further information. Consider, for example, index funds that invest based on an algorithm designed to track a market index. Or consider momentum traders, whose strategies are based on market-wide "risk on"/"risk off" factors. Consider too retail investors who are excited about a particular stock—Tesla, for example, or GameStop—but who have never read an annual report nor reviewed a quarterly financial statement. Not only do such investors not benefit from additional disclosures, when we consider that disclosures are not costless, additional disclosures likely harm them.<sup>239</sup>

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237. See *Socially Responsible Investment Guidelines for the United States Conference of Catholic Bishops*, U.S. CONF. CATH. BISHOPS (2021).

238. See, e.g., Matt Levine, *It's Good to Win a Proxy Fight*, BLOOMBERG L. (June 1, 2021, 4:42 PM), <https://www.bloomberg.com/opinion/articles/2021-06-01/it-s-good-to-win-a-proxy-fight> [<https://perma.cc/C9B2-5T3V>] (citing the successful campaign activist hedge fund Engine No. 1 waged against Exxon Mobil).

239. Under standard versions of the efficient capital markets hypothesis, such "non-information" investors may benefit when other larger, more sophisticated investors act to cause information to be reflected into securities prices. See, e.g., Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L. J. 711 (2006). However, information that is not material to a company's value does not enter into price by this or any other mechanism. Therefore, it cannot benefit either "non-information" or any other type of investor who does not

The intra-investor conflict, created when some benefit but others are harmed, implies a limit to investor demand for disclosure. The investor protection rationale entails protecting investors from each other. Protecting investors from harm means not allowing some investors to impose the cost of their preferences upon other investors. But who wins when it is investor versus investor? If some investors want costly disclosures because they perceive a benefit from them, but others do not because they see only cost, what are we to do? Which investors' interest controls?

Some have suggested that majority rules or, at least, that "heft" counts.<sup>240</sup> This can be seen in the argument that big mutual funds—like BlackRock—should control because they "represent" so many investors through their funds.<sup>241</sup> But this claim is deeply misleading. The vast majority of the funds invested by large mutual fund complexes—BlackRock, Vanguard, State Street—are invested passively, in the form of indexes or exchange-traded funds (ETF's).<sup>242</sup> These passive investments, as noted above, do not benefit from further information disclosures because they simply follow an algorithm or track an index. Indeed, if there is a voice that ought *not* to be seriously considered in advocating further disclosures, it is the voice of fund complexes managing non-information sensitive passive investments. If institutional investors are to be considered at all on the topic of more or less disclosures, it is only the active funds—the funds that actually use and therefore benefit from disclosures—that should count. Furthermore, counting only their active funds makes the holdings of institutional intermediaries much less hefty.

A more fundamental problem with deferring to the interests of institutional asset managers is that the SEC was not established under a principle of majority rules. Congress did not delegate the SEC authority to serve "majority investor preferences." The delegation is for the purpose of "investor protection." Additionally, the word "investor" standing alone implies investors as a class—that is, something upon

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have some outside (non-investment) use for the information. *See infra* subsection V.B.2. (discussing why climate disclosures, although immaterial, might benefit institutional asset managers).

240. *See* Marcel Kahan & Edward B. Rock, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders*, 100 B.U. L. REV. 1171, 1784 (2021); Sean J. Griffith & Dorothy S. Lund, *Conflicted Mutual Fund Voting in Corporate Law*, 99 B.U. L. REV. 1151, 1171 (2019).

241. *See* Jill E. Fisch, Assaf Hamdani & Steven D. Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17 (2019); Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2033 (2019); David Webber, Michal Barzuza & Quinn Curtis, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1249 (2020).

242. *See* Griffith & Lund, *supra* note 240, at 1155.

which all investors could hypothetically agree. What is that? What is in the common interest of investors as a class?

Because all investors invest with an expectation of a financial return, the interest that investors, as a class, share is the financial return of the investment.<sup>243</sup> Investors, like all people, may have other interests besides financial return. People might care about clean water, breathable air, and puppies. But, given a large enough group, there will be others who are indifferent, opposed, or even if they share the same general preferences, have an ordinal ranking of preferences that renders them opposed to action on a specific issue.<sup>244</sup> In markets, the law of large numbers will operate to cancel out offsetting preferences, leaving the one interest that all investors share—that is, their interest in a financial return.<sup>245</sup>

While it is true that some people may use their investments to achieve non-financial objectives, this does not change the fact that the expectation of a financial return is the one interest investors share as a class. When people use their investment assets for other ends, they do not act as *investors*. For example, in the casebook classic *Pillsbury v. Honeywell*, an investor bought shares of Honeywell solely to object to the company's manufacture of munitions used in the Vietnam War.<sup>246</sup> In doing so, he may have acted laudably as a concerned citizen, but he did not act as an investor.<sup>247</sup> Similarly, I myself have bought shares of corporations solely to object to class action settlements.<sup>248</sup> In doing so, I acted as a professor concerned about the integrity of the legal system, but I did not act as an investor. In several cases, in fact, I did not know the company's product or even industry. I

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243. See generally HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 62 (1996). The SEC has acknowledged the uniform interest in financial return among investors. The SEC's experience over the years in proposing and framing disclosure requirements has not led it to question the basic decision of Congress that, insofar as investing is concerned, the primary interest of investors is economic. After all, the principal, if not the only, reason why people invest their money in securities is to obtain a return. Disclosure of Environmental Matters, Securities Act of 1933 Release No. 33-5569, (Feb. 11, 1975); Environmental and Social Disclosure, Securities Exchange Act of 1934 Release No. 33-5627 (Oct. 14, 1975).

244. See generally Robert Wutscher et. al., *Mathematics in Economics: An Austrian Methodological Critique*, 33 *PHIL. INVESTIGATIONS* 44 (2010).

245. See Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 *STAN. L. REV.* 923, 961 (1984) (observing that "profit maximization is the only goal for which we can at least theoretically posit shareholder unanimity" and suggesting that "the presumption of profit maximization could be changed by express shareholder approval"). Accord HANSMANN, *supra* note 243, at 62.

246. *State ex rel. Pillsbury v. Honeywell, Inc.*, 191 N.W.2d 406, 408 (Minn. 1971).

247. Accordingly, the court held that Pillsbury did not have an appropriate purpose to exercise the books and records provisions of corporate law. *Pillsbury*, 191 N.W.2d at 413.

248. See generally Sean J. Griffith & Anthony A. Rickey, *Objections to Disclosure Settlements: A How To Guide*, 70 *OKLA. L. REV.* 281 (2017).

did not care if I gained or lost from the investment. I cared only that it gave me standing to object to what I consider to be an abusive legal practice. I was, in other words, serving some other purpose with my investment. I was doing something else. By contrast, investors act *as such* when they act out of concern for the one interest they all share—that is, increasing financial return.

Concern for financial return, because it is the one interest that investors can be presumed to share, operates as a form of agenda control.<sup>249</sup> Any departure from financial return necessarily leads to discord in the investor base, opposing one group agenda against another. But this is precisely what Congress commanded the SEC to prevent. Protecting investors means treating those who invest in securities not as concerned citizens but as *investors* and protecting them as such. Protecting *investors qua investors* means protecting them *from* the concerned citizens—the Pillsburys and the professors—in their midst. It means protecting investors as a class from groups of investors (even a majority group) with opposing interests.

Once we understand the perspective of investors as such, we can see what it might mean to mandate disclosures in order to protect investors. All disclosures are costly, but some disclosures might nevertheless benefit investors as such. Which disclosures benefit investors as such? Disclosures that are relevant to the company's financial return. When information is relevant to financial return, it is at least potentially beneficial to investors. By contrast, when disclosures serve only individual or group preferences—by serving non-financial interests or idiosyncratic financial interests<sup>250</sup>—they necessarily harm investors *as a class* by imposing cost without a concomitant benefit. Harming investors as a class, it should be clear, is not consistent with protecting investors. Protecting investors means mandating only those disclosures with the potential to benefit, not harm them. This can only be information relevant to the company's financial return.

