

WOKE-WASHING AT WORK

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ABSTRACT

In the modern era, corporate marketing and branding processes frequently encompass a public commitment to progressive social causes favored by a firm's base of both consumers and workers. So-called woke capitalism, or values-based branding, is designed to build a relationship between the firm and its stakeholders that will yield brand loyalty and increased profits. It has proved exceptionally effective with millennial workers, who increasingly seek to express social justice and political values through their brand affiliations. Sometimes woke capitalism involves authentic promises of principled production and service, but not always. Values-based corporate promises that turn out to be inauthentic amount to "woke-washing": Firms deploy progressive values or social activism language in marketing campaigns to reap reputational benefits, but do not align their practices with their commitments.

We argue that workers who are drawn to a firm by values-based branding are as much consumers of the brand as they are workers. When worker-consumers experience woke-washing and realize that they have been made unwittingly complicit in the firm's deception, they are understandably distraught and outraged. Not only have they invested labor into a brand fundamentally incompatible with their deeply held values, but their very identities are on the line. While consumers in this situation may bring claims under consumer law, workers who consume the brand have no remedy because consumer law blocks employees qua employees from bringing suit. And when consumer-workers protest, employment law offers little solace: They can be disciplined or discharged at-will without legal protection.

Work law scholars have begun to explore the possibilities of using consumer law to hold employers accountable to workers in the gig economy, where employers often frame workers as something other than employees (for example, independent contractors) in order to avoid the mandates of labor and employment law. Consumer law scholars have articulated

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theories for holding firms liable to consumers for identity-based harm when they are defrauded by broken promises regarding the goods and the brands that they consume. Both lines of argument, however, leave undisturbed consumer law's traditional worker/consumer dichotomy. This Article directly contests that dichotomy, arguing that consumer law's historical resistance to claims by employees is inapposite where firms engage in values-based branding that simultaneously exploits workers' identities as consumers of the brand and as workers. We argue that consumer law should protect workers' challenges to their employers' inauthentic embrace of a social justice mission when the employer has relied upon values-based branding to recruit and retain its workforce. Because brand values have signaling attributes that run to the core of one's moral identity, they should be treated as a symbolic consumable under consumer law statutes, even absent the purchase of a tangible product or service. While these claims will be difficult to win, this broader framing of consumer law claimants as worker-consumers could create opportunities to forge alliances between labor and consumer advocacy groups. These alliances could both provide leverage in settlement negotiations and extend beyond the courtroom to help galvanize more meaningful and transformative social justice change.

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INTRODUCTION

In an American economy premised on production, exploitation of the labor process was the main source of profits. Work was the core economic driver, and most citizens constructed their identities around their labor or those of the heads of households in which they resided.¹ By contrast, consumption was the quintessential leisure that made work tolerable.² Thus, the line between work and consumption appeared clear: Work was yin, consumption was yang.

The boundaries between producers and consumers were also presumed clear: Workers produced, and consumers were the essential third parties in the profit-making venture. During labor disputes, workers and consumers were often cast as adversaries with oppositional interests: If employers were forced to pay labor more, prices would increase and consumers would suffer. Employers were aligned with consumers; workers were the outliers. Indeed, employers whose investments in capital locked them into a particular region were seen as guardians of the community's interests against the demands of selfish and greedy workers, whose relatively transient status gave them no permanent stake in the community.³

But the line between production and consumption has never been absolute, and workers and consumers have not always been adversaries. Employers have often dealt with workers simultaneously as producers *and* consumers. For example, employers manipulated prices at company stores as well as rents in company housing for coal miners and textile workers who lived in company towns, thus maintaining profit margins even while raising hourly wages or conferring benefits designed to ward off unionization.⁴ Generous employee discount programs at automobile manufacturers helped to attract and retain workers while also increasing profits and substituting for wage gains made through collective bargaining.⁵ Moreover, the social

1. See ZYGMUNT BAUMAN, *WORK, CONSUMERISM AND THE NEW POOR* 2, 17 (2d ed. 2005) (explaining how work in the industrial society supplied the economic means for subsistence, determined one's social standing, and structured the "itinerary of life"). See generally STUDDY TERKEL, *WORKING: PEOPLE TALK ABOUT WHAT THEY DO ALL DAY AND HOW THEY FEEL ABOUT WHAT THEY DO* (1974) (describing how work constructs identity).

2. Marek Korczynski & Ursula Ott, *When Production and Consumption Meet: Cultural Contradictions and the Enchanting Myth of Consumer Sovereignty*, 41 J. MGMT. STUD. 575, 576 (2004).

3. MARION G. CRAIN, PAULINE T. KIM, MICHAEL SELMI & BRISHEN ROGERS, *WORK LAW: CASES AND MATERIALS* 12 (4th ed. 2020); see Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 484 (2003) (describing how laws permitting incorporation reinforced this vision of employer interests as aligned with community interests).

4. DAVID ALAN CORBIN, *LIFE, WORK, AND REBELLION IN THE COAL FIELDS* 9–10, 32 (1981).

5. Rebecca Blumenstein & Andrea Puchalsky, *The Real Reason People in Detroit Remain Loyal to American Cars*, WALL ST. J. (Jan. 29, 1998, 12:01 AM), <https://www.wsj.com/articles/SB886031457487193000> [<https://perma.cc/5XKU-F4EQ>]; see *infra* notes 96–101 & accompanying text (describing automobile discounts for employees, their friends, and families at Ford and elsewhere).

movements that advocate on behalf of labor and those that represent consumers have at various points framed the interests of their constituents as intertwined in the struggle to reform the capitalist system and redistribute profits to the working class or improve working conditions for laborers. Ethical consumer movements led by women during the 1930s urged consumers to act collectively to moderate abuses by the capitalist system that had led to the Great Depression, pressing for stronger child labor laws, enhanced labor protections, higher wages, and collective bargaining rights.⁶ Likewise, the United Farm Workers Organizing Committee made effective use of the consumer boycott in the 1960s to pressure grape growers into signing a historic agreement that improved wages and working conditions for migrant farm workers.⁷

Nevertheless, the idea that workers and consumers are fundamentally distinct groups with conflicting interests has endured, shaping the law in significant ways that make it difficult to challenge employer practices that exploit workers as consumers.⁸ Work law is categorically separate from consumer law. Both bodies of law impose threshold gatekeeping requirements that require claimants to identify either as an employee or as a consumer to secure coverage under the law. Consumers will not typically qualify as employees for purposes of coverage under work law, and employees will forego protection as consumers for purposes of recovery under consumer legislation.⁹

These legal barriers remain well-ensconced even as firms have doubled down on engaging workers simultaneously as workers and as consumers of the firm's corporate brand. Increasingly, corporate marketing efforts are

6. Nick French, "Ethical Consumption" Used to Mean Something More than Feeling Smug About Your Purchases, *JACOBIN* (Jan. 31, 2023), <https://jacobin.com/2023/01/ethical-consumption-labor-movement-organize-working-class-consumer-movement> [<https://perma.cc/4XKR-XWNK>]; see *infra* notes 288–92 & accompanying text (describing the rise of ethical consumerism during the Progressive Era).

7. See MONROE FRIEDMAN, *CONSUMER BOYCOTTS: EFFECTING CHANGE THROUGH THE MARKETPLACE AND THE MEDIA* 47–49 (1999); see also Jennifer Gordon, *Law, Lawyers and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 12, 24–26 (2005) (describing how union organizers exerted consumer pressure to improve working conditions for farm workers by emphasizing the use of pesticides and absence of bathroom facilities for workers, suggesting to consumers that the food they were buying was unsafe and potentially contaminated). See generally LEO WOLMAN, *THE BOYCOTT IN AMERICAN TRADE UNIONS* (1916).

8. For example, employers may utilize financing and credit instruments to lock workers into service, such as Training Repayment Agreement Provisions (TRAPs) or deceptive franchise agreements. They may also require workers to consume and model the apparel they sell, significantly reducing their waged compensation. See Jonathan F. Harris, *Consumer Law as Work Law*, 112 CALIF. L. REV. 1, 12–23 (2024) (discussing TRAPs and other devices); Marion Crain, *Consuming Work*, in *INVISIBLE LABOR: HIDDEN WORK IN THE CONTEMPORARY WORLD* 257 (Marion G. Crain, Winifred R. Poster & Miriam A. Cherry, eds., 2016) (discussing consumption requirements imposed on workers in retail clothing stores and legal challenges raised under minimum wage laws).

9. See Harris, *supra* note 8, at 26–27, 42–44.

directed not only at consumers, but also at workers. Marketing efforts targeting workers take three forms: (1) Employer branding designed to recruit and retain workers by painting the firm as a “good” employer, typically focused on wages, working conditions, employee discounts and other economic benefits associated with the job;¹⁰ (2) internally-focused branding that infuses the employer’s public-facing brand into job performance, which entails efforts to ensure that frontline workers represent the brand and perform their jobs consistently with its messaging;¹¹ and (3) values-based branding that anticipates and draws upon the pre-existing identities of prospective workers, including their lifestyle preferences and moral values, to attract them and ensure that they invest in the firm at the level of heart and mind.¹² Appealing to workers in these ways enhances employer recruiting and retention success, ensures that the employer’s brand message is communicated effectively to consumers, and reduces the need for managerial oversight.

The third category of branding above—values-based branding—is one of the most provocative corporate marketing and branding strategies, and it is aimed at *both* consumers and workers. Values-based branding entails publicly signaling a commitment to progressive social causes favored by the firm’s consumer/worker base. Consider, for example, the public commitments that many firms have made in support of social justice movements like Black Lives Matter (BLM), #MeToo, and Lesbian, Gay, Bisexual, Transgender, Queer/Questioning Plus (LGBTQ+), or to social justice-related goals such as sustainability, commitments to enhance diversity, equity and inclusion (DEI), or the mitigation of environmental damage.¹³ Also known as “woke capitalism,” values-based branding is controversial for two reasons. First, it explicitly inserts corporations into the political realm, affording them outsized influence over the democratic process and injecting them into an increasingly polarized political environment.¹⁴ Second, many commentators accuse CEOs and firms of

10. Tim Ambler & Simon Barrow, *The Employer Brand*, 4 J. BRAND MGMT. 185, 192–93 (1996); see also *infra* Section II.A.

11. See Colin Mitchell, *Selling the Brand Inside*, HARV. BUS REV., January 2002, at 99, 99–100, 101–02, 105; see also *infra* Section II.B.

12. Chris Land & Scott Taylor, *Surf’s Up: Work, Life, Balance and Brand in a New Age Capitalist Organization*, 44 SOCIOLOGY 395, 409–10 (2010); see also *infra* Section II.C.

13. See *infra* note 91 (providing examples).

14. See STEPHEN R. SOUKUP, *THE DICTATORSHIP OF WOKE CAPITAL: HOW POLITICAL CORRECTNESS CAPTURED BIG BUSINESS* 13–19 (2021) (describing and critiquing the politicization of business); CARL RHODES, *WOKE CAPITALISM: HOW CORPORATE MORALITY IS SABOTAGING DEMOCRACY* 11–13 (2022) (worrying that ceding control over politics to powerful corporations will undermine democracy); Vanessa Fuhrmans, Miles Kruppa & Lauren Weber, *Company Bosses Draw a Red Line on Office Activists*, WALL ST. J. (Apr. 21, 2024, 1:56 PM), <https://www.wsj.com/lifestyle/workplace/company-bosses-draw-a-red-line-on-office-activists-bd11b7aa> [<https://perma.cc/UJK8>]

hypocrisy when they take public positions on political and social issues of the day, alleging that they are simply engaged in profit-mongering.¹⁵

This kind of inauthentic values-based branding is colloquially known as “woke-washing.” Woke-washing refers to appropriating the language of social activism and progressive social values into branding and marketing, without actually aligning the firm’s practices and policies with those values.¹⁶ When workers are attracted to a firm by woke-washing, they suffer significant identity harm when they discover that the representations are false.

In a parallel argument, consumer law scholars have explained that consumers who are misled by “greenwashing”—values-based branding relating to environmental or social sustainability¹⁷—suffer significant identity harm when they discover that efforts to align their consumption habits with their personal values have been frustrated by the firm’s misrepresentations about its products.¹⁸ Such harm goes beyond tangible loss and veers into the moral harm of “being unwittingly complicit in . . . harm[ing] the environment,” when in fact the consumer had endeavored to do the opposite.¹⁹ This identity harm, those scholars argue,

-EGBB] (noting that executives and corporate advisors are increasingly leery of becoming “ensnared in partisan politics”).

15. See Saabira Chaudhuri, *Does Your Mayo Need a Mission Statement?*, WALL ST. J., May 21, 2022, at B1, B6 (quoting CEO who pointed out that brands with a social justice purpose increase sales twice as fast as those without and help to attract top talent); Ross Douthat, *The Rise of Woke Capital*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/2018/02/28/opinion/corporate-america-activism.html> [<https://perma.cc/UJ5Z-YEHY>] (suggesting that companies signal their virtuous support for progressive social causes favored by their consumer base and their workers in an effort to attract and retain them, rather than as part of an authentic commitment to do good); see also VIVEK RAMASWAMY, WOKE, INC.: INSIDE CORPORATE AMERICA’S SOCIAL JUSTICE SCAM 7, 27, 192 (2021) (claiming that by mixing morality with commercialism, woke capitalism betrays the free market and sinks to the level of “reputational laundering” designed to enhance profits).

16. Erin Dowell & Marlette Jackson, “*Woke-Washing*” *Your Company Won’t Cut It*, HARV. BUS. REV. (July 27, 2020), <https://hbr.org/2020/07/woke-washing-your-company-wont-cut-it> [<https://perma.cc/DUL5-CLXJ>].

17. In contemporary lexicon, greenwashing refers to deceptive marketing or other misleading behavior that seeks to persuade individuals that a company’s products and practices are environmentally sustainable. See generally MERRIAM-WEBSTER, *Greenwashing*, <https://www.merriam-webster.com/dictionary/greenwashing> [<https://perma.cc/A9AK-SKNG>] (defining “greenwashing” as “the act or practice of making a product, policy, activity, etc. appear to be more environmentally friendly or less environmentally damaging than it really is”); see also Stephan Olk, *The Effect of Self-Congruence on Perceived Green Claims’ Authenticity and Perceived Greenwashing: The Case of EasyJet’s CO₂ Promise*, 33 J. NONPROFIT & PUB. SECTOR MKTG. 114, 115 (2021) (defining greenwashing as “the efforts by companies to mislead their customers into thinking that their practices as well as their products and services are more environmentally friendly than they truly are”).

18. See Sarah Dadush, *Identity Harm*, 89 U. COLO. L. REV. 863, 865 (2018) [hereinafter Dadush, *Identity Harm*]; see also Sarah Dadush, *The Law of Identity Harm*, 96 WASH. U. L. REV. 803, 804 (2019) [hereinafter Dadush, *The Law of Identity Harm*].

19. Dadush, *Identity Harm*, *supra* note 18, at 891.

should be cognizable under consumer law because consumption in American culture has such a powerful identity-signaling effect.²⁰

Workers lured by woke-washing suffer an even more profound identity harm. The idea that one's physical and intellectual labor has been harnessed without consent toward ends that are fundamentally inconsistent with one's values is obviously deeply disturbing. It is not surprising that workers who have found themselves in such situations have reacted with outrage. Worse, the identity harm is exacerbated by economic and status-based harm that results when employers retaliate by discharging workers when they protest. Consider the following examples at Google and Whole Foods.

Google workers have consistently sought to hold their employer to its espoused commitments on how the technology they produce is deployed. In 2018, workers mobilized to protest Project Maven, a Pentagon contract to provide AI-powered tools to analyze drone surveillance footage, choose targets, and transmit human decisions to weapon systems.²¹ A protest letter signed by 3,100 employees asked Google to cancel the project, pointing out that Google's involvement in producing AI that facilitates war would "irreparably damage Google's brand and its ability to compete for talent," drawing an explicit connection between Google's ethical commitments ("Don't be Evil"), its brand appeal to consumers, and its ability to compete by recruiting the most talented workers.²² Google responded by declining to renew the contract.²³ Subsequently, Google workers learned that Google had contracted to develop a censored version of its search engine for the Chinese market called Project Dragonfly.²⁴ Horrified to realize that Google had committed to a Project whose uses exacerbated human rights violations and that they had participated in producing products whose uses were at odds with their deeply-held values, workers conducted an internationally synchronized virtual walkout.²⁵ Woke-washing in this context was especially stark: After the Project Maven protests, Google had publicly reaffirmed its commitment to creating ethical technology and stated that it would refrain from developing technologies that "gather or use information for surveillance violating internationally accepted norms," or "whose purpose contravenes widely accepted principles of international law and

20. See Dadush, *The Law of Identity Harm*, *supra* note 18, at 840–41 (arguing that identity harm should be operationalized under state consumer law).

21. Scott Shane & Daisuke Wakabayashi, *The Business of War: Google Employees Protest Work for the Pentagon*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/technology/google-letter-ceo-pentagon-project.html> [<https://perma.cc/EUA6-2LCE>].

22. *Id.*

23. *Id.*

24. Kate Conger & Daisuke Wakabayashi, *Google Employees Protest Secret Work on Censored Search Engine for China*, N.Y. TIMES (Aug. 16, 2018), <https://www.nytimes.com/2018/08/16/technology/google-employees-protest-search-censored-china.html> [<https://perma.cc/KQV2-DAG9>].

25. *Id.*

human rights.”²⁶ When the company retreated from that stance, the Project DragonFly protesters rebelled, demanding corporate transparency and seeking to hold Google to its commitments.²⁷ Google retaliated by firing four of the protesting workers, claiming that the protests were political complaints unrelated to workers’ material employment interests.²⁸

In 2024, Google workers staged sit-ins and protests at the company’s offices in New York and California protesting Project Nimbus, Google’s contract to provide cloud computing services to Israel’s government.²⁹ The 2024 actions were an escalation of resistance by a worker coalition called “No Tech for Apartheid” formed in 2021 after the details of Project Nimbus became public.³⁰ Alarmed by reports that Google’s work on Project Nimbus involved providing direct services to the Israel Defense Forces (IDF) and reports that the IDF had used Google photos to identify and detain Palestinians en masse in the West Bank, workers demanded that Google drop Project Nimbus. As one software engineer put it,

[I]t is horrifying to think that the code I write could be used by the Israeli Military in the first ever AI powered genocide. . . . We did not come to Google to work on technology that kills. By engaging in this contract leadership has betrayed our trust, our AI Principles, and our humanity.³¹

Some of the protesting workers issued a statement that made a direct connection between their ethical concerns and their health and safety:

Google executives have ignored our concerns about our ethical responsibility for the impact of our technology as well as the damage to our workplace health and safety caused by this contract, and the

26. Sundar Pichai, *AI at Google: Our Principles*, THE KEYWORD (June 7, 2018), <https://www.blog.google/technology/ai/ai-principles/> [https://perma.cc/W63R-RGSH].

27. Shririn Ghaffary, *Google Employees Are Demanding an End to the Company’s Work with Agencies Like CBP and ICE*, VOX (Aug. 14, 2019, 2:30 PM), <https://www.vox.com/2019/8/14/20805562/human-rights-concerns-google-employees-petition-cbp-ice> [https://perma.cc/L2KR-3HUK].

28. Martin Coulter, *Google Said Employees Don’t Have a Right to Protest Its Choice of Customers in the First Day of the ‘Thanksgiving Four’ Trial*, BUS. INSIDER (Aug. 25, 2021, 7:24 AM), <https://www.businessinsider.com/google-thanksgiving-four-trial-protest-2021-8> [https://perma.cc/SAD7-APR2].

29. Caroline Haskins, *Google Workers Protest Cloud Contract with Israel’s Government*, WIRED (Apr. 16, 2024, 1:09 PM), <https://www.wired.com/story/google-no-tech-for-apartheid-project-nimbus-israel-gaza-protest/> [https://perma.cc/M9DC-Y5DA].

30. *Id.*

31. Wendy Lee, *Google Employees Stage Sit-ins to Protest Company’s Contract with Israel*, L.A. TIMES (Apr. 17, 2024, 2:59 PM), <https://www.latimes.com/business/story/2024-04-16/google-israel-sit-ins-project-nimbus> [https://perma.cc/2WLR-AH6G].

company's internal environment of retaliation, harassment, and bullying.³²

Google eventually ordered the arrest of nine workers who had staged sit-ins and protests and fired at least 28 others.³³

Workers at Amazon-owned Whole Foods have also reacted with outrage and activism to the company's bait-and-switch mission messaging. In the wake of George Floyd's murder by a white police officer in 2020, Whole Foods workers donned BLM masks at work. Drawn to Whole Foods' dedication to sustainability, community engagement, and a transparent, inclusive workplace culture that respects all stakeholders,³⁴ workers hoped to signal their support for the Black community and to connect BLM to the racial discrimination they had experienced in the workplace. They were further inspired by Amazon CEO Jeff Bezos's public statements of support for BLM and the struggle against racial injustice. The Whole Foods Markets' website displayed a very notable statement proclaiming "Racism has no place here" and "We support the Black community and meaningful change in the world."³⁵ Nevertheless, Whole Foods ordered workers to remove the masks or go home, implementing a previously unenforced company policy against work apparel containing "slogans, messages, logos, or advertising that are not company-related."³⁶ Workers who refused were disciplined or terminated. Like Google, Whole Foods argued that workers who participate in political protests at work that are not directly connected to working conditions are not protected at law. Further, it asserted that it had the right to control the manner of dissemination of such messages in its store.³⁷

32. *Id.*

33. Dara Kerr, *Google Worker Says the Company Is 'Silencing Our Voices' After Dozens Are Fired*, NPR (Apr. 19, 2024, 6:08 AM), <https://www.npr.org/2024/04/19/1245757317/google-worker-fired-israel-project-nimbus-cloud-protestor> [<https://perma.cc/UYU9-3NTN>]; Mohammad Khatami, Zeldia Montes & Kate Sim, *Google Fired Us for Protesting Its Complicity in the War on Gaza. But We Won't Be Silenced*, THE NATION (Apr. 29, 2024), <https://www.thenation.com/article/activism/google-firings-gaza-project-nimbus/> [<https://perma.cc/2CYD-XFJL>]; Gerrit De Vynck & Caroline O'Donovan, *Google Workers Arrested After Protesting Company's Work with Israel*, WASH. POST (Apr. 16, 2024), <https://www.washingtonpost.com/technology/2024/04/16/google-sit-in-employee-protest-nimbus-israel/> [<https://perma.cc/J6ZL-EHQ2>].

34. Whole Foods' value proposition is to sell organic, natural, healthy food products to customers who are passionate about food and the environment. Its sourcing emphasizes purchases from local farmers and screens out food containing common ingredients that are either unhealthy or damaging to the environment. Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV., Dec. 2006, at 78.

35. *Frith v. Whole Foods Mkt., Inc.*, 38 F.4th 263, 275 n.11 (1st Cir. 2022).

36. *Id.* at 267.

37. *Id.* at 275 & n.11 (noting that because BLM was perceived as "a controversial message associated with a political movement advancing an array of policy proposals," Whole Foods had a credible non-discriminatory reason for enforcing its dress code policy that countered plaintiffs' class

Under existing work law, Google and Whole Foods were likely in the clear.³⁸ Nonunion workers employed at will can be disciplined or fired for engaging in attempts to hold their employer to its brand promise. While the National Labor Relations Act (NLRA) protects collective protests by nonunion workers, this protection is limited to concerted activity “for mutual aid,” typically understood to encompass material conditions of employment such as wages, hours or working conditions.³⁹ Further, objections to the values articulated by a firm as part of its brand are unprotected because they pertain to managerial prerogative to establish the future direction of the firm. Even unionized workers may struggle to challenge inauthentic representations where they pertain to the core of entrepreneurial control over the direction of the business, and thus lie outside the realm of collective bargaining.⁴⁰

In recent years, scholars have argued that consumer law could offer recourse for workers struggling to hold firms to their promises.⁴¹ Workers

action Title VII claim, namely that it sought to curb disruptive protests that might interfere with business); Whole Foods Mkts., Inc., N.L.R.B. No. 01-CA-263079 (Dec. 20, 2023), <https://www.nlr.gov/case/01-CA-263079> [<https://perma.cc/PW2X-Z5ZM>] (finding that wearing BLM masks did not constitute protected concerted activity under the NLRA).

38. The terminated Google workers and the Whole Foods workers filed unfair labor practice charges with the NLRB. The Whole Foods claims were unsuccessful. *See* Whole Foods Mkts., Inc., N.L.R.B. No. 01-CA-263079 (Dec. 20, 2023), <https://www.nlr.gov/case/01-CA-263079> [<https://perma.cc/PW2X-Z5ZM>] (finding no nexus between BLM message conveyed by masks and the “advancement of mutual aid and protection in the workplace”). The Google claims are pending, *see* Caroline O’Donovan & Gerrit De Vynck, *Fired Google Workers Who Protested Israel Deal File Complaint with Labor Board*, WASH. POST (Apr. 30, 2024), <https://www.washingtonpost.com/technology/2024/04/30/google-fired-israel-nlr-labor/> [<https://perma.cc/MFE2-N96S>], but are also likely to be unsuccessful either because the nexus between the subject of the protests and working conditions is not sufficient or because they involved challenges to managerial prerogatives, specifically the future business direction of the company. *See* Marion Crain, *Profit, Mission, and Protest at Work*, 108 MINN. L. REV. 2285–89 (2024).

It is possible that an individual worker at Whole Foods may be able to make out a cognizable case of race discrimination under Title VII if she can establish that the employer’s disciplinary action was a departure from its standard procedure and amounted to retaliation against the individual because of her allegations of race discrimination and participation in racially charged protests criticizing the employer. *See, e.g.*, *Kinzer v. Whole Foods Mkt., Inc.*, 99 F.4th 105, 118–20 (1st Cir. 2024) (allowing such a case to move forward and denying summary judgment to employer). *But see* Frith, 38 F.4th at 273, 275 (finding that although claims by a putative class of plaintiffs based on the same facts stated a “technically viable” discrimination claim, their allegations failed to establish that the employer’s enforcement of its apparel policy was motivated by race, as distinguished from the “obvious alternative explanation” that the store sought to prevent the “mass expression of a controversial message by employees in their stores”).

39. Crain, *supra* note 38, at 2285–87.

40. *Id.* at 2288–89.

41. *See, e.g.*, Harris, *supra* note 8; Christopher L. Peterson & Marshall Steinbaum, *Coercive Rideshare Practices: At the Intersection of Antitrust and Consumer Protection Law in the Gig Economy*, 90 U. CHI. L. REV. 623, 625–26 (2023) (exploring whether consumer protection law can be deployed to protect rideshare workers); Sharon Block, *Employing Lots of Law to Do “Employment Law,”* ONLABOR (Sept. 27, 2022), <https://onlabor.org/employing-lots-of-law-to-do-employment-law/> [<https://perma.cc/F3EK-GJ79>] (advocating for consumer protection strategies to protect gig workers).

are, after all, consumers of the jobs they hold.⁴² Under traditional interpretations of consumer law, however, workers' identities as workers eclipse their identities as consumers of the job and their claims are barred, lest every employment dispute be transformed into a consumer law dispute. The law's unwillingness to consider workers' overlapping identities as both workers and consumers thus blocks recovery—even where employers are deliberately activating both identities as a strategy to bolster profits. Scholarly arguments that have secured the best traction in harnessing consumer law to protect workers have focused on workers in the gig economy, who are usually outside the protections of traditional labor and employment law because they are categorized as independent contractors rather than employees, or where employers are providers of services and credit products to workers.⁴³ That body of scholarship does not challenge the traditional worker/consumer dichotomy in culture and law; it argues instead that where employers treat workers as consumers, consumer law should offer redress.⁴⁴

This Article considers whether legal challenges to woke-washing are feasible for workers under consumer protection legislation, and if so, whether they might foster alliances between consumer and worker movements that could confer greater extra-legal leverage against firms and thus yield more lasting social reform. More fundamentally, we directly challenge the worker/consumer dichotomy, arguing that workers who are both *employees and consumers* should find redress under consumer law. We bring to bear scholarship by sociologists and marketing theorists who demonstrate that the worker/consumer dichotomy is a false divide, and we show how firms deliberately exploit both identities simultaneously. In short, we contend that workers are consumers—not only of the jobs they hold, and of the discounted items they receive as compensation, but also of the firm's brand itself. But they are also workers, subject to employer control and the demands of the employment relationship. When the firm undertakes values-based branding as a part of its employee recruitment and retention process, workers consume that brand just as consumers external to the firm do: They rely upon promises made by the firm that include representations about the nature of the firm and its values. They dedicate their labor to the firm, and they align themselves with the employer's values-based brand. And as

42. See Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 356, 370 (2011) (observing that when employees are deciding whether to accept or to remain in a job, they are analogous to consumers of the job and its package of benefits).

43. See Harris, *supra* note 8, at 4–6.

44. See sources cited *supra* note 41 (scholarship discussing the use of consumer law to advance workers' rights).

worker-consumers, they signal their identity in an even more fundamental way than they would if they were solely consumers.

Part I describes the historical shift away from a production economy and toward a consumption economy, and the shift's impact on how individuals identify in modern society. We explain how the growth of our consumption economy drove the development of the corporate brand and spurred corporate mission statements that appeal to the political identities of consumers, including values-based branding that signals moral and political alignment with social justice and environmental goals that sweep beyond the traditional profit-maximizing goals of the corporation. Part II describes how marketing and branding once aimed exclusively at consumers has been extended to workers. We catalogue the ways in which marketing, branding, and compensation and management practices eroded the traditional worker-consumer dichotomy, capitalizing on identity-signaling habits common to both workers and consumers. By treating workers as consumers, by branding them as ambassadors for the firm, and most importantly by adopting values-based brands that cater to the concerns of the modern labor force, firms have deliberately blurred the traditional legal boundary between worker and consumer.

Part III explains how the ideological divide between worker and consumer prevents current law from offering protection to workers seeking to challenge inauthentic corporate communications on social justice issues. The common law of employment is typically unavailing. In the employment relationship, firms retain sovereignty over management and control of the business, the product or service it produces, and its direction. Dissatisfied workers' only option is exit or collective rebellion. Labor law offers limited protection because control over the direction of the business is cast as peculiarly within managerial prerogative. Individual claims—contract claims for breach or tort claims for misrepresentation—founder on the doctrine of employment-at-will, the default rule governing employment relationships. Because workers can have no legitimate expectation of job security in such a regime, the law deems any harm as transitory at best. Consumer law might initially seem more promising, but it has traditionally barred most claims by employees, permitting them only if the plaintiff's identity as a consumer is easily severable from her identity as a worker. Thus, workers can recover under consumer law only when their identities as workers are irrelevant to the claim.

We then explore how consumer law might serve as a foil for organizational advocacy to mobilize consumers and workers as allies, leveraging pressure on firms to live up to brand promises that involve social justice concerns. Part IV addresses the novel question whether—given the breakdown in the worker/consumer boundary occasioned by corporate

mission, branding, marketing and management strategies—consumer law protections could be harnessed to boost litigation challenging inauthentic values-based branding. We argue that consumer law should protect workers' challenges to their employers' inauthentic embrace of a social justice mission where the employer relies upon values-based branding to recruit and retain its workforce. Because brand values have signaling attributes that run to the core of one's moral identity and thus are extremely valuable to worker-consumers, they should be treated as a symbolic consumable under consumer protection statutes, even absent any sort of tangible product purchase. To achieve this end, courts must accept workers' intertwined identities as both employees and consumers relative to the firms for which they labor. Part V discusses the opportunities that this broader framing might offer to forge alliances between labor and consumer advocacy groups. Building upon notions of ethical consumerism hailing from the 1930s that were effective in shifting government policy toward the New Deal, these alliances might expand the scope of pressure beyond the courtroom and support more transformative change. Part VI concludes.

I. THE RISE OF THE CONSUMPTION ECONOMY AND THE VALUES-BASED CORPORATE BRAND

This Part describes the evolution of the economy from an industrial sector focused on production to a knowledge and information-based economy driven by consumption. In this economy, individuals increasingly develop and express their identities through consumption rather than solely through their labor. As the focus shifted from exploiting labor to increase profits to creating a business identity designed to attract consumers to the firm's products and services, marketing research began to emphasize the importance of using the corporate brand to forge a psychological bond with consumers. As branding became more sophisticated, corporations increasingly shifted toward values-based marketing, explicitly embracing a mission that extends beyond the workplace, the products produced, and traditional stakeholders to include broader social justice agendas. Consumption choices became politicized, serving as a form of political voice in an era of declining unionization and rising authoritarianism at work. This shift was not a turn away from the traditional profit-based motive of the firm; values-based marketing yields significant profits for business, particularly given its ability to attract and retain both social justice-minded consumers and a committed, loyal workforce.⁴⁵

45. See Chaudhuri, *supra* note 15, at B1, B6 (quoting CEO who pointed out that brands with a social justice purpose increase sales twice as fast as those without, and also help to attract top talent).

A. The Rise of the Consumption Society and the “Citizen-Consumer”

Following World War II, the United States underwent a gradual and fundamental shift from a production economy to a consumption economy. This shift was driven by government policy and legislation. John Maynard Keynes’ revolutionary insights⁴⁶ provided the justification for turning away from the belief that free markets would ultimately provide full employment and toward an activist role for government policy in promoting price stabilization, market stability and job growth. Economic growth would be stimulated only if demand increased. The government led the way with infrastructure investments designed to stimulate the economy, such as public works programs.⁴⁷ New Deal legislation in the 1930s, premised on Keynesian economic theory, aimed to increase the purchasing power of consumers by enhancing wages and promoting job security, to the benefit of firms and workers alike.⁴⁸

In the years following World War II, a “consumer’s republic” emerged in which consumer spending came to be seen as aligned with the national economic interest.⁴⁹ Improved living standards spurred new values, and commodities were freely available and permeated American life as a new cultural force.⁵⁰ Marketing and advertising exploded: Corporate advertising expenditures tripled between World War II and 1959,⁵¹ and marketing theory became increasingly sophisticated.⁵² Consumption, rather than work, came to define identity.⁵³

46. See generally JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY* (1936).

47. See ERIC RAUCHWAY, *THE MONEY MAKERS: HOW ROOSEVELT AND KEYNES ENDED THE DEPRESSION, DEFEATED FASCISM, AND SECURED A PROSPEROUS PEACE* 96–97 (2015).

48. CRAIN ET AL., *supra* note 3, at 24. Perhaps the most important pieces of legislation directed toward this goal were the Railway Labor Act of 1926, 45 U.S.C. §§ 151–163 (protecting the right of railway workers to organize unions and collectively bargain), the National Labor Relations Act of 1935, 29 U.S.C. §§ 151–168 (protecting workers’ right to organize unions and collectively bargain over wages, hours and working conditions) and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (establishing a threshold minimum wage and requiring the payment of overtime wages for hours worked in excess of 40 per week).

49. LIZABETH COHEN, *A CONSUMERS’ REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 8–9 (2004).

50. *Id.* at 10. See generally DAVID M. POTTER, *PEOPLE OF PLENTY* (1954) (describing the rise of consumer culture in an era of abundance and sophisticated marketing); JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* (1958) (chronicling the widespread American emphasis on consumption and the rise of corporate marketing and advertising).

51. COHEN, *supra* note 49, at 301.

52. See, e.g., VANCE PACKARD, *THE HIDDEN PERSUADERS* (1957) (exposing and critiquing the utilization of marketing research on consumer psychology and motivation).

53. See ROBERT BOCOCK, *CONSUMPTION* 79–80 (1993) (describing shift from production-oriented identity formation to an identity shaped by consumptive practices and aspirations); BAUMAN, *supra* note 1, at 24, 112 (arguing that modern culture engages individuals as consumers rather than as producers).

The freedom to choose among market options and to express one's values through consumptive choices came to define not only individual identity, but citizenship itself. New Deal Keynesian-influenced policy provided the foundation for this link. An egalitarian democracy could be achieved only by the redistribution of power, and mass consumption was the engine of that power:

Keynesianism was thought to encourage greater economic egalitarianism because dynamic consumer demand depended on a wide distribution of purchasing power. . . . Fueling “mass consumption”—enhancing the ability of the mass of Americans to purchase goods—promised not only a route to economic recovery, but also a more democratic and egalitarian America⁵⁴

And so the “citizen consumer” was born.⁵⁵ Citizen-consumers express preferences, beliefs, and values through consumptive acts, signaling identity to others through their choice of a particular firm's products or services. In short, they “vote” with their dollars:

While few people in society actively engage in traditional forms of politics in a sustained way . . . nearly everyone engages in acts of consumption almost every day. This means that consumption . . . is a potentially powerful means of expressing political and moral preferences. Consumption thus transforms from an activity solely aimed at satisfying one's immediate needs and desires, to one that provides opportunities to express social and political preferences, and to make an impact on the world.⁵⁶

In the ensuing years as corporate economic power and political influence became ever more pronounced, individual acts of consumption became a proxy for aligning oneself with firms that evinced a particular political or social justice perspective as well as with the products or services produced by the firm.

54. COHEN, *supra* note 49, at 55–56.

55. *Id.* at 8 (coining this phrase). Cohen explained: “*Citizen consumers* of the New Deal and World War II eras put the market power of the consumer to work politically, not only to save a capitalist America in the midst of the Great Depression, but also to safeguard the rights of individual consumers and the larger ‘general good.’” *Id.*; see also Kevin Kolben, *The Consumer Imaginary: Labor Rights, Human Rights, and Citizen-Consumers in the Global Supply Chain*, 52 VAND. J. TRANSNAT'L L. 839, 861, 865 (2019) (explaining that the idea of “consumer citizenship” refers to “consumers who make purchasing choices informed by a political ideal and desire to connect with producers,” and observing that “consumption, in this perspective, should thus be understood to be expressive of political ideals, and to be a form of action”).

56. Kolben, *supra* note 55, at 865.

B. Forging Relationships with Consumers Through the Corporate Brand

Corporations both initiated and responded to the shift to a consumption economy by developing sophisticated branding and marketing campaigns that influenced and reflected cultural trends and values. Corporate brands allowed firms to distinguish their products and services in an increasingly crowded and competitive market.⁵⁷ More powerful than advertising because of the affective associations they evoke, brands offered firms significant opportunities to strengthen the consumer-firm connection.

1. The Value of Brands

Historically the brand served merely as an identifier that allowed consumers to distinguish among similar products.⁵⁸ Over time and as a result of corporate branding strategy, however, the cultural identity associated with the brand became more valuable than the product itself. Indeed, in many cases the brand became the product being sold.⁵⁹ Brands are strongly associated with corporate reputation and market share,⁶⁰ and

57. On the significance and value added by brands to businesses, their products and services, see generally DAVID A. AAKER, *MANAGING BRAND EQUITY: CAPITALIZING ON THE VALUE OF A BRAND NAME* (1991) (describing how brands produce value for businesses); DOUGLAS ATKIN, *THE CULTING OF BRANDS: WHEN CUSTOMERS BECOME TRUE BELIEVERS* (2004) (comparing brands to cults in terms of their effect upon consumers); JANELLE BARLOW & PAUL STEWART, *BRANDED CUSTOMER SERVICE: THE NEW COMPETITIVE EDGE* (2004) (describing service branding); LESLIE DE CHERNATONY & MALCOLM McDONALD, *CREATING POWERFUL BRANDS IN CONSUMER, SERVICE AND INDUSTRIAL MARKETS* (2d ed. 1998) (describing the dialogue between consumers and marketers and how consumers consume and adjust brand messages to reinforce prior expectations); KEVIN FORD, *BRANDS LAID BARE: USING MARKET RESEARCH FOR EVIDENCE-BASED BRAND MANAGEMENT* (2005) (discussing role played by brands in converting market transactions into relationships with customers that in turn generate additional value for the firm); DOUGLAS B. HOLT, *HOW BRANDS BECOME ICONS: THE PRINCIPLES OF CULTURAL BRANDING* (2004) (explaining how brands that provide compelling, consensus expressions of societal values become iconic); NICHOLAS IND, *LIVING THE BRAND* (1st ed. 2001) (discussing functions of brands and role of brand in motivating employees); NICHOLAS IND, *THE CORPORATE BRAND* (1997) [hereinafter IND, *THE CORPORATE BRAND*] (explaining why branding has assumed so much significance in modern society, and noting centrality of employees to the brand experience in service sector businesses); KEVIN LANE KELLER, *STRATEGIC BRAND MANAGEMENT: BUILDING, MEASURING, AND MANAGING BRAND EQUITY* (1998) (describing why brands matter and how they assist businesses in increasing profit margins); and KLAUS SCHMIDT & CHRIS LUDLOW, *INCLUSIVE BRANDING: THE WHY AND HOW OF A HOLISTIC APPROACH TO BRANDS* (2002) (explaining emotional appeal and power of brands).

58. AAKER, *supra* note 57, at 7.

59. Sonya K. Katyal, *Stealth Marketing and Antibranding: The Love that Dare Not Speak Its Name*, 58 *BUFF. L. REV.* 795, 801 (2010); see also Scott Baker & Kevin Collins, *Trademarks and Consumer Communication 3* (Feb. 10, 2025) (unpublished manuscript) (on file with author) (“The trademark is a means of consumer communication and self-expression. . . . The clean distinction between trademarks and the goods to which the trademark attaches collapses; the trademark is itself the good consumers desire.”).

60. THE EXPRESSIVE ORGANIZATION: LINKING IDENTITY, REPUTATION, AND THE CORPORATE BRAND 52 (Majken Schultz, Mary Jo Hatch & Mogens Holten Larsen eds., 2000); see also TOM

are also the most valuable assets that many corporations possess. Accordingly, corporations invest billions in developing, maintaining and marketing a unique brand.⁶¹ Intellectual property law encourages this investment, typically by protecting the trademark created and propagated through advertising.⁶²

A strong brand offers significant value to the firm, permitting the firm to charge more for its products and to establish a platform for extensions into new product and service markets.⁶³ The ideal brand thus does more than simply influence an individual's decision in a single transaction: It creates a relationship between the firm and its consumers.⁶⁴

2. *How Brands Work—Creating Relationships and Identities*

Traditional advertising conveyed information to consumers about a new product and sought to convince them that it would enhance their lives. But more sophisticated corporate marketing and advertising departments utilize insights from psychiatry and the social sciences to direct consumers toward particular brands. Firms endeavor to seduce consumers, tempt them to buy branded products and services, and even groom them to desire those products or services.⁶⁵ Brands thus have the potential to wield greater influence than traditional advertising because they operate at a pre-cognitive

BEAUDOIN, CONSUMING FAITH: INTEGRATING WHO WE ARE WITH WHAT WE BUY 76 (2003) (noting that the identity and strength of the brand is more important to maintaining market share than the quality of the product itself).

61. There is a rich literature on the significance and value added by brands to businesses, their products, and services. *See generally* AAKER, *supra* note 57 (describing how brands produce value for businesses); BARLOW & STEWART, *supra* note 57 (describing service branding); FORD, *supra* note 57 (discussing role played by brands in converting market transactions into relationships with customers that in turn generate additional firm value by facilitating brand extensions); IND, THE CORPORATE BRAND, *supra* note 57 (explaining why branding has assumed so much significance in modern society, and noting the centrality of employees to the brand experience in service sector businesses); KELLER, *supra* note 57 (describing how brands assist businesses with increasing profit margins).

62. *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163–64 (1995) (observing that trademark law helps to ensure that the producer of a desirable product reaps the financial and reputation-related rewards associated with it); *see also* Baker & Collins, *supra* note 59 (manuscript at 3, 24) (explaining that trademark protection also facilitates communication among consumers who seek to signal identity characteristics about themselves to others through their decisions to purchase branded products).

63. AAKER, *supra* note 57, at 18.

64. Shmuel I. Becher & Sarah Dadush, *Relationship as Product: Transacting in the Age of Loneliness*, 2021 U. ILL. L. REV. 1547, 1549–50; FORD, *supra* note 57, at 38; DE CHERNATONY & McDONALD, *supra* note 57, at 129–33; John Deighton, *Consumer Identity Motives in the Information Age*, in *INSIDE CONSUMPTION: CONSUMER MOTIVES, GOALS, AND DESIRES* 233, 240 (S. Ratneshwar & David Glen Mick eds., 2005).

65. BAUMAN, *supra* note 1, at 26; ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (1984) (identifying principles that are key to influencing decisions, including several used heavily in marketing).

level.⁶⁶ “Stealth marketing” through product placements in television shows and movies illustrates how firms deploy brands at a pre-cognitive level to shape product choices.⁶⁷

Corporate branding does more than merely provide information to aid in distinguishing among product choices or manipulating unconscious perceptions. Brands tell a story about a particular product or firm, not only conveying its superiority and trustworthiness relative to competitors but also portraying it as a symbol of political, cultural or social values. A compelling brand typically appeals to human emotion and exploits human frailties, such as the basic need for emotional security, affirmation of self-worth, ego gratification, a sense of belonging, the desire for creative expression, empowerment, or a connection to one’s roots.⁶⁸

At bottom, the relationship between the consumer and the firm is the core product being sold.⁶⁹ The brand is designed to engage the consumer in a dialectical process in which the brand assumes a quasi-human function as a “relationship partner” that facilitates identity and addresses personal anxieties.⁷⁰ When the brand is perceived by onlookers as a relationship—or even as a community—it can be used to the firm’s benefit not only to attract consumers, but to recruit employees.

3. *Brand Communities*

Influential brands not only foster relationships between consumers or employees and the firm, they also build relationships between members, creating brand communities. Brands that create communities afford a consistent, coherent identity to those who align themselves with the brand.⁷¹

66. See Kevin Helliker, *This is Your Brain on a Strong Brand: MRIs Show Even Insurers Can Excite*, WALL ST. J., Nov. 28, 2006, at B1 (reporting on study establishing that the brain reacts powerfully to strong brands, even those associated with “dull” topics such as insurance); see also Ching-Hung Lin, Hsu-Ping Tuan & Yao-Chu Chiu, *Medial Frontal Activity in Brand-Loyal Consumers: A Behavior and Near-Infrared Ray Study*, 3 J. NEUROSCIENCE PSYCH. & ECON. 59, 60 (2010) (explaining that neuroimaging research has demonstrated that iconic brands modulate long-term brain responses, exerting a powerful influence over consumer decision-making; brain cell activation responses to iconic brands may even resemble the processes characteristic of addiction).

67. Katyal, *supra* note 59, at 825; see also MARTIN LINDSTROM, *BUYOLOGY* 56, 50 (2008) (explaining that brand associations—particularly when modeled by attractive people who we desire to emulate—trigger mirror neurons, which cause us to mimic one another’s buying behavior).

68. DE CHERNATONY & MCDONALD, *supra* note 57, at 133.

69. See Becher & Dadush, *supra* note 64, at 1547 (“Today’s firms are in the business of selling not only products or services, but also ‘communal’ or ‘social’ relationships.”).

70. See *id.* at 1561–62 (explaining how firms seek to develop a relationship with consumers through the medium of the brand, offering deep emotional rewards through transactions with the firm rather than focusing on single product transactional exchanges; by humanizing the exchange, firms transform consumers into “emotionally invested loyalists”); see also DE CHERNATONY & MCDONALD, *supra* note 57, at 131–33 (describing and categorizing consumer-brand relationships ranging from “committed partnerships” and “marriages of convenience” to “flings” or “secret affairs”).

71. BEAUDOIN, *supra* note 60, at 44.

At the same time, brand communities allow individuals to reconcile the fundamental tension between asserting their individuality and the aspiration to be part of something greater than themselves.⁷² Individuals no longer need “bowl alone”—by consuming the brand, they can satisfy the human desire for belonging and community.⁷³ Brand communities thus effectively convert individual brand consumption into a communal activity.⁷⁴

In some cases, consumers or employees may be attracted more by the social networks that accompany brand affiliations than by the brands (products or services) themselves. When this happens, brand loyalty becomes the reward for meeting consumers’ needs for community. For example, Starbucks reaped brand loyalty by providing the physical space for family-like social networks to form. It leveraged the individual longing for community and the warmth and intimacy associated with its coffeehouses to help it sell coffee. As Starbucks’ CEO Howard Schultz put it, “we are not . . . in the coffee business serving people . . . [W]e are in the people business serving coffee.”⁷⁵

4. *The Influence of Brands*

In short, brands are far more than advertising, marketing, or speech: Brands *act*. The most powerful brands can induce consumers to form a relationship with the company, to act on the relationship by purchasing a product or service, and finally to join the branded community.⁷⁶ The brands we buy signal the cultural communities to which we belong, the values to which we subscribe, and our social status. Consumers align themselves with

72. ROB WALKER, *BUYING IN: THE SECRET DIALOGUE BETWEEN WHAT WE BUY AND WHO WE ARE* 22 (2008).

73. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (documenting the ways in which Americans have become increasingly isolated from one another and the consequent reduction in social and civic engagement). Some theorists compare brands to religions or cults because they cater to deep human needs, particularly the longing for community and connection. See BEAUDOIN, *supra* note 60, at 39, 44; ATKIN, *supra* note 57, at 57, 62–64.

74. Thomas C. O’Guinn & Albert M. Muniz, *Communal Consumption and the Brand*, in *INSIDE CONSUMPTION*, *supra* note 64, at 252, 252–53. Apple offers a compelling illustration of a powerful brand community. Its emphasis on nonconformism and creativity and its strong oppositional consciousness relative to Microsoft made the Apple brand a natural site for the formation of a community that reconciles individuality with the need to belong. See Russell W. Belk & Gülnur Tumbat, *The Cult of Macintosh*, 8 *CONSUMPTION MKTS. & CULTURE* 205, 205 (2005) (cataloguing marketing appeal of Apple’s powerful brand); see also Geoffrey A. Fowler, *Living by the Book of Apple*, *WALL ST. J.*, Aug. 26, 2011, at B1 (explaining that Apple devotees display a level of community and fervor for the brand consonant with elements of some religions).

75. Christoph Burmann & Sabrina Zeplin, *Building Brand Commitment: A Behavioural Approach to Internal Brand Management*, 12 *BRAND MGMT.* 279, 282 (2005). Marketing experts attribute price premiums of up to 20% to this strategy. See Susan Fournier & Lara Lee, *Getting Brand Communities Right*, *HARV. BUS. REV.*, Apr. 2009, at 107, 110.