That investor protection justifies *only* those disclosures that are relevant to financial return does not mean that any and all disclosures that might be relevant to financial return are justified. Just as investors need protection from other investors' interests in non-financial information, they also need protection from other investors' speculative evaluations of financial relevance. It may be, for example, that nuclear war or the collision of a large meteor with the earth would dramatically affect financial returns; however, requiring companies to disclose how they would be affected would likely impose more cost than benefit

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249. See HANSMANN, *supra* note 243, at 35–44.

250. Idiosyncratic financial interests might include competitively sensitive information that benefits a competitor of the issuer or information that is otherwise useful for an investor's personal business interests as opposed to their interests as an investor in that specific financial asset. See *infra* subsection V.B.2.



on investors. The disclosure of financial material under an investor protection rationale must therefore be bounded by a baseline principle of relevance. Fortunately, securities law contains such a principle in the concept of materiality.

Materiality, as we have already noted, combines considerations of relevance and weight. In order to be material, information must be relevant to a "reasonable investor," and it must be sufficiently weighty to alter the "total mix" of information under consideration.<sup>251</sup> Relevance, as I have argued, means a given fact must somehow affect the financial returns. Weight means the impact of the fact on the issuer must be sufficiently large to matter in deciding whether to invest or how to vote. If information is *likely* to influence a given security's financial return, then it is material.<sup>252</sup> Information that cannot be said to have such an effect is not material.

Using the concept of materiality as a guide to relevance suggests that in order to be justified under the investor protection rationale, mandatory disclosures must have a clear and plausible relationship to the financial return of an investment. Speculative or uncertain information would not meet this standard. Information that is immaterial, like information that is unrelated to financial return, imposes a cost on investors without a concomitant benefit.<sup>253</sup> This harms investors as a class. Because harming investors is inconsistent with protecting them, such disclosures cannot be said to derive from an investor protection rationale.

Before proceeding to analyze actual disclosure mandates under the investor protection rationale, we should pause to consider two possible objections. Both relate to statutory interpretation. The first asks whether the SEC's authority is in fact, limited to investor protection given the presence of statutory language that might be interpreted to authorize it to act for broader purposes. The second asks why, if the SEC's statutory authority is limited to investor protection, it is necessary to make a constitutional case out of it. Is the statute not sufficient?

First, with regard to statutory purpose, some argue that the SEC is not strictly limited to the investor protection rationale when it acts to

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251. See Roisman *supra* note 35 and accompanying text (discussing the "double aspect" of materiality).

252. See *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (holding that material information must "assume[] actual significance in the deliberations of the reasonable shareholder" or "significantly alter[] the 'total mix' of information . . . available.").

253. The difference is that with irrelevant information there is no possible benefit. With relevant but immaterial information, there is a possible benefit, but the benefit is not cost justified. The materiality determination results from analyzing the cost benefit tradeoff. Irrelevance does not require a tradeoff analysis because there is no class benefit.

mandate disclosure. In particular, some read the disjunctive in the phrase “in the public interest *or* for the protection of investors” to empower the SEC to serve the public interest for purposes other than investor protection.<sup>254</sup> Interpreting the statutory language in this way would grant the SEC regulatory *carte blanche* to address essentially any problem touching on capital markets. The SEC’s self-described mission—“to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation”—implicitly adopts this expansive vision of regulatory authority.<sup>255</sup>

However, this reading must fail as a matter of statutory interpretation. Textual analysis requires that words and phrases in statutes be read in light of the surrounding statutory language and in the context of the overall statutory scheme.<sup>256</sup> Accordingly, the Supreme Court has “consistently held that the use of the words ‘public interest’ in a regulatory statute is not a broad license to promote general public welfare.”<sup>257</sup> Rather, the overall statutory scheme “give[s] content and meaning to the words ‘public interest’” in legislation.<sup>258</sup> The overall statutory scheme of the securities laws narrows rather than expands the meaning of “public interest,” subordinating the phrase to the overarching principle of “investor protection.”<sup>259</sup>

Every statute granting the SEC rulemaking authority over corporate disclosures specifies the disclosure of matters that would protect investors from being defrauded or misled by promoters.<sup>260</sup> When it

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254. *See, e.g.*, Allison Herren Lee, SEC Commissioner, Address at ESG Disclosure Priorities Event, Living in a Material World: Myths and Misconceptions about “Materiality” (arguing that the federal securities laws give the SEC authority to require disclosures “in the public interest” or “for the protection of investors” without regard to materiality).

255. *See, e.g.*, U.S. SECURITIES AND EXCHANGE COMMISSION: ABOUT THE SEC, <https://www.sec.gov/about.shtml> [<https://perma.cc/D4VN-2HGF>] (describing the agency’s mission). The components of the SEC’s mission are drawn from language in both the Securities Act and the Securities Exchange Act. *See* 15 U.S.C. §§ 77b(b), 78c(f). However, these statutory sections are not broad grants of authority but rather limitations on the agency’s authority to act. *See infra* text accompanying note 266.

256. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme . . . .”) (internal citations and quotations omitted).

257. *N.A.A.C.P. v. Federal Power Commission*, 425 U.S. 662, 669 (1976).

258. *Id.* at 669.

259. *See also* Bernard S. Sharfman, *Non-Material Mandatory Climate Change Disclosures*, 1 OHIO ST. BUS. L. J. ONLINE 1 (2021) (arguing that disclosures in the “public interest” must be “for the protection of investors”).

260. *See* Andrew N. Vollmer, *Does the SEC Have Legal Authority to Adopt Climate-Change Disclosure Rules?*, MERCATUS CENT.: FIN. REGUL. POL’Y BRIEF (Aug. 2021) (providing statutory analysis of the language and context of each relevant provision).

was originally enacted, the Securities Act required registrants to disclose matters specified on Schedule A of the Act. This Schedule, which later became the basis of Regulation S-K, focused on three areas: (1) facts relating to the assets being offered for investment, (2) facts relating to the identity and interests of the investment's promoters and managers, and (3) facts relating to the economic value of the investment. These disclosures are all designed to protect investors by triggering the release of value-relevant information from unscrupulous promoters who might be inclined to withhold it.<sup>261</sup> The meaning of "public interest" must be understood in light of this surrounding context.<sup>262</sup> Moreover, the same context appears in each statutory scheme in which the phrase occurs.<sup>263</sup> Any time Congress has wished the SEC's authority to expand beyond investor protection, as in the case of the conflict mineral disclosures,<sup>264</sup> it has expressly authorized the SEC to act for that purpose.<sup>265</sup>

So understood, "public interest" narrows, rather than expands, the meaning of "investor protection." It does so by adding an additional requirement to valid regulatory action. The SEC may only act for the fundamental purpose of investor protection, and when it does so, it must also act in the public interest. Acting in the public interest means considering additional factors relevant to the public. It means analyzing the tradeoffs inherent in regulation. The securities laws further specify how the SEC is to undertake this analysis:

Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.<sup>266</sup>

This is language of limitation, not expansion. The meaning of public interest is here limited to concepts of efficiency, competition, and capital formation, not other possible visions of public interest such as cli-

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261. As described by the House report, the requirements of Schedule A "are items indispensable to any accurate judgment upon the value of the security." H.R. REP. NO. 73-85, at 7 (1933).

262. Analysis of the legislative history compels the same conclusion. In adopting legislation allowing the SEC to supplement Schedule A as "necessary or appropriate in the public interest or for the protection of investors" (the language that now appears in the statute), a House report stated, "To assure the necessary knowledge for [investors'] judgment, the bill requires enumerated definite statements. Mere general power to require such information as the Commission might deem advisable would lead to evasions, laxities, and powerful demands for administrative discriminations." H.R. REP. NO. 73-85, at 7 (1933).

263. See Vollmer, *supra* note 260.

264. See *supra* notes 172-179 and accompanying text.

265. Other examples include the additional information on corporate governance and executive compensation required by the Dodd-Frank Act. See Vollmer, *supra* note 260, at 9 ("The SEC's disclosure rulemaking power is limited.").

266. 15 U.S.C. §§ 77b(b), 78c(f).

mate health or diversity, equity, and inclusion. Furthermore, investor protection remains the primary purpose. Note the “also,” meaning *in addition to* investor protection. Investor protection is primary. The SEC can only act to protect investors, and when it does so, its actions must also be in the public interest in the specific sense of promoting efficiency, competition, and capital formation.