76. Fournier & Lee, *supra* note 75, at 107, 110.

a particular brand that is socially constructed by the firm's advertising and marketing strategy, and adopt the brand as a means to express an identity, preferences, passions, or a particular politics. Ultimately, corporate brands express and influence not only individual identities, but our culture, our language, our aspirations, and our politics.

C. *The Politicized Brand*

Although we commonly perceive the purpose of business as the pursuit of profit, a parallel view has long existed which holds that firms bear a responsibility to help safeguard our social welfare. This view can be justified as a quid pro quo for the privilege of organizing in the corporate form, or as the logical outcome of a firm's strategic decision to further community interests in the region where its capital-intensive operations were located.⁷⁷ Initially, religious teachings and Victorian social conscience motivated business owners to address society's moral failures with a blend of philanthropy and humanism aimed at improving the circumstances of the working class.⁷⁸ These early impulses matured during the industrial revolution when firms began to adopt specific policies and practices that eventually came to be known as voluntary corporate social responsibility (CSR) practices.⁷⁹ Moving beyond philanthropy and humanistic reforms, firms invested in community infrastructure and implemented policies that supported the war effort during World War II.⁸⁰

Pressure from civil rights organizations and environmental movements in the 1960s and 1970s influenced the development of CSR practices around specific issues, including civil rights, anti-war, pollution and resource depletion.⁸¹ The rising influence of brands as a political signifier for the citizen-consumer made it imperative that firms align their CSR practices with their brands, importing social justice ideals into branding strategies. As civil rights and environmental legislation imposed new legal obligations,

77. CRAIN ET AL., *supra* note 3, at 12; *see also* Blair, *supra* note 3, at 454 (explaining that a corporate charter created a legal entity whose status and separate governance made it possible to build lasting institutions that could make long-term investments to improve the wealth and standard of living in the community, which endured as individual participants in the entities came and went).

78. Mauricio Andrés Latapí Agudelo, Lára Jóhannsdóttir & Brynhildur Davídsdóttir, *A Literature Review of the History and Evolution of Corporate Social Responsibility*, 4 INT'L J. CORP. SOC. RESP. 4, 6 (2019); Archie B. Carroll, *A History of Corporate Social Responsibility: Concepts and Practices*, in THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 19 (Andrew Crane, Abigail McWilliams, Dirk Matten, Jeremy Moon & Donald S. Siegel eds., 2008). For a more detailed history, *see* Crain, *supra* note 39, at 113–14.

79. Agudelo et al., *supra* note 78, at 3. *See generally* HOWARD R. BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN (1953) (hailed as the book marking the beginnings of modern literature on CSR).

80. Carroll, *supra* note 78, at 19; Agudelo et al., *supra* note 78, at 3.

81. Agudelo et al., *supra* note 78, at 4.

CSR initiatives also helped firms to avoid legal liability. In addition, the initiatives reduced reputational risk and, at times, diminished the attractiveness of unionization, thereby reinforcing their economic advantage to the firm.

The 1980s prompted a focus on business ethics in response to insider trading scandals that highlighted managerial and corporate wrongdoing and other evidence of corporate greed.⁸² Publicity stemming from environmental disasters caused by failures of corporate oversight⁸³ and poor labor conditions for third-world workers manufacturing goods for American firms⁸⁴ resulted in considerable reputational damage to firms' brands. Consumers responded by boycotting products, and corporate share prices and revenue fell.⁸⁵ The adoption of CSR commitments promising to uphold environmental and labor standards offered a partial solution, while simultaneously affording consumers an opportunity to exercise political influence through their purchasing decisions.⁸⁶

By the 1990s and 2000s, the strategic use of CSR had become widely accepted.⁸⁷ CSR codes influenced by "conscious capitalism," as it came to be known,⁸⁸ promise to generate lasting value for all stakeholders, including but not limited to customers, workers, investors, suppliers, and dealers, as well as host communities and society as a whole.⁸⁹ Most commonly, they

82. See JAMES B. STEWART, DEN OF THIEVES (1991) (describing the scandals); Karen W. Arenson, *How Wall Street Bred an Ivan Boesky*, N.Y. TIMES, Nov. 23, 1986 (§ 3), at 1 (describing the culture of the 1980s on Wall Street as "a kind of glorification of the acquisition of money").

83. See, e.g., LARRY EVEREST, BEHIND THE POISON CLOUD: UNION CARBIDE'S BHOPAL MASSACRE 17–43, 45–64 (1986) (describing the inadequate factory design and shortage of safety devices and procedures that contributed to the 1984 explosion at Union Carbide's pesticide plant in Bhopal, India).

84. DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 79 (2006).

85. Jonah Peretti & Michele Micheletti, *The Nike Sweatshop Email: Political Consumerism, Internet, and Culture Jamming*, in POLITICS, PRODUCTS, AND MARKETS: EXPLORING POLITICAL CONSUMERISM PAST AND PRESENT 127 (Michelle Micheletti, Andreas Follesdal & Dietlind Stolle eds., 2004).

86. VOGEL, *supra* note 84, at 46–56. See generally C.B. Bhattacharya, Shuili Du & Sankar Sen, *Corporate Social Responsibility and Competitive Advantage: Overcoming the Trust Barrier*, 57 MGMT. SCI. 1528 (2011) (explaining the role of CSR initiatives in enhancing competitive advantage).

87. Lee Burke & Jeanne M. Logsdon, *How Corporate Social Responsibility Pays Off*, 29 LONG RANGE PLAN. 495, 495 (1996).

88. PATRICIA ABURDENE, MEGATRENDS 2010: THE RISE OF CONSCIOUS CAPITALISM 22–45 (2005). For an excellent description of the rise of conscious capitalism and illustrations of it, see Matthew T. Bodie, *Labor Relations at the Woke Corporation*, N.Y.U. ANN. SURV. L. (forthcoming 2024).

89. For example, Chobani has at various points defined its mission as encompassing "transforming our food system for the betterment of our planet, our people, and our communities," including "cow comfort" on dairy farms and "responsible manufacturing practices." Chobani has now removed these phrases from its website, but the language used in the past is archived online. See *Chobani*, KARMALIZE, <https://karmalize.org/business/chobani/> [<https://perma.cc/S5PC-EW7W>].

include corporate commitments to DEI agendas and commitments to address climate change through measures aimed at sustainable production. Firms that embrace conscious capitalism commonly adopt an elevated purpose or mission in which profits are seen as the means to an end, rather than as the firm's primary goal, and both shareholders and society reap the benefits of the value added.⁹⁰

Most recently, firms have advanced overtly political and social justice-oriented statements of their corporate mission and philosophy, including commitments to support movements such as Black Lives Matter (BLM), the #Me-Too movement, and the LGBTQ+ movement.⁹¹ Woke capitalism represents the latest phase in a continuum that began with philanthropic investment, evolved into corporate social responsibility, and transitioned into conscious capitalism, but unlike its predecessors, it deliberately incorporates political and social causes into a firm's corporate identity and mission. Like conscious capitalism and some forms of CSR that preceded it, values-based branding is strategic in nature. It is also more controversial than its forerunners primarily because it is both overtly political, and historically has been analytically distinct from business concerns such as

Similarly, fashion-startup Rent the Runway touts its small carbon footprint and presses the claim that renting clothes is better for the environment than buying them. Corrie Driebusch, *For Allbirds, Warby Parker, Other Fall IPOs, Greed Is Out. Do-Gooding Is In.*, WALL ST. J. (Sept. 8, 2021, 3:28 PM), <https://www.wsj.com/articles/for-chobani-allbirds-other-coming-ipos-greed-is-out-do-gooding-is-in-11631093400> [<https://perma.cc/PB4T-G638>].

90. See Chaudhuri, *supra* note 15 (describing trend and the value that it adds to corporate profits); Driebusch, *supra* note 89 (describing a new generation of public companies that see themselves as "mission-driven"); see also Robert E. Quinn & Anjan V. Thakor, *Creating a Purpose-Driven Organization*, HARV. BUS. REV., July–Aug. 2018 (describing process by which corporate mission is communicated to consumers and workers).

91. See, e.g., Tracy Jan, Jena McGregor & Meghan Hoyer, *Corporate America's \$50 Billion Promise*, WASH. POST (Aug. 24, 2021, 7:03 PM), <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/> [<https://perma.cc/JD9B-BVVV>] (describing wave of corporate statements supporting BLM following George Floyd's murder); Yvette Lynne Bonaparte, *Meeting the Moment: Black Lives Matter, Racial Inequality, Corporate Messaging, and Rebranding*, 21 ADVERT. & SOC'Y Q., Fall 2020 (describing messaging by Nike, Starbucks and others in support of BLM); Nicole Torres, *#MeToo's Legacy*, HARV. BUS. REV., Jan.–Feb. 2020 (discussing aftermath of #MeToo and its impact on corporate culture); Yvette Lynne Bonaparte & Martha E. Reeves, *Cause-Related Advertising, the #MeToo Movement, and Implications for Marketers*, 21 ADVERT. & SOC'Y Q., Winter 2020 (discussing cause-related advertising campaigns focusing on issues important to women and the #MeToo movement).

Although our focus in this paper is on woke branding, it is certainly true that conservative "anti-woke" values can also serve as the basis for corporate mission and can be instrumental in creating brand loyalty and community. For example, Black Rifle Coffee Company was founded by military veterans and defines its mission as "serv[ing] coffee and culture to people who love America," and has branded itself as not only pro-military and pro-law enforcement, but also has become the "unofficial coffee of the MAGA universe," endorsed by Sean Hannity and Donald Trump, Jr. See *Who We Are*, BLACK RIFLE COFFEE CO., <https://www.blackriflecoffee.com/about-us/who-we-are> [<https://perma.cc/Y4XY-ZL7T>]; Jason Zengerle, *Selling the Culture Wars: Can the Black Rifle Coffee Company Become the Starbucks of the Right?*, N.Y. TIMES MAG., July 14, 2021, at sm 28.

methods of production (sustainability) or hiring and compensation practices within the firm (DEI goals).

II. WORKERS AS CONSUMERS OF THE CORPORATE BRAND

Firms that deployed sophisticated marketing techniques aimed at consumers soon discovered that the attraction to brands as identity-signaling devices was not limited to consumers. Nor was the line between consumers and workers quite so clear as it had seemed in theory. Workers are simultaneously consumers of the branded job—regardless of whether they consume the firm’s products or services, although these are often part of the benefits package associated with a particular job. They are also consumers of the brand itself. They enter the relationship as consumers of the branded job and are transformed through internal branding into frontline ambassadors for the brand. They also consume discounted products or services as part of a compensation package or a branding endeavor, signal identity through affiliation with the brand, and forego other opportunities in reliance on the status or intangible promise of the brand—sometimes for lower wages than they might reap at a firm with a less desirable brand. Indeed, since relationship marketing is what branding is all about, a firm’s workers form the quintessential relationship with the brand.

The first half of this Part describes the ways in which employers have positioned their brands to appeal to consumers. Many of its insights, however, are applicable to workers, as well. Thus, the second half of this Part explores the ways in which employers have utilized corporate branding and marketing to draw workers to the firm, to improve the customer experience, to enhance worker loyalty and retention rates, and to reduce compensation costs. The common theme throughout is that firms have found it profitable to treat workers like consumers—of the branded job, of branded goods, and of the brand itself. By regarding the line between workers and consumers as flexible and porous, firms have profited.

A. Instrumental Branding—The Branded Job

Employers have long understood that in order to attract workers, jobs and working conditions must be competitive within the labor market. Workers are, after all, consumers of the job and its package of benefits.⁹²

92. See Estlund, *supra* note 42, at 356, 370 (observing that when employees are deciding whether to accept or to remain in a job, they are analogous to consumers of the job and its package of benefits).

The concept of treating employees as consumers and their jobs and/or job experiences as a product is well entrenched in the marketing literature.⁹³ In the context of the employer-worker relationship, human resource scholarship reflects an early instrumental view of employer branding as the set of commitments firms make to workers as consumers regarding the benefits of working at the company.⁹⁴ These benefits may occasionally encompass intangibles like prestige, but more commonly they mirror economic and developmental aspects of the employment relationship, such as compensation, hours, health and safety, training and promotion opportunities, and job satisfaction.⁹⁵

Employee discounts perfectly symbolize the porous nature of the theoretical line between work and consumption. In some cases, employee discounts (particularly on consumable goods such as groceries) are merely a part of a larger compensation package that attracts workers who are drawn to the firm's values-based brand. In other contexts, discounted merchandise may be instrumental not only by enticing the worker to the firm, but also by satisfying the employer's desires to have its workers model or publicly consume the brand. In this way, employee discounts also have the potential to increase the market for the products themselves.

For example, Henry Ford realized early on that he could increase the market for his cars by raising the wages of his workers and simultaneously discounting the cars to Ford employees and their families. According to Ford, "One's own employees ought to be one's own best customers."⁹⁶ Ford understood that the firm needed to interact with workers both as workers and as consumers, with the brand's fortune at top of mind.⁹⁷ Over the ensuing years, Ford operationalized the insight that the firm could profit by engaging its workers simultaneously as consumers, offering vehicle discounts as a part of its overall compensation package, and tying them to

93. See, e.g., Lara Moroko & Mark D. Uncles, *Characteristics of Successful Employer Brands*, 16 J. BRAND MGMT. 160, 171 (2008) (noting that the concept of the employment experience as "a product" and employees as "consumers of this product" was "suggested more than two decades ago").

94. See generally Vikram R. Bhargava & Suneal Bedi, *Brand as Promise*, 179 J. BUS. ETHICS 919 (2022) (discussing the concept of a brand as a promise in the marketing literature and referencing sources).

95. See Michelle Wallace, Ian Lings, Roslyn Cameron & Neroli Sheldon, *Attracting and Retaining Staff: The Role of Branding and Industry Image*, in WORKFORCE DEVELOPMENT: PERSPECTIVES AND ISSUES (Roger Harris & Tom Short eds. 2014) (discussing functional or instrumental brand benefits as representing "basic motivations such as remuneration, compensation and benefits, training and development, promotion opportunities, and job security").

96. Jeff Nilsson, *Why Did Henry Ford Double His Minimum Wage?*, SATURDAY EVENING POST (Jan. 3, 2014), <https://www.saturdayeveningpost.com/2014/01/ford-doubles-minimum-wage/> [<https://perma.cc/VE2Z-LVTF>].

97. See Jason E. Taylor, *Did Henry Ford Mean to Pay Efficiency Wages?*, 24 J. LAB. RSCH. 683, 687, 690 (2003) (describing the link between wages and demand for Ford products as "the essence of [Ford's] revolution in business practices," particularly the \$5.00/day minimum rate adopted in 1914).

the firm's performance. In the 1980s, rank-and-file employees at the "Big Three" American automakers, along with their relatives, became eligible for vehicle discounts ranging from 5% to 20% off the sticker price, but only in exchange for contract concessions.⁹⁸

The discount programs also furthered Ford's interest in demonstrating the reliability and desirability of its brand by promoting public consumption of Ford vehicles by those who knew them best—Ford employees and their friends and family. The extended discount programs led to substantial profits for Ford. One estimate suggests that, in just one year, discounted purchases generated sufficient additional sales demand to keep two factories operational for the entire year.⁹⁹ In this way, workers also functioned as "goodwill ambassadors" for the company, modeling their commitment to the brand through their consumer choices—albeit choices that were coerced, at least to some degree, by Ford.¹⁰⁰ Employees who did not purchase and drive a Ford could suffer discharge for disloyalty.¹⁰¹

B. Internal Branding—Workers as Front-Line Brand Ambassadors

Service businesses depend upon front-line workers to convey and fulfill their brand promise.¹⁰² In order to ensure that workers do so in a way consistent with the company's marketing, firms must market the corporate mission, the brand and its values *inside* the firm to workers.¹⁰³ Some service firms have even consolidated their marketing and HR departments, and in the process, shifted to marketing departments the responsibility for personnel management.¹⁰⁴ The wisdom of this move is apparent given that

98. Blumenstein & Puchalsky, *supra* note 5, at B1. Ford also utilized vehicle discounts in early retirement and buyout offers to union-represented workers. See *Chrysler Extends Buyouts, Early Retirements for 23,000 UAW-Represented Hourly Workers*, DAILY LAB. REP. (BNA) No. 211, Nov. 4, 2009, at A-2.

99. Blumenstein & Puchalsky, *supra* note 5, at B10.

100. *See id.*

101. *See, e.g.*, Swanson, 36 LA 305 (1961) (Gochnauer, Arb) (Ford discharged mechanic in service department for disloyalty after mechanic purchased a new Nash Rambler).

102. Marion Crain, *Managing Identity: Buying into the Brand at Work*, 95 IOWA L. REV. 1179, 1183 (2010).

103. *See, e.g.*, Mitchell, *supra* note 11, at 99, 103–05 (advising firms to "bring the brand alive" for workers through a professional internal marketing campaign that runs parallel to consumer marketing and advertising campaigns); LIBBY SARTAIN & MARK SCHUMANN, BRAND FROM THE INSIDE: EIGHT ESSENTIALS TO EMOTIONALLY CONNECT YOUR EMPLOYEES TO YOUR BUSINESS 26–28 (2006); SCHMIDT & LUDLOW, *supra* note 57, at 5–6.

104. Khanyapuss Punjaisri & Alan Wilson, *The Role of Internal Branding in the Delivery of Employee Brand Promise*, 15 J. BRAND MGMT. 57, 60 (2007); Julie Anixter, *Transparency, Or Not? Brand Inside: Brand Outside*, in BEYOND BRANDING 161, 180 (Nicholas Ind ed., 2003).

“[internal branding is] nothing but a[n] HR strategy borrowed from marketing to attract and retain talents.”¹⁰⁵

Management strategists advise firms to conduct a professional internal branding campaign that “bring[s] the brand alive” for workers, parallel to the firm’s consumer marketing and advertising campaign except that the target is the worker.¹⁰⁶ Internal branding programs typically include coordinated hiring, training and socialization, and a disciplinary and reward structure designed to imprint brand values upon workers’ identities.¹⁰⁷ Rules governing employees’ appearance,¹⁰⁸ dress,¹⁰⁹ and performative labor are essential components of internal branding, particularly for service and lifestyle brands, since they make the branded service or lifestyle more tangible.¹¹⁰

The most successful internal branding programs virtually eliminate the consumer/worker dichotomy. Strong indoctrination programs, a focus on selecting workers who are a good fit with the corporate ideology (“buy in or get out”), and a sense of elitism (the notion that those who work for the company are insiders, part of something special and superior) characterize companies that strive for complete alignment between workers’ identities and the corporate brand.¹¹¹ The more fully workers identify (or “connect”) with the brand, the more dedicated they become to advocating for it, resulting in improved job performance, and reducing the need for close management and oversight. Thus, internal branding serves both as a control mechanism and to induce employee investment.¹¹² Ideally, effective internal

105. Mukesh Biswas & Damodar Suar, *Which Employees’ Values Matter Most in the Creation of Employer Branding?*, 7 J. MKTG. DEV. & COMPETITIVENESS 93, 94 (2013); see also Olivier Herrbach & Karim Mignonac, *How Organisational Image Affects Employee Attitudes*, 14 HUM. RES. MGMT. J. 76, 76–79 (2004) (detailing relationship between corporate image and issues of concern to human resources professionals, including effective hiring, retention, and better morale).

106. Mitchell, *supra* note 11, at 103–05.

107. See *id.* (recommending a professional campaign orchestrated by the marketing department but aimed at workers rather than consumers).

108. See Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL’Y 13, 45–57 (2007) (discussing Darlene Jespersen’s challenge to Harrah’s casino’s appearance and grooming code).

109. Physical elements such as uniforms are analogized to product packaging design. See DE CHERNATONY & MCDONALD, *supra* note 57, at 222–23.

110. See *id.*

111. See JAMES C. COLLINS & JERRY I. PORRAS, *BUILT TO LAST: SUCCESSFUL HABITS OF VISIONARY COMPANIES* 121–23 (1994) (describing strategies used to align employee identity with the firm at Disney, Nordstrom, and Proctor & Gamble).

112. Crain, *supra* note 102, at 1206–09; see also Marion Crain, *Arm’s Length Intimacy: Employment as Relationship*, 35 WASH. U. J.L. & POL’Y 163, 169–74 (2011) (explaining how workers invest emotionally in the employment relationship); Denise M. Rousseau, *Why Workers Still Identify with Organizations*, 19 J. ORGANIZATIONAL BEHAV. 217, 221–22 (1998) (explaining that workers willingly make sacrifices for their employers when they perceive the employment relation as a relationship rather than as an economic transaction).

branding yields a more satisfied workforce with higher morale, greater job satisfaction, lower turnover, and ultimately, lower labor costs.¹¹³

Retail clothing stores with strong brands are perhaps the best example of effective internal branding in which firms manage to align workers' identities as both consumer and worker, and simultaneously to further employee recruitment and customer satisfaction. These stores require workers to purchase and model branded clothing, footwear, and accessories in keeping with current fashions, including seasonal shifts, and to comply with grooming requirements that regulate hair style, facial hair, tattoos, makeup, jewelry, and fingernail length and color.¹¹⁴ Employees, hired off the sales floor while shopping and attracted to the jobs by the allure of the brand and the opportunity to purchase discounted merchandise, welcome the requirement.

In this business model, the customer's in-store experience is shaped by interactions with sales workers who portray and convey the brand's personality by wearing seasonally appropriate clothing sold in the store.¹¹⁵ The employer mines new employees from its customer base, instructing its supervisors to solicit shoppers whose personal attributes best showcase the brand.¹¹⁶ Once hired, the workers' bodies become the medium for conveying the brand promise to consumers, implying a prior act of consumption of the employer's product and ensuring that "work and consumption are intertwined on the bodies of workers."¹¹⁷ Workers are barred from wearing clothing or accessories incompatible with the brand,

113. Herrbach & Mignonac, *supra* note 105, at 76–79 (detailing relationship between corporate image and issues of concern to human resources professionals, including effective hiring, retention, and better morale); Alan Bergstrom, Dannielle Blumenthal & Scott Crothers, *Why Internal Branding Matters: The Case of Saab*, 5 CORP. REPUTATION REV. 133, 138 (2002) (observing that just as customers who feel an affinity for a brand will pay a price premium for it, workers are willing to substitute brand prestige for benefits and compensation).

114. See Joyce E. Cutler, *Three Retailers Sued for Requiring Employees to Wear Store's Clothes*, Daily Lab. Rep. (BNA) No. 27, Feb. 10, 2003 (describing the practice as "the industry standard" for mass market fashion retailers). Many clothing retailers have softened their formal dress codes in response to litigation, so that employees are not required to purchase clothes from the store, but are simply required to look "brand appropriate" and "avoid wearing obvious labels belonging to competitors." Jenny Strasburg, *Gap Close to Settling / Clothing Voucher Handout Proposed in Dress-Code Suit*, SFGATE (Jan. 28, 2005), <https://www.sfgate.com/business/article/Gap-close-to-settling-Clothing-voucher-handout-2735163.php> [<https://perma.cc/9T95-64ZV>]; see, e.g., *Kullar v. Foot Locker Retail, Inc.*, 85 Cal. Rptr. 3d 20 (Ct. App. 2008) (class action challenging Foot Locker's requirement that employees wear footwear "consistent with" Foot Locker shoes).

115. Crain, *supra* note 8, at 264.

116. See Steven Greenhouse, *Going for the Look, but Risking Discrimination*, N.Y. TIMES (July 13, 2003), <https://www.nytimes.com/2003/07/13/us/going-for-the-look-but-risking-discrimination.html> [<https://perma.cc/U29P-8Z76>] (describing A&F strategy of recruiting employees from its customer base; managers solicit consumers while they are shopping in stores).

117. Lynne Pettinger, *Gendered Work Meets Gendered Goods: Selling and Service in Clothing Retail*, 12 GENDER WORK & ORG. 460, 473 (2005).

including attire mandated by religious faith, such as the hijab.¹¹⁸ Those who fail to comply with the “look” policy are disciplined, scheduled for reduced hours, or discharged.¹¹⁹

Consider Abercrombie & Fitch’s (A&F) branding strategy. A&F sought salespeople who fit the A&F brand: young, slim, and white. Its prime recruiting ground was its own sales floor. In the Netflix documentary, *White Hot: The Rise & Fall of Abercrombie & Fitch*,¹²⁰ former workers detail how A&F capitalized on its brand to appeal to the insecurities of teens who wanted desperately to fit in and to belong. The clothes themselves were not particularly unique—instead, it was the A&F brand that distinguished them, invoking A&F’s marketing imagery of sexy, partially clothed attractive young white teens.¹²¹ Wanting to be seen as “cool,” teens flocked to the store and sought to affiliate themselves with the brand by buying branded clothing. Interactions with workers who portray and convey the brand’s “personality” shape the customer’s in-store experience.¹²² These experiences augment and even substitute for traditional advertising, reinforcing the “aspirational lifestyles” that are the hallmark of the brand and its core business driver.

C. Workers as Consumers of the Values-Focused Brand

When confronted with products that are identical in all respects save for the corporate brand, consumers will pay more to acquire the branded product, not for what the product is but for what it represents. External marketing aimed at consumers informs prospective workers, and workers arrive at the workplace with assumptions and views about the firm and its brand.¹²³ Workers will also pay to access brand value, commonly in the form of accepting lower wages, especially when perceived value equates with a

118. The Court eventually made clear that employers who bar workers from wearing religious attire such as the hijab are likely in violation of Title VII. *See Equal Emp. Opportunity Comm’n v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015) (finding that A&F’s look policy, while neutral on its face, nevertheless violates Title VII if it is applied to block accommodation of a religious practice).

119. Cutler, *supra* note 114.

120. Alison Klayman, *White Hot: The Rise & Fall of Abercrombie & Fitch*, NETFLIX (2022), <https://www.netflix.com/title/81323741> [<https://perma.cc/48B8-G58B>].

121. *See id.*

122. In the district court case that went to the Supreme Court on a Title VII religious discrimination challenge to its Look Policy, A&F executives asserted that an essential function of an A&F salesperson is to “act as a model for the brand”—indeed, salespeople are called “models”; that its Look Policy was critical to the in-store brand experience which includes employee interactions and functions as a core business driver for the brand; that such interactions substitute for advertising; and that exceptions to the policy had a negative impact on the brand and on sales. *See Equal Emp. Opportunity Comm’n v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272, 1280 (N.D. Okla. 2011).

123. Biswas & Suar, *supra* note 105, at 94.

firm's commitment to social causes.¹²⁴ Because a positive corporate image may enhance job applicants' interest due to "perceived value fit with the organization," marketing analysts recommend that employers emphasize CSR content relating to mission in their online recruitment postings.¹²⁵ To attract such applicants, it is not enough to feature CSR commitments on a company webpage; they should be included in online job postings, preferably at the beginning of the posting as part of a company overview, where they will have maximum impact. The same study reveals that close to half of employees surveyed would forgo 15% of their wages to work for a company where they believe they could make a positive social or environmental difference.¹²⁶

Millennials display an especially strong desire to work for companies with a demonstrated commitment to social responsibility.¹²⁷ A 2016 study reports that 79% of this group would consider a company's CSR commitments when deciding where to work, and two-thirds would decline a job if a company lacks strong CSR values.¹²⁸ The study also reported that 76% of millennials would opt to work for a company that embraced social responsibility even if it paid less relative to other companies.¹²⁹ Some researchers refer to the opportunity to enact one's identity at work as an "identity incentive" conferring a form of compensation that may substitute

124. See, e.g., Douglas H. Frank & Craig Smith, *Will Employees Pay to Work for a More Socially Responsible Organization?*, 2016 ACAD. MGMT. (PROC.) 868, 868 (2016) (finding that study participants "will sacrifice 12 to 18 percent of their wages to work for the organization whose mission they view as more socially beneficial"); Vanessa C. Burbano, *Social Responsibility Messages and Worker Wage Requirements: Field Experimental Evidence from Online Labor Marketplaces*, 27 ORG. SCI. 1010, 1023 (2016) (finding that prospective workers who "receiv[e] information about an employer's social responsibility" reduce their wage requirements).

125. Petya Puncheva-Michelotti, Sarah Hudson & Gewen Jin, *Employer Branding and CSR Communication in Online Recruitment Advertising*, 61 BUS. HORIZONS 643, 644 (2018). The authors cite a 2012 study by Zukin & Szeltner reporting that approximately half of survey respondents were willing to take a 15% pay cut to work for employers that demonstrated a commitment to environmental and social responsibility. *Id.* The willingness of employees to forgo pay in exchange for working at a company that affords them an opportunity to advance their alignment with a company's CSR interests and/or their personal interests has been documented in various contexts. See, e.g., Nader T. Tavassoli, Alina Sorescu & Rajesh Chandy, *Employee-Based Brand Equity: Why Firms with Strong Brands Pay Their Executives Less*, 51 J. MKTG. RSCH. 676, 684 (2014) (testing the impact of brand value on executive pay and finding that firms with strong brands are able to pay their executives less).

126. Puncheva-Michelotti et al., *supra* note 125.

127. See Christine Moorman, Commentary, *Brand Activism in a Political World*, 39 J. PUB. POL'Y & MKTG., 388, 391 (2020) ("Millennial workers, in particular, want their jobs to be meaningful, and they value the opportunity to participate in important social debates and to be involved in activities important to the world.").

128. CONE COMM'NS, 2016 CONE COMMUNICATIONS EMPLOYEE ENGAGEMENT STUDY 5 (2016), https://accp.org/wp-content/uploads/020_2016ConeCommunicationsEmployeeEngagementStudyReport.pdf [<https://perma.cc/U2FA-NNZK>].

129. *Id.*

for financial incentives and providing management with an additional locus of control over workers.¹³⁰

In short, consumers and employees desire to align their personal values and beliefs with brands known for progressive social values. Given the strong emphasis that firms place on infusing the brand into workers, attempts to disaggregate the worker from the consumer are futile. Branded workers are the embodiment of consumption, and what they consume and embody is the firm's brand.

III. THE WORKER/CONSUMER DIVIDE: BARRIERS TO RECOVERY UNDER CONSUMER LAW

Workers have found it difficult to hold employers accountable for statements made about the nature of the corporate mission because the law forces them to identify as either workers or consumers. The doctrines of managerial prerogative and employment-at-will typically block claims predicated on an individual's status as an employee. Consumer status is completely irrelevant to these claims. Likewise, theories framed as violations of consumer law are blocked by the law's insistence that only consumers can recover under consumer law—employees are outside the scope of its reach. Thus, regardless of the type of claim, courts refuse to recognize that multiple identities exist and are being exploited by firms simultaneously.

Despite the general opposition of consumer law to claims brought by workers, some scholars and activists have invoked it to address unfair and deceptive financing and credit tactics used by employers to lock workers into service. These include Training Repayment Agreement Provisions (TRAPs), which are marketing and operations management services offered to workers through exploitative and deceptive franchise arrangements, as well as temporary staffing agencies that collude with client firms to artificially suppress wages and restrict the employment of the temporary workers they hire.¹³¹ These claims have some promise, in part because they do not challenge the consumer-worker dichotomy. The workers raising these claims are typically defined as outside the protections of labor and employment law because—as gig workers or independent contractors—they lack employee status. As a result, they may more easily claim a status as consumers.

130. See Michel Anteby, *Identity Incentives as an Engaging Form of Control: Revisiting Leniencies in an Aeronautic Plant*, 19 *ORG. SCI.* 202, 215 (2008) (exploring how a French aeronautics plant used identity incentives to shape and control employees' identities and examining how these identities are desired by and beneficial to employees).

131. See Harris, *supra* note 8, at 4–6.

Could consumer law ground claims by worker-consumers that challenge inauthentic representations about the firm's brand and purpose? As a first step to answering that question, this Part begins with an overview of consumer law and afterwards, turns to efforts by plaintiff-workers to stand in the shoes of a consumer and leverage consumer law to obtain relief. This Part examines the obstacles that workers face as they struggle to bridge the traditional worker-consumer divide to fashion a cognizable claim. We find that consumer law recovery is especially problematic when individuals claiming consumer status are simultaneously asserting their identities as employees.

A. Consumer Law

Both federal and state consumer laws offer consumers some redress for resulting harm based on deceptive brand promises. The most significant federal law is the Federal Trade Commission Act (FTC Act) which established the Federal Trade Commission (FTC).¹³² Section five of the FTC Act broadly prohibits “unfair or deceptive acts or practices,” including false and misleading promises in or affecting commerce, and empowers the FTC to take appropriate action to address such practices.¹³³

All fifty states and the District of Columbia have enacted their own versions of the FTC Act¹³⁴ known as Unfair and Deceptive Acts and Practices (UDAP) statutes or “little FTC Acts.”¹³⁵ Although there are considerable differences among UDAP statutes,¹³⁶ the laws reflect the FTC's basic goal of safeguarding consumers from unfair or deceptive business practices.¹³⁷ However, unlike the FTC Act, UDAP statutes contain a private right of action that empowers individual consumers to challenge

132. Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

133. 15 U.S.C. § 45(a).

134. See generally CAROLYN CARTER, CONSUMER PROTECTION IN THE STATES (2018), <https://www.nclc.org/images/pdf/udap/udap-report.pdf> [<https://perma.cc/M2SN-Z9S9>] (providing a fifty-state overview of state-based consumer protection laws).

135. Dee Pridgen, *Wrecking Ball Disguised as Law Reform: Alec's Model Act on Private Enforcement of Consumer Protection Statutes*, 39 N.Y.U. REV. L. & SOC. CHANGE 279, 284 (2015) [hereinafter Pridgen, *Wrecking Ball*]; see also *id.* at 281 (characterizing state consumer protection statutes as “state unfair and deceptive acts and practices or ‘UDAP’ laws” and discussing their origins); Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 920–24 (2017) [hereinafter Pridgen, *Dynamic Duo*] (discussing the evolution of state UDAP laws).

136. See DEE PRIDGEN, JEFF SOVERN & CHRISTOPHER L. PETERSON, CONSUMER LAW: CASES AND MATERIALS 117–18 (5th ed. 2020) (discussing some of the differences among state UDAP laws).

137. See Pridgen, *Wrecking Ball*, *supra* note 135, at 282–83.

prohibited practices,¹³⁸ and many of them empower state attorneys general to seek relief on behalf of consumers.¹³⁹

The utility of UDAP statutes to challenge woke-washing rests primarily in their prohibition against deceptive practices. UDAP decisions interpreting the meaning of a deceptive practice commonly rely on FTC guidance which defines it as “a representation, omission or practice” that is likely to “materially mislead” a consumer acting reasonably under the circumstances.¹⁴⁰

Although woke-washing as a phenomenon has garnered attention only recently, the potential of UDAP laws to address such deception can be gleaned from their growing application to greenwashing.¹⁴¹ Initially, greenwashing opponents relied on UDAP laws to tackle deceptive product labeling.¹⁴² In more recent cases, the laws are being used to “target alleged false or misleading statements in annual ESG [environmental, social, and governance] or sustainability reports, on websites, or in other general marketing materials.”¹⁴³ Similar to consumer unhappiness over woke-washing, these claims allege a mismatch between firms’ public statements and their actual performance.¹⁴⁴

Of course, when it comes to allegations of both greenwashing and woke-washing, not all firm statements will qualify as actionable under UDAP statutes. For a statement to be misleading, it must amount to a misrepresentation, understood as “an express or implied statement contrary to fact.”¹⁴⁵ Any number of statements will fall short of this standard

138. *Id.* at 282–86 (examining the private enforcement of state UDAP laws).

139. Pridgen, *Dynamic Duo*, *supra* note 134, at 915 (“[S]tate consumer protection laws give major remedial authority to the state enforcing agencies, typically the state attorney general.”); *id.* at 920–21 (“State attorneys general can also obtain redress or restitution for consumers either as part of injunctive relief, or as expressly authorized by the state UDAP statute”).

140. *See* Fed. Trade Comm’n, *FTC Policy Statement on Deception* (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [<https://perma.cc/8QJ9-S39K>]; *see also* *United States v. Locascio*, 357 F. Supp. 2d 536, 549 (E.D.N.Y. 2004) (stating that the FTC has “laid out a three-part test for determining whether an advertisement is misleading: (1) there must be a representation, omission, or practice that is likely to mislead the consumer; (2) it must be likely to mislead consumers acting reasonably under the circumstances; and (3) it must be material”).

141. *See supra* note 17 (discussing and defining greenwashing).

142. *See* David Hackett, Reagan Demas, Douglas Sanders, Jessica Wicha & Aleesha Fowler, *Growing ESG Risks: The Rise of Litigation*, 50 ENV’T L. REP. 10849, 10850 (2020). The early cases were framed as challenges to sustainability performance rather than greenwashing, but since greenwashing refers to deceptive marketing that seeks to persuade others that a company’s products and practices are environmentally sustainable, the two are essentially the same.

143. *Id.* at 10850.

144. *Id.* at 10852–53.

145. Fed. Trade Comm’n, *supra* note 140, at n.4.

including, for example, statements that constitute acceptable puffery and exaggerations.¹⁴⁶

When an alleged misrepresentation consists of “specific and verifiable facts,” a court is more likely to conclude that it is actionable under consumer protection law.¹⁴⁷ Consider *Organic Consumers Ass’n v. Tyson Foods, Inc.*, a case involving Tyson Foods.¹⁴⁸ Plaintiffs, two advocacy groups, alleged that Tyson violated the D.C. Consumer Protection Procedures Act by falsely informing consumers that the company produced its products in an environmentally responsible manner.¹⁴⁹ To support this claim, plaintiffs pointed to sustainability representations that Tyson made, with respect to its brand, through advertising and marketing on the company’s website, social media accounts and television.¹⁵⁰ The representations included, for example, the statement that Tyson is a “steward[] of the animals, land[,] and [the] environment.”¹⁵¹ Tyson also touted its commitment to keeping its “chickens healthy,” to ensuring that they were injury free, and to treating them humanely.¹⁵² A video on the company’s website and YouTube described Tyson’s chickens as “happy.”¹⁵³

Plaintiffs alleged that these representations materially misrepresented the reality of Tyson’s practices because the company “regularly fails to comply with environmental laws and is the second largest polluter in the United States.”¹⁵⁴ Plaintiffs also asserted that contrary to Tyson’s claim that its chickens were “happy” and injury free,¹⁵⁵ the company raised and handled the birds in “disease-ridden and inhumane conditions” as a matter of standard business practices.¹⁵⁶ The complaint further stated that Tyson benefited from its deception because consumers “are willing to pay more for environmentally responsible poultry products and/or products from animals raised humanely.”¹⁵⁷ In its motion to dismiss the complaint, Tyson argued that its communications were “merely opinions, predictions and

146. For a discussion of some of the concerns involved in determining which statements amount to statements of fact for purposes of consumer protection law, see, for example, Shmuel I. Becher, Yuval Feldman & Meirav Furth-Matzkin, *Toxic Promises*, 63 B.C. L. REV. 753, 784–86 (2022); Dadush, *Identity Harm*, *supra* note 18, at 906–08.

147. Hackett et al., *supra* note 142, at 10852 (citation and internal quotation marks omitted).

148. *Organic Consumers Ass’n v. Tyson Foods, Inc.*, No. 2019 CA 004547 B, 2021 D.C. Super LEXIS 7 (D.C. Super Ct. Mar. 31, 2021).

149. *Id.* at *1–2.

150. See Complaint at 5–8, *Organic Consumers Ass’n*, 2021 D.C. Super LEXIS 7 (No. 2019 CA 004547 B).

151. *Id.* at 6.

152. *Id.* at 9.

153. *Id.*

154. *Id.* at 16; see also *id.* at 56.

155. *Id.* at 9.

156. *Id.* at 16.

157. *Id.* at 48.

aspirations” and as such, no reasonable consumer would be misled by them.¹⁵⁸ The court rejected this contention, and held that the representations were sufficiently “detailed and concrete” to be actionable.¹⁵⁹

However, some courts have shown a willingness to allow plaintiffs an opportunity to prove that a misrepresentation occurred even absent concrete promises based on verifiable facts. Thus, in *Earth Island Institute v. Coca-Cola Co.*,¹⁶⁰ another case brought under the D.C. Consumer Protection Procedures Act, the defendant sought to dismiss plaintiff’s greenwashing complaint for failure to state a claim based in part on the argument that the alleged misrepresentations were “aspirational” statements about “future goals,” and that instead of being clear commitments, they simply reflected the firm’s “corporate ethos.”¹⁶¹ The court ruled in favor of the plaintiff and observed that “even aspirational statements can be actionable . . . because they can convey to reasonable consumers that a speaker is taking (or intends to take) steps that at least have the potential of fulfilling those aspirations.”¹⁶² This ruling is especially relevant as statements made in the context of values-based branding run the gamut, and commonly take the form of a firm’s stated desires and goals.

Tyson, *Earth Island*, and similar cases¹⁶³ make clear that state consumer laws can provide consumers with a meaningful legal avenue to push back against misleading brand representations made by woke firms. Even when claims may not represent slam dunks, court rulings have increasingly allowed plaintiffs to survive motions to dismiss, and to have a chance at compelling companies to undertake course correcting measures.

B. Worker-Consumers as Plaintiffs

Plaintiff-workers who have invoked consumer law to contest employer misrepresentations have met with mixed success in part because courts consistently respond that only consumers—and not employees—can do so. This Section examines how courts deploy this legal mindset when confronted with consumer law claims by plaintiff-workers in two contexts: situations involving misrepresentation claims regarding the nature of the branded job, and situations involving misrepresentation claims as to branded products. We argue that the judicial response to both types of

158. *Organic Consumers Ass’n*, 2021 D.C. Super. LEXIS 7, at *8.

159. *Id.* at *8–9.

160. *Earth Island Inst. v. Coca-Cola Co.*, 321 A.3d 654 (D.C. 2024).

161. *Id.* at 658.

162. *Id.* at 659. The Court further observed that “Earth Island alleges that Coca-Cola neither takes nor intends to take any such steps, and if that is correct, then its representations could mislead reasonable consumers.” *Id.*

163. *See infra* Section V.B. (analyzing consumer law claims involving deception).

claims makes it clear that traditional interpretations of consumer law would be inadequate to address the adverse consequences that misrepresentations made by woke corporations visit upon worker-consumers. Only in instances where the employee's claim depends solely upon a consumer-firm relationship, independent of the employment relationship, will courts allow these claims. This relatively rigid distinction, which views consumer and worker identities as fundamentally separate, prevents courts from recognizing alternative possibilities, even in cases where employers are fully cognizant of and exploit these overlapping identities to their advantage.

1. Challenging Misrepresentations Made About the Job—Instrumental Branding

As explored above in Section II.A, firms recruiting workers typically engage in instrumental branding: they strive to brand the job itself as desirable.¹⁶⁴ These endeavors primarily target wages and hours, but they may also include other perks and benefits, such as training opportunities, health and safety guarantees, job satisfaction and work-life balance, access to discounted products or services as part of the overall compensation package, prestige, and other intangible benefits associated with the brand.¹⁶⁵ Since firms clearly conceptualize workers as consumers of the jobs they hold,¹⁶⁶ could workers deploy this identity to ground claims under consumer law that the job was not as represented?

To succeed on such a claim, workers would need to demonstrate that they are consumers vis-à-vis a product or service that forms the basis of their complaint. Although some UDAP laws are written broadly or interpreted to apply to “any person,”¹⁶⁷ the majority are narrowly tailored or interpreted to protect only consumers.¹⁶⁸ As it stands, courts do not appear

164. See *supra* notes 92–122 & accompanying text (describing branding focusing on a firm's reputation as an employer).

165. See Moroko & Uncles, *supra* note 93, at 167; Wallace et al., *supra* note 95, at 25.

166. See Moroko & Uncles, *supra* note 93, at 171 (referencing the perception of workers as consumers of their jobs).

167. See, e.g., Moss v. Guttormson, 551 N.W.2d 14, 17 (S.D. 1996) (interpreting South Dakota's Deceptive Trade Practices and Consumer Protection Law which applies to “[a]ny person” to reject the defendant employer's contention that as an employee, the plaintiff lacked standing to sue under the law and holding that an employee qualifies as a “person” under the Act's expansive coverage (alteration in original)).

168. See, e.g., Brandon v. Am. Sterilizer Co., 880 S.W.2d 488, 490 (Tex. Ct. App. 1994) (“[T]he purpose of the DTPA is the protection of consumers from deceptive trade practices.”); Pridgen, *Dynamic Duo*, *supra* note 135, at 943 (“[T]he state UDAP laws originated in a consumer protection context, with a goal of protecting consumers who would otherwise be inadequately protected under then-existing law.”); Michelle L. Evans, Annotation, *Who Is a “Consumer” Entitled to Protection of State Deceptive*

to have been especially receptive to workers who have tried to prove that they were consumers of their jobs for purposes of establishing that their employers misrepresented material aspects of those jobs. Consider the case of *Garrett-Alfred v. Facebook, Inc.*¹⁶⁹ Plaintiffs worked as content moderators for a contracting company (Cognizant Technology Solutions), hired by Facebook to police Facebook's social media platform. Content moderators had to review graphic content on Facebook including murders, tortures, child pornography, and rape. Plaintiffs alleged that their employment placed them at increased risk of developing serious mental health injuries and associated physical injuries, including PTSD, stroke and epilepsy.¹⁷⁰ They claimed that both Facebook and Cognizant violated the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) by "exposing [them] to dangerous content, concealing the dangers, refusing to implement proper precautions, preventing [them] from becoming aware of the scope of the dangers of content moderation by requiring broad NDAs, and by misrepresenting dangers through false advertisements about the jobs."¹⁷¹ In ruling against plaintiffs on defendants' motion to dismiss, the court stated that "[f]or an act to be a deceptive act under FDUTPA, it must be likely to mislead a consumer to a consumer's detriment."¹⁷² The court concluded, however, that the plaintiffs had failed to allege that the challenged practices were harmful to them as consumers.¹⁷³

Courts have also used the employee/consumer distinction to prevent workers from pursuing a UDAP claim against an employer by classifying employment-related disagreements as private disputes that do not affect commerce. A common judicial perspective is that because consumer laws are designed to prohibit deceptive practices in the conduct of any trade or commerce,¹⁷⁴ they necessarily exclude from coverage "internal employment or intra-enterprise disputes" that have little if any connection to a firm's

Trade Practice and Consumer Protection Acts, 63 A.L.R. 5th 1, 25 (1998) ("In order to impose liability under a state deceptive-trade-practice and consumer-protection act, it is necessary that the injured party be a consumer entitled to protection under the act.").

169. 540 F. Supp. 3d 1129 (M.D. Fla. 2021).

170. *Id.* at 1134, 1141–42.

171. *Id.* at 1141.

172. *Id.* at 1142.

173. *Id.* ("Plaintiffs' claims do not allege that Cognizant's or Facebook's actions misled consumers in any way; they allege only that employees were deceived.").

174. *See, e.g., Winston Realty Co. v. G.H.G., Inc.*, 320 S.E.2d 286, 291 (N.C. Ct. App. 1984) (observing, with respect to North Carolina's statute, that "[c]ommerce' in its broadest sense comprehends intercourse for the purposes of trade in any form" (alteration in original)); *Chila v. Chila*, No. D.N. CV94 0140570 S, 1995 Conn. Super. LEXIS 1056, at *3–6 (Conn. Super. Ct. Apr. 3, 1995) (striking plaintiff's UDAP claim, the court held that the allegations did not involve any trade or commerce, nor did it state that the employee had suffered a consumer injury).

business operations.¹⁷⁵ *Bonham v. Wolf Creek Academy*¹⁷⁶ effectively demonstrates this limitation under North Carolina’s UDAP statute.¹⁷⁷ The *Bonham* plaintiffs alleged that their employer, operators of a school for troubled teens, failed to provide overtime pay for their work as house parents, and also failed to “keep a safe working environment.”¹⁷⁸ The apparent basis for this latter allegation was plaintiffs’ contention that the employer did not inform them of the violent histories of the teenage boys under their care. In dismissing plaintiffs’ UDAP claim, the court commented that an employer’s failure “to tell an employee of all aspects of the job to be accomplished or the perils that might be encountered” falls short of demonstrating that an activity was in or affecting commerce.¹⁷⁹ To allow a UDAP claim absent such a demonstration, concluded the court, would create an untenable result.

[The statute] would . . . be violated in a myriad of employment relationships, such as where a bank fails to inform a new teller that banks get robbed, where a telephone company fails to tell a lineman than he could be electrocuted or fall, or where an NFL team fails to tell a lineman that he could be seriously injured by contact with an opposing player.¹⁸⁰

As the court saw it, plaintiffs’ allegation was a “run-of-the mill employment dispute[.]” that fell outside the statute’s scope.¹⁸¹ This view stems from a rigid bifurcation between consumer and worker that precludes employment or employees from falling within the scope of consumer laws.

175. *Manning v. Zuckerman*, 444 N.E.2d 1262, 1266 (Mass. 1983) (observing that “[d]isputes arising out of the employment relationship between an employer and an employee are not cognizable” under Massachusetts’ UDAP statute); *see also* *Stone v. Landis Constr. Co.*, 120 A.3d 1287, 1291 (D.C. 2015) (concluding that loss of potential employment was not actionable under the D.C. consumer protection statute in part because, “virtually without exception, courts in other jurisdictions have rejected arguments that their consumer protection statutes encompass employment”).

176. 767 F. Supp. 2d 558 (W.D.N.C. 2011).

177. Unfair and Deceptive Trade Practices (UDTPA) are governed by Chapter 75-1.1(a) of the North Carolina General Statute. N.C. GEN. STAT. § 75-1.1(a) (2024) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.”).

178. *Bonham*, 767 F. Supp. 2d at 570.

179. *Id.* at 574.

180. *Id.*

181. *Id.* (quoting *Dalton v. Camp*, 548 S.E.2d 704, 710 (N.C. 2001)); *see also* *Stone v. Landis Constr. Co.*, 120 A.3d 1287, 1290 (D.C. 2015) (“[For purposes of the District of Columbia’s UDAP law,] [a]n employee and an employer are not engaged in trade or commerce with each other. . . . Nor indeed does employment naturally fall even within the definition of ‘goods and services.’ Employment produces goods and services. It is not ‘the economic output of society,’ but rather one of the relationships within that society, whereby economic output is produced.” (emphasis omitted) (citation omitted)).