Second, given the strength of this statutory interpretation argument, why is it necessary to consider the constitutional question at all? Given that our First Amendment analysis essentially asks whether the government’s speech mandate can be viewed as an “uncontroversial” application of the investor protection rationale, why not ask and answer the question under the statute and leave the constitution out of it? If the SEC promulgates a disclosure rule inconsistent with the investor protection rationale, it exceeds its rulemaking authority, and the rule can be struck down on that basis. End of story.

The answer to this question turns on administrative law principles. Were an SEC rulemaking to be challenged as inconsistent with the principle of investor protection under the relevant statute, the SEC could reply that because the meaning of the term “investor protection” is nowhere defined in the statute, the agency is entitled to supply its own interpretation of the phrase. It is also likely, in order to preserve the maximum scope of regulatory authority, that the SEC would settle on an interpretation of investor protection that is less restrictive than the one offered above. For example, it might interpret “investor protection” to require only that the action be taken to further the interests of some investor or group of investors. In this way, as long as some investor benefits from the regulatory action, the SEC has protected that investor’s interests and thereby served the purpose of investor protection. This interpretation is, for the reasons described above, inferior to the interpretation of investor protection offered here. However, it is not necessarily unreasonable. And under the *Chevron* doctrine, in matters of statutory interpretation, courts are required to defer to agency interpretations of undefined or ambiguous terms as long as the proffered interpretation is not unreasonable.<sup>267</sup> As a result, the SEC’s expansive definition of investor protection might control. Were this to be the case, the agency’s rule-making could be found

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267. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). However, the Supreme Court has recently indicated less deference to administrative agencies, at least where the issue is a “major question” best left to Congress. *See, e.g., West Virginia v. EPA*, 142 S.Ct. 2587 (2022) (holding that the “major questions doctrine,” which requires “Congress to speak clearly if it wishes to assign an agency decisions of vast economic and political significance,” prevented the EPA from enacting carbon emissions caps). If applied to the proposed climate disclosures, the “major questions” doctrine could also bar the SEC from enacting the rule.

to be consistent with that purpose, and the challenge to its statutory authority dismissed.

The constitutional analysis, by contrast, proceeds differently and yields a potentially different result. When we interrogate the meaning of investor protection under the First Amendment, we are not construing a statute. Instead, we are determining the standard of review of actions restricting a fundamental right. The compelled commercial speech doctrine offers a deferential standard of review, but the doctrine applies only to regulatory actions that are un-controversially motivated to protect consumers.<sup>268</sup> The meaning of consumer protection under this inquiry is not defined by statute. Rather, it is an inquiry into the government's motive. Furthermore, the "uncontroversial" requirement suggests a higher standard than deference in the court's review of the government's asserted purpose.

Consumer protection in the context of securities regulation means investor protection. But the meaning of investor protection under the commercial speech doctrine is not determined by administrative law principles. How the SEC understands investor protection might be relevant to a court's analysis of whether the agency has in fact acted in pursuit of it, but courts construing the First Amendment are not bound to interpret the term as the agency does. *Chevron*, in other words, does not apply. Rather, courts are free to conduct their own inquiry into the meaning of investor protection, and the interpretation offered by this Article may guide them.

## B. Courting Controversy with ESG

The analytic framework advanced by this Article can now be used to evaluate SEC rulemaking. In order to receive deferential judicial review, disclosure mandates must be uncontroversially motivated to protect investors. Investor protection is to be understood on a class basis—investors as such, rather than individual investors or groups. Disclosures that protect investors are those that are both relevant to the financial return of an issuer and sufficiently weighty to affect the value of that issuer's securities. Accordingly, disclosure mandates failing these tests must be judged under heightened scrutiny: either a form of intermediate scrutiny requiring that the mandate be no more restrictive than necessary or, alternatively, a form of strict scrutiny should the mandates be found to impose a political viewpoint.

Applying this rubric would validate the vast majority of mandatory disclosure rules promulgated by the SEC. Most such rules call forth facts directly relevant to the issuer's securities, usually through (1) descriptions of corporate assets and how they are used, (2) details about the persons entrusted with managing those assets, or (3) historical in-

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268. See *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996).

formation regarding the financial returns of those assets. Insofar as this is factual information with the clear potential to impact the value of a security, its disclosure can easily be justified on the basis of an investor protection rationale. Moreover, in the absence of any reason to believe that the SEC was motivated to serve another interest in mandating them, such disclosures satisfy the controversy test as well. They are therefore entitled to *Zauderer's* deferential standard of review, under which they would be upheld.<sup>269</sup>

The same cannot be said of the SEC's proposed climate rules. Instead, the proposed climate rules create controversy in at least three ways. First, they engage in viewpoint discrimination. Second, they do not seek to protect investors but rather to advance an interest group agenda. Third, they redefine concepts at the core of the SEC's regulatory agenda—investor protection and materiality. As a result, the proposed rules are ineligible for deferential review under *Zauderer*. Once *Zauderer* no longer applies, the proposed rules are unlikely to survive their encounter with the First Amendment.

### 1. *Engaging in Viewpoint Discrimination*

The proposed climate-based disclosure rules proceed from a set of premises. These are: (1) that the earth's climate is changing in ways that are infelicitous to human habitation, (2) that those changes are the result of human actions, principally relating to carbon dioxide emissions, to which businesses contribute, and (3) that corporate action to limit carbon dioxide emissions could halt the infelicitous consequences of climate change. Each of these premises is necessary to support mandatory climate disclosures. If the climate were not changing, or were not changing as a result of human action, it would be nonsensical to require corporations to disclose how they might contribute to the problem. If carbon dioxide and other GHG's were not the principal culprits, then it would be nonsensical to focus attention on these items. Furthermore, if changes made by corporations would not result in reducing the unwanted consequences of climate change, the entire enterprise would be vain.

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269. Even if intermediate scrutiny were to apply, commentators have argued that many disclosure rules could survive this standard as well. Dooley, *supra* note 205, at 204 (concluding that most disclosure regulation would be upheld under *Central Hudson* because courts' ends-means analyses would defer to the SEC); Drury, *supra* note 211, at 786 (concluding that "SEC rules requiring disclosures should be upheld under a *Central Hudson* analysis"); Page, *supra* note 211, at 826–28 (concluding that the ends-means test under *Central Hudson* is sufficiently indeterminate to allow judges to validate the vast majority of disclosure mandates). *But see* Antony Page & Katy Yang, *Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?*, 39 U.C. DAVIS L. REV. 1, 64–81 (2005) (arguing that Regulation FD could not survive First Amendment scrutiny).

Moreover, the SEC insists that it is acting to protect investors, not merely the environment.<sup>270</sup> Therefore, we must add a fourth premise: (4) that corporate climate practices influence corporate economic performance. Without the fourth premise, there is no necessary link between the proposed climate disclosures and investor protection, a linkage that is necessary in order for the SEC to have rulemaking authority.

Each of these four premises is contested. With regard to the first, the question is not whether the climate is changing—that change occurs is an observation, not a testable theory.<sup>271</sup> The question, instead, is whether and how various factors influence observed climate change. On this question, there is considerable disagreement.<sup>272</sup> The scientific basis of climate change is, at present, poorly understood.<sup>273</sup> Although many scientists have attempted to model climate change, the outputs of their models are highly variable and often contradictory.<sup>274</sup> Projections have struggled to predict reality.<sup>275</sup> With regard to the second premise, estimates of the human contribution to the total “greenhouse effect” range from as low as small to imperceptible.<sup>276</sup> Even assuming that the earth is warming and that humans contribute to it, the effect seems to be mild.<sup>277</sup> With regard to the third premise, if humans have

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270. Proposed Rule Release, *supra* note 1, 87 Fed. Reg. at 21335–36 (“Investors need information about climate-related risks—and it is squarely within the Commission’s authority to require such disclosure in the public interest and for the protection of investors—because climate-related risks have present financial consequences that investors in public companies consider in making investment and voting decisions.”).