2. *Challenging Misrepresentations Made About the Products: Worker as Consumer of Discounted Merchandise*

Although courts that have considered the issue seem generally opposed to workers maintaining consumer status under UDAP laws, some have shown a limited willingness to do so based on what we describe as the “dual status” framework. This expression captures the fact that workers often possess various identities vis-a-vis their relationship with a company, and it specifically describes a worker who is also an end-user consumer of the company’s goods or services. Courts occasionally state that UDAP laws do not extend to employees or the employment relationship,¹⁸² but this admonition, correctly read, signifies that the laws do not protect employees in their capacity as employees. Even as the specific language of UDAP laws varies, they offer employees protection if a deceptive practice occurred in the context of their interaction with the business as consumers, rather than in the context of the employment relationship.¹⁸³ As explained by one court, “[a] plaintiff establishes his standing as a consumer in terms of his relationship to a transaction, not by contractual relationship with the defendant. The only requirement is that the goods or services sought or acquired by the consumer form the basis of his complaint.”¹⁸⁴

The dual-status framework recognizes that under UDAP laws, a business can interact with its workers in their consumer role in a manner that is separate from the employer-employee relationship. This understanding is analogous to the approach that some courts use for purposes of the dual-persona doctrine in workers’ compensation claims.¹⁸⁵ Under the doctrine, an employer who is normally shielded from tort liability based on the

182. See, e.g., *Stone*, 120 A.3d at 1291 (observing that for purposes of the District of Columbia’s UDAP law, employment is “not a ‘business opportunity’”); *Hajmm Co. v. House of Raeford Farms, Inc.*, 403 S.E.2d 483, 492 (N.C. 1991) (observing that North Carolina’s UDAP law “does not cover employer-employee relations”); see also *Buie v. Daniel Int’l Corp.*, 289 S.E.2d 118, 120 (N.C. Ct. App. 1982) (observing that “[u]nlike buyer-seller relationships, . . . employer-employee relationships do not fall within the intended scope” of the North Carolina UDAP).

183. See, e.g., *Durling v. King*, 554 S.E.2d 1, 4 (N.C. Ct. App. 2001) (“[T]he mere existence of an employer-employee relationship does not in and of itself serve to exclude a party from pursuing an unfair trade or practice claim” (internal quotation marks omitted) (quoting *Dalton v. Camp*, 548 S.E.2d 704, 710 (N.C. 2001))); see also *id.* (observing that the proper inquiry “is not whether a contractual relationship existed between the parties, but rather whether the defendants’ allegedly deceptive acts affected commerce” (internal quotation marks omitted) (quoting *Prince v. Wright*, 541 S.E.2d 191, 192–93 (N.C. Ct. App. 2000))).

184. *Kennedy v. Sale*, 689 S.W.2d 890, 893 (Tex. 1985); see also *Bonham*, 767 F. Supp. 2d at 574 (“[E]mployment relationships are excluded as a matter of law from coverage by the UDTPA absent pleading special circumstances.”).

185. See generally 10 LEX K. LARSON & THOMAS A. ROBINSON, LARSON’S WORKERS’ COMPENSATION LAW § 113.01D (2024). See also Andrew R. Klein, *Apportionment of Liability in Workplace Injury Cases*, 26 BERKELEY J. EMP. & LAB. L. 65, 90 n.120 (2005) (reporting on sources highlighting the jurisdictional shift toward the dual persona doctrine).

exclusivity principle of the workers' compensation system, may become subject to such liability if an employee's injury stems from the employer's breach of its duty of care arising from a relationship that is sufficiently distinct from and independent of the employment relationship.¹⁸⁶ The doctrine applies in situations where a company wears at least two hats vis-à-vis its relationship with a worker.

Likewise, for purposes of UDAP laws, a business can have a relationship with its workers in their role as consumers that is distinct from the employment relationship. The theory describes the reality of many contemporary workers who consume the products and services sold by the firms for which they work including heavily branded companies such as automotive manufacturers,¹⁸⁷ companies like Whole Foods and Apple, as well as clothing stores such as the Gap and Banana Republic.¹⁸⁸ *Nathe v. Weight Watchers International, Inc.* usefully illustrates the theory. In the case, a court held that a Weight Watchers' employee stated a claim under a New York consumer protection law based on her allegation that the company misled "its customers and the public by promoting and selling as 'healthy' products which contain harmful food additives."¹⁸⁹ Importantly, the employee plaintiff alleged that she was harmed, not in her capacity as an employee of Weight Watchers, but as an end-user consumer who purchased the company's food products and then realized that they were not as described.¹⁹⁰

In circumstances where it is available, the "dual-status" framework can helpfully counter judicial statements and suggestions that UDAP statutes preclude a company's workers from also qualifying as the company's consumers. That said, this perspective suffers from serious shortcomings. It requires affected employees to demonstrate that, as end-user consumers, they acquired or sought to acquire goods or services that form the basis of their UDAP complaint. This requirement impedes the framework's utility for groups of workers who wish to join forces to oppose woke-washing

186. H. Michael Bagley, Daniel C. Kniffen, Katherine D. Dixon, & Marion Handley Martin, *Workers' Compensation*, 51 MERCER L. REV. 549, 553–54 (1999); see also *id.* at 554 n.34 ("For the dual persona doctrine to apply, the duties imposed upon the second persona must be totally separate from those imposed by the employer-employee relationship." (internal quotation marks omitted) (quoting *Doggett v. Patrick*, 398 S.E.2d 770, 771 (1990))).

187. See *supra* notes 96–101 and accompanying text (discussing the illustration of Ford Motor Company).

188. See *supra* notes 120–22 and accompanying text (using the illustration of Abercrombie & Fitch); see also Philipp Egeler, Fabian Abed, & Marion Büttgen, *Corporate Brand Experience as a New Construct and Its Effects on Employees' Corporate Brand Pride and Brand-Supporting Behaviours*, 17 INT'L J. BUS. MGMT. 39, 43 (2022) (referencing the "experiences that employees can have by using the products their companies offer and experiencing the symbolic brand benefits, such as the value a company stands for").

189. No. 06 Civ. 4154, 2007 U.S. Dist. LEXIS 68689, at *4 (S.D.N.Y. 2007).

190. *Id.*

behavior as each worker must qualify as an end-user consumer. In addition, the framework's recognition of a worker's dual identity is based on an inflexible construction that understands a worker-consumer as either a worker or a consumer but not both.

IV. WORKERS AS CONSUMERS OF CORPORATE BRAND VALUES

This Part puts forth an alternative theory to empower workers to stand as worker-consumers under UDAP statutes, allowing them to challenge firms that dishonor brand promises rooted in social justice commitments. Unlike the two compromised approaches to recovery analyzed in Part III, this theory conceptualizes workers as consumers of corporate brand values. It is premised on the corporate brand promises that accompany a firm's internal branding activities which function—along with public mission statements and advertising—as the primary medium for communicating brand values to a firm's employees. When employees adopt and embrace those promises, they become not only consumers of the brand and its associated values, but brand advocates. Indeed, for employees to represent effectively the brand and the promise of brand values to a firm's stakeholders, they must first internalize those very same values and promises. We highlight the economic importance of brands in light of their signaling and identity attributes, and offer a construction of brand values as a consumable under UDAP statutes. We conclude by unpacking the adverse consequences of internal branding for employees in their role as worker-consumers, and examine remedies to address those consequences.

A. Transacting for Access to the Power of Brand Value

As discussed in Section II.B, firms commonly inculcate employees with corporate brand values during the internal branding process. For workers at firms with values-based brands, this is a positive process; indeed, as explained in Section II.C, workers—similar to consumers—affirmatively choose to associate themselves with such brands and use that association both to signal identity and to ensure that their labor is deployed toward ends that align with their personal values and beliefs. Whereas a firm's end-user consumers pay monetary sums to purchase the promise of a brand, employees do so by way of their labor. They exchange labor for tangible aspects of the job as well as intangible ideological aspects of the brand, which they will realize if the firm makes good on its brand promises. For

workers, the brand and its espoused values are part and parcel of their expected compensation package.¹⁹¹

Consider, for example, the situation of workers at Disney who were attracted in part by the firm's strong commitment to LGBTQ+ values and causes.¹⁹² When Florida legislators, with the support of Governor Ron DeSantis, passed House Bill 1557, the "Don't Say Gay" bill prohibiting discussion of gender identity and sexual orientation in public schools,¹⁹³ Disney remained silent.¹⁹⁴ Disney's silence on this issue contrasted sharply with its previous willingness to publicly oppose state government efforts to pass bathroom bills that would discriminate against transgender individuals.¹⁹⁵ Workers were shocked and alienated.

The dissonance between Disney's positive LGBTQ+ messaging and Disney's initial silence on "Don't Say Gay" prompted not only outrage, but activism from employees. As one reporter aptly commented, the dispute had

191. See Crain, *supra* note 39, at 2266–71, 2232–24; *supra* notes 123–30 and accompanying text (collecting and analyzing research on employee willingness to accept reduced compensation in exchange for an affiliation with a brand that aligns with their values).

192. Disney's support of the LGBTQ+ community takes several forms. First, Disney's LGBTQ+ workplace policies include benefits to same-sex couples, support for transitioning employees, and leadership training on LGBTQ+ inclusion. *Disney Earns Perfect Score for LGBTQ Workplace Equality*, WALT DISNEY CO. (Mar. 28, 2019), <https://thewaltdisneycompany.com/disney-earns-perfect-score-for-lgbtq-workplace-equality/> [<https://perma.cc/P7LB-7BPA>]. Second, Disney makes substantial financial donations to organizations that support LGBTQ+ communities. Aphichaya Suwannaphul, *Consumers' Attitudes Towards Brand Activism of the Walt Disney Company for LGBTQ+ Communities* 11 (Dec. 20, 2021) (M.B.A. Thesis, Thammasat University) (on file with Thammasat University Library), http://ethesisarchive.library.tu.ac.th/thesis/2021/TU_2021_6302043101_15017_18346.pdf [<https://perma.cc/P8NT-DWL6>]. Third, as a media enterprise, Disney has been in the vanguard on positive depictions of LGBTQ+ individuals in film and television. See Brooks Barnes, *GLAAD Praises Increased Inclusiveness of Disney Films*, N.Y. TIMES (Dec. 15, 2022), <https://www.nytimes.com/2022/12/15/business/media/glaad-disney-lgbtq.html> [<https://perma.cc/SXU9-TUK8>] ("Disney released more movies with L.G.B.T.Q. characters than any other studio in 2021."). These positive depictions include allowing the lead character on the *Ellen* sitcom to reveal her sexual identity which over time spurred the creation of other LGBTQ+ programming. *Disney Mulling if 'Ellen' Should Reveal She Is Gay*, WALL ST. J. (Sept. 16, 1996, 12:01 AM), <https://www.wsj.com/articles/SB842823052765049000> [<https://perma.cc/JLQ9-4MH3>]. Disney has also held an event celebrating LGBTQ+ Pride at its Magic Kingdom Park for more than 30 years. Beth Bell, *Keep Dancing: Pulse Remembrance & Pride Month Events*, VISIT ORLANDO (May 6, 2024), <https://www.visitorlando.com/blog/post/pride-month-orlando/> [<https://perma.cc/2YSM-VBRU>].

193. Amelia Nierenberg, *What Does 'Don't Say Gay' Actually Say?*, N.Y. TIMES (Mar. 23, 2022), <https://www.nytimes.com/2022/03/23/us/what-does-dont-say-gay-actually-say.html> [<https://perma.cc/4634-XND8>] (analyzing the bill); see also Patricia Mazzei, *DeSantis Signs Florida Bill That Opponents Call 'Don't Say Gay'*, N.Y. TIMES (Mar. 28, 2022), <https://www.nytimes.com/2022/03/28/us/desantis-florida-dont-say-gay-bill.html> [<https://perma.cc/ZZV4-8339>].

194. See Brooks Barnes, *Disney to Lose Special Tax Status in Florida Amid 'Don't Say Gay' Clash*, N.Y. TIMES (Apr. 21, 2022), <https://www.nytimes.com/2022/04/21/business/disney-florida-special-tax-status.html> [<https://perma.cc/DAQ8-TZ4B>] (observing that "[m]ore than 150 companies . . . had already signed a Human Rights Campaign letter opposing the legislation" while Disney was still silent).

195. Pornsit Jiraporn, Denise Potosky, & Sang Mook Lee, *Corporate Governance and Lesbian, Gay, Bisexual, and Transgender-Supportive Human Resource Policies from Corporate Social Responsibility, Resource-Based, and Agency Perspectives*, 58 HUM. RES. MGMT. 317, 318 (2019).

“become a high-profile example of a stark shift in corporate culture: A socially conscious generation of workers are demanding that their employers speak out on contentious social and political issues.”¹⁹⁶ For Disney workers, affiliation with a brand that did not live up to its promise to advance the interests of LGBTQ+ workers was untenable because it clashed with deeply-held personal values. When they were asked to relocate from California to Florida so that Disney could centralize park operations and take advantage of lucrative state tax credits, workers concerned about the incongruity between Florida’s expressed values on LGBTQ+ issues and Disney’s historical commitment to diversity and inclusion were understandably anxious. And when Disney was publicly silent in the face of the “Don’t Say Gay” bill, that concern turned to walkouts and protests.¹⁹⁷ Eventually, Disney’s CEO yielded to pressure, publicly condemning the legislation.¹⁹⁸

Given the strong internal branding for which Disney is famous,¹⁹⁹ it seems likely that Disney workers considered the brand values part-and-parcel of the compensation package and working conditions that justified the relocation request. Workers demanded a pause on the Florida relocation, pointing to Disney’s recent addition of “inclusion” as a fifth “key” corporate priority for workers and noting the incompatibility of inclusion with Florida’s stance on LGBTQ+ issues.²⁰⁰ In effect, workers threatened to

196. Brooks Barnes, *Disney Employees Walk Out Amid Furor Over Florida Legislation*, N.Y. TIMES (Mar. 22, 2022), <https://www.nytimes.com/2022/03/22/business/media/disney-florida-employee-protests.html> [https://perma.cc/7XXV-K6MA].

197. See Robbie Whelan & Katherine Sayre, *Disney Workers Walk Out to Protest Company’s Response to Florida Bill*, WALL ST. J. (Mar. 22, 2022, 7:19 PM), <https://www.wsj.com/articles/disney-workers-walk-out-to-protest-companys-response-to-florida-bill-11647991140> [https://perma.cc/S8J9-B96B] (reporting that Disney required thousands of workers to transfer from southern California to Florida in order to centralize park operations and take advantage of lucrative state tax credits, prompting workers to protest because they believed that Disney had an obligation premised on its asserted values to oppose a bill fundamentally inconsistent with its espoused values: “People shouldn’t be forced to live in a place that they’re fearful of”).

198. *Id.* The level of worker discontent, the public relations debacle that ensued, and Governor DeSantis’s retaliatory termination of a special tax district favoring Disney eventually contributed to a leadership change at Disney. See Brittany Bernstein, *Disney Fires CEO Bob Chapek After Woke War with DeSantis*, YAHOO NEWS (Nov. 21, 2022, 1:12 PM), <https://www.yahoo.com/news/disney-fires-ceo-bob-chapek-131235505.html> [https://perma.cc/6CCZ-6D4W]; Robbie Whelan, Joe Flint, & Lauren Thomas, *Robert Iger Returns as Disney CEO as Bob Chapek Is Ousted*, WALL ST. J. (Nov. 21, 2022, 11:37 AM), <https://www.wsj.com/articles/walt-disney-names-bob-iger-ceo-replacing-bob-chapek-11669000050> [https://perma.cc/8HWM-DE2H].

199. See Crain, *supra* note 102, at 1213–16 (describing sophisticated program of internal branding at Disney).

200. See Erich Schwartzel, *Disney Employees Slated to Relocate to Florida Caught in Political Crossfire*, WALL ST. J. (Apr. 26, 2022, 5:24 PM), <https://www.wsj.com/articles/disney-employees-slated-to-relocate-to-florida-caught-in-political-crossfire-11651008278> [https://perma.cc/T97M-UUP7] (noting workers’ reliance on Disney’s recent and public commitment to inclusion as a core value). Some commentators use the language of “rainbow washing” to describe the mismatch between

withhold their labor unless a central aspect of the employment bargain—the authentic commitment to inclusion of LGBTQ+ issues—was delivered.

Beyond the practical role of the brand and its values in recruiting and retaining workers, support for conceptualizing a brand as a purchasable commodity for purposes of consumer law can be found in the research of intellectual property scholars who analyze trademark law through the lens of brand theory.²⁰¹ As a brand, trademarks not only convey product information, they also function as “important attribute[s] of the product itself” and “may even become the product itself.”²⁰² Detached from an actual physical product, brands exist as intangible products or goods, the value of which lies in how they make consumers feel and what they allow consumers to say about themselves.²⁰³ As brands can exist independently from a firm’s physical products, it is reasonable to infer that workers can and do don the mantle of consumers for UDAP purposes when they effectively purchase a corporate brand even without making an actual tangible product purchase.

The fundamental question is whether “brand values” fit within the meaning of consumption. Traditional views of consumption conjure up

a firm’s stated commitment to LGBTQ+ issues and its actual practices. See, e.g., Lola Méndez, *What Is Rainbow Washing? How This Sneaky Marketing Tactic Hurts the Queer Community*, GOOD HOUSEKEEPING (June 5, 2024), <https://www.goodhousekeeping.com/life/a43713768/rainbow-washing/> [<https://perma.cc/F7CV-ZTMF>]; Matt Symonds, *How to Detect Rainbow Washing Versus Genuine LGBTQ+ Support*, FORBES (June 27, 2024, 1:18 PM), <https://www.forbes.com/sites/mattsymonds/2024/06/26/how-to-detect-rainbow-washing-versus-genuine-lgbtq-support/> [<https://perma.cc/PM46-KBA9>]; see also Catherine Baksi & Jonathan Ames, *City Firms’ ‘Wokewashing’ on Gay Rights*, THE TIMES (May 30, 2024, 12:01 AM), <https://www.thetimes.com/uk/law/article/city-firms-wokewashing-on-gay-rights-pjphcstqk> [<https://perma.cc/93AH-UN5F>].

201. See, e.g., Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981, 986 (2012) (“Consumers often buy branded goods not for their quality but as badges of loyalty, ways to express identity, and items to alter and interpret for self-expression.”); Katyal, *supra* note 59, at 801 (“[I]nstead of serving as a product identifier, branding strategies today make the trademark—and the cultural identities associated with the mark—the product itself.” (emphasis omitted)); Jessica M. Kiser, *Brands as Copyright*, 61 VILL. L. REV. 45, 60 (2016) (“Trademarks have become brands; that is, they now are more about allowing corporations to protect reputation and persona than preventing unfair competition and advancing consumer protection.”).

202. Shahar J. Dilbary, *Famous Trademarks and the Rational Basis for Protecting “Irrational Beliefs”*, 14 GEO. MASON L. REV. 605, 620 (2007); see also Alex Kozinski, Essay, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 960 (1993) (“No longer do trademarks merely identify sources; frequently today they become part of the product itself.”).

203. When discussing consumer behavior in this context, scholars often refer to “hedonic consumption” or the sensory, fantastical, and emotive experiences associated with consuming products. See Elizabeth C. Hirschman & Morris B. Holbrook, *Hedonic Consumption: Emerging Concepts, Methods and Propositions*, 46 J. MKTG. 92, 92 (1982) (defining “hedonic consumption as those facets of consumer behavior that relate to the multisensory, fantasy and emotive aspects of product usage experience”). Over time, the concept has been extended to forms of intangible consumption. See, e.g., Linda D. Hollebeck, Amir Zaib Abbasi, Carsten D. Schultz, Ding Hooi Ting, & Valdimar Sigurdsson, *Hedonic Consumption Experience in Videogaming: A Multidimensional Perspective*, 65 J. RETAILING & CONSUMER SERVS. 1, 1 (2022); see also Stacey Dogan, Essay, *Bounded Rationality, Paternalism, and Trademark Law*, 56 HOUS. L. REV. 269, 278–82 (2019) (discussing the significance of hedonic consumption for trademark law and how hedonic consumption impacts consumer behavior).

images of tangible products,²⁰⁴ and while a great deal of consumption continues to involve tangible items (e.g., the purchase and/or lease of retail goods such as clothing, food, household items), current understandings of consumption are sufficiently capacious to encompass intangible consumption including services,²⁰⁵ experiences,²⁰⁶ knowledge,²⁰⁷ and the like.²⁰⁸

For our purposes, scholars have highlighted how symbolic consumption “assist[s] individuals in the creation, confirmation and communication of their identity.”²⁰⁹ Notably, the application of symbolic consumerism extends beyond tangible goods to reach a range of intangible consumables²¹⁰

204. See Carl J. Strikwerda, Review Essay, *Too Much of a Good Thing? Consumption, Consumerism, and Consumer Cooperation in Modern History*, INT’L REV. SOC. HIST. 127, 131–32 (2018) (discussing the evolution of consumption and the vital role that production and the acquisition of goods have played in shaping consumption); Kerryn Higgs, *A Brief History of Consumer Culture*, MIT PRESS READER (Jan. 11, 2021), <https://thereader.mitpress.mit.edu/a-brief-history-of-consumer-culture/> [<https://perma.cc/55J8-6JQM>] (discussing the roots of consumption in terms of acquisition and production); see also George Reisman, *Definitions Pertaining to Production and Consumption*, 32 IL POLITICO 108, 108 (1967) (referring to “consumption” as “[t]he using up, wearing out or deterioration both of products and nature given goods (such as mineral deposits)”).

205. Scholars have examined the implications of consumer services in a range of contexts. See, e.g., Roscoe Hightower, Michael K. Brady & Thomas L. Baker, *Investigating the Role of the Physical Environment in Hedonic Service Consumption: An Exploratory Study of Sporting Events*, 55 J. BUS. RSCH. 697, 704 (2002) (“explor[ing] the role of the servicescape in hedonic service consumption” with respect to sporting events); Bernard Korai & Nizar Souiden, *Rethinking Functionality and Emotions in the Service Consumption Process: The Case of Funeral Services*, 31 J. SERVS. MKTG. 247, 248–49 (2017) (discussing the commodification of death and funeral services through the lens of consumer consumption).

206. For useful discussions of experiential consumerism, see, for example, Amit Kumar, *The Unmatchable Brightness of Doing: Experiential Consumption Facilitates Greater Satisfaction Than Spending on Material Possessions*, 46 CURRENT OP. PSYCH., Mar. 26, 2022, at 1 (discussing the commodification of death and funeral services through the lens of consumer consumption); Morris B. Holbrook & Elizabeth C. Hirschman, *The Experiential Aspects of Consumption: Consumer Fantasies, Feelings and Fun*, 9 J. CONSUMER RSCH. 132 (1982); and G. Luna-Cortés, *The Influence of Symbolic Consumption on Experience Value and the Use of Virtual Social Networks*, 21 SPANISH J. MKTG. 39, 40 (2017) (arguing that the concept of symbolic consumption includes the consumption of experiences by consumers).

207. See, e.g., Kevin C. Desouza, Yukika Awazu & Yun Wan, *Factors Governing the Consumption of Explicit Knowledge*, 57 J. AM. SOC’Y FOR INFO. SCI. & TECH. 36, 36 (2006) (discussing the consumption of explicit knowledge, defined as “documents, frequently asked questions, manuals, business plans, and experience reports,” and exploring how such knowledge is governed).

208. See, e.g., Yuksel Ekinci, Ercan Sirakaya-Turk & Sandra Preciado, *Symbolic Consumption of Tourism Destination Brands*, 66 J. BUS. RSCH. 711, 711 (2013) (“While goods are consumed for utilitarian value, consumption also is symbolic.”).

209. *Id.* at 711; see also Luna-Cortés, *supra* note 206, at 40 (describing symbolic consumerism as “consumer’s perception of products and brands in order to acquire, create, preserve and present their identities”).

210. See, e.g., Ekinci et al., *supra* note 208, at 711 (applying symbolic symbolism to tourism); Alfredo Guzmán Rincón, Ruby Lorena Carrillo Barbosa, Marelby Amado Mateus & Néstor Ordoñez Saavedra, *Symbolic Consumption as a Non-Traditional Predictor of Brand Loyalty in the Sports Industry, Football Club Segment*, 9 HELIYON, no. 4, 2023, at 2 (examining symbolic consumerism as applied to brand loyalty in the sports industry); Gretchen Larsen, Rob Lawson & Sarah Todd, *The*

including brand values. When applied to brand values, symbolic consumerism refers to individuals' use of brands "to communicate their identities to the world, signaling their affiliations, values, and even political or social stances."²¹¹ In a recent article, scholars import the significance of symbolic consumerism to describe the process by which consumers consume brands as a form of "brand activism" on critical DEI issues.²¹² In line with a central argument that we describe in the next section, their findings document the harm that can result from the consumption of inauthentic brand values.²¹³

B. Establishing Harm and Seeking a Remedy

If a court accepts our alternative framework and allows workers to pursue a UDAP law claim against an employing firm based on the theory that they were consumers of deceptive corporate brand values, more will be required: Workers must establish that they were harmed as a result of the firm's deception and they must match the harm with the available relief. Both tasks may prove tricky. For example, in the Whole Foods case, how might workers prove harm stemming from consumption of the firm's brand? And when it comes to relief, while UDAP laws can provide monetary relief for a worker who incurred damages if she purchased a branded good that was misrepresented, consumer law cannot provide relief for a worker terminated from her job for wearing a BLM mask.