271. That climate changes, because it is confirmed by any and all evidence—by evidence of warming as well as cooling, flooding as well as draught—is an unfalsifiable.

272. See JASON S. JOHNSTON, *Climate Rationality: From Bias to Balance* 385 (2021). See also U.S. Senate Minority Report: More Than 650 International Scientists Dissent Over Man-Made Global Warming Claims, Dec. 11, 2008 (cataloguing scientific dissent concerning factors influencing climate change).

273. STEVEN E. KOONIN, *UNSETTLED: WHAT CLIMATE SCIENCE TELLS US, WHAT IT DOESN'T, AND WHY IT MATTERS* (2021).

274. *Id.* at 4 (“The results from the multitude of climate models disagree with, or even contradict, each other.”).

275. See JOHNSTON, *supra* note 272, at 404–42. See also ALEX EPSTEIN, *THE MORAL CASE FOR FOSSIL FUELS* 101–04 (2014) (statistical comparison of predictions from climate models with actual observations).

276. See EPSTEIN, *supra* note 275, at 108 (“There is a greenhouse effect. It’s logarithmic. The temperature has increased very mildly and leveled off completely in recent years. The climate-prediction models are all failures, especially models based on CO<sub>2</sub> as the major climate driver . . .”). Accord Minority Report, *supra* note 272 (“Based on the laws of physics, the effect on temperature of man’s contribution to atmospheric CO<sub>2</sub> levels is miniscule and indiscernible from the natural variability caused in large part by changes in solar energy output.”) (quoting atmospheric scientist Robert L. Scotto).

277. See JOHNSTON at 457–67. See also Testimony of Professor William Happer, Senate Testimony (Feb 25, 2009) (“There have been similar and even larger warm-

precious little to do with climate change, then even large changes in human conduct will have a negligible effect on climate.<sup>278</sup> Finally, despite assertions that corporate climate policies benefit economic returns, there is no causal evidence to support such claims.<sup>279</sup> Some studies find a positive correlation between pro-climate policies and investment returns,<sup>280</sup> while others find no relationship or a negative relationship.<sup>281</sup> Emphasizing that correlation is not causation, others argue that any apparent effect on performance is driven by other factors, such as the presence of high-performing tech stocks in ESG portfolios.<sup>282</sup>

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ings several times in the 10,000 years since the end of the last ice age. These earlier warmings clearly had nothing to do with the combustion of fossil fuels. The current warming also seems to be due mostly to natural causes, not to increasing levels of carbon dioxide.”)

278. BJORN LOMBORG, FALSE ALARM 42 (2020) (using the MAGICC model developed by the EPA and the UN climate scientists to show that “the effect of just the US going to zero fossil fuels from today onward would be a reduction in temperature of about 0.33°F in 2100.”). *See also* Phillip Stott in Minority Report, *supra* note 272 (“Climate change is governed by hundreds of factors or variables, and the very idea that we can manage climate change predictably by understanding and manipulating at the margins one politically-selected factor (CO<sub>2</sub>) is as misguided as it gets.”).
279. Sanjai Bhagat, *An Inconvenient Truth About ESG Investing*, HARV. BUS. REV. (March 31, 2022), <https://hbr.org/2022/03/an-inconvenient-truth-about-esg-investing> [<https://perma.cc/746L-4HMA>]. *See also* Hans Bonde Christensen et al., *Economic Analysis of Widespread Adoption of CSR and Sustainability Reporting Standards*, SUSTAINABILITY ACCOUNTING STANDARDS BOARD, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3315673](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3315673) [<https://perma.cc/2RU6-PTSW>] (meta-analysis finding lack of support for connection between ESG reporting with firm financial performance); Bradford Cornell & Aswath Damodaran, *Valuing ESG: Doing Good or Sounding Good?* (2020), [https://papers.ssrn.com/abstract\\_id=3557432](https://papers.ssrn.com/abstract_id=3557432) [<https://perma.cc/EM9D-8DJY>].
280. *See, e.g.*, Timo Busch & Gunnar Friede, *The Robustness of the Corporate Social and Financial Performance Relation: A Second-Order Meta-Analysis*, CORP. SOC. RESP. AND ENV'T MGMT. (March 30, 2018); N. C. Ashwin Kumar et al., *ESG Factors and Risk-Adjusted Performance: A New Quantitative Model*, J. SUSTAINABLE FIN. & INV. (June 13, 2016).
281. Jun Xie et al., *Do Environmental, Social, and Governance Activities Improve Corporate Financial Performance?*, BUS. STRATEGY AND THE ENV'T (Dec. 2017) (finding that most ESG activities have a “nonnegative relationship” with corporate financial performance); Scientific Beta, “*Honey, I Shrunk the ESG Alpha*”: *Risk-Adjusting ESG Portfolio Returns* (April 2021); Samuel Hartzmark & Abigail Sussman, *Do Investors Value Sustainability? A Natural Experiment Examining Ranking and Fund Flows*, J. FIN.; Aneesh Raghunandan & Shivaram Rajgopal, *Do ESG Funds Make Stakeholder-Friendly Investments?* (May 2022), <https://ssrn.com/abstract=3826357> [<https://perma.cc/4GKQ-KUNH>].
282. Akane Otani, *Big Technology Stocks Dominate ESG Funds*, WALL STREET J. (Feb. 11, 2020); Camila Hodgson, *Funds Branded “ESG” Are Laden with Technology Stocks*, FIN. TIMES (Aug. 14, 2020).



The debate over the causes of climate change and what, if anything, to do about it has become highly political.<sup>283</sup> This Article takes no position on that debate; the SEC, however, does. In seeking to mandate climate disclosures, the agency takes the position that the four premises stated above are true. The proposed rules then organize corporate disclosures on that basis.

The SEC expects companies to view climate change as a serious risk. Any company that dissents from this view must justify its dissent. For example, in requiring financial statement disclosure of costs associated with severe weather events, the proposed disclosure rules proceed from the assumption that all such events are caused by climate change.<sup>284</sup> Any issuer that does not share this assumption must state and explain any "policy decisions" underlying their dissent.<sup>285</sup> Issuers that share the Commission's viewpoint on climate are not required to state their reasoning or explain their "policy decisions." The rule's burden falls asymmetrically on those that do not share the government's viewpoint.

Requiring a justification—making someone expressly state and defend their views—is a way of enforcing viewpoint conformity.<sup>286</sup> This is especially true in cases where there is a dominant view, enforced by

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283. On the politics of climate change, *see, e.g.*, Lipton, *infra* note 300, and Williams, *infra* note 301. *See also* Letter from U.S. Sen. to Hon. Gary Gensler, Chair, Sec. and Exch. Comm'n (Apr. 5, 2022) (available at <https://www.sec.gov/comments/s7-10-22/s71022-20122544-278541.pdf> [<https://perma.cc/5WG4-NZE5>]) (letter signed by 19 senators urging withdrawal of the proposed climate disclosure rules); Letter from U.S. Rep. to Vanessa A. Countryman, Sec'y, Sec. and Exch. Comm'n (Apr. 11, 2022) (available at <https://www.sec.gov/comments/s7-10-22/s71022-20123081-279409.pdf> [<https://perma.cc/56XQ-5K8V>]) (letter signed by forty house members urging withdrawal of the proposed climate disclosure rules).

284. *See* Proposed Rule Release, *supra* note 1, 87 Fed. Reg. at 21464–65 (to be codified at 17 C.F.R. §§ 210.14-02(c), (e)); *see, e.g.*, Proposed Rule Release, *supra* note 1, 87 Fed. Reg. at 21464 (to be codified at 17 C.F.R. § 210.14-02(a)); U.S. CONST. amend. I.

285. *See* Proposed Rule Release, *supra* note 1, 87 Fed. Reg. at 21464 (to be codified at 17 C.F.R. § 210.14-02(a)); *see, e.g.*, W. Virginia State Bd. Of Educ. v. Barnette, 319 U.S. 624 (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."); *see also, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977) (holding that states may not compel citizens to display state motto on license plates).

286. *See generally* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) (demonstrating how viewpoint diversity has the power to alter the conclusions of a group); CASS R. SUNSTEIN, *CONFORMITY: THE POWER OF SOCIAL INFLUENCE* (2019) (explaining why people conform to other's expectations and whether this is a force for good or bad decision making); IRVING L. JANIS, *VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES* (1972) (seminal work on "groupthink" as a psychological drive for consensus at any cost suppresses dissent and appraisal of alternatives in decision making groups).

a powerful elite, that is intolerant of dissent.<sup>287</sup> Those holding a dissenting view—for example, that severe weather events cannot be blithely assumed to be the product of human action or that global temperature changes might be not materially impacted by carbon emissions from human activities—can be forced into conformity by making them articulate their unpopular views publicly. Corporations operate not in the “marketplace of ideas” but simply in the marketplace.<sup>288</sup> In this context, the need to avoid offending customers and employees can be expected to bring corporate speech, once compelled, into conformity with mainstream opinion.

The claim that these disclosures are not political but purely financial is belied by the fact that the SEC requires them without regard to materiality. Financial disclosures have some basis in materiality. The proposed GHG disclosures, however, are not qualified by materiality.<sup>289</sup> Furthermore, the narrative climate-risk disclosures apply the concept of materiality selectively. For example, while the requirement that issuers disclose only material climate risks superficially resembles the traditional materiality standard, the privileging of climate risk over other kinds of remote contingencies reveals the government’s bias.<sup>290</sup> There are many remote contingencies that might affect corporate profitability. A partial list might include nuclear war, civil unrest, quarantines and lockdowns, inflationary monetary policy, and supply chain disruptions. In mandating disclosure of a particular contingency ahead of others, the government privileges that risk as clear and present rather than speculative and remote. This again amounts to the imposition of a viewpoint.

The SEC defends itself against the claim that climate risk is speculative by arguing that several other mandatory disclosure items, such

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287. See Adam D. Galinsky et al., *Power Reduces the Press of the Situation: Implications for Creativity, Conformity, and Dissonance*, 95 J. OF PERSONALITY & SOC. PSYCH. 1450, 1454–55 (2008); See generally Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCH. MONOGRAPHS: GEN. & APPLIED, 9 (1956); Solomon E. Asch, *Opinions and Social Pressures*, 193 SCI. AM. 5, 31–35 (1955); SOLOMON E. ASCH, *SOCIAL PSYCHOLOGY* (1952).

288. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1, 2–3 (1984) (describing the origins of the marketplace of ideas and its role in free speech jurisprudence).

289. See *id.*, 87 Fed. Reg. at 21469 (to be codified at 17 C.F.R. § 299.1504(e)(1)); see, e.g., *id.*, 87 Fed. Reg. at 21341.

290. See Proposed Rule Release, *supra* note 1, 87 Fed. Reg. at 21467 (to be codified at 17 C.F.R. § 229.1502(b)). The SEC cites *Basic v. Levinson* as support for this approach to materiality. See *id.*, 87 Fed. Reg. at 21351, n.209 (citing *Basic v. Levinson*, 485 U.S. 238 (1998)). Note, however, that *Basic* does not support the weight of the SEC’s argument. *Basic* involved a risk that was both clear and present at hand—stock price reaction to merger rumors—not a risk remote as climate change.

as fair value estimates and loss contingencies, also involve estimations of uncertainty, applications of judgment, and assumptions.<sup>291</sup> However, the mere fact that two estimates each involve future events does not render them comparable. Estimates of climate risk contain many more embedded assumptions—namely, the four premises with which this section began—than typical contingent loss estimates. For example, the loss contingency from a class action lawsuit is a product of a claim's probability of success and the severity of likely damages, each of which can be estimated on the basis of precedent—prior judicial decisions and settlement amounts—and is amenable to actuarial analysis.<sup>292</sup> Such estimates are comparable to climate only if one disregards (or disbelieves) the uncertain probabilities, indeterminate factors, and contested premises that accompany climate estimates.<sup>293</sup> They are comparable, in other words, only if one starts from the government's viewpoint on climate.

The SEC reveals its viewpoint in myriad other ways. For example, it asserts that "the science of climate modeling has progressed in recent years and enabled the development of various software tools,"<sup>294</sup> but it does not acknowledge the indeterminacy and contradictions that beset these models.<sup>295</sup> Similarly, the SEC's suggestion that issuers employ consultants to measure climate risk—"climate consulting firms are available to assist registrants"<sup>296</sup>—endorses an industry whose entire existence is based on supporting the four premises with which this section began.<sup>297</sup> In shilling for this industry, the SEC has endorsed a particular viewpoint on a contested issue.

The promulgation of a specific viewpoint on climate, consistent with the interests of the political party currently in power, thus emerges as the motivation behind the SEC's climate disclosure

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291. See Proposed Rule Release, *supra* note 1, 87 Fed. Reg. at 21363.

292. See, e.g., Tom Baker & Sean J. Griffith, *How the Merits Matter: D&O Insurance and Securities Settlements*, 157 UNIV. PA. L. REV. 755 (2009) (describing actuarial estimates of settlement values).

293. See, e.g., BASEL COMMITTEE ON BANKING SUPERVISION, CLIMATE-RELATED FINANCIAL RISKS—MEASUREMENT METHODOLOGIES 17 (2021), <https://www.bis.org/bcbs/publ/d518.pdf> [<https://perma.cc/4DB8-ZS29>] (stating that "the range of impact uncertainties, time horizon inconsistencies, and limitations in the availability of historical data on the relationship of climate to traditional financial risks, in addition to a limited ability of the past to act as a guide for future developments, render climate risk measurement complex and its outputs less reliable as risk estimators").

294. Proposed Rule Release, *supra* note 1, 87 Fed. Reg. at 21353.

295. See, e.g., *supra* notes 274–275.

296. Proposed Rule Release, *supra* note 1, 87 Fed. Reg. at 21353.

297. A consultant who openly acknowledged the indeterminacy of climate modeling would find that they had no basis on which to sell their services. See also Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075 (2016) (describing consultants' investment in the systems that generate the need for consulting).

rules.<sup>298</sup> Disclosure is a mechanism of social conformity and social control.<sup>299</sup> The point of the rules is not to serve investors but rather to force companies and their managers, directors, auditors, lawyers, and consultants to demonstrate ideological conformity.<sup>300</sup>

The SEC cannot use its regulatory authority to force assent to a regnant political orthodoxy.<sup>301</sup> The use of investor protection as a pretext to impose viewpoint conformity creates “controversy” as this Article has defined the term. As a result, deferential judicial review under *Zauderer* is no longer available. Even if, contrary to the analysis of this Article, securities regulation applied only to unprotected speech,<sup>302</sup> the First Amendment would not allow the government to use securities regulation as a means to engage in viewpoint discrimination.<sup>303</sup> The imposition of viewpoint conformity triggers strict scru-

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298. In U.S. politics, addressing climate change is a central agenda item of the Democratic party. See THE 2020 DEMOCRATIC PLATFORM, <https://democrats.org/where-we-stand/party-platform/combating-the-climate-crisis-and-pursuing-environmental-justice/> [<https://perma.cc/5HCB-RGAU>] (listing “Combating the Climate Crisis and Pursuing Environmental Justice” as one of ten core agenda items and stating that “Climate change is a global emergency. We have no time to waste in taking action to protect Americans’ lives and futures.”). As of March 21, 2022, when the proposed rules were promulgated, the democratic party controlled the presidency, the house of representatives, and, through the tie-breaking vote of the vice-president, the senate. The SEC, which by statute must contain both democrat and republican commissioners, consisted of three democrats and one republican. All three democrats voted in favor of the proposed rules. The one republican commissioner voted against them.

299. See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Ingber, *supra* note 288.

300. Honest advocates acknowledge this. See, e.g., Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REGUL. 499, 532 (2020) (“The goal, in short, is to make sustainability information relevant to financial performance, even if it is not currently, by empowering noninvestor groups to pressure corporations into improving their behavior. . . . Far from pursuing investor wealth, much of the sustainability movement is designed to make corporate profits difficult to achieve unless management attends to the needs of noninvestor stakeholders.”); Cynthia A. Williams, *Fiduciary Duties and Corporate Climate Responsibility*, 74 VANDERBILT L. REV. 1875, 1912 (2021) (describing the Proposed Rules as an outgrowth of “the Biden Administration’s ‘whole-of-government’ approach to climate”).