This discussion begins by exploring the first of these issues, the understanding of harm for worker-consumers even in the absence of consuming a tangible product. It examines the relevance of ascertainable loss and intangible harm. Next, the discussion considers the available relief

Symbolic Consumption of Music, 26 J. MKTG. MGMT. 671–68 (2010) (using the theory of symbolic consumption to examine the relationship between music and self-identity); see also Luna-Cortés, *supra* note 206, at 40–41 (observing that the majority of studies on symbolic consumerism "focus on the symbolic interaction between consumers and the products they buy" and pointing out that "there are some studies that focus on consumption of services and experiences").

211. Abass Temitope, Joseph Oluwaseyi & Ravi Kolawole Shkar, *Symbolic Consumption and Brand Loyalty: Examining the Effects of Identity and Brand Symbol* (Nov. 12, 2024) (unpublished manuscript) (on file with ResearchGate), https://www.researchgate.net/profile/Abass-Temitope-2/publication/385812663_Symbolic_Consumption_and_Brand_Loyalty_Examining_the_Effects_of_Identity_and_Brand_Symbol/links/67360f6368de5e5a3075d99e/Symbolic-Consumption-and-Brand-Loyalty-Examining-the-Effects-of-Identity-and-Brand-Symbol.pdf [<https://perma.cc/R56G-G7MY>]; see also Natasha Lewis & Jesa Vrendenburg, *Contemporary Consumption of Brand Activism*, in THE FUTURE OF CONSUMPTION 263, 264 (Kristina Bäckström, Carys Egan-Wyer & Emma Samsioe eds., 2024) (describing how consumers are engaged in "brand activism consumption" to construct their identities including in the context of "values-driven issues, which are often politically, socially, and emotionally charged").

212. Lewis & Vrendenburg, *supra* note 211, at 266–67.

213. *Id.* at 269, 276 (noting that the misalignment between a consumer's activist values and those of inauthentic brands "may negatively affect their self-perceptions" and "can be damaging to consumer wellbeing," both physically and psychologically).

under UDAP statutes. We demonstrate that more often than not, an injunction will best serve the interests of worker-consumers who prevail on a UDAP law claim. As a result, we briefly consider First Amendment implications associated with injunctive relief.

1. Ascertainable Loss

Most state UDAP statutes require plaintiffs pursuing a private action to establish that they have suffered an ascertainable loss stemming from the alleged deceptive act.²¹⁴ Demonstrating an ascertainable loss²¹⁵ often involves evidence of loss related to the expected benefit of a bargain.²¹⁶ In the typical case, a plaintiff claims that her loss occurred because she was misled into purchasing a product that turned out to be different or inferior relative to that for which she bargained.

In the context of a woke-washing scenario where a worker challenges the authenticity of a values-based brand, the worker is no different than an end-user consumer who argues that misrepresentations about the brand have diminished the value of the product purchased. If the worker declines more financially lucrative jobs at comparable firms because she seeks the value alignment that she finds in the firm's values-based brand (which substitutes for higher compensation), she has suffered a loss if the firm's values prove to be deceptive. Like the shopper who paid a premium for a branded product relative to comparable items that she could have purchased elsewhere, the worker should be allowed to prove an ascertainable loss by showing that absent the deception she would have opted to work at an alternative firm where she would have received more money.²¹⁷

214. Pridgen, *Wrecking Ball*, *supra* note 135, at 304 (“A general ‘ascertainable loss’ requirement is present in the state consumer protection statutes of thirty-four states.”); Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 KAN. L. REV. 18–21, 50–54 (2005) (finding that most state consumer protection statutes or courts interpreting them require showing an ascertainable loss).

215. 17 AM. JUR. 2D *Consumer and Borrower Protection* § 299 (2025) (“The term ‘ascertainable loss’ is often used in reference to the private litigant’s burden and means a loss that is quantifiable or measurable, not hypothetical or illusory.”).

216. *See* 1 NAT’L CONSUMER L. CTR., CONSUMER CREDIT LAW MANUAL § 4.06 (2024) (highlighting various approaches used by courts to determine loss-of-bargain damages for UDAP violations including “the difference between the value of the product as represented and as sold, an amount equaling the difference between the final sale price and the lower price originally agreed upon or advertised, the appreciation in the value of a home that the defendant’s UDAP violations prevented the plaintiff from purchasing, or the cost of replacing a product with one of the quality and size that the seller promised to deliver”).

217. For purposes of establishing a prima facie case, plaintiffs do not need to establish a specific amount of damages, and need only supply an estimate. *See* Bob Cohen, Annotation, *Right to Private Action Under State Consumer Protection Act—Preconditions to Action*, 117 A.L.R.5th 155 (2004).

2. *Identity Harm*

Sarah Dadush uses the phrase “identity harm” in the consumer law context to capture “the anguish experienced by a consumer who learns that her efforts to consume in line with her personal values have been undermined by a business’s exaggerated or false promises about its wares.”²¹⁸ Dadush offers as an illustration the case of Volkswagen owners who bought their cars based on the company’s “clean diesel” marketing only to discover later that the cars emitted pollutants far beyond what Volkswagen had represented.²¹⁹ The owners’ disappointment encompassed not only the tangible economic loss of owning a vehicle valued far below reasonable expectations but also the emotional distress stemming from being duped into betraying their values.²²⁰

Dadush advances several arguments why courts should recognize a claim that encompasses identity harm. She explains that because this harm bears little relationship to the price that consumers pay for an offending product, monetary damages are usually inadequate to address fully the consequences that can flow from a firm’s false promises.²²¹ In addition, the non-economic quality of such harm makes it difficult for courts to identify and assess.²²² By allowing a specific claim for intangible harm, Dadush hopes to arm consumers with another tool to help hold corporate wrongdoers accountable.

Dadush’s formulation of identity harm offers a useful starting point to think about the type of intangible harm experienced by workers who wear the mantle of both branded worker and branded consumer when confronted with corporate woke-washing. It is common for consumers to feel betrayed by a company’s false promises, and to suffer intangible harm. “Devastated,” “depressed,” “angry,” “hurt,” “frustrated,” and “disappointed” are some of the terms that capture the range of emotions experienced when consumers realize they have been deceived.²²³

218. Dadush, *Identity Harm*, *supra* note 18, at 863.

219. *Id.* at 864–65.

220. *Id.* at 891–92.

221. *Id.* at 923.

222. *Id.* at 868; *see also id.* at 923 (“Financial loss is not the only dimension along which harm is experienced, nor is it the only dimension along which harm should be measured.”); *id.* at 928 (referring to the identity harm associated with the case of Volkswagen to make the point that such harm “is quite difficult to detect legally”).

223. *See, e.g.*, Hai Ninh Nguyen & Thanh Binh Nguyen, *Sense of Online Betrayal, Brand Hate, and Outrage Customers’ Anti-Brand Activism*, 17 *INNOVATIVE MKTG.* 74, 75–76 (2021) (observing that “[d]edicated customers have negative emotions when experiencing a sense of betrayal, such as disgust, anger, and feelings of loss” and listing the use of misleading advertisements by firms to appeal to customers as one such betrayal); Taeshik Gong & Chen-Ya Wang, *The Effects of a Psychological Brand Contract Breach on Customers’ Dysfunctional Behavior Toward a Brand*, 31 *J. SERV. THEORY & PRAC.*

However, there are important qualitative differences between the identity harm suffered by duped worker-consumers and Dadush's account of such harm for consumers. These differences make the case for worker-consumer injuries even more compelling than the argument for consumer injuries. Dadush's vision of identity harm rests on consumers qua consumers, whose experience of "psychic injury" hinges on an "injury [that] unfolds somewhere beyond the consumer."²²⁴ So framed, she regards identity harm as "derivative in that it stems from injuries suffered by other humans or the planet, injuries in which the consumer became implicated transactionally, through her purchase."²²⁵ For workers, however, the injuries are direct, not derivative.²²⁶

An assessment of identity harm experienced by worker-consumers affected by woke-washing must also account for brand separation, otherwise known as disidentification.²²⁷ Existing research on disidentification from corporate brands has focused on consumers.²²⁸ Researchers explain:

[D]isidentification is considered a cognitive separation process whereby an individual's identity was originally and socially defined (constructed) in line with a particular group's identity, but now cognitive dissonance has ensued. This dissonance creates conflict with one's self-image to a point that the individual has no choice but to disassociate with the [brand's] values²²⁹

Disidentification is as an essential means of self-preservation that enables individuals to calm the internal emotional turmoil that arises when they realize that their actions have diverged from their core values.²³⁰

When experiencing disidentification, consumers can separate or disassociate by refusing to purchase the product or service at issue or by ceasing to patronize the branded store. Disidentification for workers, however, is a much more challenging and complex process. First, workers who have been conditioned to live the brand 24/7 through internal branding

607, 608 (2021) ("When customers perceive that a brand has failed them, this can trigger an intense reaction of outrage, resentment, anger, and betrayal.").

224. Dadush, *The Law of Identity Harm*, *supra* note 18, at 822.

225. Dadush, *Identity Harm*, *supra* note 18, at 868.

226. See *supra* notes 24–32 & accompanying text (referencing the harm articulated by Google workers who discovered that they had dedicated their labor to purposes anathema to their values).

227. See Nwamaka A. Anaza et al., *Customer-Brand Disidentification: Conceptualization, Scale Development and Validation*, 133 J. BUS. RSCH. 116 (2021); Jane Costa & Peter Fleming, *Beyond Dis-Identification: A Discursive Approach to Self-alienation in Contemporary Organizations*, 62 HUMAN RELS. 353 (2009).

228. See, e.g., Anaza et al., *supra* note 227.

229. *Id.* at 117.

230. *Id.*

programs will have integrated the brand and its values much more thoroughly into their identities.²³¹ As firms have broadened their brand mission to include aesthetic messages as well as moral and ethical messages, they expect employees to align their personal moral values with those of the company.²³² In the words of one commentator, such a shift has profound implications for the very “soul” of employees.²³³

The greater the identification process, the harder it becomes for employees to achieve disidentification. Imagine an employee whose moral alignment with the corporate brand is so complete that she acts as a brand ambassador not only with strangers, but also with friends and family members.²³⁴ False promises from her employer will likely leave her feeling deeply betrayed and may jeopardize the foundation of her identity, causing her to question her own values and potentially arousing similar doubt and even suspicion among her circle of friends and family. Apart from these internal identity concerns, the employee must also reconcile her role as an inadvertent participant in the firm’s deceptive narrative on important social justice issues.

Quitting is one disidentification response available to workers who face such emotional distress in the aftermath of a firm’s woke-washing behavior. Of course, this decision will exact a heavy burden on workers as it will require them to sacrifice their livelihoods. Yet this is the price that employment law imposes upon workers in an at-will regime.²³⁵ Moreover, quitting is not always an effective strategy. Physical separation from the firm does not equate with emotional separation (consider, for example, relationships that workers may have with coworkers who are also friends and family members) and it may not alleviate the moral upheaval that some workers experience as a result of the incongruity between their values and the labor they performed in service of a firm’s false brand promises. For

231. See *supra* Section II.B (discussing the impact of internal branding on workers).

232. Mette Morsing, *Corporate Moral Branding: Limits to Aligning Employees*, 11 CORP. COMM’NS 97, 104 (2006) (commenting that corporate brands send “strong aesthetic messages” to consumers, whereas they send strong moral messages to employees and a “moral commitment sticks deeper than an aesthetic commitment”); *id.* (adding that the “fulfillment of moral brand promises is ultimately a concern for employees, as their personal morals become associated with the corporate moral and vice versa”).

233. *Id.* (explaining that as a result of the increased emphasis on ethics and moral values as part of corporate brands, firms used to want the “sweat” of employees, but they now want their “soul”).

234. See, e.g., Philipp Egeler, Fabian Abed & Marion Büttgen, *Corporate Brand Experience as a New Construct and Its Effects on Employees’ Corporate Brand Pride and Brand-Supporting Behaviours*, 17 INT’L J. BUS. & MGMT. 39, 39 (2022) (observing that internal branding efforts involve cultivating branding behaviours among employees that “go beyond prescribed roles” such that employees act as “brand representatives to friends, family, customers or even potential hires”).

235. See Crain, *supra* note 112, at 163 (exploring the interdependence between employees and employers and their mutual investment at work, and countering the traditional legal vision of employment as an arm’s-length cash-for-labor transaction which either is free to leave at any time).

these workers, that disconnect may manifest in self-alienation as they struggle to regain a sense of their unadulterated authentic identity.²³⁶

Although there are variations among state UDAP statutes, a consumer who suffers an ascertainable loss can generally assert a claim for a range of potential remedies including compensatory damages or statutory minimums, equitable relief, attorney fees, and punitive damages.²³⁷ Allowing workers to recover compensatory damages to remedy the harm caused by woke-washing, for both tangible *and* intangible harm, would represent a step in the right direction to stop corporations from engaging in misleading representations. However, because injunctive relief is even more important to avert harm, we conclude this Part by examining some of the legal issues associated with restricting a firm's woke-washing communications.

3. *Injunctive Relief*

A request for injunctive relief relating to a firm's branded communications raises important First Amendment prior constraint concerns,²³⁸ and requires consideration of the current legal landscape governing commercial versus non-commercial speech. Rather than providing an exhaustive overview, this discussion aims only to highlight the implications of this landscape for legal challenges to woke-washing.

A useful place to start for our purposes is the judicial distinction established by the Supreme Court between commercial speech and types of noncommercial speech, especially political speech. Political speech is at the heart of the First Amendment.²³⁹ It represents expression that contributes to the marketplace of ideas "essential to our system of self-government,"²⁴⁰ and it is afforded special protection, subject to the highest level of review, because it "rest[s] on the highest rung of the hierarchy of First Amendment

236. Costa & Fleming, *supra* note 227, at 362 (describing the process of self-alienation that attaches when the "imaginary authentic self is visualized, but cannot be realized").

237. See Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 174 (2011) (discussing the different remedies available as between state based consumer protection acts and the FTC).

238. See *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (stating an injunction is a "prior restraint on expression [that] comes to this Court with a 'heavy presumption' against its constitutional validity" (citing *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968))); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.").

239. See James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 199–201 (1984) (discussing the primacy of political speech).

240. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting).

values.”²⁴¹ Commercial speech, on the other hand, occupies a “subordinate position in the scale of First Amendment values.”²⁴² It has been variously characterized as “expression related solely to the economic interests of the speaker and its audience”²⁴³ as well as speech that “does no more than propose a commercial transaction.”²⁴⁴ Commensurate with its second-class status,²⁴⁵ commercial speech merits less protection under the First Amendment compared to other forms of constitutionally protected expression.²⁴⁶

Free speech doctrine also makes clear that false or misleading commercial speech may be prohibited entirely.²⁴⁷ To garner constitutional protection, commercial speech must at a minimum “concern lawful activity and not be misleading.”²⁴⁸ Commercial speech that does not meet this threshold is subject to state regulation including prohibition.²⁴⁹ The misleading exception reflects the view that “the First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely.”²⁵⁰ As a result, an injunction prohibiting or correcting false or misleading commercial speech is not vulnerable to constitutional challenge as long as it does not interfere with speech more than is reasonably necessary to further substantial government interests.²⁵¹

241. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). Political speech is protected even if it is false. *See United States v. Alvarez*, 567 U.S. 709, 713 (2012); *see* Amanda Shanor & Sarah E. Light, Essay, *Greenwashing and the First Amendment*, 122 COLUM. L. REV. 2033, 2084–85 (2022).

242. *Cent. Hudson*, 447 U.S. at 584.

243. *Id.* at 561.

244. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (referring to commercial speech as speech “removed from any ‘exposition of ideas,’ and from ‘truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government’” (citation omitted)); *see* Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1155–56 (2012) (proposing a workable concept of commercial speech).

245. *See, e.g.*, Jennifer E. Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929, 1967 (2015).

246. *Central Hudson*, 447 U.S. at 562, 562 n.5 (1980) (stating commercial speech, “although meriting some protection, is of less constitutional moment than other forms of speech”).

247. *Id.* at 566; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact.”); *Va. State Bd. of Pharmacy*, 425 U.S. at 771 (“Untruthful speech, commercial or otherwise, has never been protected for its own sake.”).

248. *Central Hudson*, 447 U.S. at 566; *see also* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 38 (2000) (examining the meaning of misleading commercial speech and considering the difficulties of determining when speech is misleading).

249. *See Central Hudson*, 447 U.S. at 563–64 (“There can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”); *In re R.M.J.*, 455 U.S. 191, 207 (1982) (“[A]lthough the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests.”).

250. *Va. State Bd. of Pharmacy*, 425 U.S. at 771–72.

251. *See, e.g.*, *Ibanez v. Fla. Dep’t of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136, 152 (1994) (“States may not completely ban potentially misleading speech if narrower limitations can ensure that the information is presented in a nonmisleading manner.”).

Applying this standard, courts have routinely granted plaintiffs injunctive relief to prevent and/or correct misleading and deceptive speech. Consider, for example, *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, a case involving a non-profit organization, Humane Farm Animal Care (HFAC), and an egg producer, Handsome Brook Farm (HBF).²⁵² HFAC sent emails to grocery retailers throughout the country which stated that, contrary to HBF's assertion, the company did not produce certified eggs, eggs that were organic and pasture raised.²⁵³ As a result of the email, which also encouraged the grocers to change their egg suppliers, HBF lost existing and potential customers.²⁵⁴ Supported by evidence demonstrating that its eggs were indeed certified, HBF sued HFAC for false advertisement and the district court issued a preliminary injunction that prohibited HFAC from continuing to circulate the email and required it to publish a retraction.²⁵⁵ On appeal, the Fourth Circuit affirmed and held that the issuance of the injunction did not impose an unconstitutional prior restraint on HFAC's speech given the determination that the email was likely false or misleading commercial speech, and the strong public interest in preventing and correcting misleading advertisements.²⁵⁶

Of course, the analysis is not always so clear-cut, as corporate speech often blends elements of both commercial and political expression. Whether and when to protect such hybrid speech, and the level of protection to accord if protection is appropriate, is notoriously complicated. *Nike v. Kasky* illustrates some of the problems associated with mixed messages.²⁵⁷ In the late 1990s, Nike came under intense scrutiny following reports that the many workers who manufactured the company's products in overseas factories were being exploited, subjected to grueling working conditions as well as physical and sexual abuse.²⁵⁸ In response, Nike mounted a public relations campaign and vehemently denied the reports. The denials prompted a lawsuit alleging that the company's campaign consisted of false and misleading statements in violation of California's false advertising and unfair competition laws.²⁵⁹ Nike argued that the statements, even if false, qualified as noncommercial political speech on matters of public concern and were thus entitled to constitutional protection. Nike and its supporters viewed the statements as part and parcel of an international, public debate

252. *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 F. App'x 251 (4th Cir. 2017).

253. *Id.* at 252–53.

254. *Id.* at 253.

255. *Id.*

256. *Id.* at 265.

257. *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert. denied*, 539 U.S. 654 (2003).

258. *Id.* at 248 (listing various media articles reporting on human rights abuses and widespread labor violations in Nike factories located overseas).

259. *Id.* at 247.

regarding the labor practices of transnational corporations.²⁶⁰ From Nike's perspective, this political speech effectively sanitized its problematic commercial speech and collapsed the distinction between the two categories,²⁶¹ with the end result being political speech that merited constitutional protection.

The trial court and the California Court of Appeals both ruled in Nike's favor but the California Supreme Court held otherwise, and reversed the lower courts' holdings.²⁶² The majority observed that because the statements in question "were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products,"²⁶³ they were "commercial speech for purposes of applying state laws barring false and misleading commercial messages."²⁶⁴ In contrast to this focus on "the commercial identity or role of the speaker," the dissent honed in on the content of Nike's speech, stressing that Nike was entitled to be heard and that the public was entitled to have access to Nike's message.²⁶⁵ The dissent further reasoned that Nike's statements deserved constitutional protection because Nike's commercial speech was "inextricably intertwined" with its noncommercial political speech.²⁶⁶ To satisfy the inextricably intertwined test, it must be impossible to present the noncommercial aspects of the speech without the commercial aspects.²⁶⁷ The majority was skeptical that the test applied to Nike and indicated that if it did, Nike did not satisfy it. As the majority explained, "No law required Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization, nor was it impossible for Nike to address those subjects separately."²⁶⁸

The United States Supreme Court granted cert to consider Nike's First Amendment claim, but after hearing arguments, the Court declined to issue a ruling, observing that its decision to review Nike's appeal had been

260. *Id.* at 259.

261. Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 617 (2006) ("In essence, Nike's claim effectively called for collapsing the commercial speech doctrine into the Supreme Court's political speech jurisprudence, forcing a union of standards not easily wed.").

262. *Kasky*, 45 P.3d at 247.

263. *Id.*

264. *Id.*

265. *Id.* at 263.

266. *Id.* at 266 (internal quotation marks omitted) (quoting *Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 796 (1988)) ("Nike realistically could not discuss its general policy on employee rights and working conditions and its views on economic globalization *without* reference to the labor practices of its overseas manufacturers, Nike products, and how they are made.").

267. *See Bd. of Trs. v. Fox*, 492 U.S. 469, 474 (1989).

268. *Kasky*, 45 P.3d at 260-61.

“improvidently granted.”²⁶⁹ Although dismissed, the case attracted considerable attention²⁷⁰ and sharply highlighted the uncertainty involved in analyzing hybrid speech as well as determining the line between commercial and noncommercial speech.²⁷¹ As one commentator opined, the crux of the Nike debate is “whether the central factor in identifying commercial speech relates, as implied by the California Supreme Court majority, to the commercial *identity* or *role* of the speaker, or, as the dissents claimed, to the commercial *content* of the speech.”²⁷²

Recent decisions of the Supreme Court suggest that the corporate identity of the speaker does not resolve questions over the nature of hybrid speech, and cast further doubt on the ability of government to regulate corporate speech that is categorized as political.²⁷³ In *Citizens United v. Federal Election Commission*, the Court recognized that First Amendment protection extends to corporations that engage in political speech, finding that constitutional protection for such speech cannot be circumscribed because of the corporate identity of the speaker.²⁷⁴ In a series of cases decided since *Citizens United*, the Court has entrenched and expanded its discourse of corporate personhood, finding that corporations can assert religious exercise rights,²⁷⁵ and that the First Amendment authorizes business owners to refuse to create expressive designs that contradict their beliefs.²⁷⁶ The import of these cases, as the Court explained in *303 Creative LLC v. Elenis*, is that “speakers [do not] shed their First Amendment protections by employing the corporate form to disseminate their speech.”²⁷⁷

Corporate commitments to progressive missions fall into a hybrid category of speech that appears political on its surface, but is arguably also partly commercial (since it is designed to respond to customer concerns and

269. *Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003).

270. Linda Greenhouse, *Nike Free Speech Case Is Unexpectedly Returned to California*, N.Y. TIMES (June 27, 2003), <https://www.nytimes.com/2003/06/27/us/supreme-court-advertising-nike-free-speech-case-unexpectedly-returned-california.html> [<https://perma.cc/2JVN-WU5Y>].

271. See Erwin Chemerinsky & Catherine Fisk, *What Is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143, 1150 (2004) (discussing the line between commercial and noncommercial speech in the context of *Nike v. Kasky*).

272. C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161, 1164 (2004).

273. See Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 34 (2016) (detailing how a recent anti-regulatory turn in the Court’s First Amendment jurisprudence threatens the constitutional validity of governmental regulation of corporate political speech).

274. 558 U.S. 310, 342 (2010) (holding that the First Amendment protects corporations’ freedom to spend corporate funds on indirect support of political candidates).

275. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 712–14 (2014) (finding a right to religious expression for closely held corporations under the Religious Freedom Restoration Act).

276. See *303 Creative LLC v. Elenis*, 600 U.S. 570, 587–90, 602–03 (2023).

277. *Id.* at 594.

to position the corporate brand in a way that attracts consumers to its products and services). Scholars Amanda Shanor and Sarah Light persuasively argue that the underlying core values of freedom of speech must include democratic norms grounded not only in political life but also economic life.²⁷⁸ They articulate a new theory of commercial speech that rejects the premise of a clear “ex ante philosophical boundary between speech that is ‘commercial’ . . . or ‘political’”²⁷⁹ and which is instead grounded on the “constitutional value that the commercial speech doctrine was created to advance.”²⁸⁰ As they explain,

the scope of what should be understood as “commercial speech” must be based upon the *reasons why* commercial speech is treated distinctly under First Amendment doctrine and the *normative values* that truthful commercial speech enables and supports. Namely, truthful information in the marketplace is protected because such information is necessary for the people to participate meaningfully in both political and economic life.²⁸¹

Shanor and Light identify two key normative values undergirding the commercial speech doctrine. The first, informational reliance, underscores the doctrine’s focus on trust-based relationships characterized by dependency between listeners (including consumers) and commercial speakers, where the former depends heavily on the latter for truthful information.²⁸² With respect to the second value, democratic participation,²⁸³ they resurrect the importance of economic democracy to an analysis of what is and is not commercial speech,²⁸⁴ and emphasize that access to commercial information is a necessary condition to allow listeners,

278. Shanor & Light, *supra* note 241, at 2084–85.

279. *Id.* at 2041.

280. *Id.* at 2080. Although Shanor and Light avoid describing their theory using the terms “hybrid” or “mixed,” it sounds in a similar vein inasmuch as they reject the existence of a clear defining line between commercial and political speech and employ the former terminology only after a careful ex post analysis of underlying constitutional values that such speech is supposed to represent. For a consideration of mixed/hybrid speech proposals, see, for example, Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 610 (2008) (critiquing the binary approach to mixed speech and arguing in favor of “subject[ing] viewpoint-discriminatory regulations on mixed speech to intermediate scrutiny”); Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 400–09 (2009) (discussing the hybrid or mixed speech approach); *see also id.* at 373 (rejecting the hybrid or mixed speech approach).

281. Shanor & Light, *supra* note 241, at 2091.

282. *Id.* at 2093–95.

283. *Id.* at 2095–2101.

284. The focus on economic life reflects the Court’s holding in *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Shanor & Light, *supra* note 241, at 2085–86; *see also id.* at 2086 (observing that the Supreme Court “framed the architecture of commercial speech doctrine around the informational needs of the public as decisionmakers in *both* economic and political life”).

not speakers, to participate in economic life.²⁸⁵ Importantly, the focus on these values trumps the more traditional inquiries used to determine when speech qualifies as commercial speech including considerations of whether the speech at issue “propos[es] a commercial transaction” or whether it is “related solely to the economic interests of the speaker and its audience”²⁸⁶

Shanor and Light’s analysis applies readily to the precognitive impact of branding described in Part II. Under that analysis, a judicial outcome would turn not on whether woke speech is or is not part of an important public debate. Instead, if the speech in question constitutes actionable misconduct under consumer law because it is deceptive or unfair, it should be regulated as commercial speech since consumer-workers depend on firms for information about corporate policies and practices including any company commitments to social justice issues. In addition, such information usefully enables consumer-workers to make informed market choices about their economic life and how to invest their resources including their labor. As such, courts should be able to regulate inauthentic woke corporate speech through injunctive relief without First Amendment vulnerability.

If a court did not adopt Shanor and Light’s frame, and instead used a binary approach to hybrid speech, it would need to determine whether the speech is predominantly political or commercial.²⁸⁷ Assuming the speech is predominantly commercial, in order to garner First Amendment protection it must concern lawful activity, and it must not be deceptive. On this last point, the possibility of media scrutiny surrounding litigation to prove or disprove the authenticity of a statement (e.g., proof that corporate policies and practices are out of step with the corporate statement of support for, e.g., LGBTQ+ causes or the BLM cause) could itself prompt positive change within the firm, or conversely, cause the firm to abandon the messaging altogether, as the legal process might otherwise expose the deceptive cloak of brand manipulation. Thus, even if an attempt to challenge the authenticity of the woke brand/speech is ultimately unavailing, the resulting media attention would draw public scrutiny to the firm’s brand, scrutiny that the firm would likely deem unwelcome from a public relations perspective.

285. Shanor & Light, *supra* note 241, at 2097 (observing that these decisions “can make one’s life profoundly, materially different, and one’s experience of their life as one full (or not) of dignity, joy, opportunity, desperation, despair, or hope”).

286. *Id.* at 2079 (alteration in original) (citation and internal quotation marks omitted).

287. Olree, *supra* note 280, at 386–87 (observing that most circuit courts have identified speech as government speech or private speech by using a four factor test: “(1) whether the central purpose of the governmental program facilitating the message is to promote private views; (2) who exercises editorial control over the content of the message; (3) who is the literal speaker of the message; and (4) who bears ultimate responsibility for the content of the message”).

Nevertheless, it is apparent given the constitutional trend toward deregulation of corporate political speech that difficult questions could arise about the categorization of woke speech, and consequently, the level of review that might be applied to an injunction seeking to prohibit or regulate it. For this reason, we turn next to a consideration of how extra-legal strategies could combine with litigation to press for more transformative change.

V. BEYOND LAW: THE PROSPECTS FOR TRANSFORMATIVE CHANGE THROUGH LABOR/CONSUMER ALLIANCES

While recovering compensatory damages for harm caused by woke-washing might prove meaningful to an individual worker, such a result is not transformative for workers as a group. The availability of compensatory or even punitive damages is not likely to stop corporations from engaging in misleading and false representations. Nor do recoveries under UDAP statutes by individuals hold promise for transformative social change. Nevertheless, the opportunity for equitable relief under consumer law—particularly in combination with the private attorney general provisions present in some state legislation—has the potential not only to frame challenges to woke-washing at a collective level, but also to foster an alliance between consumers and labor movements that may enhance leverage against employers both within and outside the judicial system. This final Part addresses those possibilities, exploring the historical intersection between labor and consumer advocacy and suggesting that joint efforts might significantly advance larger social justice goals, including policy and legislative goals.

A. *Historical and Legal Backdrop*

Although we now think of consumer-led movements and labor movements as distinct, they were not always so. In the Progressive Era, consumer movements led by middle- and upper-class women organized around “ethical consumption,” pressing for child labor protections and minimum wage laws.²⁸⁸ Historian Dana Frank, in the course of documenting the gendered history of consumer organizing, noted the ways in which the consumer/producer dichotomy was inadequate to describe how individuals and groups interfaced with work, politics, and social life.²⁸⁹ The National

288. French, *supra* note 6.

289. See generally DANA FRANK, PURCHASING POWER: CONSUMER ORGANIZING, GENDER, AND THE SEATTLE LABOR MOVEMENT, 1919–1929 (1994); Dana Frank, *Where are the Workers in Consumer-Worker Alliances? Class Dynamics and the History of Consumer-Labor Campaigns*, 31 POL. & SOC’Y 363 (2003).

Consumers' League (NCL) and the League of Women Shoppers (LWS) saw ethical consumerism as a part of a larger struggle to empower the working class and counterbalance its power vis-à-vis corporations. They believed that "[t]he ethical role of the consumer . . . was not just to buy from 'good' companies and boycott 'bad' ones but to take collective action to reorder the capitalist system."²⁹⁰ In the NCL's eyes, consumer organizing and pressure were primarily aimed at improving the working conditions of producers.²⁹¹ Toward that end, these groups aligned themselves closely with the more radical goals of the labor movement. Led by women, the NCL and the LWS represented a voice of morality advocating in the public interest.²⁹²

The harsh realities of the Depression reinforced the inextricable link between worker and consumer interests. The NCL and LWS supported labor's goals throughout the 1930s and 1940s, picketing and boycotting firms when workers were on strike, and advocating for collective bargaining rights and wage protections as a part of the New Deal strategy of raising the purchasing power of the masses.²⁹³ New Deal legislation was premised on the understanding that consumers were also workers or resided in a household that depended upon the income of a worker. Business growth would be stimulated only if consumers had money and could spend more. Government policy was designed to boost the purchasing power of consumers by raising wages and promoting job security, which would in turn enhance spending and stimulate demand for new goods and services to the benefit of firms and workers alike.²⁹⁴

By the 1940s and 1950s, however, the earlier consumer movements had declined. Although organized labor embraced consumerism as part of its support for Keynesian economics during the post-World War II era, its interest in consumer issues was instrumental—and shaped by both race and gender.²⁹⁵ The so-called "family wage ideology" pitched the need for a wage that would support a male head of household/worker with a female homemaker, limiting women's influence to the home front.²⁹⁶ The AFL and the CIO displayed "apathy" toward consumer issues associated with women.²⁹⁷ Accordingly, the gendered norms of the day cast a consumer movement led by women as weak, entrenching the divide between the labor

290. French, *supra* note 6.

291. COHEN, *supra* note 49, at 22.

292. *See id.* at 135.

293. French, *supra* note 6; COHEN, *supra* note 49, at 35.

294. *See supra* notes 46–47 & accompanying text (describing Keynesian economic theory undergirding New Deal legislation).

295. COHEN, *supra* note 49, at 154.

296. *See* Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1163–66 (1991) (discussing family wage ideology and its role in solidifying the gender divide between the market and the home, as well as its impact on the unionization of women).

297. COHEN, *supra* note 49, at 39.

and consumer movements.²⁹⁸ Nor was the labor movement engaged with African American consumer activism of the day. Early on, African Americans used consumer power to promote their rights as producers, targeting firms that refused to employ Black workers with “Don’t Buy Where You Can’t Work” appeals.²⁹⁹ Marginalized within labor unions and from the mainstream of politics, women and Blacks turned to consumer mobilization as an outlet for political voice.³⁰⁰

Not until the 1960s when the Democrats regained control of the White House, and Keynesian economic principles gained new traction, did the labor movement turn toward consumerism.³⁰¹ During the 1960s, the AFL-CIO marshalled support for the newly burgeoning “third wave” of consumerism, offering significant financial and political support to consumer activists and pressing for a consumer protection agency.³⁰² Labor leaders saw both the potential to improve the working conditions of workers, and the opportunity to broaden labor’s base.³⁰³ The consumer movements of the 1960s and thereafter, however, were less radical than the earlier consumer movements: “[T]his was a politics of Americans who banded together as consumers to protect the practice, not the ideal, of advanced capitalism.”³⁰⁴

The fragile alliances that developed between labor and consumer groups and the joint picketing and protest actions that occurred during the 1930s and 1940s were further threatened by the 1947 Taft-Hartley and 1959 Landrum-Griffin amendments to the NLRA, which imposed significant restrictions on picketing and boycott actions conducted by labor organizations.³⁰⁵ Section 8(b)(4) of the NLRA prohibits secondary boycotts—pressure by a labor organization aimed at coercing “secondary” businesses with whom the union does not have a primary labor dispute (a dispute over the terms and conditions of employment), to cease doing

298. *Id.* at 135.

299. *Id.* at 44, 52, 370–71.

300. *Id.* at 53.

301. *Id.* at 351–53.

302. *Id.* at 353.

303. *Id.* at 354. Indeed, in 1965 the AFL-CIO organized a conference in Washington, D.C. entitled “The Worker is a Consumer.” *Id.* at 353.

304. *Id.* at 359.

305. Historic judicial and legislative hostility to collective action by labor unions—particularly the boycott—was solidified in the 1947 addition of secondary boycott provisions to the NLRA. See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 61–62, 82–83, 132 (1991); Megan Stater Shaw, “*Connote No Evil*”: *Judicial Treatment of the Secondary Boycott Before Taft-Hartley*, 96 N.Y.U. L. REV. 334, 336–37 (2021). The 1959 Landrum-Griffin amendments closed some of the loopholes in the secondary boycott provisions and added regulation of labor picketing, particularly so-called “blackmail” organizational and recognitional picketing. See Archibald Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 262–70 (1959).

business with the primary employer (with whom the union does have a dispute).³⁰⁶ Damages are available against labor organizations for violations of section 8(b)(4).³⁰⁷ Further, the organizational and recognitional picketing provisions in section 8(b)(7) limit the duration of picketing by a labor organization aimed at pressuring the employer to recognize and bargain with a union that has not won an election, or at pressuring employees to support such a union.³⁰⁸

As Michael Duff has explained, the growth of worker centers and other alternative forms of labor activism in recent years has made it more likely that secondary boycott liability (and also potentially regulatory limitations imposed by the organizational and recognitional picketing provisions) could attach to nonunion groups that advance concerns about work-related issues and have the requisite purpose to deal with employers in a bilateral fashion over employee labor disputes or with the goal of improving workers' pay, working conditions, or hours.³⁰⁹ This risk is particularly high where the groups ally themselves with labor unions during protests and receive funding or other support from them. The National Labor Relations Board has ruled that unions cannot “avail themselves of nonunion groups to avoid

306. NLRA, 29 U.S.C. § 158(b)(4).

307. Labor Management Relations Act (LMRA) § 303(b), 29 U.S.C. § 187 (authorizing private actions for damages where an employer has been injured by a labor organization's unfair labor practice under section 8(b)(4)). This is the only unfair labor practice for which damages are available under the NLRA.

308. NLRA, 29 U.S.C. § 158(b)(7).

309. See Michael C. Duff, *ALT-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U. L. REV. 837, 839–41, 846–48 (2014). Section 2(5) of the NLRA, 29 U.S.C. § 152(5), defines a “labor organization” as “any organization . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rate of pay, hours of employment, or conditions of work.” Although this provision at first blush seems limited, the rise of so-called “alt-labor” groups such as worker centers, independent contractor groups, domestic worker groups, and immigrant worker organizations has raised new questions about the definition of “labor organization” for NLRA purposes. See Josh Eidelson, *Alt-Labor*, AM. PROSPECT (Jan. 29, 2013), <https://prospect.org/notebook/alt-labor/> [<https://perma.cc/3BF4-Y633>] (coining the term “alt-labor”). See generally Michael M. Oswald, *Liminal Labor Law*, 110 CALIF. L. REV. 1855 (2022) (explaining how labor law's deficiencies have led movement actors to operate in the “in-between” spaces between what current law is and what projections about the future will say it is not); Catherine L. Fisk, *Sustainable Alt-Labor*, 95 CHI.-KENT L. REV. 7 (2020) (calling for law reform that would offer alt-labor groups an institutional role in enforcing local labor standards and thereby help alt-labor groups build sustainable organizations).

Conservative groups have pressed for a more expansive interpretation of NLRA § 2(5) to limit the efficacy of alt-labor groups like these. See, e.g., Kris Maher, *Nonunion Worker Advocacy Groups Under Scrutiny*, WALL ST. J. (July 24, 2013, 6:26 PM), <https://www.wsj.com/articles/SB10001424127887323971204578626283846775530> [<https://perma.cc/MW9Y-YM2P>] (reporting that Republican lawmakers suggested that worker advocacy groups met the statutory definition of labor organizations and that as a result, they should be required to file financial reports with the government the same as labor unions); Stefan J. Marculewicz & Jennifer Thomas, *Labor Organizations by Another Name: The Worker Center Movement and Its Evolution into Coverage Under the NLRA and LMRDA*, FEDERALIST SOC'Y REV. (Nov. 19, 2012), <https://fedsoc.org/fedsoc-review/labor-organizations-by-another-name-the-worker-center-movement-and-its-evolution-into-coverage-under-the-nlra-and-lmrda> [<https://perma.cc/4R9J-NNEH>].

the strictures of the law,”³¹⁰ meaning that unions cannot join with allies to accomplish what they cannot do alone—at least if the ally organization is acting as an agent of the union or seeks to deal with the employer and represent the individuals in furtherance of their cause.³¹¹ Accordingly, a social justice or consumer organization must proceed cautiously when aligning with a labor organization by conducting protests intended to pressure an employer to recognize and bargain with an entity that has not won an election, to pressure workers to join such an organization, or to pressure businesses that have dealings with the employing firm involved in the labor dispute.³¹²

In short, the Taft-Hartley and Landrum-Griffin amendments expose labor organizations to sanctions to which other social justice or consumer groups conducting protests would not be subject. While nonlabor organizations receive heightened protection for their political speech, labor organizations do not, making alliances between the two types of groups both potentially advantageous and simultaneously risky. This overt speaker-based distinction between speech by labor organizations and speech by nonlabor organizations, though frequently criticized by scholars, has been defended against constitutional attack on the basis that labor organizations are engaged in mere economic speech, rather than political speech.³¹³

310. Ctr. for United Lab. Action (CULA), 219 N.L.R.B. 873, 880 (1975). CULA was a labor support group “devoted to the improvement of working conditions and the advancement of all workers of all races and nationalities in the struggle against the U.S. corporations.” *Id.* at 877. It supported strikes by picketing and providing modest financial support for strikers. *Id.* In this case, CULA picketed a retail store alongside a union. The union asked consumers not to buy products made by the employer with whom it had a dispute, which was not a violation of the secondary boycott provisions because it was deemed to be following a struck product, while CULA asked consumers to stop patronizing a store altogether until the store ceased stocking products made by the employer with whom the union had a dispute, which would have violated the secondary boycott provisions had CULA been deemed a labor organization. *Id.* at 878, 880. Some commentators at the time were concerned with the vagueness of the definition of “labor organization” for NLRA coverage purposes and read *CULA* as supporting an expansive interpretation. See Comment, *Protest Groups and Labor Disputes—Toward a Definition of Labor Organization*: Center for United Labor Action, 17 WM. & MARY L. REV. 796, 801–02 (1976) (suggesting that almost any group that admits employees to its membership might be deemed a labor organization under section 2(5)).

311. *CULA*, 219 N.L.R.B. at 873.

312. Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE L. REV. 561, 584 (2014).

313. See James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism and the Living Constitution*, 69 TEX. L. REV. 889 (1991) (explaining that the conduct of civil rights protestors has a much stronger claim to constitutional protection than the same conduct when done by labor activists, and criticizing the distinction); see also Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1967–68 (1994) (explaining that the distinction rests in part upon an assumption that labor organizations’ demands threatened the capitalist order, while other social justice organizations’ demands did not).

B. Using Consumer Protection Laws to Challenge Misleading Values-Based Branding

If secondary boycott concerns make it too risky for labor-consumer alliances to undertake protests in the streets, what about the potential for alliances forged through litigation under consumer protection laws? Consumer advocacy groups have invoked both federal and state consumer laws to challenge misleading values-based branding, including CSR statements and marketing relating to environmental and sustainability concerns. Although sustainability values-based claims initially targeted false or misleading statements on product labels, recent cases look beyond the label to also target misleading statements contained in branding and marketing materials, including annual ESG or sustainability reports, statements on social media, and website materials.³¹⁴ Even more recently, groups have started to include claims of deceptive labor-related practices, offering a blueprint for how consumer laws might advance the collective interests of consumers and workers against corporate woke-washing.

Some of these claims take the form of FTC complaints but increasingly, they are being brought under UDAP statutes.³¹⁵ While most UDAP statutes

314. See Hackett et al., *supra* note 142, at 10850, 10852; see also Cheryl P. Vollweiler, *Environmental Litigation Trends: What Is Heating Up Besides the Climate?*, AM. BAR ASS'N (Dec. 20, 2023), https://www.americanbar.org/groups/tort_trial_insurance_practice/resources/brief/2023-summer/environmental-litigation-trends-what-heating-besides-climate/ [https://perma.cc/2Q6G-G9XJ] (discussing the changing face of environmental litigation including ESG lawsuits); Andrew Jacobs, *Lawsuits Over 'Misleading' Food Labels Surge as Groups Cite Lax U.S. Oversight*, N.Y. TIMES (Sept. 15, 2021), <https://www.nytimes.com/2021/09/07/science/food-labels-lawsuits.html> [https://perma.cc/RRS3-MPQY] (noting that a “flurry of litigation by advocacy groups seek[s] to combat what they say is a rise in deceptive marketing by food giants”); *Greenwashing Claims on the Rise: Avoiding Dirty Laundry*, QUINN EMMANUEL URQUHART & SULLIVAN, LLP (Mar. 22, 2021), <https://www.quinnemanuel.com/the-firm/publications/greenwashing-claims-on-the-rise-avoiding-dirty-laundry/> [https://perma.cc/M73V-PDG4] (discussing the rise of greenwashing claims).

Although greenwashing is growing in frequency, greenhushing is a more recent phenomenon that is also garnering attention. Greenhushing occurs when “when firms under report or strategically withhold information about their environmental goals and achievements.” Stephan Dua Modest, *Greenhushing: What Is It and Why Do Companies Do It?*, DOWN TO EARTH (Sept. 30, 2024, 1:38 AM), <https://www.downtoearth.org.in/climate-change/greenhushing-what-is-it-and-why-do-companies-do-it> [https://perma.cc/C2C6-LWAN] (discussing greenhushing, the reasons why it occurs, and its implications for environmental sustainability); see also Kristen McGachey, *Greenhushing on the Rise as Backlash Against ESG Grows: 'It's Like an Unhealthy Marriage'*, FIN. NEWS (Mar. 25, 2024, 12:02 AM), <https://www.fn.london.com/articles/greenhushing-esg-fund-marketing-names-20240325> [https://perma.cc/4Z8X-G3GD] the key reasons leading to greenhushing, “firms fear reputational backlash on topics such as climate change”).

315. See, e.g., Jacobs, *supra* note 314 (“The mounting wave of legal activism in part reflects the frustration of advocates who have made little headway in recent years convincing federal regulators to increase their oversight of the nation’s food supply . . .”).

The growing reliance among advocacy groups on UDAP statutes also reflects concerns about the FTC’s enforcement powers. See *AMG Cap. Mgmt., LLC v. Fed. Trade Comm’n*, 593 U.S. 67, 82 (2021) (eliminating the FTC’s authority under Section 13(b) of the FTC Act to provide consumers with

permit consumers to maintain a private right of action, some statutes go even further and allow non-profits to act as private attorneys general. In this respect, one UDAP statute stands out and offers an especially appealing platform on which to build alliances between worker and consumer advocacy groups. The District of Columbia Consumer Protection Procedures Act (CPPA)³¹⁶ not only authorizes consumers³¹⁷ and nonprofit organizations³¹⁸ to bring a private right of action to seek relief from the use of an illegal trade practice, it also authorizes “public interest organizations” to do the same.³¹⁹ Such an organization can bring a CPPA claim on its own behalf, its members’ behalf, or on behalf of the general public³²⁰ if it satisfies three criteria. First, it must be “organized and operating, in whole or in part, for the purpose of promoting interests or rights of consumers.”³²¹ Second, the consumers at issue “must be capable of bringing suit in their own right” and third, the organization must possess a “sufficient nexus” to the consumers’ interests to adequately represent them.³²²

Further, because local courts in the District of Columbia (D.C.) were established pursuant to Article I, they are not constitutionally bound by Article III’s “case or controversies” standing requirement.³²³ Instead, the CPPA enables a public interest organization to establish standing in the D.C.

equitable remedies including the disgorgement and restitution of money); *see also* Maureen K. Ohlhausen & James F. Rill, *Pushing the Limits?*, in RULEMAKING AUTHORITY OF THE US FEDERAL TRADE COMMISSION 155, 165–66 (Daniel A. Crane ed., 2022) (analyzing the Court’s decision in *AMG Capital Management*). The agency also continues to be hobbled by limited resources. *See, e.g., FTC Asking House Commerce for More Resources, Authority*, 21 WARREN’S CONSUMER ELECS. DAILY, no. 144, July 28, 2021 (reporting on the testimony from the Commission for the House Consumer Protection Subcommittee hearing to the effect that the commission is “facing extremely severe resource constraints”).

316. *See* D.C. CODE §§ 28-3901 to -3913 (2025).

317. The CPPA originally permitted suits to be brought by “[a]ny consumer who suffers any damage as a result of . . . a trade practice.” D.C. CODE § 28-3905(k)(1) (2025). In 2000, this provision was amended to permit suits by “[a] person, whether acting for the interests of itself, its members, or the general public . . . seeking relief from the use by any person of a trade practice.” D.C. CODE § 28-3905(k)(1) (2025). In 2012, the DCCA was further amended to allow nonprofit organizations and public interest organizations to bring actions under the law. D.C. CODE § 28-3905(k)(1)(C–D) (2025).

318. *See* D.C. CODE § 28-3905(k)(1)(C) (2025); *see also* D.C. CODE §§ 28-3901(a)(14) (2025) (defining a “nonprofit organization” to “mean[] a person who . . . [i]s not an individual; and . . . [i]s neither organized nor operating, in whole or in significant part, for profit”).

319. D.C. CODE § 28-3905(k)(1)(D) (2025).

320. *Id.* Based on these criteria, it appears that the DCCA is sufficiently capacious to permit labor unions or labor rights groups to gain standing. Notably, a public interest organization can satisfy the nexus requirement even if protecting consumer interests is a subsidiary rather than primary purpose of the organization. Thus, the fact that representing and advocating for the interests of workers is the primary purpose of a labor union or organization is not determinative. *See, e.g., Ctr. for Inquiry Inc. v. Walmart, Inc.*, 283 A.3d 109, 117 (D.C. 2022) (commenting that plaintiff satisfies the nexus requirement and has standing to pursue a DCCA claim even as it is not known as a “champion of consumer rights”).

321. *See* D.C. CODE § 28-3901(a)(15) (2025); *see also* *Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174, 183 (D.C. 2021).

322. D.C. CODE § 28-3905(k)(1)(D) (2025); *see also* *Animal Legal Def. Fund*, 258 A.3d at 183.

323. *See, e.g., Atchison v. District of Columbia*, 585 A.2d 150, 153 (D.C. 1991).

local courts based solely on a statutory violation.³²⁴ This legal landscape allows advocacy groups to pursue a collective action under the CPPA to target claims of corporate deception without regard for whether it satisfies traditional Article III standing requirements.³²⁵

A growing number of advocacy groups are pursuing consumer protection litigation under D.C.'s unique consumer protection law, challenging inauthentic values-based corporate branding and marketing.³²⁶ Many of those cases have involved greenwashing and related allegations. For example, Ben and Jerry's faced a lawsuit filed under the CPPA by Organic Consumers Association alleging that the company's marketing of its ice cream on its product labels and website was false and misleading.³²⁷ The allegations focused on the company's portrayal of "Happy Cows" raised in "Caring Dairies" together with phrases such as "values-led sourcing" to describe Ben & Jerry's ice cream. The complaint alleged that the company's actual practices contradicted its message to consumers that its business was environmentally responsible and its products chemical free.³²⁸ Panera Bread has also faced multiple greenwashing lawsuits over its "Food As It Should Be" campaign.³²⁹ One of those suits, a claim filed by the advocacy group

324. *Animal Legal Def. Fund*, 258 A.3d at 183–84 (stating that the DCCA reflected a legislative intent to "modify[] Article III's doctrinal requirements with a more expansive statutory test" and "to confer 'maximum standing' to public interest organizations").