301. In the words of the Court: “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.” *W. Virginia State Bd. of Educ. v. Barnett*, 319 U.S. 624 (1943).

302. See *supra* subsection III.B.1.

303. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (striking down a hate crime ordinance aimed at fighting words that stirred racial animus, holding that even unprotected categories of speech “may [not] be made the vehicles for content discrimination unrelated to their distinctively proscribable content”).

tiny.<sup>304</sup> Under strict scrutiny, the SEC would have to show that the climate disclosure rules are the least restrictive means necessary to achieve a compelling governmental interest.<sup>305</sup> The SEC would not be able to survive this standard of scrutiny.<sup>306</sup> Whatever standard of scrutiny applies, the SEC is not entitled to deference for its interpretation of climate science nor is it entitled, through regulation, to impose that interpretation on corporate issuers and their investors.<sup>307</sup>

## 2. *Serving the Interests of Asset Managers at the Expense of Ordinary Investors*

A second way in which the proposed rules create controversy is by privileging the interests of a subset of investors over the interests of investors as a class. The SEC repeatedly acknowledges that it promulgated the climate disclosure rules because they were demanded by asset managers. The proposed rule release points to "investor demand" fifty-four times as a justification,<sup>308</sup> devoting entire sections of discussion to "The Growing Investor Demand for Climate-Related Risk Disclosure and Related Information" and "Investors' Demand for Climate Information."<sup>309</sup> Yet when investors are identified as the source for this demand,<sup>310</sup> they are invariably asset managers.<sup>311</sup>

Asset managers want climate information, and they want the SEC to force issuers to give it to them. There may be several reasons for this. One possibility is that asset managers have come to believe wholeheartedly in the four premises above. Another is that climate information, specifically emissions data, is useful in the asset management business and therefore valuable to asset managers without re-

304. *Rosenberger v. Rectors and Visitors of the Univ. of Va.* (1995) ("When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

305. *Alameda Books v. City of Los Angeles*, 122 S.Ct. 1728, 1730 (2002) ("Strict scrutiny leaves few survivors.").

306. *See infra* subsection V.B.4.

307. *Accord* Jonathan H. Adler, *Super Deference and Heightened Scrutiny*, 74 FLA. L. REV. 268 (2022) (arguing that deference to governmental expertise is inappropriate in situations where heightened First Amendment scrutiny applies).

308. *See* Comment Letter from Lawrence A. Cunningham et al. to Sec. and Exch. Comm'n 3 (April 25, 2022) (on file at the Sec. and Exch. Comm'n) (analyzing citation patterns) [hereinafter Professors' Comment Letter].

309. Proposed Rules Release, *supra* note 1, at 25–29 and 330–34.

310. Often the SEC cites as a source of demand not investors but rather political organizations such as the United Nations and advocacy groups such as the Net Zero Asset Managers Initiative, Climate Action 100+ and the Glasgow Financial Alliance for Net Zero. *See* Proposed Rule Release, *supra* note 1.

311. Professors' Comment Letter, *supra* note 308, at 3–4 (identifying institutions identified in the release as sources of "investor demand").

gard to its relevance either to climate change or to corporate profits. How might climate information be valuable to asset managers?

Asset managers compete for investors.<sup>312</sup> Investors might be attracted by a manager's claim to offer climate-friendly funds.<sup>313</sup> However, the information necessary to build and market such portfolios is costly. To develop this information, asset managers must evaluate and compare the climate-friendliness of essentially every publicly-traded company. This evaluation and comparison would require a major research effort, meaning a large staff of analysts and a concomitantly large budget. Moreover, even with such a budget, the effort might fail because the relevant information is internal to each issuer and not available to outside analysts unless the issuer elects to gather and share it. If the information is costly to compile and process, issuers might not bother.<sup>314</sup>

The exercise would be cost-prohibitive for all but the largest asset managers, and even these firms would have to adjust fees to cover these costs. Fund fees would have to rise to account for the increase in research costs. That firms have so far been reluctant to raise fees in order to make this investment indicates doubt that their investors would ultimately accept higher marginal costs to hold a climate-friendly portfolio, at least when competitors continue to offer low or no cost funds. The asset managers' solution is therefore to outsource the cost of this research onto corporate issuers. Because increasing costs marginally decreases issuer returns, the ultimate cost of producing this information would be borne by investors. It would not, however, be borne by asset management firms, whose return depends primarily on assets under management (AUM), not investment returns. In this way, asset managers reap the benefits, but investors pay the costs.

Evidence of this agenda permeates the proposed rules but nowhere more than in the rules requiring disclosure of GHG emissions. As discussed above, issuers are required to disclose GHG emissions data without regard to its materiality.<sup>315</sup> Nevertheless, even when it is not financially material to the issuer or relevant to the "reasonable inves-

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312. This competition is driven by the ability to charge fees based on assets under management ("AUM"). See Sean J. Griffith & Dorothy Lund, *Conflicted Mutual Fund Voting in Corporate Law*, 99 BOSTON UNIV. L. REV. 1151, 1176-79 (2019) (describing the role of AUM in mutual fund operations).

313. Michal Barzuza, et al., *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020) (arguing that mutual funds' ESG activism is driven by the desire to attract investors).

314. This is likely the case. In addition to the inherent uncertainties involved in estimating the effect of climate change and in projecting these consequences onto a particular business's operations in the future, consider that the proposed rules require companies to gather this information not only with regard to their own operations but also for their customers and suppliers. See, e.g., Proposed Rules Release, *supra* note 1, § 229.1500(t); *id.* at 62-63.

315. *Id.* at 110.

tor,"<sup>316</sup> institutional asset managers find emissions data to be a useful proxy for climate friendliness.<sup>317</sup> GHG data is "quantifiable and comparable across companies and industries" and therefore easy to feed into algorithms ranking investments on the basis of climate friendliness.<sup>318</sup> The SEC openly justifies the GHG disclosures as important to asset managers.<sup>319</sup>

However, insofar as GHG disclosures are not material, they are not in investors' interests. Investors benefit from financially relevant information concerning the companies in which they invest. Investors as such derive no benefit from information that is not financially relevant,<sup>320</sup> yet as we have seen, this information is costly to produce.<sup>321</sup> Compelling its production thus imposes a cost without a benefit, thereby harming investors. Harming investors is not consistent with the SEC's mission to protect them.

Forcing ordinary investors to bear a cost that benefits only institutional asset managers and financial institutions inverts the notion of investor protection. Other mandatory disclosures may benefit some investors more than others—information investors, for example—yet to the extent that the information is relevant to investors as such, it becomes incorporated into price and thereby benefits all.<sup>322</sup> The proposed climate disclosures, by contrast, present a case in which a subset of investors derives *all* of the benefits, and ordinary investors—

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316. See 17 C.F.R. § 229.303(a); see, e.g., Commission Guidance, *supra* note 28.

317. See *supra* notes 88–92.

318. Proposed Rule Release, *supra* note 1.

319. The SEC also notes that the disclosures will help banks and other financial institutions track the data necessary to comply with their own emissions commitments. See *id.* at 11 n.15. However, these institutions made these commitments of their own accord and for their own reasons, no doubt encouraged by employees and clients, but entirely uncoerced by the SEC. Indeed, it would be beyond the SEC's authority to require emissions commitments. It is therefore puzzling why the SEC should use its authority to help these institutions make good on commitments privately made for their own reasons. Indeed, in doing so, the SEC furthers bankers' interests at the expense of investors, the constituency the agency was established to protect.

320. Asset managers and individuals with an idiosyncratic commitment to climate activism may benefit. In the case of asset managers because the disclosures help them derive income from assets under management. In the case of individuals because the disclosures somehow enhance their personal utility functions. Investors as a class, however, do not. See *supra* section V.A.

321. See, e.g., Goshen & Parchomovsky, *supra* note 239; *supra* subsection V.B.2; 17 C.F.R. § 229.303(a); Commission Guidance, *supra* note 28.