325. Advocacy groups can also pursue a collective action under the CPPA without the need to satisfy the various hurdles involved in pursuing a class action. *See Animal Legal Def. Fund v. Hormel Foods Corp.*, 249 F. Supp. 3d 53, 64 (D.D.C. 2017) (stating that the CPPA section authorizing private attorney general suits "does not require class proceedings and is a 'separate and distinct procedural vehicle from a class action,' to which CAFA does not apply" (quoting *Breakman v. AOL LLC*, 545 F.Supp. 2d 96, 105 (D.D.C. 2008))).

326. *See, e.g., Jacobs, supra* note 314 ("[A]dvocacy groups are increasingly filing CPPA claims, relying on a provision in the D.C. law that allows a public interest or nonprofit organization to bring lawsuits on behalf of itself, its members, and the general public."); Christopher Cole, Johnjerica Hodge & Katie O'Brien, *How DC Consumer Protection Suits May Advance ESG Goals*, LAW360 (Jan. 11, 2023), <https://www.law360.com/articles/1564628> [<https://perma.cc/X8LB-94PB>] ("D.C. plaintiffs are deploying a new tactic to attack allegedly false corporate narratives regarding environmental, social and governance initiatives.").

327. *See Organic Consumers Ass'n v. Ben & Jerry's Homemade, Inc.*, No. 2018 CA 004850 B, 2019 D.C. Super. LEXIS 1 (D.D.C. Jan. 7, 2019) (denying defendant's motion to dismiss). Following the suit, Ben & Jerry's discontinued the use of the term "Happy Cows." Organic Consumers Ass'n, *Ben & Jerry's Stops Calling Cows 'Happy' After Being Sued for False Advertising*, PR NEWSWIRE (Jan. 16, 2020, 2:06 PM), <https://www.prnewswire.com/news-releases/ben--jerrys-stops-calling-cows-happy-after-being-sued-for-false-advertising-300988510.html> [<https://perma.cc/R6Y7-BVNT>].

328. *Id.*

329. *See Panera's Menu Goes 100% Clean*, FAST CASUAL (Jan. 13, 2017), <https://www.fastcasual.com/news/paneras-menu-goes-100-clean/> [<https://perma.cc/Y4KN-Z4TE>] (describing the campaign); *see also Sally v. Panera Bread Co.*, No. 4:22-cv-00217, 2022 U.S. Dist. LEXIS 68697, at *8 (E.D. Mo. Apr. 13, 2022) (granting plaintiff's motion to remand the case back to state court); *Tabler v. Panera LLC*, No. 19-cv-01646, 2020 U.S. Dist. LEXIS 114716 (N.D. Cal. June 30, 2020) (dismissing claims under the California Unfair Competition Law and the California Consumers Legal Remedies Act for failure to state a claim); *Clean Label Project Found. v. Panera*, No. 2019 CA 001898 B, 2019 D.C. Super. LEXIS 14, at *13 (D.C. Super. Ct. Oct. 11, 2019) (denying Panera's motion to dismiss).

Clean Label Project Foundation, alleged violations of the CPPA based on the use of various terms and phrases such as “100% of our food is 100% clean” on Panera Bread’s “menus, bags, websites, social media, press and news articles, in-store signage, and YouTube videos.”³³⁰ According to the complaint, these representations allowed Panera to charge higher prices for its product and to “deceiv[e] consumers into believing that the Products are of a higher quality, free from synthetic chemicals, or free from chemical residues from the production process when they are not.”³³¹ To support its position, plaintiff pointed to an investigation of Panera food items which indicated the presence of pesticides, fungicides, and a synthetic biocide.³³²

More recently, advocacy groups have used both D.C.’s consumer protection law and the FTC to expand their focus to include claims of deceptive labor-related woke-washing to address working conditions in US-based workplaces,³³³ as opposed to those of workers located outside the US.³³⁴ In some instances, groups are drawing a connection between and among worker rights, sustainability practices, and animal welfare. For example, Tyson is facing a CPPA greenwashing lawsuit regarding its treatment of chickens (hereinafter *Tyson I*).³³⁵ Tyson is also the subject of an FTC complaint alleging that public pronouncements on its website, social media accounts, and in its sustainability report touting workplace

330. Complaint at *5, *Clean Label Project Found.*, 2019 D.C. Super Lexis 14 (No. 2019 CA 001898 B), 2019 D.C. Super. Ct. Pleadings LEXIS 214 [hereinafter Panera Complaint]; see also *Clean Label Project Found.*, 2019 D.C. Super LEXIS 14, at *13 (denying Panera’s motion to dismiss).

331. Panera Complaint, *supra* note 330, at 4, 16.

332. *Id.* at 5. While we did not locate any online information that sheds light on the aftermath of the CPPA suit against Panera, at some point, Panera stopped claiming that its products are “100% clean” in favor of describing them as just “clean.” Alex Berezow, *Chemicals on Panera Bread’s ‘No No List’ Are in Its Food*, AM. COUNCIL ON SCI. & HEALTH (Apr. 30, 2019), <https://www.acsh.org/news/2019/04/30/chemicals-panera-breads-no-no-list-are-its-food-13991> [<https://perma.cc/65RU-JYSD>] (printing Panera’s “No No” List).

333. See *infra* text accompanying notes 335–40 (discussing an FTC complaint in *Tyson II* to address alleged violations of workers’ rights); see also *infra* text accompanying notes 347–50 (discussing a CPPA complaint against Smithfield Foods to address alleged violations of workers’ rights).

334. Consumers have relied on consumer protection laws to try to hold American corporations accountable for labor abuses abroad, particularly in their supply chains. These efforts have been especially pronounced in the chocolate industry. See, e.g., *Dana v. Hershey Co.*, 180 F. Supp. 3d 652, 670 (N.D. Cal. 2016) (claims against Hershey for violating California consumer protection laws because it failed to disclose on its chocolate products’ packaging that some of the cocoa used was produced by means of slave labor and abusive child labor); *McCoy v. Nestlé USA, Inc.*, 173 F. Supp. 3d 954, 972 (N.D. Cal. 2016) (claims against Nestlé for violating California consumer protection laws by omitting information about labor abuses in its supply chain on its chocolate products’ packaging); *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 868 (9th Cir. 2018) (claims against Mars for violating California consumer protection laws by omitting any disclosure of labor abuses in its supply chain on its chocolate products’ packaging); *Tomasella v. Nestlé USA, Inc.*, 962 F.3d 60 (1st Cir. 2020) (claims against Nestlé for violating Massachusetts Consumer Protection laws by omitting information from its product labels about the use of child labor in its cocoa supply chain). See generally Dadush, *The Law of Identity Harm*, *supra* note 18, at 809–10 (discussing the chocolate cases).

335. See *supra* notes 147–159 & accompanying text (reviewing the greenwashing case against Tyson).

safety and claiming to partner with “independent” family-owned farms are “egregiously misleading” consumers (hereinafter *Tyson II*).³³⁶

According to the *Tyson II* complaint, since 2015, Tyson has reported more severe workplace injuries than all but two other companies.³³⁷ The complaint, filed during the height of COVID, notes that contrary to Tyson’s stated commitment to improving workers’ health and safety, the company did not implement recommended social distancing measures.³³⁸ Citing a 2018 report conducted by the Small Business Administration, the complaint also challenged Tyson’s claim that it uses “independent farmers” to raise its chickens. The report determined that the farmers were not truly independent since many of them were unable to negotiate terms and conditions with Tyson.³³⁹ As an illustration, the report observed that under arrangements with Tyson, farmers were compelled to make costly improvements to their chicken barns without additional compensation and that the upgrades locked them into contracts with Tyson.³⁴⁰ The complaint further alleged that despite Tyson’s projected image of relying on “independent farmers,” it “relies almost exclusively on industrialized factory-style operations for the production of its chicken products.”³⁴¹ Notably, the *Tyson II* complaint was jointly initiated by Food and Water Watch, a food advocacy group, and Venceremos, a poultry workers’ rights organization.³⁴²

Similarly, in 2020, six non-profit consumer advocacy groups filed a complaint with the FTC against Cargill, Inc. alleging that Cargill’s statements concerning its turkey production practices are misleading as related to animal welfare and environmental sustainability, as well as workers’ rights. In particular, the groups argued that Cargill’s use of the slogan “Raised by Independent Family Farmers” misrepresented its actual practice, which was to source turkeys from large, corporate-controlled factory farms.³⁴³ The complaint claimed that the slogan implied that the

336. See Letter from Kim Richman, Richman L. Grp., to Serena Viswanathan, Acting Assoc. Dir., Div. of Advert. Pracs., Bureau of Consumer Prot., Fed. Trade Comm’n (July 30, 2020) [hereinafter *Tyson FTC Complaint*] (on file with the authors).

337. *Id.* at 18.

338. *Id.* at 21–22. Tyson recently settled lawsuits alleging that the company was responsible for the COVID 19 death of three of its workers because it failed to follow COVID guidelines relating to social distancing and testing. See, e.g., Kevin Baskins, *Tyson Settles Suits Filed by Families of Workers Who Died in Storm Lake COVID-19 Outbreak*, DES MOINES REG. (Mar. 13, 2024, 2:15 PM), <https://www.desmoinesregister.com/story/news/health/2024/03/13/tyson-settles-lawsuits-over-storm-lake-iowa-plant-covid-19-worker-deaths/72956282007/> [<https://perma.cc/XNU6-LCQA>].

339. *Tyson FTC Complaint*, *supra* note 336, at 15–17.

340. *Id.* at 15.

341. *Id.* at 14.

342. *Id.* at 3.

343. Organic Consumers Ass’n, *Nonprofits File FTC Complaint Against Cargill’s ‘Family Farmer’ Turkey Label Claims*, FOOD MFG. (Nov. 24, 2020), <https://www.foodmanufacturing.com/labeling/news/21204408/nonprofits-file-ftc-complaint-against-cargills-family-farmer-turkey-label-claims> [<https://perma.cc/AZF2-BW8G>].

sourcing of turkeys from family farms would benefit the animals, the workers and the end-consumer, when in fact Cargill's practices exploit contract farmers and its slaughterhouse workers.³⁴⁴ It is unclear if the FTC initiated an investigation into Cargill as a result of the complaint. However, in 2021, the Food Animal Concern Trust (FACT) filed a complaint against Cargill under the D.C. consumer law containing many of the same allegations set forth in the FTC complaint.³⁴⁵ According to the FACT website, the case was resolved through mediation and Cargill agreed to remove or change misleading statements on its website.³⁴⁶

A final illustration involves a 2021 suit filed by Food & Water Watch against Smithfield Foods, Inc., a multinational meatpacking company and frequent labor law violator, under D.C.'s consumer law.³⁴⁷ The complaint alleged that Smithfield misrepresented working conditions in its plant in connection with the company's safety-oriented marketing during COVID.³⁴⁸ The complaint stated that Smithfield's actions were an attempt "to allay heightened consumer concerns for worker safety."³⁴⁹ The complaint added that

[I]ne-level meatpacking workers, in part due to false fears of a meat shortage, have been required to work in person throughout the pandemic—often in cramped conditions on crowded production lines. Smithfield has repeatedly assured consumers through advertisements and a comprehensive social media campaign that the company's workers are adequately protected from the hazards of COVID. Indeed, the company has prominently featured workplace

344. *Id.*

345. Richman L. & Pol'y, *Cargill Sued by Nonprofit FACT for Violating DC Consumer Law by Misleading Customers About Sustainable, Humane, and "Independent Family Farm" Sourcing*, PR NEWSWIRE (Dec. 20, 2021, 1:45 PM), <https://www.prnewswire.com/news-releases/cargill-sued-by-nonprofit-fact-for-violating-dc-consumer-law-by-misleading-customers-about-sustainable-humane-and-independent-family-farm-sourcing-301448436.html> [<https://perma.cc/8F5J-W3YL>].

346. *FACT and Cargill Resolve Lawsuit Regarding Turkey Marketing Claims*, FOOD ANIMAL CONCERNS TR., <https://www.foodanimalconcernstrust.org/blog/fact-and-cargill-resolve-lawsuit-regarding-turkey-marketing-claims> [<https://perma.cc/3XFP-2QH9>].

347. *Food & Water Watch v. Smithfield Foods, Inc.*, No. 21-cv-02065, 2021 U.S. Dist. LEXIS 258966, at *10 (D.D.C. Dec. 6, 2021) (granting plaintiff's motion to remove the case back to state court); see also Michael Corkery, *Smithfield Foods Is Sued by an Advocacy Group Claiming It Stoked Fears of Meat Shortages*, N.Y. TIMES (Sept. 17, 2021), <https://www.nytimes.com/2021/06/21/business/smithfield-meat-shortages.html> [<https://perma.cc/4RNZ-C69S>].

348. See Complaint at 1, *Food & Water Watch v. Smithfield Foods, Inc.*, No. 2021 CA 002020 B (D.C. Super. Ct. June 16, 2021) [hereinafter *Smithfield Complaint*]; see also Linda Qiu, *Meatpackers Misled Public and Influenced Trump Administration During COVID, Report Says*, N.Y. TIMES (May 12, 2022), <https://www.nytimes.com/2022/05/12/us/politics/meatpackers-trump-covid.html> [<https://perma.cc/YMF7-6FEC>] (observing that some "59,000 workers at meatpacking plants contracted the virus from March 1, 2020, to Feb. 1, 2021, and 269 eventually died").

349. *Smithfield Complaint*, *supra* note 348, at 2.

safety as an integral part of its marketing and branding efforts during the pandemic.³⁵⁰

A D.C. superior court judge denied Smithfield's motion to dismiss the lawsuit.³⁵¹

C. Prospects for Alliances Between Groups

These cases offer a blueprint to build alliances between consumer groups and labor unions to challenge the adverse implications of woke-washing on worker-consumers. As Ben Sachs has explained, legislation that confers individual rights and procedural forms of action that permit group claims can help galvanize collective action, giving rise to a sort of hydraulic force that insulates early group action from traditional forms of employer retaliation and furthers a collective consciousness of kind.³⁵² Collective claims can help mobilize groups in two ways. First, they offer a framing device to establish a common understanding of a shared set of problems.³⁵³ Second, they provide the foundation to build a collective identity that will survive the litigation and sustain a collective response to the social problems.³⁵⁴ Using law to accomplish these ends is particularly effective because law provides legitimacy in identifying the injustice and articulating it as a collective injustice rather than one suffered only on an individual level.³⁵⁵ The involvement and support of advocacy organizations will best realize the likelihood that galvanized collective action will not only be achieved but also extended post-litigation.³⁵⁶

These insights are equally applicable where multiple social justice movements are involved. Consumer law claims brought by consumer advocacy groups acting in tandem with labor could have significant impact, particularly if the groups join forces in boycott actions and other extra-legal collective pressure strategies. As compared with individual worker/consumer plaintiffs, advocacy groups are better positioned to challenge woke-washing under consumer laws: These groups have the capacity to advance the joint interests of workers and consumers without

350. *Id.*

351. Order Denying Motion to Dismiss, *Food & Water Watch v. Smithfield Foods, Inc.*, No. 2021 CA 002020 B (D.C. Super. Ct. July 22, 2022).

352. See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2721–43 (2008) (analyzing how the Fair Labor Standards Act and Title VII have been used to galvanize, insulate and generate a collective response to workplace problems that will sustain collective action after the litigation is complete).

353. *Id.* at 2722.

354. *Id.*

355. *Id.* at 2724–25.

356. See *id.* (explaining how the involvement of a labor union and a community-based workers' center was critical in galvanizing worker action through the deployment of statutory rights claims).

the need for workers to establish that they are consumers within the traditional meaning of a consumer statute, and they are far better situated and resourced to achieve equitable remedies.³⁵⁷

Tyson II usefully illustrates these lessons in the context of greenwashing. The combined forces of Food and Water Watch and Venceremos enabled the groups to use the law to galvanize collective support against Tyson's practices. Of course, because *Tyson II* involved an FTC claim, individual workers lacked standing to bring a complaint.³⁵⁸ Yet, the workers also would not have been able to pursue a similar complaint under the DCCA.³⁵⁹ As importantly, while it is unclear if the FTC has taken any action on the *Tyson II* complaint,³⁶⁰ the complaint appears to have factored into a campaign on the part of several advocacy groups including Venceremos to pressure Tyson to improve labor conditions at its plants.³⁶¹ Together, the ongoing campaign and the FTC complaint have garnered the attention of legislators³⁶² and led to the introduction of legislation that would provide needed protection for workers involved in processing meat and poultry and to bolster the availability of reliable consumer information.³⁶³

While consumer law seldom offers significant monetary relief for individual workers, it has the potential to stop corporations from engaging

357. See, e.g., Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 FORDHAM L. REV. 2223, 2224 (2018) ("Few [individual] victims, if any, would take on the cost and complexity of the legal system alone to recoup such small sums. Only by aggregating their claims and pooling resources can ordinary litigants realistically access the legal system.").

358. See *supra* note 138 & accompanying text (noting that individual consumers lack standing under the FTC to pursue private right of action claims, although UDAP confers such a right of action).

359. See *supra* Part III (describing the limitations on workers' ability to maintain a consumer protection claim under court application of existing law).

360. The FTC has authority to investigate misleading or deceptive acts or practices. See FTC Rules of Practice, 16 C.F.R. § 2.1 (2025) ("Commission investigations and inquiries may be originated upon the request of the President, Congress, governmental agencies, or the Attorney General; upon referrals by the courts; upon complaint by members of the public"). However, it also has considerable discretion over whether to do so especially given the many complaints that it receives.

361. Sam Bloch, *In Arkansas, Increasing Pressure on Tyson Foods and Governor Hutchinson to Protect Workers' Lives*, THE COUNTER (July 7, 2020, 4:18 PM), <https://thecounter.org/arkansas-pressure-tyson-foods-governor-hutchinson-protect-workers-covid-19/> [<https://perma.cc/377C-YPA2>].

362. *US Lawmakers Prod FTC on Complaints Filed Against Tyson's Misleading Advertising*, ANIMAL EQUAL. (June 18, 2024), <https://animalequality.org/news/us-lawmakers-prod-ftc-on-complaints-filed-against-tysons-misleading-advertising/> [<https://perma.cc/W3PH-H6S9>] (noting that several legislators sent a letter to the FTC requesting that it move forward with an investigation into the complaint filed against Tyson).

363. See Press Release, Cory Booker, As Thanksgiving Approaches, Booker, Khanna Announce Legislation to Protect Meatpacking Workers (Nov. 23, 2021), <https://www.booker.senate.gov/news/press/as-thanksgiving-approaches-booker-khanna-announce-legislation-to-protect-meatpacking-workers> [<https://perma.cc/SB72-7BW9>] (discussing the proposed Protecting America's Meatpacking Workers Act); see also Press Release, Cory Booker, Booker Introduces Package of Bills to Reform U.S. Food System (Feb. 2, 2023), <https://www.booker.senate.gov/news/press/booker-introduces-package-of-bills-to-reform-us-food-system> [<https://perma.cc/SV5M-7W39>] (listing the proposed bill as one of several bills reintroduced in Congress to reform aspects of the food system).

in misleading and false representations. Further, equitable forms of relief that encompass corrective advertising orders or orders requiring companies to undertake a corrective advertising campaign to counter previously disseminated misleading statements stand to benefit an entire class of consumer-workers as opposed to an individual worker. Finally, the potential to forge alliances between worker and consumer advocacy groups to represent worker-consumers in litigation might also ground jointly organized extra-legal actions, including boycotts and other forms of protest, that could offer leverage in settlement talks with an offending firm.

CONCLUSION

The law assumes that workers' identities and consumers' identities are fundamentally distinct, but that has never been true. Workers consume not only the products and services they produce, but the values that brands embrace—sometimes because employers require them to do so, and sometimes because they are drawn to them by the same branding processes that appeal to consumers. Branded workers are the embodiment of consumption, and what they consume and embody is the firm's brand.

In this era of political polarization and increasing worker activism, firms are struggling to figure out how to proceed. Some firms are holding steadfast in their commitments to DEI causes, based on their own deeply held beliefs or because they feel compelled to do so given the composition of their workforce and consumer base, the demands of a competitive product market, and the challenges of a tight labor market.³⁶⁴ Other firms are electing to distance themselves from overtly political or social justice messaging as a part of their branding to avoid alienating segments of their workforce or consumer base. Early signs of this distancing occurred prior to the 2024 presidential election,³⁶⁵ and since then, pressure from the Trump

364. Miranda Jeyaretnam, *These U.S. Companies Are Not Ditching DEI Amid Trump's Crackdown*, TIME (Feb. 26, 2025, 4:00 AM), <https://time.com/7261857/us-companies-keep-dei-initiatives-list-trump-diversity-order-crackdown/> [<https://perma.cc/U6YT-DTDS>].

365. See Fuhrmans et al., *supra* note 14 (suggesting that the risks of becoming involved in partisan politics are altering the calculus on corporate messaging on issues that don't directly affect the business); Chip Cutter & Ray A. Smith, *Corporate America Is Sitting Out the Trump-Biden Rematch*, WALL ST. J. (May 10, 2024, 5:30 AM), <https://www.wsj.com/business/corporate-america-is-sitting-out-the-trump-biden-rematch-a61f6b77> [<https://perma.cc/2PBR-8Q3B>] (noting that companies that were outspoken on political and social issues during the 2020 presidential election are leaning more toward neutrality); Maxine Joselow, *'Greenhushing': Why Some Companies Quietly Hide Their Climate Pledges*, WASH. POST (July 19, 2023), <https://www.washingtonpost.com/climate-environment/2023/07/13/greenhushing-climate-trend-corporations/> [<https://perma.cc/9DLR-JNGW>] (describing trend to eliminate climate pledges from websites and marketing in an effort to appeal more broadly to all consumers); see also Emily Peck, *Companies Are Backing Away from "DEI,"* AXIOS (Jan. 4, 2024), <https://www.axios.com>

II administration on firms in many sectors has induced some to step back from a DEI emphasis in mission and branding.³⁶⁶ For example, when the Trump II administration pressured law firms with ties to the President's political and legal adversaries to sever those ties and shift their allegiances—including demands to eliminate DEI programs and redirect pro bono efforts toward causes favored by the President, rather than those traditionally chosen by the firm, such as immigration work—firms that capitulated faced student protests and boycotts by prospective recruits.³⁶⁷ Some students who had been drawn to law firms for their pro bono work on progressive causes or their commitment to diversity became disillusioned when the firms, under political pressure, shed those aspects of their brand identities.³⁶⁸ In short, mission matters to workers.

Where values-based branding is deliberately aimed at attracting consumers and workers, firms should not be permitted to engage in woke-washing without legal consequence. Worker-consumers who internalize a firm's values-based branding and invest their labor in the firm and its brand experience significant identity harm and dis-identification costs when they discover that they have been duped by inauthentic brand value commitments. As employees of the firm, they have an interest in ensuring the sincerity of promises vis-a-vis their employment. As consumers of the brand, they have an interest in ensuring the sincerity of corporate brand promises, including those based on communications regarding important social justice issues.

Consumer law has the capacity to protect not only consumers from deceptive woke-washing practices but also workers, by framing them as worker-consumers of corporate brand values. Worker-consumers serve as front-line brand advocates who align their identities with the firm's brand and who signal that alignment in the workplace and beyond. As such, they should be permitted to demonstrate harm suffered, both ascertainable and intangible, from their investment of labor—and in some cases, foregone wages—when values-based promises prove false.

.com/2024/01/04/dei-jobs-diversity-corporate [https://perma.cc/4EVA-VUTT] (noting that employers are re-evaluating and reframing DEI initiatives in response to backlash from right-wing politicians who have limited DEI programming in some red states).

366. Conor Murray & Molly Bohannon, *IBM Reportedly Walks Back Diversity Policies, Citing 'Inherent Tensions': Here Are All the Companies Rolling Back DEI Programs*, FORBES (Apr. 11, 2025, 11:27 AM), <https://www.forbes.com/sites/conormurray/2025/04/11/ibm-reportedly-walks-back-diversity-policies-citing-inherent-tensions-here-are-all-the-companies-rolling-back-dei-programs/> [https://perma.cc/YLF4-UMKW].

367. Lindsay Ellis, *Big Law Firms Struck a Truce With Trump—and Set Off a Clash With Recruits*, WALL ST. J. (Apr. 4, 2025, 8:55 AM), <https://www.wsj.com/lifestyle/careers/big-law-firms-struck-a-truce-with-trump-and-set-off-a-clash-with-recruits-bef68b62> [https://perma.cc/98YR-G4JF].

368. *Id.*

Finally, firms that deploy social justice commitments in marketing campaigns to enhance their brands and increase profits, but do little if anything to advance the actual social justice cause, exploit the very social justice movements they claim to support. Woke-washing firms undermine real change by creating a false narrative that they are addressing significant social problems, when in reality, these firms are diverting energy away from social justice movements, leaving the underlying structural problems unaddressed. Remediating this harm demands not only individual relief but collective injunctive relief.