322. See Fisch, Hamdani & Solomon; Bebchuk & Hirst; Webber, Barzuza & Curtis, *supra* note 241. In such cases, regulation involves a tradeoff of benefits as harms. But the tradeoff analysis must still be done from the perspective of the class as a whole, not from the perspective of particular interest groups within the class.

investors as such—derive none yet still bear the cost of disclosure. This is not investor protection. It is regulatory capture.<sup>323</sup>

Given that only a subset of investors and not investors as a class stand to benefit from its rulemaking, the SEC cannot validly claim to act out of an investor protection rationale. Moreover, evidence that the SEC is acting on the basis of an alternative motivation—that is, serving the interests of asset managers and financial institutions—suggests that the investor protection rationale is, at best, pretextual. In light of this “controversy,” deference under *Zauderer* does not apply, and the SEC must survive, at a minimum, intermediate scrutiny under *Central Hudson*.

### 3. *Changing the Meaning of Investor Protection and Materiality*

A third way in which the proposed rules cause controversy is by implicitly changing the meaning of investor protection and materiality. To see this, it helps to consider the rules from the perspective of what might be called “portfolio benefit theory.” This justification is not explicitly offered by the SEC, but it has been argued by some academic supporters of the rule.<sup>324</sup>

Portfolio-benefit theory begins by arguing that the correct perspective from which to evaluate whether an intervention benefits or harms investors is the perspective of *diversified* investors—that is, investors holding the market as a whole. Such investors might view a regulatory intervention as beneficial even if it harmed particular companies within a portfolio provided that the intervention benefited the portfolio overall. So, for example, a broadly diversified investor might favor an intervention that harmed Exxon (by forcing it to abandon fossil fuels) because the intervention benefits the portfolio as a whole (by preventing climate change).<sup>325</sup> The portfolio benefit theory could be

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323. When a regulatory agency, founded to operate in the public interest, serves the interest of regulated entities, here asset managers and financial institutions, at the expense of the interest it was founded to protect, it is textbook regulatory capture. See GEORGE STIGLER, *THE THEORY OF ECONOMIC REGULATION* (1971) (describing the situation in which “regulation is acquired by the industry and is designed and operated primarily for its benefit”).

324. See, e.g., Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1 (2020) (using portfolio-theory to argue that diversified investors should seek to internalize negative externalities within the portfolio, thus explaining institutional investors’ increasing engagement on climate issues); Luca Enriques & Alessandro Romano, *Rewiring Corporate Law for an Interconnected World*, 64 ARIZ. L. REV. 51, 59 (2022) (arguing that “institutional investors [may] exercise their influence as shareholders of individual portfolio companies to induce them to internalize part of the externalities that negatively affect the performance of the investors’ portfolio as a whole”).

325. This is a hypothetical example. Even the UN Climate Panel does not project economic Armageddon from climate change. See IPCC, *Climate Change 2014: Impacts Adaptation and Vulnerability, Part A: Global and Sectoral Aspects*



used to justify climate disclosures by arguing that even if the disclosures harm individual companies in the portfolio, they serve to benefit the portfolio overall by helping to prevent or forestall negative consequences of climate change.

As I have argued elsewhere, the portfolio-benefit theory is a law professor's hypothetical with no relevance to the real world of investment policy.<sup>326</sup> In the real world, few, if any, portfolio-holders in fact hold "the market."<sup>327</sup> As a result, few, if any, firms are in fact motivated to put the market ahead of the weighted returns of the individual firms in their portfolios, and any firm that tried would likely break the law in so doing.<sup>328</sup>

More fundamentally, the portfolio-benefit theory suffers from an insurmountable knowledge problem.<sup>329</sup> A fund manager or regulator who actually wanted to adopt "the portfolio perspective" on a given question would face an impossible equation for which the necessary inputs are unavailable. To see this, consider an intervention that promises to harm Exxon but benefit the climate.<sup>330</sup> The decision-maker would have to calculate: (1) the actual effect of the intervention on the climate, (2) the benefit or cost of that effect distributed to every firm in the portfolio, including Exxon. Furthermore, (3) the decision-maker would have to anticipate how people and firms would adapt to the intervention in future periods and factor that adaptation into the model. None of the steps of this calculation is feasible. With regard to the first, as noted above, climate modeling is uncertain, indeterminate, and contested, and climate models have little predictive

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(2014) available at [www.ipcc.ch/site/assets/uploads/2018/02/WGIAR5-Chap10\\_FINAL.pdf](http://www.ipcc.ch/site/assets/uploads/2018/02/WGIAR5-Chap10_FINAL.pdf) [<https://perma.cc/V4ZX-YPB4>] ("For most economic sectors, the impact of climate change will be small relative to the impacts of other drivers . . .").

326. Sean J. Griffith, *Opt-in Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX. L. REV. 983, 1016–20 (2020).

327. *See id.*

Not all . . . portfolio-holders are broadly diversified. Indeed, not all mutual funds, even index funds, are broadly diversified. Many focus on a few firms or an industry sector. Even funds based on broadly diversified indices, including the S&P 500, are weighted by market capitalization such that much of their return is driven by a few large firms. Broadly diversified fund portfolios may also overweight particular industries. Again, this is true of the S&P 500, approximately half of which consists of information technology, health care, and financial companies. The voting incentives for holders of such portfolios would favor those industries in which they are overweight. Because few if any mutual funds, even indexes, hold "the market," the market-wide perspective exists in hypothetical form only.

*Id.* at 1017–18 (citations omitted).

328. *Id.* at 1018 ("Voting intentionally to harm a company is contrary to public policy, inconsistent with the core rationales for shareholder voting, . . . and likely contrary to Delaware law.") (citations omitted).

329. F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

330. *See* Griffith, *supra* note 326, at 1019–20.

power.<sup>331</sup> With regard to the second, the decisionmaker would have to apply the results of this impossible modeling exercise to each and every firm in the portfolio, analyzing the impact on profit and loss for each firm in the portfolio. Moreover, much of the necessary data is simply not available because the relevant information is private and proprietary to each individual firm. Most importantly, however, the estimation requires decision-makers to anticipate and plan for the myriad ways in which human beings will adapt and respond to the intervention. Human action is dynamic and, as such, often thwarts the intentions of static regulatory regimes.<sup>332</sup> It is impossible to guess how firms will react to rule-making and therefore impossible to calculate the effects of a rule across a portfolio of firms. The portfolio-benefit theory thus collapses under the weight of the knowledge problem.

Even if it were not rejected as an outright impossibility, the portfolio-benefit theory could not save the climate disclosure rules from constitutional invalidation. The portfolio-benefit theory redefines concepts at the heart of securities regulation—namely, investor protection and materiality. Investor protection under the portfolio-benefit theory is defined by reference to a subset of investors—namely, diversified investors. Because not all investors are diversified, this means treating the interests of the whole as identical to the interests of a part. The perspective of diversified investors may be more fitting than the perspective of politically or financially motivated subgroups, but it is still a subgroup. Narrowing “investor” to mean only diversified investors would change the meaning of the term and, with it, the meaning of investor protection.

The portfolio benefit theory also changes the definition of materiality. As discussed above, traditionally the concept of materiality embodies two considerations: relevance and weight.<sup>333</sup> Each of these considerations has a different reference point. Relevance looks to the perspective of the investor, but weight looks to the impact of a fact on the issuer. A fact has weight depending upon how it affects the valuation of the corporate issuer, not depending upon how it affects the investor. By trading off the harm to individual firms against the benefit to the portfolio, the portfolio-benefit theory looks to the weight of a

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331. See, e.g., *supra* notes 274–275.

332. Consider, as one example of dynamism and unintended consequences, the deforestation in Asia and South America caused by European biodiesel fuel goals. See Arthur Nelsen, *EU biofuels goals seen behind deforested area as big as the Netherlands*, REUTERS (July 5, 2021), available at <https://www.reuters.com/article/us-biofuels-deforestation-europe-idUSKCN2EB0B9> [<https://perma.cc/4HAR-CMBG>]; Melanie Hall, *New palm oil figures: Biodiesel use in EU fueling deforestation*, DEUTSCHE WELLE (Jan. 6, 2016), <https://p.dw.com/p/1lyOw> [<https://perma.cc/UEN9-74LB>].

333. See *supra* note 34 (Proposed Rules Release); Roisman, *supra* note 35.

fact or an intervention on the *portfolio*, not individual *firms*. This changes the reference point and therefore the meaning of materiality.

The SEC cannot change the meaning of these terms without creating controversy. The SEC's regulatory authority is limited to the concept of investor protection as qualified by the concept of materiality. Changing the meaning of these foundational concepts effectively redefines the agency's regulatory authority. But changing the meaning of foundational concepts creates controversy, and controversy, once engendered, renders judicial deference under *Zauderer* inapplicable. Again, the SEC must withstand at least intermediate scrutiny under *Central Hudson*. And this, as the next section demonstrates, it cannot do.

#### 4. Application of Heightened Scrutiny

Having failed to qualify for deferential judicial review under *Zauderer*, the proposed rules must satisfy a form of heightened scrutiny: either strict scrutiny, or a form of intermediate scrutiny akin to that described in *Central Hudson*. Each of these forms of scrutiny considers the strength of the government's interests alongside the means undertaken to achieve it. In the case of strict scrutiny, the government's interest must be "compelling" and the means narrowly tailored to it. In the case of intermediate scrutiny, the government's interest must be "important" and the means directly related and no more extensive than necessary to achieve it.<sup>334</sup> The proposed climate rules would fail either one of these tests.

Under either of these tests, we first ask: what is the government's interest in mandating climate disclosures? There is more than one possible answer here. The government might claim that its interest is in preventing the negative consequences of climate change. In order for this to count as a compelling justification, however, the government should bear some burden of proof to establish the plausibility of at least the first three climate premises discussed above. Even if it could do so, the government likely could not establish the necessary relationship between corporate disclosure regulations and climate change. More obvious strategies for preventing climate change would include direct regulations, perhaps through the EPA, to control carbon dioxide emissions, through a carbon tax or other system. The regulation of corporate speech does not qualify as narrowly tailored, or even directly related, to the prevention of climate change.

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334. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n N.Y.*, 447 U.S. 557, 564 and 570 (1980); see also *Milavetz, Gallop & Milavetz P.A. v. United States*, 559 U.S. 229, 249 (2010) (describing *Central Hudson* as holding that "restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny"); *Zauderer v. Off. of Disciplinary Council*, 471 U.S. 626 (1985).

Instead, the SEC seems likely to assert an investor protection rationale for its rulemaking.<sup>335</sup> However, as demonstrated, the rule in fact subverts investor protection. Only by changing the concept of investor protection does the rule fit the justification. Moreover, given that the rules only help some investors—asset managers—at the expense of investors as a class, it is difficult to see how the investor protection justification can count as compelling or even important for these particular rules.

Nevertheless, even allowing the SEC to claim investor protection, the proposed rules cannot be more restrictive than necessary, and they manifestly are. The rules require the disclosure of immaterial information. Compelling the production of immaterial information is not necessary to protect investors. Immaterial disclosures provide at best, “only ineffective or remote” support for investor protection. Moreover, insofar as some of the proposed rules require the disclosure of *material* information, these too are more extensive than necessary because companies are already required to release material information concerning climate under existing disclosure rules. The duplication of existing disclosure rules is unnecessary and therefore more restrictive than necessary.

Because what cannot pass under intermediate scrutiny must likewise fail when scrutiny is strict, the proposed climate disclosure rules must be invalidated under either form of heightened scrutiny. Recall that we have only reached this heightened standard of scrutiny because the controversy inherent in the rulemaking made *Zauderer* inaccessible to the SEC. Most SEC rule-making would be upheld under *Zauderer*, if not under *Central Hudson*. The climate rules, however, must be invalidated under the later because the former is unavailable.

### C. Other Controversial Mandates

First Amendment analyses of other ESG agenda items—such as diversity, equity, and inclusion—would likely arrive at the same conclusion. Controversy could be demonstrated by connecting the disclosure mandate to a political viewpoint.<sup>336</sup> Alternatively, controversy could be demonstrated by pointing out that such disclosures are apparently irrelevant to corporate financial returns and therefore not uncontroversially motivated by the investor protection rationale. In ei-

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335. See, e.g., Proposed Rule Release, *supra* note 1. Were the SEC to base its rulemaking on some public interest, such as addressing climate change, other than investor protection, it would risk invalidation under *West Virginia v. EPA* since doing so would invoke a “major question” without Congressional guidance. See *supra* note 267.

336. Diversity, equity, and inclusion disclosures, for example, proceed from a particular ideological perspective, from which the government cannot compel speech without rousing heightened scrutiny.

ther case, *Zauderer* does not apply to shield the ESG agenda from First Amendment scrutiny. Indeed, given the potential connection between climate change and economic returns, disclosures concerning climate change are more likely than most other ESG matters to survive serious scrutiny. That these rules necessarily fail under First Amendment Scrutiny does not bode well for other ESG agenda items.

Nor does it bode well for other disclosure rules not centrally focused on investor protection. For example, the mandatory inclusion of shareholder proposals concerning social or political matters under Rule 14a-8 is difficult to justify as uncontroversial.<sup>337</sup> The rule forces corporations to speak to matters of interest to small groups of shareholders, often without regard to whether the matters are relevant to the company's financial returns. Shareholder proposals have proliferated in recent years, and many of them advance a nakedly political agenda.<sup>338</sup> Insofar as these proposals are unconnected to financial return, they are not uncontroversially motivated to serve the purposes of investor protection, meaning *Zauderer* cannot shield Rule 14a-8 from heightened First Amendment scrutiny.

In each of these cases, the SEC creates controversy by exceeding the regulatory mandate to protect investors. Having opened the door to alternative agendas, the SEC has invited a serious constitutional challenge to its rules. Application of First Amendment scrutiny to securities regulation will serve to constrain the expansion of the agency's regulatory agenda, confining it to clear and consistent application of the investor protection rationale.

## VI. CONCLUSION

The SEC's recent foray into ESG threatens to shatter the constitutional deference that the agency has enjoyed throughout most of its history. In spite of compelling speech, the SEC's mandatory disclosure rules have not been subjected to serious constitutional review because they could typically be seen to proceed from the investor protection rationale. The agency's recent departure from that rationale provides an opportunity to resolve lingering doctrinal ambiguities concerning

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337. 17 C.F.R. § 240.14a-8. Full elaboration of the arguments concerning 14a-8 are beyond the scope of this Article. I undertake this effort elsewhere. See Sean J. Griffith, *The Shareholder Proposal as Compelled Speech* (working paper on file with author).

338. See, e.g., Tom P. Skulski & Glenn O'Brien, *2022 Proxy Season – Shareholder Proposal Review*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (available at <https://corpgov.law.harvard.edu/2022/10/03/2022-proxy-season-shareholder-proposal-review/> [<https://perma.cc/U2LY-EQV2>]) (finding that of 538 proposals making it to a vote in the first half of 2022, fifteen percent addressed environment and climate, thirty-nine percent addressed social issues, and just under half addressed governance issues).

the application of the First Amendment to securities regulation. Unfortunately for the SEC, the analysis is unlikely to go its way.

This Article has argued that the key to First Amendment analysis of mandatory disclosure regulation is the concept of controversy. Under the commercial speech doctrine, controversy is created when regulation exceeds the regulatory purpose for which governmental action is authorized. In the case of the SEC's proposed climate disclosure rules, controversy is engendered by the pressure these rules put on the investor protection rationale, which limits and defines the SEC's authority to compel speech. Investor protection requires that regulatory action be motivated to serve the interests of investors as a class. Because the climate rules appear to be motivated either to impose a political viewpoint or to serve the interests of institutional asset managers, they cannot be said to proceed "uncontroversially" from the investor protection rationale. The creation of controversy triggers heightened judicial review which the proposed climate rules and, most likely, the bulk of the ESG agenda cannot survive. Nevertheless, most of the SEC's disclosure regulations, aimed as they are at material financial disclosures, are likely to survive First Amendment scrutiny.